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

William Carter, Plaintiffs, v. City of Chicago, Ronald Watts, Darryl Edwards, Alvin Jones, Kallatt Mohammed, John Rodriguez, Calvin Ridgell, Jr., Elsworth J. Smith, Jr., Gerome Summers, Jr., and Kenneth Young, Jr. Defendants.	)	Case No. 17 C 7241 Judge LaShonda A. Hunt

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 and state law claims against the City:

INTRODUCTION

As set forth in the City's Memorandum of Law in Support of Its Motion for Summary Judgment (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 indisputable 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.

Summary judgment in favor of the City is also warranted on the state law malicious prosecution claim vicariously asserted against it. Defendant Officers' alleged misconduct was not within the scope of their employment as a matter of law, and Plaintiff's attempt to impose liability against the City for malicious prosecution via the doctrine of *respondeat superior* fails in every respect.

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.

As demonstrated in the City's Memorandum (at 9-11), Plaintiff cannot, nor has he attempted to, establish a citywide practice of misconduct. Specifically, Plaintiff's *Monell* claim narrowly focuses only on the alleged criminal misconduct of Watts and the "Watts Gang of officers" at Ida B. Wells, ignoring the department as a whole. In his Response (at 7), Plaintiff does not point to citywide or department-wide evidence to support his *Monell* claim but instead contends "[t]he City is unable to cite any authority for its claim that plaintiff must prove the wrongdoing was 'a citywide practice.'"

Acknowledging as he must the Seventh Circuit's decision in *Rossi v. City of Chicago,* 790 F.3d 729 (7th Cir. 2015), Plaintiff contends *Rossi* is "not on point" and does not "foreclose[]" *Monell* liability that "is limited to a single public housing project." Plaintiff misreads the case law.

Rossi explicitly recognized that 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." 790 F.3d at 737 (original emphasis). It further recognized "misbehavior 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). In other words, A practice that permeates the CPD as a whole necessarily must be one that is citywide in scope. Plaintiff incorrectly attempts to limit the *Rossi* decision as holding that "judicial comments" could not defeat summary judgment. (Response at 7-8). However, *Rossi* is not so limited and Plaintiff does not meaningfully dispute *Rossi*'s central holding that citywide evidence is required to maintain a widespread practice *Monell* claim.

Rossi is not alone in requiring citywide evidence to support a widespread practice *Monell* claim. For example, in *Giese v. City of Kankakee*, 71 F.4th 582, 589 (7th Cir. 2023), a case cited by Plaintiff, the Seventh Circuit held that the plaintiff's *Monell* claim failed because the plaintiff did not put forth evidence of a citywide practice. Relying on *Rossi*, the *Giese* court held "such claim requires more than evidence of 'individual misconduct by … officers'; it requires 'a *widespread practice* that permeates a critical mass of an institutional body.'" *Id.* The plaintiff in *Giese* could not support a *Monell* claim because she did not provide department-wide evidence of behavior that was so widespread that the department's failure to address it suggested the existence of a code of silence. *Id.* Both *Rossi* and *Giese* support the City's position that citywide evidence must be presented to support a widespread practice *Monell* claim. Plaintiff's failure to present such evidence warrants entry of summary judgment in favor of the City.

Plaintiff's reliance on the district court decision in *Whitney v. Khan*, 2021 WL 105803 (N.D. Ill. Jan. 12, 2021), is misplaced. In a single sentence, Plaintiff contends evidence showing that a practice pervades an entire entity is unnecessary because, in *Whitney*, the district court "upheld *Monell* liability for a case challenging dental care limited to one housing unit at the Cook County Jail." (Response at 7). This description of the decision in *Whitney* is highly misleading. *Whitney* involved a class action lawsuit that challenged an express policy of Cook County Jail which resulted in a reduction of the Jail's dental staff. Procedurally, *Whitney* did not "uphold" *Monell* liability; the court denied the plaintiffs' motion for partial summary judgment against Sheriff Dart and Cook County on their *Monell* claim. 2021 WL 105803, at *7. Moreover, the *Whitney* decision did not involve and did not address the issue of the widespread practice element of a *Monell* claim. *Whitney* does not support Plaintiff here, where the City is explicitly challenging Plaintiff's failure to establish evidence of citywide misconduct as required under *Rossi* and *Giese*.

