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

KENT MAYNARD, JR.,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 24-cv-03612
	)	
THE CITY OF CHICAGO, a municipal corporation, and Chicago Police Officer CARMEN MOSTEK (Star 8664),	)	District Judge Elaine E. Bucklo
	)	Magistrate Judge Young B. Kim
Defendants.	)	

DEFENDANT THE CITY OF CHICAGO'S REPLY
IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S
FIRST AMENDED VERIFIED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendant The City of Chicago ("City"), by and through one of its attorneys, Simerdeep Kaur, Assistant Corporation Counsel for the City, for its Reply in Support of Its Motion to Dismiss Plaintiff's First Amended Verified Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), states as follows:

INTRODUCTION

Plaintiff's Response to the City's Motion to Dismiss fails to rebut the City's arguments. For the following reasons, and for the reasons argued in the City's Motion to Dismiss, this Court should grant the City's Motion to Dismiss and dismiss Counts II, III, VIII, and IX of the FAC against the City with prejudice.

ARGUMENT

I. PLAINTIFF'S ADMISSION ARGUMENT AS TO MOSTEK FAILS.

Plaintiff's primary argument in his Response is the following: Because Mostek admitted in both her Answer to the First Amended Verified Complaint ("FAC"), Doc. 35, and in her Statement to COPA, Doc. 37-1, that, during the incident in this case, she was acting under color of state law and within the scope of her employment as a police officer with the City, and because Mostek is represented by the same Law Department as the City, the City is bound by these admissions by

Mostek, and the City's Motion to Dismiss should be denied on this basis ("Admission Argument"). Doc. 37 at pp. 2, 4–8, 11–12 & n.1, 5. Plaintiff's Admission Argument fails on the facts and on the law for multiple reasons as detailed below.

First, the Court should hold Plaintiff's Admission Argument is waived because it is undeveloped and unsupported by any authority. Conspicuously absent from Plaintiff's Admission Argument is *any* citation to legal authority that explains why the City, as a principal, is bound by the statements of Mostek, as the City's alleged (though denied) agent. Moreover, Plaintiff makes no attempt to explain or elaborate on *why* the City is bound by Mostek's statements. Instead, Plaintiff merely asserts in conclusory fashion that the City has admitted Mostek was acting under color of state law and within the scope of her employment as a police officer with the City. The Court is well within its authority under Seventh Circuit precedent to find Plaintiff's Admission Argument is waived. *See Gibson v. Chubb Nat'l Ins. Co.*, --- F.Supp.3d ----, No. 20 C 1069, 2024 WL 2209494, at *7 (N.D. Ill. May 14, 2024) (Bucklo, J.) (finding Chubb's arguments conclusory and finding "[b]eyond those assertions, Chubb fails to explain why this disqualifies Glasser as an expert on the issue of 'fine arts,' or to cite any relevant legal authority," and holding as a result "Chubb's argument is waived.") (citing *Weinstein v. Schwartz*, 422 F.3d 476, 477 n.1 (7th Cir. 2005)); *Gaines v. Chi. Bd. of Educ.*, --- F.Supp.3d ----, No. 19 C 775, 2024 WL 640802, at *21 (N.D. Ill. Feb. 15, 2024) (Bucklo, J.) ("Because defendants do not develop this argument or cite any authority, it is waived.") (citing *Smith v. Ne. Ill. Univ.*, 388 F.3d 559, 569 (7th Cir. 2004)).

