EXHIBIT A

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

Lionetta White, Special Administrator of the Estate of LIONEL WHITE, SR.,	)	
Plaintiff,	)	Case No. 17 C 2877
v.	)	Judge Sara L. Ellis
CITY OF CHICAGO, RONALD WATTS, ALVIN JONES, ELSWORTH SMITH JR., KALLATT MOHAMED, MANUEL LEANO, BRIAN BOLTON, ROBERT GONZALEZ, and DOUGLAS NICHOLS,	)	
Defendants.	)	

DEFENDANT CITY OF CHICAGO'S REPLY BRIEF
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Defendant City of Chicago submits the following Reply in support of its motion for summary judgment on Plaintiff's §1983 municipal liability claims against the City:

INTRODUCTION

Plaintiff's Response to Defendants' Motions for Summary Judgment (Dkt. #270) (hereinafter, "Response") confirms her *Monell* claim is an attempt to improperly impose *respondeat superior* liability on the City under the guise of *Monell* for the criminal misconduct of individual defendants Ronald Watts and Kallatt Mohammed. Representative of Plaintiff's wide-ranging and unfocused *Monell* claim, the Response offers numerous bullet points, arguments, and citations to other cases in an effort to convince this Court there must be something that creates a jury question on one of her many *Monell* theories. However, as set forth in the City's Memorandum of Law in Support of Its Motion for Summary Judgment (Dkt. #256) (hereinafter, "City's Memorandum"), Plaintiff has failed to adduce evidence establishing the existence of a widespread practice for the purpose of establishing *Monell* liability; the evidence establishes the City was *not* deliberately indifferent to the alleged misconduct of the Defendant Officers; and, Plaintiff has failed to prove that a City practice or policy was the moving force behind the constitutional injuries alleged by Plaintiff. Plaintiff's failure to develop sufficient evidence to prove any of the three fundamental elements necessary to prevail on a "widespread practice" *Monell* claim renders appropriate summary judgment in favor of the City.

LEGAL STANDARD

Plaintiff's Response (at 45-46) identifies the ways to prove a claim pursuant to *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658 (1978), but carefully avoids discussing the rigorous standards that must be met in order to actually prevail. Importantly, these rigorous standards "must be scrupulously applied in every case alleging municipal liability." *First Midwest Bank v. City of Chicago,* 988 F.3d 978, 986 (7th Cir. 2021). The Supreme Court has warned:

> Where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability. As we recognized in *Monell* and have repeatedly

> reaffirmed, Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights.

Bd. of Cnty. Comm. of Bryan County, Okla. v. Brown, 520 U.S. 397, 415 (1997) ("*Bryan County*"). As another court recently articulated, "*Monell* sets high standards, and for good reason. Courts must guard against lowering the standards, or else municipalities could be subject to vicarious liability through the backdoor." *Black v. City of Chicago*, 2022 WL 425586, at *9 (N.D. Ill. Feb.11, 2022).

The Response repeatedly disregards the rigorous standards that must be met to impose direct liability on the City and confirms Plaintiff is attempting to subject the City to "vicarious liability through the backdoor." Plaintiff essentially seeks to make the City an insurer for the misdeeds of Watts and Mohammed irrespective of CPD's ongoing and ultimately successful efforts to investigate the allegations of their misconduct. A municipality cannot be found liable under § 1983 simply because it employs an individual. *Monell,* 436 U.S. at 691; *Bryan County,* 520 U.S. at 403.

DISCUSSION

I. The City is entitled to summary judgment on Plaintiff's *Monell* claim because Plaintiff has failed to adduce evidence establishing the existence of a widespread practice.

A. Plaintiff Has Failed to Develop Evidence of a Citywide Practice of Misconduct.

Plaintiff has failed to adduce evidence of a *citywide* practice that meets the rigorous standards for holding the City liable for the constitutional injuries allegedly sustained by Lionel White Sr. ("White"). The gravamen of a widespread practice *Monell* claim "is not individual misconduct by police officers (that is covered elsewhere under § 1983), but a *widespread* practice that permeates a critical mass of an institutional body." *Rossi v. Chicago,* 790 F.3d 729, 737 (7th Cir. 2015) (original emphasis). "[M]isbehavior by one or a group of officials is only relevant where it can be tied to the policy, customs, or practices of *the institution as a whole*." *Id.* (emphasis added).

"The word 'widespread' must be taken seriously in demonstrating a *Monell* claim." *Condon v. City of Chicago*, 2011 WL 5546009, at *3 (N.D. Ill. 2011). By tying her "widespread practice" claim

almost exclusively to "Defendant Watts and his crew" at Ida B. Wells (see bullet points in Plaintiff's Response, at 50-52), Plaintiff ignores the department as a whole and the other geographical areas of the City. Plaintiff's repeated references to the number of "wrongful convictions" allegedly tied to Watts thus misses the point. Plaintiff's narrow focus on Watts and his "crew" at the Ida B. Wells homes has resulted in her failure to demonstrate a genuine issue of material fact on the "widespread practice" element of the *Monell* claim, *i.e.*, no evidence of a *citywide* practice. Referring to the very allegations of the Complaint (Dkt. #1, ¶74), Plaintiff has failed to present evidence of a *citywide* practice of robbery and extortion, planting or fabricating evidence, or manufacturing false charges against innocent persons.

Plaintiff incorrectly suggests the City's position that *Monell* requires a citywide practice is "out of step" with Seventh Circuit law. (Response at 53). Although Plaintiff claims the City's cases are "easily distinguished" on their facts, she fails to distinguish the legal principles underlying the cases. *Rossi*, 790 F.3d at 737, explained that *Monell* requires a "widespread practice that permeates a critical mass of an institutional body" (here, the entire CPD). *Ruiz-Cortez v. City of Chicago*, 931 F.3d 592, 599 (7th Cir. 2019), confirmed "*Monell* does not subject municipalities to liability for the actions of misfit employees." Significantly, Plaintiff provides no case law to support the proposition that the requirement of a citywide practice is "out of step" with the law in this Circuit.[1]

Plaintiff's argument on the widespread practice issue inadvertently reveals another fatal flaw underlying the *Monell* claim. The Response (at 49) argues the City was on notice of Watts' misconduct "and simply turned a blind eye." Plaintiff similarly suggests there was a "repeated pattern of behavior" providing notice of a risk "to which the City did not respond." (*Id.* at 50). As fully set out in the City's

[1] The cases cited by Plaintiff in the Response (*Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293 (7th Cir. 2010); *Gable v. City of Chicago*, 296 F.3d 531 (7th Cir. 2002); *Estate of Moreland v. Dieter*, 395 F.3d 747 (7th Cir. 2005); *Woodward v. CMS*, 368 F.3d 917 (7th Cir. 2004) address the frequency of conduct needed for a *Monell* claim rather than the need for a *citywide* practice, and therefore do not undermine the City's position or demonstrate it is "out of step" with current law.

