

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

<p>RYAN MCFADYEN, <i>et al.</i>,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>DUKE UNIVERSITY, <i>et al.</i>,</p> <p style="text-align: center;">Defendants.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p><u>DEFENDANT CITY OF DURHAM'S MOTION TO SEVER COUNT 41 OF SECOND AMENDED COMPLAINT</u></p>
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NOW COMES Defendant the City of Durham, North Carolina (the "City"), herein by and through its attorneys, and pursuant to Rule 21 of the Federal Rules of Civil Procedure and Rule 7.3 of the Rules of Practice and Procedure of the United States District Court for the Middle District of North Carolina, and in the event the Court does not grant the City's motion for judgment on the pleadings (Doc. 385), the City moves the Court to sever and adjudicate separately from the remainder of this action Plaintiffs' claim under the North Carolina Constitution, which claim appears at ¶¶ 1382 - 1385 of Plaintiffs' Second Amended Complaint (Doc. 136), and has been denominated by this Court as, and is referred to herein as, "Count 41".

IN SUPPORT WHEREOF, the City respectfully submits that severance of Count 41 is necessary to minimize risks of unfair prejudice and confusion, and in that regard shows the Court the following:

1. This case has been stayed as to the City since June 9, 2011 (see Order granting motions to stay proceedings, Doc. no. 218), pending the City's and other Defendants' appeal to the United States Court of Appeals, following which, and after denial of Plaintiffs' petition to the United States Supreme Court, only Count 41 (which claim was not addressed substantively on appeal) remains pending against the City.

2. Consequently, no other proceedings have transpired as to Count 41, except for the City's motion to dismiss Count 41, the merits of which were not reached on appeal, and the City's pending motion for judgment on the pleadings as to Count 41 (Doc. 385), which motion is currently pending.

3. In particular, by reason of the stay, no other pretrial proceedings, other than this Court's status conference on March 14, 2014, have occurred with respect to Count 41, no initial pretrial conference has been convened, and no discovery whatsoever has been conducted by or obtained from the City with respect to Count 41.

4. In contrast, however, there are 12 other defendants in this action, against whom are pending multiple other claims, denominated by the Court as "Counts 1, 2, 5, 18, 21, 24, and 32". Substantial and voluminous discovery has proceeded as to the claims encompassed by Counts 21 and 24, and as to them, such discovery has been completed.

5. In particular, the undersigned is informed by counsel representing Plaintiffs and the other Defendants that with respect to Counts 21 and 24:

(a) Plaintiffs and those other Defendants, or some of the other Defendants, have submitted and responded to: 8 sets of interrogatories, 10 sets of requests for production of documents, and 6 sets of requests for admissions.

(b) Plaintiffs and those other Defendants, or some of the other Defendants have produced at least 45,000 pages of documents.

(c) Plaintiffs and those other Defendants, or some of the other Defendants have taken at least 38 depositions.

6. The other Defendants have filed a motion for judgment on the pleadings on or renewed motions to dismiss all of the remaining claims asserted against them, which are encompassed by Counts 1, 2, 5, 18, and 32.

7. Thus, with respect to all claims other than those asserted against the City, discovery has either been conducted and completed (Counts 21 and 24)¹ or motions for judgment on the pleadings or to dismiss are pending (Counts 1, 2, 5, 18, and 32).

8. The claims asserted against the other Defendants in Counts 1, 2, 5, 18, 21, 24, and 32 are separate from, and are based on legal principles that are distinct and severable from, the legal principles on which Count 41 is based, to the extent such legal principles are articulated in Plaintiffs' second amended complaint.

9. Likewise, the alleged facts on which the claims asserted against the other Defendants and which form the bases for the liability asserted in Counts 1, 2, 5, 18, 21, 24, and 32 are for the most part, if not entirely, different than the alleged facts which form the apparent bases for the liability on the part of the City asserted in Count 41, to the extent such alleged facts are set forth in Plaintiffs' second amended complaint with any reasonable degree of specificity.

10. Further, the parties and the Court recognized the undeveloped status and absence of any discovery as to Count 41 at the March 14, 2014 status conference.

11. Plaintiffs' second amended complaint, which was originally asserted against 50 Defendants, consists of 428 pages, 1,388 numbered paragraphs, and 28 attachments.

12. However, Count 41 consists of slightly more than one page, three numbered paragraphs, and no attachments. Plaintiffs' second amended complaint does not articulate the legal principles and alleged facts that support Count 41.

13. At this stage of the litigation, with a motion for judgment on the pleadings based in part on the absence of an adequate statement of Plaintiffs' claim against the City, and prior to the commencement of any discovery, the City simply has nothing to go on to find out what is alleged or to understand what is involved so it can defend this claim.

14. Accordingly, the case against the City, as represented by Count 41, the status of the case against the City, and the forthcoming prosecution of the case stand or will stand on an entirely different procedural, legal, and factual footing than the case against the 12 other Defendants.

15. There exists the possibility, if not the probability, that upon determination of the pending motions for judgment on the pleadings by the other Defendants, the sole remaining claims will be those encompassed by Counts 21 and 24, as to which discovery has been completed, and presumably Counts 21 and 24 are ripe for motions for summary

¹ The undersigned is informed and believes there may be issues arising from the discovery conducted with respect to Counts 21 and 24 that Plaintiffs and/or some of the other Defendants may submit to the Court for resolution.

judgment, and are or will be ready for trial, if necessary, in October 2014, thus widening the gulf between those claims and Count 41.

16. Moreover, with no discovery whatsoever having been conducted with respect to Count 41 and its markedly different procedural, legal, and factual footing as described above, Count 41 is not, and will not be for some time, ripe for a motion for summary judgment or ready for trial.

17. It would be unreasonable, unfair, and prejudicial to the City to require it to litigate this case on the same schedule and track as the remaining Defendants.

18. It would also be prejudicial to the City to require it to defend Count 41 in the same action as the other claims and with the other Defendants.

19. Severance of Count 41 will allow the case to proceed in an orderly and expeditious fashion as to the other Defendants, while allowing the City adequate time for discovery, submission of a summary judgment motion, and preparation for trial if necessary.

20. Severance of Count 41 will also prevent undue complications in the presentation of evidence and possible juror confusion, and will not prejudice or unduly Plaintiffs in the pursuit of their claims against the other Defendants.

WHEREFORE, Defendant the City of Durham, North Carolina prays that the Court sever Plaintiffs' claim under the North Carolina Constitution (Count 41 of Plaintiffs' Second Amended Complaint), adjudicate that claim separately from the

remainder of this action, and grant the City such other and further relief as is just and proper.

Respectfully submitted, this the 6th day of May, 2014.

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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 6th day of May, 2014.

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