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,	**BRIEF IN SUPPORT OF DEFENDANT CITY OF DURHAM'S MOTION TO SEVER COUNT 41 OF SECOND AMENDED COMPLAINT**
v.	
DUKE UNIVERSITY, *et al.*,	
Defendants.	

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 Rules 7.2 and 7.3 of the Rules of Practice and Procedure of the United States District Court for the Middle District of North Carolina, submits this brief in support of Defendant City of Durham's Motion to Sever Count 41 of Second Amended Complaint.

STATEMENT OF THE NATURE OF THE MATTER BEFORE THE COURT AND FACTS RELEVANT TO THE MOTIONS

Having prevailed on every claim asserted by Plaintiffs against it, except one, and following a stay pending appeal, the City returns to this Court for the adjudication of that one remaining claim. That one and only claim, which alleges that the City violated Plaintiffs' rights under the North Carolina Constitution, 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".

However, there are 12 other Defendants in this case, as to whom Plaintiffs have asserted numerous claims. Some of these claims were not stayed, and significant and voluminous discovery has proceeded as to those claims. Based on the significant differences between the procedural status, legal grounds, and factual bases of Count 41 and the procedural status, legal grounds, and factual bases of the many claims asserted against the 12 other Defendants in this case, the City has moved to sever Count 41.

QUESTION PRESENTED

The City's motion presents the following question: should the Court sever Count 41 and adjudicate that claim separately from the many other claims asserted against the 12 other Defendants in this action?

The City respectfully submits that Count 41 should be severed. Because of the significant procedural, legal, and factual differences between Count 41 and the multiple claims asserted against the 12 other Defendants in this action, severance is necessary to minimize the risks of prejudice and possible confusion.

ARGUMENT
COUNT 41 SHOULD BE SEVERED

Rule 21 of the Federal Rules of Civil Procedure authorizes a court to drop or add a party. The rule further provides that "The court may also sever any claim against a party." As the language of Rule 21 indicates, a decision to sever a claim is discretionary.

Arnold v. Eastern Air Lines, Inc., 681 F.2d 186, 192 (4th Cir. 1982) (decision to sever committed to trial court's discretion; review is for abuse of discretion). And the court's authority to sever is quite broad. In re EMC Corp., 677 F.3d 1351, 1355 (Fed. Cir. 2012) ("To be sure, Rule 21, which authorizes a district court to 'sever any claim against a party,' provides a district court broad discretion."); Acevedo-Garcia v. Monroig, 351 F.3d 547, 559 (1st Cir. 2003) ("wide discretion" to order severance); Rice v. Sunrise Express, Inc., 209 F.3d 1008, 1016 (7th Cir. 2000) (within court's "broad discretion" to sever a claim under Rule 21); U.S. v. O'Neil, 709 F.2d 361, 367 (5th Cir. 1983) (same).

Indeed, the Seventh Circuit has stated that, "[a]s long as there is a discrete and separate claim, the district court may exercise its discretion and sever it." 209 F.3d at 1016. Count 41 is the only claim Plaintiffs have against the City; the City is the only Defendant as to Count 41. Count 41 is based on the North Carolina Constitution, unlike any other claim asserted against any other Defendant. Count 41 is undoubtedly a separate and distinct claim from the many other claims asserted against the 12 other Defendants in this case.

Although the separate and distinct factor is readily met, it appears the inquiry in this Court regarding a motion to sever is perhaps a little more detailed. In Watkins v. Hospitality Group Management, Inc., No. 1:02CV897 2003 U.S. Dist. LEXIS 22291 (M.D.N.C. Dec. 1, 2003), this Court acknowledged its discretion to sever claims, based on considerations of the risks of prejudice and confusion. Id. at *33 (citing Arnold, 681 F.2d at 192, 193). Finding the risks of prejudice and confusion to be "significant", this Court ordered severance of one plaintiff's employment discrimination claims from the

employment discrimination claims of another plaintiff arising from the plaintiffs' employment with the same employer. Id. at *32-*35.

