IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

RYAN MCFADYEN, MATTHEW WILSON, and BRECK ARCHER	)	
Plaintiffs,	)	
v.	)	1:07CV953
DUKE UNIVERSITY, et al.,	)	
Defendants.	)	

ORDER

BEATY, District Judge.

This matter is before the Court on a Joint Motion to Strike Plaintiffs' Untimely and Unauthorized "Corrected" Response Brief ("Joint Motion to Strike Corrected Response Brief" or "Joint Motion to Strike") [Doc. #360] filed by Defendants Tara Levicy ("Defendant Levicy"), Gary Smith ("Defendant Smith"), Duke University ("Defendant Duke University"), and Duke University Health System, Inc. ("Defendant Duke Health"), (collectively "the Duke Defendants"). In its Joint Motion to Strike, the Duke Defendants ask the Court to strike the Corrected Response Brief in Opposition to the Duke Defendants' Joint Motion for Judgment on the Pleadings ("Corrected Response Brief") [Doc. #351] filed by Plaintiffs Ryan McFadyen ("Plaintiff McFadyen"), Matthew Wilson ("Plaintiff Wilson"), and Breck Archer ("Plaintiff Archer"), (collectively "Plaintiffs"). Plaintiffs have filed a Memorandum in Opposition to the Duke Defendants' Motion to Strike [Doc. #368] and the Duke Defendants have filed a Joint Reply Brief [Doc. #369]. Defendant Linwood Wilson ("Defendant Wilson") filed a Motion to Join the Duke Defendants' Motion to Strike and Motion to Expedite Briefing on Defendants' Motion to Strike [Doc. #365] and a Motion to Join the Duke Defendants' Joint Reply Brief

[Doc. #370]. Thus, the matter is ripe and ready for adjudication. For the reasons set forth herein, the Court will grant in part, and deny in part Defendant Wilson's Motion to Join the Duke Defendants' Motion to Strike and Motion to Expedite Briefing on Defendants' Motion to Strike [Doc. #365] and his Motion to Join the Duke Defendants' Joint Reply Brief [Doc. #370] and the Court will grant the Duke Defendants' Joint Motion to Strike Corrected Response Brief [Doc. #360].

I. FACTUAL AND PROCEDURAL BACKGROUND

As the factual and procedural background in this case is extensive, this section will only address the background facts that are relevant to the instant Motion. On March 31, 2011, this Court ruled on the Motions to Dismiss in this case, completely dismissing 27 counts of the 41-count Second Amended Complaint and allowing the remaining counts to go forward against various defendants. After the Court entered its Memorandum Opinion and Order on the Motions to Dismiss, the Duke Defendants filed their Answer to the Second Amended Complaint [Doc. #195] on April 14, 2011. In late April 2011, the City of Durham, Durham police officers, and Durham police officials appealed this Court's decision to allow any remaining counts to proceed against them, arguing that they were shielded from suit on qualified, public official, and governmental immunity grounds. On June 9, 2011, the Court entered an Order [Doc. #218] staying the proceedings in this case,[1] including discovery, pending resolution of the interlocutory appeal in this case. Among the stayed counts was Count 1, the

[1] The proceedings were stayed as to all the remaining counts except for Count 21 (Breach of Contract) and Count 24 (Fraud) against Duke University and various Duke officials.

§ 1983 Search and Seizure Violation and Conspiracy claim regarding the Nontestimonial Identification Order ("NTO"), Count 2, the § 1983 Search and Seizure Violation and Conspiracy claim regarding the search of Plaintiff McFadyen's dorm room, and Count 5, the § 1983 Making False Public Statements claim, which are the subject of this Order. On December 17, 2012, the Fourth Circuit issued an opinion reversing, *inter alia*, the district court's denial of the Durham police officers and police officials' motions to dismiss the federal § 1983 claims, which included Counts 1, 2, and 5. See Evans v. Chalmers, 703 F.3d 636 (4th Cir. 2012) cert. denied, 134 S. Ct. 98, 187 L. Ed. 2d 33 (U.S. 2013) and cert. denied, 134 S. Ct. 617, 187 L. Ed. 2d 409 (U.S. 2013). The Fourth Circuit Mandate [Doc. #331], which gave effect to the Fourth Circuit Judgment in this case, was issued on January 23, 2013.

