IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LIONETTA WHITE Plaintiff, v. CITY OF CHICAGO, et al Defendants.	)))))))))	Case No. 17-cv-2877 Judge Sara Ellis Magistrate Judge Laura McNally

DEFENDANT KALLATT MOHAMMED'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant, Kallatt Mohammed ("Mohammed"), by and through one of his attorneys, Special Assistant Corporation Counsel Eric S. Palles of Mohan Groble Scolaro, P.C., in support of his Motion for Summary Judgment states as follows:

INTRODUCTION

Mohammed and the other Defendant Officers have moved for summary judgment in their favor. Mohammed hereby adopts and incorporates Sections III through V of the separate motion for summary judgment of Defendant Officers. Mohammed writes separately concerning why the totality of Plaintiff's decedent's statements are insufficient to withstand Mohammed's motion for summary judgment.

Lionel White ("White"), the original plaintiff, died of a drug overdose in February 2023, prior to providing any sworn testimony in this case. *See* Dkt. 160 at 1; *see also* JSOF at ¶ 110. His account of the events is set forth in his Complaint (Dkt. 1), his statements to investigators into misconduct both before (with OPS) and after (with COPA) the filing of this suit (JSOF ¶¶ 115-16, 119-20) and an affidavit he filed in connection with his post-conviction petition. (JSOF ¶¶ 117-

118). In sum, White alleges that, after being warned that police were arriving, he retreated to his girlfriend's apartment. *Id.* Shortly after, Watts and Jones entered the apartment and Jones punched White. *Id.* The officers searched the apartment and although they did not recover any drugs, they arrested White for drug possession, to which he pleaded guilty two months later. *Id*.

There is no basis to corroborate White's allegations of fabrication[1] and there is no admissible evidence that can overcome this motion for summary judgment.

LEGAL STANDARD

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a). In determining whether summary judgment is appropriate, the Court must construe all facts in a light most favorable to the non-moving party and draw all reasonable inferences in that party's favor, *Majors v. Gen. Elec. Co*., 714 F.3d 527, 532 (7th Cir. 2013), but is not required to "draw every conceivable inference from the record - only those inferences that are reasonable." *Wade v. Collier*, No. 10 C 6876, 2013 U.S. Dist. LEXIS 127263, at *16-17, 2013 WL 4782028 (N.D. Ill. Sept. 6, 2013), *quoting Bennington v. Caterpillar Inc*., 275 F.3d 654, 658 (7th Cir. 2001).

Summary judgment should be granted to the moving party who demonstrates that "there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); s*ee also Modrowski v. Pigatto*, 712 F.3d 1166, 1168 (7th Cir. 2013). It is the "put up or shut up" moment in a lawsuit — "when a party must show what evidence it has that would convince a trier of fact to accept its version of events." *See Steen v. Myers*, 486 F.3d 1017, 1022 (7th Cir. 2007); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986) (the purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to

[1] While there is independent corroboration that White was injured and sent to the hospital after his arrest, there is no claim of excessive force, and any such claim is barred by the applicable statutes of limitation.

see whether there is a genuine need for trial."). In order to overcome the undisputed facts set forth in a defendant's motion for summary judgment, a plaintiff cannot rest on the allegations in his complaint but must point to affidavits, depositions or other admissible evidence. Fed. R. Civ. P. 56(e)(2); *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996); *Besser v. Moats*, No. 16-1058, 2017 WL 3328530 2017 U.S. Dist. LEXIS 123068, at *4-5 (C.D. Ill. Aug. 4, 2017). Summary judgment requires a non-moving party "to respond to the moving party's properly-supported motion by identifying specific, *admissible* evidence." *MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co*., 994 F.3d 869, 876 (7th Cir. 2021) (emphasis added). In so doing, a court may not consider a hearsay statement that would be inadmissible at trial. *Blackburn v. UPS, Inc*., 179 F.3d 81, 95 (3d Cir. 1999) (citing *Philbin v. Trans Union Corp*., 101 F.3d 957, 961 n.1 (3d Cir. 1996)). White's unavailability has left Plaintiff with insufficient admissible evidence to produce a judgment in her favor.

