APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-3049

FIRST MIDWEST BANK, Guardian of the Estate of Michael D. LaPorta, a disabled person,

Plaintiff-Appellee,

v.

CITY OF CHICAGO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 14 C 9665 — Harry D. Leinenweber, *Judge*.

Argued December 10, 2019
Decided February 23, 2021
ECF No. 58

Before SYKES, *Chief Judge*, and KANNE, *Circuit Judge*.[1]

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[1] The Honorable Amy Coney Barrett, Associate Justice of the Supreme Court of the United States, was a judge of this court and member of the panel when this case was submitted but did not participate in the decision and judgment. The appeal is resolved by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

OPINION

SYKES, *Chief Judge*. Patrick Kelly shot his friend Michael LaPorta in the head during an argument at the end of a night of drinking together. LaPorta's injuries left him severely and permanently disabled. Kelly, a Chicago police officer, was off duty and not acting under color of state law at the time of the shooting. LaPorta nevertheless sued the City of Chicago under 42 U.S.C. § 1983, which provides a federal remedy against state actors who deprive others of rights secured by the federal Constitution and laws. He sought damages for the injuries he suffered at Kelly's hands.

The theory of the case was novel. LaPorta claimed that the City had inadequate policies in place to prevent the shooting—or more precisely, that the City's policy failures caused Kelly to shoot him. He identified several policy shortcomings: the failure to have an "early warning system" to identify officers who were likely to engage in misconduct, the failure to adequately investigate and discipline officers who engage in misconduct, and the perpetuation of a "code of silence" that deters reporting of officers who engage in misconduct. A jury found the City liable and awarded $44.7 million in damages. The City moved for judgment as a matter of law, and the district court denied the motion.

We reverse. LaPorta's injuries are grievous, but his legal theory for holding the City liable is deeply flawed. Whatever viability it might have had under state tort law (we're skeptical, but there's no need to make a prediction), it has no foundation whatsoever in constitutional law. When Kelly shot LaPorta, he was

not acting as a Chicago police officer but as a private citizen. LaPorta claimed that he was deprived of his due-process right to bodily integrity. But it has long been settled that "a State's failure to protect an individual against private violence … does not constitute a violation of the Due Process Clause." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989). We remand with instructions to enter judgment for the City.

I. Background

Late one night in January 2010, LaPorta went drinking with his friend Patrick Kelly, a Chicago police officer. It's undisputed that Kelly was off duty at the time of these events. After patronizing two bars, the friends went to Kelly's house. At some point Kelly began hitting his dog. LaPorta yelled at him to stop and said he was leaving. Kelly then shot LaPorta in the head.[2] LaPorta survived but suffered traumatic brain injuries that left him severely and permanently disabled. He is unable to walk, has cognitive deficits, and cannot use his right arm. He is blind in one eye and deaf in one ear.

LaPorta filed suit in state court against the City of Chicago and other defendants; initially he raised only state-law claims for relief. LaPorta's father, as his son's guardian, substituted as plaintiff in October 2011, and three years later he amended the complaint to add a claim against the City under § 1983 for

[2] At trial the City disputed LaPorta's account and instead argued that LaPorta shot himself with Kelly's gun. Because we are reviewing a denial of a motion for judgment as a matter of law, we view the evidence in LaPorta's favor. *Ruiz-Cortez v. City of Chicago*, 931 F.3d 592, 601 (7th Cir. 2019).

violation of LaPorta's right to due process. The City removed the case to federal court. First Midwest Bank later replaced LaPorta's father as his guardian and was substituted as the plaintiff. For ease of reference, we continue to refer to LaPorta as the plaintiff.

The City moved to dismiss, arguing that the complaint failed to allege a cognizable constitutional violation and thus could not support municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Relying largely on *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990), the judge denied the motion. After discovery the City moved for summary judgment, noting again the absence of any constitutional violation. Citing *DeShaney*, 489 U.S. at 196–97, the City argued that it had no constitutional duty to protect LaPorta from Kelly's private violence. The judge denied the motion, again relying on *Gibson*. *LaPorta v. City of Chicago*, 277 F. Supp. 3d 969, 986–87 (N.D. Ill. 2017).

At trial LaPorta testified about the shooting and its aftermath. Kelly invoked his Fifth Amendment right to remain silent. Beyond the transactional witnesses, most of LaPorta's case focused on Kelly's history of civilian and internal disciplinary complaints and evidence about the Chicago Police Department's policies—or more specifically, its policy failures. LaPorta identified three general policy deficiencies: (1) the City failed to implement an "early warning system" to identify problem officers; (2) it failed to adequately investigate and discipline officers who engaged in misconduct; and (3) it fostered a "code of silence" that deterred reporting of officers who engaged in misconduct.

The theory of LaPorta's case was that these policy failures produced a deep-rooted culture of tolerating and covering up officer misconduct, which led Kelly to believe that he could shoot LaPorta with impunity. LaPorta's counsel told the jury that the case was about more than the violation of LaPorta's constitutional rights; it was about the need for systemic reform in the Chicago Police Department.

More specifically, in closing argument LaPorta's counsel repeatedly argued that by finding the City liable, the jury could help to bring about desperately needed institutional reform in the Chicago Police Department and improve the relationship between the police and citizens. Here's a taste:

> No more distinctions between "us" and "them," citizens and police. Let's make the streets safer for both by bringing back the trust. Why is there no trust? Because there's no transparency. Why is there no transparency? Because it's an "us versus them" attitude. And we need to bridge that. And when I say "we," I actually mean you.
>
> You have the power to do it. … If you should find that the City did, indeed, through Patrick Kelly violate Michael LaPorta's constitutional rights and if you find that it engaged in custom[ary], widespread policies, then you have that power to bring forth that change.
>
> Real reforms can only begin after a judgment is brought forth. Without that, there is no justice. Real changes can be made, a new order and trust can be restored to the

> community that both citizens and police officers share. Yes, your task is monumental. It's big.

Again and again, counsel exhorted the jury to seize the opportunity to reform the Chicago Police Department by holding the City liable:

> [D]on't we want that change in culture? Of course, we would pass the buck to someone else. We would leave it up to the City, but you heard from a city councilman and from the mayor that time and again, attempts to reform from within have failed. …
>
> You are now in the driver['s] seat, and you have the ability to police the police.

To kickstart a transformation this large, counsel urged the jury to set the damages award high enough to send a message and bring about needed reform. To that end, he argued that the Chicago Police Department had

> a longstanding culture and attitude that won't get changed unless there's a massive mandate. It can't be little.
>
> The message has to be sent: You cannot do this again, whether it's with Patrick Kelly or any of the other officers that rise above him in the number of complaints because there are many, many more officers out there, ladies and gentlemen, that are worse than Patrick Kelly.

The City objected to this mode of argument, but the judge overruled the objection.[3] LaPorta's counsel ended his closing argument by reading a fictitious letter that he had written purporting to be from LaPorta to his parents and brother. The "letter" apologized for being a burden and expressed deep pain that he would never be able to marry, have children, or take over the family business. The City objected to this line of argument too, but the judge overruled the objection.

