EXHIBIT 1

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

GERMIN SIMS AND ROBERT LINDSEY, Plaintiffs, v. CITY OF CHICAGO, RONALD WATTS, PHILLIP CLINE, DEBRA KIRBY, BRIAN BOLTON, ROBERT GONZALEZ, ALVIN JONES, MANUEL LEANO, KALLATT MOHAMMED, DOUGLAS NICHOLS JR., AND ELSWORTH SMITH JR., Defendants.	)	Case No. 19 C 2347 Judge Rebecca R. Pallmeyer

DEFENDANT CITY OF CHICAGO'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Defendant City of Chicago, in support of its motion for summary judgment on Plaintiffs' §1983 and state law claims against the City, submits the following memorandum of law.

INTRODUCTION

The allegations underlying Plaintiffs' *Monell* claim in the Complaint suggest two broad theories that might be asserted at trial: failure to discipline and a "code of silence." (Dkt. #1, ¶¶ 46; 51). As established below, the City is entitled to summary judgment on Plaintiffs' *Monell* claims, no matter the theory. Plaintiffs have failed to adduce evidence establishing the existence of a widespread practice for the purpose of establishing *Monell* liability. As an additional and independent basis for summary judgment, the evidence establishes the City was *not* deliberately indifferent to the alleged misconduct of the Defendant Officers. Plaintiffs similarly have failed to prove that a City practice or policy was the moving force behind the constitutional injuries alleged by them. Plaintiffs' 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. At the end of the day, application of fundamental *Monell* principles reveals the *Monell* claim to be nothing more than an attempt to improperly impose *respondeat superior* liability on the City under § 1983 for the criminal misconduct of individual defendants Ronald Watts and Kallatt Mohammed.

The Complaint also asserts a state law claim for malicious prosecution against the City pertaining to Plaintiffs' arrests. (Dkt. #1, at ¶72). For the reasons set forth in the Individual Defendants' motion for summary judgment, Plaintiffs' claims arising from their 2009 arrests are barred because their guilty pleas to the criminal charges arising from those arrests extinguish any claims for antecedent misconduct. Independently, the City is entitled to summary judgment on the entire malicious prosecution claim for a more fundamental reason. Predicated on the doctrine of *respondeat superior*, Plaintiffs as a matter of law cannot establish the criminal misconduct allegedly perpetrated by the Defendant Officers constituted acts committed within the scope of their employment.

STATEMENT OF FACTS

Background

Defendant Ronald Watts was one of the sergeants assigned to supervise Chicago Police Department ("CPD") officers who patrolled public housing, including the Ida B. Wells housing complex. (CSOF ¶5).[1] Plaintiffs were arrested on October 15, 2009, and charged with drug crimes. (CSOF ¶6). On July 12, 2010, Plaintiff Sims pleaded guilty to and was convicted of a drug crime in Case No. 09 CR 20361 in a court hearing in which Cook County Circuit Court Judge Lawrence Flood found that a factual basis existed for the plea and that Plaintiff Sims' plea was freely and voluntarily made. (CSOF ¶7). On September 22, 2010, Plaintiff Lindsey pleaded guilty to and was convicted of a drug crime in Case No. 09 CR 20361 in a court hearing in which Judge Lawrence Flood found that a factual basis existed for the plea and that Plaintiff Lindsey's plea was freely and voluntarily made. (*Id.*)

The Joint Investigation

In September 2004, CPD's Internal Affairs Division ("IAD") initiated a confidential investigation of allegations that Public Housing officers were taking money from drug dealers to allow them to continue selling narcotics. (CSOF ¶8). IAD investigator Cal Holliday and other IAD personnel, including then-IAD Lieutenant (and later Chief) Juan Rivera, met with representatives from the United States Attorneys' Office ("USAO"), the Federal Bureau of Investigation ("FBI"), the United States Drug Enforcement Agency ("DEA"), the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), and a federal program known as "High Intensity Drug Trafficking Areas" ("HIDTA"). (CSOF ¶¶ 10-11). Following that September 2004 meeting, it was determined by the USAO that a joint investigation would be conducted with CPD's IAD that would be federally prosecuted and that the USAO would control everything that resulted from the investigation. (CSOF ¶¶ 11-12).

[1] References to the City's Rule 56.1 Statement of Facts will be designated as "CSOF."

An FBI report from September 2004 referenced information from an ATF source, a drug dealer, who was alleging Watts would extort bribe payments from him in order to allow him to continue drug trafficking activity at the Ida B. Wells housing complex. (CSOF ¶¶13; 16). Two other drug dealers at Ida B. Wells, Wilbert Moore and Ben Baker, also began cooperating in the first year of the joint investigation. (CSOF ¶¶ 24-28; 30-32). Ben Baker made allegations against Watts after he was arrested in March 2005. (CSOF ¶ 30).

In May 2005, the Cook County State's Attorney's Office ("CCSAO") was made aware of the allegations against Watts. (CSOF ¶¶ 32; 36-37). At that time, Assistant State's Attorney ("ASA") David Navarro met with Baker, Baker's wife Clarissa Glenn, Baker's attorney, and two IAD police officers to discuss Baker's allegations against Watts. (CSOF ¶31). Notwithstanding the allegations against Watts, the CCSAO proceeded with the prosecution of Baker following his 2005 arrest (as well as the 2009 prosecutions of Plaintiffs); the CCSAO never filed charges against Watts or any members of his tactical team. (CSOF ¶38).

As of February 2006, the FBI reported the joint investigation had been unable to substantiate or corroborate the allegations against Watts. (CSOF ¶39). Assistant United States Attorney ("AUSA") Gayle Littleton advised at that time the USAO would decline prosecution because of "the parallel SAO prosecution and because the case lacked federal prosecutive merit." (CSOF ¶40). The federal government closed its investigation. (CSOF ¶¶ 40; 46). Notwithstanding this development, IAD did not stop investigating. (CSOF ¶¶ 42-45). IAD Chief Debra Kirby reopened an IAD investigation of Clarissa Glenn's allegations of misconduct against Watts. (CSOF ¶43). Kirby instructed IAD Sgt. Joe Barnes to bring the additional information to the FBI, which he did in or about November 2006. (CSOF ¶¶ 43-44). In December 2006, the USAO determined the case against Watts was prosecutable "if additional evidence could be developed" and reopened the federal government's joint investigation with IAD on January 18, 2007. (CSOF ¶47).

The reopened investigation included the use of significant investigatory resources and techniques including Title III wiretaps, consensual overhears, use of confidential human sources, pen registers, covert surveillance, and money rips, among other tactics. (CSOF ¶52). In late 2007 into early 2008, the joint FBI/IAD investigation developed evidence that Mohammed accepted bribes from federal confidential informants ("CI") to allow drug operations to continue. (CSOF ¶¶ 52-54). The evidence was presented to the USAO, but it declined to prosecute at that time because there was insufficient evidence to convict Watts. (CSOF ¶53). Other operations and scenarios were conducted in an attempt to develop evidence for the USAO to bring charges, but they were deemed unsuccessful by the USAO to support charges against Watts. (CSOF ¶¶ 54-55).

On November 21, 2011, an operation successfully recorded Watts and Mohammed stealing suspected drug proceeds (really, government funds) from an FBI CI. (CSOF ¶56). Additional operations and interviews were conducted to further investigate whether other members of the tactical team were corrupt, with negative results. (CSOF ¶¶ 57-58). As a result of the joint FBI/IAD criminal investigation, Watts and Mohammed resigned from CPD and were criminally charged, prosecuted, and convicted. (CSOF ¶59; City Answer, Dkt. #42 ¶¶ 61-63).

