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

EDWARD CARRINGTON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	1:08CV119
	)	
DUKE UNIVERSITY, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This case involves 32 claims set out in a 225-page Amended Complaint [Doc. #145] by Plaintiffs Edward Carrington, Casey J. Carroll, Michael P. Catalino, Gale Catalino, Thomas Clute, Kevin Coleman, Joshua R. Coveleski, Edward J. Crotty, Edward S. Douglas, Kyle Dowd, Patricia Dowd, Daniel Flannery, Richard Gibbs Fogarty, Zachary Greer, Irene Greer, Erik S. Henkelman, Steven Henkelman, John E. Jennison, Ben Koesterer, Mark Koesterer, Joyce Koesterer, Fred Krom, Peter J. Lamade, Adam Langley, Christopher Loftus, Daniel Loftus, Barbara Loftus, Anthony McDevitt, Glenn Nick, Nicholas O'Hara, Lynnda O'Hara, Daniel Oppedisano, Sam Payton, John Bradley Ross, Kenneth Sauer, III, Steve Schoeffel, Robert Schroeder, Devon Sherwood, Daniel Theodoridis, Bret Thompson, Christopher Tkac, Tracy Tkac, John Walsh, Jr., Michael Ward, Robert Wellington, William Wolcott, and Michael Young (collectively, "Plaintiffs"), all of whom are former members of the Duke University men's lacrosse team or their parents, against Defendants Duke University ("Duke"), Duke University Health System, Inc. ("Duke Health"), Duke President Richard Brodhead ("Brodhead"), Duke Provost Peter Lange ("Lange"), Duke Vice President for Student Affairs Larry Moneta ("Moneta"), Duke Senior Vice President for Public Affairs and Government Relations John

Burness ("Burness"), Duke Executive Vice President Tallman Trask ("Trask"), Duke Assistant Vice President for Student Affairs and Dean of Students Suzanne Wasiolek ("Wasiolek"), Head of the Duke Card Office Matthew Drummond ("Drummond"), Duke University Associate Vice President for Campus Safety and Security Aaron Graves ("Graves"), Director and Chief of the Duke Police Department Robert Dean ("Dean"), Duke Health Nurse Tara Levicy ("Levicy"), Duke Health Nurse Theresa Arico ("Arico"), Duke Deputy General Counsel Kate Hendricks ("Hendricks"), Duke Chancellor for Health Affairs and President and Chief Executive Officer of Duke University Health System, Inc. Victor Dzau ("Dzau"), the City of Durham ("the City"), District Attorney's Office Investigator Linwood Wilson ("Wilson"), Durham Police Department Detective Mark Gottlieb ("Gottlieb"), Durham Police Department Investigator Benjamin Himan ("Himan"), Durham City Manager Patrick Baker ("Baker"), Durham Chief of Police Steven Chalmers ("Chalmers"), Deputy Chief of Police Ronald Hodge ("Hodge"), Executive Officer to the Chief of Police Lee Russ ("Russ"), Durham Police Commander of Investigative Services Stephen Mihaich ("Mihaich"), Durham Police Uniform Patrol Bureau Commander Beverly Council ("Council"), Durham Police District Two Uniform Patrol Commander Jeff Lamb ("Lamb"), Durham Police Department Lieutenant Michael Ripberger ("Ripberger"), and Durham Police Department Spokesman David Addison ("Addison").[1]

Defendants have collectively filed multiple Motions to Dismiss, specifically, a Motion to

[1] Plaintiffs' Amended Complaint also asserted claims against Attorney J. Wesley Covington ("Covington"). Mr. Covington's Estate was later substituted as a party in this case, and by Order dated October 15, 2010, Plaintiffs voluntarily dismissed their claims against Marsha Covington as executrix of the Estate of John Wesley Covington. Therefore, no claims remain against Covington or his Estate.

Dismiss by Defendant Wilson [Doc. #146], a Motion to Dismiss by Defendant Gottlieb [Doc. #147], a Motion to Dismiss by Defendant Addison [Doc. #148, 149], a Motion to Dismiss by Defendants Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, and Russ [Doc. #150], a Motion to Dismiss by Defendant Himan [Doc. #151], a Motion to Dismiss by Defendants Duke, Brodhead, Burness, Dean, Drummond, Dzau, Graves, Hendricks, Lange, Moneta, Trask, and Wasiolek [Doc. #152], a Motion to Dismiss by Defendants Duke Health, Arico, and Levicy [Doc. #153], and a Motion to Dismiss by the City [Doc. #154]. Defendants previously filed various Motions to Dismiss with respect to Plaintiffs' original Complaint, but those Motions to Dismiss were rendered moot by the filing of Plaintiffs' Amended Complaint on February 22, 2010. In their present Motions to Dismiss the parties have incorporated the prior briefing filed in connection with the original Motions to Dismiss and, as appropriate, have added additional briefing with respect to new matters raised in the Amended Complaint. The new Motions to Dismiss with respect to the Amended Complaint were referred to the Court for determination on May 4, 2010, and are addressed in this Memorandum Opinion.[2]

[2] The Court notes that some of the issues raised in the Motions to Dismiss in the present case are similar to certain of the issues raised in two other cases in this District that have been identified by the parties and the Clerk's Office as "related" to the present case: McFadyen, et al. v. Duke University, et al. (1:07CV953) and Evans, et al. v. City of Durham, et al. (1:07CV739). Those cases also involve multiple Motions to Dismiss for which briefing has now been completed and which have been referred to the Court for consideration. Orders and Opinions are being entered in those cases contemporaneously with the present Order and Opinion in this case. These cases have not been formally consolidated, and are still proceeding as separate cases, although consolidation of discovery may be appropriate in light of the overlapping issues raised. In addition, given the overlapping legal issues, much of the analysis presented in the three Opinions in these cases is the same. The Court restates the analysis in each case, however, so that each Opinion can stand alone.

I. FACTUAL BACKGROUND

This case arises out of the investigation of members of the Duke University men's lacrosse team on charges of rape, sexual assault, and kidnapping. The Plaintiffs here include members of the lacrosse team who were subject to a Non-Testimonial Order ("NTO"), but who were not indicted in that investigation (the "Plaintiff Players")[3], in addition to some of their parents (the "Plaintiff Parents")[4] (collectively, "Plaintiffs").[5] Because this matter is before the Court on Motions to Dismiss, the Court must take as true the facts alleged in the Amended Complaint.[6]

Based on the facts set out in the Amended Complaint, on March 13, 2006, members of

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[3] The "Plaintiff Players" in this case are Edward Carrington, Casey J. Carroll, Michael P. Catalino, Thomas Clute, Kevin Coleman, Joshua R. Coveleski, Edward J. Crotty, Edward S. Douglas, Kyle Dowd, Daniel Flannery, Richard Gibbs Fogarty, Zachary Greer, Erik S. Henkelman, John E. Jennison, Ben Koesterer, Fred Krom, Peter J. Lamade, Adam Langley, Christopher Loftus, Daniel Loftus, Anthony McDevitt, Glenn Nick, Nicholas O'Hara, Daniel Oppedisano, Sam Payton, John Bradley Ross, Kenneth Sauer, III, Steve Schoeffel, Robert Schroeder, Devon Sherwood, Daniel Theodoridis, Bret Thompson, Christopher Tkac, John Walsh, Jr., Michael Ward, Robert Wellington, William Wolcott, and Michael Young.

[4] The "Plaintiff Parents" in this case are Gale Catalino, Patricia Dowd, Irene Greer, Steven Henkelman, Mark Koesterer, Joyce Koesterer, Barbara Loftus, Lynnda O'Hara, and Tracy Tkac.

[5] The Court notes that the allegations in the Amended Complaint regarding the "Plaintiffs" often appear to relate to only the "Plaintiff Players." In this summary, the Court has retained the allegations as set out in the Amended Complaint. Therefore, some references to "Plaintiffs" may refer to only the "Plaintiff Players." The Court has used the terms "team members," "players," and "lacrosse players" to refer interchangeably to the individuals who were members of the Duke men's lacrosse team, which includes all of the Plaintiff Players.

[6] The Court notes that many of Plaintiffs' factual allegations do not relate directly to the claims that are actually asserted. However, in the interest of completeness, the Court has attempted here to summarize the various allegations.

the Duke University men's lacrosse team attended an off-campus party at a residence at 610 N. Buchanan Avenue, in an area of Durham known as Trinity Park, near the Duke campus. The residence was owned by Duke and was rented to lacrosse team co-captains Dave Evans, Matt Zash, and Dan Flannery.[7] Two exotic dancers were hired to perform at the party. The dancers, Crystal Mangum and Kim Pittman, arrived at the residence and began to perform at around midnight. Plaintiffs allege that Mangum was "severely mentally and emotionally disturbed" and was under the influence of alcohol and/or drugs when she arrived, and "staggered and collapsed" during the performance. (Am. Compl. ¶ 93, 95). The performance prematurely ended after four minutes, and Mangum and Pittman left the residence approximately 45 minutes later, at about 12:50 a.m., after players helped get Mangum into Pittman's car. Plaintiffs allege that during the interim period of time, Mangum and Pittman had locked themselves in the bathroom, that Mangum was alternatively yelling and muttering incoherently, and that Mangum repeatedly tried to re-enter the house after the inhabitants had locked her out.

At 12:53 a.m., as Mangum and Pittman were leaving, Pittman made a 911 call to Durham Police, reporting that they had been subjected to racial taunts and harassment at 610 N. Buchanan, but stating that she was not hurt in any way. Plaintiffs allege that after leaving the party, Mangum "became belligerent" with Pittman and accused Pittman of stealing her purse and money. Pittman tried to remove Mangum from the car at a grocery store parking lot, ultimately asking a store security guard to intervene. (Am. Compl. ¶ 97). The security guard

[7] Evans is a Plaintiff in one of the related cases in this Court, 1:07CV739. Flannery is a Plaintiff in the present suit. The other team co-captain, who did not live at 610 N. Buchanan, was Bret Thompson, who also is a Plaintiff in the present suit.

concluded that Mangum was intoxicated and called 911. Sergeant Shelton and Officer Barfield of the Durham Police Department responded, and determined that Mangum was feigning unconsciousness in the car. Pittman advised the officers that she had made the earlier 911 call reporting racial harassment at 610 N. Buchanan. The officers took Mangum to Durham Access Center, a facility for mentally ill patients and people under the influence of drugs. During the intake procedures at Durham Access, a nurse asked Mangum if she had been raped, and Mangum nodded yes. Plaintiffs allege that Mangum was "seizing on the intake nurse's suggestion in order to avoid involuntary commitment." (Am. Compl. ¶ 102). Based on her statement, Mangum was taken to Duke Hospital[8] for a forensic rape examination.

Mangum arrived with Officer Barfield at the emergency room of Duke Hospital at 2:40 a.m. for a sexual assault examination. Plaintiffs allege that over the course of the early morning on March 14, Mangum gave at least seven different conflicting accounts of events. However, Plaintiffs allege that "all seven doctors and nurses who examined Mangum at Duke Hospital between 2:00 a.m. and 7:00 a.m. found no objective medical or physical evidence of sexual assault." (Am. Compl. ¶ 112). Upon arrival at Duke Hospital, Mangum told Durham Police Officer Gwendolen Sutton that she had been dancing in a group of four women and that she had been raped by five men in a bathroom. However, Mangum subsequently told Sergeant Shelton a few minutes later that she had not been raped, and instead said that "some of the guys" had "groped her" and had taken her money. (Am. Compl. ¶ 106). Shelton went to call

[8] Plaintiffs allege that Duke Hospital is owned and operated by Duke University Health System, Inc., which is ultimately controlled by the Executive Committee of the Board of Trustees of Duke University.

his watch commander to report that Mangum had recanted the rape allegation. However, Mangum then told a doctor that she had been raped and refused to respond to questions from Shelton. Later, at around 3:00 a.m., Durham Police engaged in an extensive briefing of the case to the Duke University Police Department.[9] According to the report of Duke Police Officer Christopher Day, Mangum was claiming to have been raped by approximately 20 white men, and she had changed her story several times. Plaintiffs allege that according to Officer Day's report of the briefing he received from Durham Police, it was anticipated that charges would not exceed misdemeanor simple assault against the occupants of 610 N. Buchanan.

Plaintiffs further allege that at about the same time, approximately 3:00 a.m., Mangum gave another account to Duke Hospital nurse Tara Levicy, "who interviewed Mangum as a sexual assault examiner and played an ancillary role in the physical examination of Mangum conducted by Dr. Julie Manly." (Am. Compl. ¶ 106). With respect to Nurse Levicy, Plaintiffs allege that at the time of the examination on March 14, Levicy had been certified as a sexual assault nurse examiner ("SANE") for less than two weeks and had only a year's experience as a nurse in any capacity. Plaintiffs allege that this level of experience falls below the standards of the International Association of Forensic Nurses, "which require a nurse to have at least three years of active practice before pursuing a SANE certification." (Am. Compl. ¶ 116). Plaintiffs allege that although Mangum told Levicy she had been raped by three men vaginally, anally, and

[9] Plaintiffs allege that the Duke Police Department is a North Carolina law enforcement agency with the full range of police authority, and with "primary police jurisdiction over, among other things, crimes reported to have occurred on its campus and on property owned or controlled by Duke University, including adjacent streets and roadways, within the Durham City limits." (Am. Compl. ¶ 62).

orally and that no condoms were used, "the forensic exam conducted by Manly and Levicy uncovered no objective medical or physical evidence to corroborate her allegations of rape or traumatic sexual assault." (Am. Compl. ¶ 123). Plaintiffs allege that Levicy took notes during Dr. Manly's physical examination, and that those notes indicate no symptoms of serious physical pain and no bruising. The only signs of physical trauma recorded were "three small scratches on her right knee and right ankle" and the "only diagnosis of any abnormality in the pelvic examination was 'diffuse edema [i.e. swelling] of the vaginal walls,'" which Plaintiffs allege "can be caused by smoking, sex within 24 hours prior to the vaginal exam, frequent sex, antidepressants, or taking Flexeril." (Am. Compl. ¶ 125, 126). Plaintiffs allege that Mangum "complained of severe pain" during the examination, but that she "did not exhibit any of the symptoms normally associated with [] severe pain" and "[t]his behavior was highly atypical for a rape victim who lacked any bruising, bleeding, tearing or other visible physical injury." (Am. Compl. ¶ 128, 129). Mangum was discharged from Duke Hospital after her forensic exam. The next day, on Wednesday, March 15, Mangum went to UNC Hospital complaining of pain. However, Plaintiffs allege that a physician at UNC concluded that due to her "'long psychological history she is at very high risk of narcotic abuse'" and decided not to prescribe any narcotics to Mangum. (Am. Compl. ¶ 130).

The responsibility for investigating Mangum's rape claim was initially assigned to Durham Police Investigator B.S. Jones. Plaintiffs allege that on March 14, 2006, Jones concluded that there was no evidence to proceed with a rape investigation and that the file would be closed. Mangum contacted Investigator Jones that afternoon requesting that police retrieve the property

that Mangum alleged Pittman had stolen from her. This request was referred to Sergeant Mark Gottlieb, who was in charge of property crimes for District 2 of the Durham Police. Plaintiffs allege that "Gottlieb had acquired a widely known reputation for vindictive and abusive law enforcement practices toward Duke students" including "selective and malicious investigation and prosecution, excessive force, false arrest, fabricating evidence, and falsifying police reports." (Am. Compl. ¶ 134). Soon after being assigned the case, Gottlieb assigned Investigator Benjamin Himan, who had only two months' experience, to assist him with the investigation.

Plaintiffs allege that on March 15, as Gottlieb and Himan assumed responsibility for the case, Robert Dean, the Director of the Duke University Police, notified Suzanne Wasiolek, Duke's Dean of Students, of the rape allegations. Plaintiffs allege that Dean Wasiolek is a lawyer and is a trusted advisor, and "enjoyed a special relationship of authority, trust, and confidence with students." (Am. Compl. ¶ 138). Duke Police Director Dean told Wasiolek that neither Duke Police nor Durham Police believed the accusations, that the accuser was not credible and had presented inconsistent accounts, and that "'this would go away.'" (Am. Compl. ¶ 139). Plaintiffs allege that Wasiolek contacted the lacrosse team coach, Coach Pressler, on his cell phone to notify him of the allegations, and that Coach Pressler was with the lacrosse team at the time. The team co-captains, Flannery, Zash, Evans, and Thompson, called Wasiolek back and spoke to her directly on Coach Pressler's cell phone. Plaintiffs allege that "Dean Wasiolek advised the players that they should not hire lawyers and that they should not tell anyone, including their parents, about the rape allegations." (Am. Compl. ¶ 143). Plaintiffs allege that "Dean Wasiolek said: '[R]ight now you don't need any attorney. Just don't tell anyone, including

your teammates or parents, and cooperate with police if they contact you.'" (Am. Compl. ¶ 143). Plaintiffs allege that Coach Pressler "passed Dean Wasiolek's advice along to the entire lacrosse team" and in reliance on the advice, the players did not procure legal representation or tell their parents about the allegations for the next several days while the investigation continued. (Am. Compl. ¶ 147).

The next day, on March 16, Gottlieb and Himan obtained photographs of the lacrosse players from the Duke Police, received a copy of the report of Duke Police Officer Day, and interviewed Nurse Levicy. During the interview with Nurse Levicy, Levicy told Himan that "'due to HIPAA laws she was unable to divulge patient information'" but that "'there were signs consistent with sexual assault during her test.'" (Am. Compl. ¶ 150). Plaintiffs allege that by this statement, Levicy, acting as Duke Hospital's sexual assault examiner, "advised Durham Police, in effect, that a rape had likely occurred." (Am. Compl. ¶ 153). Plaintiffs allege that this statement was made by Levicy "with an intentional, or at least reckless, disregard for the truth." (Am. Compl. ¶ 152). Himan and Gottlieb also interviewed Mangum later that same day, and during that interview, Mangum repeated her claims, identified her attackers as "Adam," "Matt," and "Brett," and gave brief descriptions of the attackers. (Am. Compl. ¶ 156). Mangum was shown photo arrays consisting only of lacrosse players, but she stated that "'they all look like'" and she was not able to plausibly identify any lacrosse player as her attacker, or even accurately identify who had attended the party. (Am. Compl. ¶ 158).

On that same day, March 16, Gottlieb and Himan obtained a search warrant for 610 N. Buchanan. Plaintiffs contend that "unidentified Duke officials" gave Gottlieb keys to the house,

"which Duke owned and rented to three of the four lacrosse co-captains." (Am. Compl. ¶ 162). Co-captains Zash and Evans were home at the time of the search, and the third co-captain, Flannery, arrived while the search was being conducted. During the evening of March 16, and continuing until the early morning on March 17, Zash, Evans, and Flannery cooperated and assisted with the search, voluntarily accompanied Durham Police to the police station for questioning, provided Gottlieb with a list of the lacrosse players who attended the party, voluntarily submitted to physical inspections at Duke Medical Center for signs of scratches or other injuries, and voluntarily provided DNA samples.

Later on March 17, the co-captains met with Coach Pressler and associate Athletic Director Chris Kennedy. Kennedy told the co-captains that they needed to tell their parents about the allegations and that they would need legal counsel. Kennedy recommended that the co-captains contact Attorney J. Wesley Covington, who had already been contacted by Dean Wasiolek. Plaintiffs allege that "Covington had often been engaged by Duke to handle potentially embarrassing or controversial legal problems" and Dean Wasiolek had "advised or instructed Kennedy to tell the co-captains to seek Covington's advice." (Am. Compl. ¶ 169). The next day, March 18, co-captains Evans, Zash, and Flannery met with Covington, and Evans' parents later spoke with Covington by telephone. In addition, co-captain Bret Thompson's father contacted Covington by telephone two days later. Plaintiffs allege that in these conversations, Covington indicated that he often handled similar matters for Duke, that the problem would "go away," and that the players and their parents should not retain other counsel, and instead should allow him to "work on their behalf," without entering into a formal

attorney-client relationship. (Am. Compl. ¶ 173). Plaintiffs allege that Covington and Dean Wasiolek were providing this advice because they were "secretly acting on behalf of Duke and its administrators." (Am. Compl. ¶ 173). Plaintiffs further allege that on March 20, Covington "was engaged in covert discussions both with Duke officials and with Gottlieb, Himan, and/or other Durham officials to arrange for Durham Police to interrogate the lacrosse players en masse without the benefit of counsel." (Am. Compl. ¶ 178). Plaintiffs allege that Covington then encouraged all of the lacrosse team members to participate in voluntary, uncounseled interviews and DNA testing set up through the Duke Police Department. Plaintiffs allege that Himan called Coach Pressler to set up the uncounseled interviews of players who attended the party, and Covington advised Coach Pressler that this was "a good plan." (Am. Compl. ¶ 179). The interview was scheduled for March 22. Plaintiffs allege that Duke University President Richard Brodhead learned of the allegations in a newspaper article on March 20, and that Brodhead called Duke's Vice President for Student Affairs, Larry Moneta, who told him that the accusations were not credible.

Plaintiffs allege that on March 20, Himan interviewed the other dancer at the party, Kim Pittman, who told Himan that the rape charges were a "'crock'" and that Mangum "had not been out of Pittman's company for more than five minutes during their entire time at 610 N. Buchanan – during which time, Mangum had been trying to get back into the house." (Am. Compl. ¶ 180). Plaintiffs allege that Himan subsequently located an outstanding arrest warrant for Pittman for an alleged probation violation, and Gottlieb arrested Pittman on this warrant. Plaintiffs allege that Himan and Gottlieb offered Pittman a deal on the probation violation to

induce her to change her account of events "to create a fictional window of opportunity, when she was separated from Mangum, during which the rape might have occurred." (Am. Compl. ¶ 183).

Also on March 20, Duke Police obtained a subpoena for the medical records of Mangum's forensic examination. On March 21, Gottlieb went to Duke Hospital and served the subpoena on Nurse Levicy. Plaintiffs allege that at that time, Levicy made "crucially false and misleading statements" to Gottlieb regarding the evidence, including that the exam had revealed evidence of "blunt force trauma" and that Mangum "had edema and tenderness to palpitation both anally and especially vaginally," which were "entirely fabricated." (Am. Compl. ¶ 185, 186). Plaintiffs allege that these false statements were "the only evidence on which further investigation could plausibly be based." (Am. Compl. ¶ 189). Plaintiffs allege that Levicy was acting in concert with Gottlieb and Himan and that she "actively conspired with the Durham Investigators to prop up and to prolong the investigation . . . repeatedly adjusting or elaborating her testimony to rebut mounting evidence of innocence as it emerged." (Am. Compl. ¶ 190).

Plaintiffs also allege that Nurse Supervisor Arico subsequently made a statement to the media explaining that a sexual assault nurse can diagnose blunt force trauma through the use of a colposcope. Plaintiffs contend that this statement was misleading since no colposcope was used during Mangum's exam. Also on March 21, Mangum was again interviewed by Durham Police and was shown photo arrays containing only lacrosse team members, but Mangum was unable to identify anyone as her attacker.

Plaintiffs allege that many of the lacrosse team members' parents learned of the

allegations during the evening of March 21 and early morning of March 22, prior to the uncounseled police interviews that had been set up by Covington. The parents told Coach Pressler that the interviews would need to be delayed so that the players could consult with their parents and lawyers first. Covington told one of the parents that he was "'not really representing anyone"' but was "'advising Duke."' (Am. Compl. ¶ 201). Based on the parents' demands, Covington rescheduled the interviews for March 29. However, Covington continued to urge that some or all of the players submit to uncounseled interviews with Gottlieb.

On March 23, Gottlieb applied for a Non-Testimonial Order ("NTO") seeking DNA evidence from all 46 white members of the lacrosse team. Plaintiffs allege that Gottlieb and Himan deliberately made false statements and misleading representations in the affidavit submitted in support of the NTO application. For example, Plaintiffs allege that the application stated that medical records and interviews "'revealed the victim had signs, symptoms, and injuries consistent with being raped and sexually assaulted vaginally and anally"' and that she had been "strangled." (Am. Compl. ¶ 205). Plaintiffs contend that this information in the NTO was false, and that Gottlieb and Himan knew it was false. Plaintiffs also allege that the NTO application falsely stated that Mangum had lost fake fingernails during the attack and that fake fingernails were found in the bathroom, and did not mention that nail polish was also found and that Mangum had told Gottlieb and Himan that she had been affixing and painting her fake fingernails just before leaving the party. Plaintiffs allege that the NTO application also falsely accused the occupants of 610 N. Buchanan of using aliases to conceal their identities and attempting to conceal their sports affiliation. Plaintiffs contend that the application was

knowingly premised on false and misleading information, including information provided by Levicy, and that Levicy subsequently altered evidence and reports to corroborate the allegations in the NTO application. The requested NTO was signed on the afternoon of March 23, and all of the team members fully and immediately complied by "providing DNA samples, submitting to examinations for injuries, and sitting for photographs." (Am. Compl. ¶ 214).

The filing of the NTO application on March 23 triggered intense local media and press coverage of the rape allegations. On March 24, 2006, District Attorney Michael Nifong took over the investigation. Plaintiffs allege that Durham officials ceded control of the investigation to Nifong, and that Nifong assumed a policymaking role for the City. Durham Police Commander Jeff Lamb instructed Gottlieb and Himan to take directions from Nifong and to continue to report regularly to Durham Police senior staff. Plaintiffs allege that Nifong assumed control of the investigation to capitalize on the media coverage, in order to advance his own personal political interests in the upcoming primary election.

Coach Pressler and the lacrosse team co-captains subsequently met with Executive Vice-President Trask, Athletic Director Joe Alleva, and associate Athletic Director Kennedy. Plaintiffs allege that the co-captains told Trask that they had been advised by their lawyer not to discuss the events, and in response, Trask told them that "anything they told him would be protected from disclosure by 'student-administrator privilege.'" (Am. Compl. ¶ 226). Based on this representation, the co-captains denied the allegations of rape and admitted hiring the exotic dancers and the underage drinking at the party. Plaintiffs allege that Trask later offered to and did disclose the discussion to the Durham Police.

Plaintiffs allege that beginning March 24, lacrosse team members began to experience harassment by professors and other students, both in class and out of class. Plaintiffs allege that Duke Senior Vice President John Burness made statements to the media deploring the rape allegations and "maligning the Duke lacrosse team as a gang of hooligans." (Am. Compl. ¶ 232). On March 25, Duke President Brodhead convened a meeting with other Duke officials, including Burness, Trask, Wasiolek, Duke attorney Kate Hendricks, Athletic Director Joe Alleva, and Duke Academic Council Chairman Paul Haagen. Plaintiffs allege that the officials decided to "send a signal" based on the "recent torrent of negative publicity," and therefore made the decision to cancel the next two lacrosse games, purportedly as punishment for the underage drinking at the party. (Am. Compl. ¶ 236). Plaintiffs allege that the punishment was designed to send "a public signal that Duke sympathized with the accuser, credited the rape allegations, and condemned the lacrosse players." (Am. Compl. ¶ 238). Plaintiffs allege that President Brodhead refused to meet with parents of lacrosse team members that day. The parents instead met with Alleva, Wasiolek, Moneta, and Trask. Plaintiffs allege that at the meeting, the parents asked Duke to remove their sons' pictures from its website, but Duke delayed taking this action, allowing time for the pictures to be downloaded and used by others in harassment of the players. Plaintiffs further allege that the parents asked Moneta to remind professors of Duke's policy prohibiting harassment, but Moneta refused. Plaintiffs also allege that the Duke officials refused to make any public statement in support of the players, and instead President Brodhead issued a public statement asserting that "'Physical coercion and sexual assault are unacceptable in any setting and will not be tolerated at Duke . . . . [T]he claims against our players, if verified, will

warrant very serious penalties, both from the university and in the courts. . . . I urge everyone to cooperate to the fullest with the police inquiry while we wait to learn the truth." (Am. Compl. ¶ 246, 248).

Plaintiffs allege that from March 25 to March 30, various Duke faculty members, employees and students began protests against the lacrosse team members on and off campus, including a "candlelight vigil" and a "pot-banging" protest outside 610 N. Buchanan and at a nearby duplex occupied by other lacrosse team members, and an "open mike" protest on campus. During the candlelight vigil, the protestors surrounded the duplex and banged on windows. Plaintiffs allege that the team members inside called Moneta and asked for help, but he told the players there was nothing he could do. Plaintiffs also allege that players were also accosted on campus, but Moneta refused to provide more security or excused absences from class. Plaintiffs allege that Duke employee Sam Hummel "played an instrumental role" in organizing the protests, and other faculty members also organized and attended the protests. (Am. Compl. ¶ 256). In addition, Plaintiffs allege that "Professor Houston Baker wrote an open letter not only condemning the lacrosse players as violent rapists, but also denouncing them on the basis of their race, class, and gender" in violation of Duke's anti-harassment policy, but that Professor Baker "suffered no disciplinary action for his misconduct." (Am. Compl. ¶ 301, 302). Plaintiffs allege that over the next few days, the harassment on campus intensified, including statements by faculty members at an Academic Council meeting attended by Brodhead and Trask. Plaintiffs contend that the "campus atmosphere of intense hostility and racial animosity against the lacrosse players boiled over into racial violence and threats of racial violence." (Am.

Compl. ¶ 316). Plaintiffs allege that due to the threats, many of the players moved out of their residences or remained secluded in their rooms.

After assuming control of the investigation, Nifong met with Gottlieb and Himan on March 27 to receive a briefing on the investigation up to that point. Plaintiffs allege that Gottlieb and Himan told Nifong of the material contradictions in Mangum's allegation, that Pittman had called the claim "a crock," that Mangum had failed to identify any attackers in the photo line-ups, that the co-captains had voluntarily cooperated, and that Mangum was not credible. Plaintiffs allege that the Durham Supervisors (Baker, Chalmers, Hodge, Russ, Mihaich, Council, Lamb, Ripberger, and Addison) were informed of this information as well. Plaintiffs allege that Nifong responded to this evidence by stating, "'You know, we're f*cked!'" but nevertheless continued the investigation. (Am. Compl. ¶ 270).

Plaintiffs allege that Nifong began making statements to the media, including over 70 media interviews during the week of March 27. Among other things, Nifong stated that he was prepared to indict every member of the team who attended the party as accessories to rape. In addition, Plaintiffs allege that in numerous media statements, Nifong invoked the purported medical and physical evidence from the forensic exam. Plaintiffs also allege that in his media statements, Nifong implied that the victim's allegations were consistent and credible, although he knew this was false. Plaintiffs allege that Nifong also repeated the false accusation that team members had formed a "wall of silence" and were not cooperating. Finally, Plaintiffs allege that Nifong made statements that were "calculated to inflame the racial and class-based passions" in the community. (Am. Compl. ¶ 280).

Plaintiffs allege that Duke failed to correct the false statements made by Nifong. With respect to the medical and physical evidence, Plaintiffs allege that Duke was aware of the information demonstrating that Nifong's statements were false. (Am. Compl. ¶ 275). With respect to the consistency of Mangum's allegations, Plaintiffs allege that Duke was aware of Officer Day's report, which provided Duke with evidence that Mangum's allegations were not credible, but Duke failed to provide the Day report to lacrosse team members or the public. With respect to the "wall of silence" statements, Plaintiffs contend that Duke knew this charge was untrue but did not contradict it, and instead reinforced it, for example by Duke Provost Peter Lange's statement that "'[t]he students would be well advised to come forward. They have chosen not to.'" (Am. Compl. ¶ 279). Finally, Plaintiffs allege that Duke reinforced the racially inflammatory comments, for example by Brodhead's statement that "the allegations against the players had 'reviv[ed] memories of the systematic racial oppression we had hope to have left behind us.'" (Am. Compl. ¶ 281).

With respect to the Durham Police Department, Plaintiffs allege that Durham Police Corporal Addison, as the Department spokesperson, falsely told the media that "all forty-six white lacrosse players had refused to cooperate with police" and that "'authorities vowed to crack the team's wall of solidarity.'" (Am. Compl. ¶ 248). Plaintiffs allege that Addison also told the media that there was "'really, really strong physical evidence of rape.'" (Am. Compl. ¶ 274). In addition, Plaintiffs contend that Addison was responsible for "Crimestoppers" posters distributed on March 28 and March 29. The first poster stated that:

On Monday, March 13, 2006 about 11:00 pm, the Duke University Lacrosse Team

> solicited a local escort service for entertainment. The victim was paid to dance at the residence located at 610 Buchanan. The Duke Lacrosse Team was hosting a party at the residence. The victim was sodomized, raped, assaulted and robbed. This horrific crime sent shock waves throughout our community. . . . Durham CrimeStoppers will pay cash for any information which leads to an arrest in this case.

(Am. Compl. ¶ 282). The second poster was a poster that featured pictures of 43 of the 46 white lacrosse players and a quote by Spokesperson Addison stating, "'We're not saying that all 46 were involved. But we do know that some of the players inside that house on that evening knew what transpired and we need them to come forward.'" (Am. Compl. ¶ 283). Plaintiffs allege that these statements were "knowingly false" and that Addison acted with malice and with reckless disregard for Plaintiffs' constitutional rights. Plaintiffs contend that this poster, which was republished in local newspapers, further increased tension and hostility, to the point of physical threats against the team members, but Duke took no steps to discredit the posters.

On March 28, the lacrosse team co-captains, Evans, Zash, Flannery, and Thompson, met with Brodhead, Hendricks, and other Duke officials. Plaintiffs allege that Brodhead assured the co-captains of confidentiality at the meeting, but that within a week, administrators offered to voluntarily provide the Durham Police with information regarding the accounts given by the players to administrators. Plaintiffs also allege that at the meeting, Brodhead urged them to issue a public apology. In response, the co-captains issued a public apology for having the party, along with a denial of the rape charges. That day, Brodhead held a press conference and announced that he was "suspending the men's lacrosse season indefinitely -- 'until the legal

situation is clarified.'" (Am. Compl. ¶ 289). Brodhead also stated that "'[p]hysical coercion and sexual assault are unacceptable in any setting and will not be tolerated at Duke'" and Plaintiffs contend that "[t]he effect of Brodhead's statements was to impute guilt to the lacrosse players, and to further inflame public opinion against them." (Am. Compl. ¶ 289). In the statement, Brodhead stated that Durham Police were taking the lead in the investigation because Duke could not compel testimony or obtain warrants or DNA records, which Plaintiffs contend was false since Duke Police had full municipal police power to investigate reported crimes on Duke-owned property.

Plaintiffs allege that on March 28, Durham Police deliberately leaked to the media the 911 call made by Pittman as she and Mangum were leaving the residence on March 14. Plaintiffs contend that the tape was leaked by Durham Police "in order to inflame race-related community passions against the lacrosse players and to retaliate against them for the exercise of constitutional rights." (Am. Compl. ¶ 292). Plaintiffs allege that Durham Police and Duke Police knew that Pittman was the caller, but falsely denied information about the identity of the caller and released the tape as if it were an unrelated, racially-charged event. Plaintiffs allege that in response to the 911 call, Brodhead stated that the racial slurs reported in the call were "'disgusting'" and that "'[r]acism and its hateful language have no place in this community.'" (Am. Compl. ¶ 296). Plaintiffs contend that this statement sent "a clear message that he and the Duke administration believed Mangum's account of what occurred on the night of March 13-14" and "directly accused the lacrosse players of being racists who committed unprovoked racial harassment." (Am. Compl. ¶ 298).