Memorandum on the issue of deliberate indifference (at 16-22), both of these assertions are conclusively refuted by the actual evidence. The City did not "turn a blind eye" to Watts' criminal misconduct. To the contrary, the CPD took significant steps to address the allegations of criminal misconduct through its initiation of a confidential investigation and ongoing participation in the joint FBI/IAD investigation, which ultimately resulted in the criminal convictions of Watts and Mohammed. Nor can Plaintiff establish that the City "did not respond" to the allegations, as the evidence demonstrates CPD's ongoing involvement and ultimately successful efforts to bring to an end Watts' criminal misconduct. *Id.*

The Response (at 54) incorrectly asserts the City "ignores" that Plaintiff referenced similar misconduct by other police officers who were not part of the Watts team. Examples identified by Plaintiff pertain to former Chicago police officers Jerome Finnigan and Corey Flagg, who were involved in corrupt activities. Rather than "ignore" those references, the City addressed them directly. (*See* Memorandum, at 10-11; 29-30). As the City established, the only putative "evidence" related to Finnigan and Flagg comes from reports referenced by Plaintiff's expert, Jon Shane. However, Shane's only reference to those officers in his report is found in a block quotation taken from two pages of the 2016 Police Accountability Task Force ("PATF") report that mentions allegations against miscellaneous officers who were indicted over the years. (*Id.*) Shane admitted at deposition he does not know anything about Finnigan's or Flagg's cases and he did not review the reasonableness of the IAD investigations that led to their indictments and convictions. (*Id.*). Because Shane simply copied and pasted a portion of the PATF report without any actual knowledge of Finnigan's or Flagg's cases or the reasonableness of the IAD investigations mentioned in that report, any related testimony on the subject of Finnigan or Flagg lacks foundation and is inadmissible. Expert evidence offered by the nonmovant to defeat summary judgment must be admissible. *Lewis v. CITGO Petroleum Corp.,* 561 F.3d 698, 704 (7th Cir. 2009).

In sum, Plaintiff has not presented evidence or otherwise explained how the alleged criminal enterprise operated by rogue employees at Ida B. Wells is a "citywide" practice. Plaintiff's failure to establish a citywide practice warrants summary judgment in favor of the City on the *Monell* claim.

B. Plaintiff Has Not Presented Evidence Supporting a Code-of-Silence *Monell* Theory.

In the City's Memorandum (at 11-16), the City explained Plaintiff's generalized "code of silence" theory does not apply to individuals like Watts and Mohammed, who were engaged in a criminal enterprise and were co-conspirators working to conceal each other's misconduct to advance their criminal activities.[2] In other words, Watts' and Mohammed's concealment of their actions from authorities was undertaken because they did not want to get caught, not because of some generalized notion of a CPD "code-of-silence" in which officers would not report misconduct by their fellow officers. And refuting any notion of an institutional "code of silence," Watts' criminal actions were reported and Watts was investigated by CPD's IAD, ultimately resulting in Watts' criminal conviction.

Plaintiff argues some of the Defendant Officers knew of Watts' misconduct and did not report it; those who did were retaliated against. (Response at 86). According to Plaintiff, these actions and/or inactions were part of the "code of silence" that caused a violation of White's constitutional rights. (*Id.* at 87). The fatal flaw undermining Plaintiff's argument is that Watts' suspected misconduct *was* reported and Watts *was* investigated by CPD's IAD, ultimately resulting in Watts' criminal conviction. Even if some officers did not report their suspicions, CPD did receive and investigate allegations concerning Watts' misconduct. IAD's ultimately successful investigation of Watts' alleged misconduct is the very antithesis of an institutionalized, department-wide "code of silence."[3]

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[2] As set forth in the City's Memorandum (at 12), to the extent Plaintiff is suggesting members of the alleged criminal enterprise concealed their criminal misconduct from law enforcement or others, their concealment cannot reasonably be attributed to a department-wide "code of silence." Criminal conspirators conceal each other's misconduct because of the mutual benefit to each other (*i.e.*, they do not want to be caught) so as to further the interests of, continue, and protect the criminal enterprise.

[3] For the same reason, the claims of police officers Daniel Echeverria and Shannon Spalding fail to establish a "code of silence" relevant to Plaintiff's claims. The CPD investigated the allegations of Watts' misconduct,

The Court's analysis should end here, but for purposes of completeness, the City addresses additional "code of silence" arguments offered in the Response. Plaintiff's generalized arguments about a longstanding policy and practice of a "code of silence" are inapposite. For example, Plaintiff (Response at 90-91) points to other court decisions in which a "code of silence" theory survived summary judgment based upon the PATF report and the 2017 Department of Justice ("DOJ") report, but none of those cases involved an ongoing confidential investigation of alleged criminal corruption as was involved here. *Est. of McIntosh by Lane v. City of Chicago*, 2022 WL 4448737 (N.D. Ill. Sept. 23, 2022) and *Est. of Loury by Hudson v. City of Chicago*, 2019 WL 1112260 (N.D. Ill. 2019), concerned officer-involved shootings. *LaPorta v. City of Chicago*, 277 F. Supp. 3d 969 (N.D. Ill. 2017) involved an off-duty shooting by a police officer. The overwhelming focus of the PATF and DOJ reports relate to allegations of excessive force and officer-involved shootings. Referring to the high-profile shooting of Laquan McDonald as the "tipping point," the PATF report focused on police-involved shootings of citizens. (*See, e.g.*, Exh. 67, at 4). The DOJ report similarly focused on the use of force and the City's systems for detecting and correcting the unlawful use of force by police officers. (*See, e.g.*, Exh. 69, at 1). Whatever relevance the PATF and DOJ reports may have had to the summary judgment issues in *McIntosh*, *Loury*, or *LaPorta*, which involved officer-involved shootings, they have no relevance to the claims in this case. This case does not involve an officer-involved shooting or a claim for excessive force, so these reports are irrelevant here. *Milan v. Schulz*, 2022 WL 1804157, at *5 (N.D. Ill. June 2, 2022) ("[T]he [DOJ] Report focused on police officer shootings and the City's oversight of officers' use of force, which are not at issue in this case."). Perhaps most significantly, neither the PATF nor DOJ report addressed the joint FBI/IAD investigation of Watts at issue in this case.

which belies the notion of an institutionalized, department-wide "code of silence." Moreover, Plaintiff has not shown how any alleged "retaliation" against Spalding and Echeverria is causally related to the alleged misconduct perpetrated by Defendant Officers that Plaintiff contends violated White's constitutional rights.

As set forth in the City's Memorandum (at 12-13), the City produced evidence consisting of Rules, Regulations, and General Orders demonstrating the City did not condone a "code of silence" in the relevant time period. With little explanation, Plaintiff argues a jury should be allowed to determine whether those rules were mere "window-dressing." (Response, at 92). Plaintiff's cursory and undeveloped argument should be considered waived. *Shipley v. Chi. Bd. Election Comm'rs*, 947 F.3d 1056, 1062-63 (7th Cir. 2020). Even if considered, however, this argument fails. Plaintiff's suggestion (Response at 92) that CPD merely enacted the rules without considering whether they were actually implemented disregards the factual record. The City presented evidence that all CPD recruits were trained on multiple topics, including the CPD's disciplinary procedures, rules, and regulations, and that all Defendant Officers in this case completed their Basic Recruit Training. (CSOF ¶¶ 110, 111). The evidence thus establishes the City had a written policy expressly prohibiting a "code of silence" as described by Plaintiff that was implemented by CPD and trained to its officers.