In the present case, the risk of prejudice to the City is palpable. First, although only one claim is asserted against it, the City would be required to play "catch up" on the discovery on other claims that has proceeded in this case since May 2011. This will severely burden and prejudice the City. If the Court tries Count 41 along with the many other claims asserted against the 12 other Defendants in October 2014, the City will not receive a full and fair opportunity to conduct discovery, file and obtain a ruling on a summary judgment motion, and prepare for trial.

Complicating these challenges in this compressed time period are the following additional facts:

(1) As of the present time, there is no clear explication of the claim that is encompassed by Count 41. Plaintiffs' second amended complaint, which was originally asserted against 50 Defendants, is comprised of 428 pages, 1,388 numbered paragraphs, and 28 attachments. 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.

Indeed, because the remaining 1,385 paragraphs and 427 other pages of Plaintiffs' second amended complaint are directed to 40 other causes of action asserting dozens of claims against 50 Defendants, as to which 33 causes of action and 37 Defendants have been dismissed, the legal principles and alleged facts on

which Plaintiffs rely in support of Count 41 are, in effect, obscured. At this stage of the litigation, with the City's motion for judgment on the pleadings based in part on the absence of an adequate statement of Count 41, and prior to the commencement of any discovery, the City simply has nothing to go on to find out what is alleged in support of Count 41 or to understand what is involved so it can defend this claim. And with a potential trial date of October 2014 the opportunity for discovery and the ability of the City to learn and understand the factual basis for Count 41 is severely impaired.

(2) The amount and volume of discovery conducted thus far as to Counts 21 and 24, which encompass claims for fraud and breach of contract against persons and entities who are not employees of or affiliated with the City, is substantial and includes:

- 8 sets of interrogatories, 10 sets of requests for production of documents, and 6 sets of requests for admissions;
- at least 45,000 pages of documents produced; and
- 38 depositions conducted.

The time and effort required to wade through and navigate the substantial amount and volume of discovery conducted thus far, but which may not be relevant to Count 41, will likely cause the City to expend valuable resources and incur unnecessary expense, as well as consume precious time needed to prepare for trial on Count 41.

Similarly, monitoring and managing the flow of information generated from discovery to be conducted between Plaintiffs and the 12 other Defendants as to Counts 1, 2, 5, 18, and 32 will also cause the City to expend valuable resources, incur unnecessary expense, and consume precious time needed to prepare for trial on Count 41.

Counts 1, 2, 5, 18, 21, 24, and 32 do not involve the City, and by the nature of several, if not most of these claims—breach of contract (Count 21), fraud (Count 24), and negligent supervision, hiring, training, discipline, and retention of persons who were not City personnel (Count 32)—they are not relevant to Count 41. As a result, discovery that has been or will be conducted on Counts 1, 2, 5, 18, 21, 24, and 32 may be and probably is largely irrelevant to Count 41. However, the City cannot simply ignore this discovery.

Monitoring and managing information that has been or will be generated from discovery on Counts 1, 2, 5, 18, 21, 24, and 32 comes at a price. If nothing else the City will incur the costs of litigation necessary to manage a mass of information which may be largely irrelevant to Count 41. The City will be prejudiced if it is forced to incur those costs.

(2) The City, through no fault of its own, is very much a latecomer to this case in its present state. But the City is a latecomer as a result of its successful defense of numerous other claims. The City should not be penalized for being a

latecomer.[1] Instead, severance is an appropriate tool for case management, and the proper management of this case warrants severing Count 41 so that the remainder of this case may proceed without delay, while providing the City (and Plaintiffs) time and an adequate opportunity to perform the work necessary to conduct discovery and prepare as to Count 41. See, Acevedo-Garcia v. Monroig, 351 F.3d at 558 ("The decision to separate parties or claims is a case management determination peculiarly within the discretion of the trial court") (internal quotation marks and citations omitted). Indeed, at least one court has recognized severance as a proper technique to allow claims to proceed without being delayed by waiting for the maturation of less developed claims. See, Jones v. City of St. Louis, 217 F.R.D. 490, 491 (E.D. Mo. 2003).