Also on March 28, the State Bureau of Investigation reported to Nifong that their examination of the rape kit items had not discovered any semen, blood or saliva on any of the rape kit items. Plaintiffs allege that Himan also conducted a secret interview with Mangum. Plaintiffs allege that later that day or the next, Nifong, Gottlieb, and Himan met with Duke Police, including Graves and Dean, and Durham officials, including Baker and Chalmers, and reported that Mangum's accounts of the attack were patently inconsistent, that the SBI lab results had come back negative, and that Mangum had failed to identify any alleged attackers in two separate photo arrays. Plaintiffs allege that "the purpose of this meeting was to coordinate approaches to bolstering the prosecution's case" and the Durham Investigators (Wilson,[10] Gottlieb, and Himan), Durham Supervisors, and Duke Police "agreed to expedite the identifications and arrests of Duke lacrosse players, notwithstanding evidence demonstrating the lacrosse players' innocence." (Am. Compl. ¶ 308). Plaintiffs allege that within a few days, Nifong received a second exculpatory report from the SBI, concluding that no DNA from any of the players was found on Mangum's rape kit items or clothing, that DNA from one resident was found on a towel, and that DNA from another resident was found on the bathroom floor. Plaintiffs allege that this information was known by Durham Investigators, Durham Supervisors, and high level Duke officials. However, Plaintiffs allege that rather than terminating the investigation, "Nifong immediately began to tailor his public comments to suggest that condoms

[10] Although Plaintiffs designate Defendant Linwood Wilson as a "Durham Investigator" in the Amended Complaint, the Court notes that Defendant Wilson is alleged to be an employee the District Attorney's office and not the City of Durham. (Am. Compl. ¶ 66). In addition, although he is included in general allegations as part of the group of "Durham Investigators," Wilson is not alleged to have become directly involved in the investigation until late April 2006. (Am. Compl. ¶ 401).

might have been used in the alleged rape, to prepare the way for later public disclosure of the exculpatory DNA evidence." (Am. Compl. ¶ 313). Plaintiffs contend that on March 30 and March 31, Nifong again made statements to the media indicating that a sexual assault had occurred based on the medical and physical evidence from Duke Hospital, and that if a condom were used, they would expect that there would not be any DNA evidence recovered.

Plaintiffs allege that during this time, on March 30 and 31, Duke Police became involved in helping to bolster Mangum's allegations. Plaintiffs allege that Officer Day added a "continuation page" as an addendum to his report, which as originally written had noted the inconsistencies in Mangum's allegations. Plaintiffs contend that the "continuation page" purported to "cast doubt on the reliability of his own contemporaneous report, which Duke had not yet disclosed to the lacrosse players or the public, by indicating that it was based on hearsay and imperfectly overheard conversations." (Am. Compl. ¶ 322). Plaintiffs allege that Day was coerced to write this "continuation page" by "Duke administration officials," although Plaintiffs do not specify which officials. Plaintiffs also allege that unspecified "Duke Police officials," at Nifong's request, directed Duke Police officers who had been present at Duke Hospital on March 14 to "write deliberately misleading accounts of what they witnessed that night" including suppressing facts about Mangum's lack of credibility. (Am. Compl. ¶ 323).

Also on March 31, Duke Police Investigators Smith and Stotsenberg gave Gottlieb several reports. Plaintiffs allege that according to Gottlieb, the reports included "'one key card report for the Duke team members from March 13 and March 14'" that was prepared by the Duke Card Office. (Am. Compl. ¶ 324). Plaintiffs allege that the "key card reports provided

information on when and where the members of the lacrosse team had swiped their Duke ID cards in slots on locations at Duke's campus during March 13 and March 14," which would include doors to dormitories and academic buildings, dining facilities, vending machines, and photocopy machines, and which would allow the Durham Investigators to "roughly track the movements of lacrosse players on Duke's campus on March 13 and 14." (Am. Compl. ¶ 325). Plaintiffs contend that the disclosure of the key card report without a subpoena violated the Family Educational Records and Privacy Act (FERPA) as well as Duke's own privacy policies. Plaintiffs allege that this information was used to prepare a third photo identification array with all white lacrosse players who had likely attended the party, which was presented to Mangum on April 4.

Gottlieb conducted the third photo identification procedure with Mangum on April 4, using the photo arrays of only lacrosse players, with knowledge of which players had likely attended the party based on the previous interviews with the co-captains and the key card reports. Plaintiffs allege that this suggestive line-up violated standard Durham Police protocols. During this photo identification procedure, Mangum identified Reade Seligmann and Colin Finnerty as two of her attackers with "100% certainty" and identified Dave Evans with "90% certainty," although she had previously failed to identify them in the March photo arrays, and they did not match the physical descriptions she initially provided to police. (Am. Compl. ¶ 348). Plaintiffs allege that Mangum also identified other lacrosse players as being at the party, even though those players were determined not to have been at the party. Plaintiffs therefore allege that the information provided by Duke as to who had attended the party was crucial in

Nifong's determination of who to indict. In addition, Plaintiffs allege that the Durham Investigators deliberately delayed disclosing the procedures used in the April 4 line-up, and that the Durham Investigators and Durham Supervisors were aware of the abuses involved in the April 4 line-up.

The next day, on April 5, the medical records from Duke Hospital were provided to Nifong. Plaintiffs allege that Duke had actual or constructive knowledge of the falsity of the statements made by Levicy regarding the medical and physical evidence, and that instead of correcting the statements, Levicy's supervisor, Theresa Arico, made statements to the media on April 1 ratifying Levicy's statements and corroborating Mangum's credibility, including stating that "'these injuries are consistent with the story she told.'" (Am. Compl. ¶ 336). Plaintiffs further allege that the medical records provided on April 5 included a SANE report that had been deliberately falsified by Levicy with "multiple strike-outs and addenda that attempted to render her report inculpatory in light of what Levicy understood the evidence to be at the time." (Am. Compl. ¶ 341). For example, Plaintiffs allege that "in the notation about whether the alleged rapists had sought to conceal evidence, Levicy had initially entered 'no'." (Am. Compl. ¶ 341). In the version produced on April 5, however, this was crossed out, and "'yes'" was indicated, with the handwritten notation "'wiped her off with a rag.'" (Am. Compl. ¶ 341). As noted above, Plaintiffs allege that Levicy was acting in concert with Gottlieb and Himan, and was fabricating evidence to render the forensic report consistent with the information provided in the NTO affidavit and the DNA evidence available at the time.

Plaintiffs allege that on April 5, Brodhead canceled the remainder of the lacrosse season

and forced Coach Pressler to resign, despite having "actual or constructive knowledge of the lacrosse players' innocence." (Am. Compl. ¶ 355, 356). Plaintiffs allege that in his public statements, Brodhead sympathized with those who rushed to condemn the lacrosse players, and did not call on faculty members or students to stop their harassment or threatening behavior toward the lacrosse team members. Plaintiffs allege that in his statement, Brodhead effectively communicated Duke's belief in the players' guilt and stated that Duke would defer to the police inquiry, without disclosing the exculpatory evidence in Duke's possession. In this regard, Plaintiffs contend that by this time, Duke knew that Nifong's investigation was not proceeding in good faith, but "Duke withheld the exculpatory evidence and information in its exclusive possession, and watched silently as Nifong characterized the evidence and otherwise commented on the case and the lacrosse players in a way that Duke knew or should have known to be false." (Am. Compl. ¶ 332). In addition, Plaintiffs allege that the statements that were made to the media by Duke maligned the lacrosse players and distanced them from Duke. Plaintiffs allege that the decisions to cancel the season and to fire Coach Pressler were without basis and were acknowledged to be unfair, and were made in light of "Duke's image" and the negative portrayals of the lacrosse team in the media.

Plaintiffs allege that on the same day that the lacrosse season was canceled and Coach Pressler was fired, a full page advertisement appeared in the Duke newspaper signed by 88 Duke faculty members and sponsored by 15 academic departments and programs, addressing the allegations against the lacrosse team. Plaintiffs allege that "[t]he ad concluded by expressly encouraging public protests against the lacrosse players." (Am. Compl. ¶ 368). Plaintiffs

contend that the ad constituted harassment of the players in violation of Duke's anti-harassment policy, and caused the players serious emotional and reputational harm, but that Duke said nothing in response to the ad and refused to "denounce or otherwise disavow its message of guilt and condemnation of the lacrosse players." (Am. Compl. ¶ 374). Plaintiffs allege that additional harassment by faculty continued and was reported to Brodhead, including a report on April 6 by the women's lacrosse team coach of the in-class verbal harassment of lacrosse team members by professors, but Brodhead dismissed her concerns. Plaintiffs allege that the campus atmosphere continued to be hostile to the lacrosse team members in May, with a march and rally by the New Black Panther Party adjacent to the Duke campus on May 1. Plaintiffs also allege that an Ad Hoc Committee appointed by Brodhead released a report on May 1 regarding past disciplinary incidents involving the lacrosse team, accompanied by statements by the Committee Chairman at a press conference that "painted a highly prejudicial, highly unfair picture of the behavior of lacrosse players." (Am. Compl. ¶ 411).

With respect to the continuing police investigation, Plaintiffs allege that on April 6, Mangum provided Gottlieb and Himan with a written statement that contradicted her previous accounts in several material respects. Plaintiffs allege that the Durham Investigators and Durham Supervisors were aware of these inconsistencies. Plaintiffs further allege that Nifong refused to review the exculpatory evidence compiled by defense attorneys and instead continued to pursue the investigation by locating a private DNA testing lab to perform more sensitive DNA testing than that performed by the SBI. Plaintiffs allege that the private lab, DSI, performed more detailed analysis that concluded that the rape kit items contained the DNA of

at least four males, but that the tests excluded with 100 percent certainty every member of the lacrosse team. Plaintiffs allege that on April 10, Nifong, Himan, and Gottlieb met with representatives of DSI and conspired to illegally conceal DSI's findings by agreeing not to take notes and by agreeing to "obfuscate or conceal the full results of DSI's tests from the players and their attorneys." (Am. Compl. ¶ 384). After the meeting, Nifong publicly revealed the results of the SBI's DNA testing, which he had known for over a week, but Nifong did not reveal the results of the DSI testing. Plaintiffs allege that Nifong and members of the media speculated that the lack of DNA evidence could be because condoms were used, and Duke did not contradict this speculation even though Duke knew or should have known that Mangum had told Duke hospital employees that condoms were not used. Plaintiffs also allege that Nifong continued to point to Levicy's statements and the examination at Duke Hospital as evidence that a sexual assault took place, and Duke remained silent even though Duke knew or should have known that the examination yielded no objective medical or physical evidence supporting the allegations.

Plaintiffs further allege that prior to seeking indictments on April 17, the Durham Investigators sought to confirm the identities of party attendees "in order to ensure against indicting a player who could readily establish an alibi." (Am. Compl. ¶ 394). Plaintiffs allege that "[t]hese efforts were facilitated by Duke's cooperation and included, on information and belief, warrantless entry and searches of a dorm and dorm rooms and uncounseled interrogation of lacrosse players known to be represented by counsel." (Am. Compl. ¶ 394). Plaintiffs allege that according to Duke Police, two Durham Police detectives visited a residence hall and notified the

Duke Police ahead of time, but no search warrants were executed and "[t]he purpose of the visit was to conduct interviews." (Am. Compl. ¶ 395).

On April 17, Gottlieb testified before the grand jury, and Plaintiffs allege that Gottlieb placed decisive emphasis on Levicy's corroboration of Mangum's allegations. The grand jury indicted Reade Seligmann and Colin Finnerty on charges of rape, sexual assault, and kidnapping. Plaintiffs allege that Nifong made clear that he would indict a third player, which he did, almost a month later, on May 15. On April 21, Gottlieb, Himan, Nifong, and Nifong's investigator, Linwood Wilson, met with DSI representatives and they all agreed that DSI would produce a written report that would purport to be the final and complete report of all DNA testing conducted by DSI, but that would omit the fact that the DNA of four other males was found on the rape kit items and that none of the players' DNA profiles matched or were consistent with any of the DNA found on the rape kit items. Plaintiffs allege that the Durham Supervisors were aware of the substance of this meeting but continued to allow Nifong to direct the investigation and pursue indictment of a third player.

Plaintiffs allege that on May 8, Officer Day's report, which outlined the inconsistencies in Mangum's statements and her lack of credibility, became public. Plaintiffs allege that Duke official Aaron Graves, Duke Police Director Dean and Durham City Manager Baker attempted to discredit the report as based on imperfectly overheard conversations which Officer Day had misunderstood and misrepresented. Plaintiffs allege that Duke Police "used their authority to silence Officer Day, in order to prevent exculpatory information from coming out." (Am. Compl. ¶ 420).

Plaintiffs further allege that unspecified Durham police officials also tried to prevent disclosure of early doubts of Mangum's credibility. Specifically, Plaintiffs allege that a tape existed of Durham police officers' conversations on March 13 and 14, including officers discussing their determination at that time that Mangum was not credible, but this tape was destroyed. Plaintiffs also allege that in May, "senior police and other officials in the City of Durham subjected Sergeant Shelton to an internal investigation, accusations of unprofessional conduct, and threats of disciplinary action in an attempt to intimidate and discredit him for reporting Mangum's recantation of her rape claim while at Duke Hospital on March 13." (Am. Compl. ¶ 422).

In addition, Plaintiffs allege that after defense counsel came forward with exculpatory evidence, Gottlieb created a thirty-three page document entitled "Supplemental Case Notes" that was "created from memory as Gottlieb had virtually no contemporaneous notes of witness interviews or other investigative tasks." (Am. Compl. ¶ 423). Plaintiffs allege that "these supplemental notes attempted to address many gaping holes exposed by defense counsel in the prosecution's case, and to shore up the case at its weakest points." (Am. Compl. ¶ 423). Plaintiffs also allege that Gottlieb, Himan, Wilson, and Nifong met with representatives from DSI on May 12 and received DSI's report on DNA testing, with the understanding that this report "would be provided to the lacrosse players and to the court under the knowingly false pretense that it represented a final and complete report of DSI's work and contained all of DSI's findings with respect to DNA testing." (Am. Compl. ¶ 426). Plaintiffs allege, however, that the report was "deliberately misleading" because it intentionally omitted any reference to the four

unidentified males whose DNA had been detected. Plaintiffs allege that the Durham Supervisors knew about the substance of the May 12 meeting and the intentionally misleading report, and nevertheless continued to allow Nifong to direct the investigation. On May 15, Nifong obtained an indictment against David Evans on charges of rape, kidnapping, and sexual assault, and announced that this would be the last indictment based on the evidence they had developed, although Plaintiffs allege that "the remaining lacrosse players nevertheless continued to live in reasonable fear of potential future indictment for many months." (Am. Compl. ¶ 432).

On May 31, Nifong subpoenaed Duke to obtain key card records for the lacrosse players for March 13 and 14. However, as discussed above, Plaintiffs allege that the key card report had already been provided to Gottlieb on March 31 by Duke Police Investigators Smith and Stotsenberg and had been used by Nifong in his investigation and prosecution. Plaintiffs allege that the subpoena was a sham "in order to paper over" the "prior illegal disclosure." (Am. Compl. ¶ 434). Plaintiffs allege that on June 2, Duke's Director of the key card office, Matthew Drummond, sent letters to all 47 members of the lacrosse team informing them that Duke had received the subpoena and would be complying with the subpoena on June 12 if no motions to quash were filed. Plaintiffs allege that similar letters were sent by Kate Hendricks of Duke's Office of Counsel to defense attorneys for the lacrosse players, stating that Duke considered the information to be subject to the Family Educational Records & Privacy Act and therefore was providing notice of the subpoenas, without disclosing that the records had already been provided to Durham Police. Plaintiffs allege that Hendricks, Drummond, the Duke Police, and the Durham Investigators all "knew that Duke had already produced the relevant key card reports

to Nifong and that the subpoena was a sham." (Am. Compl. ¶ 438). Plaintiffs allege that "[i]n reliance on the false representation that Duke had not already disclosed this information, attorneys for virtually all of the unindicted lacrosse players prepared and filed motions to quash the subpoena for key card information," which "required a significant expenditure of time, effort, and legal fees." (Am. Compl. ¶ 439). A hearing was held on July 17 in state court on the motions to quash. Plaintiffs allege that at the hearing, Nifong "argued strenuously for the State's right to obtain the information." (Am. Compl. ¶ 440). Plaintiffs further allege that attorneys for Duke attended the hearing but "sat silent as Nifong urged the court to order Duke to provide information that Duke already had provided to him." (Am. Compl. ¶ 441). On July 21, the state court entered a protective order quashing the subpoena, stating that the request did not "'rise to the level required to overcome the confidentiality of student information assured by FERPA.'" (Am. Compl. ¶ 442).

Plaintiffs allege that the investigation and prosecution ultimately began to unravel. Plaintiffs allege that at a state court hearing on December 15, 2006, "it became evident that the Durham Investigators had illegally conspired with DSI to conceal DNA results indicating that the DNA of at least four men, none of whom were Duke lacrosse players" had been found in the DNA testing of the rape kit. (Am. Compl. ¶ 457). Plaintiffs also allege that on December 20, Nifong received notice of ethics charges by the State Bar for his "inflammatory media campaign against the lacrosse players during March and April 2006." (Am. Compl. ¶ 458). Plaintiffs allege that with respect to the false public statements by Nifong that were the basis of the ethics charges, Duke knew or should have known that the claims were false, but stood

silently by. On December 22, after Mangum told Investigators she could no longer be 100% sure that she had actually been raped, Nifong dismissed the rape charges, but continued to prosecute the kidnapping and sexual assault charges. On January 10, 2007, Nurse Levicy met with Wilson and Himan and "speculated, for the first time, that condoms might have been used in the alleged assault." (Am. Compl. ¶ 462). Plaintiffs allege that during this meeting, Levicy falsely told Wilson and Himan that Mangum had been unsure whether condoms had been used, thus attempting to "dissipate the dispositive exculpatory significance" of the DNA tests. (Am. Compl. ¶ 192).

Two days later, on January 12, Nifong was forced to recuse himself from the prosecution and the case was referred to the North Carolina Attorney General. Plaintiffs allege that "[s]oon after Nifong was removed from the case, Levicy met with investigators from the North Carolina Attorney General's office and conceded, for the first time, that it was possible that 'no attack had occurred.'" (Am. Compl. ¶ 465). On April 11, 2007, after conducting an investigation, the Attorney General dismissed all charges against the indicted lacrosse players, declaring that the indicted players were innocent of the charges. The Attorney General's report of the investigation concluded that no medical evidence confirmed Mangum's stories, and that Nurse Levicy "'based her opinion that the exam was consistent with what the accusing witness was reporting largely on the accusing witness's demeanor and complaints of pain rather than objective evidence.'" (Am. Compl. ¶ 470). On June 16, 2007, Nifong was disbarred by the North Carolina State Bar.

Plaintiffs allege that they were injured by the Defendants' conduct. Specifically, Plaintiffs

contend that as to all of the lacrosse team members, "Defendants' actions both directly caused irreparable reputational injury, and enhanced the injury to reputation caused by others" based on the false accusations. (Am. Compl. ¶ 473). Plaintiffs also contend that "Defendants' actions both directly caused severe emotional distress to plaintiffs, and enhanced the severe emotional distress inflicted by the actions of others." (Am. Compl. ¶ 474). Plaintiffs contend that Defendants' actions subjected the Plaintiff Players to "harassment and vile abuse," caused them to lose the chance to compete for athletic titles in men's lacrosse, caused them to lose job opportunities or other business opportunities, and forced them to incur legal costs and fees.

Plaintiffs' claims and contentions in the Amended Complaint are directed selectively against the various Defendants, and those Defendants can be divided into eight groups for purposes of analyzing the claims and the various Motions to Dismiss: (1) the Duke University Defendants: Duke University, Brodhead, Burness, Drummond, Dzau, Hendricks, Lange, Moneta, Trask, and Wasiolek; (2) the Duke Police Defendants: Graves and Dean; (3) the Duke SANE Defendants: Duke Health, Arico, and Levicy, (4) Defendant Wilson, the Investigator employed by the District Attorney's Office,[11] (5) the Durham Police Defendants: Detective Gottlieb and Investigator Himan; (6) Defendant Addison, the Durham Police Department spokesperson; (7) the Durham Supervisor Defendants: Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ; and (8) the City of Durham.

Plaintiffs bring the following claims: (1) Intentional Infliction of Emotional Distress against Duke, Duke Health, Brodhead, Dzau, Arico, and Levicy; (2) Negligent Infliction of

[11] Plaintiffs have not asserted any claims in this case against Michael Nifong, who was the District Attorney involved in the investigation and prosecution.

Emotional Distress against Duke, Duke Health, Brodhead, Dzau, Arico, and Levicy; (3) Negligent Supervision against Duke, Duke Health, Brodhead, Dzau, and Arico; (4) Negligence in Conducting and Reporting Forensic Medical Examination against Duke, Duke Health, Brodhead, Dzau, Arico, and Levicy; (5) Negligent Failure to Warn against Duke, Duke Health, Brodhead, Dzau, Arico, and Levicy; (6) Intentional Infliction of Emotional Distress against Duke, Duke Health, Brodhead, Moneta, Lange, Burness, Trask, Wasiolek, Dzau, Hendricks, Drummond, Graves, and Dean; (7) Negligent Infliction of Emotional Distress against Duke, Duke Health, Brodhead, Moneta, Lange, Wasiolek, Burness, Trask, Dzau, Hendricks, Drummond, Graves, and Dean; (8) Fraud and Conspiracy to Defraud against Duke, Hendricks, Drummond, Graves, Dean, Gottlieb, Himan, Wilson, and the City; (9) Negligent Misrepresentation against Duke, Hendricks, and Drummond; (10) Abuse of Process and Conspiracy to Abuse Process against Duke, Hendricks, Drummond, Graves, Dean, Gottlieb, Himan, Wilson, and the City; (11) Constructive Fraud against Duke, Brodhead, Trask, and Wasiolek; (12) Negligence in Voluntary Undertaking against Duke, Brodhead, Trask, and Wasiolek; (13) Negligence in Special Relationship against Duke and Brodhead; (14) Negligence for Failure to Protect against Duke; (15) Breach of Contract against Duke; (16) Tortious Breach of Contract against Duke; (17) Promissory Estoppel, withdrawn by Plaintiffs; (18) Intrusion upon Seclusion against Duke, Brodhead, Trask, Lange, Burness, and Moneta; (19) Negligent Supervision against Duke, Brodhead, Moneta, Lange, and Trask; (20) 42 U.S.C. § 1983 claim for Fourth Amendment Violation related to Key Card Reports against Duke, Hendricks, Drummond, Graves, Dean, Gottlieb, Himan, Wilson, and the City; (21) 42 U.S.C. § 1983 claim

for Fourth Amendment Violation related to DNA Samples against Duke, Duke Health, Arico, Levicy, Gottlieb, Himan, Wilson, and the City; (22) 42 U.S.C. § 1983 claim for Fourteenth Amendment Violation for Malicious Investigation against all Defendants; (23) Obstruction of and Conspiracy to Obstruct Justice against all Defendants; (24) 42 U.S.C. § 1983 claim for Deprivation of Property without Due Process against Gottlieb, Himan, Wilson, Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, and the City[12]; (25) 42 U.S.C. § 1983 claim for False Public Statements against Gottlieb, Himan, Wilson, Addison, and the City; (26) 42 U.S.C. § 1983 claims against the City[13] pursuant to Monell; (27) 42 U.S.C. § 1983 claim for Negligent Supervision against Defendants Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, and Russ; (28) Intentional Infliction of Emotional Distress against Gottlieb, Himan, Wilson, Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, and the City; (29) Negligent Infliction of Emotional Distress against Gottlieb, Himan, Wilson, Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, and the City; (30) Negligence by the Durham Police against Gottlieb, Himan, Wilson, Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, Addison, and the City; (31) Negligent Hiring and Training against Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, and the City; (32) claims for

[12] This claim and several others were asserted against the "Durham Supervisors," which included Defendant Addison, based on the groupings in the Amended Complaint. However, Plaintiffs have clarified that Defendant Addison is not included in the claims asserted in Counts 24, 27, 28, 29, or 31, and the Court has therefore excluded him from those claims.

[13] These claims were also originally asserted against Gottlieb, Himan, Wilson, Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, and Addison in their official capacities, but Plaintiffs have agreed that there is no basis for separate "official capacity" claims since the City is named on these claims.

violation of the North Carolina Constitution Article I, Section 19 against the City.[14] In considering these various Motions to Dismiss, the Court will first outline the applicable legal standard for considering motions to dismiss, and will then apply that standard to analyze each of the 32 claims raised by Plaintiffs in this case.

II. STANDARD OF REVIEW ON MOTIONS TO DISMISS

In reviewing a Motion to Dismiss for failure to state a claim pursuant to Rule 12(b)(6), the Fourth Circuit has directed that "we 'take the facts in the light most favorable to the plaintiff,' but 'we need not accept the legal conclusions drawn from the facts,' and 'we need not accept as true unwarranted inferences, unreasonable conclusions, or arguments.'" Giarratano v. Johnson, 521 F.3d 298, 302, 304 (4th Cir. 2008) (quoting Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship, 213 F.3d 175, 180 (4th Cir. 2000)). In Ashcroft v. Iqbal, the Supreme Court addressed the appropriate standard for analyzing motions to dismiss pursuant to Rule 12(b)(6), noting that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)). The Court in Iqbal laid out "two working principles" for considering Rule 12(b)(6) motions to dismiss. First, the Court in Iqbal noted that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Id. Thus, "[a] pleading that offers 'labels and conclusions' or 'a formulaic

[14] This claim is also asserted based on the actions of Gottlieb, Himan, Wilson, Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, and Addison in their official capacities.

recitation of the elements of a cause of action"' or "'naked assertion[s]' devoid of 'further factual enhancement"' will not do. Id. In this regard, the Iqbal Court noted that Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief," but Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." Id. at 1949, 1950. Thus, in considering a Rule 12(b)(6) Motion to Dismiss, courts may begin by "identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Id. at 1950.

Second, the Iqbal Court noted that "only a complaint that states a plausible claim for relief survives a motion to dismiss," and therefore courts must determine whether the facts actually pled in the complaint show that the pleader is entitled to relief. Id. Thus,"[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief."' Id. at 1949 (internal citations omitted). Thus, dismissal of a complaint is proper where plaintiffs' factual allegations fail to "produce an inference of liability strong enough to nudge the plaintiff's claims 'across the line from conceivable to plausible."' Nemet Chevrolet, Ltd. v.

Consumeraffairs.com, Inc., 591 F.3d 250, 256 (4th Cir. 2009) (citing Iqbal, 129 S. Ct. at 1952 (internal quotation omitted)).

In considering claims that are asserted under state law, the Court "must rule as the North Carolina courts would, treating decisions of the Supreme Court of North Carolina as binding, and 'departing from an intermediate court's fully reasoned holding as to state law only if 'convinced' that the state's highest court would not follow that holding.'" Iodice v. United States, 289 F.3d 270, 275 (4th Cir. 2002). However, pleading standards are a matter of procedural law governed in this Court by federal, not state, law. See Jackson v. Mecklenburg County, N.C., No. 3:07-cv-218, 2008 WL 2982468, at *2 (W.D.N.C. July 30, 2008) ("North Carolina substantive law applies to the elements of Plaintiffs' state law claims but the Federal Rules of Civil Procedure govern procedural law and North Carolina 'pleading requirements, so far as they are concerned with the degree of detail to be alleged, are irrelevant in federal court even as to claims arising under state law.'" (quoting Andresen v. Diorio, 349 F.3d 8, 17 (1st Cir. 2003) (citations omitted))). Therefore, the Iqbal pleading standard applies to both federal and state law claims in this case.

III. ANALYSIS OF CLAIMS ASSERTED IN THIS CASE

The Court will consider each of Plaintiffs' alleged claims to determine whether Plaintiffs have stated a claim under these standards and the applicable state and federal law. The Court will consider each of the counts individually, in the order in which they are asserted. As a result, there will be some duplication of analysis, except where it can be avoided, but the Court has organized the analysis in this way in order to ensure that each claim is separately addressed.

Count 1: Intentional Infliction of Emotional Distress, asserted against Duke, Duke Health, Brodhead, Dzau, Arico, and Levicy

In Count 1, Plaintiffs assert claims for Intentional Infliction of Emotional Distress ("IIED") against Duke, Duke Health, Brodhead, Dzau, Arico, and Levicy. As the basis for Count 1, Plaintiffs allege that Nurse Levicy intentionally provided to Durham Investigators information regarding the alleged rape that was false and misleading, and that the information was intentionally false or was provided with reckless disregard for the truth. Plaintiffs allege that Levicy's actions were malicious, willful and wanton, and that her supervisor, Arico, ratified Levicy's actions. Plaintiffs contend that Arico's ratification of Levicy's actions was extreme and outrageous. Plaintiffs contend that the remaining named Defendants (Duke, Duke Health, Brodhead, and Dzau) ratified Levicy's and Arico's conduct through inaction. Finally, Plaintiffs contend that all of the named Defendants intended to cause severe emotional distress, or acted with reckless disregard for Plaintiffs' emotional state.

Under North Carolina law, "liability arises under the tort of intentional infliction of emotional distress when a defendant's conduct exceeds all bounds of decency tolerated by society and the conduct causes mental distress of a very serious kind." West v. King's Dep't Store, Inc., 321 N.C. 698, 704, 365 S.E.2d 621, 625 (1988). "The essential elements of an action for intentional infliction of emotional distress are '1) extreme and outrageous conduct by the defendant 2) which is intended to and does in fact cause 3) severe emotional distress.'" Waddle v. Sparks, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992) (quoting Dickens v. Puryear, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981)). With respect to the first element, conduct is "extreme and outrageous" when it is "so outrageous in character, and so extreme in degree, as to go beyond

all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 493, 340 S.E.2d 116, 123 (1986). With respect to the second element, "[a] defendant is liable for this tort when he 'desires to inflict severe emotional distress . . . [or] knows that such distress is certain, or substantially certain, to result from his conduct . . . [or] where he acts recklessly . . . in deliberate disregard of a high degree of probability that the emotional distress will follow' and the mental distress does in fact result." Dickens v. Puryear, 302 N.C. 437, 449, 276 S.E.2d 325, 333 (1981) (quoting Restatement (Second) of Torts § 46 cmt. i (1965)). With respect to the third element, "the term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." Waddle, 331 N.C. at 83, 414 S.E.2d at 27 (quoting Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 327 N.C. 283, 304, 395 S.E.2d 85, 97, reh'g denied, 327 N.C. 644, 399 S.E.2d 133 (1990)). "Humiliation and worry are not enough." Jolly v. Acad. Collection Serv., 400 F. Supp. 2d 851, 866 (M.D.N.C. 2005). The North Carolina Supreme Court has noted that "[e]motional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea," but "*[i]t is only where it is extreme that the liability arises.*" Waddle, 331 N.C. 73, 84, 414 S.E.2d 22, 27 (1992) (emphasis in original); see also Pacheco v. Rogers & Breece, Inc., 157 N.C. App. 445, 451, 579 S.E.2d 505, 509 (2003) (applying this

standard and noting that "[e]ven assuming, *arguendo*, that some issues are 'too obvious to dispute,' the legal presence of severe emotional distress is not among these," and rejecting the contention that outrageous conduct can substitute for severe emotional distress).

In the present Motion to Dismiss, the named Defendants contend that the factual allegations in the Amended Complaint do not establish any intent to inflict severe emotional distress toward Plaintiffs. Defendants further contend that the alleged conduct was not extreme and outrageous as required to establish a claim under North Carolina law, and that even if the alleged conduct were extreme and outrageous, Plaintiffs have not alleged sufficient facts to establish that they suffered from "severe emotional distress." With respect to the requirement that Plaintiffs have suffered "severe emotional distress," the Court notes that in the Amended Complaint, Plaintiffs do not include any specific allegations of emotional or mental disorders or severe and disabling emotional or mental conditions suffered by any of the Plaintiffs individually. Indeed, the Amended Complaint does not include any specific identification of any particular Plaintiff's mental or emotional condition or the nature of his or her emotional distress. With respect to this issue, this Court has previously dismissed IIED claims where the complaint included only a conclusory statement of damages, without any "factual allegations regarding the type, manner, or degree of severe emotional distress [the plaintiff] experienced." Swaim v. Westchester Acad., Inc., 170 F. Supp. 2d 580, 585 (M.D.N.C. 2001); see also Vogler v. Countrywide Home Loans, Inc., No. 1:10CV370, 2010 WL 3394034, at *9 (M.D.N.C. Aug. 26, 2010) (dismissing claim as insufficient where "[p]laintiffs assert that they suffered severe emotional distress, but do not allege any facts in support of this assertion"); Baucom v. Cabarrus

Eye Ctr., P.A., No. 1:06CV209, 2007 WL 1074663, at *5 (M.D.N.C. Apr. 4, 2007) (noting that "[a]lthough the amended complaint makes the conclusory statement that Defendant's actions caused 'great emotional distress,' Plaintiff does not allege any facts or conditions from which she suffered to support this motion"); cf. Holleman v. Aiken, 193 N.C. App. 484, 501, 668 S.E.2d 579, 590 (2008) (concluding that the plaintiff had failed to allege a claim for IIED where the "plaintiff has failed to make any specific allegations as [to] the nature of her severe emotional distress"); Soderlund v. Kuch, 143 N.C. App. 361, 371, 546 S.E.2d 632, 639 (2001) ("The crux of establishing 'severe emotional distress' is that the emotional or mental disorder may generally be diagnosed by professionals trained to do so," even if an actual diagnosis has not been made); Fox-Kirk v. Hannon, 142 N.C. App. 267, 281, 542 S.E.2d 346, 356 (2001) (holding that a claim for infliction of emotional distress was "not justiciable" where, at the time of the filing of the complaint, the plaintiff "had not sought any medical treatment or received any diagnosis for any condition that could support a claim for severe emotional distress").

In the present case, it is not sufficient for the Amended Complaint to state summarily that all 47 Plaintiffs suffered "severe emotional distress," without alleging facts supporting this assertion. This is simply a "label and conclusion" or "naked assertion" that will not do under the pleading standards set out in Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). Plaintiffs have failed to include any factual allegations as to each Plaintiff's emotional or mental disorders, condition, or diagnosis, in order to state a claim that each of them suffered from severe emotional distress. Plaintiffs also failed to sufficiently allege a link between any emotional or mental disorder or condition and the specific misconduct alleged in this claim.

Therefore, Defendants' Motion to Dismiss as to Count 1 will be granted, and Plaintiffs' claims for intentional infliction of emotional distress will be dismissed on this basis. As such, the Court need not consider the remaining contentions raised by Defendants in their Motion to Dismiss this claim.

Count 2: Negligent Infliction of Emotional Distress, asserted against Duke, Duke Health, Brodhead, Dzau, Arico, and Levicy

In Count 2, Plaintiffs bring a claim for Negligent Infliction of Emotional Distress ("NIED") against Duke, Duke Health, Brodhead, Dzau, Arico, and Levicy. As the basis for this claim, Plaintiffs contend that Levicy was grossly negligent and reckless in breaching the duty of care and professional judgment required for a sexual assault nurse examiner. Plaintiffs contend that Levicy "did not exercise due care and recklessly disregarded standards of professional judgment in the examination of Crystal Mangum and her misreporting of it, and in her deliberate and/or reckless mischaracterization of the medical evidence to the Durham Investigators." (Am. Compl. ¶ 491). Plaintiffs contend that Arico was grossly negligent and reckless in breaching the duty of care and professional judgment as a supervisor, based on her "deliberate, public ratification of Levicy's misrepresentations to the Durham investigators." (Am. Compl. ¶ 492). Plaintiffs contend that the remaining named Defendants (Duke, Duke Health, Brodhead, and Dzau) were grossly negligent and reckless in their supervision of Levicy and Arico, and ratified Levicy's and Arico's negligent conduct through express action and inaction. Plaintiffs allege generally that the negligence of the named Defendants "did in fact cause the plaintiffs mental anguish and severe emotional distress." (Am. Compl. ¶ 495).