On February 27, 2013, the Duke Defendants filed a Joint Motion for Judgment on the Pleadings [Doc. #335], requesting that the Court dismiss Counts 1 and 2 (§ 1983 unlawful search and seizure claims), Count 18 (common law obstruction of justice claim), and Count 32 (common law negligent supervision, hiring, training, discipline, and retention claim) against them in light of the Fourth Circuit decision in this case. On March 25, 2013, Plaintiffs filed a Motion to Stay the Duke Defendants' Joint Motion for Judgment on the Pleadings [Doc. #337], requesting that the Court (1) stay any decision on the Duke Defendants' Joint Motion for Judgment on the Pleadings pending resolution of Plaintiffs' petition for certiorari to the United States Supreme Court or (2) alternatively, give Plaintiffs an additional 60 days to respond to the Duke Defendants' Joint Motion for Judgment on the Pleadings. On May 17, 2013, the Court entered an Order [Doc. #340] denying Plaintiffs' request to stay the proceedings pending resolution of the petition for certiorari but granting the request for a 60-day extension to file a

response to the Joint Motion for Judgment on the Pleadings, which was due on May 30, 2013. Thereafter, on May 30, 2013, Plaintiffs filed their Response to the Duke Defendants' Joint Motion for Judgment on the Pleadings ("Response to the Joint Motion for Judgment on the Pleadings") [Doc. #341], asserting that (1) Counts 1 and 2 should be dismissed "because this Court is bound by the Fourth Circuit's conclusion that those counts do not allege a constitutional violation", (Resp. to Mot. J. on Pleadings [Doc. #341], at 18); (2) that Count 18 should proceed against the respective Duke Defendants and Defendant Wilson; and (3) Count 32 (common law negligent supervision, hiring, training, discipline, and retention claim) should proceed against Duke University and Duke Health to the extent it is not duplicative of Count 18. The Duke Defendants filed their Joint Reply Brief [Doc. #343] on June 17, 2013 and thus the matter of the Duke Defendants' Joint Motion for Judgment on the Pleadings was fully ripe and ready for adjudication when it was submitted to chambers on June 18, 2013. However, Plaintiffs, in their Response to the Joint Motion for Judgment on the Pleadings [Doc. #341], requested that the Court wait to make a decision as it related to Counts 1 and 2 in this case pending the outcome of their petition for a writ of certiorari to the Supreme Court. The petition for certiorari was denied on November 12, 2013. Ultimately, in considering Plaintiffs' request to stay a ruling on Counts 1 and 2 in this case pending resolution of the matters before the Supreme Court, review of the Joint Motion for Judgment on the Pleadings was ripe on November 12, 2013 when certiorari was denied.

A status conference hearing was held on March 14, 2014 so that the Court and parties

in both the Evans case (1:07CV739) and the McFadyen case (1:07CV953)[2] could reach a consensus regarding the status of the remaining claims in both cases.[3] At the hearing, counsel for the McFayden Plaintiffs stated that the following claims and parties remained pending in this case:

1. Count 1 (§ 1983 Search and Seizure Violation and Conspiracy (Regarding the NTO)) against Defendant Levicy
2. Count 2 (§ 1983 Search and Seizure Violation and Conspiracy (Regarding the search of Plaintiff McFadyen's dorm room)) against Defendants Levicy and Smith
3. Count 5 (§ 1983 Making False Public Statements) against Defendant Wilson
4. Count 18 (Common Law Obstruction of Justice and Conspiracy to Obstruct Justice) against Defendants Levicy, Wilson, Robert Steel, Richard Brodhead, Victor Dzau, John Burness, Duke University, and Duke Health
5. Count 21 (Breach of Contract) against Defendant Duke University
6. Count 24 (Fraud) against Defendants Smith, Aaron Graves, Robert Dean, Matthew Drummond, and Duke University
7. Count 32 (Negligent Supervision, Hiring, Training, Discipline, and Retention) against Defendants Duke University and Duke Health

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[2] The Carrington case (see Case Number 1:08CV119), which was a case related to the McFadyen and Evans' cases was terminated on January 21, 2014 after the remaining count in that case, Count 32 against the City of Durham, was voluntarily dismissed by the Carrington Plaintiffs.

[3] The hearing was originally scheduled for January 23, 2014, but, upon request of the Evans Plaintiffs (see Case Number 1:07CV739), the hearing was continued to March 14, 2014.

