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,	**REPLY BRIEF IN SUPPORT OF CITY OF DURHAM'S MOTION FOR JUDGMENT ON THE PLEADINGS ON PLAINTIFFS' CLAIM UNDER THE NORTH CAROLINA CONSTITUTION (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 Rules 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure and Rules 7.2 and 7.3(h) of the Rules of Practice and Procedure of the United States District Court for the Middle District of North Carolina, submits this reply brief in support of the City of Durham's Motion for Judgment on the Pleadings on Plaintiffs' Claim under the North Carolina Constitution (Count 41 of Second Amended Complaint).

ARGUMENT

In Plaintiffs' Memorandum in Opposition to the City of Durham's Motion for Judgment on the Pleadings (Count 41), filed May 13, 2014 and docketed as Document 399, several matters are newly raised. Those matters are addressed below.

I. THE CITY'S MOTION FOR JUDGMENT ON THE PLEADINGS IS NOT A REQUEST FOR RECONSIDERATION OF ISSUES PREVIOUSLY ADDRESSED.

Plaintiffs assert that this Court has a "practice" of "consistently refus[ing] to reconsider issues raised in a Rule 12(c) motion that it fully addressed at the Rule 12(b)(6) stage." (Doc. 399, p. 6, citing Alexander v. City of Greensboro, 801 F. Supp. 2d 429, 434 (M.D.N.C. 2011)). Although Alexander makes no reference to any such "practice" of this Court nor to any such "consistent" refusal to reconsider, the City does not expect or request that this Court address issues it has already fully addressed. On the contrary, the City requests that this Court consider and rule on issues it has not addressed.

In this regard, in denying the City's Rule 12(b)(6) motion to dismiss, this Court did not address the following arguments made by the City in its present motion for judgment on the pleadings. The City respectfully submits that these arguments are appropriately considered now in light of the decision in this case by the United States Court of Appeals for the Fourth Circuit:

1. The provisions of the North Carolina Constitution on which Plaintiffs rely do not support their purported claim.

2. Plaintiffs have and are currently pursuing alternative remedies, which preclude a claim under the North Carolina Constitution.

3. Plaintiffs have not articulated any duty owed to them under the North Carolina Constitution that was not fulfilled, or any right they held thereunder that was breached.

The foregoing points are discussed at pp. 5-11 (point 1), 11-14 (point 2), and 14-16 (point 3) of the City's brief in support of its motion for judgment on the pleadings (Doc. 386). Even a casual reading of this Court's Memorandum Opinion denying the City's motion to dismiss pursuant to Rule 12(b)(6) shows this Court did not address or rule on these points. (See Doc. 186, pp. 211-15). Instead, this Court focused on the significance of the City's governmental immunity defense (id., pp. 212-14), and having denied summary judgment as to that defense, this Court rightly did not reach the foregoing points.

Indeed, with respect to point 2 above, this Court's Memorandum Opinion stated, "unresolved questions remain with respect to whether there are other adequate remedies under state law, particularly in light of the City's assertion of governmental immunity." (See Doc. 186, p. 214) And as to points 1 and 3 this Court stated only that, "Defendants contend that Plaintiffs have not alleged any constitutional violation". (Id., p. 212) This Court did not reject those points. (Id., pp. 211-15) There is no analysis or discussion anywhere in the Memorandum Opinion relating to them. (Id.) They are simply not addressed. (Id.) The City respectfully submits that, in the wake of the Court of Appeals' decision, the time has come to address these points, and the decision in Alexander does not suggest otherwise.

II. COLLECTION OF DNA EVIDENCE AND THE SEARCH OF PLAINTIFF MCFADYEN'S DORM ROOM VIOLATED NEITHER THE FOURTH AMENDMENT NOR THE NORTH CAROLINA CONSTITUTION.

Plaintiffs' contention that State v. Grooms, 540 S.E.2d 713 (N.C. 2000), supports Count 41 is misguided. In State v. Grooms, the North Carolina Supreme Court upheld

collection of blood, hair, and saliva samples pursuant to a search warrant. Id. at 727. The court expressly rejected the defendant's contention that the State should have obtained a nontestimonial identification order (NTO) and provided him counsel pursuant to the statutes authorizing NTOs. Id. The court noted the difference between search warrants, requiring probable cause, and NTOs, which are based on a lower standard, as follows:

> [A] nontestimonial identification order authorized by article 14 of chapter 15A of the General Statutes of North Carolina is an investigative tool requiring a lower standard of suspicion that is available for the limited purpose of identifying the perpetrator of a crime.