Finally, Plaintiff argues (Response at 91) that a jury should be allowed to determine whether "evidence" of Mayor Emanuel's comments is too remote to be relevant. Of course, a jury does not determine if evidence is relevant and/or admissible. As set forth in the City's Memorandum (at 13-14), this example is insufficient to demonstrate a genuine issue of material fact supporting Plaintiff's *Monell* claim. See, e.g., *Velez v. City of Chicago*, No. 18 C 8144, 2023 WL 6388231, at *25 (N.D. Ill. Sept. 30, 2023) (rejecting Mayor Emanuel's 2015 speech as relevant to a code of silence theory and recognizing those comments and other evidence "substantially pre-dates and post-dates the alleged misconduct against Velez in 2001, so the evidence is not relevant"). And even if remoteness was not at issue, "Mayor Emanuel's statement was made in the context of an excessive force case involving a police shooting," which as explained above, is not relevant here. *Page v. City of Chicago*, No. 19 C 7431, 2021 WL 365610, at *3 (N.D. Ill. Feb. 3, 2021). The only relevant, competent evidence in this case demonstrates the City is entitled to summary judgment on Plaintiff's "code of silence" *Monell* claim.

II. The City is entitled to summary judgment on Plaintiff's *Monell* claim because the City was not deliberately indifferent to the alleged misconduct of Watts and Mohammed.

Even if Plaintiff could demonstrate a genuine issue of material fact as to the existence of a citywide practice sufficient for purposes of *Monell*, she cannot overcome summary judgment on the element of deliberate indifference. As set forth in the City's Memorandum (at 17-19), the City took significant steps to address the allegations of Watts' and Mohammed's criminal misconduct through its initiation of a confidential investigation and ongoing participation in the joint FBI/IAD investigation, which ultimately resulted in the criminal convictions of Watts and Mohammed. Because the City did not "condone" or "approve" of Watts' or Mohammed's criminal misconduct, Plaintiff's *Monell* claim cannot survive summary judgment on the element of deliberate indifference.

Flipping the burden of proof, Plaintiff's Response (at 74) initially argues CPD's participation in the joint FBI/IAD investigation "does not disprove" the element of deliberate indifference in this case. Plaintiff contends the City's Memorandum improperly focuses only on Watts and Mohammed rather than her "broader" theory of liability. To make that argument, however, Plaintiff must divorce her *Monell* claim from the express allegations underlying the complaint. Plaintiff's suggestion that the City's focus on Watts and Mohammed is too narrow[4] is belied by the allegations: (1) City officials knew of the misconduct by "Watts and the Watts Gang" and allowed it to continue; (2) City officials knew that absent intervention by CPD, the misconduct by "Watts and his gang" would continue; and (3) the City and its supervisors "deliberately chose to turn a blind eye" to the alleged misconduct of "Watts and his gang," thereby allowing them to continue engaging in criminal misconduct, including the "wrongful arrest, detention, and prosecution" of White. (Complaint, ¶¶ 42-46; 48-49). Plaintiff's belated attempt to avoid these allegations and reconfigure her *Monell* claim tacitly concedes she cannot

[4] Plaintiff cites *Godinez v. City of Chicago*, 2019 WL 5597190 (N.D. Ill. 2019), to suggest the City is looking at his *Monell* theory "from the wrong vantage point." (Response at 75). As Plaintiff's own allegations establish, the City is looking at his *Monell* theory from the very "vantage point" expressly set forth in the complaint.

show CPD "deliberately chose to turn a blind eye" to the criminal misconduct of Watts and Mohammed. Plaintiff certainly cannot demonstrate CPD acquiesced in or condoned Watts' so-called "criminal enterprise," which is needed to meet the rigorous standard of proof for deliberate indifference. *Wilson v. City of Chicago*, 6 F.3d 1233, 1240 (7th Cir. 1993).

As set forth in the City's Memorandum (at 19-20), the Seventh Circuit in *Wilson* explained the determinative issue for deliberate indifference is whether the CPD can be said to have approved the practice, which in this case is the criminal enterprise allegedly operated by Watts. Plaintiff attempts to reverse the burden and challenge the City's reliance on *Wilson* by suggesting "the bar is not so low." (Response at 75). Plaintiff's effort to sidestep *Wilson* necessarily overlooks that *Monell* imposes a "rigorous standard of culpability," *i.e.*, that the municipality's action was taken with deliberate indifference to the plaintiff's constitutional rights. *First Midwest Bank*, 988 F.3d at 986–87 (cleaned up). "*This is a high bar*. Negligence or even gross negligence on the part of the municipality is not enough." *Id.* at 987 (emphasis added). This Court should reject Plaintiff's attempt to shift the burden to the City on the element of deliberate indifference.

According to Plaintiff, "the issue is not whether the City was deliberately indifferent to Watts' and Mohammed's criminal enterprise, but whether the City was deliberately indifferent to White's "constitutional rights to be free from fabricated evidence and false arrests." (Response at 78). As set forth above, the issue of whether the City was deliberately indifferent to Watts' and Mohammed's criminal enterprise is the very issue raised in Plaintiff's pleadings. More to the point, the broader question of whether the City was deliberately indifferent to White's constitutional rights can only be answered by determining whether the City was deliberately indifferent to Watts' and Mohammed's criminal misconduct. Based on the evidence, the answer to that determinative question is "No."

Plaintiff collaterally argues the City was not constrained by the FBI investigation from taking additional investigatory steps. (Response at 78-79). Plaintiff's argument is based on criticism from her

retained experts Jon Shane and Jeffrey Danik. For the reasons set forth in Defendants' *Daubert* motions filed in conjunction with summary judgment, Shane and Danik should be barred from offering their opinions and criticisms of CPD in this case. But even if considered, neither Danik nor Shane can opine the CPD declined to investigate the allegations against Watts and Mohammed. CPD did conduct an investigation. That the investigation of Watts and Mohammed could have been done differently or completed sooner (in the experts' opinions) does not establish deliberate indifference. See *Sims v. Mulcahy,* 902 F.2d 524, 544 (7th Cir.1990) (finding a city investigation of alleged misconduct did not constitute deliberate indifference or tacit authorization even if the investigation could have been more thorough); *Frake v. City of Chicago*, 210 F.3d 779, 782 (7th Cir. 2000) ("[t]he existence or possibility of other better policies which might have been used does not necessarily mean that the defendant was being deliberatively indifferent").

Plaintiff also responds (at 78) to a footnote in the City's Memorandum that addressed another criticism by Shane and Danik, *i.e.*, that CPD should have moved administratively against Watts and Mohammed notwithstanding the ongoing confidential joint FBI/IAD criminal investigation. As the City noted, for CPD to move administratively before the criminal investigation was concluded, it would have had to reveal to Watts and Mohammed the evidence developed with and controlled by the federal government, thus compromising the integrity of the joint criminal investigation. (City Memorandum at 21 n.10). For purposes of the deliberate indifference analysis, however, resolution of this issue is unnecessary. That a different or better investigation could have been conducted does not establish deliberate indifference. *Frake*, 210 F.3d at 782; *Sims*, 902 F.2d at 544.

Plaintiff argues the *Sims* and *Frake* cases are factually distinguishable from the issues in this case. (Response at 83-84). But Plaintiff cannot quarrel with the legal propositions for which these cases are offered, *i.e.*, the existence of other, better policies does not establish deliberate indifference. Plaintiff's attempt to distinguish *Wilson* similarly fails. According to Plaintiff's interpretation of *Wilson*,

the policymaker in that case was not deliberately indifferent because "at worst" the policymaker "did not respond quickly or effectively" enough to the alleged practice. (*Id.* at 82). However, Plaintiff's reading of *Wilson* directly refutes the criticisms offered by Shane and Danik, *i.e.*, "at worst" CPD's investigation was not concluded "quickly or effectively" enough (or, should have been better, been done differently, *etc.*). Paraphrasing *Wilson*, the fact that the steps taken in the joint investigation were not successful sooner does not establish CPD "acquiesced in [Watts's criminal enterprise] and by doing so adopted it as a policy of the City." 6 F.3d at 1240.

