## IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA CIVIL ACTION NO. 1:08-CV-119

EDWARD CARRINGTON, et al.,	
Plaintiffs,	
V.	
DUKE UNIVERSITY, et al.,	
Defendants.	

# THE CITY OF DURHAM'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

The City of Durham, North Carolina (the "City"), by and through its attorneys, and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, hereby moves the Court to dismiss all claims against the City in Plaintiffs' First Amended Complaint, for failure to state a claim upon which relief can be granted.

IN SUPPORT WHEREOF, the City respectfully shows the following:

1. <u>As to Causes of Action 8, 10, 20-26 & 28-29</u>: Plaintiffs' causes of action are deficient for the reasons described in the City's prior briefing—its opening and reply briefs in support of its motion to dismiss Plaintiffs' original Complaint (Doc. Nos. 73 & 109) and its supplemental supporting brief (Doc No. 135). Pursuant to this Court's Order (Doc. No. 144), the City incorporates those briefs and accompanying exhibits, along with its suggestion of subsequently decided authority (Doc. No. 143), in support of this Motion.

2. As to Causes of Action 27 & 30-31: These negligence-based claims are

deficient for reasons set out in briefs already before this Court.<sup>1</sup> Namely:

- The City's opening brief in support of its motion to dismiss (Doc. No. 73) at 34-36 (City not responsible for Nifong as a matter of law); 43 (allegations insufficient to suggest proximate cause); 44-45 (conspiracy allegations conclusory); and the City's reply arguments (Doc. No. 109) as to the same issues, *see id.* at 1 n.1 (conspiracy), 17-20 (Nifong), & 23 n.18 (proximate cause).
- Defendant Himan's Brief in Support of Motion to Dismiss (Doc No. 67) at 35-36 (in conducting criminal investigation, duty is to public at large, not to suspects); and
- Defendant Gottlieb's Brief in Support of Motion to Dismiss (Doc. No. 69) at 29-31 (same).

Pursuant to this Court's order (Doc. No. 144), those briefs are incorporated by

reference in support of this Motion.

3. <u>As to Cause of Action 32:</u> Plaintiffs' claim premised on an alleged violation of

the North Carolina Constitution is deficient for the reasons described in the supplemental

supporting brief accompanying this Motion. Pursuant to this Court's Order (Doc. No.

144), the City offers and relies on that accompanying brief in further support of this

Motion.

<sup>&</sup>lt;sup>1</sup> In its original motion (Doc. No. 72), the City moved to dismiss these negligencebased causes of action "to the extent that [they] are based upon the actions of District Attorney Michael Nifong." *See id.* ¶ 1. The briefs listed above provide ample additional reasons for dismissal. *See also* City's Brief in Support of Motion to Dismiss, *McFadyen v. Duke University*, No. 1:07-CV-00953 (Doc. No. 62) at 44-45. In accordance with the Court's Order, the City has not provided further argument on these claims in the accompanying brief, which is limited to Plaintiffs' new state constitutional claim, but the City would be pleased to further brief these claims should the Court so desire.

WHEREFORE, the City prays that this Motion be granted, that Plaintiffs' claims,

as set forth above and in the accompanying and incorporated briefs, be dismissed, and

that the City be awarded such other and further relief as is just and proper.

This the 15th day of March, 2010.

#### FAISON & GILLESPIE

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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 15th day of March, 2010.

## FAISON & GILLESPIE

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