The substantive jury instruction on the due-process claim told the jury to first consider whether LaPorta proved by a preponderance of the evidence that Kelly "intentionally or with reckless indifference" shot him. If he proved this, then the jury was instructed to consider whether he also proved "each of the following things":

> One, prior to Michael D. LaPorta's shooting, the City of Chicago had one or more of the following policies: Failing to maintain an early warning system that would identify officers who would engage in misconduct in the future; maintaining a code of silence in which officers failed to report misconduct or covered up the misconduct of other officers;

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[3] That was error. This form of argument is plainly improper. In asking the jury to award damages high enough to deter future misconduct rather than compensate LaPorta for his injuries, counsel was asking the jury to award punitive damages. But a municipality is immune from punitive damages. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). The judge acknowledged the error when ruling on the City's motion for remittitur but concluded that it was harmless.

> failing to terminate officers who engaged in serious misconduct; failing to discipline officers who engaged in misconduct; and/or failing to investigate allegations of officer misconduct.
>
> The second thing—there's two. One or more of the policies described in Paragraph 1 caused Patrick Kelly to intentionally or with reckless indifference shoot Michael D. LaPorta.
>
> Three, the Chicago City Council knew that because one or more of the policies described in Paragraph 1 existed and was allowed to continue, it was highly predictable that its off-duty officers would violate the bodily integrity of persons they came into contact with because there was a pattern of similar constitutional violations or it was highly predictable even without a pattern of similar constitutional violations.

The instruction concluded: "If you find that Plaintiff has proved each of these things by a preponderance of the evidence, then you must decide for Plaintiff and go on to consider the question of damages."

The jury returned a verdict for LaPorta and awarded $44.7 million in damages. The jurors concluded that two of the City's policies—its failure to maintain an adequate early warning system and its failure to adequately investigate and discipline officers—caused Kelly to shoot LaPorta.

The City moved for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil

Procedure. Relying again on *DeShaney*, the City argued that it had no constitutional duty to protect LaPorta from Kelly's private violence. The judge denied the motion, concluding that *DeShaney* was inapplicable. The City also moved for a new trial based on several trial errors, including the "send a message" closing argument by LaPorta's counsel and his fictitious letter purporting to be from LaPorta to his family. The judge denied that motion as well. This appeal followed.

II. Discussion

The City challenges the denial of its motion for judgment as a matter of law. We review that ruling de novo. *Ruiz-Cortez v. City of Chicago*, 931 F.3d 592, 601 (7th Cir. 2019). The City also renews its request for a new trial based on counsel's improper remarks during closing argument. Because we agree with the City's first argument, we have no need to reach the second.

Section 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress … .

The statute thus provides a remedy for violations of federal rights committed by persons acting under

color of state law. To prevail on a § 1983 claim, the plaintiff must prove that "(1) he was deprived of a right secured by the Constitution or laws of the United States; and (2) the deprivation was visited upon him by a person or persons acting under color of state law." *Buchanan-Moore v. County of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009).

An action is not "under color of state law" merely because it is performed by a public employee or officer; the action must be "related in some way to the performance of the duties of the state office." *Barnes v. City of Centralia*, 943 F.3d 826, 831 (7th Cir. 2019) (quotation marks omitted).

A municipality is a "person" under § 1983 and may be held liable for its own violations of the federal Constitution and laws. *Monell*, 436 U.S. at 690–91. Note the qualifier: "its own violations." Municipal liability under *Monell* carries an important limitation: the statute does not incorporate the common-law doctrine of respondeat superior, so a municipality cannot be held liable for the constitutional torts of its employees and agents. *Id.*

Accordingly, to prevail on a § 1983 claim against a municipality under *Monell*, a plaintiff must challenge conduct that is properly attributable to the municipality itself. *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 403–04 (1997). Specifically, the plaintiff must prove that the constitutional violation was caused by a governmental "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Monell*, 436 U.S. at 694. We have interpreted this language to include three types of actions that can support

municipal liability under § 1983: "(1) an express policy that causes a constitutional deprivation when enforced; (2) a widespread practice that is so permanent and well-settled that it constitutes a custom or practice; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority." *Spiegel v. McClintic*, 916 F.3d 611, 617 (7th Cir. 2019) (quotation marks omitted).

A *Monell* plaintiff must also prove that the policy or cus-tom demonstrates municipal fault. *Brown*, 520 U.S. at 404. When a municipality takes action or directs an employee to take action that facially violates a federal right, municipal fault is easily established. *Id.* at 404–05. In contrast, where (as here) the plaintiff alleges that the municipality has not directly violated his rights but rather has caused an employee to do so, a "rigorous standard[] of culpability … applie[s] to ensure that the municipality is not held liable solely for the actions of its employee." *Id.* at 405. In this situation, the plaintiff must demonstrate that the municipality's action "was taken with 'deliberate indifference'" to the plaintiff's constitutional rights. *Id.* at 407. This is a high bar. Negligence or even gross negligence on the part of the municipality is not enough. *Id.* 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.*

Finally, a *Monell* plaintiff must prove that the municipality's action was the "moving force" behind the federal-rights violation. *Id.* at 404. Like the heightened showing of municipal fault, this rigorous

causation standard guards against backsliding into respondeat superior liability. *Id.* at 405. To satisfy the standard, the plaintiff must show a "direct causal link" between the challenged municipal action and the violation of his constitutional rights. *Id.* at 404.

These requirements—policy or custom, municipal fault, and "moving force" causation—must be scrupulously applied in every case alleging municipal liability. As the Supreme Court has cautioned:

> 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.

Id. at 415.

These principles are settled and familiar. So too is the requirement that the plaintiff must initially prove that he was deprived of a federal right. That's the first step in every § 1983 claim, including a claim against a municipality under *Monell*. A *Monell* plaintiff must establish that he suffered a deprivation of a federal right *before* municipal fault, deliberate indifference, and causation come into play.

LaPorta's claim fails at this first step. He did not suffer a deprivation of a right secured by the federal Constitution or laws. It's undisputed that Kelly was not acting under color of state law when he shot LaPorta. His actions were wholly unconnected to his

duties as a Chicago police officer. He was off duty. He shot LaPorta after they spent a night out drinking together and had returned to his home to continue socializing at the end of the evening. Kelly's actions were those of a private citizen in the course of a purely private social interaction. This was, in short, an act of private violence.

LaPorta's claim is premised on the Fourteenth Amendment right to due process—specifically, the due-process liberty interest in bodily integrity. But he overlooks that the Due Process Clause is a restraint upon *governmental* action: "*No State shall* … deprive any person of life, liberty, or property, without due process of law … ." U.S. CONST. amend. XIV (emphasis added). And as the Supreme Court explained more than three decades ago, the Clause does not impose a duty on the state to protect against injuries inflicted by private actors.

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

DeShaney, 489 U.S. at 195.

DeShaney involved a due-process claim on behalf of a young boy who was abused by his father. *Id.* at 191. County social workers became aware of suspicious injuries and other signs of abuse but took no action to remove the child from his father's custody. *Id.* After the latest and most severe beating left the boy permanently disabled, the father was arrested and convicted of child abuse. The boy's mother then sued the county and the social workers under § 1983 alleging that they violated her son's right to due process. *Id.* at 193.