The FBI/IAD investigation continued after the arrests of Watts and Mohammed, including interviews of other officers and individuals. (CSOF ¶61). CPD supervisors, including IAD Chief Rivera and Police Superintendent Garry McCarthy, inquired of the USAO and/or FBI if there was evidence that any other officers on Watts' team other than Watts and Mohammed were involved in the criminal misconduct, and were told there was not. (CSOF ¶¶ 63-64). Several years after the conclusion of the joint FBI/IAD investigation, then-Superintendent Eddie Johnson also inquired of the USAO and FBI whether there was evidence that any officers besides Watts and Mohammed were involved in improper conduct that would warrant an indictment or disciplinary charges, and was told there was not. (CSOF ¶65). The FBI's September 25, 2014 memorandum closing the joint FBI/IAD

investigation reported that after all logical and reasonable investigation was completed, Watts and Mohammed were the only two officers implicated by the evidence to have been stealing drugs and drug proceeds from drug dealers and drug couriers. (CSOF ¶66). Mohammed similarly confirmed to the USAO that, other than himself, he did not know of any other officers who were engaging in criminal activities with Watts. (CSOF ¶62).

The CPD's Rules, Regulations, and Policies

CPD had Rules and Regulations that mandated the reporting of misconduct. (CSOF ¶¶ 75-77). These rules included: CPD Rule 14, which prohibited members from making a false report, written or oral; CPD Rule 21, which required officers to report promptly to the Department any information concerning any crime or other unlawful action; and CPD Rule 22, which prohibited the failure to report any violation of its Rules and Regulations or any other improper conduct that was contrary to the policy, orders, or directives of the Department. (*Id.*). As to CPD policies, the City produced CPD G.O. 93-03, which defines the responsibilities of Department members when allegations of misconduct come to their attention. (CSOF ¶¶ 78-82).

Regarding discipline, General Order 93-03 provided that the Superintendent is charged with the responsibility for, and has the authority to maintain, discipline within the Department. (CSOF ¶79). The City also produced evidence regarding: the complaint investigation process following the initiation of a Complaint Register ("CR"); SPARs (Summary Punishment Action Requests), which are mechanisms for supervisory officers to identify and punish less serious violations that they observe and do not require; and, Command Channel Review, through which supervisors are informed of and review investigations of allegations of misconduct against an individual. (CSOF ¶¶ 82-84; 90). A Rule 30(b)(6) witness for the City, Lt. Michael Fitzgerald, testified that when officers in the department were disciplined or stripped of their police powers, supervisors would notify their subordinates that discipline had been imposed and remind them to obey the rules and the law. (CSOF ¶88). The City also produced

evidence showing the imposition of discipline of its officers, including reports for 2004 to 2009, which set forth the amount of CRs that were opened, the amount of CRs that were sustained, and the numbers of officers who were separated or resigned under investigation. (CSOF ¶92).

LEGAL STANDARD

Summary judgment is appropriate when there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 150 (7th Cir. 1994); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Though the movant bears the burden of showing that summary judgment is appropriate, the non-moving party 'may not rest upon mere allegations in the pleadings nor upon conclusory statements in affidavits; it must go beyond the pleadings and support its contentions with proper documentary evidence.'" *Beardsall v. CVS Pharmacy, Inc.*, 953 F.3d 969, 972 (7th Cir. 2020) (internal citation omitted). Therefore, unless Plaintiff "can point to sufficient evidence regarding such issues of judgment to allow [them] to prevail on the merits, he cannot prevail at the summary judgment stage." *Singer v. Raemisch*, 593 F.3d 529, 534–35 (7th Cir. 2010) (internal citations omitted). All facts, and any inferences to be drawn from them, must be viewed in the light most favorable to the nonmoving party. *Scott v. Harris,* 550 U.S. 372, 378 (2007). However, "that duty does not extend to drawing inferences that are supported only by speculation or conjecture." *Swetlik v. Crawford,* 738 F.3d 818, 829 (7th Cir. 2013) (internal quotations omitted). The nonmovant also must produce "more than a scintilla of evidence to support his position" that a genuine issue of material fact exists. *Pugh v. City of Attica,* 259 F.3d 619, 625 (7th Cir. 2001). 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).

DISCUSSION

Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978), and its progeny set out the requirements for municipal liability under § 1983. Fundamentally, local governments can be held liable

for constitutional violations only when they themselves cause the injury. 436 U.S. at 694 ("it is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983"); *Bd. of Cnty. Comm. of Bryan County, Okla. v. Brown,* 520 U.S. 397, 403–404 (1997) ("*Bryan County*"); *First Midwest Bank v. City of Chicago,* 988 F.3d 978, 986 (7th Cir. 2021). "A municipality may not be held liable under § 1983 based on a theory of respondeat superior or vicarious liability." *Jenkins v. Bartlett,* 487 F.3d 482, 492 (7th Cir. 2007) (citing *Monell,* 436 U.S. at 694). Moreover, 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. To succeed on a § 1983 claim against a municipality, the plaintiff must establish conduct "that is properly attributable to the municipality" itself. *Bryan County,* 520 U.S. at 403-04.

A constitutional injury is a threshold requirement for § 1983 municipal liability. *See City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986). "That's the first step in every § 1983 claim, including a claim against a municipality under *Monell*." *First Midwest Bank,* 988 F.3d at 987. If a plaintiff proves a constitutional violation, three types of action can support § 1983 municipal liability: (1) an express policy; (2) a widespread practice that is so permanent and well-settled as to constitute a custom or usage within the force of law; or (3) a decision by a person with final policymaking authority. *McCormick v. City of Chicago*, 230 F.3d 319, 324 (7th Cir. 2000).

If a plaintiff claims that his constitutional injury was caused by a widespread practice, he also must show the municipality acted with deliberate indifference and demonstrate a direct causal link between the municipal action and the alleged deprivation of federal rights. *J.K.J. v. Polk County,* 960 F.3d 367, 377 (7th Cir. 2020); *First Midwest Bank,* 988 F.3d at 987. Deliberate indifference "is a high bar. Negligence or even gross negligence on the part of the municipality is not enough." *First Midwest Bank,* 988 F.3d at 987. "A plaintiff must prove that it was obvious that the municipality's action would lead to constitutional violations and that the municipality consciously disregarded those

consequences." *Id.* Municipal liability attaches only where the final policymaker acts with deliberate indifference as to the known or obvious consequences of that action. *Bryan County,* 520 U.S. at 407.

Finally, a *Monell* plaintiff must prove the municipality's action was the "moving force" behind the constitutional violation. *First Midwest Bank*, 988 F.3d at 987. To satisfy this rigorous causation standard, the plaintiff must show a "direct causal link" between the challenged municipal action and the violation of his constitutional rights. *Id.* "These requirements—policy or custom, municipal fault, and 'moving force' causation—must be scrupulously applied in every case alleging municipal liability." *Id.* 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.

Bryan County, 520 U.S. at 415.

Plaintiffs in this case assert a "widespread practice" type of *Monell* claim, in which they must prove their constitutional injuries were caused by a widespread municipal practice. They also must show the municipality acted with deliberate indifference and demonstrate a direct causal link between the municipal action and the deprivation of federal rights. *J.K.J.,* 960 F.3d at 377; *First Midwest Bank,* 988 F.3d at 987. As explained below, Plaintiffs have failed to develop sufficient evidence to prevail on any of these three required elements for *Monell* liability on a "widespread practice" claim. This Court should enter summary judgment in favor of the City and against Plaintiffs on their *Monell* claim.