8. Count 41 (Violations of Art. I, § 19 of the North Carolina Constitution) against Defendant City of Durham

At the hearing, counsel for Defendant Levicy noted that the Joint Motion for Judgment on the Pleadings [Doc. #335] was pending with respect to Counts 1, 2, 18, and 32 in this case. The concessions Plaintiffs made in their Response to the Joint Motion for Judgment on the Pleadings [Doc. #341]—that Counts 1 and 2 should be dismissed in light of the Fourth Circuit ruling in this case— were not discussed at the status conference hearing. After, but on the same day as, the status conference hearing, counsel for Plaintiffs filed a Status Report of the Remaining Claims and Defendants [Doc. #350] in this case. Relevantly, the Report stated that counsel for Plaintiffs would be amending Plaintiffs' Response to the Joint Motion for Judgment on the Pleadings [Doc. #341] to clarify Plaintiffs' position with respect to Counts 1, 2, and 5. Specifically, counsel for Plaintiffs asserted that (1) Count 1 against Defendant Levicy should go forward because "the Fourth Circuit did not reach the constitutional question raised in Count 1, holding that the police defendants were entitled to qualified immunity, which Levicy does not have" because she is a private party and (2) Counts 2 and 5 should be dismissed because the Fourth Circuit ruled, as to those counts, that there was no constitutional violation. (Status Report of Remaining Claims [Doc, #350], at 2.) Thus, on the same day, counsel for Plaintiffs filed a partial-redline and highlighted Corrected Response Brief [Doc. #351] asserting that Counts 2 and 5 should be dismissed per the Fourth Circuit ruling in this case but that Count 1 should go forward because the Fourth Circuit did not reach the constitutional question raised in Count 1.

On March 24, 2014, the Duke Defendants filed a Joint Motion to Strike the Corrected Response Brief [Doc. #360] asserting that the brief is untimely and unauthorized pursuant to Local Rules 7.3(k) and 83.4(a)(2). Plaintiffs filed their Memorandum in Opposition to the Duke Defendants' Joint Motion to Strike [Doc. #368] on March 31, 2014 and the Duke Defendants filed their Joint Reply Brief [Doc. #369] on April 3, 2014.[4] Defendant Wilson filed a Motion to Join the Duke Defendants' Motion to Strike and Motion to Expedite Briefing on Defendants' Motion to Strike [Doc. #365] and a Motion to Join the Duke Defendants' Reply Brief [Doc. #370] on March 26, 2014 and April 4, 2014, respectively.

II. DISCUSSION

A. The Corrected Response Brief Violates the Local Rules

The Duke Defendants argue that Plaintiffs' Corrected Response Brief is untimely and unauthorized, and as such, violates the local rules. Local Rule 7.3(k) states, in relevant part, "[t]he failure to file a brief or response within the time specified in this rule shall constitute a waiver of the right thereafter to file such brief or response, except upon a showing of excusable neglect." In this case, it is undisputed that Plaintiffs' initial Response to the Joint Motion for Judgment on the Pleadings [Doc. #341] was timely when it was filed on May 30, 2013. However, the Duke Defendants argue that Plaintiffs' Corrected Response Brief, which was filed on March 14, 2014, is untimely because it was filed months after the response was due in this

[4] On March 26, 2014, the Court entered an Order [Doc. #366] expediting the briefing schedule for the parties to respond and reply to the Duke Defendants' Joint Motion to Strike the Corrected Response Brief to assist the parties in adhering to other deadlines in this case, specifically the status conference hearing scheduled for May 16, 2014, discovery proceedings, and the October 2014 trial set in this case.

matter and should be stricken. As can be gleaned from Plaintiffs' Memorandum in Opposition to Defendants' Motion to Strike [Doc. #368], Plaintiffs do not address whether their Corrected Response Brief is untimely under the local rules. However, Plaintiffs do argue that their Corrected Response Brief clarified their position as to the remaining claims subject to the Joint Motion for Judgment on the Pleadings and that they have not waived a right to challenge Count 1.

However, the Court disagrees with Plaintiffs, to the extent they argue that the Corrected Response Brief in this case should be considered by the Court or that they did not waive a right to challenge Count 1. Plaintiffs' response to the Joint Motion for Judgment on the Pleadings was due May 30, 2013, per the May 17, 2013 Order in this case, and indeed Plaintiffs filed a timely response brief on May 30, 2013. However, over nine months after Plaintiffs filed a timely response brief in this matter, they filed an untimely, corrected brief and did not seek leave of court to amend their response. See Fed. R. Civ. P. 6(b) ("When an act may or must be done within a specified time, the court may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect."). To the extent Plaintiffs argue that they informed the Court that Count 1 remained pending in this case at the March 14, 2014 Status Conference hearing and that somehow affected the status of the fully briefed issues regarding the Joint Motion for Judgment on the Pleadings, the Court does not find such an argument availing in light of the circumstances in this case. Plaintiffs did inform the Court that Count 1–as well as Counts 2, 5, 18, 21, 24, 32, and 41–remained pending in this case at the March 14, 2014 Status Conference hearing (Status Conference Hr'g Tr. 18:18-20:2 [Doc. #364], March 14, 2014). However, counsel for Plaintiffs did not address their attempt to modify