The Supreme Court rejected the claim, explaining that the purpose of the Due Process Clause is "to protect the people from the State, not to ensure that the State protect[s] them from each other." *Id.* at 196. The Court accordingly held that the state does not have a due-process duty to protect against acts of private violence. *Id.* at 196–97. And "[b]ecause … the State had no constitutional duty to protect [the child] against his father's violence, its failure to do so—though calamitous in hindsight—simply does not constitute a violation of the Due Process Clause." *Id.* at 202.

The Court recognized two limited exceptions to this general rule. First, the state has an affirmative duty to provide for the safety of a person it has taken into its custody involuntarily. *Id.* at 199–200. This is often referred to as the "special relationship" exception. *See Buchanan-Moore*, 570 F.3d at 827. When a state takes a person into its custody and renders him involuntarily unable to care for himself, it has "a corresponding duty" to provide for his basic needs; a violation of this duty "transgresses the

substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *DeShaney*, 489 U.S. at 200. The special-relationship exception did not apply in *DeShaney* for the obvious reason that the injured child was not in state custody. *Id.*

DeShaney's second exception arises only by implication from a brief observation in the Court's opinion. The Court explained that although the county and its social workers "may have been aware" of the dangers the child faced in his father's home, they "played no part in the[] creation" of those dangers. *Id.* at 201. This language is generally under-stood as a second exception to *DeShaney*'s general rule, one that applies when the state "affirmatively places a particular individual in a position of danger the individual would not otherwise have faced." *Doe v. Village of Arlington Heights*, 782 F.3d 911, 916 (7th Cir. 2015) (quoting *Buchanan-Moore*, 570 F.3d at 827).

The *DeShaney* exception for state-created dangers is narrow. *Id.* at 917. A plaintiff must show that the state affirmatively placed him in a position of danger and that the state's failure to protect him from that danger was the proximate cause of his injury. *Buchanan-Moore*, 570 F.3d at 827. To satisfy the proximate-cause requirement, the state-created danger must entail a foreseeable type of risk to a foreseeable class of persons. *Id.* at 828. A generalized risk of indefinite duration and degree is insufficient. *Id.* at 828–29. Finally, because the right to protection against a state-created danger arises from the substantive component of the Due Process Clause, the state's failure to protect the plaintiff must shock the conscience. *Id.* at 827–28. "Only 'the most egregious

official conduct' will satisfy this stringent inquiry." *Jackson v. Indian Prairie Sch. Dist. 204*, 653 F.3d 647, 654 (7th Cir. 2011) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

Unless one of these limited exceptions applies, the state has no duty under the Due Process Clause to protect against private violence. *DeShaney* made that clear, and we have frequently applied its teaching. For example, in *Wilson v. Warren County*, 830 F.3d 464 (7th Cir. 2016), the plaintiffs sued a county and several of its officials alleging that they failed to prevent private persons from seizing their property. Citing *DeShaney*, we explained that the Due Process Clause "does not require a state to protect citizens from private acts unless the state itself creates the danger." *Id.* at 469. The exception for state-created dangers did not apply in *Wilson*, so we affirmed a summary judgment for the defendants. *Id.* at 470. Notably, we rejected the plaintiffs' *Monell* claim against the county because it had no constitutional duty to protect against the private wrongful conduct. *Id.*

Latuszkin v. City of Chicago, 250 F.3d 502 (7th Cir. 2001), involved a § 1983 claim arising out of a drunk-driving accident by an off-duty Chicago police officer. After attending a private party with other officers in a police-station parking lot, the intoxicated officer drove home in his own vehicle and on the way struck and killed a pedestrian. *Id.* at 503. The victim's husband filed a *Monell* claim against the City, but the district court dismissed it. *Id.* at 504. We affirmed, citing *DeShaney* and explaining that "[g]overnmental bodies … generally have no constitutional duty to

protect individuals from the actions of private citizens." *Id.* at 505. Because the intoxicated officer "was acting as a private citizen, rather than as a police officer, when he killed [the pedestrian], none of her federally protected rights were violated." *Id.*

In *Wilson-Trattner v. Campbell*, 863 F.3d 589 (7th Cir. 2017), the plaintiff filed a § 1983 claim against a county sheriff and several of his deputies seeking damages for their failure to adequately protect her from her abusive ex-boyfriend, also a sheriff's deputy. She reported her ex-boyfriend's conduct to the sheriff's department, and the defendants simply advised her to seek a protective order. *Id.* at 592. Local police eventually arrested the ex-boyfriend after a particularly explosive episode at her home. The victim then sued the sheriff and his deputies in their individual and official capacities; she alleged that their inadequate response to her complaints caused her ex-boyfriend to continue abusing her with impunity. *Id.* at 593. Applying *DeShaney*, we held that the sheriff and his deputies had no constitutional duty to protect her from her ex-boyfriend's private acts of violence; we noted as well that the exception for state-created dangers did not apply. *Id.* at 593–96.

We could describe other examples, but it's enough for present purposes to say that we have repeatedly applied *DeShaney*'s holding that the state has no due-process duty to prevent harm from private actors unless one of the limited exceptions applies. *See, e.g.*, *D.S. v. E. Porter Cnty. Sch. Corp.*, 799 F.3d 793, 798–99 (7th Cir. 2015) (applying *DeShaney* to bar a claim that a school failed to protect the plaintiff from bullying); *King ex rel. King v. E. St. Louis Sch. Dist.*

189, 496 F.3d 812, 815–17 (7th Cir. 2007) (applying *DeShaney* to bar a claim that a school failed to protect a student from a private attack while walking home); *Waubanascum v. Shawano County*, 416 F.3d 658, 665–71 (7th Cir. 2005) (applying *DeShaney* and rejecting a claim that a county violated a foster child's right to due process when the child was abused by a foster parent to whom the county had issued a "courtesy license" at the request of the child's county of residence); *Estate of Allen v. City of Rockford*, 349 F.3d 1015, 1019–23 (7th Cir. 2003) (applying *DeShaney* and holding that police officers who arrested the plaintiff and transported her to the hospital had no constitutional duty to protect her from a doctor's forcible collection of urine and blood samples for treatment purposes); *Hernandez v. City of Goshen*, 324 F.3d 535, 537–39 (7th Cir. 2003) (applying *DeShaney* to bar a claim that a police department caused a workplace shooting by failing to act on a reported threat); *Windle v. City of Marion*, 321 F.3d 658, 661–63 (7th Cir. 2003) (applying *DeShaney* and holding that police officers had no constitutional duty to protect the plaintiff from sexual abuse by her teacher).