DECEDENT'S STATEMENTS ARE INADMISSIBLE HEARSAY

During the course of preparing the parties' joint statement of facts under this Court's summary judgment procedures, Plaintiff's counsel proffered facts supported only by White's out-of-court statements made to OPS in September 2006 and to COPA in November 2018. JSOF ¶¶ 115-16,119-20. The statements are clearly hearsay and not made under circumstances in which the evidentiary rules make an exception where the declarant is unavailable. Fed. R. Evid. 804. The statements therefore cannot be used to oppose summary judgment unless they are admissible under the residual hearsay exception. Fed R. Evid. 807. Because the rule is unavailing for several reasons, Mohammed is entitled to judgment as a matter of law.

First, the Rule requires a written notice of intent. Fed. R. Evid. 807(b). Plaintiff's counsel has never provided notice of intent to use the statements. Notice must be "reasonable" and afford

an opposing party a "fair opportunity" to meet it. *Id.* Plaintiff's decedent passed away in February 2023. Discovery closed in December 2023. On March 5, 2024, Judge Maldonado set this case for trial on July 7, 2025. Dkt. 172. After the judge's appointment to the Circuit Court of Appeals, on September 4, 2024, this Court scheduled dispositive motions to be filed and a trial date of September 15, 2025, which still stands. Dkt. 188. For no apparent reason, Plaintiff withheld her intentions for nine months prior to the close of discovery and has yet to serve a written notice of intent for the subsequent fifteen months.

Numerous circuit courts have noted that the legislative history of this notice requirement manifested the intent that it be rigidly enforced. *United States v. LaGrua*, Nos. 98-1323(L), 98-1568, 1999 U.S. App. LEXIS 12091 (2d Cir., June 11, 1999); *United States v. Atkins*, 618 F.2d 366, 372 (5th Cir. 1980); *United States v. Ruffin*, 575 F.2d 346, 358-59 (2d Cir. 1978); see also *United States v. Oates*, 560 F.2d 45, 72-73 n.30 (2d Cir. 1977). Testimony is properly excluded for failure to comply with the notice requirement, notwithstanding that there is no possibility that such testimony would come as surprise to the opposing party. *Lloyd v. Professional Realty Services, Inc*., 734 F.2d 1428, (11th Cir. 1984), cert. denied, 469 U.S. 1159 (1985).

Plaintiff's counsel must account for this unreasonable delay. Had Defendants known of the intent to use White's statements, they could have deposed each of White's interrogators before the discovery cut-off. They would not have had to seek clarification of this Court's procedures in the face of these statements being offered for their proof in connection with the joint statement of undisputed facts. Currently, the absence of notice under Rule 807(b) of 25 months and counting results in a "mangled mess of procedural fairness." *White v. City of Chicago*, 17 C 2877, 2024 U.S. Dist. LEXIS 208846 *12; 2024 WL 4818436 (N. D. Ill., Nov. 18, 2024). The statements can be excluded for this reason.

Additionally, neither statement to the disciplinary investigators passes muster under the rule. Fed. R. Evid. 807 embodies the so-called "residual exception" to the hearsay rule. The Rule applies only in the absence of any other exception and is to be used only rarely and in exceptional circumstances. *Keri v. Board of Trs. of Purdue Univ.*, 458 F.3d 620, 631 (7th Cir. 2006); *Hill v. City of Chicago*, 2011 WL 3876915, 2011 U.S. Dist. LEXIS 98494, *14 (N.D. Ill., Sept. 1, 2011); *Brown v. Phillip Morris, Inc.,* 228 F. Supp. 2d 506, 512 (D.N.J. 2002). Most importantly, the statements must have "sufficient guarantees of trustworthiness."[2]

Assessing the trustworthiness of a hearsay statement under Fed. R. Evid. 807 requires the court to examine the totality of the circumstances under which it was given and whether it is corroborated by independent evidence. Here, White's version of the arrest is largely uncorroborated. As to the circumstances:

White's first statement was given to OPS investigator Wilbert Neal at Dixon Correctional Center on September 18, 2006, five months after White's arrest. The end-product of Neal's interview was a narrative summary, not verbatim, drafted by Neal and signed by White under penalty of perjury and Neal's report that White identified Alvin Jones and Mohammed from a photo array, adding, however, that White stated Mohammed had nothing to do with his arrest. JSOF ¶¶ 115-16.