their position with respect to Count 1 during the hearing even when counsel for Defendant Levicy stated that Counts 1, 2, 18, and 32 are pending but are also the subject of the Joint Motion for Judgment on the Pleadings [Doc. #341] in this case (Status Conference Hr'g Tr. 20:11-17). Nor did counsel for Plaintiffs request leave of court during the March 14, 2014 Status Conference hearing to file their Corrected Response Brief, which was filed later that day. Additionally, any purported contention by Plaintiffs that by stating that Count 1 was still pending at the hearing was the equivalent to a withdrawal of their concession that Count 1 did not allege a constitutional violation and should proceed to discovery is somewhat undermined by the fact that Plaintiffs still concede that Count 2 should be dismissed, which was also a concession Plaintiffs made in their original response brief and was also announced as a pending claim at the hearing. For all of these reasons, the Court finds that it was not put on notice and the Court did not impliedly accept Plaintiffs' alleged withdrawal of their concession that Count 1 is subject to dismissal at the March 14, 2014 Status Conference hearing.

Additionally, to the extent Plaintiffs' request that the Court consider their untimely, Corrected Response Brief, the Court finds that Plaintiffs have not demonstrated excusable neglect. See L.R. 7.3(k); see also Fed. R. Civ. P. 6(b)(1)(B). In assessing excusable neglect, the significant circumstances include: " '[1] the danger of prejudice to the [adverse party] . . . [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.' " Morris-Belcher v. Hous. Auth. of City of Winston-Salem, No. 1:04CV255, 2005 WL 1423592, at *3 (M.D.N.C. June 17, 2005) (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship., 507 U.S. 380, 395, 113 S. Ct. 1489, 1489, 123 L. Ed. 2d 74

(1993)); see also Daye v. Potter, 380 F. Supp. 2d 718, 720-21 (M.D.N.C. 2005) (applying the Pioneer excusable neglect factors in considering an alleged violation under Local Rule 7.3(k)). As the Fourth Circuit has underscored, " 'a district court should find excusable neglect only in the *extraordinary cases* where injustice would otherwise result.' " Symbionics Inc. v. Ortlieb, 432 F. App'x 216, 220 (4th Cir. 2011) (quoting Thompson v. E.I. DuPont de Nemours & Co., 76 F.3d 530, 534 (4th Cir. 1996)).

While neither party squarely address the excusable neglect factors, Plaintiffs assert that the Duke Defendants have not made any showing of prejudice that they might suffer as a result of the Court considering the Corrected Response Brief. However, the Court notes that if the Corrected Response Brief is allowed, the Duke Defendants would be faced with the prospect of filing a reply to the Corrected Response Brief in this matter, after the issues subject to the Joint Motion for Judgment on the Pleadings were fully briefed in this case for several months. This is particularly relevant as the parties requested and the Court decided that matters in this case would be expedited to prepare for the May 16, 2014 Status Conference hearing and, now, the October 2014 trial scheduled in this case. Additionally, even if the Court were to find that any prejudice to the Duke Defendants in this case is slight, the other factors, discussed below, weigh in favor of a finding that Plaintiffs have not demonstrated excusable neglect. In addressing the second factor, as previously stated, accepting Plaintiffs' Corrected Response Brief would require that additional time be given to the Duke Defendants to file a reply brief, which would unduly delay the Court's consideration of the Joint Motion for Judgment on the Pleadings, which the Court has already considered extensively. Again, such a delay is significant in this matter as the Court determined that it would expedite resolution of pending motions in

this case to prepare for the upcoming scheduled status conference hearing and the trial set in this case. Thus, the second factor weighs in favor of disallowing the Corrected Response Brief.

Moreover, as to the third factor, Plaintiffs have not proffered a single reason that addresses why their Corrected Response Brief was delayed for over nine months. Plaintiffs' suggest that their Corrected Response Brief merely clarifies their position as to Counts 1, 2, and 5 in this case. However, even if the Court deemed such a change as a mere clarification, Plaintiffs have not demonstrated why they did not make such a clarification in a timely manner or with requested leave of court. Furthermore, the Court does not find such an error to be a mere clarification because Plaintiffs, in their Corrected Response Brief, advance a wholly new legal position as to Count 1, which contradicts their previous position regarding Count 1, and for the first time addresses Count 5 (asserted against Defendant Wilson only),[5] which was not addressed in the initial Response to the Joint Motion for Judgment on the Pleadings [Doc. #341]. Plaintiffs' new argument as to Count 1 was not before the Court in the fully briefed arguments regarding the Joint Motion for Judgment on the Pleadings in this case. Furthermore, as to their new legal position in Count 1, this is not the case where the Plaintiffs have demonstrated that their changed position or significantly delayed Corrected Response Brief was due to matters out of their control, such as a subsequent change in authority. In fact, it appears