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

A. Plaintiffs have Failed to Develop Evidence of a Citywide Practice of Misconduct.

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.* To be "widespread," a practice must be "so permanent and well-settled that it constitutes a custom and practice with the force of law even though it was not authorized by written law or express policy." *Id.*; *see also Monell*, 436 U.S. at 691 (a widespread practice is "persistent," "permanent," and "well settled").

Plaintiffs' "widespread practice" *Monell* claim against the City is based on the alleged criminal misconduct of Watts and the Defendant Officers (*e.g.*, robbery; extortion; use of excessive force[2]; planting evidence; fabricating evidence; manufacturing false charges against innocent persons). *See, e.g.*, Compl., ¶70. However, Plaintiffs have failed to adduce evidence of a *citywide* practice of such criminal misconduct that meets the rigorous standards for holding the City liable for their alleged constitutional injuries. Instead, Plaintiffs tie their widespread practice claim almost exclusively to Watts and the "Watts Gang of officers" at Ida B. Wells, ignoring the department as a whole as well as other geographical areas of the City. Restated in terms that correspond to the allegations, Plaintiffs have not proven a *citywide* practice of robbery and extortion, planting or fabricating evidence, or manufacturing false charges against innocent persons. Such evidence is necessary for a *Monell* claim because "a municipality cannot be held liable solely because it employs a tortfeasor." *Monell,* 436 U.S. at 691.

[2] Plaintiffs' complaint references Defendant Officers' use of excessive force during his arrests. (*See, e.g.*, Compl., ¶¶ 37; 44; 50). However, Plaintiffs have not asserted a claim for excessive force against the Defendant Officers or the City. Absent an underlying constitutional violation, they cannot maintain a claim under *Monell*. *See Petty v. City of Chicago*, 754 F.3d 416, 424 (7th Cir. 2014). Moreover, if they had asserted such a claim, it would have been time-barred. "A claim for excessive force accrues, and the statute of limitations begins to run, at the time the defendant police officer allegedly used the excessive force." *Jackson v. City of Chicago*, 2021 WL 2375997, at *1 (N.D. Ill. June 10, 2021); *see also Evans v. Poskon*, 603 F.3d 362, 363 (7th Cir. 2010) (recognizing "excessive force during an arrest … accrues immediately."). In Illinois, § 1983 excessive force claims carry a two-year statute of limitations. *Alvarez v. Enriquez*, 2011 WL 796095, at *1 (N.D. Ill. Feb. 28, 2011). Here, the statute of limitations on any purported excessive force claim based on Plaintiffs' 2009 arrests would have expired in 2011. *Monell* claims brought pursuant to §1983 are "governed by the accrual rules applicable to other Section 1983 claims." *Walden v. City of Chicago*, 755 F. Supp. 2d 942, 958 (N.D. Ill. 2010). Because any excessive force claim is time barred, a *Monell* claim premised on excessive force likewise would be untimely. *Id.* ("because a *Monell* claim is premised on an underlying constitutional violation … the claim can go forward when premised on claims that have been timely filed").

"*Monell* liability is rare and difficult to establish." *Stockton v. Milwaukee Cnty.*, 44 F.4th 605, 617 (7th Cir. 2022). Plaintiffs have not established—nor have they even attempted to demonstrate—a *citywide* practice that constitutes a permanent City custom and practice with the "force of law." Plaintiffs' narrow focus on Watts and his "gang" at the Ida B. Wells homes has resulted in his failure to demonstrate a genuine issue of material fact on the "widespread practice" element of his *Monell* claim. Plaintiffs' failure of proof on this requirement dooms the claim because "*Monell* does not subject municipalities to liability for the actions of misfit employees." *Ruiz-Cortez v. City of Chicago*, 931 F.3d 592, 599 (7th Cir. 2019); see also *Howell v. Wexford Health Sources, Inc.*, 987 F.3d 647, 654 (7th Cir. 2021) ("In applying *Monell* and avoiding respondeat superior liability, one key is to distinguish between the isolated wrongdoing of one or a few rogue employees and other, more widespread practices").

Although Plaintiffs allege former Chicago police officer Jerome Finnigan and officers working with him "engaged in their misconduct at around the same time that plaintiffs were subjected to the abuses described" in the complaint (Compl., ¶58), that mere allegation does not get the widespread practice claim over the summary judgment hurdle. Plaintiffs cannot avoid summary judgment by simply relying on allegations in the complaint. *Beardsall*, 953 F.3d at 972. Beyond allegations, the only putative evidence related to Finnigan comes from the report of Plaintiff's expert, Jon Shane.[3] Shane's report, however, simply references Finnigan in a block quotation lifted from two pages of the 2016 Police Accountability Task Force ("PATF") report that mentions allegations against miscellaneous officers who were indicted over the years, including Finnigan. (CSOF ¶68). Shane has admitted he knows nothing about the facts of Finnigan's case and he did not review the reasonableness of the IAD investigation of Finnigan that led to his indictment and conviction. (CSOF ¶73). Because Shane simply

[3] For the reasons set forth in Defendants' *Daubert* motions jointly filed with this motion, Plaintiff's experts Jon Shane and Jeffrey Danik should be barred from offering their opinions and criticisms of CPD in this case, and neither their testimony nor their reports should be considered in ruling on this motion. But even if not barred, their reports, testimony, and opinions are insufficient to overcome summary judgment, as explained herein.

copied and pasted a portion of the PATF report without any actual knowledge of Finnigan's case or the reasonableness of the IAD investigations mentioned in that report, any related testimony or evidence on the subject of Finnigan lacks foundation, is inadmissible, and cannot be considered here.[4]

In sum, Plaintiffs have not presented evidence or otherwise explained how the alleged criminal enterprise operated by rogue employees at Ida B. Wells equates to a citywide practice. Dispositive for purposes of *Monell* liability, Plaintiffs have not established a "*widespread* practice that permeates a critical mass of an institutional body." *Rossi,* 790 F.3d at 737 (emphasis in original). Plaintiffs' failure to establish a citywide practice warrants summary judgment in favor of the City on the *Monell* claim.

B. Plaintiffs Have Not Presented Evidence Supporting a Code-of-Silence *Monell* Theory.

Plaintiffs broadly allege that pursuant to a "code of silence," the Defendant Officers engaged in misconduct "knowing their fellow officers would cover for them and help conceal their widespread wrongdoing." (Compl., ¶53). Now beyond the pleadings stage, Plaintiffs have failed to demonstrate how the alleged "code of silence" specifically applies to *this* case or, critically, how it was the "moving force" that caused the alleged constitutional violations of which they complain. Plaintiffs' "code of silence" *Monell* theory fails for lack of supporting evidence.

Plaintiffs' "code of silence" theory is based on the broad concept that police officers are expected to conceal each other's misconduct. (Compl., ¶51). However, such a generalized definition does not apply to individuals like Watts and Mohammed, who were engaged in a criminal enterprise. Criminal co-conspirators engaged in a criminal enterprise conceal each other's misconduct because of the mutual benefit to each other (*i.e.*, they did not want to be caught), rather than because of some vague "code of silence" that officers would not turn each other in. Under Plaintiff's amorphous definition, every single claim of police misconduct seemingly would qualify as a "code of silence" case

[4] Moreover, the fact that Finnigan ultimately was criminally indicted and convicted demonstrates the CPD through its IAD did not condone his criminal misconduct.

simply by using those magic words. The law should not be so easily manipulated, particularly in the context of *Monell*, where "liability is rare and difficult to establish." *Stockton*, 44 F.4th at 617.

Plaintiff's allegations aside, the *evidence* produced in this case demonstrates the City did not condone a "code of silence" in the relevant time period. First and foremost, IAD's investigation of the allegations against Watts, including through its joint investigative efforts with the FBI, is the very antithesis of a department-wide policy to ignore and/or condone criminal misconduct of its officers. Plaintiff's "code of silence" theory ignores that Watts' alleged misconduct *was* reported and *was* investigated by CPD.