Second, from a factual standpoint, the City has not admitted Mostek was acting within the scope of her employment as a police officer with the City. That the parties are represented by the same "Law Department" is irrelevant. The critical fact here is that each party is represented by a different set of attorneys. It should go without saying, but since the City must respond to Plaintiff's argument, the City points out the obvious: having different attorneys allows each party to advance separate – and

sometimes conflicting – arguments. Moreover, the City recognizes that the Court must stick to the four corners of the Complaint, but in case the Court is inclined to consider Plaintiff's argument (which itself is outside of the four corners of the Complaint), the City notes that it has not, in fact, admitted scope of employment through the Law Department's representation of Mostek. On June 4, 2024, the Deputy Corporation Counsel for the Federal Civil Rights Litigation Division of the City of Chicago Department of Law ("FCRL") sent a letter to Mostek explaining that, "[f]ollowing a review of the allegations" in the initial complaint, the FCRL "agrees to represent you in this case under a reservation of rights because the facts do not clearly demonstrate that you were acting within the scope of your employment at the time of the incident," and "[a]s alleged by Plaintiff, your conduct was not of the type that the City of Chicago empowered you to perform as a Chicago police officer." *See* June 4, 2024, Letter to Mostek attached as Exhibit 1.[1] The letter further explains the City is obligated to represent Mostek under the terms of a collective bargaining agreement, but the FCRL is representing Mostek for now under a reservation of rights and may decline to continue to represent Mostek "if the facts show that you were not acting in the scope of your employment at the time of the events alleged in the complaint." *Id.* Therefore, the fact that FCRL is currently representing Mostek does not equate to the City admitting Mostek was acting under color of state law or within the scope of her employment as a police officer with the City.

Third, from a factual standpoint, in Mostek's Statement to COPA, Mostek does not admit she was acting under color of state law or within the scope of her employment as a police officer with the City. *See* Doc. 37-1. Plaintiff argues Mostek testified "she was performing a police function by protecting Plaintiff *against his own dog*," and "Mostek swore that her actions to protect her dog, herself, *and Maynard* were taken under color of state law and calculated – at least in part – to serve the City's

[1] The City does not attach this letter with any intention of converting its Motion to Dismiss into a motion for summary judgment. The City is merely responding to Plaintiff's Admission Argument in a limited, factual way.

interests." Doc. 37 at pp. 2 n.1, 7–8. Plaintiff does not explain how or why Mostek protecting Plaintiff from his dog constitutes performing a police function, acting under color of state law, or acting to serve the City's interests. The City's interests are not served by an officer shooting a dog in the head or protecting a person from their own dog because Plaintiff's allegations are that the shooting was unnecessary (and thus that Aggie must not have been a threat to the public). But more importantly, Mostek was not responding to questioning by COPA to glean facts to establish color of state law or scope of employment. *See* Doc. 37-1. To be sure, the words "color of state law," "scope of employment," "police function," and "serve the City's interests" do not appear in the Statement. *See id.* Nor is COPA's function to question Mostek about acting under color of state law or within the scope of employment as a police officer. Rather, COPA investigates allegations of misconduct.

Fourth, from a legal standpoint, Plaintiff fails to meet his burden of establishing Mostek had actual or apparent authority from her principal, the City, to do the things Plaintiff alleges she did. "Actual authority requires that at the time of an agent's conduct, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." *Bilek v. Fed. Ins. Co.*, 8 F.4th 581, 587 (7th Cir. 2021) (cleaned up). "In addition, an agent may bind his principal through the exercise of apparent authority, which arises when a principal creates, by its words or conduct, the reasonable impression in a third party that the agent has the authority to perform a certain act on its behalf." *Ill. Conf. of Teamsters & Emps. Welfare Fund v. Mrowicki*, 44 F.3d 451, 463 (7th Cir. 1994) (cleaned up).