White's second "statement" is in the form of a memorandum prepared of a COPA interview of White conducted on November 29, 2018 at the offices of Loevy & Loevy, twelve years later and over a year after this suit was filed. White was represented by his present counsel. White was not sworn and his lawyers refused to allow the COPA investigators to record the interview. *See* JSOF ¶119. Courts have listed various factors to consider in determining trustworthiness, some

[2] Mohammed concedes for purposes of this motion that the statements may be more probative than any other evidence that the Plaintiff can obtain through reasonable efforts. Fed. R. Evid. 807 (a) (2).

pertinent to this case and some not. Two helpful compendiums are contained in *United States v. Moore,* 824 F.3d 620 – (7th Cir. May 27, 2016) and *Navedo v. PrimeCare Med, Inc.,* 2014 U. S. Dist LEXIS 51484, 2014 WL 1451836 (M.D. Pa., Apr. 14, 2014). Among the factors militating against admissibility, neither statement was spontaneous, verbatim or recorded in any manner. Although White's motivation in 2006 is obscure, we may infer he was seeking some sort of judicial relief. Certainly, by 2018, after filing this suit, White's statements before COPA and his two lawyers were in anticipation of litigation. Then there is the issue of character; suffice to say that White had numerous felony convictions over his lifetime, including two armed robberies. JSOF ¶127. Finally, and most importantly, the evidence lacks our law's ultimate guarantee of trustworthiness: the opportunity to cross-examine.

District courts confronting similar circumstances have rejected attempts to inject a decedent's out-of-court statements where other corroboration was lacking. In *Brown v. Phillip Morris*, 228 F. Supp. 2d 506 (D.N.J. 2002), plaintiff attempted to avert summary judgment by proffering a video statement her decedent had recorded at his attorney's office prior to his death. Although finding that several factors militated in favor of admissibility, other factors diminished their trustworthiness including 1) decedent did not make the statement under oath and penalty of perjury; 2) defendants did not have the opportunity to cross-examine decedent and the statement was not spontaneous; 3) the statement was made many years after the events giving rise to plaintiff's claims; 4) decedent had an interest in presenting facts related to his statement in the light most favorable to his claims; and 5) there was no corroborating evidence. The court barred the statement and granted summary judgment for the defendant. *Id.* at 524; *see also Navedo v. PrimeCare Med, Inc.,* 2014 U. S. Dist LEXIS 51484, 2014 WL 1451836 (M.D. Pa., Apr. 14, 2014) which similarly involved a videotaped statement by the decedent in her lawyer's office with

similar results, the court excluding the statement on a motion *in limine* because decedent was not under oath and defendant was not able to cross-examine her, the testimony was not spontaneous but was made in anticipation of litigation, and Decedent thus had a considerable financial stake in her statements, and her statements six months after her medical treatment was not contemporaneous. *Id.* at *7. In *Borger-Greco v. AMTRAK*, 2005 U.S. Dist. LEXIS 10658 (E.D. Pa. June 1, 2005), the court in ruling on summary, refused to consider a decedent's written statement, drafted on the prompting of his attorney, and certain statements made to his wife. Any claims to trustworthiness were vitiated by the fact that defendants were not given the opportunity to cross-examine the decedent regarding the contents of his written statement and that, after talking to his attorney, decedent had a motive to paint an unfavorable portrait of Amtrak and its agents. *Id.* at *24.

If Plaintiff cannot establish an element essential to her case, that White was framed, the Defendants are entitled to summary judgment. The evidence relied upon must be competent evidence of a type otherwise admissible at trial. *Bombard v. Fort Wayne Newspapers*, 92 F. 3d 560, 562 (7th Cir. 1996).

THE POST-CONVICTION AFFIDAVIT IS INADMISSIBLE

Plaintiff also relies upon the allegations contained in White's August 25, 2016 affidavit in support of his post-conviction petition. Certainly, Fed. R. Civ. P. 56 contemplates the use of affidavits to support or oppose motion for summary judgment. However, "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). A party may not rely upon inadmissible hearsay in an affidavit to oppose a motion

for summary judgment. *Wigod v. Chicago Mercantile Exch*., 981 F.2d 1510, 1518-19 (7th Cir. 1992).