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

B. The DOJ Report, PATF Report, and COPA's Findings are Inadmissible.

Plaintiff generally contends (at 8-10) that portions of reports from the Department of Justice ("DOJ"), the Police Accountability Task Force ("PATF"), and the Civilian Office of Police Accountability ("COPA") should be considered in opposition to summary judgment. Because these materials are inadmissible, this Court should not consider them 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.").

The DOJ Report, the PATF Report, and COPA's investigative reports are irrelevant and therefore inadmissible. See Fed. R. Evid. 402 ("Irrelevant evidence is not admissible."). As to the DOJ

Report, it's conclusions were "delivered specifically in the context of excessive force" (*Walker v. City of Chicago*, 596 F.Supp.3d 1064, 1075 (N.D. Ill. 2022)) and were based on a review of "incidents that occurred between January 2011 and April 2016." Ex._, Executive Summary, p. 2. In contrast, there are no claims in this case based on use of force, and the time frame at issue here (2004 or 2006) is significantly earlier than the time periods considered in the DOJ report. Similarly, the PATF report focused on use-of-force complaints (*Fix v. City of Chicago*, 2022 WL 93503, at *2 (N.D. Ill. Jan. 10, 2022)), and addressed community policing issues as they existed in 2016.

COPA's investigative reports also are irrelevant and/or inadmissible for multiple reasons. 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); Plaintiff's Ex. 18, Dkt. #230-18, at 7-8. 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.)[1] ("Introducing evidence of COPA's findings therefore risks usurping the role of the jury, which may

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

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").

In addition, the DOJ Report, the PATF Report, and 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 attempts to interject snippets of out-of-court language from these materials to oppose summary judgment consist of classic hearsay and should be excluded. Plaintiff's assertion (Response at 8-9) that the DOJ Report and COPA's findings are admissible under Fed. R. Evid. 803(8)(A)(iii) 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. 803(8)(A), then Rule 803(8)(C)'s limitations would be meaningless. *Id.* Moreover, given the DOJ report's focus on excessive force complaints and officer-involved shootings, its findings cannot be considered sufficiently trustworthy *in this case*, which does not involve excessive force or officer-involved shootings. *Id.* The mere snippets of language gleaned from the PATF and DOJ Reports lack sufficient context, further undermining their trustworthiness for purposes of Fed. R. Evid. 803(8)(B).

The PATF Report is not admissible under Fed. R. Evid. 801(d)(2), as Plaintiff suggests (Response at 10), because it "is the product of the Police Accountability Task Force and its affiliated Working Groups" and "it should not be assumed that every Task Force (or Working Group) member embraces in totality every formulation in this report or even that all participants would agree with any given recommendation if it were taken in isolation." *See* Plaintiff's Ex.20, at 143. In short, Plaintiff's

references to the PATF Report do not meet the requirements of admissibility under Fed. R. Evid. 801(d)(2) because they are not properly considered statements of an opposing party.

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

In the City's Motion (at 11-16), the City demonstrated that 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. In other words, the concealment of Watts' and Mohammed's 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.

Citing *Giese*, Plaintiff asserts (Response at 11) that a "code of silence" can give rise to a valid *Monell* claim. However, the Seventh Circuit in *Giese* held that the plaintiff's "code of silence" *Monell* claim failed because the plaintiff failed to put forth evidence of a citywide practice. 71 F.4th at 589. According to *Giese*, "such a [code of silence] claim requires more than evidence of 'individual misconduct by … officers'; it requires 'a *widespread practice* that permeates a critical mass of an institutional body.'" *Id.* (quoting *Rossi*, 790 F.3d at 737). The plaintiff in *Giese* could not maintain a "code of silence" *Monell* claim because "[s]he does not provide any department-wide studies or statistics that demonstrate such behavior was so widespread that the department's failure to address it suggested the existence of a code of silence." *Id.* As explained above in Section I(A), Plaintiff has failed to put forth evidence of a citywide practice for purposes of *Monell*. Plaintiff's "code of silence" *Monell* theory also fails for failure to develop department-wide evidence, rather than a criminal enterprise operated by rogue employees at the Ida B. Wells homes. Plaintiff also has failed to plausibly

demonstrate how the alleged "code of silence" applies to this specific case or how it was the "moving force" that caused the constitutional violation alleged by Plaintiff.