Neither actual nor apparent authority is plausible here, nor does Plaintiff meet his burden to show such authority existed with respect to Mostek. The City made clear in its Motion to Dismiss that Mostek's conduct is not of the kind Mostek is employed to perform as a CPD police officer—the first criterion for scope. *See* Doc. 33 at pp. 20–25. Overall, Mostek's admissions cannot properly bind the City in a situation where the City, as principal, has questioned and declined the assertion that Mostek

was acting within the scope of her employment. S*ee All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 867–68 (7th Cir. 1999) ("An agent cannot just bootstrap himself into a position where he can bind his principal.") (cleaned up); *Patrick Eng'g, Inc. v. City of Naperville*, 976 N.E.2d 318, 330 (Ill. 2012) ("If the unauthorized acts of a governmental employee are allowed to bind a municipality, the municipality would remain helpless to correct errors or, worse, to escape the financial effects of frauds and thefts by unscrupulous public servants.") (cleaned up). For the foregoing reasons, this Court should reject Plaintiff's Admission Argument.

II. PLAINTIFF FAILS TO REBUT THE CITY'S ARGUMENTS THAT THE *MONELL* CLAIMS FAIL AT EVERY PRONG.

Plaintiff pleads two *Monell* claims against the City: (1) a pattern and practice of CPD police officers using excessive force (Count II); and (2) a failure to train, supervise, and discipline CPD police officers (Count III). The City argued Plaintiff fails to sufficiently plead all four *Monell* claim elements, Doc. 33 at pp. 7–18. For the following reasons, Plaintiff's Response fails to rebut those arguments, and this Court should thus dismiss Counts II and III of the FAC with prejudice.

A. Plaintiff Has Not Pled a Constitutional Violation.

The City argued Plaintiff failed to plead a constitutional violation because, first, Mostek's actions were not linked to any authority granted to her by the City and, second, Mostek was not acting in her official police capacity when she shot Plaintiff's dog. *See* Doc. 33 at pp. 8–13. The City's argument is based on a two-prong test that requires Plaintiff to plead sufficient facts to infer that Mostek acted under the color of state law **and** that her actions were attributable to the City. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978) (explaining the plaintiffs "must establish not only that [the defendant] acted under color of the challenged statute, but also that its actions are properly attributable to the [municipality]."). Plaintiff's Response reveals his misunderstanding of the City's arguments or, alternatively, a failure to grasp well-established Supreme Court precedent.

1. Mostek's Alleged Actions Are Not Fairly Attributable to the City.

Plaintiff argues "[t]he City spends nearly three pages discussing the three-prong test of Rodriguez without acknowledging Rodriguez was a case involving a private actor, not a police officer. By contrast, Mostek is a CPD Officer. Rodriguz is irrelevant here." Doc. 37 at p. 5 n.3. At the outset, it is important to recognize that Plaintiff's argument is premised on an incorrect assumption. Plaintiff argues Mostek's off-duty status is irrelevant and views her as always being a police officer. *Id.* Such a suggestion is absurd and would mean *every* action a police officer *ever* takes is under the color of law.

Contrastingly, the City contends Mostek was a private citizen walking her dog at the time of the incident. As such, because Plaintiff wants to sue the City for a private citizen's actions[2], he must allege sufficient facts to infer that the actions were fairly attributable to the City. The City cited to *Rodriguez*, which consolidates the various tests available to determine the existence of "fair attribution." Doc. 33 at p. 9. (citing *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 823–24 (7th Cir. 2009)). The City argued this Court should apply an analysis in this case similar to the one the Supreme Court applied in *Lindke v. Freed*, 601 U.S. 187, 188 (2024). That is, this Court should determine if there was a clear connection and authorization between the City and Mostek's actions on April 22, 2024. The answer is no, and instead of attempting to answer this question in his Response, Plaintiff opts for a scattershot approach: confusing, conflating, and confounding the issues and taking the position the fair attribution requirement is not relevant here. This case is not about police misconduct; this case is about a dispute between two private citizens. Accordingly, Plaintiff failed to plead state action.