In order to state a claim for Negligent Infliction of Emotional Distress ("NIED") under

North Carolina law, "a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . . , and (3) the conduct did in fact cause the plaintiff severe emotional distress." McAllister v. Khie Sem Ha, 347 N.C. 638, 645, 496 S.E.2d 577, 582-83 (1998) (quoting Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990), reh'g denied, 327 N.C. 644, 399 S.E.2d 133 (1990)). Thus, to state a claim for NIED, Plaintiffs must allege a sufficient basis to support the contention that they each suffered "severe emotional distress" under North Carolina law, and that the "severe emotional distress was the foreseeable and proximate result" of the defendant's alleged negligence. Id. at 645, 496 S.E.2d at 583. "[M]ere temporary fright, disappointment or regret will not suffice." Id. As with a claim for intentional infliction of emotional distress, "severe emotional distress" requires an "emotional or mental disorder . . . which may be generally recognized and diagnosed by professionals trained to do so." Id.

As noted above, in the Amended Complaint, Plaintiffs do not include any specific allegations of emotional or mental disorders or severe and disabling emotional or mental conditions suffered by any of the Plaintiffs, and the Amended Complaint does not include any specific identification of any particular Plaintiff's mental or emotional condition or the nature of their emotional distress. It is not sufficient to state summarily that all 47 Plaintiffs suffered "severe emotional distress." As noted above, Plaintiffs have failed to detail the specifics of each Plaintiff's emotional or mental disorders, condition, or diagnosis. Cf. Holleman v. Aiken, 193 N.C. App. 484, 502, 668 S.E.2d 579, 590 (2008) (dismissing NIED claim because "plaintiff does

not make any specific factual allegation as [to] her 'severe emotional distress'); Swaim v. Westchester Acad., Inc., 170 F. Supp. 2d 580, 585 (M.D.N.C. 2001). Therefore, Defendants' Motion to Dismiss as to Count 2 will be granted, and Plaintiffs' claims for negligent infliction of emotional distress will be dismissed.[15]

Count 3: Negligent Supervision, asserted against Duke, Duke Health, Brodhead, Dzau, and Arico

In Count 3, Plaintiffs assert a claim for Negligent Supervision against Duke, Duke Health, Brodhead, Dzau, and Arico. As the basis for this claim, Plaintiffs contend that Nurse Levicy and Arico were employees of Duke Health acting within the scope of their employment when they committed the tortious acts alleged in Count 1 for Intentional Infliction of Emotional Distress. Plaintiffs contend that the named Defendants knew or had reason to know of Levicy's and Arico's conduct, and failed to exercise due care to supervise them and take steps to prevent them from continuing their tortious conduct. Plaintiffs contend that Duke, Duke Health,

[15] In addition, the Court notes that as with any negligence claim, liability for NIED will not attach unless Plaintiffs' claim is based on a recognized legal duty of Defendants to Plaintiffs. See Foster v. Crandell, 181 N.C. App. 152, 169, 638 S.E.2d 526, 537 (2007) ("In order to meet the requirements of the first element [of an NIED claim], a plaintiff must establish that the defendant breached a duty of care owed to the plaintiff."); Holleman v. Aiken, 193 N.C. App. 484, 502, 668 S.E.2d 579, 591 (2008) (dismissing claim for NIED because "[w]e find no factual allegations of negligence in the complaint" where "[n]egligence is the breach of a legal duty owed by the defendant that proximately causes injury to plaintiff" (internal quotation omitted)). As discussed *infra* in Count 4, a nurse or other medical professional does not owe a duty of care to individuals who are not their patients based on information provided to the police by the medical professional. Therefore, even if the conduct alleged as to Defendant Levicy would fall below the standard of care for a nurse or other medical professional, Plaintiffs have not stated a claim for negligence against these Defendants because Levicy and the other named Defendants did not owe a duty of care to Plaintiffs with respect to the examination of Crystal Mangum and reporting of the medical evidence to the Durham Investigators.

Brodhead, Dzau, and Arico failed to exercise due care to correct the injuries caused by Levicy, and instead "ratified and condoned Levicy's dissemination of misinformation to police and prosecutors." (Am. Compl. ¶ 501).

"North Carolina recognizes the existence of a claim against an employer for negligence in employing or retaining an employee whose wrongful conduct injures another." Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 494, 340 S.E.2d 116, 123 (1986). This type of claim "becomes important in cases where the act of the employee either was not, or may not have been, within the scope of his employment." Id. at 495, 340 S.E.2d at 124. "However, before the employer can be held liable, plaintiff must prove that the incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency." Id.

As the basis for a claim of negligent supervision or retention, "Plaintiff must demonstrate that [defendant's] employees committed tortious acts, of which [defendant] had actual or constructive knowledge," and as such, the underlying tortious conduct is "an essential element of this claim." Kimes v. Lab. Corp. of Am., Inc., 313 F. Supp. 2d 555, 569 (M.D.N.C. 2004) (granting summary judgment on negligent supervision claim after underlying emotional distress claims were dismissed); see also Guthrie v. Conroy, 152 N.C. App. 15, 26, 567 S.E.2d 403, 411 (2002) (dismissing claim against employer that was based on ratification of employee's behavior when the underlying IIED claim was dismissed). In the present case, to the extent that the claim in Count 3 for negligent supervision is based directly on the alleged IIED claim in Count 1, which the Court has dismissed, there is no underlying tort upon which to base the negligent

supervision claim.

However, to the extent that Plaintiffs are attempting to assert a claim for negligent supervision related to conduct beyond the IIED claim in Count 1, the Court has concluded below that other claims are going forward as to Defendant Levicy.[16] Under North Carolina law, an employer may be held liable for the tortious acts of its employees, based on either a theory of (1) *respondeat superior* if the employee was acting in the scope of his or her employment, or (2) negligent supervision if, "prior to the [tortious] act, the employer knew or had reason to know of the employee's incompetency" even if "the act of the employee either was not, or may not have been, within the scope of his employment." Hogan, 79 N.C. App. at 495, 340 S.E.2d at 124. Therefore, the negligent supervision claim may be asserted as an alternative to *respondeat superior* liability under state law. Therefore, the Court will not dismiss the claim asserted in Count 3 for negligent supervision with respect to Duke and Duke Health, to the extent that other underlying claims are proceeding in this case as to Levicy, such as the obstruction of justice claim discussed in Count 23.

However, a claim for negligent hiring, retention, and supervision would be actionable only against the employer, not the individual supervisors. Cf. Foster v. Crandell, 181 N.C. App. 152, 170-71, 638 S.E.2d 526, 538-39 (2007) (noting that liability for negligent hiring or retention

[16] Specifically, the Court has concluded below that although there is no underlying claim properly asserted as to Defendant Levicy for negligence, Plaintiffs' claim for obstruction of justice against Levicy may proceed. There are also claims going forward as to Defendant Levicy pursuant to § 1983, but the parties have not addressed the extent to which a state negligent supervision claim could arise based on underlying conduct that involves a violation of § 1983. Because other state court claims are proceeding on which to base the negligent supervision claim in any event, further resolution of this issue is reserved for subsequent briefing at summary judgment.

would extend only to an employer who employed an incompetent employee either as an employee or independent contractor, not to co-employees); Ostwalt v. Charlotte-Mecklenburg Bd. of Educ., 614 F. Supp. 2d 603, 609 (W.D.N.C. 2008) ("North Carolina courts have determined that no claim for negligent supervision lies when the Defendant is not the employer of the individual who commits the tortious act.").[17] Therefore, this claim is properly dismissed as to Brodhead, Dzau, and Arico.

As a result of these determinations, the Motion to Dismiss will be granted in part and denied in part. Specifically, the claim asserted in Count 3 for negligent supervision will be dismissed as to Defendants Brodhead, Dzau, and Arico. However, the Claim asserted in Count 3 for negligent supervision will go forward as to Duke and Duke Health to the extent that other underlying claims are proceeding in this case as to Defendant Levicy.

Count 4: Negligence in Conducting and Reporting Forensic Medical Examination, asserted against Duke, Duke Health, Brodhead, Dzau, Arico, and Levicy

In Count 4, Plaintiffs assert a claim for Negligence in Conducting and Reporting Forensic Medical Examination against Duke, Duke Health, Brodhead, Dzau, Arico, and Levicy. As the basis for this claim, Plaintiffs contend that the named Defendants owed Plaintiffs a duty of

[17] North Carolina courts do recognize a physician's independent duty to patients of medical residents or interns when the physician is directly responsible for supervising the residents or interns. See Mozingo v. Pitt County Mem'l Hosp., Inc., 331 N.C. 182, 192, 415 S.E.2d 341, 347 (1992). However, the facts alleged in the present case would not establish a basis for liability under Mozingo, since this case does not involve a claim by a patient, nor does it involve any recognized legal duty to Plaintiffs on the part of any of the named Defendants, as discussed *infra* in Count 4. Thus, to the extent that Plaintiffs are attempting to allege other direct negligence by the named Defendants, the Court concludes that the named Defendants did not owe a legal duty to Plaintiffs, as discussed with respect to the negligence claims asserted in Count 4.

reasonable care in the conduct of forensic and/or medical examinations of Mangum in connection with her allegations of rape. Plaintiffs contend that "[t]his duty included the duty to exercise due care in collecting, assessing, analyzing, and reporting the physical and medical evidence derived from Duke's examination of Mangum on March 14, 2006." (Am. Compl. ¶ 505). Plaintiffs contend that the named Defendants breached the duty of care based on "Levicy's misrepresentation to the Durham Investigators and others that the medical and physical evidence was consistent with Mangum's rape allegations; defendants' failure to require sufficient training to its sexual assault nurse examiners and its failure to ensure that a properly trained SANE [Sexual Assault Nurse Examiner] nurse examined Mangum; defendants' failure to provide adequate supervision of Levicy and other SANE nurses; Levicy's subsequent mischaracterizations of the medical and physical evidence to the Durham Investigators; defendants' suppression of and/or failure to disclose exculpatory information derived from Duke's examinations of Mangum on March 14; Arico's public statements ratifying Levicy's misrepresentations concerning the medical and physical evidence from Duke's examinations of Mangum; [and] defendants' failure to correct Levicy's misrepresentations concerning the medical and physical evidence from Duke's examinations of Mangum." (Am. Compl. ¶ 506).

Under North Carolina law, a plaintiff states a claim for negligence if he alleges sufficient facts to establish "(1) that there has been a failure to exercise proper care in the performance of some legal duty which defendant owed to plaintiff under the circumstances in which they were placed; and (2) that such negligent breach of duty was a proximate cause of the injury." Hairston v. Alexander Tank & Equip. Co., 310 N.C. 227, 232, 311 S.E.2d 559, 564 (1984); see also Estate

of Mullis by Dixon v. Monroe Oil Co., 349 N.C. 196, 201, 505 S.E.2d 131, 135 (1998) (noting that a common law negligence claim has four essential elements: "duty, breach of duty, proximate cause, and damages"). When a claim is asserted against a health care provider by a third party who was not a patient of the health care provider, the claim should be analyzed to determine whether it is a claim for medical malpractice or for ordinary negligence. See Iodice v. United States, 289 F.3d 270, 275-77 (4th Cir. 2002). Under North Carolina law, a "medical malpractice action" is "a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C. Gen. Stat. § 90-21.11. In Iodice v. United States, the Fourth Circuit considered claims asserted under North Carolina law by plaintiffs who were injured and killed in an automobile accident caused by another driver, Jones, who was under the influence of alcohol and narcotics. The plaintiffs brought suit against Jones' health care provider, who had prescribed heavy doses of narcotics despite Jones's history of drug and alcohol addiction. In reviewing the claims, the Fourth Circuit held that to the extent the claims were "attacking the quality of the medical care," they were appropriately viewed as medical malpractice claims, and under North Carolina law, "'the relationship of physician to patient must be established as a prerequisite to an actionable claim for medical malpractice.'" Iodice, 289 F.3d at 275 (quoting Easter v. Lexington Mem'l Hosp., Inc., 303 N.C. 303, 305-06, 278 S.E.2d 253, 255 (1981)); see also Estate of Waters v. Jarman, 144 N.C. App. 98, 101, 547 S.E.2d 142, 144 (2001) (noting that medical malpractice claims asserted against a hospital involve claims of negligence in the "clinical care" provided to the patient); Fireman's Mut. Ins. Co. v. High Point

Sprinkler Co., 266 N.C. 134, 141, 146 S.E.2d 53, 60 (1966) ("The relation of physician and patient imposes upon the physician a duty of care for the protection of the patient from injury which he does not owe to others.").

Applying this rule in the present case, the Court notes that Plaintiffs were not patients at Duke Health and did not receive any treatment or examination themselves. Instead, they are third parties attempting to assert a claim for the alleged negligence of the named Defendants. Therefore, the Court concludes that to the extent that Plaintiffs' claim for negligence in the present case is based on the quality of care provided to Mangum, including any claim based on the clinical care, diagnosis, or medical assessment by Defendants, such a claim is a medical malpractice claim and must be dismissed, because this type of claim may not be asserted by individuals who were not patients of Defendants.

The Fourth Circuit in Iodice also considered the alternative claims asserted by the plaintiffs in that case for "ordinary negligence" against the health care providers. The Fourth Circuit noted that under North Carolina law, "when a negligence claim against a health care provider does not 'arise out' of the 'furnishing' of 'professional services,' it is not a medical malpractice claim, but rather may be brought as an ordinary negligence claim." Iodice, 289 F.3d at 276 (citing Estate of Waters, 144 N.C. App. at 103, 547 S.E.2d at 145). In such "ordinary negligence" actions, courts apply the "reasonably prudent person" standard, and "in such ordinary negligence actions the 'liability of the defendant [health care provider] to the plaintiff depends on whether the defendant owed a duty of care to the plaintiff, which duty was violated, proximately causing injury to the plaintiff.'" Id. at 276, 279 (quoting Blanton v. Moses H. Cone

Mem'l Hosp. Inc., 319 N.C. 372, 375, 354 S.E.2d 455, 457 (1987)) (concluding further that "North Carolina would require a tight nexus" between the alleged negligence and the harm to the victim, if it permitted third party plaintiffs to recover at all). Such an "ordinary negligence" claim "presupposes the existence of a legal relationship between the parties by which the injured party is owed a duty which either arises out of a contract or by operation of law. If there is no duty, there can be no liability." Prince v. Wright, 141 N.C. App. 262, 266, 541 S.E.2d 191, 195 (2000) (internal quotations omitted). "'[A] duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.'" Peal by Peal v. Smith, 115 N.C. App. 225, 230, 444 S.E.2d 673, 677 (1994) (quoting W. Page Keeton et al., The Law of Torts, § 53 (5th ed. 1984)). "Such duty of care may be a specific duty owing to the plaintiff by the defendant, or it may be a general one owed by the defendant to the public, of which the plaintiff is a part." Paschall v. N.C. Dep't of Corr., 88 N.C. App. 520, 524, 364 S.E.2d 144, 146 (1988) (quoting Pinnix v. Toomey, 242 N.C. 358, 362, 87 S.E.2d 893, 897-98 (1955)). "The existence of a duty is 'entirely a question of law . . . and it must be determined only by the court.'" Peal by Peal, 115 N.C. App. at 230, 444 S.E.2d at 677 (quoting W. Page Keeton et al., The Law of Torts, § 37 (5th ed. 1984)).

In this case, Plaintiffs contend that they have stated claims for ordinary negligence based on their allegations that Levicy made false statements to investigators, apart from any medical care provided to Mangum. However, even if the conduct alleged as to Defendant Levicy did not comply with professional standards or fell below a reasonable standard of care, Plaintiffs can only bring a negligence claim for the alleged failure to meet the standard of care if Levicy owed

a duty of reasonable care *to the Plaintiffs*. In the Amended Complaint, Plaintiffs allege that Levicy owed them a "duty to exercise due care in collecting, assessing, analyzing, and reporting the physical and medical evidence derived from Duke's examination of Mangum." (Am. Compl. ¶ 505). However, the Court finds that there is no basis to support the contention that a sexual assault nurse examiner owes a duty to the general public, or to individuals who are members of the public who may subsequently be targeted during a police investigation. Plaintiffs have cited no North Carolina or Fourth Circuit cases supporting such a duty, and this Court concludes that North Carolina public policy would not support imposing such sweeping potential liability on health care professionals for providing assessments and reports to police officers.[18] Indeed, the Fourth Circuit has rejected third party claims that would impose a duty on a physician to third parties, where such a duty could interfere with the physician's primary duty to the patient. Cf. Iodice, 289 F.3d at 276 ("'[D]octors should owe their duty to their patient and not to anyone else so as not to compromise this primary duty.'" (quoting Russell v. Adams, 125 N.C. App. 637, 640, 482 S.E.2d 30, 33 (1997) (internal quotation omitted))). Plaintiffs have not asserted any factual basis on which to conclude that a specific legal duty arose between Levicy and members of the lacrosse team and their parents, and North Carolina law would not support an extension

[18] This public policy is illustrated in North Carolina General Statute § 90-21.20(d), which specifically provides immunity to hospital directors, administrators, physicians, and other designated persons who participate in making a report to police under that statute for certain wounds, injuries and illnesses, unless the director, administrator, physician, or other designated person is acting in bad faith. See N.C. Gen. Stat. § 90-21.20. Thus, North Carolina law would not recognize claims for negligence related to participation in a report provided to police under that statute. Although the parties have not raised this statute in the present case, it provides further evidence that North Carolina law would not recognize negligence claims in these circumstances or impose a duty that would extend to Plaintiffs here based on simple negligence.

of liability to health care providers in these circumstances. Therefore, the Court concludes that a nurse or other medical professional does not owe a duty of care to the general public or members of the public who may subsequently be investigated by police based on information provided to the police by the medical professional.[19] Thus, even if at least some of the conduct alleged as to Defendant Levicy fell below a reasonable standard of care, Plaintiffs have failed to state a claim for negligence because they have not asserted facts that would support the contention that Defendants owed a duty of reasonable care *to them*.

Therefore, based on all of the discussion set out above, the Court concludes that the Motion to Dismiss as to Count 4 should be granted, and the claims asserted in Count 4 will be dismissed.[20]

Count 5: Negligent Failure to Warn, asserted against Duke, Duke Health, Brodhead, Dzau, Arico, and Levicy

In Count 5, Plaintiffs contend that Duke, Duke Health, Brodhead, Dzau, Arico, and Levicy created a hazardous condition by intentionally or recklessly providing false and misleading information to the Durham Investigators. Plaintiffs contend that the named Defendants knew or should have known that this hazardous condition threatened Plaintiffs, and

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[19] A health care professional, like any other person, may be liable for intentional torts if the elements of those torts are established. However, the inquiry as to Count 4 is only whether a duty exists that would support potential liability for negligence in the circumstances alleged.

[20] Finally, the Court notes that to the extent that Plaintiffs bring negligence claims against Duke, Duke Health, Brodhead, Dzau, and Arico for ratification of Levicy's statements and failure to properly supervise Levicy, there is no basis for those claims because there is no underlying negligence claim as to Levicy and because a claim for negligent supervision is a claim against the employer, as discussed with respect to Count 3 above. Moreover, as discussed above, the named Defendants did not owe a duty to Plaintiffs that would support a claim for negligence.

that Defendants therefore had a duty to warn Plaintiffs about the hazardous condition that Defendants had created. Plaintiffs contend that the named Defendants breached that duty by failing to warn Plaintiffs about the hazardous condition, and failing to disclose to Plaintiffs "the false and misleading nature of the information provided to the Durham Investigators or to otherwise protect plaintiffs from the dangerous situation that defendants had created." (Am. Compl. ¶ 514). Plaintiffs contend that the named Defendants instead engaged in "concealing and suppressing exculpatory information, defrauding and harassing the plaintiffs, and actively conspiring and collaborating with the Durham Supervisors and Durham Investigators to aggravate and prolong the ordeal." (Am. Compl. ¶ 514).

This claim is based in negligence, and therefore as noted above, Plaintiffs must allege facts sufficient to establish that "(1) that there has been a failure to exercise proper care in the performance of some legal duty which defendant owed to plaintiff under the circumstances in which they were placed; and (2) that such negligent breach of duty was a proximate cause of the injury." Hairston v. Alexander Tank & Equip. Co., 310 N.C. 227, 232, 311 S.E.2d 559, 564 (1984). A negligence claim based on a "failure to warn" may arise in premises liability cases based on the specific type of duty imposed upon landowners, or in products liability cases, based upon the specific type of duty imposed upon sellers or manufacturers of a product. See, e.g., Nelson v. Freeland, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998) (noting that under North Carolina law, a landowner owed a duty to those lawfully on his premises to keep his premises reasonably safe and to warn of hazards or dangers of which he is aware); N.C. Gen. Stat. § 99B-5 (outlining requirements for claim against manufacturer or seller of a product based on failure

to warn of substantial risk of harm).[21] However, Plaintiffs cite no basis for asserting such a claim under the facts as alleged in the present case, which does not involve a duty of a landowner or a duty of a seller or manufacturer of a product. To the extent that Plaintiffs contend that such a claim is based on ordinary negligence principles, the Court has considered Plaintiffs' claims against Defendants for negligence in Count 4 above, and has concluded that Plaintiffs cannot state a claim for negligence because Defendants did not owe a duty to Plaintiffs. To the extent that Plaintiffs in this Count 5 assert that Defendants created a duty by creating a "hazardous condition," the Court finds that this assertion does not allege a legal duty that would support a claim for negligence in the present case. Therefore, Defendants' Motion to Dismiss Count 5 will be granted and the claims asserted in Count 5 will be dismissed.

Count 6: Intentional Infliction of Emotional Distress, asserted against Duke, Duke Health, Brodhead, Moneta, Lange, Burness, Trask, Wasiolek, Dzau, Hendricks, Drummond, Graves, and Dean

In Count 6, Plaintiffs assert another claim for Intentional Infliction of Emotional Distress, this time against Duke, Duke Health, Brodhead, Moneta, Lange, Burness, Trask, Wasiolek, Dzau, Hendricks, Drummond, Graves, and Dean. In this Count, Plaintiffs allege that the named Duke University and Duke Police Defendants engaged in extreme and outrageous conduct involving "ratification of defendant Levicy's misrepresentations," attempts to "interfere with plaintiffs' exercise of their constitutional rights," the "suppression of exculpatory evidence," statements "maligning the lacrosse players and inciting public resentment and passions against

[21] In addition, although a duty to warn may arise in some jurisdictions with respect to a potentially dangerous psychiatric patient, the North Carolina Court of Appeals has held that under North Carolina law, psychiatrists do not have a duty to warn third persons of a patient's potential danger. Gregory v. Kilbride, 150 N.C. App. 601, 610, 565 S.E.2d 685, 692 (2002).

them," conspiracy with the Durham Investigators, "bad-faith breaches of contract," and failure to prevent professors and students from harassing the Plaintiff Players. Plaintiffs again assert summarily that this conduct caused "mental anguish and severe emotional distress to the plaintiffs," without providing any additional basis or details to establish the nature of emotional distress as to each individual Plaintiff. (Am. Compl. ¶ 521).

As noted in Count 1 above, under North Carolina law, "[t]he essential elements of an action for intentional infliction of emotional distress are '1) extreme and outrageous conduct by the defendant 2) which is intended to and does in fact cause 3) severe emotional distress.'" Waddle v. Sparks, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992) (quoting Dickens v. Puryear, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981)); see also West v. King's Dep't Store, Inc., 321 N.C. 698, 704, 365 S.E.2d 621, 625 (1988). With respect to the third element, "the term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." Waddle, 331 N.C. at 83, 414 S.E.2d at 27 (quoting Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990) reh'g denied, 327 N.C. 644, 399 S.E.2d 133 (1990)). In the present Motion to Dismiss, the named Defendants contend that Plaintiffs have failed to state a claim for IIED because they have failed to sufficiently plead facts that would establish "extreme and outrageous conduct" or "extreme emotional distress." With respect to the requirement that Plaintiffs have suffered "severe emotional distress," the Court notes that in the Amended Complaint, as discussed above, Plaintiffs do not include any

specific allegations of emotional or mental disorders or severe and disabling emotional or mental conditions suffered by any of the Plaintiffs individually. As discussed above, this Court has previously dismissed IIED claims where the complaint included only a conclusory statement of damages, without any "factual allegations regarding the type, manner, or degree of severe emotional distress [the plaintiff] experienced." Swaim v. Westchester Acad., Inc., 170 F. Supp. 2d 580, 585 (M.D.N.C. 2001). In the present case, it is not sufficient for the Amended Complaint to state summarily that all 47 Plaintiffs suffered "severe emotional distress," without alleging facts supporting this assertion. Therefore, Defendants' Motion to Dismiss as to Count 6 will be granted, and Plaintiffs' claims for intentional infliction of emotional distress will be dismissed on this basis.

Count 7: Negligent Infliction of Emotional Distress, asserted against Duke, Duke Health, Brodhead, Moneta, Lange, Wasiolek, Burness, Trask, Dzau, Hendricks, Drummond, Graves, and Dean

In Count 7, Plaintiffs bring an additional claim for Negligent Infliction of Emotional Distress, contending that the conduct alleged in Count 6, in addition to being intentional, was also reckless and grossly negligent, and breached a duty of care owed by the named Defendants to Plaintiffs. However, Plaintiffs again have only alleged generally that Defendants' negligence "did in fact cause the plaintiffs mental anguish and severe emotional distress." (Am. Compl. ¶ 529).

As discussed above, to state a claim for NIED, Plaintiffs must allege a sufficient basis to support the contention that they each suffered "severe emotional distress" under North Carolina law, and that the "severe emotional distress was the foreseeable and proximate result"

of Defendants' alleged negligence. McAllister v. Khie Sem Ha, 347 N.C. 638, 645, 496 S.E.2d 577, 583 (1998). As with a claim for intentional infliction of emotional distress, "severe emotional distress" requires an "emotional or mental disorder . . . which may be generally recognized and diagnosed by professionals trained to do so." Id.

As noted above, in the Amended Complaint, Plaintiffs do not include any specific allegations of emotional or mental disorders or severe and disabling emotional or mental conditions suffered by any of the Plaintiffs, and the Amended Complaint does not include any specific identification of any particular Plaintiff's mental or emotional condition or the nature of their emotional distress. It is not sufficient to state simply that all 47 Plaintiffs suffered "severe emotional distress," and, Plaintiffs have failed to detail the specifics of each Plaintiff's emotional or mental disorders, condition, or diagnosis. Cf. Holleman v. Aiken, 193 N.C. App. 484, 502, 668 S.E.2d 579, 591 (2008); Swaim v. Westchester Acad., Inc., 170 F. Supp. 2d 580, 585 (M.D.N.C. 2001). Therefore, Defendants' Motion to Dismiss as to Count 7 will be granted, and Plaintiffs' claims for negligent infliction of emotional distress will be dismissed.[22]

[22] In addition, as previously noted, liability for NIED will not attach unless Plaintiffs' claim is based on a recognized legal duty of the Defendants to the Plaintiffs. See Foster v. Crandell, 181 N.C. App. 152, 169, 638 S.E.2d 526, 537 (2007) ("In order to meet the requirements for the first element [of an NIED claim], a plaintiff must establish that the defendant breached a duty of care owed to the plaintiff."); Holleman v. Aiken, 193 N.C. App. 484, 502, 668 S.E.2d 579, 591 (2008) (dismissing claim for NIED because "[w]e find no factual allegations of negligence in the complaint" where "[n]egligence is the breach of a legal duty owed by the defendant that proximately causes injury to plaintiff."). In this case, it does not appear that Plaintiffs' claims in this Count are based on any recognized legal duty. However, the Court need not consider this issue with respect to this NIED claim, since Plaintiffs' claims are subject to dismissal for the reasons set forth above.

Count 8: Fraud and Conspiracy to Defraud, asserted against Duke, Hendricks, Drummond, Graves, Dean, Gottlieb, Himan, Wilson, and the City

In Count 8, Plaintiffs bring a claim for fraud against Duke, the Duke Police (Graves and Dean), Hendricks, Drummond, the Durham Investigators (Gottlieb, Himan, and Wilson), and the City, all related to the lacrosse team members' key card reports. As discussed in the Factual Background, Plaintiffs contend that on March 31, Duke Police gave several reports to Gottlieb, including the "key card report" for the lacrosse team members that was prepared by the Duke Card Office and that provided information on where the members of the lacrosse team had swiped their Duke ID cards during March 13 and March 14. Two months later, on May 31, Nifong subpoenaed Duke to obtain the key card records for the lacrosse players for March 13 and 14. Plaintiffs allege that the subpoena was a sham "in order to paper over" the "prior illegal disclosure." Plaintiffs further allege that on June 2, Duke's Director of the key card office, Defendant Drummond, sent letters to all 47 members of the lacrosse team informing them that Duke had received the subpoena and would be complying with the subpoena on June 12 if no motions to quash were filed. The letter stated: "Duke University has received a subpoena (copy attached) requiring us to produce certain information regarding use of your DukeCard. If you wish to object to the release of these records by the University, your attorney must file a motion to that effect. If we have not heard from you by Monday, June 12, 2006, at 9:00 a.m., we intend to comply with the terms of the subpoena. If you file a motion to quash or otherwise object to the subpoena, please send us copies of the relevant papers at your earliest convenience." (Am. Compl. ¶ 435). Plaintiffs allege that similar letters were sent by Defendant Hendricks of Duke's Office of Counsel to defense attorneys for the lacrosse players, stating that Duke considered the

information to be subject to the Family Educational Records & Privacy Act and therefore was providing notice of the subpoenas. However, Plaintiffs allege that neither letter disclosed that the records had already been provided to the Durham Investigators. Plaintiffs allege that Hendricks, Drummond, Graves, Dean, and the Durham Investigators all "knew that Duke had already produced the relevant key card reports to Nifong and that the subpoena was a sham." (Am. Compl. ¶ 438). Plaintiffs allege that "[i]n reliance on the false representation that Duke had not already disclosed this information, attorneys for virtually all of the unindicted lacrosse players prepared and filed motions to quash the subpoena for key card information," which "required a significant expenditure of time, effort, and legal fees." (Am. Compl. ¶ 439). A hearing was held on July 17, 2006 in state court on the motions to quash. Plaintiffs allege that attorneys for Duke attended the hearing but "sat silent as Nifong urged the court to order Duke to provide information that Duke already had provided to him." (Am. Compl. ¶ 441). On July 21, the state court entered a protective order quashing the subpoena, stating that the request did not "'rise to the level required to overcome the confidentiality of student information assured by FERPA.'" (Am. Compl. ¶ 442).

In Count 8, Plaintiffs allege that the letters sent to the team members and their attorneys by Hendricks and Drummond contained false representations or concealment of a material fact because the letters did not disclose or acknowledge that the key card reports had already been provided to the Durham Investigators. Plaintiffs contend that the representations were reasonably calculated to deceive and did deceive the recipients, causing them to spend time, effort, resources, and attorney's fees to quash a subpoena for the records. Plaintiffs contend that

"the above-named defendants and/or other senior Duke University and Durham officials" were aware that the records had already been disclosed and that the subpoena was a sham. (Am. Compl. ¶ 534). Plaintiffs allege that the named Defendants "conspired and collaborated with one another in issuing the sham subpoena and the fraudulent letters with the intent to deceive plaintiffs and to conceal Duke University's illegal prior disclosure . . . of the key card reports." (Am. Compl. ¶ 536). Plaintiffs contend that the fraud was committed by Duke employees within the scope of their employment.

Under North Carolina law, "the following essential elements of actual fraud are well established: '(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.'" Forbis v. Neal, 361 N.C. 519, 526-27, 649 S.E.2d 382, 387 (quoting Ragsdale v. Kennedy, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)). Such a claim requires a showing that the "plaintiff acted or refrained from acting in a certain manner due to defendant's representations" and that the plaintiff's reliance on the false representations was "justified or reasonable." Pleasant Valley Promenade v. Lechmere, Inc., 120 N.C. App. 650, 663, 464 S.E.2d 47, 57 (1995). In cases alleging fraudulent concealment or nondisclosure, the plaintiff "must additionally allege that all or some of the defendants had a duty to disclose material information to him as silence is fraudulent only when there is a duty to speak." Breeden v. Richmond Cmty. Coll., 171 F.R.D. 189, 194 (M.D.N.C. 1997). A duty to disclose may arise from the existence of a fiduciary relationship or where "one party has taken affirmative steps to conceal material facts from the other." Id. at 196. A duty to disclose may also arise in "other

attendant circumstances," and in this regard North Carolina courts have recognized that while a defendant may not initially be under a duty to speak, once the defendant does speak, he is "required to make a full and fair disclosure as to the matters discussed." Shaver v. N.C. Monroe Constr. Co., 63 N.C. App. 605, 614, 306 S.E.2d 519, 525 (1983); see also Breeden, 171 F.R.D. at 194 n.4 (noting that courts have held that "a duty to disclose in the absence of a fiduciary relationship could arise if a party makes partial ambiguous statements which require other disclosures to prevent confusion"); Wicker v. Worthy, 51 N.C. (6 Jones) 500, 1859 WL 2087, at *2 (1859) (noting that "mere silence" may not be sufficient to create a claim, but if the defendant "says or does any thing intended and calculated to create [a false] impression . . . he will be liable to the action"). Thus, "even if a party otherwise has no duty to disclose a particular matter, should that party speak about it, then a full and fair disclosure may be required." Breeden, 171 F.R.D. at 196.

In considering whether Plaintiffs have sufficiently alleged a claim of fraud in the present case, the Court also notes that under Federal Rule of Civil Procedure 9(b), "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Generally, to satisfy this requirement, a plaintiff must identify the time, the place, and the contents of the allegedly false statements, the identity of the person making the representation, and what was obtained as a result of the fraudulent misrepresentation. See Breeden, 171 F.R.D. at 195 (noting that "courts generally require that a plaintiff plead the time, place, and contents of the alleged fraudulent misrepresentation, as well as the identity of each person making the misrepresentation and what was obtained thereby" (internal quotations

omitted)); S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC, 189 N.C. App. 601, 610, 659 S.E.2d 442, 449 (2008). Moreover, "[i]n order to comply with the pleading requirements of Rule 9(b) with respect to fraud by omission, a plaintiff usually will be required to allege the following with reasonable particularity: (1) the relationship or situation giving rise to the duty to speak, (2) the event or events triggering the duty to speak, and/or the general time period over which the relationship arose and the fraudulent conduct occurred, (3) the general content of the information that was withheld and the reason for its materiality, (4) the identity of those under a duty who failed to make such disclosures, (5) what those defendant(s) gained by withholding information, (6) why plaintiff's reliance on the omission was both reasonable and detrimental, and (7) the damages proximately flowing from such reliance." Breeden, 171 F.R.D. at 195. "However, a court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied: '(1) that the defendant has been made aware of the particular circumstances for which [it] will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts.'" Adams v. NVR Homes, Inc., 193 F.R.D. 243, 250 (D. Md. 2000) (citation omitted). Finally, "[a]llegations of fraud may be made 'upon information and belief' only when the matters are particularly within the defendants' knowledge, and facts are stated upon which the belief is founded." Breeden, 171 F.R.D. at 197 (citing Andrews v. Fitzgerald, 823 F. Supp. 356, 375 (M.D.N.C. 1993)).