In sum, IAD's ongoing participation in the joint FBI/IAD investigation demonstrates CPD's lack of approval of Watts' criminal misconduct and its commitment to eliminating such conduct. Plaintiff thus cannot prove her allegations that the City "deliberately chose to turn a blind eye" in response to allegations of criminal misconduct by Watts and Mohammed. There is no evidence in this case from which an inference of deliberate indifference can be fairly or reasonably drawn by the jury. Plaintiff's *Monell* claim cannot survive summary judgment on the element of deliberate indifference.

III. The City is entitled to summary judgment on Plaintiff's *Monell* claim because Plaintiff has failed to prove a City policy or practice was the "moving force" behind White's alleged constitutional injuries.

A plaintiff asserting a *Monell* claim must prove the municipality's action was the "moving force" behind the alleged constitutional violation. *First Midwest Bank*, 988 F.3d at 987; *Bohanon v. City of Indianapolis*, 46 F.4th 669, 675 (7th Cir. 2022). As *First Midwest Bank* explained about the "moving force" requirement:

> [T]his rigorous causation standard guards against backsliding into respondeat superior liability. To satisfy the standard, the plaintiff must show a "direct causal link" between the challenged municipal action and the violation of his constitutional rights.

988 F.3d at 987. Significantly here, "it is not enough to show that a widespread practice or policy was a *factor* in the constitutional violation; it must have been the *moving force*." *Johnson v. Cook County*, 526 Fed. Appx. 692, 696 (7th Cir. 2013) (emphasis in original).

Plaintiff's Response (at 84-85) summarily concludes a jury must determine causation in this case. But as set forth in the City's Memorandum (at 22), in order to survive summary judgment, Plaintiff would have to show it was disciplinary deficiencies of the CPD, rather than the criminal conduct and motivations of Watts and Mohammed, that were the moving force behind the alleged violations of White's constitutional rights. According to Plaintiff, the City "offers the Court a false binary" because events can have multiple proximate causes. (Response at 85). That argument, however, reveals a fundamental misunderstanding of the rigorous causation standard required in a *Monell* claim. Although an event may have multiple proximate causes, causation for *Monell* purposes requires more. It is not enough to suggest CPD's alleged failure to conduct adequate investigations of police misconduct was *a factor* in the constitutional violations alleged by Plaintiff; it must have been the *moving force*. *Johnson*, 526 Fed. Appx. at 696. Even if an allegedly deficient disciplinary process was a factor in Watts' and Mohammed's belief they could "get away" with misconduct, it was not the "moving force" behind the alleged misconduct. If proven by Plaintiff, the officers' misconduct was motivated by self-interest and committed for their sole benefit. The moving force behind the alleged constitutional violations was criminal misconduct committed by criminals with the intent to further a criminal enterprise.

The Response (at 86) argues other courts have allowed the causation issue to go to the jury in "analogous circumstances." However, the circumstances of those cases are not analogous and provide no guidance on the causation issue here. None of the cases on which Plaintiff relies involved allegations of criminal misconduct committed by criminals pursuant to a criminal enterprise. *Godinez*, 2019 WL 5597190, concerned allegations of an officer's improper use of restraint techniques. *Marcinczyk v. Plewa*, 2012 WL 1429448 (N.D. Ill. 2012), involved allegations that a police officer conspired with the plaintiff's husband to frame the plaintiff for a crime to in order to adversely impact divorce proceedings between the plaintiff and her husband. *Washington v. Boudreau*, 2022 WL 45999708

(N.D. Ill. 2022) (coerced statements/confessions), *Estate of Loury by Hudson*, 2019 WL 1112260 (officer-involved shooting), *Thomas,* 604 F.3d 293 (delayed responses to inmates' medical requests), *Woodward*, 368 F.3d 917 (detainee's in-custody suicide), and *First Midwest Bank v. City of Chicago,* 337 F. Supp. 3d 749 (N.D. Ill. 2018)*, rev'd and remanded First Midwest Bank,* 988 F.3d 978 (off-duty shooting by police officer), similarly do not involve circumstances remotely analogous to the criminal misconduct committed as part of the criminal enterprise at issue here.

As the Seventh Circuit recently reemphasized, the "rigorous causation standard" for a *Monell* claim requires "a 'direct causal link' between the challenged municipal action and the violation of [the plaintiff's] constitutional rights." *Dean v. Wexford Health Sources, Inc.*, 18 F.4th 214, 235 (7th Cir. 2021). It is not enough to show that the alleged widespread practice was a factor in the constitutional violation. *Johnson, supra.* Absent evidence of a "direct causal link," Plaintiff's attempt to hold the City responsible for constitutional injuries allegedly arising from the criminal misconduct of Watts and Mohammed collapses into an improper claim based on *respondeat superior*. The City is entitled to summary judgment on the issue of "moving force" causation.

IV. The Evidence Fails to Support Plaintiff's Failure to Supervise and Failure to Discipline Theories.

Plaintiff has failed to develop sufficient evidence of a widespread practice, deliberate indifference, or causation to move forward on her *Monell* claim, whether characterized as a failure to supervise, failure to discipline, or failure to investigate. Summary judgment in favor of the City is warranted, no matter the theory. Although unnecessary to go further, the City addresses for purposes of completeness Plaintiff's arguments concerning the alleged failures to investigate and/or discipline.[5]

[5] Most of Plaintiff's arguments regarding the alleged failures to investigate/discipline are based on the report of her retained expert, Jon Shane. For the reasons set forth in Defendants' *Daubert* motion jointly filed with the City's Memorandum for Summary Judgment, Shane should be entirely barred from offering his opinions and criticisms of CPD. Relevant to the discussion here, Shane has no basis for his opinion suggesting the City's failure to conduct adequate investigations of police misconduct was the moving force behind the alleged criminal misconduct in this case. (*See* Defendants' Motion to Bar Jon M. Shane's *Monell* Opinions, Dkt. #255).

Plaintiff's Response (at 56) initially argues there is sufficient evidence to go to a jury on the failure to investigate and discipline theory. Plaintiff expends several pages in her Response presenting generalized arguments about the history of the CPD's disciplinary system, including several criticisms pushed by her expert, Shane. These arguments amount to nothing more than an exercise in misdirection, because according to Shane, CPD "should have taken supervisory measures to stop the adverse behavior" at issue. (Exh. 50 at 11). Using Shane's own words, CPD *did* take "supervisory measures," which "stopped" the criminal misconduct and ultimately resulted in the successful criminal prosecutions of Watts and Mohammed. In sum, CPD did what Shane advocates it should have done.