2. <u>Mostek Was Not Acting under Color of State Law.</u>

[2] The City agrees that it is often times easier for a plaintiff to plead color of law or fair attribution when an off-duty police officer is involved because police officers are cloaked with certain authorities that can be invoked even while they are not on the clock. Indeed, the City would have a steeper hill to climb if the facts were that Mostek, recently off work and still in uniform, encountered Plaintiff and Aggie, showed her badge, and told Plaintiff that he would be arrested if he did not bring his dangerous dog inside because it was scaring people on the street and then proceeded to shoot the dog and detain Plaintiff until on-duty officers arrived. But such is not the case here.

Plaintiff argues Mostek was acting under color of state law because of the Admission Argument and because the TRR report proves the incident was a police-involved incident. Doc. 37 at pp. 4–5. Plaintiff further argues "shouldering aside and to the ground of Plaintiff while he attempted to reach his dog, the display of a weapon, and then the actual use of a weapon were visible, physical invocation of authority." *Id.* at p. 7. By Plaintiff's logic because Mostek admitted in her Answer that she was acting under the color of law, then she must have been. *Id.* at p. 4. Not so. The question of whether Mostek's actions were performed under color of state law is a legal determination that rests with the Court. Indeed, it is a statutory requirement of section 1983 and requires an analysis of the nature of the specific acts performed. *Pickrel v. City of Springfield*, 45 F. 3d 1115, 1118–19 (7th Cir. 1995).

Here, Plaintiff raises the Admission Argument. Plf.'s Resp. at p. 4. In support of his argument Plaintiff cites to *Coles v. City of Chicago*, 361 F. Supp. 2d 740 (N.D. Ill. 2005). Doc. 37 at. p. 4. However, *Coles* emphasizes the determination of whether actions are taken under color of state law require factual and legal analysis. In *Coles*, the central issue was whether the City was required to indemnify the officer. *Id.* at 746. The City argued it was not required to indemnify the officer because the officer was not acting under color of law. *Id.* at 741. The Court denied the City's motion for summary judgment and reasoned even though the officer was off-duty, he announced himself to a crowd of individuals as police, signaling his desire to perform a police function and admitted he was assisting security to restore the peace on scene. *Id.* at 748–49. Contrastingly, here, Plaintiff cannot point to anything Mostek did that leads to any inference Mostek was effectuating a police function. Instead, Plaintiff focuses on the Admission Argument, which fails for the reasons explained above.

Next, Plaintiff's reliance on the TRR is misplaced for similar reasons. Plaintiff argues because the TRR refers to Mostek as an "involved member" and because the TRR concludes the force was in compliance with departmental policy, Mostek was acting under color of state law. Doc. 37 at pp. 4–5. Plaintiff's assumption that Mostek was acting under color of state law because she is a police officer

is flawed and contravenes well-established law. The Seventh Circuit opined that, though most police officers are state officials, the mere fact a defendant is a police officer does not mean the defendant acted under color of state law. *Gibson v. City of Chi.*, 910 F. 2d 1510, 1516 (7th Cir. 1990). Moreover, the TRR does not substantiate Plaintiff's claims; rather, it highlights critical facts Plaintiff conveniently overlooks. Specifically, the TRR indicates Mostek was off-duty, out of uniform, and not engaged in any police function at the time of the incident. Doc. 22-2 at p. 1. Overall, Plaintiff's reliance on post-incident documents does not help him meet the requisite legal standard for a motion to dismiss.

The only thing Plaintiff attempts to point to that happened during the incident is the "shouldering" Plaintiff aside, display of a weapon, and the use of the weapon. Doc. 37 at 7. Plaintiff argues these actions were sufficient invocation of state authority and bring Mostek within the meaning of "color of law." *Id.* Plaintiff again relies on *Coles* to argue Mostek's action were calculated in part to serve the City's interests. *Id.* at pp. 7–8. As discussed above, *Coles* is distinguishable. In *Coles*, not only did the off-duty officer announce he was a police officer to a crowd, but the officer was also acting pursuant to a CPD General Order that required off-duty officers to take some action when they witnessed a crime. 361 F. Supp. 2d at 749. Contrastingly, here, Mostek was not acting in response to witnessing a crime as the officer in *Coles* was. Rather, Mostek was acting in self-defense, in defense of her property, and defending Plaintiff from his dog. These are not actions that only a police officer is authorized to take. In fact, the actions Mostek took were with her personal weapon[3], as argued in the City's Motion to Dismiss. Doc. 33 at p. 17-18. As for the "shouldering" of Plaintiff and the display of the weapon—a display Plaintiff did not even see—Plaintiff cited nothing to support the notion that pushing someone aside is an invocation of state authority. Plaintiff has failed to plead sufficient facts