Moreover, CPD had Rules and Regulations that mandated the reporting of misconduct. (CSOF ¶¶ 75-77). CPD Rule 14 prohibited members from making a false report, written or oral. (CSOF ¶77). CPD Rule 21 required officers to report promptly to the Department any information concerning any crime or other unlawful action. (*Id.*). CPD Rule 22 prohibited the failure to report to CPD any violation of its Rules and Regulations or any other improper conduct which is contrary to the policy, orders, or directives of the Department. (*Id.*). In addition, CPD G.O. 93-03 "defines the responsibilities of Department members when allegations of misconduct come to their attention," and mandates that "Members who have knowledge of circumstances relating to a complaint will submit an individual written report to a supervisor before reporting off duty on the day the member becomes aware of the investigation." (CSOF ¶80). CPD G.O. 93-03 further directs: "When misconduct is observed or a complaint relative to misconduct is received by a non-supervisory member, such member will immediately notify a supervisory officer and prepare a written report to his commanding officer containing the information received, observations made, and action taken." (CSOF ¶81). The evidence thus establishes the City had a clear written policy expressly prohibiting a "code of silence" as it is described in the complaint.

Plaintiffs' complaint offers a number of allegations in an attempt to create a "code of silence" claim, but none provides evidence sufficient to resist summary judgment. Plaintiffs suggest former Chicago Mayor Rahm Emanuel in December 2015 "acknowledged" a code of silence within the Chicago Police Department. (Compl., ¶65). This example is insufficient to demonstrate a genuine issue of material fact supporting Plaintiff's *Monell* claim. Mayor Emanuel's 2015 comments were made years after the events giving rise to Plaintiffs' lawsuit. Accordingly, these allegations are too remote and not relevant to an alleged "code of silence" in 2009. See *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"). Moreover, "Mayor Emanuel's statement was made in the context of an excessive force case involving a police shooting," which is not relevant here. *Page v. City of Chicago*, No. 19 C 7431, 2021 WL 365610, at *3 (N.D. Ill. Feb. 3, 2021); *Thomas v. City of Markham*, No. 16 C 8107, 2017 WL 4340182, at *4 (N.D. Ill. Sept. 29, 2017) ("allegations of general past misconduct or allegations of dissimilar incidents are not sufficient to allege a pervasive practice and a defendant's deliberate indifference to its consequences.") (cleaned up). Plaintiffs have offered no evidence to establish the relevance of Mr. Emanuel's comments to their claims and cannot, as a matter of law, link comments from a 2015 speech to their 2009 arrests.

Plaintiffs' complaint also references *Obrycka v. City of Chicago*, No. 07-CV-2372 (N.D. Ill.), alleging a federal jury in that case returned a verdict that the City "had a widespread custom and/or practice of failing to investigate and/or discipline its officers and/or code of silence." (Compl., ¶64). However, Plaintiffs have offered no evidence to support that allegation or link the facts of *Obrycka* to the alleged misconduct in this case. Further undermining Plaintiffs' attempted reliance on *Obrycka*, the District Court in that case expressly noted the basis for the jury's verdict was "unclear" and was "based

on the unique facts of [that] case." Case No. 07-CV-2372, Mem. Op. & Order, Dkt. #712, at 10.[5] Plaintiffs have developed no evidence connecting the "unique" and "unclear" findings in *Obrycka* to their alleged constitutional injuries.

According to Plaintiffs (Compl., ¶54), CPD members who attempted to report Watts' misconduct were "ignored or punished." To the extent this vague allegation is intended to refer to police officers Daniel Echeverria and Shannon Spalding, it is insufficient to establish relevant evidence of an applicable "code of silence." Plaintiffs' expert Shane suggested that Echeverria and Spalding were retaliated against and threatened for their participation with the FBI in the investigation of Watts. (CSOF ¶68). However, Plaintiff has failed to show how any alleged "retaliation" against Spalding and Echeverria was a citywide policy or was causally related to the alleged misconduct perpetrated by Defendant Officers that Plaintiffs contend violated their constitutional rights. Moreover, the City cannot be held liable to Plaintiffs for purportedly violating the constitutional rights of Spalding and Echeverria.[6] Constitutional rights are personal in nature and cannot be asserted vicariously. *Daniels v. Southfort*, 6 F.3d 482, 484 (7th Cir. 1993).

Plaintiffs' "code of silence" allegations (Compl., ¶¶ 66-67) also invoke the 2016 PATF report and the 2017 Department of Justice ("DOJ") report. Neither report saves their "code of silence" claim. Those reports are irrelevant in time and scope. Plaintiffs' arrests occurred in 2009, which was seven before the 2016 PATF and 2017 DOJ reports were issued. Evidence that considerably postdates the alleged misconduct is not relevant. *Velez*, 2023 WL 6388231, at *25. Post-event evidence is irrelevant under *Monell*. *Calusinski v. Kruger*, 24 F.3d 931, 936 (7th Cir. 1994) ("[S]ubsequent conduct is irrelevant to determining the Village of Carpentersville's liability for the conduct of its employees on

[5] It also is unclear whether *Obrycka* remains good law in light of the Seventh Circuit's decision in *First Midwest Bank*, 988 F.3d at 990 (abrogating *Obrycka,* 2012 WL 601810 (N.D. Ill. Feb. 23, 2012)).

[6] Allegations pertaining to Spalding and Echeverria are irrelevant to the claims in this lawsuit. This case is not about the retaliation lawsuit brought by Spalding and Echeverria; it is about the alleged violation of Plaintiffs' constitutional rights by Defendant Officers.

February 23, 1988. 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"). Reliance on data or information years after 2009 is not a reliable or appropriate method of determining what caused the alleged harm to Plaintiffs here, or a reliable indicator of what notice the City had of the alleged unconstitutional practice prior to 2009.

The reports are irrelevant and inadmissible for other reasons. The overwhelming focus of the PATF and DOJ reports relate to allegations of excessive force and officer-involved shootings (such as the high-profile Laquon McDonald case).[7] Plaintiffs do not and cannot assert a claim for excessive force (see footnote 2, *supra*), and this case does not involve a police shooting, so these materials 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."). Indeed, neither the PATF nor DOJ report addressed the joint FBI/IAD investigation at issue in this case. The only relevant, competent evidence demonstrates that the City is entitled to summary judgment on Plaintiffs' "code of silence" claim.[8]

[7] The PATF and DOJ reports are inadmissible hearsay as well. In instances where these reports were deemed admissible, the cases did not involve the same relevancy hurdles present in this case. Those other cases involved officers' use of force in the same time frame considered in the DOJ and PATF reports. *See*, *e.g.*, *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; *Godinez v. City of Chicago*, No. 16 C 7344, 2019 WL 5597190 (N.D. Ill. Oct. 30, 2019). As there are no claims based on use of force in this case (*see* footnote 2, *supra*), and the time frame at issue in this case (2009) is earlier than the time periods covered in the PATF and DOJ reports, those materials are irrelevant here. Because they are irrelevant in terms of scope and time, any reliance on them would yield unreliable and untrustworthy conclusions in violation of Fed. R. Evid. 803(8)(B).

[8] Plaintiffs' "code of silence" section of the complaint also asserts that the allegations concerning former officer Finnigan provide an example of a "widespread practice." (Compl., ¶56). As discussed in the preceding section (*supra*, at 10-11), the only putative "evidence" related to Finnigan comes from the report of Plaintiffs' expert Shane, whose only reference to Finnigan is found in a block quotation lifted from two pages of the PATF report. For the reasons discussed above, Shane lacks a sufficient foundation to offer any opinion related to the allegations against Finnigan. Accordingly, Plaintiffs present no evidentiary support for the assertion that Finnigan provides an "example" of a widespread "code of silence" practice.