(3) If Count 41 is not severed, the City will be forced to defend Count 41, along with the 7 other counts asserting the many other claims against the 12 other Defendants. Without severance, the jury will hear allegations of bad acts of numerous other persons who are not employees of the City and allegations against entities not affiliated with the City. Plaintiffs' arguments regarding and condemnation of these alleged acts may prejudice the jury against the City. A risk

[1] The City's and the other City Defendants' defense efforts have contributed to the dismissal of the claims encompassed in 33 other counts asserted against 37 other Defendants, thus narrowing this case to the claims encompassed by the remaining 7 counts (Counts 1, 2, 5, 18, 21, 24, and 32) against the 12 other Defendants and Count 41 against the City. As a result of those defense efforts the burden on this Court as well as the parties has been reduced.

of the same type of prejudice led this Court to order severance in Watkins, supra. This Court explained that,

> the risk of prejudice and confusion resulting from a joint trial is significant. A jury hearing allegations of a series of offensive comments toward both Plaintiffs may view the evidence in the aggregate, prejudicing them against [Defendant] Hospitality.

2003 U.S. Dist. LEXIS 22291 at *34. Likewise, the risk posed by the aggregation of 1,000+ allegations and many claims against the 12 other Defendants with the one claim against the City is significant and should be eliminated. Indeed, given the much greater number of allegations and claims in this case than in Watkins, the risk of prejudice posed by such aggregation is much higher in this case.

Not only does the City face a significant risk of prejudice of the same nature that led this Court to order severance in Watkins, there is also a great danger of confusion. The claims against the 12 other Defendants which, again, are not asserted against the City, are separate and distinct from Count 41. These other claims are based on different legal standards and principles. The elements of these claims are different. And there are many of these claims. And there are many Defendants. Further, with respect to the conspiracy claims (Count 18), there will be complex evidentiary issues that may be difficult for a jury to understand. The number and nature of other claims and other Defendants, with the varying allegations and applicable legal principles, is a recipe for great confusion, if not disaster.

Like Watkins, the risk of confusion warrants severance.

> A jury hearing allegations of a series of offensive comments toward both Plaintiffs . . . may confuse the evidence in some other manner when looking for discriminatory intent towards one Plaintiff alone.

2003 U.S. Dist. LEXIS 22291 at *34. Likewise, there is ample opportunity for and an enormous risk of confusion between and among the many and varied allegations, legal requirements, and Defendants.

In the case sub judice, there exists an element of risk of prejudice and confusion that is in addition to that which led this Court to order severance in Watkins. Because Plaintiffs have asserted conspiracy claims (Count 18) against most of the other Defendants, none of whom, again, is an employee of or associated with the City, the rules of evidence and the standards of liability are certainly more complex, if not also liberalized and relaxed. See, e.g., Howard v. Carroll Cos., Inc., No. 1:12CV146 2012 U.S. Dist. LEXIS 101195, at *46 (M.D.N.C. July 19, 2013), quoting Dove v. Harvey, 168 N.C. App. 687, 690, 608 S.E.2d 798, 800 (2005) (state law claim of civil conspiracy "associate[s] the defendants together and perhaps liberalizes the rules of evidence to the extent that under proper circumstances the acts and conduct of one might be admissible against all."). Consequently, the City's need for protection from the dangers of prejudice and confusion created by aggregating more than 1,000 allegations and numerous claims is even more acute in this case than that need was in Watkins.[2] Moreover, given that

[2] The liberalized evidentiary standard may also justify broader discovery, and thereby impose a greater burden on the City to manage discovery and information, much of which may not be relevant to Count 41. The City cannot ignore such discovery and information, and therefore would incur greater litigation costs, expend more resources, and consume additional time regarding discovery that may be largely irrelevant.

Count 18 was dismissed as to the City, severance will prevent an indirect revival of that count as to the City.