[3] The City also points out that Mostek repeatedly refers to the weapon as her "off-duty" weapon in the COPA statement that Plaintiff attached to his response, and, importantly, had not even recently qualified with the weapon with CPD. Doc. 37-1 at pp. 33-34, 55-56, 72-73.

to infer Mostek was acting under color of state law on April 22, 2024. Thus, Plaintiff's section 1983 claims against the City fail.

B. Plaintiff Fails to Plead Municipal Action.

The City raised three arguments about Plaintiff's failure to plead municipal action in support of his *Monell* claims: (1) Plaintiff failed to plead an express policy in support of his excessive force claim in Count II; (2) Plaintiff failed to plead a widespread practice in support of his excessive force claim in Count II; and (3) Plaintiff failed to plead a failure to train, supervise, and discipline claim in Count III. Doc. 33 at pp. 13–16. Plaintiff's Response waived any response on the express policy and failure to train, supervise, and discipline arguments. As to Plaintiff pleading a widespread practice to support his excessive force *Monell* claim, Plaintiff fails to rebut the City's arguments.

First, Plaintiff's Response waived two of the three arguments. As to the express policy argument, Plaintiff argues "Plaintiff's claim is not only under CPD's written policies but rather" under CPD's unwritten, widespread practices and that "Plaintiff alleges the written policies regarding excessive use of force are honored only in the breach." Doc. 37 at p. 8. Plaintiff plainly failed to respond to the City's arguments and made no argument or showing that the FAC pleads the City has an express policy that causes a constitutional violation when enforced. And as to the failure to train, supervise, and discipline argument, Plaintiff's Response provides no response to the City's arguments. Consequently, this Court should hold Plaintiff waived any response in defense of the FAC with respect to pleading an express policy in support of his excessive force *Monell* claim in Count II and with respect to pleading a failure to train, supervise, and discipline *Monell* claim in Count III. *See Braun v. Vill. of Palatine*, 56 F.4th 542, 553 (7th Cir. 2022);*Lee v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 912 F.3d 1049, 1053–54 (7th Cir. 2019) (explaining "even a complaint that passes muster under the liberal notice pleading requirements of Federal Rule of Civil Procedure 8(a)(2) can be subject to dismissal if a plaintiff does not provide argument in support of the legal adequacy of the complaint," and "[t]his rule applies …

when a litigant effectively abandons the litigation by not responding to alleged deficiencies in a motion to dismiss.") (citing *Alioto*, 651 F.3d at 721). Thus, this Court should dismiss Count III with prejudice as forfeited and abandoned and dismiss Count II with respect to that claim being based on an express policy.