Based on these standards and the allegations set out in the Amended Complaint, the Court concludes that Plaintiffs have sufficiently alleged a claim for fraud against Duke, based on the allegations against Duke employees Graves, Dean, Drummond, and Hendricks. In the

Amended Complaint, Plaintiffs allege that Graves, Dean, Drummond, and Hendricks acted together to "cover up" the prior disclosure of the key card reports by making a false representation or concealment of a material fact in the letters from Drummond and Hendricks that were sent to the players and their attorneys. Specifically, Plaintiffs allege that Drummond, Hendricks, Graves, and Dean knew that the Duke key card reports had previously been disclosed to Durham Police and that the subpoena was a "sham," but nevertheless sent the letters which could be fairly read as at least implying that the key card reports had not been previously disclosed. In addition, Plaintiffs allege that once Drummond and Hendricks undertook to send the letters, they obligated themselves to make a full and fair disclosure of the material facts, which they failed to do because they did not inform the players that the key card reports had already been provided to the police. Plaintiffs have alleged that the misrepresentation was reasonably calculated to deceive in order to "cover up" and avoid potential liability for the previous disclosure. Plaintiffs allege that the letters did in fact deceive the recipients, causing them to incur specific expenses that they would not otherwise have incurred. Consistent with Rule 9, Plaintiffs have alleged the time, place, and content of the false representations, based on the letters that were sent to the players and their counsel on or about May 31, 2006. To the extent that this claim is based on a fraudulent omission, Plaintiffs have identified the general content of the information that was withheld and the reason for its materiality, and the identity of those who failed to make such disclosures. Plaintiffs have also alleged the relationship and events giving rise to the duty to speak, based on the actions of Drummond and Hendricks in undertaking to send the letters. Of course, it will ultimately be

Plaintiffs' burden to prove all of the elements of this claim, including that Drummond, Hendricks, Dean, and Graves were aware that the key card reports had previously been provided to the Durham Police, in order to establish the requisite intent to deceive.[23] Cf. Ausley v. Bishop, 133 N.C. App. 210, 217, 515 S.E.2d 72, 78 (1999) ("For actionable fraud to exist, [the defendant] 'must have known the representation to be false when making it . . . '" (quoting Fulton v. Vickery, 73 N.C. App. 382, 388, 326 S.E.2d 354, 358 (1985)). However, at this stage in the case, Plaintiffs have sufficiently alleged this claim of fraud as to Drummond, Hendricks, Graves, and Dean, acting in the course and scope of their employment as employees of Duke. With respect to the scope of this claim, however, the Court concludes that Plaintiffs have not alleged any fraudulent representation or omission with respect to the players' parents, who are not alleged to be recipients of the letters. Therefore, the parents who are Plaintiffs in this case have not stated a claim for fraud. As such, the Motion to Dismiss Count 8 as to Drummond, Hendricks, Graves, Dean, and Duke will be granted with respect to the claims asserted by the Plaintiff Parents.

The Court further concludes that Plaintiffs have not alleged a sufficient factual basis to support the claim for fraud against the Durham Investigators (Gottlieb, Himan, and Wilson) and the City of Durham. "'[W]here multiple defendants are asked to respond to allegations of fraud, the complaint should inform each defendant of the nature of his alleged participation in the fraud.'" Breeden, 171 F.R.D. at 197 (quoting Andrews v. Fitzgerald, 823 F. Supp. 356, 373

[23] Likewise as to Graves and Dean, although Plaintiffs have alleged that they collaborated with Drummond and Hendricks in making the false representations in the letters, it will be Plaintiffs' burden to ultimately establish Graves' and Dean's direct involvement in the false representations to the players and their attorneys.

(M.D.N.C. 1993)). "'The identity of those making the misrepresentations is crucial. Courts have been quick to reject pleadings in which multiple defendants are lumped together and in which no defendant can determine from the complaint which of the alleged representations it is specifically charged with having made, nor the identity of the individual by whom and to whom the statements were given.'" Id. at 198 (quoting McKee v. Pope Ballard Shepard & Fowle, Ltd., 604 F. Supp. 927, 931 (N.D. Ill. 1985) (internal quotations omitted)). With respect to allegations of fraud by omission, "[e]ach defendant must be informed of when his or her duty to disclose material information to plaintiff arose and of his or her role in the alleged fraudulent omission of such information." Id. "A complaint fails to meet the particularity requirements of Rule 9(b) when a plaintiff asserts merely conclusory allegations of fraud against multiple defendants without identifying each individual defendant's participation in the alleged fraud." Adams v. NRV Homes, Inc., 193 F.R.D. 243, 250 (D. Md. 2000). To the extent the claim is asserted based on an alleged conspiracy, the "complaint alleging a conspiracy must do more than state mere legal conclusions regarding the existence of the conspiracy. . . . Specific factual allegations showing the time and place of the conspiracy and the connection of the defendant to the injury are essential in such instances to state a cause of action." Joyner v. Abbott Labs., 674 F. Supp. 185, 191 (E.D.N.C. 1987). In the present case, based on the allegations in the Amended Complaint, the Court concludes that there is no factual allegation to state a plausible claim that Gottlieb, Himan, or Wilson made any false representation to Plaintiffs related to the key card reports, nor is there any basis that would give rise to a duty by Gottlieb, Himan, or Wilson to Plaintiffs to disclose information regarding the key card reports. Moreover, the general

allegations of a "conspiracy" are not sufficient to create a cause of action against Gottlieb, Himan, and Wilson based on the allegedly fraudulent actions of Duke employees Drummond, Hendricks, Graves, and Dean.[24] Finally, Plaintiffs also have not alleged any basis to hold the City of Durham liable for the alleged fraud by Duke.[25]

Therefore, for all of these reasons, the Court concludes that the Motions to Dismiss as to Count 8 should be granted in part and denied in part. Specifically, the fraud claim against Gottlieb, Himan, Wilson, and the City will be dismissed as to both the Plaintiff Players and the Plaintiff Parents, and the fraud claim brought by the Plaintiff Parents against Drummond, Hendricks, Graves, Dean, and Duke will also be dismissed. However, the fraud claim brought by the Plaintiff Players in Count 8 against Drummond, Hendricks, Graves, Dean, and Duke related to the key card reports is sufficient to state a claim and provide adequate notice to Defendants of the basis of the claim, and that claim will therefore be allowed to continue forward.

Count 9: Negligent Misrepresentation, asserted against Duke, Hendricks, and Drummond

In Count 9, Plaintiffs bring an alternative claim for Negligent Misrepresentation against Duke, Hendricks, and Drummond related to the letters sent to the players and their attorneys

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[24] Moreover, "under North Carolina law, a municipality ordinarily cannot be a party to a conspiracy" and "even where a municipality's employees are sued in their personal capacities, there can be no conspiracy if the actions complained of were taken in the course of the employees' official duties." Iglesias v. Wolford, 539 F. Supp. 2d 831, 836 (E.D.N.C. 2008).

[25] The Court notes that District Attorney Nifong is not named as a Defendant in this case, and as discussed in Count 26 *infra*, the Court has concluded that there is no basis to hold the City responsible for the independent actions of Nifong. Therefore, the Court does not consider here whether Plaintiffs' allegations would support a claim for fraud against Nifong.

regarding the subpoena for the key card reports. In this Count, Plaintiffs contend that even if the conduct alleged in Count 8 was not fraudulent, the letters from Hendricks and Drummond regarding the key card report contained negligent misrepresentations that breached the duty of Defendants Hendricks and Drummond "to take care not to make false statements to and/or conceal material facts from plaintiffs." (Am. Compl. ¶ 540). Plaintiffs allege that as a result of the negligent misrepresentations, they "suffered injuries including the expenditure of time, effort, resources, and attorney's fees in quashing the sham subpoena." (Am. Compl. ¶ 541).

For claims of negligent misrepresentation involving pecuniary losses, North Carolina has adopted the rule "set forth in the Restatement (Second) of Torts § 552 (1977). . . . [which] provides in pertinent part: . . . 'One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.'" Raritan River Steel Co. v. Cherry, Bekaert & Holland, 322 N.C. 200, 209, 367 S.E.2d 609, 615 (1988) (quoting Restatement (Second) of Torts § 552 (1977)). Thus, North Carolina has "adopted the Restatement 2d definition of negligent misrepresentation" and North Carolina courts have held that "the action lies where pecuniary loss results from the supplying of false information to others for the purpose of guiding them in their business transactions." Driver v. Burlington Aviation, 110 N.C. App. 519, 525, 430 S.E.2d 476, 480 (1993); see also Middleton v. Russell Grp., 126 N.C. App. 1, 29-30, 483 S.E.2d 727, 743 (1997).

In light of these provisions, and having considered the allegations set out in the Amended Complaint, the Court concludes that the facts as alleged would not support a claim for negligent misrepresentation involving pecuniary loss under the Restatement (Second) of Torts § 552 provisions because the alleged misrepresentations by Drummond and Hendricks in the letters to Plaintiffs and their counsel do not arise out of a business transaction or involve information provided for the purpose of guidance in any business or commercial dealing. On this point, Plaintiffs contend that the "business transaction" requirement is met in this case because "Plaintiffs' dealings with Duke were founded on a very traditional business transaction: Plaintiffs paid tuition and fees in exchange for the education and other services furnished by the University." (Pls.' Resp. Brief, Doc. #96, at 15). However, even if this "payment of tuition in exchange for education and services" could be viewed in some instances as a "business transaction," it does not follow that every representation made by a university employee to a student in any context necessarily arises out of that business transaction or would support a claim for "negligent misrepresentation."

In the present case, the claims asserted in Count 9 are based on the alleged misrepresentations contained in the letters sent by Drummond and Hendricks to Plaintiffs regarding the release of the key card information pursuant to a subpoena, and these alleged misrepresentations simply do not relate to a commercial or business transaction and do not involve the provision of information for the guidance of others in their business dealings. Plaintiffs have pointed to no North Carolina case that would recognize the existence of a claim for negligent misrepresentation in these circumstances. Therefore, the Court concludes that

Plaintiffs have failed to state a claim with respect to the negligent misrepresentation claim in Count 9. As such, the Motion to Dismiss will be granted as to Count 9, and Plaintiffs' claim will be dismissed.[26]

Count 10: Abuse of Process and Conspiracy to Abuse Process, asserted against Duke, Hendricks, Drummond, Graves, Dean, Gottlieb, Himan, Wilson, and the City

In Count 10, Plaintiffs assert claims of abuse of process and conspiracy to abuse process, asserted against Duke and Duke employees Hendricks, Drummond, Graves, and Dean, as well as the Durham Investigators (Gottlieb, Himan, and Wilson) and the City, all related to the subpoena issued by District Attorney Nifong for the key card reports. In this Count, Plaintiffs allege that the named Defendants "obtained the issuance and service of a sham subpoena for plaintiffs' key card reports." (Am. Compl. ¶ 543). Plaintiffs contend that this conduct constitutes "abuse of process" because the "subpoena was sought and served by these defendants to achieve a collateral purpose not within the intended scope of the process used --

[26] In their briefing on the Motion to Dismiss, Plaintiffs do not contend that Count 9 is a general negligence claim that could be brought outside of the provisions of the Restatement (Second) of Torts § 552. To the extent that Plaintiffs could be attempting to assert a general negligence claim, no special duty of care is imposed upon university employees in their communications with students, as discussed with respect to Count 12, *infra*. To the extent that Plaintiffs contend that FERPA created a duty of care or a duty to disclose, that statute does not create a private right of action, as discussed in Count 20. In addition, the Court notes that by choosing to send the letters to the players and their attorneys, the Duke employees may have assumed an obligation not to be intentionally deceptive, as discussed with respect to the claim for fraudulent concealment in Count 8. However, the facts alleged as to Count 9 do not support the conclusion that Duke employees owed Plaintiffs a duty of care or assumed a duty of care to support a claim for simple negligence. Finally, even if Plaintiffs were attempting to assert such a claim, it appears that any such claim would, at most, be based on alleged negligent omissions or concealment, and this Court has previously determined that the tort of negligent misrepresentation in North Carolina does not include "negligent omissions." Breeden v. Richmond Cmty. Coll., 171 F.R.D. 189, 202-03 (M.D.N.C. 1997).

namely, to conceal the facts that Duke University had already illegally disclosed, and the Durham Investigators had illegally used the key card reports." (Am. Compl. ¶ 544). Plaintiffs allege that "[b]y collaborating in the issuance and use of a sham subpoena, the defendants committed a willful act whereby they sought to use the subpoena power of the court as a means to gain advantage of the plaintiffs in respect to some collateral matter -- namely, to conceal from plaintiffs defendants' illegal prior disclosure and use of the key card reports." (Am. Compl. ¶ 545).

Under North Carolina law, "[a]buse of legal process consists in the malicious misuse or misapplication of that process to accomplish some purpose not warranted or commanded by the writ. . . . . The distinctive nature of an action for abuse of process is the improper use of process after it has been issued, and not for maliciously causing it to issue." Ellis v. Wellons, 224 N.C. 269, 271, 29 S.E.2d 884, 885 (1944) (internal quotation omitted); Melton v. Rickman, 225 N.C. 700, 703, 36 S.E.2d 276, 278 (1945) ("One who uses legal process to compel a person to do some collateral act not within the scope of the process or for the purpose of oppression or annoyance is liable in damages in a common law action for abuse of process."). "There are two essential elements for an action for abuse of process, (1) the existence of an ulterior motive, and (2) an act in the use of the process not proper in the regular prosecution of the proceeding." Ellis, 224 N.C. at 271, 29 S.E.2d at 885. "The ulterior motive requirement is satisfied when the plaintiff alleges that the prior action was initiated by defendant or used by him to achieve a collateral purpose not within the normal scope of the process used. The act requirement is satisfied when the plaintiff alleges that once the prior proceeding was initiated, the defendant

committed some wilful act whereby he sought to use the existence of the proceeding to gain advantage of the plaintiff in respect to some collateral matter." Stanback v. Stanback, 297 N.C. 181, 201, 254 S.E.2d 611, 624 (1979). Under North Carolina law, the second element requires Plaintiffs to establish "malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ." Pinewood Homes, Inc. v. Harris, 184 N.C. App. 597, 602, 646 S.E.2d 826, 831 (2007) (emphasis in original) (quoting Stanback, 297 N.C. at 200, 254 S.E.2d at 624); see also Barnette v. Woody, 242 N.C. 424, 431, 88 S.E.2d 223, 227 (1955) ("The distinction between an action for malicious prosecution and one for abuse of process is that malicious prosecution is based upon malice in causing the process to issue, while abuse of process lies for its improper use after it has been issued."). Thus,"[e]vil purpose alone is not sufficient" and "[r]egular and legitimate use of process, though with a bad intention, is not a malicious abuse of process." Melton v. Rickman, 225 N.C. 700, 704, 36 S.E.2d 276, 278 (1945) (internal quotation omitted) (concluding that the alleged conduct of the defendant was "not commendable" but that "his conduct prior to the issuance of the warrant does not give rise to a cause of action" because "[t]here can be no abuse of a writ before its issuance"); see also Heck v. Humphrey, 512 U.S. 477, 486 n.5, 114 S. Ct. 2364, 2372 n.5, 129 L. Ed. 2d 383 (1994) (noting that "[t]he gravamen of that tort [abuse of process] is not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends" and "[c]ognizable injury for abuse of process is limited to the harm caused by the misuse of process").

In the present case, Plaintiffs have alleged an "evil purpose" or "ulterior motive" with

respect to the first element of the abuse of process claim, based on the allegations that Duke employees collaborated with District Attorney Nifong to induce issuance of the subpoena for the key card reports in order to cover up the prior disclosure of the key card reports to Durham Investigators. However, Plaintiffs have not alleged any facts to establish the malicious misuse or misapplication of the subpoena after its issuance. Cf. In re Burzynski, 989 F.2d 733, 739 (5th Cir. 1993) (concluding that the plaintiff had failed to allege an illegal or improper use of process in a claim for abuse of process based on subpoenas allegedly issued for improper purposes). Indeed, in the present case, the subpoena itself was quashed, and no use was made of the subpoena. Therefore, even if there was an improper motivation as alleged in the Amended Complaint, there is no allegation of improper use of process sufficient to state a claim for abuse of process under North Carolina law.[27] Therefore, the Motions to Dismiss as to Count 10 will be granted, and the claim asserted in Count 10 will be dismissed.

Count 11: Constructive Fraud, asserted against Duke, Brodhead, Trask, and Wasiolek

In Count 11, Plaintiffs bring a claim for Constructive Fraud against Duke and the following Duke employees: President Brodhead, Vice President Trask, and Dean Wasiolek. In this Count, Plaintiffs contend that Brodhead, Trask, and Wasiolek had a "relationship of trust and confidence" with the team members, and were "bound in equity and good conscience to act in good faith and with due regard for the interests of plaintiffs, who reposed confidence in

[27] Moreover, the Court also notes that even if an abuse of process claim could be stated based on the facts as alleged, it was District Attorney Nifong who issued the subpoena, and who had the authority to do so, and therefore any abuse of process claim would be against Nifong, who is not a defendant in this case.

them." (Am. Compl. ¶ 550). Specifically as to Dean Wasiolek, Plaintiffs contend that a confidential relationship existed between her and the students based upon her role as Dean of Students, her role as an attorney, and her role as "an authorized representative and agent of Duke University to its students." (Am. Compl. ¶ 550). Plaintiffs allege that Wasiolek abused the relationship of trust and confidence by "advising the plaintiff lacrosse players not to tell their parents of the rape allegations made against them and of the legal jeopardy facing them, and advising them not to seek and obtain legal representation." (Am. Compl. ¶ 551). Plaintiffs further contend that Wasiolek abused the relationship of trust and confidence by steering the players to attorney Wesley Covington for legal advice, and then collaborating with Covington in subordinating the interests of the players to the interests of Duke and its officials. With respect to Vice President Trask, Plaintiffs contend that Trask contributed to the fraud by reinforcing Wasiolek's advice not to procure legal representation. Plaintiffs also allege that the co-captains met with Trask after they had subsequently obtained outside counsel, and informed Trask that they had been advised by their lawyer not to discuss the events. However, Plaintiffs allege that in response, Trask told the co-captains that "anything they told him would be protected from disclosure by 'student-administrator privilege,'" and based on this representation, the co-captains provided information to Trask which Trask later "offered to and did disclose to Durham Police." (Am. Compl. ¶ 226, 228). Finally, with respect to President Brodhead, Plaintiffs contend that Brodhead contributed to the fraud by reaffirming that Duke stood in a relationship of trust with the players. In this regard, Plaintiffs allege that President Brodhead met with the co-captains and assured them of confidentiality by telling them that "'[e]verything

you say here will stay within these walls,'" even though Duke subsequently disclosed the communications to Durham Police. (Am. Compl. ¶ 286). Plaintiffs also contend that after assuring the co-captains of confidentiality and leading them to believe they could trust him, President Brodhead urged them to issue a public apology, which they did. However, Plaintiffs contend that Dean Wasiolek, Vice President Trask, and President Brodhead were all motivated by a desire to protect their own interests and the interests of Duke University above the players' interests, and that the named Defendants did not disclose this conflict of interest to Plaintiffs. Plaintiffs contend that the conduct by Wasiolek, Brodhead, and Trask was performed within the scope of their employment, was "fraudulent, willful and wanton, and malicious," and constituted constructive fraud against Plaintiffs. (Am. Compl. ¶ 557).

Under North Carolina law, a claim for constructive fraud "arises where a confidential or fiduciary relationship exists, which has led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." Forbis v. Neal, 361 N.C. 519, 528, 649 S.E.2d 382, 388 (2007) (internal quotations omitted). To state a claim for constructive fraud, the plaintiff must allege the facts and circumstances showing "(1) a relationship of trust and confidence; (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that the plaintiff was as a result injured." Strickland v. Lawrence, 176 N.C. App. 656, 663, 627 S.E.2d 301, 306 (2006); Rhodes v. Jones, 232 N.C. 547, 548-49, 61 S.E.2d 725, 726 (1950). With respect to the existence of a confidential or fiduciary relationship, a fiduciary relationship exists "in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act

in good faith and with due regard to the interests of the one reposing confidence." HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 588, 403 S.E.2d 483, 489 (1991). Considerations would include, for instance, "plaintiff's youth and inexperience, that is, his susceptibility to influence" and the manner in which "defendant won plaintiff's confidence and assumed the position of counsel to him" as well as "the particular representations made at the time the transaction complained of was consummated." Rhodes, 232 N.C. at 549, 61 S.E.2d at 726-27. As noted above, an essential requirement of a claim of constructive fraud is that "the defendant must seek his own advantage in the transaction; that is, the defendant must seek to benefit himself." Barger v. McCoy Hillard & Parks, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997).

The North Carolina Court of Appeals has held that interactions between "educators/supervisors" and medical residents do not create a fiduciary relationship, because "[a]lthough defendants were plaintiff's teachers and advisors, they also had to serve other interests" including the objectives of the institution and the interests of the public. Ryan v. Univ. of N.C. Hosps., 168 N.C. App. 729, 2005 WL 465554, at *4 (N.C. Ct. App. Mar. 1, 2005) (table opinion). Therefore, "[b]ecause defendants had divided loyalties," the court concluded that the case was "unlike other fiduciary relationships in which the fiduciary must act primarily for the benefit of another." Id. The court in Ryan also noted that "[o]ther jurisdictions have been reluctant to find fiduciary relationships in academic settings," id., citing the decision of the South Carolina Supreme Court in Hendricks v. Clemson University, in which the court "decline[d] to recognize the relationship between advisor and student as a fiduciary one." Id. (quoting Hendricks v. Clemson Univ., 578 S.E.2d 711, 716 (S.C. 2003)).

Based on these cases, this Court concludes that as a general matter, North Carolina courts would conclude that a University Dean or President clearly has loyalties to others beyond just individual students, and therefore the existence of the administrator/student relationship alone is not a fiduciary relationship and would not support a claim for breach of fiduciary duty. However, that general conclusion does not mean that an administrator cannot ever create a confidential relationship that could result in constructive fraud if the administrator abused that relationship. In the present case, Plaintiffs allege that Dean Wasiolek , who was a lawyer, gave the players advice regarding how to handle a pending criminal investigation. Most significantly, Plaintiffs allege that Dean Wasiolek specifically told the players not to consult with an outside attorney and not to tell their parents about the pending criminal investigation. Thus, Plaintiffs allege that Dean Wasiolek effectively cut the players off from receiving any other advice or counsel, and effectively told the players to trust her and not to seek other advice. Plaintiffs allege that Dean Wasiolek then directed the players to an attorney who was acting in the best interests of Duke, not the players. Finally, Plaintiffs allege that Duke and Dean Wasiolek obtained a benefit from this transaction because Dean Wasiolek was acting to protect Duke, and was able to steer the students to a lawyer who would protect Duke's interests, without regard to the best interests of the individual students. While an administrator is not ordinarily in a fiduciary or confidential relationship with the students, an administrator who is a lawyer, who discusses pending criminal charges with her students, who affirmatively cuts them off from other advice by telling them not to seek legal advice and not to tell their parents, and who then directs them to the institution's attorney in an effort to protect the institution at the students'

expense, could plausibly be liable for constructive fraud under state law. Cf. Rhodes, 232 N.C. at 549, 61 S.E.2d at 726-27 (noting that in determining the existence of a confidential relationship, considerations include "plaintiff's youth and inexperience, that is, his susceptibility to influence," the manner in which "defendant won plaintiff's confidence and assumed the position of counsel to him," and "the particular representations made at the time the transaction complained of was consummated"). Similarly with respect to Vice President Trask, although a fiduciary relationship would not ordinarily exist between the players and Trask, Plaintiffs allege that Trask created a confidential relationship by assuring the co-captains that they could confide in him even against the advice of their attorneys, based on the existence of what Trask allegedly called a "student-administrator privilege," which Plaintiffs contend Trask subsequently breached for Duke's benefit. Likewise as to President Brodhead, although no fiduciary relationship ordinarily would exist, Plaintiffs allege that Brodhead explicitly assured the co-captains of confidentiality and urged them to trust him and to issue an apology, but that Brodhead did so only for Duke's benefit and at the expense of the co-captains.

Of course, it will ultimately be Plaintiffs' burden to present sufficient evidence to prove this claim, including actual damages suffered as a result of this alleged fraud, but the Court concludes that at this stage, there is a sufficient basis alleged in the Amended Complaint to potentially state a claim for constructive fraud under North Carolina law, at least as to those team members with whom Dean Wasiolek, Vice President Trask or President Brodhead allegedly entered into a confidential relationship.[28] In addition, because Dean Wasiolek, Vice

[28] To the extent there may be factual issues regarding which team members were involved in these communications, the Court concludes that those issues are appropriately addressed at

President Trask, and President Brodhead were allegedly acting in the course and scope of their employment with Duke, this claim would also extend to Duke. However, with respect to the scope of this claim, the Court finds that Plaintiffs do not allege any basis to establish the existence of a confidential relationship with the players' parents. Therefore, the parents who are Plaintiffs in this case have not stated a claim for constructive fraud. As such, the Motion to Dismiss Count 11 will be granted with respect to the claims asserted by the Plaintiff Parents, and the claims asserted by the Plaintiff Parents will be dismissed. However, the Motion to Dismiss Count 11 will be denied at this time with respect to the claims by the Plaintiff Players against Dean Wasiolek, Vice President Trask, President Brodhead, and Duke, and those claims will go forward.

Count 12: Negligence in Voluntary Undertaking, asserted against Duke, Brodhead, Trask, and Wasiolek

In Count 12, Plaintiffs assert a claim for Negligence in a Voluntary Undertaking. As in Count 11, this claim is brought against Duke and Duke employees Brodhead, Trask, and Wasiolek. Specifically, Plaintiffs allege in Count 12 that the named Defendants "voluntarily undertook to counsel, advise, guide and assist the plaintiffs" and "acted to discourage the plaintiffs from seeking the advice of other counselors, advisors, and helpers, such as the plaintiffs' parents and independent attorneys." (Am. Compl. ¶ 559). Plaintiffs contend that having voluntarily undertaken this role, the named Defendants failed to exercise due care in advising the Plaintiffs. Finally, Plaintiffs contend that the named individual Defendants were acting within the scope of their employment when they breached the duty of care to the

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summary judgment.

Plaintiffs.

As discussed above, in any action based on negligence, "the plaintiff must allege that the defendant breached a duty owed the plaintiff, and that this breach caused actual injury to the plaintiff" and "[i]f there is no duty, there can be no liability." Prince v. Wright, 141 N.C. App. 262, 266, 541 S.E.2d 191, 195 (2000). However, even if a duty does not otherwise exist, a duty may arise if the defendant "holds itself out to perform a duty which it then breaches." Id. at 267, 541 S.E.2d at 196; see also Hendricks v. Clemson Univ., 578 S.E.2d 711, 714 (S.C. 2003) ("Ordinarily, the common law imposes no duty on a person to act. Where an act is voluntarily undertaken, however, the actor assumes the duty to use due care."). In Davidson v. University of North Carolina at Chapel Hill, the North Carolina Court of Appeals recognized a university's potential liability for a cheerleader's physical injuries, allegedly caused when the university negligently failed to provide sufficient advice or safety information prior to practice. See 142 N.C. App. 544, 558-59, 543 S.E.2d 920, 929-30 (2001). In that case, the court held that the university "voluntarily undertook to advise and educate the cheerleaders regarding safety," and this "voluntary undertaking" established a duty of care upon the University to reasonably advise and educate the squad members regarding safety. Id. at 558, 543 S.E.2d at 929. However, due to significant policy concerns, courts have generally declined to recognize a duty of care between a university advisor and a student for academic advice or guidance. See Hendricks, 578 S.E.2d at 715 (cited with approval in Ryan v. Univ. of N.C. Hosps., 168 N.C. App. 729, 2005 WL 465554, at *4 (2005) (table opinion)). For the same reasons, courts have declined to recognize claims for "educational malpractice" given the "policy concerns with recognizing an actionable

duty of care owed from educators to students: (1) the lack of a satisfactory standard of care by which to evaluate educators, (2) the inherent uncertainties of the cause and nature of damages, and (3) the potential for a flood of litigation against already beleaguered schools." Hendricks, 578 S.E.2d at 715; see also Thomas v. Charlotte-Mecklenburg Bd. of Educ., 3:06CV238-MU, 2006 WL 3257051, at *1 (W.D.N.C. Nov. 9, 2006) ("North Carolina does not have an action for educational malpractice."); Gupta v. New Britain Gen. Hosp., 687 A.2d 111, 119 (Conn. 1996) ("[C]ourts have almost universally held that claims of 'educational malpractice' are not cognizable."); Key v. Coryell, 185 S.W.3d 98, 106 (Ark. 2004) ("[A] cause of action seeking damages for acts of negligence in the educational process is precluded by considerations of public policy."); Miller v. Loyola Univ. of New Orleans, 829 So. 2d 1057, 1060 (La. Ct. App. 2002) ("The great weight of authority generally holds that the law recognizes no cause of action for 'educational malpractice', either in tort or contract."). Thus, courts have concluded that "recognizing a duty flowing from advisors to students is not required by any precedent and would be unwise, considering the great potential for embroiling schools in litigation that such recognition would create." Hendricks, 578 S.E.2d at 715; Brown v. Compton Unified Sch. Dist., 80 Cal. Rptr. 2d 171, 172 (Cal. App. 1998) ("To hold [advisors and administrators] to an actionable 'duty of care,' in the discharge of their academic functions, would expose them to the tort claims--real or imagined--of disaffected students and parents in countless numbers" and "[t]he ultimate consequences, in terms of public time and money, would burden them--and society--beyond calculation.").

The cases that do recognize potential liability based on a voluntary undertaking, within

and outside of the school setting, do so where physical injury results from alleged negligence in the undertaking. See, e.g., Davidson, 142 N.C. App. at 558-59, 543 S.E.2d at 929-30 (recognizing potential negligence claim for physical injury suffered by cheerleader during team practice based on voluntary undertaking to advise and educate squad members regarding safety); Hendricks, 578 S.E.2d at 715 (noting that negligence claims based on voluntary undertaking "have thus far been limited to situations in which a party has voluntarily undertaken to prevent physical harm, not economic injury"). The Restatement (Second) of Torts § 323 sets out the basis for a negligence claim based on a voluntary undertaking, and specifies that such a claim exists "for physical harm resulting from [the] failure to exercise reasonable care to perform [the] undertaking." Restatement (Second) of Torts § 323; see also Furek v. Univ. of Delaware, 594 A.2d 506, 520 (Del. 1991) (holding that Restatement (Second) of Torts § 323 provided the framework for considering a university's duty to a student based on the "duty owed by one who assumes direct responsibility for the safety of another through the rendering of services in the area of protection").

Based on this weight of authority, the Court concludes first that the university-student relationship alone does not impose an actionable duty of care on administrators or advisors in the discharge of their academic functions. In addition, to the extent that Plaintiffs contend that a duty of care nevertheless existed in the present case based on a "voluntary undertaking," this Court concludes that under North Carolina law, as set out above, a university may be held liable for negligence if it makes itself responsible for a students' physical safety in a school-related activity, and if the university's alleged negligence contributed to a physical injury to the student.

However, administrators and other advisors should be free to communicate and advise students without creating potential tort liability, even if that advice turns out to be misguided or inadequate. Thus, students should not be entitled to recover on a negligence claim against an administrator or university based on the giving of poor advice.[29] This is particularly true where, as here, the alleged injury resulting from the "voluntary undertaking" of the Defendants is economic injury, rather than physical injury. Therefore, the Court concludes that with respect to the present claim in Count 12 for negligence against Duke and Duke employees Wasiolek, Trask, and Brodhead for allegedly negligent advice, North Carolina would not recognize a duty of an advisor or administrator to a student that would support a claim for negligence, particularly where no physical harm results. Therefore, the Motion to Dismiss as to Count 12 will be granted, and the claims asserted in Count 12 will be dismissed.

Count 13: Negligence in Special Relationship, asserted against Duke and Brodhead

In Count 13, Plaintiffs assert a Negligence claim against Duke and President Brodhead, alleging the existence of a "special relationship" between Duke and "its varsity athletes." Plaintiffs allege that Duke receives revenues, recruitment, media attention, and prestige due to the lacrosse team, and that Duke exercises substantial control over the lacrosse players.

[29] The Court notes that this Count 12, which is based on negligence, is different from a constructive fraud claim, which is based on allegations that an administrator established a confidential relationship with a student and then deliberately abused that relationship and took advantage of the student for his or her own advantage, as discussed with respect to Count 11. The Court concludes that it is consistent with the policies outlined above to recognize potential liability in cases where administrators create and then abuse a relationship of trust and confidence for their own benefit. However, recognizing such a claim for constructive fraud is substantially different from recognizing a claim for simple negligence in providing advice to students.

Plaintiffs contend that as a result of this special relationship, Brodhead and Duke "had a duty to take reasonable steps to protect its student-athletes from harm, including threats to their liberty, personal safety, and reputation due to false allegations of rape, harassment, and a rogue criminal investigation." (Am. Compl. ¶ 569). Plaintiffs contend that Brodhead and Duke breached this duty by failing to take reasonable steps to protect the lacrosse players.

As previously discussed, "[a]ctionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law." Davidson v. Univ. of N.C. at Chapel Hill, 142 N.C. App. 544, 553, 543 S.E.2d 920, 926 (2001) (internal quotations omitted). "In cases involving omissions, negligence may arise where a 'special relationship' exists between the parties." Id. at 554, 543 S.E.2d at 926. In Davidson, in addition to addressing the issue of a "voluntary undertaking" discussed above with respect to Count 12, the North Carolina Court of Appeals also recognized the existence of a "special relationship" between the university and its athletes. This "special relationship" imposed a duty of care on the university related to that relationship, in that case with respect to injuries suffered by the athlete during practice as part of a school-sponsored team. Id. at 557, 543 S.E.2d at 928. However, the North Carolina Court of Appeals in Davidson noted that "[o]ur holding should not be interpreted as finding a special relationship to exist between a university, college, or other secondary educational institution, and every student attending the school, or even every member of a student group, club, intramural team, or organization. We agree with the conclusion reached by other jurisdictions addressing this issue that a university should not generally be an insurer of its students' safety, and that,

therefore, the student-university relationship, standing alone, does not constitute a special relationship giving rise to a duty of care." Id. at 556, 543 S.E.2d at 928; Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1368 (3d Cir. 1993) (noting that a college does not owe a general duty of care to its students because "the modern American college is not an insurer of the safety of its students" (internal quotations omitted)).

Based on this authority, the Court concludes that Duke was not in a "special relationship"' with the lacrosse team members based on their status as students, because under North Carolina law, the student-university relationship "does not constitute a special relationship giving rise to a duty of care." In addition, although Duke was potentially in a "special relationship" with lacrosse team members related to their participation in lacrosse team events, that "special relationship" would not extend outside of the lacrosse team context. Thus, any "special relationship" that may have existed in the lacrosse team context did not transform Duke into an "insurer of the safety" of team members in all other facets of student life. In this case, the allegations asserted in Count 13 are based on Duke's alleged failure to take reasonable steps to protect team members from "threats to their liberty, personal safety, and reputation due to false allegations of rape, harassment, and a rogue criminal investigation." (Am. Compl. ¶ 569). These allegations are outside of any University-related lacrosse team function and do not relate to any participation in University-sponsored lacrosse team events. As such, the allegations are outside the scope of any "special relationship" that may have existed between team members and Duke based on their status as lacrosse team members. Therefore, the Court concludes that the claims alleged in Count 13 are outside of any "special relationship" that may have existed,

and Duke did not have a "special relationship" with lacrosse team members as students generally that imposed upon Duke a duty to protect them from "threats to their liberty, personal safety, and reputation due to false allegations of rape, harassment, and a rogue criminal investigation." (Am. Compl. ¶ 569). Therefore, the Court concludes that Plaintiffs have failed to state a claim against Duke or President Brodhead for Negligence as alleged in Count 13. As such, the Motion to Dismiss Count 13 will be granted, and the claims asserted in Count 13 will be dismissed.