This rule is not controversial. All circuits read *DeShaney* the same way. *See, e.g.*, *Martinez v. City of Clovis*, 943 F.3d 1260, 1271 (9th Cir. 2019); *Estate of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 491 (6th Cir. 2019); *Graves v. Lioi*, 930 F.3d 307, 319 (4th Cir. 2019); *M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 248–49 (5th Cir. 2018); *Matthews v. Bergdorf*, 889 F.3d 1136, 1143 (10th Cir. 2018); *L.R. v. Sch. Dist. of Philadelphia*, 836 F.3d 235, 241–42 (3d Cir. 2016); *Kruger v. Nebraska*, 820 F.3d 295, 302–03

(8th Cir. 2016); *Matican v. City of New York*, 524 F.3d 151, 155 (2d Cir. 2008); *Rivera v. Rhode Island*, 402 F.3d 27, 34–35 (1st Cir. 2005); *Butera v. District of Columbia*, 235 F.3d 637, 647–50 (D.C. Cir. 2001); *Wyke v. Polk Cnty. Sch. Bd.*, 129 F.3d 560, 566–67 (11th Cir. 1997).

LaPorta resists application of *DeShaney* by shifting the focus to the *Monell* framework for municipal liability. The judge agreed with this approach, reasoning that because the jury found that the City's policy failures "caused" Kelly to shoot LaPorta, *DeShaney* was inapplicable. Other judges in the Northern District of Illinois have issued similar rulings. *See Wagner v. Cook Cnty. Sheriff's Office*, 378 F. Supp. 3d 713, 714–15 (N.D. Ill. 2019); *Falcon v. City of Chicago*, No. 17 C 5991, 2018 WL 2716286, at *3–5 (N.D. Ill. June 6, 2018); *Cazares v. Frugoli*, No. 13 C 5626, 2017 WL 1196978, at *15 (N.D. Ill. Mar. 31, 2017); *Obrycka v. City of Chicago*, No. 07 C 2372, 2012 WL 601810, at *5–6 (N.D. Ill. Feb. 23, 2012).

These decisions reflect a basic misunderstanding of the relationship between *Monell* and *DeShaney*. *Monell* and *DeShaney* are not competing frameworks for liability. The two cases concern fundamentally distinct subjects. *Monell* interpreted § 1983 and addressed the issue of who can be sued under the statute; the Court held that a municipality is a "person" under § 1983 and may be liable—just like an individual public official—for its own violations of federal rights. 436 U.S. at 694. *Monell* did *not* address the substance of any right under the federal Constitution or laws. It has nothing to say on that subject. It's a statutory-interpretation decision.

DeShaney, on the other hand, addressed the substance of the constitutional right to due process. 489 U.S. at 194–202. The Court interpreted the Due Process Clause and defined its scope, strictly limiting the circumstances under which a privately inflicted injury is cognizable as a due-process violation. LaPorta had the burden to prove a constitutional violation *in addition to* the requirements for municipal liability under *Monell*. The judge was wrong to brush *DeShaney* aside.[4]

Applying *DeShaney*, as we must, it's clear that the City is entitled to judgment as a matter of law. It had no due-process duty to protect LaPorta from Kelly's act of private violence. LaPorta has never argued that one of the *DeShaney* exceptions applies. Rightly so; he was not in state custody at the time of his injury, and no evidence supports the exception for state-created dangers. And because LaPorta was not deprived of his right to due process, the City cannot be held liable for his injuries under § 1983—and that is so *even if* the requirements of *Monell* are established. Simply put, LaPorta suffered a common-law injury, not a constitutional one.

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[4] The judge's view that *DeShaney* is inapplicable to *Monell* claims is particularly perplexing because *DeShaney* itself involved a *Monell* claim against the county and its social-services agency. The Supreme Court had no need to address *Monell* liability. Because the county and its social-services agency had no constitutional duty to protect the child from his father, there was no underlying violation of a federal right. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 202 n.10 (1989).

As we've noted, the judge relied heavily on our decision in *Gibson*, both at summary judgment and in rejecting the City's motion for judgment as a matter of law. *Gibson* involved a Chicago police officer who was found mentally unfit for duty and placed on medical leave. 910 F.2d at 1512. The Chicago Police Department prohibited him from carrying his gun or exercising any police authority; it also collected his star, shield, and identification card—but not his gun. *Id.* Months later the officer fatally shot his neighbor. *Id.* at 1513. The victim's estate filed suit under § 1983 against the City of Chicago and several police officers alleging Fourth Amendment and due-process violations. *Id.* The complaint included a *Monell* claim against the City premised on allegations that the police department failed to implement "adequate procedures to deal with the recovery of firearms and ammunition issued to police officers who had been placed on medical leave due to mental unfitness." *Id.*

The case came to us in an unusual procedural posture. The defendants moved to dismiss, arguing that the officer was not acting under color of state law at the time of the shooting. The judge denied the motion but limited discovery to the color-of-law issue. *Id.* at 1514. When the defendants later moved for summary judgment, the estate objected to consideration of anything other than whether the officer acted under color of state law. Because the judge had limited discovery to that issue alone, the estate had no opportunity to engage in discovery on other merits issues.

Without addressing the estate's procedural objection, the judge concluded that the officer did not

act under color of state law, so the shooting victim had not been "seized" in violation of the Fourth Amendment. *Id.* at 1515. The judge also "considered and rejected the possibility that the City had a constitutional duty to protect the [victim]" as a matter of due process. *Id.* (quotation marks omitted). Accordingly, the judge entered summary judgment for the defendants on all claims. *Id.*

We agreed that the undisputed evidence showed that the officer was not acting under color of state law at the time of the shooting. 910 F.2d at 1516–19. But we faulted the judge for considering and resolving other issues on summary judgment after strictly limiting discovery to that single topic. *Id.* at 1520. So we addressed the estate's claims as if we were reviewing a dismissal on the pleadings under Rule 12(b)(6) of the Federal Rules of Civil Procedure rather than a summary judgment. *Id.* Applying the Rule 12(b)(6) standard, we concluded that the estate's factual allegations about the City's deficient policies were sufficient to permit the *Monell* claim to proceed. *Id.* at 1520–21.

In a footnote we explained that our holding was "quite compatible with *DeShaney*":

> In *DeShaney*, the Supreme Court held that county authorities who had learned that a child was at risk of being abused by his father committed no constitutional violation by their failure to act to prevent the abuse. The Court reasoned that nothing in the due process clause requires the state to protect its citizens' life, liberty, and property "against invasion by *private* actors." [*DeShaney*, 489

> U.S. at 195] (emphasis supplied). In determining that the county officials had not violated any constitutional right of the victim, the Court expressly noted that the state had "played no part in [the] creation [of the dangers faced by the victim], nor did it do anything to render him more vulnerable to them." *Id.* at [201]. It is in this important respect that the present case differs considerably from *DeShaney*. At this point in the litigation, where we are obliged to accept as true the plaintiff's factual allegations, the City is alleged to have played a part in both creating the danger (by training and arming [the officer]) and rendering the public more vulnerable to the danger (by allowing [him] to retain his weapon and ammunition after it otherwise stripped him of his authority as a policeman).

Id. at 1521 n.19. In short, we held that the estate's factual allegations were sufficient to permit the *Monell* claim to proceed beyond the pleading stage under the *DeShaney* exception for state-created dangers.

This case is different. LaPorta never invoked the *DeShaney* exception for state-created dangers. He neither pleaded nor attempted to prove up a state-created danger, and the jury was not instructed on the legal elements of that type of due-process violation.