In the City's Memorandum (at 14-16), the City detailed why Plaintiff's reliance on the PATF and DOJ Reports was misplaced and unsuccessful in opposing summary judgment on the generalized "code of silence" issue. Plaintiff's Response fails to establish the relevance or admissibility of either Report.[2] For example, Plaintiff asserts (Response at 11-12) that the PATF and DOJ Reports are not limited to excessive force complaints, but he fails to otherwise connect those reports' findings to the specific facts of this case. Plaintiff instead selects random language from these reports he believes should generate an issue of fact. Plaintiff's superficial arguments should be rejected.

First, the PATF and DOJ are irrelevant as to time and scope. As set forth in the City's Motion, the 2016 PATF and 2017 DOJ reports are too remote from plaintiff's 2004 and 2006 arrests to possess any relevancy. *See* City's Memorandum, at 14-15 (citing *Calusinski v. Kruger*, 24 F.3d 931, 936 (7th Cir. 1994) and *Velez v. City of Chicago*, 2023 WL 6388231 (N.D. Ill. Sept. 30, 2023)). The Response fails to address *Velez*, which recognized that evidence that pre-dates and post-dates the alleged misconduct is not relevant to a *Monell* claim. 2023 WL 6388231, at *25. As to *Calusinski*, Plaintiff unsuccessfully attempts to distinguish the decision by asserting it was "an excessive force case" that "involved two isolated incidents of alleged wrongdoing." However, Plaintiff's perfunctory description of *Calusinski* does not refute its relevant holding: "subsequent conduct is irrelevant to determining the [municipality's] liability for the conduct of its employees []. Holding a municipality liable for its official policies or custom and usage is predicated on the theory that it knew or should have known about the alleged unconstitutional conduct on the day of the incident." 24 F.3d at 936.[3]

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[2] *See* Section I(B), *supra*.

[3] In attempting to distinguish *Calusinski*, Plaintiff concedes "this case involves a 'criminal enterprise'" (Response at 16), further undermining his contention that the misconduct he has alleged was carried out or facilitated by a "code of silence."

It is somewhat ironic that Plaintiff attempts to distinguish *Calusinski* on the basis that it was an excessive force case. As explained in the City's Memorandum (at 15), the overwhelming focus of the irrelevant PATF and DOJ reports related 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.*, Plaintiff's Ex. 20, at 4)[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.*, Plaintiff's Ex. 17, at 1). Specifically, the DOJ Report described its investigation as follows: "Our investigation assessed CPD's use of force, including deadly force, and addressed CPD policies, training, reporting, investigation, and review related to officer use of force." (*Id.*). Plaintiff's apparent disregard of this crucial context of the DOJ investigation establishes his reliance on the DOJ Report is immaterial and any statements taken from that Report do not create a genuine issue of material fact as to his "code of silence" *Monell* theory. Plaintiff does not present a claim for physical abuse and this case does not involve the issue of excessive force or an officer-involved shooting, so these reports are irrelevant. *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 significant to the issue of relevance, neither the PATF nor DOJ report addressed the joint FBI/IAD investigation of Watts at issue in this case.

Nor are snippets from former Mayor Rahm Emanuel's 2015 remarks regarding a "code of silence" relevant to Plaintiff's 2004 and 2006 arrests. As explained in the City's Memorandum, former

[4] Plaintiff also erroneously concludes that the City, "through its 'Police Task Force' described the code of silence as deeply entrenched." Response at 15. But the PATF Report "is the product of the Police Accountability Task Force and its affiliated Working Groups" and "it should not be assumed that every Task Force (or Working Group) member embraces in totality every formulation in this report or even that all participants would agree with any given recommendation if it were taken in isolation." *See* Ex. 20 at 143. Statements by the Task Force therefore cannot be fairly or reliably attributed to the City.

Mayor Emanuel's remarks were made years after the events at issue and were made in the context of an excessive force case involving a police shooting. City's Memorandum at 13 (citing *Velez v. City of Chicago*, 2023 WL 6388231, at *25 (N.D. Ill. Sept. 30, 2023), and *Page v. City of Chicago*, 2021 WL 365610, at *3 (N.D. Ill. Feb. 3, 2021)). Notably, again, Plaintiff does not discuss *Velez*, or Judge Chang's evaluation at the summary judgment stage that former Mayor Emanuel's remarks were not relevant to a "code of silence" theory because they substantially post-dated the alleged misconduct claimed by the plaintiff. 2023 WL 6388231, at *25. See also *Lopez v. Vidljinovic*, 2016 WL 4429637, at *5 (N.D. Ill. Aug. 22, 2016) (Lay opinions and hearsay statements of former Mayor Emanuel concerning the alleged "code of silence" within the CPD deemed inadmissible at the summary judgment stage).