Again relying on generalizations, Plaintiff claims there is no merit to the City's position that it should prevail "because it had *some* procedures for disciplining officers and because it did, in fact, investigate some misconduct and discipline some officers." (Response at 61-62). Plaintiff's argument misses the point entirely. CPD didn't just investigate "some" misconduct and discipline "some" officers; it investigated and successfully stopped the very misconduct at issue in this case. Plaintiff's suggestion that the investigation took too long is simply an argument for an "other, better" policy, which as explained above, is insufficient to establish *Monell* liability. *Frake*, *supra*; see also *Wilson*, 6 F.3d at 1240 (If the policymaker "took steps to eliminate the practice, the fact that the steps were not effective would not establish that he acquiesced in it and by doing so adopted it as a policy of the city"). Here, the steps were effective in eliminating the misconduct. The City is entitled to summary judgment on any "failure to investigate" claim.[6]

However, as discussed in the City's Memorandum (at 20-21) and again in this Reply, Shane's criticisms cannot stave off summary judgment on Plaintiff's *Monell* claim, even if they are not barred.

[6] Plaintiff's Response (at 60-61) cites to a number of decisions in which summary judgment was denied on a *Monell* claim against the City, including some that involved a failure to investigate/discipline theory. Just because the courts in those decisions denied summary judgment under the facts of those cases does not mean this Court must also deny summary judgment here simply because Plaintiff here also has asserted a failure to investigate/discipline theory. It is axiomatic that each case must stand or fall on its own merits.

For the same reasons, a "failure to discipline" theory necessarily fails. The City has produced evidence establishing that it had robust procedures for disciplining officers who violated the CPD's Rules and Regulations and that it did impose discipline during the relevant time frame. (City's Memorandum at 26-27). As noted above, Plaintiff's expert Danik criticized the joint FBI/IAD investigation while suggesting additional investigatory steps that could have been taken or should have been done sooner, while Shane offered criticisms of CPD's disciplinary investigation process. But again, neither Danik nor Shane can opine the CPD "took no steps" to investigate the allegations against Watts and Mohammed.[7] That the investigation of Watts and Mohammed could have been more efficient, done differently, or completed sooner does not establish deliberate indifference. *Sims,* 902 F.2d at 544 (City investigation of alleged misconduct did not constitute deliberate indifference or tacit authorization even if the investigation could have been more thorough); *Frake*, 210 F.3d at 782 ("[t]he existence or possibility of other better policies which might have been used does not necessarily mean that the defendant was being deliberatively indifferent").

The Response (at 62) challenges the City's assertion that Plaintiff cannot resist summary judgment based solely on the rate at which complaints of police officer misconduct are sustained or not sustained. As set forth in the City's Memorandum (at 28), mere statistics of unsustained complaints, without any evidence those complaints had merit, are insufficient to establish *Monell* liability against the City. *Bryant v. Whalen*, 759 F. Supp. 410, 424 (N.D. Ill. 1991); *Strauss v. City of Chicago*, 760 F.2d 765, 768-69 (7th Cir. 1985). Plaintiff claims Shane "conducted a quantitative and qualitative analysis" of a statistically significant set of complaints against officers and concluded they lacked integrity, were unreliable, and were biased. (Response at 62). Although Shane criticized the manner in which investigations were conducted, *he did not offer any opinion* that the complaints underlying the "not

[7] As noted above, both Danik and Shane should be barred for the reasons set forth in Defendants' *Daubert* motions filed contemporaneously with the motions for summary judgment. But as previously explained, even if considered, their reports and opinions are insufficient to overcome the City's motion for summary judgment.

sustained" CRs he reviewed had merit. Absent such evidence, Plaintiff cannot establish municipal liability based on the rates at which complaints are sustained or not sustained.

Plaintiff's Response then moves away from Shane's opinions to suggest she has adduced other evidence revealing the failures of the City's investigation of complaints against police officers. Plaintiff offers examples of complaints made by other plaintiffs in the Coordinated Proceedings who made allegations against Watts for which the CPD "took no action" or otherwise took too long to investigate. (Response at 64-65). Once again, this argument ignores that CPD's IAD *did* take action concerning allegations relating to Watts as it initiated and was actively involved in a joint investigation of Watts with the FBI. Plaintiff cannot legitimately argue the CPD did not investigate Watts or stop his misconduct – it did. Once again, Plaintiff's real argument appears to be that CPD did not stop the misconduct sooner. At the risk of repetition, the suggestion that the investigation took too long is simply an argument for an "other, better" policy, which as explained above, is insufficient to establish *Monell* liability. *Frake*, *supra*; see also *Wilson*, 6 F.3d at 1240 (If policymaker "took steps to eliminate the practice, the fact that the steps were not effective would not establish that he acquiesced in it and by doing so adopted it as a policy of the city").

Plaintiff also takes issue with the City's challenge to the relevance of sources relied upon by Shane in rendering his criticisms of the CPD's disciplinary system. As discussed above (*supra* at 6) and in the City's Memorandum (at 15-16; 29), the PATF and DOJ reports, which focus on excessive force and officer-involved shootings, have no relevance to the claims in this case. The 1972 Metcalfe report likewise relates to excessive force. Plaintiff does not assert a claim for excessive force and this case does not involve a police shooting, so these materials are irrelevant here. *Milan*, 2022 WL 1804157, at *5. To the extent Shane relied upon those reports for his criticism of the CPD's disciplinary system, as explained above, he does not causally connect the alleged investigatory deficiencies with the specific officer misconduct alleged in this case. While Shane discusses investigations involving general police

misconduct and allegations of excessive force, he provides no discussion or analysis other than his say-so as to how those types of investigations can be reliably compared to a confidential investigation of alleged criminal behavior involving corruption and/or extortion, as was involved in this case.

Through Shane, Plaintiff attempts to rely on sources from many years before and after the 2006 arrest of White in an effort to manufacture a failure to discipline theory. As set forth in the City's Memorandum (at 28-29), the evidence a court considers (and allows the jury to consider) in evaluating a *Monell* claim must include a reasonable time frame before the incident at issue. *See, e.g., Brown v. City of Chicago*, 633 F. Supp. 3d 1122, 1177 n.61 (N.D. Ill. 2022) (evaluating evidence five years before the plaintiff's arrest for purposes of *Monell* liability). Plaintiff criticizes the City's reliance on *Brown*, suggesting the case did not establish a binding rule about a relevant *Monell* time period. The City simply relied on *Brown* for the straightforward proposition that relevant time periods for a *Monell* claim must be reasonable, in contrast to Shane's attempted reliance on source materials that significantly predated or post-dated White's 2006 arrest (34 years after the 1972 Metcalfe report, 9 years after the 1997 Commission on Police Integrity report, and between 10 and 11 years before the PATF and DOJ reports). Relevant time period aside, none of these source materials address the joint FBI/IAD confidential investigation of Watts and Mohammed.

In the end, the City is entitled to summary judgment on any failure to investigate and discipline claim. However these sources and reports are characterized or interpreted, they do not individually or collectively refute the dispositive fact that CPD investigated and successfully ended the very misconduct underlying Plaintiff's claims in this case.

V. Defendant Officers' alleged misconduct was outside the scope of their employment as a matter of law, rendering summary judgment appropriate in favor of the City on Plaintiff's malicious prosecution claim.