Second, Plaintiff fails to rebut the City's arguments as to Plaintiff failing to plead a widespread practice in support of his excessive force *Monell* claim in Count II. The City argued that Plaintiff has not sufficiently pled a widespread practice that existed in April 2024 because allegations relating to the DOJ and PATF reports were stale and because the other incidents cited by Plaintiff were not similar enough to make a plausible inference that the alleged widespread practices existed. Doc. 33 at pp. 9-11. Plaintiff argues in response, in conclusory fashion, that his citation to the 2017 Department of Justice Report and recent police-involved shootings is sufficient to support a widespread practice. Doc. 37 at pp. 8-9. But Plaintiff does not explain how findings from seven to eight years ago (relating to incidents over a decade ago) relating to use of force on humans and a handful of other incidents – only one of which being recent – involving use of force on humans supports his claims. The City notes that multiple other judges in this District have found that the findings of the DOJ report, without more, are too stale to support a plausible existence of a widespread practice for incidents occurring in recent years. *See Brown v. City of Chi., et al.*, No. 22-cv-03169, Order at 1–3 (N.D. Ill. March 25, 2024) (Wood, J.);[4] *Taylor v. City of Chi.*, No. 21 CV 2197, 2021 WL 4523203, at *3 (N.D. Ill. Oct. 4, 2021) (Shah, J.); *Higuera v. City of Chi., et al.*, No. 22-cv-00964, Tr. of Proceedings at 5, 44–47 (N.D. Ill. Feb. 22, 2024) (Seeger, J.).[5]

[4] This Order by Judge Wood is not a published opinion and is not available on Westlaw. The City thus attaches the *Brown* Order as Exhibit 2 to this Reply.

[5] This is a Transcript of Proceedings before Judge Seeger on February 22, 2024, during which Judge Seeger orally ruled on a motion to dismiss. The City attaches this Transcript in full as Exhibit 3 to this Reply.

Additionally, the underlying facts of the other incidents alleged by Plaintiff are far too distinguishable, and Plaintiff cannot bootstrap the alleged indignities that others have suffered into a *Monell* claim against the City when he did not suffer the same alleged indignity. In *Jordan v. City of Chicago*, Judge Durkin dismissed a *Monell* claim for a similar reason the City urges dismissal here. *Jordan v. City of Chicago*, et al., 15 CV 157, Docket Entry No. 14 at p. 3 (Durkin, J., April 27, 2015)(ACLU report regarding "stop and frisk" cannot support a claim where the plaintiff was not "stopped and frisked" but rather, arrested). This same reasoning was adopted by Judge Aspen in *Anderson v. Allen*, 2020 WL 5891406 at **3-4 (N.D. Ill. Oct. 5, 2020). Notably, the 7th Circuit has recently affirmed a District Court's decision, in deciding summary judgment, to disregard policy evidence that was not tied to the violation at issue. *See Turner v. Paul*, 953 F. 3d. 1011, 1016 (7th Cir. 2020). This Court should do the same. Simply put, Plaintiff has not pled facts relating to incidents or findings that are factually similar or close enough in time to support his widespread practice theory and his *Monell* claim should be dismissed.

C. Plaintiff Fails to Plead Deliberate Indifference.

In its Motion, the City argued that Plaintiff's allegations to not lend themselves to support the deliberate indifference prong of *Monell*: an allegation that any policymaker was aware of and acquiesced to the widespread practice Plaintiff alleges. Doc. 33 at p. 16. The City further argued Plaintiff plead himself out of court by referring to the consent decree. *Id.* at pp. 16–17. Plaintiff responds by stating "[c]overing up an officer's unconstitutional conduct is a sign and symptom of deliberate indifference." Doc. 37 at p. 10. Plaintiff further argues the continuing refusal to amend the TRR and the City paying out millions of dollars "in excessive force claims even as late as last year raises an inference not just of deliberate indifference but also of a failure to correct behavior that the City knows or should know is unconstitutional." *Id.* at p. 11 (citations omitted). Plaintiff is confused.

To meet the standards of *Twombly*, *Iqbal*, *McCauley* and their progeny, Plaintiff must show the City's final policymaker knew of the alleged widespread practices and chose to effectively adopt those practices as its own. There is no allegation in the FAC stating any of the officers on scene were the City's final policymaker. Plaintiff's reference to "paying out millions" in excessive force claims is similarly irrelevant. For municipal liability to attach under *Monell*, there *must* have been "a deliberate choice to follow a course of action[,]" that was "made from among various alternatives by city policymakers." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989) (cleaned up). Here, Plaintiff fails to make the connection between the payouts and deliberate indifference. Plaintiff alleges there was a widespread practice of excessive force, specifically by pointing guns at citizens. However, there is no allegation that these payouts were for the unconstitutional policy that Plaintiff alleges was at play here.