Count 14: Negligence for Failure to Protect, asserted against Duke

In Count 14, Plaintiffs bring a claim for Negligence against Duke, alleging that Duke negligently failed to protect the lacrosse players from harassment. Plaintiffs allege that Duke adopted certain anti-harassment policies, and that by adopting those policies, Duke voluntarily undertook a duty to exercise reasonable care in preventing harassment against the players. Plaintiffs also contend that this duty was "reinforced by Duke University's contractual and implied contractual duties to the plaintiffs, and by defendants' duties to plaintiffs as invitees." (Am. Compl. ¶ 576). Plaintiffs contend that the lacrosse players were subjected to "racial, class-based, and gender-based harassment by Duke professors, students, and employees" and that Duke negligently failed to prevent or stop the harassment. (Am. Compl. ¶ 577). Plaintiffs further contend that Duke breached its duty to Plaintiffs by intentionally inciting, participating in, promoting and ratifying the harassment.

Because this claim is based on allegations of negligence, the Court notes first that, as discussed above, there is no general duty of care owed by university administrators or advisors to protect students from harm. Specifically, as discussed above with respect to Count 13, "a

university should not generally be an insurer of its students' safety," and therefore, "the student-university relationship, standing alone, does not constitute a special relationship giving rise to a duty of care." Davidson v. Univ. of N.C. at Chapel Hill, 142 N.C. App. 544, 556, 543 S.E.2d 920, 928 (2001). Therefore, for the same reasons set out above with respect to Count 13, the Court concludes that Plaintiffs were not in a "special relationship" with Duke as students, and therefore Duke did not have a duty to protect them from harm.

Plaintiffs nevertheless contend that they have stated a claim for negligence in Count 14 because Duke owed the students a duty of care to prevent harassment based on Duke's adoption of an anti-harassment policy, which Plaintiffs contend represented a "voluntary undertaking." However, as discussed above with respect to Count 12, a university may create a duty based on a "voluntary undertaking" if the university makes itself responsible for a students' physical safety in a school-related activity, and if the alleged negligence contributed to a physical injury to the student. However, based on the allegations in the Amended Complaint, the anti-harassment policy could not be considered a "voluntary undertaking" by which Duke assumed responsibility for preventing all harassment on campus. In addition, as discussed with respect to Count 12, policy considerations weigh against recognizing an "education malpractice" claim for failure to properly enforce student policies, given the risk of "embroiling schools in litigation" over enforcement of student policies and bulletins. Therefore, the Court concludes that the anti-harassment policy is not a "voluntary undertaking" that would impose a duty upon Duke that would support a negligence claim in this case, particularly where no physical harm results.

Moreover, to the extent that Plaintiffs contend that the anti-harassment policy imposed

"contractual duties" that would support a duty under tort law, the Court concludes that the anti-harassment policy is not a binding contract or obligation imposed upon Duke, as discussed below with respect to Count 15. The North Carolina Court of Appeals has held that when the existence of a duty is alleged based on a provision in a policy or manual that was not expressly included in a contract, the plaintiff "cannot establish a legal claim to having been [misled] based on the manuals." Rucker v. First Union Nat'l Bank, 98 N.C. App. 100, 104, 389 S.E.2d 622, 625 (1990); see also Vurimindi v. Fuqua Sch. of Bus., No. 10-234, 2010 WL 3419568, at *6-7 (E.D. Pa. Aug. 25, 2010) (holding, under North Carolina law, that a student could not bring a claim against a university for breach of contract for violation of the student bulletin based on failure to prevent harassment by classmates, and further concluding that this same principle would apply even if the claim were cast in tort, since North Carolina would not recognize an educational malpractice claim). The Fourth Circuit has also noted the importance of maintaining the distinction between tort and contract law, noting that "North Carolina has recognized an 'independent tort' arising out of breach of contract only in 'carefully circumscribed' circumstances." Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 346 (4th Cir. 1998). Considering these issues in the present case, the Court concludes that, as discussed with respect to Count 15 below, the anti-harassment policy does not impose any contractual obligations on Duke, and tort law should not be used to create a contract-based claim for economic damages when no contract exists. Therefore, the Court concludes that the provisions of the anti-harassment policy do not impose a contractual duty on Duke that is enforceable in tort law.

Finally, to the extent that Plaintiffs bring their claim in Count 14 based on their status as "invitees," the Court notes that the law imposes a duty on a landowner to exercise reasonable care in the maintenance of his premises, including giving warning of hidden hazards of which the landowner has express or implied knowledge. Thomas v. Weddle, 167 N.C. App. 283, 289-90, 605 S.E.2d 244, 248-49 (2004); Barber v. Presbyterian Hosp., 147 N.C. App. 86, 89, 555 S.E.2d 303, 306 (2001). However, none of the allegations regarding the claim alleged in Count 14 relate to any obligation or duty that Duke owed as a landowner. Therefore, the Court concludes that with respect to the claims alleged in Count 14, Plaintiffs have failed to allege any basis to establish that Duke was under an obligation to prevent or stop the harassment by others.

For all of these reasons, the Court concludes that Plaintiffs have failed to allege a sufficient basis to state a claim for negligence in Count 14. Therefore, the Motion to Dismiss Count 14 will be granted, and the claims asserted in Count 14 will be dismissed.

Count 15: Breach of Contract, asserted against Duke

In Count 15, Plaintiffs bring a claim for breach of contract against Duke. As the basis for this claim, Plaintiffs contend that Duke has adopted certain policies, as set out in the Duke Undergraduate Bulletin, including a "formal, written policy strictly forbidding harassment of any student 'for any reason'" and a policy providing that "'[a]ccused students can expect a presumption of innocence throughout the disciplinary process unless found responsible through a fair and impartial hearing, and will be treated with respect throughout the process.'" (Am. Compl. ¶ 444, 593). Plaintiffs contend that the team members enrolled and paid tuition at Duke

"in reliance on the understanding and expectation that Duke University would implement and enforce these and other promises and polices made in its Bulletin, Faculty Handbook, and other relevant documents." (Am. Compl. ¶ 586). Plaintiffs contend that an express or implied contract was therefore formed between Duke and Plaintiffs, and that Duke materially breached the contract by violating and failing to enforce the policies. Specifically, Plaintiffs contend that Duke administrators made statements that violated the policy by failing to preserve the presumption of innocence. In addition, Plaintiffs contend that the actions and statements by faculty members and other students, including the advertisement placed by the 88 faculty members and the organized protests on and off campus, violated the anti-harassment policy. Plaintiffs contend that the lacrosse players were subjected to harassment based on "discrimination and bias against the lacrosse players on the basis of their race, gender, and class," and Duke made no effort to enforce the anti-harassment policy against them, even for in-class harassment. (Am. Compl. ¶ 447, 589). As a separate basis for the alleged breach of contract claim, Plaintiffs also contend that the team members enrolled and paid tuition at Duke "in reliance on the understanding that they would have the opportunity to play lacrosse, to compete for the ACC and national championships, and to play lacrosse for Coach Pressler." (Am. Compl. ¶ 591). Plaintiffs contend that this understanding created an express or implied contract, and that Duke breached the contract by cancelling the lacrosse season and forcing Coach Pressler to resign "without valid and legitimate justification." (Am. Compl. ¶ 591).

Under North Carolina law, "[t]he elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." Parker v. Glosson,

182 N.C. App. 229, 232, 641 S.E.2d 735, 737 (2007) (internal quotations omitted). "No contract is formed without an agreement to which at least two parties manifest an intent to be bound." Id.; see also Elliott v. Duke Univ., Inc., 66 N.C. App. 590, 595, 311 S.E.2d 632, 636 (1984) (noting that a contract does not exist if "one party simply believes that a contract exists, but there is no meeting of the minds."); Horton v. Humble Oil & Ref. Co., 255 N.C. 675, 679, 122 S.E.2d 716, 719 (1961) (noting that a contract must be "definite and certain or capable of being made so" such that the parties "assent to the same thing, in the same sense"). Thus, a contract exists only if there is mutual intent to contract and an agreement on sufficiently definite terms to be enforceable. In the educational context, the North Carolina Court of Appeals has recognized that a student can, in some circumstances, bring a claim against a college or university for breach of contract. See Ryan v. Univ. of N.C. Hosps., 128 N.C. App. 300, 301, 494 S.E.2d 789, 790 (1998) (citing Ross v. Creighton Univ., 957 F.2d 410, 416 (7th Cir. 1992) ("[T]he basic legal relation between a student and a private university or college is contractual in nature." (internal quotations omitted))). However, the plaintiff must "point to an identifiable contractual promise that the [defendant] failed to honor" and the claim must not involve "inquiry into the nuances of educational processes and theories." Id. at 302, 494 S.E.2d at 791 (internal quotations omitted); Ross v. Creighton Univ., 957 F.2d 410, 417 (7th Cir. 1992) (noting a potential claim if, for example, "the defendant took tuition money and then provided no education, or alternately, promised a set number of hours of instruction and then failed to deliver."). Thus, "not all aspects of the student/university relationship are subject to a contract remedy," and it is a plaintiff's obligation to point to a mutual agreement with sufficiently definite

terms or obligations. See Hendricks v. Clemson Univ., 578 S.E.2d 711, 716 (S.C. 2003).

Applying these rules in the academic context, courts in this district have repeatedly concluded that a university's academic bulletins and policies cannot be the basis of a breach of contract claim unless the bulletin or policy provision is a specific, enforceable promise that is incorporated into the terms of a contract between the university and the student. See Love v. Duke Univ., 776 F. Supp. 1070, 1075 (M.D.N.C. 1991) (finding that the academic bulletin was not a binding contract between a student and the university), aff'd, 959 F.2d 231; Giuliani v. Duke Univ., No. 1:08CV502, 2010 WL 1292321, *7-8 (M.D.N.C. Mar. 30, 2010) (dismissing breach of contract claim where the student did not allege the existence of a contract that specifically incorporated the university's handbooks and policy manuals into a contract); Mercer v. Duke Univ., No. 1:97CV959 (M.D.N.C. Sept 28, 2000) (concluding that nondiscrimination policy in the student handbook did not constitute a contract between a student-athlete and the university); see also Tibbetts v. Yale Corp., 47 Fed. Appx. 648, 656 (4th Cir. 2002) (concluding that provisions of the Yale Student Handbook were "not a contract, but merely a university policy promoting free expression"); Vurimindi v. Fuqua Sch. of Bus., No. 10-234, 2010 WL 3419568, at *6 (E.D. Pa. Aug. 25, 2010) (finding that student had no cognizable breach of contract claim under North Carolina law against a university for failure to prevent harassment by classmates, because "school publications are not generally a valid source of contract" and "[a]ttending a college or university does not warrant a student to file a breach-of-contract suit whenever he or she feels that the experience has not lived up to broad expectations that he or she may have developed after reading materials promulgated by the school's administrators,

admissions office, or public relations department"); Gally v. Columbia Univ., 22 F. Supp. 2d 199, 208 (S.D.N.Y. 1998) (holding that the fact that a professor "may have been harsh or even belittling to plaintiff does not create a valid cause of action" for breach of a non-discrimination policy in the Code of Conduct, since such claims would "open the floodgates to a slew of claims by students" and are "better left to the sound handling of school administrators"); cf. Ryan, 128 N.C. App. at 302, 494 S.E.2d at 791 (allowing breach of contract claim to proceed based on identifiable contractual provision specifically incorporated into an agreement regarding employment and medical residency).

In the present case, Plaintiffs do not allege any facts that would indicate that any provision of the Bulletin or handbook was incorporated into a binding contract. Instead, Plaintiffs point only to the academic Bulletin itself. However, there is no basis to conclude that those provisions of the academic Bulletin represented a mutual agreement or intent to be bound. In particular with respect to the anti-harassment policy, Plaintiffs allege that the academic Bulletin provided that "'[h]arassment of any individual for any reason is not acceptable at Duke University.'" (Am. Compl. ¶ 584). However, there are no factual allegations to support the contention that this policy created any specific, enforceable contractual obligations upon Duke. Instead, this provision reflects a general policy against harassment, but without any indication of any mutual agreement between Duke and the students, and without any indication of any intent by Duke to be bound to any particular obligation or course of conduct based on this general policy language. With respect to the presumption of innocence during disciplinary proceedings, Plaintiffs allege that the academic Bulletin provided that "'[a]ccused students can

expect a presumption of innocence throughout the disciplinary process unless found responsible through a fair and impartial hearing, and will be treated with respect throughout the process.'" (Am. Compl. ¶ 593). However, this provision does not set out any sufficiently definite terms or obligations to be enforceable, nor does it represent a mutual agreement between Duke and the students or any intent by Duke to be bound thereby. Moreover, even if this provision could be viewed as creating a binding obligation to follow given procedures during the disciplinary process, that obligation would not apply in the present case because Plaintiffs do not allege that the Plaintiff Players in this case were ever subject to the student disciplinary process. Thus, Plaintiffs do not set out any provision of the Bulletin or any other policy that could be viewed as creating any mutual agreement between Duke and the students or any intent by Duke to be bound, or any provision that would impose any specific obligation on Duke. Thus, Plaintiffs have failed to allege the existence of any such specific, enforceable promise supported by mutual assent and an intent to be bound. Therefore, with respect to Plaintiffs' contention that the student Bulletin and other student policies created an express or implied contract, the Court concludes that the facts as alleged in the Amended Complaint do not sufficiently allege the existence of a valid contract that would support the claim in Count 15 for breach of contract.

Similarly, with respect to Plaintiffs' contention that the team members enrolled and paid tuition at Duke "in reliance on the understanding that they would have the opportunity to play lacrosse, to compete for the ACC and national championships, and to play lacrosse for Coach Pressler," there is no allegation of any specific promise by Duke to maintain a lacrosse program or retain Coach Pressler as the coach, and there is no factual basis alleged to support the

conclusion that any of Plaintiffs' "understandings" created a valid, binding contract between Plaintiffs and Duke. The factual allegations do not establish mutual agreement or intent to be bound, nor do they indicate any sufficiently definite terms to constitute a contractual obligation. Cf. Giuliani, 2010 WL 1292321, at *6 (noting that "even contractual athletic scholarships do not ensure a student's right to play a sport but only constitute a promise by the university to provide the student with financial assistance in exchange for the student's maintenance of athletic eligibility"). Therefore, the Court concludes that Plaintiffs have failed to state a claim for Breach of Contract as set out in Count 15. As such, the Motion to Dismiss Count 15 will be granted, and that claim asserted in Count 15 will therefore be dismissed.

Count 16: Tortious Breach of Contract, asserted against Duke

In Count 16, Plaintiffs incorporate their breach of contract claims set out in Count 15 above, and further allege that "these material breaches were accompanied by aggravating and bad-faith actions (including but not limited to conspiracy, fraud, and/or misrepresentation as described above)" that are "sufficient to constitute tortious breach of contract." (Am. Compl. ¶ 599).

Under North Carolina law, to establish a claim for tortious breach of contract, a plaintiff must establish a breach of contract that is accompanied by "an identifiable tortious act." Cash v. State Farm Mut. Auto. Ins. Co., 137 N.C. App. 192, 200, 528 S.E.2d 372, 377 (2000). To withstand a motion to dismiss, a plaintiff must sufficiently plead a breach of contract action and "must also allege a tort which partakes some element of aggravation, along with the breach." Id. "Aggravation includes fraud, malice, such a degree of negligence as indicates a reckless

indifference to consequences, oppression, insult, rudeness, caprice [and] willfulness." Id. at 201, 528 S.E.2d at 377 (internal quotations omitted).

In the present case, Plaintiffs have failed to sufficiently plead a breach of contract action, as discussed above with respect to Count 15. Thus, the claim in Count 16 for tortious breach of contract, which rests on the same underlying breach of contract claim, also fails to state a claim.[30] Therefore, the Motion to Dismiss will be granted as to Count 16, and this claim will be dismissed.

Count 17: Promissory Estoppel, asserted against Duke

In Count 17, Plaintiffs originally asserted a claim for Promissory Estoppel against Duke. However, that claim has been withdrawn by Plaintiffs and is not included in the Amended Complaint. Therefore, Count 17 will be deemed dismissed.

Count 18: Intrusion upon Seclusion, asserted against Duke, Brodhead, Trask, Lange, Burness, and Moneta

In Count 18, Plaintiffs assert a claim against Duke and Duke officials Brodhead, Trask, Lange, Burness, and Moneta for a state tort denominated as "Intrusion Upon Seclusion, Solitude and Private Affairs." As the basis of this claim, Plaintiffs allege that the named Defendants "intentionally intruded upon, and caused intrusions upon, both physically and otherwise, the solitude or seclusion of plaintiffs and on plaintiffs' private affairs or concerns." (Am. Compl. ¶ 607). Plaintiffs contend that the named Defendants did so by "physical invasions and incitements of physical invasions on the plaintiffs' homes and private residences; participation

[30] Moreover, even if Plaintiffs could state a claim for breach of contract, the Court concludes that Plaintiffs have failed to allege a sufficient factual basis to state a claim for an aggravated breach by Duke.

in and incitement of loud, obstreperous, threatening, and humiliating protests at plaintiffs' residences and on campus; subjecting plaintiffs to physical harassment in their homes and on campus by media reporters, camera crews, and protestors; subjecting plaintiffs to public harassment, humiliation, and obloquy in their classes and on campus; subjecting plaintiffs to uncounseled, surprise interrogations by the Durham Investigators in their private residences and dorms; and other highly offensive intrusions." (Am. Compl. ¶ 608).

The North Carolina Supreme Court has identified four types of claims for invasion of privacy: "(1) appropriation, for the defendant's advantage, of the plaintiff's name or likeness; (2) intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (3) public disclosure of embarrassing private facts about the plaintiff; and (4) publicity which places the plaintiff in a false light in the public eye." Renwick v. News & Observer Publ'g Co., 310 N.C. 312, 322, 312 S.E.2d 405, 411 (1984). However, North Carolina does not recognize the third and fourth types of these claims. See id. at 323, 312 S.E.2d at 412; Miller v. Brooks, 123 N.C. App. 20, 25, 472 S.E.2d 350, 354 (1996); see also Sabrowski v. Albani-Bayeux, Inc., 1:02CV00728, 2003 WL 23018827, at *10 (M.D.N.C. Dec. 19, 2003). With respect to the first type of claim, Plaintiffs in this case do not assert a claim for appropriation of name or likeness. Therefore, Plaintiffs in this case are attempting to assert the second type of claim, intrusion upon seclusion. North Carolina courts have held that intrusion upon seclusion is "the intentional intrusion physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . [where] the intrusion would be highly offensive to a reasonable person." Toomer v. Garrett, 155 N.C. App. 462, 479, 574 S.E.2d 76, 90 (2002) (internal quotations omitted). The tort "'does not

depend upon any publicity given a plaintiff or his affairs but generally consists of an intentional physical or sensory interference with, or prying into, a person's solitude or seclusion or his private affairs.' Specific examples of intrusion include 'physically invading a person's home or other private place, eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, unauthorized prying into a bank account, and opening personal mail of another.'" Burgess v. Busby, 142 N.C. App. 393, 405-06, 544 S.E.2d 4, 11 (2001) (internal citation omitted) (quoting Hall v. Post, 85 N.C. App. 610, 615, 355 S.E.2d 819, 823 (1987), rev'd on other grounds, 323 N.C. 259, 372 S.E.2d 711 (1988)).

With respect to the claim alleged in Count 18, Plaintiffs assert this claim against President Brodhead, Vice President Trask, Provost Lange, Vice President Burness, and Vice President Moneta. However, Plaintiffs do not allege any factual basis to assert a plausible claim that any of these named Defendants physically invaded Plaintiffs' residences or directly engaged in any conduct that would constitute an intrusion upon seclusion under state law. Instead, Plaintiffs base this claim on the protests that occurred at Plaintiffs' residences and on campus, the media coverage, and the harassment by other students and faculty members on and off campus. However, Plaintiffs do not state a plausible claim that any of the named Defendants themselves participated in the protests or other alleged conduct, or otherwise physically invaded upon Plaintiffs' privacy or seclusion. Plaintiffs generally contend that other students and faculty members engaged in this conduct, but there is not a sufficient basis to hold the named Defendants responsible for an intrusion upon seclusion allegedly perpetrated by other students, faculty members, or members of the media. Therefore, Plaintiffs have failed to state a claim

against President Brodhead, Vice President Trask, Provost Lange, Vice President Burness, and Vice President Moneta for intrusion upon seclusion. Likewise with respect to the claim for intrusion upon seclusion against Duke itself, Plaintiffs cannot state a claim for intrusion upon seclusion based on actions by third parties such as students or members of the media.

In their Response Brief, Plaintiffs contend that Duke is responsible for intrusion upon seclusion because unidentified Duke officials provided Gottlieb with keys to the home at 610 N. Buchanan. However, the Amended Complaint also alleges that the "intrusion" at 610 N. Buchanan was pursuant to a search warrant not challenged here, and that the residents cooperated fully, and voluntarily assisted, during the search. Therefore, the alleged conduct, undertaken pursuant to a search warrant, does not state a claim for intrusion upon seclusion. Plaintiffs also contend that Duke subjected the team members to "uncounseled, surprise interrogations by the Durham Investigators in their private residences and dorms." (Am. Compl. ¶ 608). However, Plaintiffs do not allege that any Duke Defendant entered into any students' residence or dorm room. Instead, this allegation relates to conduct by the Durham Investigators. Moreover, Plaintiffs fail to provide any details regarding this alleged intrusion, including any allegations as to whose residence or dorm room was purportedly invaded or what specific conduct by any Duke employee constituted an intrusion upon seclusion.[31] Therefore, the Court concludes that Plaintiffs have failed to state a claim for intrusion upon seclusion against Duke or the other named Defendants related to either of these alleged incidents.

[31] Plaintiffs also contend that the release of the key card information could be an intrusion upon seclusion because the release would violate FERPA, but the Court has concluded that any alleged FERPA violation would not create a private right of action, as discussed in Count 20.

Finally, Plaintiffs contend that various Duke faculty members, who are not named as defendants in this case, intruded upon Plaintiffs' seclusion, and that the faculty members were operating in the scope of their employment, so that Duke is therefore responsible for their tortious conduct. However, it is unclear which specific faculty members Plaintiffs contend intruded upon their seclusion. To the extent that Plaintiffs contend that faculty members engaged in public protests, such participation in a public protest would not constitute intrusion upon seclusion under state law,[32] nor is there a sufficient basis alleged that would support the contention that faculty members engaging in off-campus protests were operating in the scope of their employment with Duke. To the extent that the claim is based on alleged confrontations between faculty members and team members during class or on campus, none of those allegations would constitute intrusion upon seclusion under state law. Moreover, any claim must be sufficiently definite to provide Defendants with notice of the basis of the claim, and to the extent that Count 18 is based on acts of faculty members alleged throughout the Amended Complaint, the Court cannot determine which acts by which faculty members are intended to form the basis of this claim for intrusion upon seclusion, and as such, there is no basis to find a plausible claim against Duke based on vicarious liability. Therefore, although the Amended Complaint alleges conduct by faculty members that is certainly questionable, those allegations do not state a claim against Duke or any of the named Defendants for intrusion upon seclusion. As such, the Motion to Dismiss Count 18 will be granted, and the claim asserted in Count 18 will be dismissed.

[32] Moreover, those activities would potentially be subject to First Amendment protection in any event.

Count 19: Negligent Supervision, asserted against Duke, Brodhead, Moneta, Lange, and Trask

In Count 19, Plaintiffs bring claims against Duke and Duke officials Brodhead, Moneta, Lange, and Trask for Negligent Supervision of Duke professors and employees. As the basis for this claim, Plaintiffs contend that employees of Duke committed tortious acts of fraud, intentional and negligent infliction of emotional distress, harassment, nuisance, intrusion upon seclusion, defamation, and other torts against Plaintiffs, and that Duke and the named Defendants knew of the ongoing tortious conduct and "took no action to stop, prevent, or sanction them, but rather condoned, approved, and ratified the incidents of tortious conduct." (Am. Compl. ¶ 616).

As discussed above with respect to Count 3, "North Carolina recognizes the existence of a claim against an employer for negligence in employing or retaining an employee whose wrongful conduct injures another." Hogan v. Forsyth Country Club, Co., 79 N.C. App. 483, 494, 340 S.E.2d 116, 123 (1986). Thus, under North Carolina law, an employer may be held liable for the tortious acts of its employees, based on either a theory of (1) *respondeat superior* if the employee was acting in the scope of his or her employment, or (2) negligent supervision if, "prior to the [tortious] act, the employer knew or had reason to know of the employee's incompetency" even if "the act of the employee either was not, or may not have been, within the scope of his employment" Id. at 495, 340 S.E.2d at 124.

In considering this claim in the present case, the Court notes first that this claim is at most a claim against Duke as the employer, not against the individual Defendants Brodhead, Moneta, Lange, and Trask. Cf. Foster v. Crandell, 181 N.C. App. 152, 170-71, 638 S.E.2d 526,

538-39 (2007) (noting that liability for negligent hiring or retention would extend only to an employer who employed an incompetent employee either as an employee or independent contractor, not to co-employees); Ostwalt v. Charlotte-Mecklenburg Bd. of Educ., 614 F. Supp. 2d 603, 609 (W.D.N.C. 2008) ("North Carolina courts have determined that no claim for negligent supervision lies when the Defendant is not the employer of the individual who commits the tortious act."). Therefore, to the extent that Count 19 is asserted against those individual Defendants, the claim will be dismissed as to those individual Defendants.

With respect to Defendant Duke, the Court notes that the underlying tortious conduct is "an essential element of this claim." Kimes v. Lab. Corp. of Am., Inc., 313 F. Supp. 2d 555, 569 (2004). In this case, the Court has allowed the potential claims against Duke officials for fraud and constructive fraud in Counts 8 and 11 to go forward. Those claims were asserted against Duke based on Plaintiffs' contentions that the Duke officials were acting within the scope of their employment, and under the North Carolina law cited above, Plaintiffs may alternatively state a claim against Duke for negligent supervision with respect to those claims. Therefore, because those tort claims are going forward against Duke officials, and because Plaintiffs have alleged claims against Duke based on both *respondeat superior* and negligent supervision, the claims asserted here in this Count against Duke will go forward.

As such, the Motion to Dismiss Count 19 will be granted in part and denied in part. Specifically, to the extent that Count 19 is asserted against the individual Defendants Brodhead, Moneta, Lange, and Trask, the Motion to Dismiss will be granted, and the claims will be dismissed as to those individual Defendants. However, the Motion to Dismiss will be denied

as to Count 19 with respect to Duke based on the underlying torts alleged in Counts 8 and 11, and the claims asserted in Count 19 against Duke will go forward.

Count 20: 42 U.S.C. § 1983 Claim for Fourth Amendment Violation related to Key Card Reports, asserted against Duke, Hendricks, Drummond, Graves, Dean, Gottlieb, Himan, Wilson, and the City

In Count 20, Plaintiffs assert the first of several claims brought pursuant to 42 U.S.C. § 1983, which prohibits any person, acting under color of state law, from depriving an individual of their rights secured under the Constitution and laws of the United States. In Count 20, Plaintiffs bring a § 1983 claim alleging that the named Defendants, acting under color of state law, violated their Fourth Amendment rights by disclosing their key card reports. Plaintiffs contend that they had a reasonable expectation of privacy in "their comings, goings, purchases, and other card-swipe transactions on the Duke campus," and that this expectation of privacy was supported by federal law and by Duke's privacy policy. (Am. Compl. ¶ 620). Plaintiffs contend that Gottlieb, Himan, Wilson, and the City violated Plaintiffs' Fourth Amendment rights based on the "Durham Investigators' use of the key card information" and based on a conspiracy and abuse of process designed to conceal that use.[33] (Am. Compl. ¶ 621). Plaintiffs also contend that Duke officials disclosed the key card reports to the Durham Investigators, as alleged in Count 8, and that this disclosure violated their Fourth Amendment rights. Finally, Plaintiffs contend that the Duke Police (Graves and Dean) were acting under color of state law

[33] This claim is brought against Defendants Gottlieb and Himan in both their individual and official capacities. However, Plaintiffs in their Responses agree that to the extent that the claim is brought against Gottlieb and Himan in their official capacities, such "official capacity" claims are duplicative of the claims against the City. Therefore, the Court considers the claims against Gottlieb and Himan only as "individual capacity" claims, since all "official capacity" claims will be treated as claims against the City.

when the disclosure was made, and that Duke, Hendricks, and Drummond were "acting in concert" with the Durham Investigators and were "willing participants in this joint activity."

"The Fourth Amendment guarantees '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures' by governmental actors. . . . [but] not every observation made by a law enforcement officer . . . constitutes a search . . . . Rather, '[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.'" United States v. Taylor, 90 F.3d 903, 908 (4th Cir. 1996) (internal citations omitted). Thus, "application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." United States v. Knotts, 460 U.S. 276, 280, 103 S. Ct. 1081, 1084-85, 75 L. Ed. 2d 55 (1983) (quotations omitted). As such, there is no violation of the Fourth Amendment if Plaintiffs did not have a reasonable expectation of privacy in the area or item searched.

The Supreme Court has held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." Id. at 281-82, 103 S. Ct. at 1085 (noting that when a person has "traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination"). In addition, when "[v]isual surveillance from public places [along the route] . . . would have sufficed to reveal all of these facts . . . . [t]he fact that the officers . . . relied . . . on the use of [a] beeper to signal the presence of [the] automobile to the

police receiver, does not alter the situation." Id. at 282, 103 S. Ct. at 1086 ("Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case."). The Supreme Court has likewise held that an individual has no expectation of privacy in telephone calls made or received because "'[w]hen he used his phone, [the individual] voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business. In so doing, [the individual] assumed the risk that the company would reveal to police the numbers he dialed.'" Id. at 283, 103 S. Ct. at 1086 (quoting Smith v. Maryland, 442 U.S. 735, 744-45, 99 S. Ct. 2577, 2582-83, 61 L. Ed. 2d 220 (1979) (finding no expectation of privacy in phone numbers dialed, because by making a call, the individual voluntarily conveyed to the phone company information that the company had facilities for recording and that it was free to record)). Similarly, there is no reasonable expectation of privacy in records provided to a bank because "[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government," and the Bank Secrecy Act, which imposes certain obligations on banks, does not create a Fourth Amendment expectation of privacy that would not otherwise exist. United States v. Miller, 425 U.S. 435, 442-43, 96 S. Ct. 1619, 1623-24, 48 L. Ed. 2d 71 (1976). Thus, no reasonable expectation of privacy exists in public comings and goings or other similar information that can be visually observed from a public place, nor is there a reasonable expectation of privacy in information submitted to a third party, even if the "third party" is a telephone company's automated system.

In the present case, Plaintiffs allege a Fourth Amendment violation based on the disclosure of their "key card" reports. However, based on the facts alleged in the Amended Complaint, those reports document only the team members' public comings and goings and other similar, public uses of their Duke Key Card. Therefore, the team members would not have a reasonable expectation of privacy in their key card reports, since the reports simply contain information that would have been publicly viewable. In addition, the key card uses were transmitted to a third party - Duke University. Therefore, because the use of the key card was voluntarily transmitted to Duke through the use of the key card system, team members would not have a reasonable expectation of privacy in the use of their key card reports. Finally, the Court notes that Plaintiffs contend that the Family Educational Rights and Privacy Act ("FERPA") creates a reasonable expectation of privacy. The provisions of FERPA, 20 U.S.C. § 1232g, "prohibit the federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized persons." See Gonzaga Univ. v. Doe, 536 U.S. 273, 276, 122 S. Ct. 2268, 2271, 153 L. Ed. 2d 309 (2002). However, the Supreme Court has clearly held that there is no private right of action under FERPA, and that plaintiffs cannot use § 1983 to bring a private cause of action for alleged FERPA violations. See id. at 287-88, 290, 122 S. Ct. at 2277-78, 2279 (noting that FERPA lacks "the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights" and only speaks in terms of "institutional policy and practice" and "therefore create[s] no rights enforceable under § 1983"). Therefore, the Court concludes that in the present case, there is no basis to conclude that FERPA creates a reasonable expectation of privacy that would support a § 1983 claim for

a FERPA violation. As such, the Court in this instance finds that there was no reasonable expectation of privacy in the key card reports, and Plaintiffs' § 1983 claim for a Fourth Amendment violation relating to the release of the key card reports in Count 20 will be dismissed.[34]

Count 21: 42 U.S.C. § 1983 Claim for Fourth Amendment Violation related to DNA Samples, asserted against Duke, Duke Health, Arico, Levicy, Gottlieb, Himan, Wilson, and the City[35]

In Count 21, Plaintiffs bring a § 1983 claim for alleged violation of the Plaintiff Players' Fourth Amendment rights based on the Non-Testimonial Order ("NTO") that required them to provide DNA samples to the Durham Investigators (Gottlieb, Himan, and Wilson). Plaintiffs contend that the team members had a reasonable expectation of bodily privacy in the provision of DNA samples, and that the DNA samples were "compelled from the plaintiffs pursuant to

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[34] The Court also notes that this § 1983 claim could not be asserted against any person or entity who was not acting "under color of state law." In this regard, the Duke Defendants contend that they are not proper defendants on this claim because they were not acting under color of state law. "[T]he under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how . . . wrongful.'" American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50, 119 S. Ct. 977, 985, 143 L. Ed. 2d 130 (1999) (citation omitted). This issue is discussed in greater detail with respect to Count 22. Based on that discussion, the Court agrees that the claims asserted in this Count would also be subject to dismissal to the extent that certain of the named Defendants were not acting under color of state law.

[35] This claim is brought against Defendants Gottlieb and Himan in both their individual and official capacities. However, Plaintiffs in their Responses agree that to the extent that the claim is brought against Gottlieb and Himan in their official capacities, such "official capacity" claims are duplicative of the claims against the City. Therefore, the Court considers the claims against Gottlieb and Himan only as "individual capacity" claims, since all "official capacity" claims will be treated as claims against the City. In addition, to the extent Plaintiffs are attempting to assert a claim against the City, that claim must satisfy the provisions of Monell as discussed in Count 26. Finally, to the extent that Plaintiffs refer to this claim in their Response to the Durham Supervisors' Motion to Dismiss, the Court concludes that all of the § 1983 "supervisory liability" claims are alleged in Count 27 and will be addressed there.

a false and overbroad application for a non-testimonial identification order that violated their Fourth Amendment rights." (Am. Compl. ¶ 629). Plaintiffs bring this claim against Gottlieb, Himan, Wilson, and the City, alleging that the NTO application was prepared by the Durham Investigators, who were acting under color of state law and who knowingly provided false and misleading information in support of the NTO application. Plaintiffs also bring this claim against Duke, Duke Health, Arico, and Levicy, alleging that Levicy was "acting in concert" with the Duharm Investigators in providing false and miseading information for the NTO application, and that Duke, Duke Health, and Arico ratified and condoned Levicy's actions.

""The Fourth Amendment [applicable to the states through the Fourteenth Amendment] prohibits law enforcement officers from making unreasonable seizures, and seizure of an individual effected without probable cause is unreasonable."' Miller v. Prince George's County, 475 F.3d 621, 627 (4th Cir. 2007) (quoting Brooks v. City of Winston-Salem, 85 F.3d 178, 183 (4th Cir. 1996)). Moreover, when police officers effect a "seizure" of a person pursuant to a warrant, the officers are still liable for violations of the Fourth Amendment if the officers "intentionally lie in warrant affidavits, or recklessly include or exclude material information known to them." Id. at 630 (citing Franks v. Delaware, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2675, 57 L. Ed. 2d 667 (1978) (holding that a defendant in a criminal proceeding may raise a constitutional challenge to searches conducted pursuant to a warrant if "a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" and if the offending information was essential to the probable cause determination)). Thus, "[a]n investigation need not be perfect, but an officer who intentionally

or recklessly puts lies before a magistrate, or hides facts from him, violates the Constitution unless the untainted facts themselves provide probable cause." Id. at 630-31; Brooks v. City of Winston-Salem, 85 F.3d 178, 183-84 (4th Cir. 1996). With regard to omissions, the Fourth Circuit has noted that "[a]n affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation," but a facially sufficient affidavit is still subject to challenge if it includes "omissions that are *designed to mislead*, or that are made in *reckless disregard of whether they would mislead*, the magistrate." United States v. Colkley, 899 F.2d 297, 300-01 (4th Cir. 1990) (emphasis in original). In this context, "'reckless disregard' can be established by evidence that an officer acted 'with a high degree of awareness of [a statement's] probable falsity,' that is, 'when viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported.'" Miller, 475 F.3d at 627 (quoting Wilson v. Russo, 212 F.3d 781, 788 (3d Cir. 2000)). Likewise, as to omissions, "'reckless disregard' can be established by evidence that a police officer 'failed to inform the judicial officer of facts [he] knew would negate probable cause.'" Id. (quoting Beauchamp v. City of Noblesville, Inc., 320 F.3d 733, 743 (7th Cir. 2003)). However, "[a] plaintiff's 'allegations of negligence or innocent mistake' by a police officer will not provide a basis for a constitutional violation." Id. at 627-28 (quoting Franks v. Delaware, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667).