Finally, as described in the next section, the City's initiation of and participation in the joint investigation wholly contradicts any notion of a department-wide (or citywide) "code of silence." Whatever application that phrase may have in some other circumstance, it certainly has none here.

* * * *

Summary judgment is the "put up or shut up" moment in a lawsuit. *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010). Plaintiffs' failure to present sufficient admissible evidence establishing a "widespread practice" warrants summary judgment in favor of the City on the *Monell* claim.

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

Aside from establishing a widespread practice of constitutional violations, which Plaintiffs have failed to do here, a *Monell* plaintiff also must satisfy 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. Rather, "[a] plaintiff must prove that it was obvious that the municipality's action would lead to constitutional violations and that the municipality consciously disregarded those consequences." *Id.* To reiterate a principle particularly relevant here, a plaintiff must establish conduct that is "properly attributable to the municipality" itself in order to succeed on a § 1983 claim against that municipality. *Bryan County,* 520 U.S. at 403–04. This "rigorous" standard of municipal fault must be "scrupulously applied" in every *Monell* case to avoid municipal liability from "collaps[ing] into *respondeat superior* liability." *First Midwest Bank*, 988 F.3d at 987, citing *Bryan County*, 520 U.S. at 415. Plaintiffs do not meet this demanding standard for municipal fault under the undisputable facts of this case.

A. Plaintiffs' Allegations of Deliberate Indifference are Refuted by the Evidence.

Regarding the element of deliberate indifference, Plaintiffs' complaint alleges the City and its supervisors "deliberately chose to turn a blind eye" to the misconduct of "Watts and his gang," thereby

allowing them to continue engaging in criminal misconduct. (Compl., ¶¶ 43-44). According to Plaintiffs, City officials knew of the misconduct and allowed it to continue. (*Id.*, ¶¶ 37; 39-40). These allegations are conclusively refuted by the actual evidence. As described below, the City did not "turn a blind eye" to Watts' criminal misconduct, nor did it fail to intervene with respect to the allegations against Watts. To the contrary, the CPD took significant steps to address the allegations of 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, Plaintiffs' *Monell* claim cannot survive summary judgment on the element of deliberate indifference.

Completely refuting the allegations that the City failed to intervene, the evidence demonstrates CPD's ongoing involvement and ultimately successful efforts to bring to an end Watts' criminal misconduct. In September 2004, CPD's IAD initiated a confidential investigation of alleged criminal misconduct by police officers. (CSOF ¶8). Investigator Holliday and other IAD personnel met with representatives from the USAO and federal agencies in September 2004, after which a federally-led joint investigation between FBI and IAD commenced. (CSOF ¶¶ 10-12). In addition to bringing the allegations to the attention of the federal government, IAD representatives met in May 2005 with ASA Navarro of the CCSAO to discuss drug dealer Ben Baker's claim that Watts wanted a payoff to allow Baker to continue his drug dealing. (CSOF ¶¶ 31-32). State prosecutors also were made aware of the various allegations being made against Watts by other drug dealers. (CSOF ¶¶ 36-37).

Even after the federal government closed the initial joint investigation in February 2006, IAD did not stop investigating. (CSOF ¶¶ 42-45). IAD Chief Kirby reopened the investigation of Clarissa Glenn's allegations of misconduct against Watts and instructed IAD Sgt. Barnes to bring the additional information to the FBI, which he did in November 2006. (CSOF ¶¶ 43-44). The USAO agreed to reopen the FBI's joint investigation with IAD in December 2006 (CSOF ¶47), which involved

significant investigatory resources and techniques. (CSOF ¶52). In late 2007 into early 2008, the joint FBI/IAD investigation developed evidence that Mohammed accepted bribes to allow drug operations to continue, but the USAO declined to prosecute because there was insufficient evidence to convict Watts. (CSOF ¶¶ 52-54). The joint investigation nevertheless continued, and investigators conducted additional operations and scenarios in an attempt to develop sufficient evidence for the USAO to bring charges against Watts. (CSOF ¶¶ 54-58).

Ultimately, on November 21, 2011, the joint operation successfully recorded Watts and Mohammed stealing suspected drug proceeds (really, government funds) from an FBI informant. (CSOF ¶56). Additional operations and interviews were conducted thereafter to investigate whether other members of the tactical team were corrupt, with negative results. (CSOF ¶¶ 57-58). Following the conclusion of the joint FBI/IAD criminal investigation, Watts and Mohammed resigned from CPD and were criminally charged, prosecuted, and convicted. (CSOF ¶59).

As the above emphatically demonstrates, the City was anything but deliberately indifferent to Watts' alleged criminal enterprise. CPD's IAD initially brought the allegations to the attention of the FBI, worked with the FBI in a joint confidential criminal investigation, worked with and provided information to the CCSAO concerning allegations against Watts, persisted in its investigation of Watts even after the USAO initially closed its investigation in early 2006, brought additional information to the FBI that convinced the USAO to reopen the investigation in late 2006, and participated in the reopened joint investigation, which involved expenditures of significant resources and the use of additional investigative techniques that ultimately resulted in a successful criminal prosecution of Watts and Mohammed. The CPD was not deliberately indifferent to the criminal misconduct of Watts and Mohammed. To the contrary, IAD's persistence and ongoing participation in the joint FBI/IAD investigation establishes CPD did not approve of, or turn a blind eye to, such criminal misconduct and demonstrated CPD's commitment to investigating, eliminating, and punishing such conduct.

Wilson v. City of Chicago, 6 F.3d 1233 (7th Cir. 1993), is instructive on the issue of deliberate indifference for purposes of *Monell*. In *Wilson*, the Seventh Circuit held that then-Superintendent of Police Richard Brzeczek, the City's designated policymaker, was not deliberately indifferent to police officers' torture of persons suspected of killing or wounding officers despite evidence that efforts to eliminate the alleged practice were ineffective, inefficient, and delinquent. *Id.* at 1240–41. The Seventh Circuit stated the determinative issue for deliberate indifference was whether Brzeczek had approved the practice. The *Wilson* Court noted that Brzeczek had referred torture complaints to the Office of Professional Standards ("OPS"), the CPD unit responsible for investigating police abuse. "It was the plaintiff's responsibility to show that in so doing this Brzeczek was not acting in good faith to extirpate the practice. That was not shown." *Id.* at 1240. "At worst," according to the Seventh Circuit, "the evidence suggests that Brzeczek did not respond quickly or effectively, as he should have done, that he was careless, maybe even grossly so given the volume of complaints." *Id.* However, "[m]ore was needed to show that he *approved* the practice. *Failing to eliminate a practice cannot be equated to approving it*." *Id.* (added emphasis). As the Seventh Circuit further explained:

> A rational jury could have inferred from the frequency of the abuse, the number of officers involved in the torture of Wilson, and the number of complaints from the black community, that Brzeczek knew that officers in Area 2 were prone to beat up suspected cop killers. *Even so, if he took steps to eliminate the practice, the fact that the steps were not effective would not establish that he had acquiesced in it and by doing so adopted it as a policy of the city. * * * Deliberate or reckless indifference to complaints must be proved in order to establish that an abuse practice has actually been condoned and therefore can be said to have been adopted by those responsible for making municipal policy.* If Brzeczek had thrown the complaints into his wastepaper basket or had told the office of investigations to pay no attention to them, an inference would arise that he wanted the practice of physically abusing cop killers to continue. There is no evidence in this case from which the requisite inference could be drawn by a rational jury.