540 S.E.2d at 728.

Moreover, in the present case, the Court of Appeals held that the probable cause requirements of the Fourth Amendment were satisfied, both for the NTO that was issued with respect to Plaintiffs and their teammates and with respect to the search warrant for Plaintiff McFadyen's dorm room. See, Evans v. Chalmers, 703 F.3d 636, 649-52, 652-55 (4th Cir. 2012), cert. denied, 134 S. Ct. 98 (2013) (analyzing under Fourth Amendment standards Plaintiffs' 42 U.S.C. § 1983 search and seizure claims arising from NTO and dorm room search, and holding that those claims should be dismissed).

If anyone is seeking reconsideration of a matter fully addressed, it is Plaintiffs, who are dissatisfied with the Court of Appeals' decision holding that:

(a) The NTO was properly issued in accordance with state law, notwithstanding the alleged deliberate false statements in and omissions from the application/affidavits for the NTO. 703 F.2d at 651 ("[T]he corrected affidavits clearly contain sufficient factual bases to establish both probable cause that a rape

was committed and 'reasonable grounds' that the named persons committed the rape, as required under the NTO statute.") See also id. at 652 ("[T]he corrected NTO affidavits would provide adequate support for a magistrate's authorization of the NTO[.]").

(b) Obtaining cheek swabs with Plaintiffs' and their teammates' DNA satisfied the requirements of the Fourth Amendment, and consequently, the Court of Appeals held Plaintiffs' 42 U.S.C. § 1983 claim alleging an unlawful seizure should be dismissed. 703 F.2d at 652. See also id. at 649 n.6 ("it is clear that seizures pursuant to the NTO statute are no less subject to the constraints of the Fourth Amendment") (internal quotation marks and citations omitted).

(c) The search warrant for Plaintiff McFadyen's dorm room was supported by probable cause, notwithstanding the alleged deliberate falsehoods and omissions in the affidavit for the warrant. According to the Court of Appeals,

> Because the corrected affidavit would provide adequate support for a magistrate's finding of probable cause, we cannot say that the false statements in the affidavit were "material" under the second Franks prong. Therefore, we reverse the district court's denial of defendants' motions to dismiss McFadyen's individual § 1983 unlawful search and seizure claim.

703 F.2d at 654.

Plaintiffs should not be permitted to relitigate these three fundamental conclusions. And because the provisions of the North Carolina Constitution on which Plaintiffs rely are synonymous and coextensive with the Fourth Amendment, see brief in

support of the City's motion for judgment on the pleadings, Doc. 386 at pp. 9-11 and cases cited therein, Count 41 must fail.

III. PLAINTIFFS ARE THE PRIMARY CAUSE OF THE DELAY.

One of the most audacious assertions Plaintiffs have made in the course of this litigation appears at page 18 of their response, in which they state that "the City has delayed the trial of this action long enough", and that the City's Rule 12(c) motion is untimely. The truth conveniently omitted from Plaintiffs' response is as follows:

(a) Plaintiffs original complaint was filed December 18, 2007 and consists of 391 pages, 1,070 numbered paragraphs, and 25 attachments. **Count 41 did not appear in Plaintiffs' original complaint.** (Doc. 1)

(b) **Plaintiffs delayed two years and two months before asserting Count 41** in their second amended complaint, filed February 23, 2010, and that pleading consists of 428 pages, 1,388 numbered paragraphs, and 28 attachments. (Doc. 136)

(c) **Plaintiffs' second amended complaint**, like its predecessor, is a dramatic example of overreaching, excessiveness, and overkill, and **contained a mass of legally unsupportable claims**, prompting this Court to observe in its Memorandum Opinion that:

> Having undertaken this comprehensive review of the 41 claims asserted in this case, the Court is compelled to note that while § 1983 cases are often complex and involve multiple Defendants, Plaintiffs in this case have exceeded all reasonable bounds with respect to the length of their Complaint and the breadth of claims and assertions contained therein. The Western District of Virginia noted similar concerns recently in a § 1983 case pending there, stating that: "There is no question but that [the] Complaint is extravagant not only in its length (29 pages and 114 numbered

> paragraphs), but also in its tone, containing numerous underlinings and italics for emphasis and provocative bold headings, such as, 'Part of a Larger Conspiracy?' and, 'Things Go From Bad To Worse'. Surely Iqbal does not require such spin and one wonders what counsel's aim is in drafting such a pleading. It certainly does not help to persuade the court." Jackson v. Brickey, No. 1:10CV00060, 2011 WL 652735, at *12 n.4 (W.D. Va. 2011). These concerns are substantially greater in the present case, where Plaintiffs have seen fit to file not 29 pages and 114 numbered paragraphs, but 428 pages and 1,388 numbered paragraphs, with dramatic rhetoric and sweeping accusations against a "Consortium" of 50 Defendants, most of which is not relevant to the actual legally-recognized claims that may be available. Indeed, Plaintiffs' potentially valid claims risk being lost in the sheer volume of the Second Amended Complaint,[97] and Plaintiffs' attempt at "spin" is wholly unnecessary and unpersuasive in legal pleadings. Plaintiffs' approach has 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."