Plaintiff must provide allegations that the final policymaking authority both knew of *and* acquiesced to the purported practice. *See Cornfield by Lewis v. Consolidated High School Dist. No. 230*, 991 F.2d 1316, 1326 (7th Cir. 1993) (emphasis added). Plaintiff has not done so. Moreover, Plaintiff failed to respond to the City's argument that Plaintiff's reference to the consent decree is fatal to his claim and has therefore waived any response. This is critical because such an allegation is the opposite of deliberate indifference and demonstrates that Plaintiff has pled himself out of court. Plaintiff's *Monell* claims should be dismissed for this reason.

D. <u>Plaintiff Fails to Plead Moving Force.</u>

The City argued that Plaintiff failed to sufficiently plead the moving force prong because (1) Plaintiff did not tie any of the alleged widespread practices to the conduct at issue in the Amended Complaint and (2) the allegations of the Amended Complaint clearly demonstrate that the "moving force" of Mostek's conduct was to protect her dog. Doc. 33 at p. 13. In response, Plaintiff merely argues that "[t]he gun pointed at Aggie was also necessarily pointed at Plaintiff" and reiterates the conclusory argument that "CPD's encouragement and deliberate indifference to unreasonable and

excessive force" caused his constitutional deprivation. Doc. 37 at p. 11. This does not directly respond to the City's argument and fails for the same reasons discussed above, and this Court should find that Plaintiff has not sufficiently pled moving force. *See, e.g.*, Exhibit 1 at p. 5.

III. THE ILLINOIS STATE LAW CLAIMS FAIL AS A MATTER OF LAW.

A. Mostek Was Acting Outside the Scope of Her Employment with the City.

The City argued Plaintiff cannot meet his burden of showing Mostek's conduct satisfies the first or third criteria for Mostek acting within the scope of her employment under Illinois law. Doc. 33 at pp. 18–26. Plaintiff's Response largely does not rebut the City's scope arguments. Rather, Plaintiff relies almost exclusively on the Admission Argument, but the Admission Argument fails for the reasons explained above. The City here addresses the minimal points Plaintiff's Response raises with respect to the first and third criteria for scope of employment.

1. The Allegations Demonstrate the First Criterion for Scope Is Not Met.

The City explained that, to satisfy the first criterion for scope, Plaintiff must show Mostek's conduct is of the kind she is employed to perform as a CPD police officer. Doc. 33 at p. 20. The only point raised in Plaintiff's Response that plausibly bears on the first criterion is Plaintiff's discussion of the TRR. Doc. 37 at pp. 4–6. Plaintiff has waived and forfeited a response to every other argument the City raised in its Motion to Dismiss as to the first criterion for scope. *See Braun*, 56 F.4th at 553; *Lee*, 912 F.3d at 1053–54; *Wach*, 2022 WL 1591715, at *2; *Republic Techs.*, 2017 WL 11716584, at *2.

Plaintiff argues that, overall, "the TRR indicates that CPD treated the Incident as a police-involved incident, not the random act of a private citizen." Doc. 37 at p. 5. The City addressed the TRR extensively in its Motion to Dismiss as well as in the above section on color of state law. Sections of the TRR form that are *already pre-included* in the form do not equate to someone from CPD literally writing on their own cognition that Mostek was in fact "an involved member performing a police function." Moreover, Plaintiff's emphasis on the language in the TRR narrative that Mostek shot