This Court also assessed in Watkins whether there were considerations that weighed against severance. That assessment is also applicable to this case. First, this Court noted that, because the claims were based on "separate law" there was little risk of inconsistent adjudications of law.[3] Id. In addition, this Court also determined that the possibility that one or both plaintiffs and some witnesses might have to testify in two trials should not preclude severance:

> On the contrary, it is in the best interests of the parties to sever the claims to ensure a fair and impartial hearing of the claims of both Plaintiffs.

Id. at *35. Likewise, it is in the best interests of Plaintiffs and the City that they receive a fair and impartial hearing that is manageable and not unnecessarily complicated.

It is difficult to conceive any principled objection on the part of Plaintiffs to severance. Nor can any prejudice to Plaintiffs be easily imagined if Count 41 is severed. Plaintiffs must marshal the evidence necessary and satisfy the legal requirements applicable to Count 41—whatever that evidence and those legal requirement are—and they must do so whether as part of a very large case against all Defendants or in a

[3] Actually, this Court noted that the claims arose from separate incidents as well as separate law. Id. at *34. Given that, unlike any other claim against the other Defendants, Count 41 is based on the North Carolina Constitution, there can be no doubt that Count 41 is based on separate law. Count 41 is the only claim asserted against the City, and the City is the only Defendant as to Count 41. Accordingly, it is at least arguable, especially in the absence of Plaintiffs' articulation of the factual basis for Count 41, that Count 41 and the other counts are based on separate incidents, such that, as in Watkins, severance poses little risk of inconsistent adjudications of fact, in addition to the minimal risk of inconsistent adjudications of law, the latter of which is discussed in text.

separate action against the City. Whatever discovery must be conducted as to Count 41 must occur, regardless of whether the discovery is part of a very large case against all Defendants or is pursued in a separate action against the City. In fact, severing Count 41 would enable Plaintiffs to proceed with all other claims against the 12 other Defendants, without having to "squeeze in" their preparation for Count 41. Plaintiffs would thus be able to concentrate their work and efforts on Counts 1, 2, 5, 18, 21, 24, and 32 and also concentrate on Count 41 in a severed action, perhaps even having an opportunity to "catch their breath" between the two trials, if Count 41 ultimately advances to trial.

From the standpoint of litigation costs, Plaintiffs will incur the costs of pursuing Count 41 whether in the very large case or separately. Not only will the City avoid the unnecessary costs associated with monitoring and managing discovery, information, and proceedings involving claims that are not asserted against it, the severance of Count 41 spares the 12 other Defendants the costs of monitoring and managing discovery, information, and proceedings involving Count 41, which would be mostly irrelevant to the remaining counts they are defending.

There are hundreds of cases granting and denying motions to sever. None of those cases appear to present the complicated and unique history and circumstances of this case. To be sure, Plaintiffs may offer cases they contend justify denial of severance. For its part, the City could also offer numerous cases that justify severance. The City respectfully submits that determination of this motion should not devolve to a my-case-is better-than-yours contest between Plaintiffs and the City, or a far reaching search of the annotations to Rule 21, or of learned treatises, such as Wright & Miller's Federal Practice

and Procedure[4] or Moore's Federal Practice,[5] or of law libraries (online and bricks and mortar). Instead, the focus should be the principles articulated by this Court in Watkins, at *33-*35, which are derived from the Fourth Circuit's decision in Arnold, 681 F.2d at 193. Such focus leads inescapably to the conclusion that severance should be granted.

SUMMARY AND CONCLUSION

This Court should sever Count 41. The risks of prejudice and confusion posed by aggregating this separate and distinct claim with the many other claims asserted against the 12 other Defendants in this case is not merely significant, as in Watkins. That risk is enormous in this case. Severance poses virtually no risk of inconsistent adjudications of fact or law. Severance will not result in undue burden to any party. Neither Plaintiffs nor any other party would be burdened by severance.

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.

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[4] See, e.g., 7 Wright, Miller & Kane, Federal Practice and Procedure, § 1689 (3d ed. 2001 and Supp. 2013).

[5] See, e.g., 4 Moore et al., Moore's Federal Practice, § 21.06 (3d ed. 2013).

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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