Id. (added emphasis).

In accordance with *Wilson*, the determinative issue is whether CPD can be said to have "adopted" the criminal enterprise allegedly operated by Watts. The CPD, through IAD, did *not* approve of the criminal enterprise; instead, it took affirmative steps to eliminate the misconduct by

actively participating in the joint investigation. Paraphrasing *Wilson*, the fact that the steps taken in the joint investigation were not successful sooner does not establish CPD "acquiesced" in Watts' criminal enterprise "and by doing so adopted it as a policy of the City." *Id.* Rather, 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. Plaintiffs thus cannot prove their 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.

In an attempt to sidestep this evidentiary failing, Plaintiffs offer two experts (Jon Shane and Jeffrey Danik) to challenge various aspects of the joint FBI/IAD criminal investigation of Watts and Mohammed. For the reasons set forth in Defendants' Rule 702 motions jointly filed with this motion, Shane and Danik should be barred from offering their opinions and criticisms of CPD in this case. But even if considered, Shane's and Danik's criticisms are insufficient to meet the rigorous standard of culpability required to establish deliberate indifference. Danik criticized the joint FBI/IAD investigation while suggesting additional investigatory steps that could have been taken or should have been done sooner. (CSOF ¶72). Shane similarly offers criticisms that CPD's disciplinary investigative process was deficient. (CSOF ¶68). But neither Danik nor Shane can opine the CPD declined to investigate the allegations against Watts and Mohammed. 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").

Again paraphrasing the Seventh Circuit in *Wilson*, *supra*, if IAD had thrown the allegations of Watts' criminal misconduct into a wastebasket, or if IAD supervisors had told Holliday and other IAD investigators to pay no attention to them, an inference could arise that CPD, through IAD, intended to allow Watts' criminal enterprise to continue. That did not happen. Instead, IAD took significant steps to investigate even after the USAO closed the initial investigation. Deliberate indifference "is a high bar. Negligence or even gross negligence on the part of the municipality is not enough." *First Midwest Bank,* 988 F.3d at 987. There is no evidence in this case from which an inference of deliberate indifference can be fairly or reasonably drawn by the jury.[9]

Additional evidence establishes the CPD was *not* being deliberately indifferent to the scope of the criminal enterprise. Former CPD Superintendent Garry McCarthy consulted with the FBI to ask if there was evidence that any *other* officers on the tactical team besides Watts and Mohammed were involved in the criminal misconduct. (CSOF ¶64). Like McCarthy, IAD Chief Juan Rivera also inquired of the FBI and USAO whether any other officers were involved, with negative results. (CSOF ¶63). The actions of McCarthy and Rivera to determine if any other officers were involved reflect CPD's continued commitment to eliminating criminal misconduct. Such actions are "more consistent with vigilance than with gross negligence – let alone deliberate indifference, an even higher bar." *Brown v. City of Chicago*, 633 F. Supp. 3d 1122, 1177 (N.D. Ill. 2022).

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

[9] Shane and Danik also suggest the CPD should have moved administratively against Watts and Mohammed notwithstanding the ongoing confidential joint FBI/IAD criminal investigation. (CSOF ¶¶ 68; 72). 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 confidential criminal investigation. (CSOF ¶¶ 69-71; 74). For purposes of the deliberate indifference analysis, however, this fundamental flaw in Plaintiffs' experts' reasoning does not matter. 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.

Yet another independent reason for this Court to grant summary judgment on the *Monell* claim is that Plaintiffs have not developed evidence it was a City policy, as opposed to individual action by Defendant Officers, that was the moving force behind any constitutional injury. This conclusion is valid irrespective of whichever *Monell* theory Plaintiffs attempt to present at trial. As noted above, a municipality cannot be held liable under the common-law doctrine of *respondeat superior* for constitutional violations committed by its employees and agents. *First Midwest Bank*, 988 F.3d at 986. A plaintiff asserting a *Monell* claim must prove the municipality's action was the "moving force" behind the alleged constitutional violation. *Id.* 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. Indeed, "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).

For the reasons set forth above, this Court need not reach the question of whether Plaintiffs have developed sufficient proof that a City policy or practice was the moving force behind the criminal enterprise allegedly causing the constitutional violations claimed in this case. As explained, Plaintiffs have failed to present evidence sufficient to establish a widespread practice that existed at the time of Plaintiffs' arrests and prosecutions, let alone one that was the "moving force" behind Watts' criminal enterprise. Plaintiffs similarly have failed to meet the rigorous standards of municipal fault that would establish CPD was deliberately indifferent to Watts' criminal enterprise (the indisputable evidence proves CPD was *not* deliberately indifferent). Plaintiffs have failed to present sufficient evidence to overcome summary judgment on the first two elements of their *Monell* claim, and they strike out on the third element, causation.

Plaintiffs broadly allege City policies and customs "facilitated, encouraged, and condoned" Defendant Officers' misconduct. (Compl., ¶45). The misconduct alleged against the Defendant Officers involved robbery, extortion, and shaking down drug dealers for bribes in exchange for allowing them to continue selling narcotics. As Plaintiffs concede (Compl., ¶8), the misconduct at issue is the operation of a "criminal enterprise" run by Watts at the Ida B. Wells housing complex. To successfully establish the "causation" element, Plaintiffs needed to develop evidence that something in CPD's supervision, control, and/or discipline of its police officers was the moving force behind the alleged criminal misconduct that violated their constitutional rights. Notwithstanding the broad framing of the causation allegations in the complaint, Plaintiffs have presented no evidence to support any of these alleged "failures" of CPD.

Plaintiffs attempt to offer the opinion[10] of their expert, Shane, who suggests that CPD's failure to properly conduct investigations "would be expected to cause officers involved in narcotics enforcement, like the Defendants in this case, to engage in corruption and extortion and to fabricate and suppress evidence." (CSOF ¶68). Although Shane offers multiple criticisms of the CPD's practices for investigating complaints of police misconduct, he does not causally connect those alleged investigatory deficiencies with the specific events involved in this case. Shane discusses investigations involving general police misconduct and allegations of excessive force, but other than his say-so, he provides no discussion or analysis of 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. Even if Shane's criticisms of CPD's administrative investigation processes are considered valid, which the City disputes, he does not explain how those deficiencies caused Watts

[10] Shane's causation opinion does not create a genuine issue of fact and should not be considered in ruling upon the City's motion for summary judgment. 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' motions to bar Shane, filed contemporaneously with this Motion. Expert evidence offered by a nonmovant to defeat summary judgment must be admissible. *Lewis, supra.*

and Mohammed to act in the way alleged, *i.e.*, operating a criminal enterprise targeting drug dealers. *Bryan County*, 520 U.S. at 405 ("Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee").

Restated in the circumstances of this case, Plaintiffs needed to show that it was the CPD's claimed disciplinary deficiencies, rather than the criminal conduct and motivations of Watts and Mohammed, that were the moving force behind the alleged violations of their constitutional rights. It is not enough to suggest CPD's alleged failure to conduct adequate investigations was *a factor* in (or contributed to) the constitutional violations alleged by Plaintiffs; it must have been the *moving force*. *Johnson v. Cook County*, *supra*. In other words, 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 criminal behavior perpetrated on Plaintiffs. The moving force was financial gain through criminal misconduct committed by criminals motivated to advance their criminal enterprise. Stripped of its reliance on familiar *Monell* buzzwords, Plaintiffs' claim essentially seeks to hold the City vicariously liable for the criminal misconduct of Watts and Mohammed.

Absent evidence of a "direct causal link," Plaintiffs have failed to establish sufficient evidence to satisfy the element of causation under their *Monell* theories. Without the requisite evidence of a direct causal link, Plaintiffs' 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.