Plaintiff separately seeks to hold the City vicariously liable for malicious prosecution under the doctrine of *respondeat superior*. Under Illinois law, an employer can be liable under the doctrine of

respondeat superior for the torts of an employee committed within the scope of his or her employment. *Wright v. City of Danville*, 174 Ill. 2d 391, 405, 675 N.E.2d 110 (1996). Conduct is deemed to be within the scope of employment if, but only if: (a) it is the kind the servant is employed to perform; (b) it occurs substantially within the authorized time and space limits; and (c) it is actuated, at least in part, by a purpose to serve the master. *Pyne v. Witmer*, 129 Ill. 2d 351, 359-60, 543 N.E.2d 1304 (1989) (citing Restatement (Second) of Agency § 228). Conduct is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master. *Id.*

Applying these principles of Illinois law, no reasonable person could conclude Watts and Mohammed were acting within the scope of employment in allegedly victimizing White and others at Ida B. Wells through operation of their criminal enterprise. As set forth in the City's Memorandum (at 31-33): (1) the acts complained of were committed solely for the benefit of Defendant Officers; (2) neither the City nor CPD received a benefit from the alleged criminal enterprise (the City's business purpose certainly is not furthered by a police officer's robbery, fabrication of criminal evidence against innocent citizens, or extortion of drug dealers in exchange for allowing their criminal activities to continue); and (3) the type of conduct asserted against Defendant Officers is the antithesis of what is within the reasonably anticipated job duties of police officers. See *Garcia v. City of Chicago*, 2003 WL 1715621, *11 (N.D. Ill. Mar. 20, 2003) (Summary judgment granted where court found the defendant officer was not acting within the scope of his employment as a matter of law; "[Plaintiff] has presented no evidence that [defendant officer] was preventing a crime or responding to an emergency. To the contrary, [plaintiff] claims that [defendant officer] was perpetrating, not preventing, a crime"); *Rivera v. City of Chicago*, 2005 WL 2739180, *5 (N.D. Ill. Mar. 25, 2014) (Accused police officer "was not employed to use the tools and techniques of policing for the purpose of stealing drugs and money.").

According to Plaintiff, the case law "confirms that the City is looking at this issue through the wrong lens." (Response at 100-01). Plaintiff is wrong. The case law identified by Plaintiff does not support an argument that the criminal misconduct of Watts and Mohammed was within the scope of their employment as law enforcement officers. In *Brown v. King*, 328 Ill. App. 3d 717 (1st Dist. 2001), an off-duty police officer stopped at the scene of an automobile accident to investigate the incident, eventually shooting the plaintiff when he began to run from the scene. The *King* court rejected the argument that simply because he was off-duty, the officer was acting outside the scope of his employment. *Id.* at 722. Stopping to investigate an accident, flashing a badge, and asking for a license and registration all were acts within the course of the officer's employment and in furtherance of the legitimate business of his employer. *Id.* at 722-23. In contrast to the alleged misconduct in this case, the officer in *King* was not stopping the plaintiff so he could perpetrate a criminal act on him. *King* certainly does not support the conclusion that taking bribes, extorting citizens, or running a criminal enterprise is within the scope of a police officer's employment, or that such conduct somehow furthers the City's business.

In *Doe v. Clavijo*, 72 F. Supp. 3d 910 (N.D. Ill. 2014), the court declined to dismiss indemnity and *respondeat superior* claims against the City for an alleged sexual assault committed by on-duty police officers. The district court judge reasoned, "Illinois courts have not yet definitively held that a sexual assault committed by an on-duty police officer is outside the scope of employment." *Id.* at 915. This Court should decline to follow *Clavijo*. Not only did that case involve very different underlying factual circumstances, *Clavijo* disregarded a significant body of Illinois law in reaching its decision. Under Illinois law, sexual assault is never deemed to be within one's scope of employment. *See*, *e.g.*, *Deloney v. Bd. of Educ. of Thornton Twp.*, 281 Ill. App. 3d 775, 783 (1st Dist. 1996) (Illinois cases are clear that as a matter of law "acts of sexual assault are outside the scope of employment"). *Clavijo* thus provides no guidance here.

Plaintiff's argument then veers into the absurd, suggesting an officer committing criminal misconduct might be considered "too loyal an employee." (Response, at 101). Plaintiff does not (and cannot) explain how robbery, extortion, planting/fabricating evidence, or manufacturing false charges against innocent individuals could plausibly derive from an officer's excessive loyalty to the law enforcement agency for which he works. The type of criminal misconduct alleged against Defendant Officers is the very antithesis of what is within the reasonably anticipated job duties of police officers.

Plaintiff cites to *Hibma v. Odegaard*, 769 F.2d 1147 (7th Cir. 1985), for the proposition that a police officer who frames an individual while on duty is acting within the scope of his employment. (Response at 101). *Hibma* does appear to suggest a police officer who uses improper methods in carrying out the objectives of his employer can be considered to be acting within the scope of his employment. However, that proposition is inapplicable where, as here, the alleged misconduct was not designed to "further the objectives" of the CPD or the City. *Hibma* is further distinguishable as that case was interpreting a Wisconsin statute, rather than Illinois law as set forth in *Pyne* and *Wright*, *supra*. More importantly, it is questionable whether *Hibma* correctly applied Wisconsin law. According to the Wisconsin Supreme Court, the *Hibma* court's scope of employment analysis improperly "discarded" the factor of the employee's intent to benefit the employer. See *Olson v. Connerly*, 151 Wis. 2d 663, 445 N.W.2d 706, 710-11 (1989) ("Perhaps *Hibma* [] cannot be reconciled with decisions of the Wisconsin Supreme Court. * * * To the extent [*Hibma*] may be read to totally eliminate the servant's state of mind, we decline to follow [it] here."). One of the elements required to establish scope of employment under Illinois law is that the conduct in question is motivated by a purpose to serve the City. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 169 (2007). *Hibma*'s apparent (and incorrect) elimination of that element thus renders it inapplicable to this Court's analysis.

Plaintiff's Response fails to meaningfully distinguish the *Garcia* and *Rivera* cases relied upon by the City. (Memorandum at 32-33). The fact that the officers in those cases were off-duty relates to

only one of the elements to be considered in the scope of employment analysis (whether the conduct occurs substantially within authorized time and space limits). An officer's on-duty status has no relevance to the other elements of the scope analysis (whether the conduct is the kind the servant is employed to perform, and whether it is actuated, at least in part, by a purpose to serve the master). If proven by Plaintiff, the officers' alleged misconduct was motivated by self-interest and committed for the officers' sole benefit; the conduct was not in furtherance of the CPD's business; and, the actions deviated from and were not a foreseeable extension of the officers' authorized job responsibilities for the CPD. Summary judgment in favor of the City is warranted on the state law malicious prosecution claim asserted vicariously against it.

VI. Summary judgment should be granted in favor of the City on Plaintiff's *respondeat superior* and indemnification claims where the Defendant Officers are not liable, and on any *Monell* claims for which the Defendant Officers prevail on the underlying claim.

Buried in a section of Plaintiff's omnibus brief directed against the individual Defendant Officers (Response, at 24), Plaintiff asserts that "COPA and OPS" are part of the City of Chicago, and therefore COPA's report is admissible "on numerous grounds" and "provides a basis to deny summary judgment" on the *Monell* claim. Plaintiff is mistaken. The COPA report is inadmissible; therefore, this Court should not consider it in evaluating the City's motion for summary judgment. *Gunville v. Walker*, 583 F.3d 979, 985 (7th Cir. 2009) ("[A] court may consider only admissible evidence in assessing a motion for summary judgment.").