White's affidavit is inadmissible hearsay, and he is patently unable to testify concerning these matters at trial[3]. As such, Plaintiff is unable to meet either his production burden or his proof burden at trial. The case of *Brown v. City of Chicago*, 633 F. Supp. 3d 1122 (N.D. Ill. 2022), is on point. Brown claimed that the police fabricated evidence against him and proffered the affidavit of a recanting (and deceased) witness from his criminal trial. Judge Pallmeyer concluded that, in the absence of evidence surrounding the circumstances of the affidavit's creation or corroborating its contents, she could not "say that corroborating circumstances 'clearly indicate' its trustworthiness as the evidentiary rule requires." *Id.* at 1162 (quoting *United States v. Jackson*, 540 F.3d 578 (7th Cir. 2008). Because the affidavit was inadmissible and there was no other evidence that the original testimony was fabricated, the defendant detectives were granted summary judgment on this claim. *Id.*

Crittenden v. Children's Hospital, 2004 U.S. Dist. LEXIS 12944; 2004 WL 1529242 (W.D. N.Y., June 30, 2004), is instructive. In *Crittenden*, the original plaintiff filed an affidavit in opposition to defendants' motion for summary judgment and died after the motion was fully briefed but before a ruling. Defendants moved to strike the affidavit as hearsay. The district court acknowledged that the death of plaintiff's decedent rendered the affidavit hearsay and therefore unsuitable for consideration on summary judgment. 2004 U.S. Dist. LEXIS 12944, *4-5. Given the material change and uncertainty about whether the affidavit was dispositive, the judge ordered a new round of briefing concerning the adequacy of the remaining evidence. *Id.* at *7-8.

[3] The affidavit also contains hearsay, i.e., statements not made of personal knowledge such as, "It was common knowledge that Watts and Jones were crooked police officers." Exhibit 52, ¶ 2. This specie of hearsay is also insufficient to create a genuine issue of material fact for purposes of summary judgment.

THE COMPLAINT IS INSUFFICIENT TO SURVIVE SUMMARY JUDGMENT

As noted, Plaintiff will have to rely on more than the Complaint to avert summary judgment. Nonetheless, Plaintiff attempts to infuse the Complaint's evidentiary heft by pointing to certain of Mohammed's 2019 answers wherein, at the time, he invoked his Fifth Amendment privilege against self-incrimination. This effort is unavailing for several reasons. First, Mohammed's Fifth Amendment assertions are denials, not admissions. *See National Acceptance Co. of America v. Bathalter,* 705 F.2d 924 (7th Cir. 1983); *United Auto Ins. v. Veluchamy, supra*, 2010 U.S. Dist. LEXIS 19432,*4, *King v. Evans*, 2015 U.S. Dist. LEXIS 121488, *6 (September 11, 2015), 2015 WL 5316773 (Gilbert, M.J.). Secondly, the invocation of the Fifth Amendment, standing alone, is not a substitute for evidence supporting Plaintiff's claims. A defendant's invocation of the Fifth Amendment cannot substantiate civil liability on its own, it must be viewed in light of the other evidence proffered. *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 390-91 (7th Cir. 1995).

While it is true that under certain circumstances in a civil case, a defendant's silence may give rise to an adverse evidentiary inference against the party asserting the privilege, *Baxter v. Palmigiano*, 425 U.S. 308 (1976), "*Baxter* does not hold that an adverse finding could properly rest on the silence, without other evidence" nor does it **"**hold that entering a civil judgment based solely on a defendant's refusal to answer on the ground of self-incrimination is not unconstitutional compulsion." *National Acceptance Co. of America v. Bathalter*, 705 F. 2d 924, 930 (1983). Consequently, "although inferences based on the assertion of the privilege are permissible, the entry of judgment based only on the invocation of the privilege and 'without regard to other evidence' exceeds constitutional bounds." *Seguban*, 54 F.3d at 391 (quoting *Baxter*, 425 U.S. at 318).