[5] The Court notes that Plaintiffs' initial Response to Joint Motion for Judgment on the Pleadings [Doc. #341], did not address Count 5, which is a claim remaining against Defendant Wilson only. However, Plaintiffs' Corrected Response Brief states that Count 5, instead of Count 1, is subject to dismissal pursuant to the Fourth Circuit ruling in this case. As will be discussed below, the Court will consider what effect, if any, Plaintiffs' new position in their Corrected Response Brief—that Count 5 should be dismissed—has on the pending Motions in this case.

that Plaintiffs' changed position as to Count 1 is due only to Plaintiffs' modified interpretation of the Fourth Circuit holding in this case. Specifically, the Court notes that Plaintiffs originally interpreted the Fourth Circuit's holding in Count 1 and its impact on the Joint Motion for Judgment on the Pleadings in this case as requiring dismissal of Count 1 against Defendant Levicy, that is, by asserting that Count 1 must be dismissed because "this Court is bound by the Fourth Circuit's conclusion that [Count 1 does] not allege a constitutional violation." (Resp. to Joint Mot. for J. on Pleadings [Doc. #341], at 2.) The Court also notes that such an interpretation of the Fourth Circuit holding is an understanding that Plaintiffs have perhaps held for quite some time, in light of the fact that they have expressed, to both this Court, and the Supreme Court, by way of their Reply Brief in Support of Petition for Writ of Certiorari [Doc. #361-2],[6] that if the Fourth Circuit decision were to stand, Count 1 would no longer be a viable

[6] In their Reply Brief in Support of Petition for Writ of Certiorari [Doc. #361-2], Plaintiffs argued that if the United States Supreme Court reversed the Fourth Circuit's decision in this case that it would "restore Petitioners' Section 1983 claim against the private parties who conspired with Respondents to violate Petitioners' Fourth Amendment rights by, for example, fabricating medical evidence and altering medical records to corroborate the false rape allegation and mislead a judicial official into issuing the NTO." (Reply Br. in Supp. of Pet. for Writ of Cert. [Doc. #361-2], Ex. B at 24.) The Court notes that Plaintiffs were the Petitioners for the purposes of the petition for writ of certiorari, and the Respondents included the City of Durham and the Durham police officers and police officials that initiated the interlocutory appeal to the Fourth Circuit in this case. In assessing Plaintiffs' argument in their Reply Brief to support their Petition to the Supreme Court, it appears that Plaintiffs' argued that if the Supreme Court reversed the decision of the Fourth Circuit, Count 1 would be restored in this case, as it is the only § 1983 claim, before the Fourth Circuit on appeal, that alleged an unlawful search and seizure due to an alleged conspiracy to corroborate rape allegations in support of the NTO affidavits. Additionally, Plaintiffs argued that if the Supreme Court reversed the decision of the Fourth Circuit in this case that such a § 1983 claim would not only be restored as to the City of Durham or police officer defendants that appealed to the Fourth Circuit, but also to the nonappealing, private parties remaining as to that claim. Defendant Levicy is the only private party, indeed the only party, remaining as to Count 1.

claim against the remaining private party against whom the Count 1 is asserted, that is, Defendant Levicy. Now Plaintiffs interpret the Fourth Circuit holding as a limited ruling, contending that the Fourth Circuit did not reach the constitutional question raised in Count 1, "holding that the police defendants were entitled to qualified immunity, which Levicy does not share."[7] (Corrected Resp. Br. [Doc. #351], at 2.) However, "lack of diligence, inadvertence, or other manifestations of carelessness and laxity" do not qualify as excusable neglect. Key v. Robertson, 626 F. Supp. 2d 566, 577 (E.D. Va. 2009); see Thompson, 76 F.3d at 533 ("Though