Although he ignores *Velez*, Plaintiff does address *Page*, contending that the court in that case made "an express finding" that former Mayor Emanuel's remarks supported an allegation that CPD maintained a "code of silence." (Response at 12-13). But *Page* was a ruling at the pleadings stage, not summary judgment, and involved a much later 2018 arrest. 2021 WL 365610, at *1. In reviewing the plaintiff's allegations at the pleading stage, the *Page* court recognized "the Mayor's address sufficiently supports *the allegation* that the CPD maintained a code of silence" but the plaintiff failed to adequately allege a causal connection to allow the court to conclude a "code of silence" was the moving force behind the plaintiff's alleged injury. *Id.* at *3 (emphasis added). For purposes of this Motion, the *Page* court's recognition of the *context* of former Mayor Emanuel's remarks (excessive force in an officer-involved shooting) is what is important, not whether the allegations in a separate complaint were supported at the pleadings stage for purposes of a Rule 12(b)(6) motion to dismiss.

Plaintiff (Response at 14-16) next relies on findings made by COPA, asserting they "are relevant to the code of silence." As an initial matter, these preliminary findings are inadmissible. (*See* Section I(B), *supra.*) COPA's findings and recommendations do not represent the final decision in the administrative process or represent a final determination by the City, as COPA's recommendations

are subject to review by the Superintendent of Police and/or the Police Board, among other additional steps in the administrative process. Chicago Municipal Code, Chapter 2-78-130(a); Plaintiff's Ex. 18, Dkt. #230-18, at 7-8. Preliminary or interim evaluative opinions of agency staff are inadmissible under Fed. R. Evid. 803(8)(A)). *Friends of Milwaukee's Rivers*, 2006 WL 2691525, at *1.

Finally, Plaintiff contends (Response at 16-17) this Court "should reject the City's attempt to redefine 'code of silence.'" The City's "definition" of Plaintiff's "code of silence" theory is based on the specific allegations in Plaintiff's own complaint. Besides objecting to it, Plaintiff does not explain why the City's "definition"—stemming from Plaintiff's own allegations—is wrong. It is Plaintiff who has alleged a "criminal enterprise" wherein co-conspirators worked to conceal each other's misconduct because of the mutual benefit to each other. As explained in the City's Memorandum (at 12), the undefined, amorphous definition suggested by Plaintiff, pursuant to which any allegation of police misconduct is proof positive of a "code of silence," is untethered to the facts of this case and should be rejected at this stage of the proceedings. Finally, the City's institution of and participation in the joint FBI/IAD investigation conclusively contradicts anyone's definition of "code of silence." Whatever application that amorphous phrase may have in other cases, it certainly has none here.

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*, which he did not, he cannot overcome summary judgment on the element of deliberate indifference. As set forth in the City's Memorandum (at 16-22), 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 their criminal misconduct, Plaintiff's *Monell* claim cannot survive summary judgment on the element of deliberate indifference.

Plaintiff's Response offers little more than a perfunctory argument on the issue of deliberate indifference. Plaintiff variously offers the conclusory statements that the City "allowed" Watts to continue, "decided to look the other way," and "disregarded" the allegations of Watts' criminal misconduct. (Response at 20). Completely refuting the notion that the City looked the other way, the evidence establishes CPD's ongoing involvement and ultimately successful efforts to bring to an end Watts' criminal misconduct. (*See* City's Memorandum, at 17-18). To support its motion, the City relied on the Seventh Circuit decision in *Wilson v. City of Chicago*, 6 F.3d 1233 (7th Cir. 1993), regarding the issue of deliberate indifference for purposes of *Monell*. *Wilson* instructed that the determinative issue for deliberate indifference was whether the policymaker had approved the practice, and that failing to eliminate a practice cannot be equated to approving it. *Id.* at 1240. As *Wilson* further explained, by taking steps to eliminate the practice, "the fact the steps were not effective would not establish [the policymaker] had acquiesced in it and by doing so adopted it as a policy of the city." *Id.*

