

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

RYAN MCFADYEN, et al.,

Plaintiffs,

v.

DUKE UNIVERSITY, et al.,

Defendants.

Civil Action No. 1:07-cv-953

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE OR EXCLUDE
FROM CONSIDERATION ELEMENTS OF THE DEFENDANTS' RULE 12(b)(6)
MOTIONS**

Dated: October 10, 2008

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THE PLAINTIFFS in the above-captioned matter, Ryan McFadyen, Matthew Wilson, and Breck Archer, pursuant to LR 7.2 and 7.3, submit this Memorandum in Support of their Motion to Strike elements of the Defendants' 12(b)(6) Motions, Briefs, and Exhibits in accordance with Federal Rules of Civil Procedure 12(d) and 12(f).

NATURE OF THE MATTER BEFORE THE COURT

Plaintiffs request that this Court examine the exhibits attached to the Defendants' Answer to determine if they are proper for consideration in the context of a Rule 12(b)(6) Motion at this time. The exhibits identified for the Court's consideration are not part of a previous court proceeding, are not relied on in the Complaint, and/or are not authenticated; as such, they must be excluded from consideration from 12(b)(6) and 12(c) motions to avoid converting them into Rule 56 motions. Fed. R. Civ. P. 12(d). If they are not excluded, Defendants request that the Motions not be converted into Rule 56 motions without the benefit of full discovery. *Id.*

STATEMENT OF THE FACTS

Plaintiffs filed this action on December 18, 2008 and amended that answer on April 17, 2008. Pursuant to a request from this Court regarding the nature of the filing of the exhibits annexed to the Amended Complaint, the Plaintiffs filed a second amended complaint on April 18, 2008, except for the nature of the filing of the exhibits, the two amended complaints are identical. The Defendants filed Motions to Dismiss pursuant to Fed. R. Civ P. 12(b)(6) on July 2, 2008. Pursuant to the Court's granting of Plaintiffs' Motion for Leave to File, Plaintiffs are required to respond to these motions on October 10, 2008..

Four of the Defendants' Motions, those of the City of Durham and all three briefs by Duke University Defendants (Duke University Defendants, Duke Police Defendants and the SANE Defendants), contain exhibits that are beyond the scope of the pleadings. These exhibits include a self-made chart purportedly made to demonstrate to the Court where the Duke Defendants have answered claims in the three individual briefs that they chose to treat as one 150-page brief, what is purported to be the entire Duke Card Contract, and two court orders that Defendant Nifong submitted to the court for payment of DNA Security, Inc's invoices.

QUESTION PRESENTED

- 1) Should the Court strike or exclude from consideration at this time materials not intrinsic to the allegations of the Amended Complaint and not subject to judicial notice pursuant to 12(d)?

ARGUMENT

I. PURSUANT TO RULE 12(F) AND 8(B), THE COURT SHOULD STRIKE AND NOT CONSIDER EXHIBITS ANNEXED TO DEFENDANTS' MOTIONS TO DISMISS AND SUPPORTING MEMORANDA THAT ARE NOT INTRINSIC TO THE PLAINTIFFS' ALLEGATIONS OR SUBJECT TO JUDICIAL NOTICE.

Federal Rule of Civil Procedure 12(d) states that "if, on a motion under Rule 12(b)(6) ..., matters outside the pleadings are presented to and not excluded by the Court, the Motion must be treated as one for summary judgment, under Rule 56." Fed. R. Civ. P. 12(d). This Court has held that exhibits to Answers and Rule 12 Motions should only

be considered if they fall into certain exceptions; the decision of whether to consider an exhibit or not is within the discretion of the court. *Gladden v. Winston-Salem State Univ.*, 495 F. Supp. 2d 517, 519 (M.D.N.C. 2007); *see also Henson v. CSC Credit Servs.*, 29 F.3d 280, 283 (7th Cir. 1994).

As Judge Tilley noted recently, “[d]ocuments extraneous to the Complaint, however, may be considered in certain circumstances without converting the Rule 12(b) (6) motion into a motion for summary judgment. Specifically, documents that are “integral to and explicitly relied on in the complaint” may be considered if the authenticity of such documents is not in question. *Gladden*, 495 F. Supp. 2d at 519 (citing *Phillips v. LCI Intern., Inc.*, 190 F.3d 609, 619 (4th Cir. 1999)).

Typically, these authentication cases deal with public documents, such as court records from prior court proceedings whose authenticity cannot be questioned. Public documents “may be considered by the Court in making its determination under Rule 12(b) (6) without converting the motion into one for summary judgment.” *Norfolk Fed. of Bus. Dists. v. City of Norfolk*, No. 96-CV-1746, 1996 WL 671293, at *1 (4th Cir. Nov. 20, 1996) (“In short, a court may consider matters of public record, items appearing in the record of the case, as well as exhibits attached to the *complaint*”) (emphasis supplied).¹

¹ *See also Clark v. USDA-RHS*, No. 3:06-cv-457, 2007 WL 3112458, at *2 (W.D.N.C. Oct. 22, 2007) (“Despite the express language of Fed. R. Civ. P. 12(b), [] [t]he district court may also take judicial notice of ‘matters of public record’ without converting a 12(b) (6) motion into a motion for summary judgment. [A] court may take judicial notice of matters of public record without converting a Rule 12(b) (6) motion into a motion for summary judgment. Here, [the Defendant refers to] publicly-recorded papers from prior court proceedings. They meet the public records exception and [the Court] may consider them in deciding this motion to dismiss. The undersigned will therefore consider

Recently, this Court held “that a court may take judicial notice of facts from a prior judicial proceeding when the *res judicata* defense raises no disputed issue of fact.” *Salami v. Monroe*, No. 1:07-CV621, 2008 WL 2981553, at *2 (M.D.N.C Aug. 1, 2008). Therefore, the standard for consideration of an exhibit that is not intrinsic to the complaint is the same of judicial notice pursuant to Rule 201 of the Federal Rules of Evidence. Thus, the non-intrinsic exhibit or material must be “not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.” Fed. R. Evid. 201(b).