In this case, Plaintiffs allege that the Plaintiff Players' Fourth Amendment rights were violated when they were compelled to appear at the Durham Police Department and provide DNA samples, submit to examinations for injuries, and sit for photographing pursuant to the

NTO. (Am. Compl. ¶ 214, 628-34). The NTO was issued pursuant to North Carolina General Statute § 15A-271 to § 15A-282. Under these statutes, an NTO may be issued by a judge upon an affidavit sworn to before the judge establishing "[t]hat there is 'probable cause' to believe that a felony offense . . . has been committed[,] that there are 'reasonable grounds' to suspect that the person named or described in the affidavit committed the offense[,] and that the results of specific nontestimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense." N.C. Gen. Stat. § 15A-273. An NTO includes "identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, . . . photographs, and lineups or similar identification procedures requiring the presence of a suspect." N.C. Gen. Stat. § 15A-271.

In their Motions to Dismiss, Defendants contend that this NTO process itself authorizes a search and seizure of citizens on "reasonable suspicion" rather than "probable cause" and that such a showing is sufficient under the Fourth Amendment. Defendants further contend that the NTO in the present case was issued by a state magistrate judge upon a finding of "probable cause" to believe that a felony offense had been committed and "reasonable grounds" to suspect that the individuals named in the affidavit committed the offense, and that this Court should defer to the magistrate judge's finding. See Simmons v. Poe, 47 F.3d 1370, 1378 (4th Cir. 1995). In addition, Defendants contend that the affidavit for the NTO would support a finding of probable cause, even if the challenged evidence is not considered. Id. ("[E]ven if an affidavit supporting a search warrant is based in part on some illegal evidence, such inclusion of illegal

evidence does not taint the entire warrant if it is otherwise properly supported by probable cause."). Finally, Defendants raise a "qualified immunity" defense, noting that "[g]overnment officials performing discretionary functions are entitled to qualified immunity from liability for civil damages to the extent that 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Washington v. Wilmore, 407 F.3d 274, 281 (4th Cir. 2005) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982)). Under the doctrine of qualified immunity, even if the violation of a constitutional right is established on the facts alleged, "courts must consider whether the right was clearly established at the time such that it would be clear to an objectively reasonable officer that his conduct violated that right." Brown v. Gilmore, 278 F.3d 362, 367 (4th Cir. 2002).[36]

For their part, Plaintiffs allege that the NTO procedure under state law is unconstitutional insofar as it could be construed as authorizing searches and seizures, which could include blood samples, urine samples, saliva samples, and physical examinations, on a showing of less than full probable cause. Plaintiffs further allege that even if the statute itself is constitutional, the NTO in this case - which effected a search and seizure of all 46 lacrosse

[36] In determining whether a governmental official is entitled to qualified immunity, the Court must first decide "'whether a constitutional right would have been violated on the facts alleged.'" Brown v. Gilmore, 278 F.3d 362, 367 (4th Cir. 2002) (quoting Saucier v. Katz, 533 U.S. 194, 200, 121 S. Ct. 2151, 2155, 150 L. Ed. 2d 272 (2001)). If the violation of the right is established, "courts must consider whether the right was clearly established at the time such that it would be clear to an objectively reasonable officer that his conduct violated that right." Id. However, pursuant to Pearson v. Callahan, courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 129 S. Ct. 808, 818, 172 L. Ed. 2d 565 (2009).

team members - violated the Fourth Amendment because it was not supported by probable cause or even by "reasonable grounds." Finally, Plaintiffs contend that the NTO resulted in an unconstitutional seizure because the NTO was issued based on an affidavit that was intentionally false and misleading and that would not have supported issuance of the NTO if the false and misleading information were not considered.

Having considered all of these contentions, the Court concludes that Plaintiffs have adequately alleged a seizure and a search of their person implicating their rights under the Fourth Amendment. See United States v. Dionisio, 410 U.S. 1, 8, 93 S. Ct. 764, 769, 35 L. Ed. 2d 67 (1973) (noting that "the obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels - the 'seizure' of the 'person' necessary to bring him into contact with government agents . . . and the subsequent search for and seizure of the evidence").[37] In addition, Plaintiffs have raised substantial questions regarding the constitutionality of the searches and seizures effected pursuant to the NTO in this case, both as to the procedure that was followed and the scope of the NTO that was entered. In considering the NTO process, the Court notes that the North Carolina state court decisions and interpretations of the NTO process appear conflicting. On one hand, the North Carolina Supreme Court has recognized that "[t]he invasion of a person's body to seize blood, saliva, and

[37] The Court notes that in addition to the "seizure" involved in being compelled to appear at the police station, Plaintiffs have raised a Fourth Amendment challenge to the "search" alleged in this case, which in addition to DNA sampling and "mug shot" photographing, also required them to disrobe for close physical examination, which they contend invaded a "reasonable expectation of privacy" and went beyond what "a person knowingly exposes to the public." Katz v. United States, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576 (1967).

hair samples is the most intrusive type of search; and a warrant authorizing the seizure of such evidence must be based upon probable cause to believe the blood, hair, and saliva samples constitute evidence of an offense or the identity of a person who participated in the crime." State v. Grooms, 353 N.C. 50, 73, 540 S.E.2d 713, 728 (2000); see also State v. Welch, 316 N.C. 578, 585, 342 S.E.2d 789, 793 (1986) (holding that "[s]ince the withdrawal of a blood sample is subject to fourth amendment requirements, a search warrant must be procured before a suspect may be required to submit to such a procedure unless probable cause and exigent circumstances exist that would justify a warrantless search"). However, on the other hand, the state courts have also indicated that "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." Grooms, 353 N.C. at 73, 540 S.E.2d at 728; see also State v. Pearson, 356 N.C. 22, 28, 566 S.E.2d 50, 54 (2002) (concluding that the "reasonable grounds" standard is "similar to the reasonable suspicion standard applied to brief detentions" under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Thus, it is unclear whether North Carolina courts would interpret the state NTO statutes as authorizing a search and seizure, including seizure of blood, hair, and saliva samples, on less than a full showing of probable cause.[38] It is also unsettled whether such an interpretation would render the state NTO statutes unconstitutional, at least

[38] The Court notes that there is no question, even under the NTO procedure, that there must be probable cause to believe that an offense has been committed. The question is only with respect to whether there must also be probable cause to believe that the subject of the order committed the offense or probable cause to believe that evidence of the crime will be found by conducting the search, rather than a lesser showing of only "reasonable suspicion."

as applied in some instances. This uncertainty is a product of unsettled U.S. Supreme Court holdings and dicta in this area. In this regard, the U.S. Supreme Court in Davis v. Mississippi held that the Fourth Amendment applies when police require citizens to come to a police station for fingerprinting, but the Supreme Court left open the possibility that in the "unique nature of the fingerprinting process" the requirements of the Fourth Amendment could be met by "narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest." 394 U.S. 721, 727-28, 89 S. Ct. 1394, 1387-98, 22 L. Ed. 2d 676 (1969). However, the Supreme Court has not determined whether or when such "narrowly circumscribed procedures" could be used, although in Davis this possibility was limited to fingerprinting, and did not include blood sampling or other more intrusive searches. Cf. Schmerber v. California, 384 U.S. 757, 770, 86 S. Ct. 1826, 1835, 16 L. Ed. 2d 908 (1966) (holding, with respect to blood sampling, that "search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned"); Dunaway v. New York, 442 U.S. 200, 211-13, 99 S. Ct. 2248, 2256-57, 60 L. Ed. 2d 824 (1979) (noting that Terry v. Ohio allows only narrowly-defined intrusions absent a showing of probable cause, and concluding that "any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause"). In a later case, the Supreme Court acknowledged that some states, in reliance on the suggestion in Davis, have "enacted procedures for judicially authorized seizures for the purpose of fingerprinting," but the Supreme Court noted that "state courts are not in accord on

the validity of these efforts to insulate investigative seizures from Fourth Amendment invalidation," and the Supreme Court declined to reach any further consideration of that issue. Hayes v. Florida, 470 U.S. 811, 817, 105 S. Ct. 1643, 1647, 84 L. Ed. 2d 705 (1985).

However, this Court need not resolve all of these unsettled issues at this stage in the present case, because even if the procedure and scope of the NTO process would otherwise pass constitutional muster, here Plaintiffs have asserted a claim that the affidavit submitted in support of the NTO application was "knowingly premised" on false and misleading information. (Am. Compl. ¶ 629). In response, Defendants raise extensive factual contentions to dispute these allegations and to demonstrate that probable cause existed even if the allegedly false statements are removed and the material omissions are included. This analysis by Defendants includes extensive parsing of pieces of the Amended Complaint, and attempts by the various Defendants to blame one another. However, the analysis suggested by Defendants requires factual analysis beyond the allegations in the Amended Complaint, and the cases cited by the Defendants in support of this analysis involve summary judgment determinations, not determinations on a motion to dismiss. Therefore, having considered the parties' contentions in this regard, the Court finds that this parsing of the facts, and certainly any consideration of Defendants' factual contentions in response, is more appropriate at summary judgment after an opportunity for discovery, when the factual record is before the Court for consideration. At this stage in the case, the Court simply concludes that where officers deliberately or recklessly supply false or misleading information to a magistrate judge to support a warrant application, as alleged in the present case, the officers may be liable under § 1983 for violation of an individual's Fourth

Amendment rights, if their actions result in the seizure of an individual without probable cause.[39] Moreover, the Court concludes that there is no question that these rights were clearly established, and no reasonable official could have believed that it was permissible to deliberately or recklessly create false or misleading evidence to present to a magistrate to effect a citizen's seizure. See Miller, 475 F.3d at 631-32 ("[T]he Supreme Court has long held that a police officer violates the Fourth Amendment if, in order to obtain a warrant, he deliberately or 'with reckless disregard for the truth' makes material false statements or omits material facts. . . . No reasonable police officer . . . could believe that the Fourth Amendment permitted such conduct." (internal citations omitted)); Brooks, 85 F.3d at 183-84.[40] Thus, the Court finds that, taking the allegations as true, Plaintiffs have alleged plausible Fourth Amendment claims as set out in Count 21, based on allegations of knowing submission of false and misleading evidence to obtain an NTO, which require at least some discovery so that Plaintiffs' claims and Defendants' qualified immunity defense can be assessed on a factual record beyond just the allegations in the Amended Complaint.

However, the Court must still consider whether Plaintiffs have sufficiently stated a claim

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[39] The Court acknowledges, as discussed above, the unsettled law regarding whether the search and seizure challenged here could be upheld on a showing of less than full probable cause. The Court will allow the parties to address that issue further at summary judgment. However, the Court concludes that there are sufficient allegations to state a plausible claim in order to go forward at this stage.

[40] The Court notes that in the context of a search or seizure conducted pursuant to a warrant, qualified immunity is analogous to the "good faith" exception to the exclusionary rule applied in criminal cases under United States v. Leon, 468 U.S. 897, 922-23, 104 S. Ct. 3405, 3420-21, 82 L. Ed. 2d 677(1984). See Malley v. Briggs, 475 U.S. 335, 344-45, 106 S. Ct. 1092, 1098, 89 L. Ed. 2d 271 (1986).

as to each of the particular Defendants against whom this Count is asserted. In considering this issue, the Court notes that this claim is first asserted against Defendants Himan and Gottlieb. As to these Defendants, Plaintiffs allege that Himan and Gottlieb were directly involved in the intentional and reckless fabrication of evidence that resulted in their seizure pursuant to the NTO, and in the perpetuation of that violation by continued misconduct directed toward the Plaintiffs after the NTO was issued. Based on the factual allegations set out in the Amended Complaint, the Court concludes that there are sufficient allegations, if true, to state a plausible § 1983 claim against Defendants Himan and Gottlieb for alleged knowing or reckless presentation of false or misleading evidence that effected a seizure and search of the Plaintiff Players pursuant to the NTO without probable cause. To the extent that Defendants Gottlieb and Himan blame Nurse Levicy, the Court finds that Plaintiffs have alleged that Gottlieb, Himan, and Levicy all conspired together to deliberately violate the team members' constitutional rights in applying for the NTO. Of course, Plaintiffs will ultimately be required to present evidence to establish that the Defendants engaged in this alleged conduct, and Defendants will be entitled to present evidence to dispute these allegations. Likewise, Himan and Gottlieb will be entitled to present their qualified immunity defense on a motion for summary judgment, for consideration on the factual record. However, at this stage, as noted above, the Court concludes that at the time of the alleged conduct, it was clearly established that an officer's fabrication of evidence before a magistrate judge to effect a search and seizure of a citizen would violate that citizen's constitutional rights. Therefore, the Motions to Dismiss will be denied as to Defendants Gottlieb and Himan.

However, with respect to Defendant Wilson, who was Nifong's investigator, Wilson is included in this Count as part of the group designated as "Durham Investigators." However, Plaintiffs allege that Wilson did not join in the investigation until late April 2006. (Am. Compl. ¶ 401). In his Motion to Dismiss, Wilson contends that Count 21 should be dismissed against him because, inter alia, "Plaintiffs have never specifically alleged Defendant Wilson took part in any Nontestimonial Identification Order" and because "Defendant Wilson was not even involved in the case at this time in the investigation, according to [Plaintiffs'] own allegations." (Def.'s Mot. to Dismiss, Doc. #80, at 11, 14 n.5). Plaintiffs do not address this issue in their Response Briefs or indicate how they contend that Defendant Wilson was involved in the constitutional violation alleged in Count 21. Therefore, the claim in Count 21 will be dismissed as to Defendant Wilson.

With respect to Defendants Levicy, Arico, Duke, and Duke Health, these Defendants contend that they are not liable under § 1983 because they were not acting "under color of state law" and because any alleged constitutional violation was attributable to Gottlieb and Himan. "[T]he under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.'" American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50, 119 S. Ct. 977, 985, 143 L. Ed. 2d 130 (1999) (internal citations omitted). Thus "the party charged with the deprivation must be a person who may fairly be said to be a state actor. . . . because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 2754, 73 L. Ed. 2d 482 (1982).

"'Under th[e state-action or color-of-law] doctrine, we 'insist []' as a prerequisite to liability 'that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State.' By doing so, we maintain the Bill of Rights as a shield that protects private citizens from the excesses of government, rather than a sword that they may use to impose liability upon one another.'" Phillips v. Pitt County Mem. Hosp., 572 F.3d 176, 181 (4th Cir. 2009) (quoting Holly v. Scott, 434 F.3d 287, 291, 292 (4th Cir. 2006) ("Statutory and common law, rather than the Constitution, traditionally govern relationships between private parties.")).

"[P]rivate parties may theoretically be sued under § 1983 using several theories, labeled as 'symbiotic relationship; public function; close or joint nexus; joint participation; and pervasive entwinement.'" Id. at 181 n.6 (citation omitted); see also Jackson v. Pantazes, 810 F.2d 426, 429 (4th Cir. 1987) (recognizing potential § 1983 liability "where a private party and a public official act jointly to produce the constitutional injury"). To the extent that a § 1983 claim is based on an alleged "joint participation" or "conspiracy" between private actors and public actors, a bare assertion of a "conspiracy" is insufficient, and a plaintiff must plead enough factual matter to plausibly suggest that an agreement was made to deprive them of their constitutional rights. See Howard v. Food Lion, Inc., 232 F. Supp. 2d 585, 597 (M.D.N.C. 2002) (holding that in bringing a conspiracy claim under § 1983, the plaintiff "must allege both a mutual understanding to achieve some unconstitutional action reached by the private and state defendants and some factual assertions suggesting a meeting of the minds," and that "[w]hen a complaint contains merely a vague allegation of conspiracy, it cannot withstand a motion to dismiss"); see also Franklin v. Fox, 312 F.3d 423, 445 (9th Cir. 2002) ("To be liable as a co-conspirator, a private

defendant must share with the public entity the goal of violating a plaintiff's constitutional rights."). Moreover, courts have held that "provision of background information to a police officer does not by itself make [a private actor] a joint participant in state action under Section 1983." Ginsberg v. Healey Car & Truck Leasing, Inc., 189 F.3d 268, 272 (2nd Cir. 1999) (citing Benavidez v. Gunnell, 722 F.2d 615, 618 (10th Cir. 1983) ("The mere furnishing of information to police officers does not constitute joint action under color of state law which renders a private citizen liable under § [ ] 1983. . . ."); Butler v. Goldblatt Bros., Inc., 589 F.2d 323, 327 (7th Cir. 1978) (granting summary judgment to private defendant on Section 1983 claim because defendant "did [nothing] more than supply information to police officers who then acted on their own initiative in arresting [plaintiff]"); see also Moldowan v. City of Warren, 578 F.3d 351, 399 (6th Cir. 2009); King v. Massarweh, 782 F.2d 825, 828-29 (9th Cir. 1986); Arnold v. IBM Corp., 637 F.2d 1350, 1356-57 (9th Cir. 1981). Thus, to be acting "under color of state law" based on joint participation, the "private action must have a 'sufficiently close nexus' with the state [so] that the private action 'may be fairly treated as that of the State itself.'" DeBauche v. Trani, 191 F.3d 499, 507 (4th Cir. 1999) (citation omitted).

In the present case, with respect to Defendant Levicy, Plaintiffs allege that Levicy participated in the NTO process and that she was acting "in concert" with Gottlieb and Himan and that they were all "willing participants in this joint activity." (Am. Compl. ¶ 630). Plaintiffs allege that "[t]here was an agreement and meeting of the minds" between Levicy and Gottlieb and Himan "to deprive plaintiffs of protected rights." (Am. Comp. ¶ 630). In support of these contentions, Plaintiffs allege that Levicy had several meetings and interviews with Gottlieb and

Himan, before and after the NTO, and actively conspired with them and altered forms and evidence as needed to fit the investigators' case. Plaintiffs set out specific allegations that Levicy produced falsified medical records and proffered false testimony to corroborate the information in the NTO application.

Having considered these contentions, the Court concludes that Plaintiffs have alleged sufficient facts to state a claim against Levicy for her alleged role in the claimed constitutional violations. Although Levicy was not employed by the City, Plaintffs allege that she shared the goal of violating Plaintiffs' constitutional rights, and that she agreed with Nifong, Gottlieb, and Himan to provide the false evidence to them as part of this agreement. These allegations are sufficient to give notice as to how she is alleged to have participated in the conspiracy, and are sufficient to allege action "under color of state law" based upon joint participation at this stage in the case. That issue will, however, be subject to further review on a motion for summary judgment to determine whether sufficient evidence exists to support this claim as to Levicy.

However, as to Defendant Arico, Plaintiffs do not allege facts specifically as to Arico to support the conclusion that she entered into an agreement with Gottlieb, Himan, or Nifong to provide false evidence in connection with the NTO and violate Plaintiffs' constitutional rights. The only specific allegation as to Arico is that she gave an interview to a newspaper reporter regarding the sexual assault examination. This allegation against Arico is insufficient to state a plausible claim that Arico entered into a conspiracy with Nifong, Gottlieb, and Himan and was acting under color of state law when she gave the interview, or that the interview alone was sufficient to sufficient to state a claim of joint participation in the alleged violation of Plaintiffs'

constitutional rights.[41] Therefore, the Motion to Dismiss will be granted with respect to Count 21 as to Defendant Arico. Cf. Howard, 232 F. Supp. 2d at 597 (dismissing § 1983 claim against private party where the complaint failed to plead any facts suggesting that the private party and the government actor reached a meeting of the minds).

Similarly as to Duke and Duke Health, these are private parties, and § 1983 claims are not intended to become a basis for private tort claims. Instead, § 1983 claims only arise where the government acts to deprive a citizen of his or her rights under the constitutional or laws of the United States. Therefore, Duke is only liable if it was acting "under color of state law" and if its actions can be treated as actions of the State itself. Although the Court has concluded that there are sufficient allegations to support at least a plausible claim that Levicy jointly participated with Gottlieb and Himan in the constitutional violations alleged as to Counts 21, that does not transform her supervisors or her employer into state actors. The allegations are not sufficient to state a plausible claim that Duke or Duke Health was acting as the Government. Therefore, the Court concludes that Plaintiffs have failed to allege a plausible claim that either Duke or Duke Health was a "state actor" or was acting "under color of state law" so as to impose § 1983 liability on a private university. Cf. Rodriguez v. Smithfield Packing Co., 338 F.3d 348, 356 (4th Cir. 2003). The Court simply cannot extend § 1983 liability, which is meant to be a limit on

[41] As discussed in greater detail below with respect to the "supervisory liability" claims, § 1983 liability is based on each individual Defendant's own misconduct, not vicarious liability based on misconduct of subordinates. In this case, Plaintiffs have set out allegations that state a plausible claim that Levicy was acting under color of state law, but that does not impute liability or "state action" to Arico, and Plaintiffs have not set out specific, non-conclusory allegations as to Arico that would state a plausible claim for joint activity or conspiracy between Arico and Nifong, Gottlieb, or Himan.

government action taken "under color of state law," to create federal liability between private parties as Plaintiffs are attempting to do here.

Finally, to the extent that Count 21 is asserted against the City, the Court notes that claims against the City under § 1983 require additional allegations based on the Supreme Court's decision in Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-38, 56 L. Ed. 2d 611 (1978), in order to impute liability to the City. Plaintiffs have made those allegations as part of Count 26, so the claim against the City will be considered as part of Count 26.

Therefore, with respect to Count 21, the Court concludes that the Motions to Dismiss will be granted in part and denied in part. Specifically, the Court concludes that Count 21 will go forward as to Defendants Gottlieb, Himan, and Levicy in their individual capacities. However, this claim will be dismissed as to Defendants Wilson, Arico, Duke, and Duke Health. In addition, to the extent that this claim is asserted against the City, that claim will be considered as part of Count 26. Finally, with respect to the scope of this claim, the Court concludes that this claim only states a potential claim for a violation of the Plaintiff Players' constitutional rights, and not as to the Plaintiff Parents. Therefore, the claims asserted in Count 21 by the Plaintiff Parents will be dismissed.

Count 22: 42 U.S.C. § 1983 claim for Fourteenth Amendment Violation for Malicious Investigation, asserted against all Defendants

In Count 22, Plaintiffs bring a § 1983 claim against all of the Defendants for alleged violation of Plaintiffs' Fourteenth Amendment rights based on a claim for "malicious investigation." In this claim, Plaintiffs contend that Gottlieb, Himan, Wilson, Graves, and Dean,

were acting under color of state law and engaged in a course of conduct to instigate and prolong a malicious, bad faith investigation. Plaintiffs contend that the remaining Defendants,[42] other than Gottlieb, Himan, Wilson and the Duke Police, joined with them in a "joint course of conduct." Plaintiffs contend that the investigation "was highly outrageous, undertaken in bad faith, caused by malicious motives, and involved conduct that shocks the conscience," thus violating Plaintiffs' due process rights under the Fourteenth Amendment. (Am. Compl. ¶ 636). With respect to the "Durham Defendants," Plaintiffs contend that the Durham Defendants knowingly disseminated false public information, retaliated against Plaintiffs for exercising Plaintiffs' constitutional rights, suppressed exculpatory evidence, tampered with and coerced witnesses, manufactured false evidence, made public statements falsely asserting Plaintiffs' guilt, deliberately inflamed community passions against the Plaintiffs, and pursued a criminal investigation of allegations they knew to be unwarranted and baseless. (Am. Compl. ¶ 637). With respect to the "Duke Defendants," Plaintiffs contend that the Duke Defendants willfully provided false information to investigators, failed to correct government officials' public assertions of false information; made and ratified false public statements; violated Plaintiffs' Fourth Amendment rights and concealed the violation; and conspired to suppress and conceal exculpatory evidence. (Am. Compl. ¶ 638).

The Fourteenth Amendment protects citizens against deprivations of liberty or property without due process of law. U.S. Const. amend. XIV. "[T]he Due Process Clause of the

[42] The remaining Defendants categorized as "Durham Defendants" are the City, Baker, Chalmers, Hodge, Russ, Mihaich, Council, Lamb, Ripberger, and Addison. The remaining Defendants categorized as "Duke Defendants" are Duke, Duke Health, Brodhead, Lange, Trask, Moneta, Burness, Dzau, Wasiolek, Drummond, Levicy, Arico, and Hendricks.

Fourteenth Amendment 'guarantees more than fair process' and 'includes a substantive component that provides heightened protection against government interference with certain fundamental rights.' . . . The core of the concept of substantive due process is the 'protection of the individual against arbitrary action of government.'" Martin v. Saint Mary's Dep't Soc. Servs., 346 F.3d 502, 511 (4th Cir. 2003). In the present case, Plaintiffs contend that they can state a claim in Count 22 for violation of the Fourteenth Amendment based on alleged conduct by government officials that "shocks the conscience." However, conduct that "shocks the conscience" may be actionable in a § 1983 claim under the Fourteenth Amendment, but only where the conscience-shocking conduct actually results in deprivation of a life, liberty or property interest. See County of Sacramento v. Lewis, 523 U.S. 833, 845-49, 118 S. Ct. 1708, 1716-18, 140 L. Ed. 2d 1043 (1998); see also, e.g., Martinez v. Cui, 608 F.3d 54, 64 (1st Cir. 2010) ("Lewis held that plaintiffs must show, not only that the official's actions shock the conscience, but also that the official violated a right otherwise protected by the substantive Due Process Clause."); Hawkins v. Freeman, 195 F.3d 732, 738 and n.1 (4th Cir. 1999). The Court must therefore consider whether Plaintiffs have alleged a deprivation of a liberty or property interest to state a claim for a Fourteenth Amendment violation in Count 22.

First, to the extent that Plaintiffs allege that their Fourteenth Amendment rights were violated because Defendants pursued a "baseless" criminal investigation against them, the Court notes that there is no recognized claim for a Fourteenth Amendment violation based only on a "malicious investigation." See, e.g., United States v. Trayer, 898 F.2d 805, 808 (D.C. Cir. 1990) ("[T]here is no constitutional right to be free of investigation."); United States v. Crump, 934

F.2d 947, 957 (8th Cir. 1991) (holding that there is "no constitutional right to be free of investigation"); Shields v. Twiss, 389 F.3d 142, 150-51 ("Regarding [plaintiff's] 'unreasonable investigation' claim, [plaintiff] has pointed to no legal basis for a § 1983 action of this sort, and the court knows of none."); Hodge v. Jones, 31 F.3d 157, 164 (4th Cir. 1994) (finding no constitutional right to be free from child abuse investigations); Hernandez v. Terrones, 397 Fed. Appx. 954, 966 (5th Cir. 2010) (concluding that "there was no freestanding, clearly established constitutional right to be free from a reckless investigation"); see also Lambert v. Williams, 223 F.3d 257, 262 (4th Cir. 2000) ("[T]here is no such thing as a '§ 1983 malicious prosecution' claim, [and w]hat we termed a "malicious prosecution" claim in [Brooks v. City of Winston-Salem, 85 F.3d 178, 183 (4th Cir. 1996)] is simply a claim founded on a Fourth Amendment seizure."). Therefore, Plaintiffs cannot state a general § 1983 claim for a Fourteenth Amendment violation based on a "malicious investigation."

To the extent Plaintiffs contend that their Fourteenth Amendment rights were violated because Defendants concealed exculpatory evidence, the Court notes that the right to disclosure of exculpatory information is a trial right, and failure to disclose exculpatory information during an investigation does not allege a deprivation of any right guaranteed under the Due Process Clause of the Fourteenth Amendment. See Taylor v. Waters, 81 F.3d 429, 436 (citing Albright v. Oliver, 510 U.S. 266, 268-76, 114 S. Ct. 807, 810-14, 127 L. Ed. 2d 114 (1994) and Baker v. McCollan, 443 U.S. 137, 142-46, 99 S. Ct. 2689, 2693-96, 61 L. Ed. 2d 433 (1979)); see also United States v. Ruiz, 536 U.S. 622, 628, 122 S. Ct. 2450, 2454, 153 L. Ed. 2d 586 (2002) (noting that a defendant's right to receive exculpatory material from prosecutors is "a right that the

Constitution provides as part of its basic 'fair trial' guarantee" under the Fifth and Sixth Amendments (citing Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963))). Thus, Plaintiffs cannot state a Fourteenth Amendment claim for failure to disclose exculpatory evidence or for concealment of evidence during the investigation where they were not subject to trial.

In addition, to the extent Plaintiffs contend that their rights were violated because Defendants tampered with and coerced witnesses and manufactured false evidence, the Fourth Circuit has held that individuals possess a Fourteenth Amendment Due Process "'right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity.'" Washington v. Wilmore, 407 F.3d 274, 282 (4th Cir. 2005) (quoting Zahrey v. Coffey, 221 F.3d 342, 349 (2d Cir. 2000)); see White v. Wright, 150 Fed. Appx. 193, 198-99 (4th Cir. 2005). However, this Fourteenth Amendment right applies to the use of fabricated evidence at trial. See Washington, at 282-84 (citing Zahrey v. Coffey, 221 F.3d 342, 349-50 (2d Cir. 2000)). This right may also potentially apply in the context of pre-trial proceedings where the fabricated evidence results in the citizen's arrest after his indictment, but there must be some deprivation of a recognized liberty or property interest in order to invoke the protections of the Fourteenth Amendment. See id. at 282-84 (citing Zahrey v. Coffey, 221 F.3d 342, 349-50 (2d Cir. 2000)). Thus, there can be no question that the Constitution has been violated when government officials intentionally fabricate evidence to frame innocent citizens, but only if that evidence is used to deprive those citizens of life, liberty, or property in some manner. See Zahrey v. Coffey, 221 F.3d 342, 348 (2d Cir. 2000) ("The manufacture of false

evidence, 'in and of itself,' . . . does not impair anyone's liberty, and therefore does not impair anyone's constitutional right."). Thus, established case law simply does not allow this Court to recognize a separate Fourteenth Amendment violation for manufacturing of false inculpatory evidence, where no life, liberty, or property interest is impaired as a result of that misconduct.

To the extent Plaintiffs have alleged a potential deprivation of a liberty interest based on the NTO, those claims are considered as part of the alleged Fourth Amendment violation in Count 21.[43] Similarly, to the extent that Plaintiffs allege a deprivation of a liberty or property interest based on allegations that Defendants disseminated false public information or made public statements falsely asserting Plaintiffs' guilt, the Court concludes that those claims are claims for reputational injury as discussed with respect to Count 25. Plaintiffs have not pointed to any other deprivation of a liberty or property interest that would support a § 1983 claim for violation of the Fourteenth Amendment.

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[43] To the extent Plaintiffs contend that their rights were violated because Defendants retaliated against Plaintiffs for exercising Plaintiffs' constitutional rights, Plaintiffs are still required to allege a deprivation of a liberty or property interest. To the extent that Plaintiffs raise allegations regarding subjective motivations of the officers, the Court notes that an officer's improper motives do not establish a Fourth Amendment violation, and police can arrest citizens if probable cause exists to support the arrest, regardless of the officers' subjective motivations. See Rogers v. Pendleton, 249 F.3d 279, 290 (4th Cir. 2001); Whren v. United States, 517 U.S. 806, 813, 116 S. Ct. 1769, 1774, 135 L. Ed. 2d 89 (1996); cf. Hartman v. Moore, 547 U.S. 250, 260-62, 126 S. Ct. 1695, 1703-05, 164 L. Ed. 2d 441 (2006) (finding that there could be no constitutional claim for "retaliatory prosecution," regardless of the officers' motivation, if there was probable cause to support the prosecution). The Court further notes, however, that as part of the Fourth Amendment claims in Count 21, the Court does not foreclose the possibility that evidence of the officer's subjective motivations may be relevant. See, e.g., Rogers, 249 F.3d at 295 (noting that in examining the officer's claim of qualified immunity, "we do not lose sight of the possible inference from the evidence that [plaintiff's] arrest was motivated by the officers' anger at his 'irreverent' refusal to consent to their search"). Therefore, Plaintiffs are free to raise their contentions as part of their Fourth Amendment claims with respect to Count 21.

Therefore, the Court concludes that Plaintiffs have not alleged any deprivation of a liberty or property interest, other than that alleged as part of Counts 21 and 25, and the Court has addressed those claims as to each of those respective counts.[44] The Court cannot recognize an additional, separate Fourteenth Amendment claim when no other protected liberty or property interest is implicated. Plaintiffs here were not indicted or tried or otherwise subject to any other deprivation of a liberty or property interest, other than as discussed with respect to Counts 21 and 25. Therefore, the Court concludes that the claims asserted in Count 22 fail to state a legally cognizable claim, and will be dismissed.

Finally, to the extent Plaintiffs bring a § 1983 claim for constitutional violations against the Duke Defendants, the Court notes again, as discussed above, that Duke is a private party, and § 1983 claims are not intended to become a basis for private tort claims. Instead, § 1983 claims arise where the government acts to deprive a citizen of his or her rights under the Constitution or laws of the United States. As discussed above, "[t]he under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.'" American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50, 119 S. Ct. 977, 985, 143

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[44] The Court notes that where a specific amendment, such as the Fourth Amendment, applies to an alleged claim, the Court will look to the contours and requirements of that more specific provision, rather than the substantive due process provisions of the Fourteenth Amendment. See Albright v. Oliver, 510 U.S. 266, 273, 114 S. Ct. 807, 813, 127 L. Ed. 2d 114 (1994) ("Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" (citation omitted)). To the extent that Plaintiffs invoke the protections of the Fourteenth Amendment as part of their claims in Count 21 and 25, the Court has already determined that each of those respective Counts is proceeding, and the Court will not further parse those claims between the Fourth and Fourteenth Amendments at this time.

L. Ed. 2d 130 (1999) (internal citations omitted). "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." United States v. Classic, 313 U.S. 299, 326, 61 S. Ct. 1031, 1043, 85 L. Ed. 1368 (1941). Thus "the party charged with the deprivation must be a person who may fairly be said to be a state actor . . . because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 2754, 73 L. Ed. 2d 482 (1982). "Under th[e state-action or color-of-law] doctrine, we 'insist []' as a prerequisite to liability 'that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State.' By doing so, we maintain the Bill of Rights as a shield that protects private citizens from the excesses of government, rather than a sword that they may use to impose liability upon one another." Phillips v. Pitt County Mem. Hosp., 572 F.3d 176, 181 (4th Cir. 2009) (quoting Holly v. Scott, 434 F.3d 287, 291, 292 (4th Cir. 2006) ("Statutory and common law, rather than the Constitution, traditionally govern relationships between private parties.")). Thus, liability under § 1983 may be imposed for private action only if "the private action 'may be fairly treated as that of the State itself.'" DeBauche v. Trani, 191 F.3d 499, 507 (4th Cir. 1999) (citation omitted); Jackson v. Pantazes, 810 F.2d 426, 429 (4th Cir. 1987). Therefore, Duke is only liable if it was acting "under color of state law" and if its actions can be treated as actions of the State itself. The Court has considered Plaintiffs' contentions and concludes that although Plaintiffs generally allege a "meeting of the minds" between all of the "Duke and Durham defendants," these contentions fail to state a plausible claim that Duke and

all of the "Duke Defendnats" were "state actors" responsible for constitutional violations by Durham Police officers. Cf. Rodriguez v. Smithfield Packing Co., 338 F.3d 348, 356 (4th Cir. 2003). Therefore, the claims asserted in Count 22 against the Duke Defendants will be dismissed on this basis as well.