Wilson's analysis of the deliberate indifference issue controls the outcome here. In accordance with *Wilson*, 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 his allegation that the City, through its officials, deliberately chose to turn a blind eye to the criminal misconduct of Watts and Mohammed, because they did not do so. Plaintiff's Response fails to address the *Wilson* case or discuss CPD's ongoing involvement in the joint FBI/IAD investigation. Plaintiff provides this Court with no reason to distinguish or depart from the reasoning of the *Wilson* case, which confirms the absence of evidence in the record from which a jury could justifiably infer deliberate indifference.

The Response fails to otherwise identify evidence to meet *Monell*'s "rigorous standard of culpability," *i.e.*, that the municipality's action was taken with deliberate indifference to Plaintiff's constitutional rights. *First Midwest Bank v. City of Chicago*, 988 F.3d 978, 986–87 (7th Cir. 2021) (cleaned

up). To repeat an important point, "This is a high bar. Negligence or even gross negligence on the part of the municipality is not enough." *Id.* at 987 (emphasis added). The evidence in this case refutes any claim the City "turned a blind eye to," "looked the other way" in response to, or "disregarded" the allegations of criminal misconduct by Watts and Mohammed. 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 his 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 21) summarily concludes a jury must determine causation in this case because he submitted an expert report. The City does not quarrel with the proposition that in some cases, an expert report can create a jury question that might defeat summary judgment. The City's position is that Shane's report does not create a genuine issue of material fact in *this* case. As set forth in the City's Memorandum (at 24), 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 violations of Plaintiff's constitutional rights. It is not enough to suggest CPD's alleged failure to conduct adequate investigations was *a factor*

in the constitutional violations alleged by Plaintiff; it must have been the *moving force*. *Johnson,* 526 Fed. Appx. at 696.

Plaintiff's Response inadvertently reveals the fatal flaw in his causation argument. In the opening sentence discussing causation, Plaintiff asserts there is "enough evidence for a jury to find that the City's practices were *a* moving force of the police misconduct." (Response at 21) (emphasis added). As *Johnson* establishes, that is the wrong causation standard. The correct inquiry is whether the alleged practices were *the* moving force of the officers' misconduct, and not just *a* factor in it.

The Response (at 21) nevertheless suggests that, because other courts have allowed the causation issue to go to the jury based on expert evidence, this Court should do likewise. The circumstances of the cases offered by Plaintiff are not factually or legally analogous, as none involved allegations of criminal misconduct committed by criminals with the intent to further a criminal enterprise as the moving force. In *Marcinczyk v. Plewa*, 2012 WL 1429448, at *4 (N.D. Ill. 2012), in what the court described as a "unique" set of facts, a police officer conspired with the plaintiff's husband to frame the plaintiff for a crime in order to adversely impact divorce proceedings between the plaintiff and her husband. The "unique facts" of *Marcinczyk* provide no guidance for assessing the moving force behind the criminal enterprise at issue here. *Est. of Loury by Hudson v. City of Chicago*, 2019 WL 1112260 (N.D. Ill. 2019), concerned an officer-involved shooting. A police officer's decision to shoot an individual following a police chase does not involve circumstances remotely analogous to the criminal misconduct motivated by operation of a criminal enterprise at Ida B. Wells. *Klipfel v. Gonzales*, 2006 WL 1697009 (N.D. Ill. 2006), also is factually and legally distinguishable. *Klipfel* involved a First Amendment claim against a police officer who threatened two whistleblower plaintiffs in retaliation for their disclosure of his misconduct. To the extent the courts in *Marcinczyk*, *Loury*, and *Klipfel* determined expert evidence created a fact issue for the jury to consider under the unique facts of those cases, those decisions do not shed light on the question presented here, *i.e.*, whether Shane's

report creates a genuine issue of material fact in this case on the issue of causation. It does not. (*See* City's Memorandum, at 23-24).