[7] Alternatively, the Court notes that Plaintiffs' new contention that Count 1 should not be dismissed because the Fourth Circuit did not reach the constitutional question "holding [only] that the police defendants were entitled to qualified immunity, which Levicy did not share" (Corrected Response Brief [Doc. #351], at 2; see Mem. in Opp'n to Defs.' Mot. to Strike [Doc. #368], at 5) is without merit. In asserting their claim in Count 1, Plaintiffs argued that the named defendants violated their Fourth Amendment rights by unreasonably seizing Plaintiffs when the defendants submitted allegedly material, false statements in support of the NTO affidavits. Additionally, Plaintiffs challenged the constitutionality of the NTO statute itself because it permitted a search based on an evidentiary finding of less than probable cause. In addressing the claim on appeal, the Fourth Circuit did hold that this Court erred in failing to dismiss the defendant police officers' constitutional challenge to the North Carolina NTO statute on qualified immunity grounds. However, that was not the end of the inquiry as the Fourth Circuit went on to state that the seizure of Plaintiffs' DNA under the NTO statute was still subject to the confines of the Fourth Amendments and analyzed whether there was a sufficient evidentiary showing, under both the "probable cause" and "reasonable grounds" standards in the NTO statute, to collect Plaintiffs' DNA. See Chalmers, 703 F.3d at 649 n.6, 651. In making such an assessment, the ultimate holding on appeal was that the defendant police officers' false statements made in support of the NTO affidavit were not materially false as to violate the Fourth Amendment. This is based on the Fourth Circuit's determination that after excising the police officers' false statements from the NTO affidavit, "the corrected NTO affidavits would provide adequate support for a magistrate's authorization of the NTO." Id. at 652. Therefore, the Fourth Circuit determined that Plaintiffs' allegations against the defendant police officers did not state a constitutional violation. Thus, Plaintiffs' new argument in their Corrected Response Brief that the Fourth Circuit's holding was limited to addressing the qualified immunity of the defendant police officers, as it relates to the constitutionality of the NTO statute, is misplaced and would not impact the Court's determination of the Duke Defendants' Joint Motion for Judgment on the Pleadings in this case.

adopting a 'flexible understanding' of the phrase 'excusable neglect,' the [Supreme] Court specifically observed that . . . 'inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect." (quoting Pioneer, 507 U.S. at 392, 113 S. Ct. at 1496) (internal quotation marks omitted)). For these reasons, the third factor weighs in favor of a finding that Plaintiffs have not demonstrated excusable neglect.

Finally, as to the fourth factor, the Court notes that Plaintiffs Corrected Response Brief was filed without leave of court, particularly, almost nine months after the arguments relating to the Joint Motion for Judgment on the Pleadings were fully briefed and almost four months after the Supreme Court denied Plaintiffs' petition for certiorari, the last proceeding that Plaintiffs contended would have any dispositive effect on Counts 1 or 2 in this case, prior to this Court's ruling. Such actions may be indicators of lack of good faith for their late filing. However, as Plaintiffs do not address their reasons for belatedly filing the Corrected Response Brief, and the Duke Defendants do not address the good faith factor, the Court will not make a determination as to whether Plaintiffs acted in good faith. However, the Court will give little weight to its lack of determination of Plaintiffs' good faith as it relates to its ultimate conclusion on the issue of excusable neglect. See Symbionics, 432 F. App'x at 219 ("[T]he fourth Pioneer factor is rarely material, as the absence of good faith is seldom at issue in excusable neglect cases." citing Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 366 (2d Cir. 2003)).

Therefore, for the reasons set forth herein, the Court will disregard Plaintiffs' Corrected Response Brief [Doc. #351]. However, in doing so, the Court recognizes that the Duke Defendants' Joint Motion to Strike does not explicitly move to strike Plaintiffs' Corrected Response Brief under Federal Rule of Civil Procedure 12(f), which allows "[t]he court [to] strike

from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Still, to the extent the Duke Defendants' Joint Motion to Strike could be construed to seek such relief pursuant to Rule 12(f), Plaintiffs' Corrected Response Brief does not constitute a "pleading" as referenced within Rule 12(f). See DiPaulo v. Potter, 733 F. Supp. 2d 666, 670 (M.D.N.C. 2010). Therefore, because the Corrected Response Brief at issue is not technically recognized as a "pleading", the Court will reject any assertion by the Duke Defendants that Plaintiffs' Corrected Response Brief should be stricken specifically pursuant to Federal Rule 12(f). However, the local rules do permit the Court to "make such orders as are just under the circumstances of the case" in the event that "a party fails to comply with a local rule of this Court." L.R. 83.4(a). Subsection 83.4(a)(2) prescribes that the Court may refuse "to allow the failing party to support or oppose designated claims or defenses" when a party does not comply with the local rules. Having found that Plaintiffs violated Local Rule 7.3(k) by filing an untimely Corrected Response Brief, without leave of the Court, which advances a wholly new argument as to Count 1, the Court concludes that it will not consider Plaintiffs' Corrected Response Brief pursuant to Local Rule 83.4(a), although the Court will not take any action pursuant to Rule 12(f). See DiPaulo, 733 F. Supp. at 670 ("Because Federal Rule of Civil Procedure 12(f) applies to pleadings . . . the court will not strike the surreply but will simply not consider it and its attachments."). Instead, upon ruling on the Duke Defendants' Joint Motion for Judgment on the Pleadings [Doc. #335] in this case, the Court will only consider the timely briefs submitted in this matter, as it relates to the Joint Motion for Judgment on the Pleadings. (See Mot. for J. on Pleadings [Doc. #335]; Resp. to Mot. for J. on Pleadings [Doc. #341]; Joint Reply Br. in Supp. of Mot. for J. on Pleadings [Doc. #343].)