"Evidence regarding an invocation of the right to remain silent generally has little or no probative value." *United States v. Tuzman*, 2017 U.S. Dist. LEXIS 195125 *11, 2017 WL 5903356 (S.D.N.Y., Nov. 27, 2017) (citing *United States v. Zaccaria*, 240 F.3d 75, 79 (1st Cir. 2001). The Court must keep this principle in mind when reviewing the following statements of fact:

> 95. Mohammed invoked his Fifth Amendment right in response to the allegation that he "conspired, confederated, and agreed to fabricate a false story in an attempt to justify the unlawful arrest, to cover-up their wrongdoing, and to cause plaintiff to be wrongfully detained and prosecuted." Dkt. 84 at 6 ¶ 26.
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> 96.. Mohammed also invoked the Fifth Amendment in response to the allegation that he "failed to intervene to prevent the violation of plaintiff's rights." Dkt. 84 at 7-8 ¶ 28

Putting aside whether Mohammed would or could deny these allegations at trial and would or could be impeached, Plaintiff cannot point to any evidence that establishes that the defendants "'directed themselves toward an unconstitutional action by virtue of a mutual understanding' and support such allegations with facts suggesting a 'meeting of the minds.'" *Sexton v. Cotton*, 2008 U.S. Dist. LEXIS 89762, at *32, 2008 WL 11516444, at *9 (N.D. Ill., Nov. 5, 2008) (quoting *Amundsen v. Chicago Park Dist*., 218 F.3d 712, 718 (7th Cir. 2000)). The "what, when, why, and how" of Defendants' supposed agreement to deprive Plaintiff of their rights is conspicuously lacking. *Amundsen, supra* at 718. Moreover, notwithstanding allegations in furtherance of the conspiracy, Mohammed and others are alleged to have "prepared police reports containing the false story," "attested through the official police reports that they were witnesses to the false story," "communicated the false story to prosecutors," and "failed to intervene to prevent the violation of plaintiff's rights" Dkt. 1 at 6-7. These allegations have been refuted by the undisputed evidence in this case that Jones, and Jones alone, prepared the arrest report, signed the complaint for

preliminary examination, testified before the grand jury, and formed the factual basis for the guilty plea. *See* JSOF at ¶¶ 76,97-98, 107.

Finally, the JSOF states:

> 93. Defendant Kallatt Mohammed invoked his right under the Fifth Amendment to the United States Constitution to not provide self-incriminating testimony when responding to multiple paragraphs of White's complaint.
>
> 94. Beginning in May 2024, Mohammed's counsel attempted on three occasions to withdraw this invocation, which was denied. No. 19 C 1717, Dkt. 742; Dkt. 194, Dkt. 214.

Again, this does nothing to surmount the Plaintiff's proof burden. Evidence regarding a prior invocation of the right to remain silent generally has little or no probative value. *United States v. Zaccaria*, 240 F.3d 75, 79 (1st Cir. 2001); *United States v. Tuzman*, 2017 U.S. Dist. LEXIS 195125 *11, 2017 WL 5903356 (S.D. N. Y., Nov. 27, 2017). It does not substitute for substantive evidence nor to raise a disputed issue of material fact.

CONSIDERATION OF THE INADMISSIBLE EVIDENCE STILL ENTITLES MOHAMMED TO SUMMARY JUDGMENT

Although the inadmissible statements and affidavits are clearly inappropriate for consideration on this motion for summary judgment, it is notable that even were they considered for the truth of the matters asserted, they do not provide sufficient evidence to support a claim against Mohammed. In his various iterations, White describes a confrontation that took place in a fifth-floor apartment between him, Watts and Jones. There were no other witnesses. *See* JSOF ¶¶ 115, 118, 120. White stated he first saw Mohammed in the building lobby after he was taken downstairs. JSOF ¶ 120. Twelve years earlier, he identified Mohammed's photograph but told the OPS investigator that Mohammed had nothing to do with his arrest. JSOF ¶ 116.

Similarly, the affidavit, while replete with factual assertions against Watts and Jones, does not mention any other Defendant Officer. *See* JSOF ¶ 118 and Exhibit 52. Nor does the Complaint, except for conclusory allegations of the type reflected above. *See* Dkt. 1.

WHEREFORE, Kallatt Mohammed prays that this Court enter summary judgment in his favor and against Plaintiff Lionetta White.

Respectfully submitted,

/s/ Eric S. Palles #2136473
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CERTIFICATE OF SERVICE

I, Eric S. Palles, an attorney, hereby certify that on March 31, 2025, I caused a true copy of the foregoing document to be served upon all counsel of record through the Court's ECF system.

/s/Eric S. Palles
Eric S. Palles