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). 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 his *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, whether the theory is described as failure to supervise and/or discipline. In response, Plaintiff suggests the report and opinions of his expert are sufficient to defeat summary judgment as to these theories. As set forth below, Shane does not save Plaintiff's *Monell* claim.[5]

Plaintiff's Response (at 18-19) initially argues Shane's expert testimony provides enough for this Court to deny the City's motion for summary judgment on the failure to supervise/discipline

[5] Plaintiff's arguments regarding the alleged failures to supervise/discipline are based on the report of his retained expert, Jon Shane. For the reasons set forth in Defendants' Motion to Bar Jon M. Shane's *Monell* Opinions (Dkt. #203), jointly filed with the City's Memorandum in Support of 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. Absent Shane, Plaintiff has no other evidence to support his *Monell* claim. In any event, as discussed in the City's Memorandum (at 11; 20; 27) and again in this Reply, Shane's criticisms cannot stave off summary judgment on Plaintiff's *Monell* claim, even if they are not barred.

theory. With little detail or explanation, Plaintiff points to one of Shane's "primary opinions" that asserts CPD should have taken supervisory measures to stop the "adverse behavior" (*i.e.*, the criminal misconduct) at issue here. (*Id.* at 18; *see also* CSOF ¶73). However, Shane's "opinion" is completely disconnected from the specific factual circumstances underlying this case. To paraphrase Shane's very own words, CPD *did* take supervisory measures, which "stopped" the criminal misconduct at issue here and ultimately resulted in the successful criminal prosecutions of Watts and Mohammed. So, CPD accomplished the very thing Shane advocated should have been done.

Plaintiff's Response inadvertently highlights another significant disconnect between Shane's opinions and the circumstances underlying this case. The Response (at 17) mentions that Shane's criticisms pertain to disciplinary investigations undertaken by the Office of Professional Standards ("OPS") and the Independent Police Review Authority ("IPRA"). However, the confidential investigation of Watts and Mohammed in this case was jointly conducted by the FBI and CPD's Internal Affairs Division. Neither OPS nor IPRA was involved in that investigation. Shane's criticisms thus lack a causal connection to the joint investigation at issue here.

Shane's generalized criticisms of CPD's disciplinary investigation process fail to overcome summary judgment for an even more fundamental reason: he cannot opine the CPD turned a blind eye to, and took no steps to investigate, the allegations against Watts and Mohammed. Plaintiff cannot legitimately argue the CPD did not investigate Watts or stop his misconduct – it did. Plaintiff's real argument appears to be that CPD did not stop the misconduct sooner. As set forth in the City's Memorandum (at 26-27), the suggestion that the investigation took too long is simply an argument for an "other, better" response, which is insufficient to establish *Monell* liability. *Frake v. City of Chicago*, 210 F.3d 779, 782 (7th Cir. 2000); 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's Response (at 19) argues Shane's expert opinions are no different than evidence accepted by other courts to defeat summary judgment. As noted above, the City does not dispute the proposition that expert evidence can be sufficient to overcome summary judgment in other cases. What might be true in some cases is not necessarily true in all cases. Irrespective of the circumstances in those other cases, the City's position is that the expert evidence *in this case* is insufficient to avoid summary judgment. And as discussed in Section I(B), *supra*, the alternative sources offered by Plaintiff besides Shane's report are irrelevant and/or inadmissible and therefore do not overcome summary judgment. *Eisenstadt v. Centel Corp.,* 113 F.3d 738, 742 (7th Cir. 1997) (a court may consider only admissible evidence in assessing a motion for summary judgment).

The City is entitled to summary judgment on any failure to investigate and discipline claim. However Plaintiff's proffered 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 attempts to hold the City vicariously liable for malicious prosecution under the doctrine of *respondeat superior* for each of his three arrests. 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 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 Plaintiff 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, as the City's business purpose certainly is not furthered by a police officer's robbery, extortion, or fabrication of criminal evidence against innocent citizens; 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.").

Notwithstanding this straightforward analysis and application of Illinois law, Plaintiff argues the City's scope of employment argument is "frivolous." With little discussion, Plaintiff points to three Seventh Circuit cases: *Argento v. Village of Melrose Park*, 838 F.2d 1483 (7th Cir. 1988); *Wilson v. City of Chicago*, 120 F.3d 681 (7th Cir. 1997) (hereinafter, *Wilson II*); and, *Yang v. City of Chicago*, 137 F.3d 522 (7th Cir. 1998). Closer examination of these three cases establish they are factually inapposite and provide little guidance here.