Furthermore, because the Court finds that it will not consider Plaintiffs' Corrected Response Brief, the Court will not address the Duke Defendants' assertion that the form and content of Plaintiffs' Corrected Response Brief did not adhere to Local Rule 7.2(a).

Additionally, Plaintiffs concede, for the first time, in their Corrected Response Brief that Count 5 should be dismissed, now contending that the Court is bound by the Fourth Circuit holding that Count 5 does not allege a constitutional violation. The Court notes that Count 5, which is a claim that is not remaining against any of the Duke Defendants, was not subject to the Duke Defendants' Joint Motion for Judgment on the Pleadings [Doc. #335], to which the Corrected Response Brief also attempts to address. Count 5 is, nevertheless, a remaining claim against Defendant Wilson and subject to Defendant Wilson's Motions to Dismiss [Docs. #324, #330], in which Plaintiffs' response was due by May 30, 2013. (See May 17, 2013 Order [Doc. #340].)[8] Plaintiffs did not respond to Defendant Wilson's Motions to Dismiss, at least as to Count 5,[9] in their initial Response to the Joint Motion for Judgment on the Pleadings [Doc. #341], which states that Defendant Wilson was joining in the Joint Motion for Judgment on the Pleadings, or in any separate response brief to Defendant Wilson's Motions to Dismiss [Docs. #324, #330]. (See Resp. to Joint Mot. for J. on Pleadings [Doc. #341], at 1.) Plaintiffs do, however, acknowledge that Count 5 should be dismissed in their Corrected Response Brief

[8] The Court notes that Defendant Wilson's Third Motion to Dismiss Counts 5 and 18 [Doc. #346], was not before the Court when it issued its May 17, 2013 Order.

[9] No issues as to Count 18, which is also subject to Defendant Wilson's Motions to Dismiss [Docs. #324, #330, #346], are raised because Plaintiffs' position as to Count 18 was not affected by the changes made in the Corrected Response Brief or the Duke Defendants' request to strike the Corrected Response Brief.

[Doc. #351]. Though the Court will not consider Plaintiffs' concession, regarding Count 5, in their Corrected Response Brief, as the Court is disregarding the Corrected Response Brief, the Court will consider any impact Plaintiffs' lack of response to Defendant Wilson's Motions to Dismiss Count 5 will have in separately resolving Defendant Wilson's Motions to Dismiss as to Counts 5 and 18.

B. The Duke Defendants' Joint Motion for Judgment on the Pleadings will not be Deemed Untimely or Otherwise Impermissible

In their Memorandum in Opposition to Defendants' Motion to Strike [Doc. #368], Plaintiffs contend that Defendants' Joint Motion for Judgment on the Pleadings is untimely because it violated the Court's Order dated April 30, 2008 [Doc. #38], which established the Rule 12 briefing schedule in this case, that the Rule 12 Motions or Answers Due in this matter were due July 2, 2008. However, to the extent Plaintiffs failed to raise this argument when they filed their Response to the Joint Motion for Judgment on the Pleadings [Doc. #341], such an argument is waived. Additionally, the Court notes that Plaintiffs' Second Amended Complaint in this matter was not filed until February 23, 2010 and thus any prior orders affecting the briefing schedule related to the previously filed complaints in this matter, including the April 30, 2008 Order, were rendered moot. Plaintiffs also argue that the Court's June 9, 2011 Order [Doc. #218], which stayed the proceedings in this case with respect to the claims that are the subject of the Duke Defendants' Joint Motion for Judgment on the Pleadings (Counts 1, 2, 18, and 32), prevented the Duke Defendants from filing its Joint Motion for Judgment on the Pleadings in this case. However, this argument is without merit as such proceedings were only stayed pending the resolution of the interlocutory appeal to the Fourth Circuit in this case. As the