COPA's investigative reports are irrelevant and/or inadmissible for multiple reasons. See Fed. R. Evid. 402 ("Irrelevant evidence is not admissible."). COPA's findings and recommendations are only a preliminary step in the administrative process and do not represent a final determination or decision by the City. Chicago Municipal Code, Chapter 2-78-130(a). Fed. R. Evid. 803(8)(A) does not allow "preliminary or interim evaluative opinions" of agency staff into evidence. See *Friends of Milwaukee's Rivers & All. for Great Lakes v. Milwaukee Metro. Sewerage Dist.,* 2006 WL 2691525, at *1

(E.D. Wis. Sept. 20, 2006), quoting *Smith v. Isuzu Motors Ltd.,* 137 F.3d 859, 862 (5th Cir.1998). Moreover, COPA investigates alleged violations of CPD's internal rules and regulations, and not violations of the Constitution. *Cooper v. Dailey*, 2012 WL 1748150, at *1 (N.D. Ill. May 16, 2012) (findings reached by an investigating agency are not admissible because evidence of violations of the general rules and policies of the CPD are inadmissible under Seventh Circuit law); see also *Thompson v. City of Chicago*, 472 F.3d 444, 453-56 (7th Cir. 2006). Finally, COPA reports are inadmissible under Fed. R. Evid. 403 because they carry "a substantial risk of unfair prejudice and confusion that outweighs [their] probative value." Order, *Stevenson v. City of Chicago*, No. 17 C 4839. Dkt. #366, at 3-4 (N.D. Ill. Aug. 8, 2022) (Durkin, J.)[8] ("Introducing evidence of COPA's findings therefore risks usurping the role of the jury, which may feel compelled to accept (or reject) those findings uncritically" and admitting COPA's reports would lead to "the oft-feared 'trial within a trial' that Rule 403 is meant to guard against").

Moreover, COPA's investigative reports are inadmissible hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally inadmissible. *Flournoy v. City of Chicago*, 829 F.3d 869, 876 (7th Cir. 2016). Plaintiff's attempt to interject snippets of out-of-court language from this report to oppose summary judgment relies on classic hearsay and should be excluded. Plaintiff's assertion (Response at 22-23) that COPA's findings are admissible under Fed. R. Evid. 803(8)(A) should be rejected. Fed. R. Evid. 803(8)(C) provides a hearsay exception for "factual findings resulting from an investigation made pursuant to authority granted by law" unless those findings lack trustworthiness. *Smith,* 137 F.3d at 862. COPA's preliminary findings, which are subject to further administrative review and revision, cannot be considered sufficiently trustworthy for purposes of meeting an exception to the hearsay rule. *Friends of Milwaukee's Rivers*, *supra*. If memoranda reflecting the preliminary opinions of agency staff members were admissible under Fed. R. Evid.

[8] A copy of Judge Durkin's Order is attached hereto as Exhibit 1.

803(8)(A), then Rule 803(8)(C)'s limitations would be meaningless. For this reason, Plaintiff's assertion (at 23) that "the City cannot possibly argue that the report lacks trustworthiness considering it is a report from the City itself," which ignores the preliminary status of these reports, does not assist the Court's analysis of admissibility. Similarly, Plaintiff's attempt, without explanation, to analogize the COPA reports to the DOJ and PATF reports—reports that separately are inadmissible (City's Memorandum, at 15-16; 29)—also fails because of the preliminary status of the COPA reports. The COPA reports do not meet the requirements for admissibility under Rule 803(8).

The Response (at 23-24), without elaboration, concludes that "statements in COPA's Report are also admissible against Defendant City of Chicago as … statements of a party opponent." Plaintiff fails to identify which "statements" in the COPA report satisfy the hearsay exception of statements of party opponents, and therefore, has not met her burden in showing admissibility. *Hartford Fire Ins. Co. v. Taylor*, 903 F. Supp. 2d 623, 640 (N.D. Ill. 2012)(*citing Bourjaily v. U.S.*, 483 U.S. 171, 175-76 (1987)("the proponent of hearsay bears the burden of establishing that the statement is admissible"); see also *Shipley*, 947 F.3d at 1062-63 (cursory and undeveloped argument are waived).

Moreover, Plaintiff's attempt to equate the COPA report to the PATF report and a "school board's letter," and conclude they are admissible as admissions of party opponents, should be rejected. The PATF report—separately inadmissible because it focused on use-of-force complaints (*Fix v. City of Chicago*, 2022 WL 93503, at *2 (N.D. Ill. Jan. 10, 2022)), which are not at issue here (see City's Memorandum, at 9 fn.2) and addressed community policing issues as they existed in 2016—was not a preliminary report and is therefore materially different from the COPA report here. And the admissibility of the school board's letter in *Cook Cnty. Sch. Dist 130 v. Ill. Educ. Labor Relations Bd.*, 2021 IL App (1st) 200909, ¶48, was analyzed under the Illinois state rules of evidence, not federal law, which applies here. See *Schrott v. Bristol-Myers Squibb Co.*, 403 F.3d 940, 943 (7th Cir. 2005) ("Federal courts do, and must, apply both the Federal Rules of Evidence and other evidentiary rules derived

from federal statutes, Supreme Court decisions, or other sources of federal law, in their proceedings."). Put simply, the preliminary COPA report cannot be fairly equated with two materially different pieces of evidence.

Because Plaintiff seeks to recover vicariously against the City based on the liability of the Defendant Officers, the City joined and adopted the motion for summary judgment filed by the Defendant Officers. If summary judgment is granted in favor of the Defendant Officers on any of Plaintiff's constitutional or state law claims, he cannot succeed against the City on his derivative *Monell*, *respondeat superior*, or indemnity claims. *See* City's Memorandum, at 33-34.

Plaintiff (Response at 24) nevertheless contends, in reliance on *Thomas*, 604 F.3d 292, that "the jury need not find any individual defendant liable and instead merely need to find that a constitutional violation occurred." According to Plaintiff, she would "still have a viable claim because a reasonable jury could conclude that there was a constitutional violation based on the COPA report alone," such that the report "would still provide a basis to deny the City's motion for summary judgment." But, as explained above, the preliminary COPA report is inadmissible hearsay and cannot be considered at summary judgment. Moreover, Plaintiff's citation to *Thomas* and her assertion that she would have a viable *Monell* claim "even if none of the Defendant Officers remained in the case" is conclusively refuted by the express allegations in the complaint. Although a municipality could be liable under *Monell* even when its agents are not, this can only occur if such a finding would not create an inconsistent verdict. *Thomas*, 604 F.3d at 305. To make that determination, the Court "must look to the nature of the constitutional violations, the theory of municipal liability and the defenses set forth." *Id.* Plaintiff claims only intentional misconduct by the individual Defendant Officers; specifically, that "[t]he Watts Gang of officers engaged in robbery, extortion, the use of excessive force, planting evidence, fabricating evidence, and manufacturing false charges." (Complaint ¶ 2). These allegations do not involve, as did *Thomas*, the possibility that a government agent unintentionally violated

plaintiff's rights because of an impermissible policy. Based on the nature of these alleged constitutional violations, it is clear the City's potential *Monell* liability is contingent on the officers' liability for the underlying misconduct.