In this instance, the three exhibits at issue fail to meet the basic criteria for consideration: they are not intrinsic to the complaint, they are not authenticated or self-authenticating, and they are not subject to judicial notice pursuant to Fed. R. Evid. 201. We address each exhibit in turn.

Document #61-5.

The City of Durham’s Exhibit 4 [Document #61-5] consists of two State Court orders for payment of invoices from DNASI obtained by Defendant Nifong. These orders must be struck or excluded from consideration for several reasons. Chief among them is there is no testimony as to the completeness of the record or confirmation that the

references in the Defendant's motion to the extent that they were part of the public record in the Plaintiff's other actions filed in this Court as well as matters of public record in her state court actions.”) (internal citations omitted).

only source of payment for the invoices was these orders. Secondly, the documents are not subject to judicial notice under the standards set by Fed. R. Evid. 201. In fact, it was known that DNASI was actively lobbying the City for business. Amend. Cmpl. ¶¶ 656, 658. Secondly, the orders were issued at the request of Defendant Nifong, who was subsequently disbarred for making false representations raises significant questions/doubts to this same court in this same matter, and therefore, reliance on his representations is not appropriate. Therefore, the Court should strike or exclude from consideration Exhibit 4 from the City of Durham's Motion to Dismiss at this time.

Document #46-5

Similarly, the Court should strike or exclude from consideration Exhibit 4 [Document #46-5] of the Duke University Defendant's Brief in Support of their Motion to Dismiss at this time. This exhibit purports to be some part of or the entire Duke Card agreement, but without discovery, the significance and completeness of the document cannot be determined accurately or completely. For example, the document is not signed by any of the Plaintiffs, and it may or may not have been a document in existence at the relevant time. It does not contain a waiver sufficient to meet the standards of N.C.G.S. § 53B, which is the statute that Plaintiffs allege these Defendants violated. That statute itself creates its own cause of action. Additionally, it too does not meet the standards set by this Court as to matters within the pleading for the purposes of Fed. R. Civ. P. 12(d). The document contains material that is not widely known, it is not intrinsic to the pleadings, and it is not subject to judicial notice pursuant to Fed. R. Evid. 208. The significance of the document—indeed its relevance—cannot be established until

discovery is complete. Therefore, the Court should strike or exclude from consideration Exhibit 4 from the Duke University Defendant's Motion to Dismiss at this time.

Document #46-2, 48-2, and 50-2

Finally, all three Duke Briefs contain the same Exhibit 1 [Document #46-2, 48-2, and 50-2], a chart purporting to identify where each claim that Duke Defendants are in is addressed. The chart is not offered as evidence, but instead is a map of sorts showing where each sub-group of Duke University Defendants has placed their arguments. The Duke Defendants requested an omnibus brief, which was denied by the Court. These defendants chose to submit three briefs as one omnibus document tied together by way of the explanatory chart. Plaintiffs have described in their Motion for Leave to File Plaintiffs' Opposition Briefs the difficulties that this scattershot approach created in responding. Therefore, the Court should strike and exclude from consideration Exhibit 1 from the Duke University Defendants, the Duke Sane Defendants, and the Duke Police Defendants' Motion to Dismiss as a violation of the Court's Order of April 30, 2008 [Document #30] denying these Defendants request to file an "Omnibus" brief.

II. THE COURT SHOULD STRIKE THE EXHIBITS.

The Court may, on its own or by Motion of a party, "strike from a pleading any insufficient defense or any ... immaterial ... matter." Fed. R. Civ. P. 12(f). A motion to strike on the grounds that material is immaterial should be granted "when it is clear that the material in question can have no possible bearing upon the subject matter of the litigation and the material may prejudice the other party." *Baucom v. Cabarrus Eye Center, P.A.*, No. 06-CV-209, 2007 WL 1074663, at * 2 (M.D.N.C Apr. 4, 2007) (internal

citations omitted); *see also Simaan, Inc. v. BP Products N. Am., Inc.*, 395 F. Supp. 2d 271, 278 (M.D.N.C. 2005). All of the exhibits listed above are not intrinsic to the pleadings, not subject to judicial notice pursuant to Fed. R. Evid. 208.. Further, Plaintiffs will be prejudiced unless the materials are struck or excluded from the Court's consideration because consideration of the materials will convert Defendants' Rule 12 motions into Rule 56 motions with no possibility for discovery.

The Exhibits are, therefore, irrelevant to the determination of Defendants' Rule 12(b)(6) Motions, and prejudicial to the Plaintiffs. They should be struck and not considered in these motions.

Dated: October 10, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 10, 2008, I electronically filed the foregoing BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE OR EXCLUDE FROM CONSIDERATION ELEMENTS OF THE DEFENDANTS 12(B)(6) MOTIONS with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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