Fourth Circuit Mandate [Doc. #331], which gave effect to the Fourth Circuit Judgment in this case, was issued on January 23, 2013, the interlocutory appeal was resolved as of that date and all stayed matters pursuant to the June 9, 2011 Order were properly resumed. Alternatively, as the Court previously discussed, to the extent Plaintiffs did not raise such an argument—that the Duke Defendants' Joint Motion for Judgment on the Pleadings [Doc. #335] violated the June 9, 2011 Order—in their initial Response to Joint Motion for Judgment on the Pleadings [Doc. #341], such an argument is also waived. Finally, the Court notes that the Joint Motion for Judgment on the Pleadings [Doc. #335] is a proper post-answer motion in this case. See Alexander v. City of Greensboro, 801 F. Supp. 2d 429, 434 (M.D.N.C. 2011). Therefore, the Joint Motion for Judgment on the Pleadings [Doc. #335] is still before the Court for final resolution.

C. Defendant Wilson's Motion for Joinder is Granted in Part, Denied in Part

Defendant Wilson, *pro se*, has also requested to join the Duke Defendants Duke Defendants' Motion to Strike and Motion to Expedite Briefing on Defendants' Motion to Strike [Doc. #365] and his Motion to Join the Duke Defendants' Joint Reply Brief [Doc. #370]. However, it is unclear to the Court why Defendant Wilson has requested to join the Duke Defendants' Joint Motion to Strike and Joint Reply Brief, as the Duke Defendants are requesting that the Court disregard the Corrected Response Brief which modifies Plaintiffs' position in Count 1 and now concedes that Count 5 should be dismissed. First, Count 1 is not a claim alleged against Defendant Wilson and thus Defendant Wilson would have no purported interest in the Corrected Response Brief to the extent it addresses Count 1. Second, the Court notes that

Defendant Wilson's Motions to Join, effectively joining the Duke Defendants' request that the Court disregard Plaintiffs' Corrected Response Brief, would be clearly inconsistent with Defendant Wilson's Motions to Dismiss Counts 5 and 18 [Docs. #324, #330, #346], as the Corrected Response Brief concedes that Count 5 should be dismissed. As such, the Court will disregard Defendant Wilson's Motions to Join [Docs. #365, #370], to the extent he requests that the Court dismiss Count 5 and joining the Duke Defendants' Joint Motion to Strike and Joint Reply Brief would be clearly inconsistent with his Motions to Dismiss Count 5 in this case. See Aikens v. Ingram, 652 F.3d 496, 504 (4th Cir. 2011) (en banc) ("[C]ourts construe *pro se* motions liberally . . . ."). However, the Court will deny Defendant Wilson's request to join the Duke Defendants' Joint Motion to Strike and Reply Brief, to the extent that he has no interest in the Court's consideration of the changes made in the Corrected Response Brief as it relates to Count 1. Additionally, to the extent Defendant Wilson filed a Motion to Join the Duke Defendants' Motion to Expedite Briefing on Defendants' Motion to Strike [Doc. #365], the Court will deny his Motion as moot, as the Court has already entered an Order [Doc. #366], expediting the briefing in this matter. However, the Court will grant Defendant Wilson's Motions to Join only to the extent that he is requesting the Court consider what effect, if any, the Corrected Response Brief has on Count 5, which is asserted against Defendant Wilson only.

III. CONCLUSION

IT IS THEREFORE ORDERED that Defendant Wilson's Motion to Join the Duke Defendants' Motion to Strike and Motion to Expedite Briefing on Defendants' Motion to Strike [Doc. #365] and his Motion to Join the Duke Defendants' Reply Brief [Doc. #370] is GRANTED IN PART AND DENIED IN PART. Specifically, the Court will DENY

Defendant Wilson's Motions to Join to the extent that he has no interest in the Court's consideration of the changes made in the Corrected Response Brief as it relates to Count 1. Additionally, to the extent Defendant Wilson filed a Motion to Join the Duke Defendants' Motion to Expedite Briefing on Defendants' Motion to Strike [Doc. #365], the Court will DENY his Motion AS MOOT, as the Court has already entered an Order [Doc. #366], expediting the briefing in this matter. However, the Court will GRANT Defendant Wilson's Motion to Join only to the extent that he is requesting the Court consider what effect, if any, the Corrected Response Brief has on Count 5, which is asserted against Defendant Wilson only.

IT IS FURTHER ORDERED that the Duke Defendants' Joint Motion to Strike [Doc. #360], and joined by Defendant Wilson for the limited purpose allowed by the Court, is GRANTED and the Court will disregard Plaintiffs' Corrected Response Brief [Doc. #351] pursuant to Local Rules 7.3(k) and 83.4(a)(2).

This, the 17th day of April, 2014.

United States District Judge