In *Argento*, the defendant officers were alleged to have used excessive force in beating the plaintiff during the course of an arrest and detention. 699 F.2d at 1486. In *Wilson II*, Jon Burge was accused of torturing the plaintiff in an attempt to extract a confession to the murders of two police officers. 120 F.3d at 685. In *Yang*, the police officer in question was accused of violating the plaintiff's rights when he pulled his gun and pointed it at the plaintiff while investigating a crime. 137 F.3d at 526. In each of these cases, the officers' conduct can be said to be at least partially "actuated by a purpose to serve the master." *Pyne*, *supra*. For example, "Some force, even deadly force, is sometimes permissible for police officers." *Martin v. Milwaukee County*, 904 F.3d 544, 556 (7th Cir. 2018). Overzealousness in obtaining a confession from a murder suspect is arguably motivated in part by a desire to enforce criminal law and thereby serve an officer's employer. *Wilson II*, 120 F.3d at 685. The police officer in *Yang* was actively investigating a crime. In stark contrast, the operation of a criminal enterprise that involves robbery, extortion, and fabrication of criminal evidence against innocent citizens is not within the spectrum of conduct that falls within a police officer's authorized job duties or permissible scope of employment.[6] Accordingly, this case is distinguishable from cases involving use of force by police officers.

Tellingly, Plaintiff's Response does not even mention the *Garcia* and *Rivera* cases relied upon by the City, neither of which involve excessive force. The *Rivera* case provides a particularly helpful analysis of Illinois scope of employment law as applied to criminal misconduct by a police officer

[6] Plaintiff's Response (at 2) also cites to *Hibma v. Odegaard*, 769 F.2d 1147 (7th Cir. 1985), for the proposition that a police officer who uses improper methods in carrying out the objectives of his employer is considered to be acting within the scope of employment. 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*. It is also 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.").

similar to that alleged here. The officer in *Rivera*, Mario Morales, entered homes with his badge and his gun falsely claiming he had a search warrant, handcuffed the occupants, and searched the homes in order to steal drugs and money. 2005 WL 2739180, at *3. Applying Illinois law as set forth in *Pyne* and *Wright*, the *Rivera* court concluded: (1) "no reasonable jury could find that Morales's actions were 'of the kind' he was hired to perform" (*id.* at *5); (2) "no jury reasonably could find Morales's conduct fell 'substantially within the time and space limits' authorized by" the CPD (*id.* at *6); and (3) "no reasonable jury could find that Morales's actions were even partly motivated by a purpose to serve" the CPD (*id.*).

As in *Rivera*, no reasonable jury could find Watts' or Mohammed's actions were "of the kind" they were hired to perform. The type of criminal misconduct alleged against Defendant Officers is the antithesis of what is within the reasonably anticipated job duties of police officers. As in *Rivera*, no reasonable jury could find Watts' or Mohammed's actions were even partly motivated by a purpose to serve the CPD. Neither the City nor CPD would benefit in any way from such criminal misconduct. Under no circumstances can an officer's acceptance of bribes in exchange for allowing drug dealing to continue in a public housing complex reasonably be deemed to be conduct motivated by a desire to serve any purpose of the City or further the City's business. As articulated in *Garcia*, 2003 WL 1715621, at *11, such misconduct does not enforce the law or prevent crime; to the contrary, it subverts the law and perpetrates crime.

Defendant Officers' alleged misconduct was not within the scope of their employment as a matter of law, and Plaintiff's attempt to impose vicarious liability against the City for malicious prosecution through the doctrine of *respondeat superior* fails in every respect. Summary judgment in favor of the City is warranted on the state law malicious prosecution claim asserted against it.

VI. Summary judgment should be granted in favor of the City on any theory of vicarious liability where the Defendant Officers are not liable, and on any *Monell* claim for which the Defendant Officers prevail on the underlying claim.

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 federal § 1983 claims, he cannot succeed against the City on his derivative *Monell* or indemnity claims. *See* City's Memorandum, at 33-34. 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).

CONCLUSION

Plaintiff's attempt to impose § 1983 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 his *Monell* claim. In addition, to the extent summary judgment is entered in favor of the Defendant Officers on any of Plaintiff's claims asserted against them, the City is likewise entitled to summary judgment on derivative *Monell* and/or indemnification claims that are based upon those corresponding claims. Finally, summary judgment in favor of the City is warranted on the state law malicious prosecution claim asserted vicariously against it.

Respectfully submitted,

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