So the judge simply misapplied *Gibson*. We did *not* hold that a *Monell* claim is exempt from *DeShaney*'s general rule that the state has no constitutional duty to prevent acts of private violence.

Nor could we. Nothing in *Gibson* suspended the *DeShaney* rule for *Monell* plaintiffs.

The judge's misreading of *Gibson* led him to overlook a fundamental defect in LaPorta's *Monell* claim, both at summary judgment and in rejecting the City's posttrial motion. Under *DeShaney* the City had no due-process duty to protect LaPorta from Kelly's act of private violence.

LaPorta suggests that his novel theory against the City finds support in *Thomas v. Cook County Sheriff's Department*, 604 F.3d 293 (7th Cir. 2010), but that case does not help him. *Thomas* involved a pretrial detainee who died in jail from pneumococcal meningitis. A jury cleared the individual defendants but found the sheriff's department liable for failing to adequately respond to Thomas's medical needs. *Id.* at 305. We concluded that "a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an *inconsistent* verdict." *Id.* The verdicts in *Thomas* were easily reconcilable. The jury found that the sheriff's department was deliberately indifferent to the detainee's medical needs—a constitutional violation—because its policies for processing medical-request forms were clearly insufficient. That finding was not at all inconsistent with its exoneration of the individual officers. *Id.* Nothing in our decision in *Thomas* lifted the plaintiff's burden to prove a predicate constitutional violation. To the contrary, because pretrial detainees have a constitutional right to medical care while in custody, the sheriff's department could be found liable for violating that

right even though the individual defendants were not. *Id.* at 301 & n.2.

LaPorta also relies on *Glisson v. Indiana Department of Corrections*, 849 F.3d 372 (7th Cir. 2017) (en banc), but that case too is distinguishable. There, a state prisoner died from acute renal failure. We concluded that a jury could find that the prison's failure to enact a coordinated-care policy for prisoners with chronic illnesses amounted to deliberate indifference to the high likelihood that prisoners would die. *Id.* at 382. It did not matter that no individual medical provider could be found liable; the problem was that "no one was responsible for coordinating [Glisson's] overall care." *Id.* at 375. Again, nothing in our decision in *Glisson* removed the plaintiff's burden to prove an underlying constitutional violation. The case involved the prisoner's Eighth Amendment right to adequate medical care. *Id.* at 378; *see Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

This case is fundamentally different. Here there was no constitutional violation because the City had no due-process duty to protect LaPorta from Kelly's private violence.

III. Conclusion

LaPorta's case is tragic. His injuries are among the gravest imaginable. His life will never be the same. But § 1983 imposes liability only when a municipality has violated a federal right. Because none of LaPorta's federal rights were violated, the verdict against the City of Chicago cannot stand. We REVERSE and REMAND for entry of judgment for the City.

Appendix B

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

No. 14 C 9665
Judge Harry D. Leinenweber

FIRST MIDWEST BANK, as Guardian of the Estate and Person of Michael D. LaPorta, a disabled person,

Plaintiff,

v.

CITY OF CHICAGO, a Municipal Corporation,

Defendant.

August 29, 2018
ECF No. 561

MEMORANDUM OPINION AND ORDER

After seven years of litigation and a month-long trial, a jury found in Plaintiff Michael LaPorta's favor on his claim that the City of Chicago had *de facto* policies that sustained serious flaws in its police force, namely: failing to investigate officers accused of misconduct; failing to discipline officers who deserved it; and failing to maintain an adequate Early Warning System to identify and correct problematic behavior. The jury further found that the last two of those policies constituted the moving force behind a January 2010 incident in which CPD Officer Patrick Kelly shot LaPorta in the head, causing severe and lasting

injuries. For these injuries, the jury awarded LaPorta $44.7 million in damages. Before the Court are the parties' post-trial motions. Going forward, this opinion presumes familiarity with this Court's other rulings in this case, especially *LaPorta v. City of Chicago*, 277 F. Supp. 3d 969 (N.D. Ill. 2017) (summary judgment ruling) and *LaPorta v. City of Chicago*, 102 F. Supp. 3d 1014 (N.D. Ill. 2015) (motion to dismiss ruling).

I. CHICAGO'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Federal Rule of Civil Procedure 50(a) allows a district court to enter judgment against a party who has been fully heard on an issue during a jury trial if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a)(1). Under the stringent judgement-as-a-matter-of-law standard, the court construes the facts strictly in favor of the party that prevailed at trial. *Schandelmeier-Bartels v. Chi. Park Dist.*, 634 F.3d 372, 376 (7th Cir. 2011) (citations omitted). "Although the court examines the evidence to determine whether the jury's verdict was based on that evidence, the court does not make credibility determinations or weigh the evidence." *Id.* (citations omitted). However, the court disregards all evidence favorable to the moving party that the jury is not required to believe. *Harvey v. Office of Banks & Real Estate*, 377 F.3d 698, 707 (7th Cir. 2004) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000)). At bottom, the court determines whether a rational jury could have found for the plaintiffs. *Id.* (citation omitted).

A. Failure to Prove Constitutional Violation

The City recycles its first JMOL argument from the summary judgment stage, contending once more that LaPorta's theory of liability cannot get off the ground given that under *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 201-02 (1989), local governments cannot be liable for failing to prevent due process violations effected by private actors. Simply enough, the City contends that Kelly acted only as a private citizen during the evening in question, and as such his coincidental profession plays no part in the liability analysis. But as the Court already described, this misses the mark by mischaracterizing LaPorta's claim. *See LaPorta v. City of Chicago*, 277 F. Supp. 3d 969, 986-87 (N.D. Ill. 2017) (denying summary judgment to City on same argument). LaPorta's *Monell* claim asserts that it is the City itself—and not Kelly—that supplies the "color of law" requirement under § 1983. *See Gibson v. City of Chicago*, 910 F.2d 1510, 1519 (7th Cir. 1990) (describing analogous *Monell* claim). Under LaPorta's theory, "the City's policies caused the harm." *Cazares v. Frugoli*, No. 13 C 5626, 2017 WL 1196978, at *14 (N.D. Ill. Mar. 31, 2017). Such a claim is not appropriately considered under *DeShaney*, and as such the City's objection predicated upon the same cannot defeat LaPorta's claim nor entitle the City to judgment as a matter of law. *See Obrycka v. City of Chicago*, No. 07 C 2372, 2012 WL 601810, at *5-6 (N.D. Ill. Feb 23, 2012) (St. Eve., J.).