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

For the reasons set forth above, this Court should grant summary judgment in favor of the City on Plaintiffs' *Monell* claim for any number of equally valid grounds. Plaintiffs have failed to

develop sufficient evidence of a widespread practice, deliberate indifference, or causation to move forward on his *Monell* claim, no matter the theory. For completeness, however, the City separately discusses the failure to supervise and failure to discipline theories referenced in the complaint.

Failure to Supervise

Summary judgment should be granted in favor of the City on Plaintiffs' claim that the City had a policy of failing to supervise its police officers. The City produced evidence of express policies demonstrating that supervisors monitored and supervised their subordinates in several ways: the complaint process following the initiation of a CR investigation; SPARs, which are mechanisms for supervisors to identify and punish less serious violations they observe and do not require initiation of a CR investigation; and, Command Channel Review, through which supervisors are informed of and review the investigations of misconduct against an individual. (CSOF ¶¶ 81-84; 90). Lt. Fitzgerald testified that when officers in the department were disciplined or stripped of their police powers, supervisors would notify their subordinates that discipline had been imposed and remind them to obey the rules and the law. (CSOF ¶88).

Notwithstanding this evidence, Plaintiffs offer an expert, Shane, who opines CPD failed to supervise officers through the internal affairs process. According to Shane, CPD should have taken supervisory measures to stop the adverse behavior at issue here. (CSOF ¶68). But as explained above, CPD supervisors affirmatively took steps to investigate and act upon the allegations made by drug dealers against Watts and Mohammed. They did not turn a blind eye to the allegations and actively engaged CPD in the joint FBI/IAD criminal investigation. Using Shane's own words, CPD *did* take "supervisory measures to stop the adverse behavior," which ultimately resulted in the successful criminal prosecutions of Watts and Mohammed (*i.e.*, "stopping" the criminal misconduct). 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"). Here, the steps taken ultimately eliminated the criminal misconduct. The City is entitled to summary judgment on any "failure to supervise" claim.

Failure to Discipline

Plaintiffs similarly cannot prevail under a failure to discipline theory. 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. The City's evidence included General Order 93-03, which provides that the Superintendent is charged with the responsibility and has the authority to maintain discipline within the Department. (CSOF ¶79). In addition, "[t]he Superintendent of Police will review recommendations for disciplinary action including those of a Complaint Review Panel which are advisory, and will take such action as he deems appropriate. Nothing in this order diminishes the authority of the Superintendent of Police to order suspensions, to separate provisional employees or probationary employees, or to file charges with the Police Board at his own discretion without regard to recommendations made by a Complaint Review Panel or subordinates." (*Id.*). The City also produced evidence reflecting the imposition of discipline of its officers, including reports for 2004 to 2009, which set forth the number of CRs that were sustained, the penalties imposed, and the numbers of employees who were separated or resigned under investigation. (CSOF ¶92).

To the extent Plaintiffs might attempt to support the failure to discipline theory with experts, it is to no avail.[11] As noted above, Danik criticized the joint FBI/IAD investigation while suggesting additional investigatory steps that could have been taken or should have been done sooner, while

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

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. 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").

With respect to CPD's disciplinary procedures, Shane also discussed the rate at which complaints of police officer misconduct are sustained. (CSOF ¶68). However, Plaintiffs cannot resist summary judgment based solely on the rate at which complaints of police officer misconduct are sustained or not sustained. Mere statistics of the rates at which such complaints are sustained, without more, "fail to prove anything." *Bryant v. Whalen*, 759 F. Supp. 410, 423–24 (N.D. Ill. 1991), citing *Strauss v. City of Chicago*, 760 F.2d 765, 768-69 (7th Cir. 1985). This is because "[p]eople may file a complaint for many reasons, or for no reason at all." *Strauss*, 760 F.2d at 769. "Consequently, the Seventh Circuit requires evidence that complaints which were not sustained actually had merit." *Bryant*, 759 F. Supp. at 424. For that reason, mere statistics of unsustained complaints, without any evidence those complaints had merit, are insufficient to establish *Monell* liability against the City. *Id.*; see also *Strauss*, 760 F.3d at 769 (dismissing *Monell* claim where the record lacked any evidence besides statistical summaries of complaints filed with the police department and noting that the number of complaints alone "does not indicate that the policies [the plaintiff] alleges exist do in fact exist and did contribute to his injury").

Although Shane refers to sustained rates, he does not offer any evidence that the complaints that were not sustained had merit. His review of the Complaint Registers and resulting criticisms relate

to his conclusion that CPD generally failed to conduct more robust administrative investigations of police officer misconduct. Although he criticized the manner in which investigations were conducted, he did not offer any opinion that the complaints underlying the "not sustained" CRs he reviewed had merit. Absent such evidence, Plaintiffs have failed to establish a viable theory of municipal liability based on the rates at which complaints are sustained or not sustained.

As partially discussed above, Plaintiffs, through Shane, improperly rely on sources from many years before and after their 2009 arrests in an effort to support a failure to discipline theory. Shane begins with the so-called Metcalfe report arising from congressional hearings in 1972, discusses a 1997 report from the Commission on Police Integrity ("CPI"), and ends with the 2016 PATF report and 2017 DOJ report. (CSOF ¶68). This material is irrelevant in scope and time to Plaintiffs' arrests, which occurred 37 years after the Metcalfe report, 12 years after the CPI report, and seven years before the PATF and DOJ reports. As noted above, evidence that considerably predates or postdates the alleged misconduct is not relevant. *Velez*, 2023 WL 6388231, at *25. To be relevant to the elements of widespread practice, notice, deliberate indifference, and causation, 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*, 633 F. Supp.3d at 1177 n.61 (evaluating evidence five years before the plaintiff's arrest for purposes of *Monell* liability). And again, post-event evidence is irrelevant under *Monell*. *Calusinski*, 24 F.3d at 936.

To reiterate a significant point, the historical materials referenced by Shane are irrelevant and inadmissible for other reasons. The PATF and DOJ reports are inadmissible hearsay. (*See* fn. 7, *supra*). The overwhelming focus of the PATF and DOJ reports relate to allegations of excessive force and officer-involved shootings. The 1972 Metcalfe report also relates to excessive force. This case does not present a claim for excessive force or involve a police shooting, so these materials are irrelevant

here. *Milan*, 2022 WL 1804157, at *5 ("[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.").

Without meaningful analysis, Shane quotes a full two pages of the 2016 PATF report that mention allegations against miscellaneous officers who were indicted over the years, including Officers Finnigan and Corey Flagg. (CSOF ¶68). When questioned, Shane conceded he does not know anything about those cases and did not review the reasonableness of the investigations of Finnigan and Flagg that led to their indictments and convictions. (CSOF ¶73). Simply parroting language from the PATF report, without any knowledge of the reasonableness of the FBI/IAD investigations mentioned in that report, lacks a sufficient foundation. See *U.S. v. Brownlee*, 744 F.3d 479, 482 (7th Cir. 2014) ("[a]n expert who parrots [ ] out-of-court statement[s] is not giving expert testimony; he is a ventriloquist's dummy"). Accordingly, Plaintiffs offer no admissible evidence pertaining to Finnigan or Flagg.[12] The City is entitled to summary judgment on the failure to discipline issue.

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 Plaintiffs' malicious prosecution claim.