Plaintiff's dog to prevent injury to her dog and herself is unavailing. Mostek's narrative in the TRR reflects a purely personal, private pursuit in which Mostek was merely engaging in her common law right, just as any other person has, to defend her property and herself. *See Christy v. Lujan*, 490 U.S. 1114, 1115 (1989) (White, J., dissenting from denial of petition for writ) ("The right to defend one's property has long been recognized at common law, see W. Blackstone, Commentaries * 138-140, and is deeply rooted in the legal traditions of this country.") (cleaned up); *People v. Durand*, 139 N.E. 78, 82 (Ill. 1923) (explaining common law right of self-defense); *Lipe v. Blackwelder*, 25 Ill. App. 119, 122 (Ill. App. Ct. 1887) ("Every man has a right to defend and protect his property of every kind and character from injury or destruction, provided he uses only such means as are reasonably necessary under the circumstances."). Finally, the reference to the Traumatic Incident Stress Management Program, *see* Doc. 37 at p. 5, is a red herring and bears no semblance on its face to police work or a determination that Mostek was performing an act she is employed to perform as a CPD police officer. Overall, Plaintiff fails to satisfy the first criterion for finding scope of employment by Mostek.

2. <u>The Allegations Demonstrate the Third Criterion for Scope Is Not Met.</u>

The City explained that, to satisfy the third criterion for scope, Plaintiff must show Mostek's conduct was caused or motivated, at least in part, by a purpose to serve her employer, the City. Doc. 33 at p. 25. The only point raised in Plaintiff's Response that plausibly bears on the third criterion is Plaintiff's reliance on the *Coles* case and Mostek's testimony in her Statement to COPA that she was protecting Plaintiff from his dog as well as protecting her dog and herself. Doc. 37 at pp. 2 n.1, 4, 8. Plaintiff has waived and forfeited a response to every other argument the City raised in its Motion to Dismiss as to the third criterion for scope. *See Braun*, 56 F.4th at 553; *Lee*, 912 F.3d at 1053–54; *Wach*, 2022 WL 1591715, at *2; *Republic Techs.*, 2017 WL 11716584, at *2.

Plaintiff does not explain why Mostek's testimony shows she was serving the City's interests. Even if Mostek was protecting Plaintiff from his dog based on her testimony to COPA that the dog

was dangerous, those are not what Plaintiff's allegations are. Plaintiff alleges that Mostek fired her weapon at the dog unnecessarily. It is not in the City's interest for off-duty officers to use their personal weapons to shoot animals that pose no threat to public safety. And even so, it is Mostek's motivations that matter here and protecting herself and her dog, even if that also includes protecting Plaintiff in turn, are still personal motivations. Consequently, Mostek's actions were not motivated to serve the City's interests. Her actions only served to protect herself, her dog, and her neighbor from his vicious dog. Overall, Plaintiff fails to satisfy the third criterion for finding scope of employment by Mostek.

B. Plaintiff Cannot Hold the City Liable for Defamation by Mostek.

Plaintiff's Response does not address the City's argument about no liability for defamation. Thus, this Court should hold Plaintiff waived any response in defense of imposing liability on the City for defamation by Mostek, and the City cannot be liable under Counts VIII and IX based on Count VI. *See Braun*, 56 F.4th at 553; *Lee*, 912 F.3d at 1053–54; *Wach*, 2022 WL 1591715, at *2.

IV. THE PRAYERS FOR PUNITIVE DAMAGES SHOULD BE STRICKEN.

Plaintiff's Response does not address the City's argument about no punitive damages against the City. Thus, this Court should hold Plaintiff waived any response in defense of punitive damages against the City, and this Court should strike the prayers for punitive damages against the City. *See Braun*, 56 F.4th at 553; *Lee*, 912 F.3d at 1053–54; *Wach*, 2022 WL 1591715, at *2.

CONCLUSION

For the foregoing reasons, the City respectfully requests this Court dismiss Counts II, III, VIII, and IX of the FAC against the City with prejudice and grant other relief the Court deems just.

Dated: September 24, 2024

Respectfully Submitted,

THE CITY OF CHICAGO

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