

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.¹ 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. As to Cause of Action 32: 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.

¹ In its original motion (Doc. No. 72), the City moved to dismiss these negligence-based 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.

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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.

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