B. Evidence of Kelly's Reckless Indifference

The City argues in the alternative that even if *DeShaney* does not apply, LaPorta failed to produce

sufficient evidence that Kelly acted intentionally or with reckless indifference when he shot LaPorta. (Chicago also argues that the "reckless indifference" standard has no place in the due process analysis; the Court dispatches this argument below at Part II.A.2.) First, LaPorta presented expert testimony undermining Kelly's version of events (Balash Tr. 1879:12-1880:11 (explaining that contrary to Kelly's statement that LaPorta picked up and cocked the gun, said model cannot be manually cocked in the manner Kelly described), 1887:6-21 (expressing disbelief at Kelly's story that his firearm had twice malfunctioned during Kelly's recruit school training)), and concluding that the shooting was no suicide (*id.* 1892:1-1912:13 (describing the evidence and concluding that Kelly shot LaPorta)). The jury also heard evidence from Defendant's witnesses that undermined the case for this being an accidental shooting. (*See* Brudenell Tr. 2689:18-21 (agreeing that the shooting did not occur as a result of someone dropping the gun); Wyant Tr. 2641:19-2642:3 (testifying that he had never heard of a Sig Sauer P226—the model of Kelly's firearm—misfiring).) Moreover, Kelly took the stand. On cross-examination, LaPorta's counsel asked whether Kelly removed the gun from its holster, held it in his hand, and then pulled the trigger and shot LaPorta in the head. Kelly responded by invoking the Fifth. As this is a civil case, the jury was permitted to take an adverse inference from Kelly's invocation. *See Hillman v. City of Chicago*, 834 F.3d 787, 793 (7th Cir. 2016) (citations omitted); *see also infra* at Part II.B.1.

Beyond all this, the City objects that LaPorta never painted a clear enough picture of Kelly's alleged

motive in carrying out this shooting. But LaPorta did not have to prove motive to prevail in this case, and the circumstantial evidence adduced at trial certainly forms a sufficient basis for a reasonable jury to find that Kelly deliberately or with reckless indifference shot LaPorta in the head. *See Harvey*, 377 F.3d at 707.

C. Failure to Maintain an EWS

LaPorta presented substantial evidence of the City's failure to maintain an Early Warning System. This evidence included the findings from an April 2016 report put out by the City-created Police Accountability Task Force ("PATF"), which noted that:

> No dedicated system exists to identify and address patterns or practices. While they are charged with investigating police misconduct, IPRA [the Independent Police Review Authority] and BIA [the Bureau of Internal Affairs] historically have not engaged in efforts to identify officers whose records suggest repeated instances of misconduct or bias. They also historically have not engaged in efforts to identify broader patterns or practices either of misconduct. The persistent failure of IPRA and BIA to examine pattern and practice evidence substantially contributes to the police accountability vacuum in Chicago.

(Tr. 2356:18-2357:3.) Alderman Moore, a member of the Chicago City Council, concurred with these findings. (Moore Tr. 887:23-888:15.) In the same vein, a January 2017 report issued by the DOJ and the U.S. Attorney's Office for the Northern District of Illinois observed that:

> The lack of a functional early intervention system coupled with inadequate supervision has placed officers and members of the public at risk. These longstanding systemic deficiencies in CPD's early intervention systems have prevented CPD from taking two steps that are crucial to ensuring officer safety and wellness as well as ensuring policing that is effective and lawful. First, CPD does not adequately and accurately identify officers who are in need for this type of action and, second, CPD does not consistently or sufficiently address officer behavior where CPD identifies negative patterns. Because of these failures, CPD officers are able to engage in problematic behavior with impunity which can and do escalate into serious misconduct. This has dramatic consequences for the public.

(Tr. 2249:1-15.)

Chicago takes issue with the PATF and DOJ reports, arguing that neither zeroes in on the proper time frame—that being the few years preceding the 2010 shooting, when perhaps some intervention could have changed Kelly's behavior and thus averted LaPorta's injury all together. This rejoinder is not as effective as Chicago hopes. First, as described in greater detail below, the PATF report reviewed CPD records dating back to 2007, and the DOJ report referred in sweeping terms to "longstanding" and "systemic" deficiencies in CPD policies. (*See infra* at Part II.B.3.) And second, LaPorta developed evidence beyond these reports that back up his contention that

Chicago lacked an effective EWS during the pertinent years. Tisa Morris, the former chief administrator for the Office of Professional Standards, testified that during her tenure from 2004 to 2007, she was not aware of any system in place to identify and discipline repeat offenders. (*Id.* 1163:18-20, 1176:25-1177:1, 1229:24-1230:9.) Lou Reiter, LaPorta's police-practices expert, backed up the ineffective-EWS conclusion as well, stating that during his 25 years working with CPD, he observed "historic and systemic deficiencies . . . in the areas of administrative investigations, or CR investigations, and not implementing an early warning system and of condoning or encouraging the code of silence." (Reiter Tr. 306:8-17.)

Chicago also tries to rebut LaPorta's evidence by explaining that the City maintained two systems during the pertinent time frame: The Behavioral Intervention System and the Personal Concerns Program, which together comprised an EWS. But Reiter cast doubt on the efficacy of these systems, explaining that they were used very rarely. (*See, e.g.*, Reiter Tr. 328:22-329:10 (testifying that because the odds of being put into BIS were "negligible," BIS provided officers no deterrent for bad conduct).) Ultimately, this, as well as Chicago's other objections to the strength of LaPorta's case, go to the weight of the evidence presented. But weighing the evidence is a task for the jury, and one that it reasonably carried out. The Court will not second-guess their determination. That is not the Court's role. *See Schandelmeier-Bartels*, 634 F.3d at 376. Chicago's renewed JMOL Motion is denied in relevant part.

D. Failure to Discipline

In the second version of LaPorta's *Monell* claim, he charges that Chicago had a widespread practice of failing to discipline adequately those officers who committed misconduct. The jury was persuaded by this theory also. As above, the City claims the jury spoke in error, that LaPorta failed to adduce sufficient evidence to permit a reasonable jury to find in his favor on this theory. Once more, the Court disagrees.

The PATF report presented at trial painted a bleak picture of CPD's disciplinary practices. In many cases, the report found that officers are simply not disciplined for sustained complaints. (Tr. 2349:14-21.) That owes in part to an "opaque, drawn-out, and unscrutinized disciplinary process" that frequently enables officers "to avoid meaningful consequences." (*Id.* 2349:18-21.) The report also called that process "haphazard," "unpredictable," and "arbitrary." (*Id.* 2245:6-7, 2354:18-19.) Contrary to Chicago's objection described above, the report focused on the relevant time frame, examining data from 2007 through 2010. (*Id.* 2349:6-2360:17; Emanuel Statement Tr. 249:3-251:24.) Beyond this, LaPorta held out evidence of Kelly's disciplinary record as an exemplar. Kelly accumulated eighteen CRs in the five years prior to the shooting. But according to Reiter, Kelly was not properly disciplined for any of these complaints. (Reiter Tr. 318:2-15.)

From this evidence, a reasonable jury could conclude that the City had a practice of failing to discipline officers adequately. That is all LaPorta must now show to prevail against the City's renewed JMOL Motion. The Motion is denied in relevant part.