For all of these reasons, the Motions to Dismiss will be granted with respect to Count 22, and the claims asserted in Count 22 will be dismissed as to all Defendants.

Count 23: Obstruction of and Conspiracy to Obstruct Justice, asserted against all Defendants[45]

In Count 23, Plaintiffs bring a claim against all of the Defendants for Obstruction of Justice and Conspiracy to Obstruct Justice. As the basis for this claim, Plaintiffs contend that all of the Defendants "individually and in concert" engaged in obstruction of justice by initiating and prolonging a bad-faith investigation, making false public statements, concealing the key card disclosures, obtaining an NTO without justification based on false and misleading information, suppressing exculpatory evidence, and subjecting Plaintiffs to harassment.

"Obstruction of justice" is a criminal offense under North Carolina General Statutes § 14-221 through §14-227. It is also a common law tort in North Carolina. Under North Carolina common law, "'[i]t is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice.'" Jones v. City of Durham, 183 N.C. App. 57, 59, 643 S.E.2d 631,

[45] The claims in Count 23 are asserted against the individual Defendants "in their individual and official capacities." Under state law, "[a] suit against a defendant in his individual capacity means that the plaintiff seeks recovery from the defendant directly; a suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent." Meyer v. Walls, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997).

633 (2007) (quoting Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 33, 588 S.E.2d 20, 30 (2003)); see also 67 C.J.S. Obstructing Justice § 1 (noting that "obstructing justice" means "impeding or obstructing those who seek justice in a court or those who have duties or powers of administering justice in courts"). This tort would include, for example, claims that "[d]efendants attempted to impede the legal justice system through [a] false affidavit," Jackson v. Blue Dolphin Commc'ns of N.C., L.L.C., 226 F. Supp. 2d 785, 794 (W.D.N.C. 2002), and claims that defendants "conspired to impede [the] investigation of this case by destroying . . . records and by falsifying and fabricating records." Henry v. Deen, 310 N.C. 75, 86, 310 S.E.2d 326, 333 (1984); see also Reed v. Buckeye Fire Equip., 241 Fed. Appx. 917, 928 (4th Cir. 2007) (collecting cases); Henry, 310 N.C. at 86, 310 S.E.2d at 333 (recognizing a potential claim for obstruction of justice where the plaintiff alleged that the defendant had destroyed and falsified medical records and thus impeded plaintiff's wrongful death claims in that civil suit). The North Carolina Court of Appeals recently held that "any action intentionally undertaken by the defendant for the purpose of obstructing, impeding, or hindering the plaintiff's ability to seek and obtain a legal remedy will suffice to support a claim for common law obstruction of justice." Blackburn v. Carbone, 703 S.E.2d 788, 796 (N.C. Ct. App. 2010) (noting that falsification of evidence could support a finding of liability for common law obstruction of justice).

In the present case, Defendants generally contend that a claim for obstruction of justice may only be raised with respect to conduct in a civil lawsuit, not with respect to conduct surrounding a potential criminal investigation. However, the North Carolina Supreme Court in

In re Kivett recognized that an "attempt to prevent the convening of the grand jury would support a charge of common law obstruction of justice." In re Kivett, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983); see also State v. Wright, 696 S.E.2d 832, 835 (N.C. Ct. App. 2010) (noting that "common law obstruction of justice extends beyond interference with criminal proceedings"); Henry, 310 N.C. at 87, 310 S.E.2d at 334 (recognizing potential obstruction of justice claim even if alleged conduct occurred while no legal proceedings were pending or actually threatened). Therefore, the Court will not interpret this claim more narrowly than the state courts have done, and will not rule out the possibility that a claim could exist for common law obstruction of justice for creation of false evidence or destruction of evidence for the purpose of impeding the justice system, even if the conduct occurred as part of a criminal investigation. Defendants contend that Plaintiffs have not alleged facts to establish that Defendants' alleged conduct actually obstructed, impeded, or hindered any aspect of the claim, but the Court concludes that Plaintiffs have alleged significant misconduct in the creation of false and misleading evidence and destruction or alteration of potential evidence, and further analysis of these issues would require consideration of factual issues more appropriately considered at summary judgment to determine if sufficient evidence is presented in support of the claim. Therefore, the Court concludes that Plaintiffs have stated a state tort claim for obstruction of justice at this stage.

However, general allegations of a "conspiracy" are not sufficient to impose liability on those not themselves involved in alleged acts of obstruction of justice. Instead, the factual allegations must support a claim that each Defendant against whom the claim is asserted was

involved in the obstruction of justice and shared the intent to obstruct justice. In the present case, Plaintiffs have alleged direct obstruction of justice by Gottlieb, Himan, and Wilson, including in the falsification of police reports and DNA reports and the threatening of witnesses.[46] Plaintiffs have also alleged direct obstruction of justice by Nurse Levicy to the extent that Plaintiffs allege that Nurse Levicy intentionally provided false information to investigators and intentionally altered medical records and reports to obstruct justice. These allegations at least raise a plausible claim that these specific Defendants acted with intent to obstruct justice. It will ultimately be Plaintiffs' burden to establish actual obstruction of justice by these Defendants, but the Court will allow this claim to go forward at this time.

In addition, to the extent that these individuals are alleged to have been acting in the course and scope of their employment, the principle of *respondeat superior* would apply to this state tort claim. In this regard, with respect to state torts, "liability of a principal for the torts of his agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business; or (3) when the agent's act is ratified by the principal." Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 491, 340 S.E.2d 116, 121 (1986). Plaintiffs have alleged *respondeat superior* liability against Duke and Duke Health as the employer

[46] In addition, Plaintiffs have sufficiently alleged that these actions were taken by Defendant Wilson in an investigatory capacity, such that absolute prosecutorial immunity would not apply, at least as to those investigatory activities. Cf. Van de Kamp v. Goldstein, 129 S. Ct. 855, 860, 172 L. Ed. 2d 706 (2009) (holding that prosecutors are absolutely immune from liability for "prosecutorial actions that are 'intimately associated with the judicial phase of the criminal process,'" but that absolute immunity does not apply to investigative or administrative tasks).

of Levicy, and against the City as the employer of Gottlieb and Himan. Therefore this claim will go forward against Duke and Duke Health based on the underlying claim against Levicy, and will go forward as to the City based on the underlying conduct of Gottlieb and Himan.[47]

However, to the extent that this claim is asserted generally against "All Defendants," the allegations against the remaining Defendants are insufficient to state a claim for obstruction of justice.[48] Therefore, the claim for Obstruction of Justice in Count 23 will go forward as to Defendants Levicy, Gottlieb, Himan, Wilson, Duke, Duke Health, and the City, but will be dismissed as to all of the other Defendants.[49] In addition, with respect to the scope of this claim, the Court concludes that this claim only states a potential claim for obstruction of justice as to the Plaintiff Players, not as to the Plaintiff Parents. Therefore, the claims asserted in Count 23 by the Plaintiff Parents will be dismissed.

Count 24: 42 U.S.C. § 1983 claim for Deprivation of Property without Due Process, asserted against Gottlieb, Himan, Wilson, Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, and the City

In Count 24, Plaintiffs bring a § 1983 claim for deprivation of property without due

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[47] The Court notes, however, that *respondeat superior* liability for the City would be based only on the claims asserted against Gottlieb and Himan as City employees. *Respondeat superior* liability would not extend liability to the City for the alleged torts of Wilson or Levicy since they are not City employees.

[48] The Court notes that although Plaintiffs allege potential obstruction of justice claims with respect to Duke Police Officer Day in changing his report, and other officers on the scene on March 13 and 14 including Durham Police Sgt. Shelton, those officers are not included as Defendants in this case, and Plaintiffs do not assert specific factual contentions as to any of the other named Defendants to state a claim for obstruction of justice against them individually.

[49] Specifically, the remaining Defendants are Baker, Chalmers, Hodge, Russ, Mihaich, Council, Lamb, Ripberger, Addison, Brodhead, Lange, Trask, Moneta, Burness, Dzau, Wasiolek, Drummond, Arico, Hendricks, Graves, and Dean.

process of law. As the basis of this claim, Plaintiffs contend that the Durham Investigators (Gottlieb, Himan, and Wilson), acting under color of state law, undertook a malicious criminal investigation that caused a loss of property without due process of law, including reputational injury, lost educational opportunities, and loss of the opportunity to participate in the 2006 Division I men's lacrosse season.

As noted above, the Fourteenth Amendment protects citizens against deprivations of liberty and property without due process of law. U.S. Const. amend. XIV. However, to state a § 1983 claim for violation of their Fourteenth Amendment rights, Plaintiffs must allege a deprivation of a federally protected liberty or property interest. Thus, "[i]n order to make out either a substantive or procedural due process claim, a plaintiff must allege sufficient facts to support a finding that the [plaintiffs] 'were deprived of life, liberty, or property, by governmental action.'" Equity in Athletics, Inc. v. Dep't of Educ., No. 10-1259, 2011 WL 790055, at *13 (4th Cir. Mar. 8, 2011) (quoting Beverati v. Smith, 120 F.3d 500, 502 (4th Cir.1997)). "A protected property interest cannot be created by the Fourteenth Amendment itself, but rather must be created or defined by an independent source." Id. "'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" Town of Castle Rock v. Gonzales, 545 U.S. 748, 756, 125 S. Ct. 2796, 2803, 162 L. Ed. 2d 658 (2005) (quoting Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972)).

In the present case, Count 24 is based on Plaintiffs' claims that they were deprived of property interests in "lost educational opportunities, including the loss of the unique athletic

opportunity to participate in the 2006 Division I men's lacrosse season, including the ability to compete for the 2006 ACC Championship and the NCAA Division I National Championship – a goal for which many had aspired and trained for much of their lives." (Am. Compl. ¶ 652). However, the Fourth Circuit has recently considered constitutional claims by student athletes and noted that "other courts have addressed this issue and have consistently held that 'the interest of the student athletes in participating in intercollegiate sports was not constitutionally protected.'" Equity in Athletics, Inc., 2011 WL 790055, at *13 (quoting Colo. Seminary v. Nat'l Collegiate Athletic Ass'n, 570 F.2d 320, 321 (10th Cir. 1978)); see also Lesser v. Neosho County Cmty. Coll., 741 F. Supp. 854, 861 (D. Kan. 1990). The Fourth Circuit accepted this "long-standing body of precedent" and concluded that the plaintiffs had failed to present any authority establishing "a property interest in intercollegiate athletic participation." Equity in Athletics, Inc., 2011 WL 790055, at *13-14. Therefore, the dismissal of the student-athletes' Due Process claims was affirmed.

Based on this authority, and the "long-standing body of precedent" cited by Defendants, the Court concludes that Plaintiffs have failed to state a claim for deprivation of any constitutionally-protected property interest based on lost educational opportunities or lost opportunities for intercollegiate athletic participation. To the extent that Plaintiffs allege a deprivation of a liberty or property interest based on allegations that Defendants disseminated false public information or made public statements falsely asserting Plaintiffs' guilt, the Court concludes that those claims are claims for reputational injury as discussed with respect to Count 25. Plaintiffs have not pointed to any other deprivation of a liberty or property interest that

would support a § 1983 claim for violation of the Fourteenth Amendment.

Therefore, the Court concludes that Plaintiffs have failed to state a claim under § 1983 for a violation of the Fourteenth Amendment as alleged in Count 24, and the claims asserted in Count 24 will be dismissed.

Count 25: 42 U.S.C. § 1983 Claim for False Public Statements, asserted against Gottlieb, Himan, Wilson, Addison, and the City[50]

In Count 25, Plaintiffs bring a § 1983 claim against Gottlieb, Himan, Wilson, Addison, and the City for "false public statements." As the basis for this claim, Plaintiffs contend that the Durham Investigators (Gottlieb, Himan, and Wilson) and Defendant Addison made multiple public statements relating to the criminal investigation that were knowingly false. Specifically, Plaintiffs contend that Defendant Addison, and District Attorney Nifong (who is not a defendant), falsely asserted that members of the lacrosse team had "perpetrated a brutal, racially motivated gang rape," that the lacrosse players had "refused to cooperate with the police in the investigation," that the "physical and medical evidence indicated that a rape had occurred," and that other members of the team had "aided and abetted in the alleged rape." (Am. Compl. ¶ 656). Plaintiffs further contend that as a result of the false public statements, they continued

[50] This claim is brought against Gottlieb, Himan, and Addison in both their individual and official capacities. However, as previously noted, Plaintiffs in their Responses agree that to the extent that the claim is brought against the individual Defendants in their official capacities, such "official capacity" claims are duplicative of the claims against the City. Therefore, the Court considers the claims against Gottlieb, Himan, and Addison only as "individual capacity" claims, since all "official capacity" claims against Gottlieb, Himan, and Addison will be treated as claims against the City. However, to the extent that the claim is also asserted against Defendant Wilson, the Court notes that Wilson is alleged to have been an employee of the District Attorney's office and does not have an "official capacity" with respect to the City. Finally, to the extent Plaintiffs are attempting to assert a claim against the City, that claim must satisfy the provisions of Monell as discussed in Count 26.

to be subjected to a malicious investigation, and they were deprived of property without due process of law due to the reputational injury.[51]

As discussed above, the Fourteenth Amendment protects against deprivations of liberty or property rights without due process of law. In this regard, the Supreme Court has recognized the right to due process "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S. Ct. 507, 510, 27 L. Ed. 2d 515 (1971). However, the Supreme Court has also held that an injury to reputation alone does not deprive a plaintiff of "liberty" or "property" interests to state a Fourteenth Amendment violation. See Paul v. Davis, 424 U.S. 693, 711-12, 96 S. Ct. 1155, 1165-66, 47 L. Ed. 2d 405 (1976). In Paul, the Supreme Court held that where defamatory flyers were distributed by police officers and caused the plaintiff reputational harm, the plaintiff could not state a Fourteenth Amendment violation unless the plaintiff alleged, in addition to the defamatory statement, that some other right or status was altered or extinguished. See id. Under Paul, a Fourteenth Amendment claim based on defamatory statements by government actors requires a plaintiff to allege "(1) the utterance of a statement about her that is injurious to her reputation, 'that is capable of being proved false, and that he or she claims is false,' and (2) 'some tangible and material state-imposed burden . . . in addition to the stigmatizing

[51] Plaintiffs also allege that the statements were made in connection with other deprivations, particularly the opportunity to complete the 2006 NCAA Division I lacrosse season. However, as discussed with respect to Count 24, there is no property interest in intercollegiate athletic participation. See Equity in Athletics, Inc. v. Dep't of Educ., No. 10-1259, 2011 WL 790055, at *13-14 (4th Cir. Mar. 8, 2011). In any event, Plaintiffs have not presented any authority that would support recognition of a "stigma-plus" claim in connection with any other alleged deprivation, and the Court recognizes the claims alleged in Count 25 only to the extent that they are connected with the alleged constitutional violations in Count 21.

statement.'" Velez v. Levy, 401 F.3d 75, 87 (2d Cir. 2005) (citation omitted). Such a claim is often referred to as a "stigma-plus" claim. Id.; Cooper v. Dupnik, 924 F.2d 1520, 1532 n.22 (9th Cir. 1991) ("The 'plus' part of this test can be met by either the denial of a right specifically secured by the Bill of Rights (such as the right to free speech or counsel), or the denial of a state-created property or liberty interest such that the Fourteenth Amendment's Due Process Clause is violated."). Courts have recognized a "stigma-plus" claim where officers are alleged to have made defamatory statements in connection with unlawful arrests or seizures in violation of the Fourth Amendment. See, e.g., Cooper, 924 F.2d at 1534-36; Marrero v. City of Hialeah, 625 F.2d 499, 517-19 (5th Cir. 1980); see also Albright v. Oliver, 510 U.S. 266, 294-96, 114 S. Ct. 807, 823-26 127 L. Ed. 2d 114 (1994) (Stevens, J., dissenting) (noting that injury to reputation plus unconstitutional prosecution is sufficient to establish "stigma plus"). In addition, the court in Cooper noted that "the law on this point - that defamation in connection with the violation of a constitutional right states a claim under section 1983 - was clear" and "it should have been clear to a reasonable public official" that such claims were actionable." Cooper, 924 F.2d at 1534-36 (denying qualified immunity for § 1983 claim involving defamatory statements "intertwined with" an alleged Fourth Amendment violation for an unconstitutional arrest).

In light of these cases and in light of the Court's determination that Plaintiffs have stated a potential claim for violation of their Fourth Amendment rights with respect to Count 21, the Court concludes that Plaintiffs have alleged a § 1983 claim for violation of their Fourteenth Amendment rights based on the alleged government officials' false public statements that imposed a reputational burden on them without providing due process. Specifically, the Court

finds that Plaintiffs have alleged a "stigma-plus" claim with a "tangible state-imposed burden . . . in addition to the stigmatizing statement," because the false public statements were made in connection with the alleged Fourth Amendment violation for alleged unlawful search and seizure as discussed above with respect to Count 21.

With respect to Gottlieb and Himan, Plaintiffs allege that Gottlieb and Himan deliberately made false statements in the affidavit in support of the NTO, with the intent that the information would be published and would stigmatize Plaintiffs. This claim is directly related to the claims asserted in Count 21. With respect to Defendants Addison and Wilson, Plaintiffs contend that Addison and Wilson each made false public statements, and Plaintiffs also contend that Addison and Wilson knew the statements were false and acted with malice and with a reckless disregard for Plaintiffs' constitutional rights. Cf. Velez, 401 F.3d at 88-89 (noting that "[w]hen government actors defame a person and - either previously or subsequently - deprive them of some tangible legal right or status . . . a liberty interest may be implicated, even though the 'stigma' and 'plus' were not imposed at precisely the same time" or by "the same actor," as long as they are "connected"); Marrero, 625 F.2d at 519 (noting that it is sufficient "that the defamation occur in connection with, and be reasonable related to, the alteration of the right or interest"). To the extent that these Defendants contest the particular nature or timing or effect of what was allegedly said, the Court concludes that such a factual inquiry is more appropriate on a motion for summary judgment, and Plaintiffs have alleged that each of the named Defendants made deliberately false public statements in connection with the NTO and the subsequent alleged falsification of evidence to support the NTO and cover-up the

constitutional violations. In addition, at this stage in the case, there are sufficient grounds to conclude that this right was clearly established, and a reasonable official would have known that it violated clearly established constitutional rights to deliberately make false public statements regarding a citizen in connection with an unlawful search and seizure of that citizen. To the extent that Defendants raise factual contentions about what a reasonable official would have done based on what they knew at the time, the Court concludes that this analysis would involve consideration of factual contentions and would be more appropriate at summary judgment on a factual record.[52]

With respect to Defendant Wilson, who was employed by the District Attorney's office, Wilson raises a defense of absolute prosecutorial immunity. See Van de Kamp v. Goldstein, 129 S. Ct. 855, 860, 172 L. Ed. 2d 706 (2009) (holding that prosecutors are absolutely immune from liability for "prosecutorial actions that are 'intimately associated with the judicial phase of the criminal process'" (quoting Imbler v. Pachtman, 424 U.S. 409, 430, 96 S. Ct. 984, 995, 47 L. Ed. 2d 128 (1976))). However, absolute immunity does not apply to investigative or administrative tasks, and the Supreme Court has held that "absolute immunity does not apply when a prosecutor gives advice to police during a criminal investigation [or] when the prosecutor makes

[52] The Court notes that this claim may, to some extent, simply overlap with the damages Plaintiffs would attempt to show with respect to Count 21. However, the Court concludes that there is sufficient basis at the present stage in the case to allow this claim to proceed, and further distinctions between the claims, if necessary, will be considered on motions for summary judgment following discovery. Similarly, the Court notes that there are issues regarding which of the Defendant failed to provide Plaintiffs the process to which they contend they were due prior to the deprivation of Plaintiffs' interests. However, the Court concludes that at this stage, Plaintiffs have alleged a joint effort among Gottlieb, Himan, Addison, and Wilson to deprive Plaintiffs of their constitutional rights, with direct participation specifically alleged as to each of them. Therefore, the Court will allow these claims to proceed.

statements to the press." Id. at 861. Therefore, absolute prosecutorial immunity would not apply to the claims asserted against Wilson in Count 25.

Finally, the Court notes that the "official capacity" claims against Addison, Gottlieb, and Himan will be treated as claims against the City, and those claims against the City will be considered as part of Count 26, since Plaintiffs must allege a separate basis for imputing liability to the City, and those allegations are made by Plaintiffs as part of Count 26.

Therefore, with respect to Count 25, the Court concludes that Count 25 will go forward as to Defendants Gottlieb, Addison, Himan, and Wilson in their individual capacities. In addition, to the extent that this claim is asserted against the City or against Gottlieb, Addison, or Himan in their "official capacities," those claims will be considered as part of Count 26. However, the Court concludes that this claim only states a potential claim for a violation of the Plaintiff Players' constitutional rights, not as to the Plaintiff Parents. Therefore, the claims asserted in Count 25 by the Plaintiff Parents will be dismissed.

Count 26: 42 U.S.C. § 1983 claims, asserted against the City[53] pursuant to Monell

In Count 26, Plaintiffs assert § 1983 claims against the City under Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Pursuant to Monell, a municipality is not vicariously liable under § 1983 for actions of its employees; instead, a municipality is only liable under § 1983 if the alleged constitutional violations were the result of a municipal policy or practice. A municipality may be liable under § 1983 "when execution of

[53] These claims were also originally asserted against Gottlieb, Himan, Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, and Addison in their official capacities, but Plaintiffs have agreed that there is no basis for separate "official capacity" claims since the City is named on these claims.

a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Monell, 436 U.S. at 694, 98 S. Ct. at 2037-38. A plaintiff can establish liability under Monell where the constitutional injury is proximately caused by a written policy or ordinance, or by a widespread practice that is "so permanent and well settled as to constitute a 'custom or usage' with the force of law." City of St. Louis v. Praprotnik, 485 U.S. 112, 127, 108 S. Ct. 915, 926, 99 L. Ed. 2d 107 (1988) (citation omitted). In addition, the Supreme Court has also recognized that liability may be imposed on a municipality where the constitutional injury is proximately caused by the decision of an official with final policymaking authority, that is, an official with authority to establish and implement municipal policy in that area. Id. Finally, municipal liability has been recognized based on inadequate training or supervision of employees if the training or supervision was so inadequate as to establish "deliberate indifference" to the rights of citizens and if the deficiency caused the constitutional violation alleged. See City of Canton v. Harris, 489 U.S. 378, 390-92, 109 S. Ct. 1197, 1206, 103 L. Ed. 2d 412 (1989). In sum, "[a] policy or custom for which a municipality may be held liable can arise in four ways: (1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure to properly train officers, that 'manifest[s] deliberate indifference to the rights of citizens'; or (4) through a practice that is so 'persistent and widespread' as to constitute a 'custom or usage with the force of law.'" Lytle v. Doyle, 326 F.3d 463, 471 (4th Cir. 2003) (quoting Carter v. Morris, 164 F.3d 215, 218 (4th Cir. 1999)). Such a claim only exists if, "through its deliberate conduct, the municipality was the 'moving force'

behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." Bd. of the County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 404, 117 S. Ct. 1382, 1388, 137 L. Ed. 2d 626 (1997).

As the basis for Count 26, Plaintiffs allege the existence of a policy or custom based on the contention that Durham Supervisors and the Durham Police "established a policy or custom encouraging Durham Police officers to target Duke University students for selective enforcement of the criminal laws," resulting in a violation of Plaintiffs' constitutional rights. Plaintiffs also allege that the City had a custom or policy of allowing Durham Police officials to publish premature official conclusions of criminality and guilt, which resulted in Addison's publication of posters in his official capacity as spokesperson, and that resulted in Hodge's public statements that "the Durham Police had a strong case against members of the Duke lacrosse team."

In addition, Plaintiffs allege that liability should be imposed on the City because Durham Supervisors and other Durham officials with final policymaking authority for the City knew of the violation of Plaintiffs' constitutional rights by Gottlieb, Himan, and Addison and "agreed to, approved, and ratified this unconstitutional conduct" by Gottlieb, Himan, and Addison. Plaintiffs also contend that Durham officials with final policymaking authority failed to exercise adequate supervisory authority over Gottlieb, given his history of "selective and malicious prosecution, excessive use of force, manufacturing of false evidence, and filing of false police reports in his dealings with Duke University students," and therefore, in assigning Gottlieb to

a lead position in the investigation, Durham Supervisors and other officials knew or were deliberately indifferent to the likelihood that Plaintiffs' constitutional rights would be violated To impose municipal liability based on the decision of a final policymaking official, the final policymaking official must have been "aware of the constitutional violation and either participated in, or otherwise condoned, it." Love-Lane v. Martin, 355 F.3d 766, 783 (4th Cir. 2004). This includes situations where "the authorized policymakers approve a subordinate's decision and the basis for it," since "their ratification would be chargeable to the municipality because their decision is final." Praprotnik, 485 U.S. at 127. Thus, liability may be imposed where the final policymaking official intentionally participates in or ratifies the constitutional violation. In addition, where a final policymaking official makes a decision or acts in a manner that is not in itself unconstitutional, liability may still exist if the final policymaking official acts with "deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision." Bd. of the County Comm'rs of Bryan County, 520 U.S. at 411, 117 S. Ct. at 1392; see also Carter v. Morris, 164 F.3d 215, 218-19 (4th Cir. 1999) (describing the required connection between the official's deliberate indifference and the ultimate constitutional violation).

Finally, as to Defendant Nifong, Plaintiffs allege that liability should be imposed on the City because District Attorney Nifong was given final policymaking authority for the City, and in his capacity as an official with final policymaking authority for the City, Nifong implemented policies on or after March 24 that violated Plaintiffs' constitutional rights. Plaintiffs also allege that Durham Supervisors knowingly ceded control of the investigation to Nifong "with

knowledge of or deliberate indifference to the violation of plaintiffs' constitutional rights" and Durham Supervisors took no corrective action even though they "had actual or constructive knowledge the Nifong had authorized and/or personally engaged in decisions from which it would have been plainly obvious to a reasonable supervisory official that violations of Plaintiffs' constitutional rights would inevitably occur."

Although "[t]he substantive requirements for proof of municipal liability are stringent," § 1983 claims are not subject to any heightened pleading standard, and "primary reliance must be placed on discovery controls and summary judgment to ferret out before trial unmeritorious suits against municipalities." Jordan v. Jackson, 15 F.3d 333, 338-40 (4th Cir. 1994). Thus, where a complaint alleges the existence of municipal policies, alleges that officials with final policymaking authority condoned and ratified unconstitutional conduct of subordinates, and alleges that the policies proximately caused the alleged constitutional violation, the allegations are sufficient at the motion to dismiss stage, although the "required showings are appreciably more demanding" at summary judgment. Id. at 340.

Having considered Plaintiffs' contentions in the present case with respect to the City, the Court concludes that Plaintiffs have sufficiently stated a claim for Monell liability against the City at this stage in the case. Specifically, the Court concludes that Plaintiffs have alleged that the City had a policy of targeting Duke students that led to multiple constitutional violations against Duke students, particularly by Gottlieb, and that the City through its final policy-making officials nevertheless continued the policy and ratified and condoned those violations. Plaintiffs have stated a plausible claim that this condoning of constitutional violations in the enforcement of

the policy led to the constitutional violations alleged by Plaintiffs in the present case.[54] Whether evidence exists to support this contention is not a question before the Court on the present motions. Of course, at later stages in the case, Plaintiffs will be required to present evidence to support these contentions, including evidence to establish the existence of an official policy or custom, and proof that the policy was the cause of the constitutional violation alleged here. See Jordan, 15 F.3d at 339-40. However, given the preliminary stage of this case, the Court concludes that those issues are more appropriately resolved at summary judgment, since resolution of this issue will require consideration of facts and proof beyond the allegations in the Amended Complaint

However, with respect to Plaintiffs' contention that Monell liability should attach based on "delegation" to Nifong, or based on Nifong's alleged status as a "final policymaker" for the City, the Court notes that "[w]hether a particular official has 'final policymaking authority' is a question of state law," and is "dependent on the definition of the official's functions under relevant state law." McMillian v. Monroe County, 520 U.S. 781, 786, 117 S. Ct. 1734, 1737, 138 L. Ed. 2d 1 (1997) (internal citation omitted). "A municipal agency or official may have final policymaking authority by direct delegation from the municipal lawmaking body, or by conferral from higher authority" such as state law. Spell v. McDaniel, 824 F.2d 1380, 1387 (4th Cir. 1987)

[54] In addition to the policy of targeting Duke students and ratification of Gottlieb's constitutional violations and assignment of Gottlieb to the investigation, Plaintiffs allege that Durham had a policy of publishing premature official conclusions of guilt. However, the Court does not reach the issue of whether these allegations are sufficient to state a Monell claim based on this policy, since the Court has already determined that Plaintiffs have alleged a sufficient policy to support a Monell claim at this stage in the case, as discussed above. Any further consideration of this issue is therefore reserved for summary judgment determination.

(internal citations omitted); see also Pembaur v. City of Cincinnati, 475 U.S. 469, 481-85, 106 S. Ct. 1292, 1299-1301, 89 L. Ed. 2d 452 (1986) (holding that a County Prosecutor may be a final policymaking official for the County where County officials delegated authority to the Prosecutor and state law authorized the County Prosecutor to establish county policy in appropriate circumstances). "Delegation may be express, as by a formal job-description, or implied from a continued course of knowing acquiescence by the governing body in the exercise of policymaking authority by an agency or official." Spell, 824 F.2d at 1387 (internal citations omitted); see also Praprotnik, 485 U.S. at 130, 108 S. Ct. at 927. ("[G]oing along with discretionary decisions made by one's subordinates . . . is not a delegation to them of the authority to make policy.") In addition, in determining whether an official has final policymaking authority in an area, "[t]he most critical factor is not the practical finality of an official's 'acts and edicts,' but their 'policy' nature." Spell, 824 F.2d at 1386 (noting that policymaking authority is "authority to set and implement general goals and programs of municipal government, as opposed to discretionary authority in purely operational aspects of government).

Under North Carolina law, the District Attorneys are state actors who act on behalf of the State of North Carolina and answer to the State Attorney General. N.C. Const. art. IV, § 18(1); N.C. Gen. Stat. § 7A-61, 69; see also Nivens v. Gilchrist, 444 F.3d 237, 249 (4th Cir. 2006) (holding that a suit against a District Attorney in his "official capacity" in North Carolina is a suit against the State as is therefore subject to Eleventh Amendment immunity). Although the Amended Complaint alleges that the City delegated authority to Defendant Nifong to direct the

investigation, the Court concludes that delegation of authority to supervise a particular investigation is not equal to delegation of authority to set City law enforcement policy. Moreover, there is no state law that would allow a city to delegate its policy-making authority to a state prosecutor, and only the state legislature has authority to prescribe duties for District Attorneys or supervise the District Attorney's exercise of authority. See N.C. Const. art. IV, § 18(1) ("The District Attorney shall advise the officers of justice in his district, be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district, perform such duties related to appeals therefrom as the Attorney General may require, and perform such other duties as the General Assembly may prescribe."); State v. Smith, 359 N.C. 199, 225, 607 S.E.2d 607, 625 (2005) (Brady, J., concurring); Simeon v. Hardin, 339 N.C. 358, 373, 451 S.E.2d 858, 868 (1994) ("[T]he district attorney's duties, including the docketing of criminal cases, are derived from statutes promulgated by the General Assembly pursuant to authority granted in Article IV, Section 18 of the North Carolina Constitution."). Therefore, the Court concludes that the City could not have delegated its policymaking authority to Nifong, and the claims against Nifong in his "official capacity" are claims against the State, not the City.[55] In light of this conclusion, the City cannot be liable under § 1983 for "official capacity" claims against Defendant Nifong or for alleged conduct by Nifong as a "policymaker." However, the City is still responsible for its own policies that result in constitutional violations by City

[55] The Court notes that Plaintiffs have not attempted to name the State as a party in this case or otherwise bring this suit against the State, since under the Eleventh Amendment, the State is immune from suits brought in federal court, and the State would not be a "person" subject to suit under § 1983. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989) ("We hold that neither a State nor its officials acting in their official capacities are 'persons' under § 1983.").

employees, even if the City employees were acting in coordination with or at the direction of Nifong. As noted above, Plaintiffs have alleged that the constitutional injuries alleged in Counts 21 and 25 were committed by City police officers, were approved or ratified by City officials with final policymaking authority for the City, and were the result of City policies adopted by those City officials. Therefore, although the Court rejects the legal contention that Nifong had final policymaking authority for the City or that the City delegated its policymaking authority to Nifong, the Court has nevertheless concluded that the Plaintiffs have stated a claim against the City pursuant to Monell, and any further consideration or determination of whether liability can be established will be before the Court at summary judgment. The Court notes, however, that a "Monell" claim is not in and of itself a § 1983 claim, and is instead simply the basis for holding the City liable for the underlying constitutional violations. Therefore, the Court's conclusion as to this Monell claim against the City simply means that the City is properly included as a Defendant on Counts 21 and 25.

Count 27: 42 U.S.C. § 1983 Claim for Negligent Supervision, asserted against Defendants Baker, Chalmers, Council, Hodge, Lamb, Ripberger, and Russ[56]

In Count 27, Plaintiffs assert a § 1983 claim against the Durham Supervisor Defendants for "Negligent Supervision." Plaintiffs assert three bases for this claim. First, Plaintiffs allege that these Defendants failed to supervise the investigation, resulting in a violation of Plaintiffs'

[56] Although this claim was originally asserted against Defendant Mihaich, Plaintiffs subsequently agreed that Defendant Mihaich should not be included in this Count, based on the representation that he "was not in the decision-making chain above Gottlieb, Himan, Addison, or Nifong and did not otherwise formulate or condone the practices and conduct at issue in this case." [Pls.' Resp. Brief, Doc. #93, at 6 n.5]. Therefore, the Court concludes that Defendant Mihaich is no longer included as a Defendant on Count 27.

constitutional rights. As to this contention, Plaintiffs allege that the named Defendants acquiesced in the decision to allow Nifong to direct the investigation, ordered Gottlieb and Himan to report to Nifong, ordered Himan and Gottlieb to expedite identifications and arrests in order to calm the community, and failed to prevent investigative abuses by the Durham Investigators that the Supervisors knew or should have known about. Second, Plaintiffs allege that these Defendants failed to supervise and control Gottlieb, and that this failure resulted in violations of Plaintiffs' constitutional rights. As the basis for this contention, Plaintiffs allege that Gottlieb had a demonstrated history of bias against Duke students, and the Supervisors knew or should have known about this history but failed to take meaningful action and acted with deliberate indifference by placing Gottlieb in a position to lead the investigation. Third, Plaintiffs allege that these Defendants failed to train, control, and supervise Addison. As to this contention, Plaintiffs allege that the Supervisors failed to adequately train Addison before placing him in the role as Crimestoppers coordinator. Plaintiffs further allege that during his tenure, Addison "demonstrated a consistent pattern of publishing premature declarations of guilt and illegality," and the Supervisors acted with reckless indifference in failing to correct this conduct. (Am. Compl. ¶ 713-714). Plaintiffs allege that in March and April 2006, "Addison, acting in his role as spokesman for the Durham Police Department and as coordinator of Durham Crimestoppers, published a series of inflammatory statements expressing the Department's official conclusion that Crystal Mangum had been raped, sodomized, sexually assaulted, and kidnapped by members of the Duke lacrosse team. In addition, Addison repeatedly expressed the Department's official view that plaintiffs were obstructing justice by failing to confess their

knowledge of or involvement in the alleged assault on Crystal Mangum." (Am. Compl. ¶ 715). Plaintiffs allege that the Supervisors knew or should have known of these statements by Addison but demonstrated reckless disregard or deliberate indifference by failing to take preventative or remedial action. Plaintiffs further allege that rather than take preventative or remedial action, "defendant Hodge publicly stated that Durham Police had a strong case against members of the Duke lacrosse team at a time when he knew or should have known that such a statement was false." (Am. Compl. ¶ 717).