(Doc. 186, pp. 220-21, quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1281 (3d ed. 2004)). In footnote 97 of its Memorandum Opinion, this Court further observed that, "The claims apparently became unmanageable even to Plaintiffs, based on the inconsistent use of Defendant 'groups' and lack of consistency in determining which claims were asserted against which Defendants." (Doc. 186, p. 221 n.97.)

(d) Plaintiffs' pleading abuses did not escape the attention of the Court of Appeals either, leading Judge Wilkinson to comment that:

> Plaintiffs have sought to raise every experimental claim and to corral every conceivable defendant. The result is a case on the far limbs of law and one destined, were it to succeed in whole, to spread damage in all directions.
>
> . . .

> [T]here is something disquieting about the sweeping scope and number of claims[.]
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> . . .
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> A second example of the complaints' overreach lies not so much in the nature of the claims as in the identity of the defendants. The plaintiffs have sued not just the police investigators, but also a number of Durham city officials such as the City Manager, Chief of Police, and various members of the police chain of command. Plaintiffs seek monetary damages from these so-called "supervisory defendants" under a theory of supervisory liability. In Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), however, the Supreme Court issued several cautionary holdings with respect to such liability—lessons that plaintiffs have utterly failed to heed.
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> . . .
>
> In short, the complaints here are wholly indiscriminate. They seek to sweep in everyone and everything, heedless of any actual indications of individual malfeasance that would justify the personal burdens that litigation can impose. What Iqbal condemned, the complaints assay. What is more, the complaints' sweeping allegations mirror the sweeping nature of the wrongs of which plaintiffs complain. It is, of course, the purpose of civil litigation to rectify, but not in a manner that duplicates the very evils that prompted plaintiffs to file suit.

703 F.2d at 659, 660, 662 (Wilkinson, J., concurring).

(e) The City promptly and timely moved to dismiss Plaintiffs' original complaint and second amended complaint, on July 2, 2008, and March 16, 2010, respectively. (Doc. 61 and 179)

(f) **On March 31, 2011, this Court** entered its Memorandum Opinion, and **dismissed much of Plaintiffs' case.** (Doc. 186)

(g) As a result of the Court of Appeals' decision issued **on December 17, 2012, every remaining claim against the City and every other City Defendant, except for Count 41, was dismissed.**

(h) After the Court of Appeals' decision, **Plaintiffs petitioned the Court of Appeals for rehearing and then petitioned the United States Supreme Court for certiorari, thereby delaying the return of this case to this Court for almost another year (350 days).**

(i) Plaintiffs' petition for a writ of certiorari was eventually filed and ultimately denied November 12, 2013, finally returning this case to this Court. 134 S. Ct. 98.

(j) As a result of the motions to dismiss by the City and other Defendants and this Court's and the Court of Appeals' decisions thereon, 33 of the 41 causes of action in Plaintiffs' second amended complaint, and 37 of the 50 Defendants Plaintiffs sued have been dismissed. With respect to the City and City personnel, **all 15 individual City Defendants have been dismissed and the multiple claims asserted in 24 of Plaintiffs' 25 causes of action against the City and the City Defendants have been dismissed, leaving only Count 41 remaining against the City.**

The foregoing shows that the overwhelming majority of the "delay" in this case (6 years out of its 7 years and 5 months lifespan) was caused by either Plaintiffs' assertion of "legally unsupportable claims and extraneous factual allegations", as this Court put it, the

elimination of those claims by this Court and the Court of Appeals, and the nearly one-year delay caused by Plaintiffs' failed petition to the Supreme Court.

Now is the first opportunity for the City to submit its motion for judgment on the pleadings. Now is the time for this Court to consider and decide that motion.

CONCLUSION

WHEREFORE, based on the reasons discussed above and in the City's motion for judgment on the pleadings (Doc. 385) and in the City's supporting brief (Doc. 386), Defendant the City of Durham, North Carolina prays that the Court grant its motion for judgment on the pleadings, dismiss Count 41 and this action as to the City, and award the City such other and further relief as is just and proper.

Respectfully submitted, this the 19th 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 19th day of May, 2014.

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