As to derivative liability claims asserted against the City, if the officer is not liable, the City cannot be vicariously liable. For example, if Defendant Officers are entitled to summary judgment because they did not violate White's constitutional rights in one of the ways alleged in the complaint, there is no remaining basis to impose vicarious liability against the City on that claim. Should this Court grant summary judgment in favor of the Defendant Officers on any of Plaintiff's federal claims, the Court should likewise grant summary judgment in favor of the City because absent a constitutional violation, there can be no claim under *Monell*. *Petty v. City of Chicago*, 754 F.3d 416, 424 (7th Cir. 2014). In the absence of wrongdoing by the Defendant Officers, the City cannot be vicariously liable. *See* 745 ILCS 10/2-109 ("A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.")

CONCLUSION

Plaintiff's attempt to impose liability on the City for the criminal misconduct of Watts and Mohammed is nothing more than a claim for *respondeat superior* in the guise of a *Monell* claim. Plaintiff has been unable to develop evidence that creates a genuine issue of material fact on the requisite elements of a cognizable *Monell* claim against the City (widespread practice; deliberate indifference; moving force causation). Accordingly, this Court should enter summary judgment in favor of the City and against Plaintiff on her *Monell* claim. In addition, summary judgment in favor of the City is warranted on the state law malicious prosecution claim asserted vicariously against it. Finally, to the extent the Defendant Officers are entitled to summary judgment on any of Plaintiff's claims against them, the City is likewise entitled to summary judgment on the derivative *Monell*, indemnification, and *respondeat superior* allegations relating to those corresponding claims.

Respectfully submitted,

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EXHIBIT 1

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

JUANITA ARRINGTON, as Independent Administrator of the Estate of RONALD ARRINGTON, deceased, Plaintiff, v. CITY OF CHICAGO, an Illinois municipal corporation, et al., Defendants.	No. 17 C 05345 Judge Thomas M. Durkin
ISIAH STEVENSON and MICHAEL COKES, Plaintiffs, v. CITY OF CHICAGO, an Illinois municipal corporation, et al., Defendants.	No. 17 C 04839 Judge Thomas M. Durkin

ORDER

Plaintiffs moved *in limine* to admit records and findings from a review conducted by the Civilian Office of Police Accountability ("COPA") regarding the vehicle collision at issue in this case. Defendants opposed and filed motions seeking to bar related evidence. The Court heard argument at a Final Pretrial Conference on August 5, 2022, and reserved its ruling on these motions. The Court now denies Plaintiffs' motion and grants Defendants' motions. These rulings are without prejudice and are subject to the explanation below.

Discussion

The claims in this case arise from a collision between a Chicago Police vehicle driven by defendant Dean Ewing and another vehicle driven by Jimmy Malone, in which the Plaintiffs in this case (Stevenson; Malone; and Ronald Arrington, decedent) were passengers. Following the incident, COPA (and its predecessor entity, the Independent Police Review Authority) conducted an investigation to determine whether Ewing had violated any applicable rules or laws via his conduct. COPA conducted multiple interviews with Ewing, other officers, and witnesses. COPA also reviewed physical, video, and other documentary evidence of the incident and the events leading up to it. It concluded that "three factors caused the accident: 1.) The alleged unlawful acts and subsequent traffic violations of the armed robbery subjects; 2.) The problematic and delayed Zone-9 radio communications; and 3.) Officer Ewing's lack of due care and due regard when operating his vehicle." In particular, COPA concluded that Ewing violated certain CPD General Orders and Illinois law by operating his emergency vehicle without due regard for the safety of all vehicle and pedestrian traffic. It recommended a 90-day suspension based on these violations. Ewing is currently in the process of appealing these determinations.

Plaintiffs moved *in limine* to admit the COPA records and findings, while Defendants moved to exclude evidence of COPA's investigation and any conclusions it reached. Defendants argued the investigation is inadmissible under Federal Rule

of Evidence 407 as a subsequent remedial measure. They also contend the COPA evidence is unfairly prejudicial and should be excluded under Rule 403.[1]

The Court does not agree that the COPA investigation and its findings are inadmissible under Rule 407 as subsequent remedial measures. The investigation's purpose was to determine whether Ewing's conduct violated the law and to assess whether any disciplinary action was warranted. Although isolated portions of COPA's report may be encompassed by the rule (for example, its discussion of shortcomings in inter-agency communications between CPD and the Illinois State Police), a factual finding regarding the cause of a traffic accident is not a subsequent remedial measure—it is not an affirmative act undertaken to reduce the risk of future accidents.

However, the Court finds that the COPA report is nonetheless inadmissible under Rule 403 because it carries a substantial risk of unfair prejudice and confusion that outweighs its probative value. Several factors exacerbate the risk of this evidence. First, COPA's findings are closely related to disputed issues the jury in this case will be tasked with deciding, including whether Ewing's conduct was willful and wanton, or negligent, at the time of the crash. Introducing evidence of COPA's findings therefore risks usurping the role of the jury, which may feel compelled to accept (or reject) those findings uncritically. *See City of New York v. Pullman Inc.*, 662 F.2d 910, 915 (2d Cir. 1981) (trial judge properly held government report

[1] The Court assumes that some or all of the COPA report would be admissible over potential hearsay objections under FRE 803(8).

inadmissible under Rule 403 in part because the jury would have considered it presumptively reliable); *Coffin v. S.C. Dep't of Soc. Servs.*, 562 F. Supp. 579, 591 (D.S.C. 1983) (expressing concern that government report "may unduly prejudice the jury whose responsibility it is to make a *de novo* determination of plaintiffs' claims"). Short of that, there remains a serious risk the jury will simply be confused by the contents of the report, which are relevant to some of Plaintiffs' claims but not others. *See English v. District of Columbia*, 651 F.3d 1, 10 (D.C. Cir. 2011) (holding trial court properly excluded portions of internal police investigation report based on potential jury confusion that would have necessitated multiple jury instructions to remedy).

Second, admitting the report is likely to prompt a complicated digression into its details. Notably, COPA's investigation was not carried out under the same standards or evidentiary rules that apply in this case. Furthermore, Ewing disputes COPA's findings and is appealing its determination, and so would likely expend significant effort at trial seeking to undermine the report. The result would be the oft-feared "trial within a trial" that Rule 403 is meant to guard against. *See Doe v. Lima*, 2020 WL 728813, at *8 (S.D.N.Y. Feb. 13, 2020).

The Court concludes that the COPA report and its conclusions are inadmissible under Rule 403 because its probative value is substantially outweighed by its prejudicial impact. The Court therefore denies Plaintiffs' motion *in limine*[2] and grants Defendants' motions *in limine*.[3] While Plaintiffs may not use the report itself

[2] MIL No. 39, R. 270, 17-cv-5345; MIL No. 2, R. 351, 17-cv-4839.

[3] MIL Nos. 7, 14, 25, R. 344, 17-cv-4839.

or make direct allusions to its conclusions, statements Ewing made to COPA as part of the investigation may be admitted as admissions. Statements by Ewing and other witnesses in the investigation can also be used for impeachment purposes. If such statements are used, Plaintiffs should not identify COPA as the entity to which they were made. The parties should agree on neutral language that may be used in such an instance or raise the issue with the Court for a ruling if no agreement can be reached. Plaintiffs may not ask questions meant to raise the subject of the COPA report, but will be permitted to use this evidence should Ewing open the door via his own volunteered testimony or testimony he elicits from others.

ENTERED:

Thomas M Durkin

Honorable Thomas M. Durkin
United States District Judge

Dated: August 8, 2022