Supervisory officials may be liable under § 1983 if "(1) . . . the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury to citizens like the plaintiff; (2) . . . the supervisor's response to that knowledge was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices[]'; and (3) . . . there was an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff." Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994). As discussed above, the Supreme Court in Ashcroft v. Iqbal reiterated that "[b]ecause vicarious liability is inapplicable to Bivens and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868 (2009). In Iqbal, the Supreme Court affirmed that under § 1983, supervisors "may not be held accountable for the misdeeds of their agents" and noted that as such, "the term 'supervisory liability' is a misnomer." Id. at 1949. Thus, each government actor "is only liable for his or her own misconduct" which requires the requisite intent for the type of constitutional

violation pled. See id. (holding that where the underlying constitutional violation required a showing of "purpose" to discriminate, "a supervisor's mere knowledge of his subordinate's discriminatory purpose" is not sufficient to establish a constitutional violation by the supervisor). Therefore, a supervisor cannot be liable under § 1983 for simply negligent conduct. However, in applying this standard, circuit courts have concluded that supervisory liability may still be imposed based on "deliberate indifference" where the underlying constitutional violation itself may be established based on deliberate indifference. See Starr v. Baca, No. 09-55233, 2011 WL 477094, at *4 (9th Cir. 2011); see also, e.g., Smith v. Ray, No. 09-1518, 2011 WL 317166, *8 (4th Cir. Feb. 2, 2011) (continuing to apply the Shaw v. Stroud "deliberate indifference" standard).[57]

In light of this evolving case law, and given the allegations presented by Plaintiffs, the Court concludes that Plaintiffs have sufficiently alleged conduct by these Supervisors to at least raise a plausible claim at this stage in the case.[58] Plaintiffs allege that the Durham Supervisors had "contemporaneous knowledge of the violations of plaintiffs' constitutional rights" by Gottlieb and Himan, and that the Durham Supervisors "agreed to, approved, and ratified" this

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[57] In this case, for the claims alleged in Count 21, Plaintiffs must allege that a false statement, essential to the probable cause determination, was included by the affiant in the warrant affidavit knowingly and intentionally, or with reckless disregard for the truth. Thus, the requisite intent to establish a constitutional violation and defeat qualified immunity is actual intent or reckless disregard for the truth. As discussed above, under Iqbal, each government actor "is only liable for his or her own misconduct" which requires the requisite intent for the type of constitutional violation pled. Therefore, "deliberate indifference," which requires a showing of actual intent or reckless disregard, would be sufficient to establish the requisite intent. See Starr v. Baca, No. 09-55233, 2011 WL 477094, at *2-4 (9th Cir. 2011).

[58] Moreover, it is apparent that these Supervisors will necessarily be involved in the discovery process in this case in any event, given their direct involvement in the alleged events and the ongoing claims against the City and other City employees.

unconstitutional conduct. (Am. Compl. ¶ 672-674). Plaintiffs also allege that the Durham Supervisors knew of Gottlieb's previous constitutional violations against Duke students, including manufacturing false evidence and filing false police reports, and were deliberately indifferent to the rights of citizens by condoning and ratifying that behavior and then assigning him to an investigation involving Plaintiffs and other Duke students. Plaintiffs contend that the Durham Supervisors acted with "reckless and callous disregard for, and deliberate indifference to, plaintiffs' constitutional rights." (Am. Compl. ¶ 702). These Defendants raise the defense of qualified immunity, but as discussed above with respect to Count 21, a reasonable police officer would have known that it would violate clearly established constitutional law to deliberately or recklessly present false or misleading evidence before a magistrate judge to effect a search or seizure without probable cause. In addition, under the Fourth Circuit's decision in Shaw, it was clearly established that an official violated the constitution if, in deliberate indifference to the constitutional rights of citizens, the official knew of his subordinate's constitutional violations and failed to act. Here, Plaintiffs allege that the Supervisors knew of Gottlieb's previous constitutional violations and were deliberately indifferent to the rights of citizens by condoning and ratifying that behavior and then assigning him to the investigation. In addition, Plaintiffs allege that the Supervisors knew of the alleged constitutional violations by Gottlieb and Himan and ratified and approved that conduct, including the alleged fabrication of the affidavit. Therefore, the Court will allow the claims against Baker, Chalmers, Hodge, Russ, Council, Lamb, and Ripberger to go forward at this time, but at summary judgment, it will be Plaintiffs' burden to "pinpoint[] the persons in the decisionmaking chain whose deliberate

indifference permitted the constitutional abuses to continue unchecked," and the Court will scrutinize evidence regarding each Defendant's direct, individual involvement, and evidence regarding their individual intent, in order to determine whether any of them is potentially liable under § 1983 for their own conduct with respect to the alleged constitutional violations that are proceeding in this case. See Shaw, 13 F.3d at 798. Therefore, the Motions to Dismiss will be denied as to Count 27, and the claims asserted in Count 27 against Baker, Chalmers, Hodge, Russ, Council, Lamb, and Ripberger will go forward at this time. In addition, the Court concludes that this claim only states a potential claim for a violation of the Plaintiff Players' constitutional rights in connection with the claims asserted in Counts 21 and 25, not as to the Plaintiff Parents. Therefore, the claims asserted in Count 27 by the Plaintiff Parents will be dismissed.

Count 28: Intentional Infliction of Emotional Distress, asserted against Gottlieb, Himan, Wilson, Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, and the City

In Count 28, Plaintiffs allege claims against the Durham Investigators (Gottlieb, Himan, and Wilson), the Durham Supervisors (Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, and Russ), and the City of Durham for Intentional Infliction of Emotional Distress. As the basis for this claim, Plaintiffs allege that the conduct by the named Defendants during the course of the investigation was extreme and outrageous and was intended to cause severe emotional distress. Plaintiffs allege that "this course of conduct included, but was not limited to, instigating, pursuing, and prolonging a malicious criminal investigation against [lacrosse team members] in the face of overwhelming exculpatory evidence; knowingly making false public

statements condemning the plaintiffs for committing rape and hiding behind a conspiracy of silence; suppressing exculpatory evidence and fabricating false inculpatory evidence; maliciously conspiring among themselves and with Duke officials; fraudulently abusing legal process, and betraying the public trust." (Am. Compl. ¶ 724). Plaintiffs contend that this conduct "did cause plaintiffs mental anguish and severe emotional distress." (Am. Compl. ¶ 726). However, Plaintiffs do not identify the nature or extent of the emotional distress as to each Plaintiff, or any factual circumstances regarding the emotional distress of any of the individual Plaintiffs.

As discussed above, under North Carolina law, "[t]he essential elements of an action for intentional infliction of emotional distress are '1) extreme and outrageous conduct by the defendant 2) which is intended to and does in fact cause 3) severe emotional distress.'" Waddle v. Sparks, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992) (quoting Dickens v. Puryear, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981)). "[T]he term 'severe emotional distress' means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." Waddle, 331 N.C. at 83, 414 S.E.2d at 27 (quoting Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990), reh'g denied, 327 N.C. 644, 399 S.E.2d 133 (1990)). "Humiliation and worry are not enough." Jolly v. Acad. Collection Serv., 400 F. Supp. 2d 851, 866 (M.D.N.C. 2005). The North Carolina Supreme Court has noted that "[e]motional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame,

humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea," but "*[i]t is only where it is extreme that the liability arises.*" Waddle, 331 N.C. at 84, 414 S.E.2d at 27 (emphasis in original); see also Pacheco v. Rogers & Breece, Inc., 157 N.C. App. 445, 451, 579 S.E.2d 505, 509 (2003).

With respect to the requirement that Plaintiffs have suffered "severe emotional distress," the Court again notes that in the Amended Complaint, Plaintiffs do not include any specific allegations of emotional or mental disorders or severe and disabling emotional or mental conditions suffered by any of the Plaintiffs individually. Indeed, the Amended Complaint does not include any specific identification of any particular Plaintiff's mental or emotional condition or the nature of his or her emotional distress. As discussed above, this Court has previously dismissed IIED claims where the complaint included only a conclusory statement of damages, without any "factual allegations regarding the type, manner, or degree of severe emotional distress [the plaintiff] experienced." Swaim v. Westchester Acad., Inc., 170 F. Supp. 2d 580, 585 (M.D.N.C. 2001). Thus, it is not sufficient for the Amended Complaint to state summarily that all 47 Plaintiffs suffered "severe emotional distress," without alleging facts supporting this assertion. Plaintiffs have failed to include any factual allegations as to each Plaintiff's emotional or mental disorders, condition, or diagnosis, in order to sufficiently allege that each of them suffered from severe emotional distress. Plaintiffs also failed to sufficiently allege a link between that emotional or mental disorder or condition and the specific misconduct alleged in this claim. Therefore, the Motions to Dismiss Count 28 will be granted, and Plaintiffs' claims for intentional infliction of emotional distress will be dismissed on this basis. As such, the Court

need not consider the remaining contentions raised by Defendants in their Motions to Dismiss this claim.

Count 29: Negligent Infliction of Emotional Distress, asserted against Gottlieb, Himan, Wilson, Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, and the City

In Count 29, Plaintiffs bring an additional claim for Negligent Infliction of Emotional Distress, contending that the conduct alleged above, presumably in Count 28, in addition to being intentional, was also reckless and grossly negligent, and breached a duty of care owed by the named Defendants to the Plaintiffs. Plaintiffs again only allege generally that Defendants' negligence "did in fact cause the plaintiffs severe emotional distress." (Am. Compl. ¶ 732).

As discussed above with respect to the previous Counts alleging Negligent Infliction of Emotional Distress as to other Defendants, in order to state a claim for Negligent Infliction of Emotional Distress ("NIED") under North Carolina law, Plaintiffs must allege a sufficient basis to support the contention that they each suffered "severe emotional distress" under North Carolina law, and that the "severe emotional distress was the foreseeable and proximate result" of Defendants' alleged negligence. McAllister v. Khie Sem Ha, 347 N.C. 638, 645, 496 S.E.2d 577, 583 (1998). As with a claim for intentional infliction of emotional distress, "severe emotional distress" requires an "emotional or mental disorder . . . which may be generally recognized and diagnosed by professionals trained to do so." Id. However, Plaintiffs have failed to include any specific allegations of emotional or mental disorders or severe and disabling emotional or mental conditions suffered by any of the Plaintiffs, and the Amended Complaint does not include any specific identification of any particular Plaintiff's mental or emotional

condition or the nature of their emotional distress. Cf. Holleman v. Aiken, 193 N.C. App. 484, 502, 668 S.E.2d 579, 591 (2008); Swaim v. Westchester Acad., Inc., 170 F. Supp. 2d 580, 585 (M.D.N.C. 2001). Therefore, the Motions to Dismiss Count 29 will be granted, and Plaintiffs' claims for negligent infliction of emotional distress in Count 29 will be dismissed.

Count 30: Negligence by the Durham Police, asserted against Gottlieb, Himan, Wilson, Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, Addison, and the City

In Count 30, Plaintiffs bring a claim for Negligence under state law against the Durham Investigators (Gottlieb, Himan, and Wilson), Durham Supervisors (Baker, Chalmers, Hodge, Lamb, Mihaich, Ripberger, Russ, and Addison), and the City of Durham. As the basis for this claim, Plaintiffs contend that the Durham Investigators owed Plaintiffs a duty to use due care with respect to the conduct of the investigation and with respect to public statements regarding the investigation, and that the conduct of the investigation by Gottlieb, Himan, and Wilson and the public statements by Addison violated this duty of care. With respect to the remaining named Defendants, Plaintiffs allege that the "Durham Supervisors participated in, ratified, and condoned these actions." (Am. Compl. ¶ 740).

This claim was asserted against the individually-named Defendants in both their official and individual capacities, but Plaintiffs concede that the "official capacity" claims are duplicative of the claim against the City and may be dismissed. With respect to the "individual capacity" claims, the individual Defendants have raised the defense of public official immunity to the extent that the claims are asserted against them in their individual capacities. "The public immunity doctrine protects public officials from individual liability for negligence in the

performance of their governmental or discretionary duties." Campbell v. Anderson, 156 N.C. App. 371, 376, 576 S.E.2d 726, 730 (2003); see also Thomas v. Sellers, 142 N.C. App. 310, 313, 542 S.E.2d 283, 286 (2001) (noting that under state law, a public officer is not liable in his individual capacity unless his conduct is "malicious, corrupt, or outside the scope of his official authority"); Moore v. Evans, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996). The named Defendants therefore contend that any state law negligence claims against them in their individual capacities are barred by public official immunity. In their Responses, Plaintiffs do not dispute this contention, and Plaintiffs do not oppose the Motions to Dismiss as to Count 30 with respect to the claims asserted against the individual Defendants in their individual capacities. Therefore, the Motions to Dismiss will be granted on that basis as to Gottlieb, Himan, Wilson, Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, and Addison, and the claims against these Defendants will be dismissed on the basis of public official immunity.

However, to the extent that this claim is asserted against the City, the Court concludes that this claim should go forward at the time. In this regard, the Court notes that Plaintiffs bring this claim for negligence based on the conduct of Wilson, Gottlieb, Himan, and Addison. In its briefing, the City requests dismissal of Count 30 to the extent that Plaintiffs assert this claim against the City based on the actions of District Attorney Nifong.[59] However, the City has not addressed this claim in its briefing to the extent that Plaintiffs assert this claim against the City

[59] As discussed with respect to Count 26, the Court has determined that the Nifong did not have an "official capacity" with respect to the City, and the City is not responsible for the actions of Nifong. Similarly, Defendant Wilson was not a City employee and does not have an "official capacity" as to the City.

based on alleged negligence by City employees Gottlieb, Himan, and Addison.[60] Therefore, this claim for negligence against the City will not be dismissed at this time to the extent that the claim is asserted based on the alleged negligence of City employees Gottlieb, Himan, and Addison. To the extent that the City asks for the opportunity to raise additional argument on these claims, the City may raise those arguments after discovery in summary judgment motions.[61] Therefore, the Motions to Dismiss will be granted on the basis of public official immunity as to Gottlieb, Himan, Wilson, Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, and Addison, but the Motions to Dismiss will be denied as to the City, and the claims against the City in Count 30 will go forward. Finally, the Court concludes that there is no basis for a claim against the City by the Plaintiff Parents, and therefore the claims asserted in Count 30 by the Plaintiff Parents will be dismissed.

Count 31: Negligent Hiring and Training, asserted against Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, and the City

In Count 31, Plaintiffs bring a claim against the Durham Supervisors (Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, and Russ) and the City of Durham for Negligent Supervision. As the basis for this claim, Plaintiffs allege that the Durham Supervisors and the

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[60] In its renewed Motion to Dismiss, the City attempts to incorporate the briefing of Defendants Himan and Gottlieb with respect to these claims, raising the "public duty doctrine." However, because this claim was not raised in the City's briefing, Plaintiffs have not had the opportunity to respond to this contention as it relates to the City. The Court will therefore consider this issue further at summary judgment to the extent that Plaintiffs' claims against the City are based in negligence and could be barred, at least to some extent, by the public duty doctrine.

[61] The City has filed a separate, pre-discovery Motion for Summary Judgment as to this claim raising the defense of governmental immunity, and that Motion is addressed below in relation to Count 32.

City of Durham owed Plaintiffs a duty under North Carolina law to use due care in the hiring, training, supervision, discipline, and retention of Durham Police personnel, including the Durham Investigators. Plaintiffs allege that the Supervisors breached this duty based on the conduct of Himan, Gottlieb, and Addison alleged above, and by negligently supervising Himan and assigning him to the investigation despite his lack of prior experience.

This claim was asserted against the individually-named Defendants in both their official and individual capacities, but Plaintiffs concede that the "official capacity" claims are duplicative of the claim against the City and may be dismissed. With respect to the "individual capacity" claims, the individual Defendants have raised the defense of public official immunity to the extent that the claims are asserted against them in their individual capacities. As noted above, "the public immunity doctrine protects public officials from individual liability for negligence in the performance of their governmental or discretionary duties." Campbell v. Anderson, 156 N.C. App. 371, 376, 576 S.E.2d 726, 730 (2003); see also Thomas v. Sellers, 142 N.C. App. 310, 313, 542 S.E.2d 283, 286 (2001); Moore v. Evans, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996). The named Defendants therefore contend that any state law negligence claims against them in their individual capacities are barred by public official immunity. In their Responses, Plaintiffs do not dispute this contention, and Plaintiffs do not oppose the Motions to Dismiss as to Count 31 with respect to the claims asserted against the individual Defendants in their individual capacities. Therefore, the Motions to Dismiss will be granted on that basis as to Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, and Russ, and the claims against these Defendants will be dismissed on the basis of public official immunity.

However, to the extent that this claim is asserted against the City, the Court concludes that this claim should go forward at the time. In this regard, the Court notes that just as in Count 30, the City has not addressed this claim in its briefing.[62] Therefore, this claim for negligence against the City will not be dismissed at this time. To the extent that the City asks for the opportunity to raise additional argument on these claims, the City may raise those arguments after discovery in summary judgment motions.[63] Therefore, the Motions to Dismiss will be granted on the basis of public official immunity as to Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, but the Motions to Dismiss will be denied as to the City, and the claims against the City in Count 31 will go forward. However, the Court concludes that there is no basis for a claim against the City by the Plaintiff Parents, and therefore the claims asserted by the Plaintiff Parents in Count 31 will be dismissed.

Count 32: Claims for violation of the North Carolina Constitution Article I, Section 19, asserted against the City[64]

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[62] In its renewed Motion to Dismiss, the City attempts to incorporate the briefing of Defendants Himan and Gottlieb with respect to these claims, raising the "public duty doctrine." However, because this claim was not raised in the City's briefing, Plaintiffs have not had the opportunity to respond to this contention as it relates to the City. The Court will therefore consider this issue further at summary judgment.

[63] The City has filed a separate, pre-discovery Motion for Summary Judgment as to this claim raising the defense of governmental immunity, and that Motion is addressed below in relation to Count 32.

[64] This claim is also asserted based on the actions of Gottlieb, Himan, Wilson, Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, and Addison in their official capacities. As to Defendants Gottlieb, Himan, Baker, Chalmers, Council, Hodge, Lamb, Mihaich, Ripberger, Russ, and Addison , these "official capacity" claims will be construed as claims against the City. However, Defendant Wilson does not have an "official capacity" with respect to the City, and no claim is asserted in this case against the State or the District Attorney's office.

Finally, Plaintiffs in the Amended Complaint have added Count 32, which is a claim against the City for violation of the North Carolina Constitution. As the basis for this claim, Plaintiffs contend that they have been deprived of their rights under Article I, Section 19 of the North Carolina Constitution. As part of the claim, Plaintiffs note that this cause of action is pled "in the alternative, in the event that the City of Durham should prevail on its argument that the other state-law causes of action pleaded in this complaint are barred in whole or in part by principles of governmental immunity, which would render the plaintiffs' state law remedies inadequate under North Carolina law and plaintiffs would possess direct claims under the North Carolina Constitution." (Am. Compl. ¶ 750).

With respect to these contentions, the Court notes that, as discussed above, Plaintiffs have asserted claims against the City for obstruction of justice and negligence with respect to Counts 23, 30, and 31 that will not be dismissed on a Motion to Dismiss. However, the City has filed a separate Motion for Summary Judgment [Doc. #113], contending that the state law claims are barred by the doctrine of governmental immunity. In this regard, the City enjoys governmental immunity on these state law claims except to the extent that its immunity has been waived by the purchase of insurance. See Mullins v. Friend, 116 N.C. App. 676, 680, 449 S.E.2d 227, 229 (1994); N.C. Gen. Stat. § 160A-485(a). Plaintiffs have alleged in the Amended Complaint that the doctrine of governmental immunity does not apply to bar the state law claims because the City has purchased insurance coverage which operates to waive sovereign immunity to the policy limits. However, in the Motion for Summary Judgment, the City contends that it has not purchased insurance that would waive its immunity for the state law

claims asserted by Plaintiffs. Specifically, the City contends that while it has purchased insurance coverage, those policies do not extend coverage to claims against the City for which a defense of governmental immunity would otherwise be available.

After the Motion for Summary Judgment was filed, the North Carolina Supreme Court issued a decision in Craig v. New Hanover County Bd. of Educ., 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009), concluding that a claim may potentially be asserted under the state constitution if other state law claims would be barred by governmental immunity. Therefore, in response to that decision, Plaintiffs subsequently added the claim in Count 32 as an alternative claim, should it ultimately be determined that the state law claims would otherwise be barred by governmental immunity.

In its renewed Motion to Dismiss, Defendants contend that Count 32 should be dismissed because Plaintiffs cannot state a claim under the North Carolina constitution. Defendants contend that Plaintiffs have not alleged any constitutional violation and that Plaintiffs have other "adequate remedies" at state law. Under North Carolina law, a claim under the state constitution may only be asserted when there is no other adequate remedy under state law. See id.; see also Corum v. Univ. of N.C., 330 N.C. 761, 782-86 413 S.E.2d 276, 289-92 (1992). Thus, to assert a direct constitutional claim, "a plaintiff must allege that no adequate state remedy exists to provide relief for the injury." Copper v. Denlinger, 363 N.C. 784, 788, 688 S.E.2d 426, 428 (2010). "An adequate state remedy exists if, assuming the plaintiff's claim is successful, the remedy would compensate the plaintiff for the same injury alleged in the direct constitutional claim." Estate of Fennell v. Stephenson, 137 N.C. App. 430, 437, 528 S.E.2d 911,

915-16 (2000), rev'd in part on other grounds, 354 N.C. 327, 554 S.E.2d 629 (2001). Moreover, an adequate remedy is one that "provide[s] the possibility of relief under the circumstances." Craig, 363 N.C. at 340, 678 S.E.2d at 355. Thus, "to be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." Id. at 339-40, 678 S.E.2d at 355.

In Craig, the Supreme Court held that where governmental immunity bars a common law negligence claim, that negligence claim does not provide an adequate remedy at state law. Id. The court further held that when a tort remedy is barred by governmental immunity, a "plaintiff may move forward in the alternative, bringing his colorable claims directly under [the] State Constitution based on the same facts that formed the basis for his common law negligence claim." Id. at 340, 678 S.E.2d at 355. The court noted that the "holding does not predetermine the likelihood that plaintiff will win other pretrial motions, defeat affirmative defenses, or ultimately succeed on the merits of his case. Rather, it simply ensures that an adequate remedy must provide the possibility of relief under the circumstances." Id. Thus, the state supreme court has concluded that where a negligence claim is asserted against the municipality but no recovery is available due to the doctrine of governmental immunity, then no adequate state remedy exists.

In the present case, 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. Therefore, to the extent that Defendants contend that Count 32 should be dismissed because there are alternative remedies, the Court will deny the Motion to Dismiss as to Count

32, and allow it to go forward as a potential alternative claim should the City ultimately prevail on its governmental immunity defense. However, the Court concludes that there is no basis for a claim against the City by the Plaintiff Parents, and therefore the claims asserted by the Plaintiff Parents in Count 32 will be dismissed.

Moreover, since these claims are going forward on an alternative basis, the Court concludes that there is no need to resolve the City's governmental immunity defense on a preliminary summary judgment determination, and that determination is better made after an opportunity for discovery and consideration with all of the remaining claims and defenses together. This approach is particularly appropriate here given that claims are proceeding against the City in any event under 42 U.S.C. § 1983. Therefore, the City's Motion for Summary Judgment [Doc. #113] raising the governmental immunity defense will be denied at this time without prejudice to the City raising the defense as part of a comprehensive Motion for Summary Judgment at the close of discovery.

For the reasons discussed, the Motion to Dismiss Count 32 will denied as to the City, and the claim against the City will go forward at this time as a potential alternative claim should the City ultimately prevail on its governmental immunity defense. However, the Court concludes that there is no basis for a claim against the City by the Plaintiff Parents, and therefore the claims asserted by the Plaintiff Parents in Count 32 will be dismissed. In addition, the Court concludes that, based on the foregoing analysis, there is no need to resolve the City's governmental immunity defense on a preliminary summary judgment determination, and therefore, the City's Motion for Summary Judgment [Doc. #113] raising the governmental immunity defense will be

denied at this time without prejudice to the City raising the defense as part of a comprehensive Motion for Summary Judgment at the close of discovery.

IV. CONCLUSION

Having undertaken this comprehensive review of the 32 claims asserted in this case by 47 different Plaintiffs against 28 Defendants, the Court concludes that the Motions to Dismiss will be granted in part and denied in part as set out herein.

In summary, Counts 21 and 25 will go forward under 42 U.S.C. § 1983 for alleged constitutional violations with respect to the claims by the Plaintiff Players.[65] The claims asserted in Count 21 are asserted pursuant to 42 U.S.C. § 1983 for violation of the Fourth and Fourteenth Amendment for unlawful searches and seizures without probable cause based on the Non-Testimonial Order that was allegedly obtained through the intentional or reckless use of false or misleading evidence or material omissions designed to mislead the magistrate judge. The claims asserted in Count 25 are asserted pursuant to 42 U.S.C. § 1983 for violation of the Fourteenth Amendment based on alleged false and stigmatizing statements by the government in connection with the alleged Fourth Amendment violations in Count 21. With respect to these § 1983 claims, to the extent that Defendants contend that there was no constitutional violation

[65] With respect to the claims going forward in this case, as set forth herein, the Court notes that such claims are only proceeding as brought by the Plaintiff Players Edward Carrington, Casey J. Carroll, Michael P. Catalino, Thomas Clute, Kevin Coleman, Joshua R. Coveleski, Edward J. Crotty, Edward S. Douglas, Kyle Dowd, Daniel Flannery, Richard Gibbs Fogarty, Zachary Greer, Erik S. Henkelman, John E. Jennison, Ben Koesterer, Fred Krom, Peter J. Lamade, Adam Langley, Christopher Loftus, Daniel Loftus, Anthony McDevitt, Glenn Nick, Nicholas O'Hara, Daniel Oppedisano, Sam Payton, John Bradley Ross, Kenneth Sauer, III, Steve Schoeffel, Robert Schroeder, Devon Sherwood, Daniel Theodoridis, Bret Thompson, Christopher Tkac, John Walsh, Jr., Michael Ward, Robert Wellington, William Wolcott, and Michael Young.

because probable cause would still exist to support the search and seizure, even if the allegedly false and misleading statements are removed and the alleged material omissions are included, the Court has concluded that this contention cannot be resolved on a motion to dismiss in light of the Plaintiffs' allegations here. Such an inquiry is fact-intensive in the present case given the number of and nature of the alleged misrepresentations and omissions. Therefore, the Court concludes that this issue is more appropriately considered on an evidentiary record after discovery.

The claims by the Plaintiff Players for the alleged constitutional violations in Count 21 are going forward as to Defendants Gottlieb, Himan, and Levicy based on allegations that they were directly involved in the alleged Fourth Amendment violations.[66] The claims by the Plaintiff Players in Count 25 are going forward as to Defendants Gottlieb, Himan, Addison, and Wilson. The claims by the Plaintiff Players in Count 21 and 25 are also going forward as to the City based on the additional allegations contained in Count 26, setting out claims for municipal liability. However, to the extent that there are claims proceeding against the City, Plaintiffs may not recover punitive damages from the City. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271, 101 S. Ct. 2748, 2762, 69 L. Ed. 2d 616 (1981). Therefore, the claim for punitive damages against the City will be dismissed. Finally, the Court will allow the § 1983 claims by the Plaintiff Players in Counts 21 and 25 to go forward against the Durham Police "supervisors,"

[66] As to Defendant Levicy, the Court concludes that Plaintiffs have alleged that she became a "state actor" by allegedly joining with Nifong, Gottlieb, and Himan to commit the alleged constitutional violations, knowing that the NTO was not supported by probable cause and was based on false and misleading assertions and material omissions. As with all of these claims, it will be Plaintiffs' burden to present proof of these allegations.

specifically, Baker, Chalmers, Hodge, Russ, Council, Lamb, and Ripberger, based on Plaintiffs' allegations as discussed with respect to Count 27. However, at summary judgment, it will be Plaintiffs' burden to "pinpoint the persons in the decision-making chain whose deliberate indifference permitted the constitutional abuses to continue unchecked," and the Court will scrutinize evidence regarding each Defendant's direct, individual involvement, and evidence regarding their individual intent, in order to determine whether any of them is potentially liable under § 1983 for their own conduct with respect to the alleged constitutional violations that are proceeding in this case.[67] The Court notes that the § 1983 claims are not going forward as to Defendant Duke, because the Court finds that Plaintiffs have failed to allege a sufficient basis to support the contention that Duke was a "state actor."

The remaining claims asserted under 42 U.S.C. § 1983, including all of the claims in Counts 20, 22, and 24 do not state plausible, legally viable claims, and will be dismissed.

With respect to the state law claims, the Court concludes that with respect to Count 23, Plaintiffs have stated a state law claim by the Plaintiff Players for obstruction of justice against Defendants Gottlieb, Himan, Wilson, and Levicy, with potential *respondeat superior* liability against the City, Duke, and Duke Health. As an alternative to *respondeat superior* under state law, Plaintiffs have also stated a claim for negligent supervision against both Duke Health and Duke in Count 3 and against Duke only in Count 19. In addition, Plaintiffs have stated a claim in Count 8 by the Plaintiff Players against Duke, Drummond, Hendricks, Graves, and Dean for

[67] In addition, special attention should be given during the discovery process to ensure that these Supervisors are not unduly burdened in light of the potential qualified immunity defense and the protections it affords.

fraud, based on allegations that Defendants Drummond, Hendricks, Graves and Dean sent letters to Plaintiffs informing them that Duke had received a subpoena relating to Plaintiffs' Duke Card information, and in doing so fraudulently misrepresented that Plaintiffs' Duke Card information had not previously been provided to Durham Police. Plaintiffs have also stated a claim by the Plaintiff Players in Count 11 for constructive fraud against Defendants Duke, Wasiolek, Trask and Brodhead, based on claims that Duke administrators created a relationship of trust and confidence and then abused that relationship for Duke's benefit.

Finally, with respect to the state law claims against the City in Counts 23, 30 and 31, and the state constitutional claim asserted in Count 32, the Court concludes that these claims, and the governmental immunity defense raised in the City's Motion for Summary Judgment [Doc. #113], are intertwined claims, that are in some cases pled in the alternative, that must be resolved at summary judgment after an opportunity for discovery, given the factual issues raised.[68]

However, Plaintiffs have failed to state a claim with respect to their remaining state law claims, including all of the claims asserted in Counts 1, 2, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 16, 17, 18, 28, and 29. Plaintiffs have also failed to state any claim by the Plaintiff Parents,[69] and all of the claims asserted by the Plaintiff Parents are dismissed.

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[68] The Court notes that as with the § 1983 claims, Plaintiffs may not recover punitive damages against the City on these state claims. See Efird v. Riley, 342 F. Supp. 2d 413, 430 (M.D.N.C. 2004) (citing Long v. City of Charlotte, 306 N.C. 187, 208, 293 S.E.2d 101, 115 (1982)).

[69] The Plaintiff Parents in this case are Gale Catalino, Patricia Dowd, Irene Greer, Steven Henkelman, Mark Koesterer, Joyce Koesterer, Barbara Loftus, Lynnda O'Hara, and Tracy Tkac.

Based on this determination, the Court notes that claims are going forward as to Defendant Gottlieb in Counts 21, 23, and 25; against Defendant Himan in Counts 21, 23, and 25; against Defendant Levicy in Counts 21 and 23; against Defendant Addison in Count 25; against Defendant Wilson in Counts 23 and 25; against the City in Counts 21 and 25 (based on the allegations in Count 26), as well as in Counts 23, 30, 31, and 32; against Defendants Hodge, Baker, Chalmers, Russ, Council, Lamb, and Ripberger in Counts 21, 25, and 27; against Defendants Brodhead, Wasiolek, and Trask in Count 11; against Defendants Graves, Dean, Hendricks, and Drummond in Count 8; against Duke Health in Counts 3 and 23; and against Duke in Counts 3, 8, 11, 19, and 23. All remaining claims are dismissed, including all of the claims asserted in Counts 1, 2, 4, 5, 6, 7, 9, 10, 12, 13, 14, 15, 16, 17, 18, 20, 22, 24, 28, and 29, and all of the claims asserted against Defendants Lange, Moneta, Burness, Dzau, Mihaich, and Arico.

Having undertaken this comprehensive review of the 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.[70] 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

[70] The Court does acknowledge that the Amended Complaint in this case is roughly half the size of the Second Amended Complaint in the related case of McFadyen, et. al v. Duke University, et. al. While this is certainly better, it is still far too much.

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 225 pages and 751 numbered paragraphs, most of which are not relevant to the actual legally-recognized claims that may be available. As in the other "related cases," Plaintiffs' potentially valid claims risk being lost in the sheer volume of the Amended Complaint, 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." 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1281 (3d ed. 2004). The Court has nevertheless undertaken this process and has considered each of Plaintiffs' claims, resulting in this rather extensive Memorandum Opinion. The Court trusts that, going forward, all of the parties will reduce both the volume of filings and the rhetoric contained therein, and will proceed on the remaining claims in a direct, professional manner, without requiring unnecessary involvement from the Court.

However, the Court is also compelled to note that the allegations in the Amended Complaint that are going forward, particularly as to Counts 21 and 25, set out allegations of significant abuses of government power. Indeed, the intentional or reckless use of false or

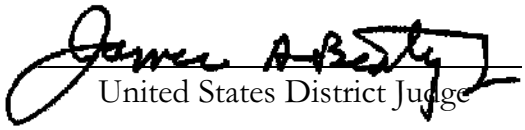
misleading evidence before a magistrate judge to effect a search and seizure without probable cause is exactly the type of "unreasonable" search and seizure that the Fourth Amendment was designed to protect against. In this regard, it has been noted that "'if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit.'" Washington v. Wilmore, 407 F.3d 274, 285 (Shedd, J., concurring) (quoting Limone v. Condon, 372 F.3d 39, 44-45 (1st Cir. 2004)). In addition, "the Supreme Court has long held that a police officer violates the Fourth Amendment if, in order to obtain a warrant, he deliberately or 'with reckless disregard for the truth' makes material false statements or omits material facts. . . . No reasonable police officer . . . could believe that the Fourth Amendment permitted such conduct." Miller v. Prince George's County, 475 F.3d 621, 631-32 (4th Cir. 2007) (internal citations omitted). Thus, there can be no question that the Constitution is violated when government officials deliberately fabricate evidence and use that evidence against a citizen, in this case by allegedly making false and misleading representations and creating false and misleading evidence in order to obtain an NTO against all of the lacrosse team members. This case will therefore proceed to discovery on the claims as set out above, and it will ultimately be Plaintiffs' burden to present proof in support of these claims.

IT IS THEREFORE ORDERED that the Motions to Dismiss [Doc. # 146, 147, 148, 149, 150, 151, 152, 153, and 154] are GRANTED IN PART and DENIED IN PART as set out herein. IT IS FURTHER ORDERED that the City of Durham's Motion for Summary Judgment [Doc. #113] is DENIED at this time, without prejudice to the City raising the issues

contained therein as part of a comprehensive Motion for Summary Judgment at the close of discovery.

A separate Order will be entered contemporaneously herewith.

This, the 31st day of March, 2011.



United States District Judge