E. Failure to Investigate

Finally, LaPorta argued, and the jury agreed, that the City had a widespread practice of not only failing to discipline malfeasant officers, but also of failing to investigate misconduct in the first place. LaPorta's statistics expert testified that 46% of the complaints filed from 2004 to 2011 concluded with a finding of "no affidavit" and were not investigated. (Rothman Tr. 2199:7-21.) Chicago rebuts that this number is unfairly inflated: State law blocks investigation into such unsupported complaints, Chicago explains, so the City's nonfeasance results from legal proscription and not from some anti-investigatory policy. But 50 ILCS 725/6, the state law Chicago relies upon, clearly applies only in the absence of an on-point collective bargaining agreement between the City and the Fraternal Order of the Police. There is such an agreement here. (Reiter Tr. 387:12-19 (describing the collective bargaining agreement).) That agreement loosens the state law stranglehold on police-conduct investigations by permitting the chief administrators of IPRA and BIA to override the affidavit requirement where such override is deemed "necessary and appropriate." (*Id.*) And according to Former CPD Commander Eugene Roy, CPD supervisors can recommend that investigations proceed even when the complaint is not supported by sufficient evidence. (Roy Tr. 955:7-10.) These workarounds permit Chicago to investigate no-affidavit complaints, but the City rarely does so. (*See* Reiter Tr. 387:9-19 (reciting from PATF report that the IPRA/BIA override is rarely used and not to the extent it could and should be).) Indeed, the DOJ report explains that such overrides are not encouraged among IPRA investigators, and

those investigators are not trained on how to obtain such overrides anyway. (Tr. 2246:8-16.)

To any extent, the City's failures to investigate extend beyond its high rate of nonfeasance vis-à-vis those complaints unsupported by affidavit. As the DOJ report concluded, "The City does not investigate the majority of cases it is required by law to investigate. . . . Those cases that are investigated suffer from serious investigative flaws that obstruct objective fact finding." (Tr. 2242:25-2243:5.) The report further stated that the City's investigative techniques are often biased, and the concluding reports are often drafted in a manner favorable to the officer by omitting conflicting or contrary evidence. (Tr. 2358:12-21.) The PATF report propounded similar findings. (*See, e.g.*, Tr. 2357:12-14 ("Since its inception, IPRA has had the power to examine patterns of complaints when investigating police misconduct but has not exercised it.").)

The City fails to muster any other argument on this score that goes to the sufficiency of the evidence rather than to its weight. As such, a reasonable jury could have concluded, as did the jury here, that Chicago had a widespread policy or practice of failing to investigate officer misconduct. The City's renewed JMOL Motion is thus denied in relevant part.

F. Deliberate Indifference

To place the next building block in LaPorta's case, he had to demonstrate that the City was deliberately indifferent to the harms that might befall those persons who come into contact with under-trained and under-disciplined officers. *See City of Canton v. Harris*, 489 U.S. 378, 388 (1989) ("[T]he inadequacy of

police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."); *Sigle v. City of Chicago*, No. 10 C 04618, 2013 WL 1787579, at *2 (N.D. Ill. Apr. 25, 2013) (applying same "deliberate indifference" standard to a failure-to-discipline theory). The jury found the City deliberately indifferent in two respects: first, as to the failure to maintain an adequate EWS, and second, as to the failure to discipline adequately. As elsewhere in its motion, the City contends that no jury could have reasonably reached these conclusions.

The PATF report opined that CPD generally lacks a culture of accountability, "largely because no one in top leadership has taken ownership of the issue." (Tr 2360:1-4.) It continued: "[a]lthough so-called problem officers are either well-known to their supervisors and CPD's leadership or easily identified, few steps are being taken to proactively manage and redirect those officers' conduct." (*Id.* 2360:1-17.) That was so even though "[t]he effective tools for providing greater oversight and supervision to officers are well-known and widely used in other jurisdictions." (*Id.* 2360:1-17.) Alderman Moore, who served as the City Council's 30(b)(6) designee, testified that police misconduct "has been ongoing for a long time, probably as long as we've had a police department. . . . 180 years." (Moore Tr. 887:15-22.) The Alderman also agreed that IPRA and BIA have not historically engaged in efforts to identify broader patterns or practices either of misconduct or racially biased policing within CPD. (*Id.* 888:3-15.)

Further, the jury heard testimony that the City Council had been warned about the sore need to ameliorate CPD's deficient policies, including by implementing an effective EWS. In June 2007, the City Council held public hearings concerning the deficiencies of the Office of Professional Standards ("OPS"), the precursor to IPRA. (Moore Tr. 892:15-24.) According to Alderman Moore, the complaints voiced at those hearings contributed to the creation of IPRA. (*Id.* 893:3-21.) One such complainant expressed his "profound fear" that IPRA would "simply recreate and perpetuate another inadequate and ineffective system like [OPS] that we have suffered with since 1974." (*Id.* 894:22-895:10.) Moore was present for that hearing; at trial, he told the jury: "We knew there were problems." (*Id.*)

Taken together, this testimony provides a legally sufficient evidentiary basis to allow a reasonable jury to find that the City knew it lacked an effective EWS and failed to discipline malfeasant officers adequately, and yet took no action to right these deficiencies. That carries LaPorta past the renewed JMOL Motion as far as the deliberate indifference requirement is concerned. FED. R. CIV. P. 50(a).

G. Causation

Though the jury agreed LaPorta had proven three systemic failures—the failures to investigate, to discipline, and to maintain an EWS—the jury found that only the latter two of those failures caused Kelly to shoot LaPorta. (Verdict Form, Dkt. 446.) Chicago challenges those two causation findings.

As the Court earlier observed, "[t]he critical question is whether the City's *de facto* policies . . .

were the 'moving force' behind Kelly's actions such that execution of the policies 'inflicts the injuries that the government as an entity is responsible [for] under § 1983.'" *LaPorta v. City of Chicago*, 277 F. Supp. 3d 969, 991 (N.D. Ill. 2017) (quoting *Estate of Novack ex rel. Turbin v. Cty. of Wood*, 226 F.3d 525, 531 (7th Cir. 2000)). There must be a "direct causal link" between the alleged policy or practice and the constitutional violation. *Id.* (quoting *Obrycka*, 2012 WL 601810, at *9). Further, "a finding of culpability simply cannot depend on the mere probability that any officer adequately screened will inflict any constitutional injury. Rather, it must depend on a finding that *this* officer was highly likely to inflict the particular injury suffered by the plaintiff." *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 412 (1997) (emphasis in original). The jury concluded LaPorta met these requirements at trial, and the Court will not disturb that finding.

To begin, LaPorta offered evidence demonstrating that the City's policies may generally encourage officers to feel immune from consequences. The PATF report noted that "[w]hen case after high-profile case results in punishment that does not match the gravity of the misconduct, it sends a message that the police can act with impunity. . . . It also leaves those who break the rules emboldened to continue doing so." (Tr. 2355:6-14.) The DOJ report shared in this conclusion, opining that CPD's failure to identify officers in need of behavioral intervention enabled those officers "to engage in problematic behavior with impunity which can and do[es] escalate into serious misconduct[, which] has dramatic consequences for the public . . . ." (*Id.* 2249:8-15.) Alderman Moore

agreed with that logic. (Moore Tr. 877:19-23 (remarking that if an officer engaged in misconduct and was not held accountable, he "would feel a little bit more of a freedom to engage in further misconduct"); *accord* Reiter Tr. 348:18-349:1 (concluding same).)