The Complaint also attempts to hold the City vicariously liable for malicious prosecution[13] for Plaintiffs' arrests 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 employment. *Wright v. City of Danville*, 174 Ill. 2d 391, 405, 675 N.E.2d 110 (1996). An employer potentially may be liable for the intentional or criminal acts of its employees when such acts are committed in the course of employment and in furtherance of the business of the employer. *Rubin v.*

[12] The fact that Finnigan and Flagg were criminally indicted, convicted, and sent to prison demonstrates CPD did not condone criminal misconduct by its officers and that IAD's investigatory practices were effective in rooting out and punishing such misconduct. Moreover, the outcomes of the Finnigan and Flagg cases (criminal convictions) provide no reasonable basis for other police officers to feel "emboldened" by allegedly deficient investigatory practices.

[13] As set forth in Defendant Officers' summary judgment papers, Plaintiffs' claims are barred as a result of their guilty pleas to criminal charges arising from their 2009 arrests.

Yellow Cab Co., 154 Ill. App. 3d 336, 338, 507 N.E.2d 114 (1st Dist. 1987); *Webb v. Jewel Companies, Inc.*, 137 Ill. App. 3d 1004, 1006, 485 N.E.2d 409 (1st Dist. 1985). However, an employer is not liable to an injured third party where the acts complained of were committed solely for the benefit of the employee. *See Rubin*, 154 Ill. App. 3d at 338; *Webb*, 137 Ill. App. 3d at 1006. If the employee's actions are different from the types of acts he is authorized to perform, or were performed purely in his own interest, he has departed from the scope of his employment. *Wright*, 174 Ill. 2d at 405.

A plaintiff bears the burden of establishing the relationship between the claimed misconduct and the scope of employment. *Pyne v. Witmer*, 129 Ill. 2d 351, 360, 543 N.E.2d 1304 (1989). "[W]hen no reasonable person could conclude from the evidence that an employee was acting within the scope of employment, a court should hold as a matter of law that the employee was not so acting" and enter summary judgment in favor of the employer. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 170-71, 862 N.E.2d 985 (2007).

Engaging in a criminal enterprise is not conduct that is plausibly within the scope of employment of a *law enforcement* officer. Plaintiffs nevertheless contend the City should be held vicariously liable under the doctrine of *respondeat superior* for the "criminal enterprise" run by Watts that included robbery, extortion, shaking down drug dealers, and framing innocent civilians. In accordance with Illinois law as described above, the City cannot be held vicariously responsible for the criminal activities allegedly perpetrated by Watts and Mohammed. It should go without saying police officers are expected to suppress or prevent crimes, not commit them.

According to the Illinois Supreme Court, 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*, 129 Ill. 2d at 359-60 (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, no reasonable person could conclude Watts, Mohammed, or any other Defendant Officer was acting within the scope of employment in allegedly victimizing Plaintiffs and others at Ida B. Wells as part of an ongoing criminal enterprise.

It cannot reasonably be disputed the acts complained of were committed solely for the benefit of Defendant Officers. Plaintiffs claim Watts and Defendant Officers engaged in robbery, extortion, planting evidence, and framing innocent individuals at the Ida B. Wells housing complex in the 2000s. (Compl, ¶¶ 8, 37). The joint FBI/IAD investigation arose from allegations that Public Housing officers were taking money from drug dealers to allow them to continue selling narcotics. (CSOF ¶8). Drug dealers alleged Watts would extort bribe payments in order to allow them to continue drug trafficking activity at Ida B. Wells. (CSOF ¶¶ 13; 16; 27-28; 32). The joint investigation developed evidence that Mohammed accepted bribes to allow drug operations to continue at Ida B. Wells. (CSOF ¶52). Watts and Mohammed were caught stealing suspected drug proceeds from an individual they believed to be a drug courier (who was actually an FBI CI). (CSOF ¶56). These actions were taken solely for the monetary benefit of Watts and Mohammed, with no intent to "serve" the City's interests. Neither the City nor CPD would benefit in any way from such criminal misconduct. See *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.")

Relatedly, the Defendant Officers' alleged misconduct cannot be said to be in furtherance of the City's business. As indicated above, 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, extortion, or fabrication of criminal evidence against innocent citizens. To the contrary, the business purpose of a police department is decidedly frustrated and undermined by such conduct. 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. See *Rivera*, 2005 WL 2739180, *6 (No reasonable jury could find police officer's actions (breaking into homes to steal drugs and money) "were even partly motivated by a purpose to serve the Chicago Police Department.")

Finally, the type of conduct alleged against Defendant Officers is the antithesis of what is within the reasonably anticipated job duties of police officers. Where, as here, the officers' actions are different from the types of acts they are authorized to perform, or were performed purely in their own interests, they have departed from the scope of their employment. *Wright*, 174 Ill. 2d at 405. Police officers are expected to assist citizens and protect them from criminal acts, not perpetrate criminal acts upon them. Police officers are not hired to foster illegal drug dealing in exchange for a bribe, rob or extort citizens, or arrest citizens based on fabricated evidence, particularly when such alleged conduct is part of an ongoing criminal enterprise. Such misconduct does not enforce the law or prevent crime; to the contrary, it subverts the law and facilitates crime. 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"). The holding in *Garcia* is directly applicable here. Defendant Officers' alleged misconduct was not within the scope of their employment as a matter of law.

Plaintiffs' attempt to impose vicarious liability against the City through the doctrine of *respondeat superior* fails in every respect. The officers' alleged misconduct, if proven, would have been 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. The evidence does not

demonstrate heavy-handed, overly zealous, or aggressive policing tactics. These were actions of a criminal nature that furthered, not prevented, criminal activity and were completely outside the scope of a law *enforcement* officer's employment as a matter of law. 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 any vicarious theory of liability where the Defendant Officers are not liable, and on any *Monell* claim for which the Defendant Officers prevail on the underlying constitutional claim.

Defendant Officers have separately moved for summary judgment as to the federal § 1983 claims asserted against them in the complaint. To the extent Plaintiffs seek to recover vicariously against the City based on the liability of the Defendant Officers, the City herein joins and adopts the motion for summary judgment filed by the Defendant Officers to the extent applicable.

The Supreme Court recognized § 1983 liability cannot attach to a municipality in the absence of an actionable constitutional violation. *Heller*, 475 U.S. at 799 (If there is no violation of the plaintiff's constitutional rights by a police officer, "it is inconceivable" the municipality could be liable pursuant to a *Monell* claim). Municipal liability for a constitutional injury under *Monell* "requires a finding that the individual officer is liable on the underlying substantive claim." *Treece v. Hochstetler*, 213 F.3d 360, 364 (7th Cir. 2000), *quoting Tesch v. County of Green Lake*, 157 F.3d 465, 477 (7th Cir. 1998). Where a plaintiff cannot establish a constitutional injury, he has no claim against the municipality. *Durkin v. City of Chicago*, 341 F.3d 606, 615 (7th Cir. 2003). Should this Court grant summary judgment in favor of the Defendant Officers on any of Plaintiffs' constitutional claims, the Court should likewise grant summary judgment in favor of the City on any related *Monell* claim 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 addition, absent wrongdoing on the part of the Defendant Officers, the City cannot be held 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."); 745 ILCS 10/9-102 (a

public entity must pay a judgment or settlement for compensatory damages only if the employee himself is liable). If summary judgment is granted in favor of the Defendant Officers on any of Plaintiffs' claims, they cannot succeed against the City on a corresponding indemnity claim.

CONCLUSION

Plaintiffs' attempt to hold the City liable for the criminal misconduct of Watts and Mohammed is nothing more than a claim for *respondeat superior* in the guise of a *Monell* claim. Plaintiffs have 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 Plaintiffs on their *Monell* claim. In addition, to the extent the Defendant Officers are entitled to summary judgment on any of Plaintiffs' claims against them, the City is likewise entitled to summary judgment on any derivative *Monell* or indemnification claim related to that corresponding claim.

Respectfully submitted,

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