Beyond this, LaPorta presented testimony that Kelly, specifically, was one such officer emboldened by the City's failure to discipline or correct his behavior via an effective EWS, and that this conditioning led Kelly to shoot LaPorta. The jury heard that Kelly was subject to eighteen complaints and yet was never disciplined or put into an EWS program. True, Kelly was twice referred to the BIS program, but Reiter explained that Kelly never actually attended the counseling those programs recommended for him. (Reiter Tr. 326:3-19.) Two of Kelly's eighteen complaints—one in September 2005 and the other in June 2006—concerned an alcohol-intoxicated Kelly battering personal associates during off-duty time. (O'Neill Tr. 3214:19-3224:25, 3247:2-17.) After the latter incident, an examining psychologist noted that Kelly "may have problems related to alcohol and control" and would benefit from intervention designed to teach him "other ways of resolving conflicts with significant others in his life." (*Id.* 3255:12-3257:20.) According to the evidence at trial, the City never provided that intervention in any form, be it meaningful entry in an EWS program, discipline, or otherwise. Reiter explained that such repeated failures to investigate and discipline reinforces in officers a sense of impunity that extends to their off-duty behavior (Reiter Tr. 306:7-25), and that CPD's failures with respect to Kelly specifically contributed

to his personal sense of impunity. (*Id.* 325:21-326:2; *see also id.* 346:5-347:3 (describing that one consequence of lacking an adequate EWS is that officers such as Kelly would be encouraged to act with impunity).)

In sum, this testimony suggested that Chicago's administrative failings were the moving force behind Kelly's actions. Keeping in mind the Court's obligation on a JMOL motion to construe the facts strictly in favor of the party that prevailed at trial, the Court refuses to overrule the jury's causation finding. A reasonable jury could have reached this conclusion; that is enough. Chicago's JMOL Motion is denied.

II. CHICAGO'S MOTION FOR NEW TRIAL

Chicago contends it is entitled to a new trial due to a bevy of errors this Court allegedly committed in instructing the jury and making evidentiary rulings. A motion for a new trial should only be granted where the verdict is against the manifest weight of the evidence, *Sauzek v. Exxon Coal USA, Inc.*, 202 F.3d 913, 921 (7th Cir. 2000), or where the trial court's evidentiary rulings or jury instructions resulted in prejudicial error, *see Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 414 (7th Cir. 2015); *EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 440 (7th Cir. 2012). The district court has great discretion in determining whether to grant a new trial. *Valbert v. Pass*, 866 F.2d 237, 239 (7th Cir. 1989) (citation omitted). In weighing such motions, the court views all evidence in the light most favorable to the prevailing party, *Wipf v. Kowalski*, 519 F.3d 380, 384 (7th Cir. 2008), and keeps in mind that "civil litigants are

entitled to a fair trial, not a perfect one," *Lemons v. Skidmore*, 985 F.2d 354, 357 (7th Cir. 1993).

A. Errors in the Jury Instructions and the Verdict Form

District courts enjoy great latitude in choosing the wording of jury instructions. *United States v. Bruce*, 109 F.3d 323, 328 (7th Cir. 1997) (citation omitted). New trials are not granted for alleged errors in jury instructions unless, considering those instructions in full, "it appears that the jury was misled and its understanding of the issues was seriously affected to the prejudice of the complaining party." *McGershick v. Choucair*, 9 F.3d 1229, 1232 (7th Cir. 1993) (citation and internal quotation marks omitted). The verdict form is considered in light of the instructions given. *Happel v. Walmart Stores, Inc.*, 602 F.3d 820, 827 (7th Cir. 2010).

Federal Rule of Civil Procedure 51 requires litigants to object to jury instructions before the instructions are given. FED. R. CIV. P. 51(b)-(c); *see LeBlanc v. Great W. Express*, 58 F. App'x 221, 223 (7th Cir. 2003) (applying Rule 51 to verdict-form objections). The objection must be "stat[ed] distinctly." FED. R. CIV. P. 51(c)(1); *see Schobert v. Ill. Dep't of Transp.*, 304 F.3d 725, 729 (7th Cir. 2002) (explaining that the objection "must be specific enough that the nature of the error is brought into focus"). Moreover, "it is not enough simply to submit an alternative instruction." *Schobert*, 304 F.3d at 729 (citation omitted). When a litigant misses its chance to object timely, the tardy objection is reviewed on a plain error standard. *See Lewis v. City of Chi. Police Dep't*, 590 F.3d 427, 434 (7th Cir. 2009) (citing FED. R. CIV.

P. 51(d)(2)). That requires the Court to determine from an examination of the entire record whether the defective instruction had a probable impact on the jury's finding. *See id.* (citations omitted); *see also United States v. Medley*, 913 F.2d 1248, 1260 (7th Cir. 1990) (citation omitted). "Plain error review of jury instructions is 'particularly light-handed.'" *Lewis*, 590 F.3d at 433 (quoting *United States v. DiSantis*, 565 F.3d 354, 361 (7th Cir. 2009) (citation omitted)).

1. Verdict Form Deficiencies

Chicago alleges it suffered prejudice because the Court confused the jury by instructing them as to deliberate indifference and yet did not provide them with a separate interrogatory on the verdict form asking after their deliberate indifference finding. In rebuttal, LaPorta contends that Chicago waived this objection and in the alternative that the failure to provide the additional interrogatory does not rise to the level of prejudicial error requiring a new trial. *See Mgmt. Hospitality of Racine*, 666 F.3d at 440.

Whether Chicago waived this objection is a close call. LaPorta contends that the City not only failed to object to the verdict form, but actually submitted this version of the verdict form to the Court, meaning that Chicago proposed the same verdict form to which it now objects. (*See* Tr. 3371:14-17 (statement from the Court that: "I believe that [the verdict form] submitted by the defendant is clearer than the plaintiff's, so the Court will give the one submitted by the defendant.").) LaPorta's characterization is not wholly accurate. True, Chicago submitted this verdict form; but the City did so in conformance with the Court's earlier and specific orders given to both parties in chambers. (*See*

12/12/2017 Status Hearing Tr. 6, Dkt. 521-2 (acknowledging that the Court essentially crafted the final verdict form).) As such, the Court will not take Defendant's submission of the ultimately-selected form as an unmitigated endorsement of that form.

That being said, Chicago did not do its utmost to make its objection clear. After the Court selected the defense-submitted form and asked whether either party wanted to add anything on the record, counsel for the City remarked vaguely that "the verdict form itself, we drafted that pursuant to the Court's order yesterday." (Tr. 3372:5-6.) The City somewhat clarified this objection later, explaining that "we did try to come up with a different . . . proposed verdict form in light of the Court's ruling that would have included specifically . . . a question 4 . . . a deliberate indifference finding specifically by the jury." (Tr. 3577:23-3578:5.) While this objection could have been more precisely stated, the Court finds this articulation particular enough to bring the nature of the alleged error into focus and thus avoid waiver under Rule 51. *Schobert*, 304 F.3d at 729.

Though Chicago did not waive the objection, the City cannot succeed on the objection's merits. To determine whether a verdict form was confusing, courts consider it in light of the instructions given. *Happel*, 602 F.3d at 827 (citations omitted). The nub of this inquiry is whether "the jury was misled in any way and whether it had [an] understanding of the issues and its duty to determine those issues." *Id.* (citation and internal quotation marks omitted). Looking through this lens, the Court cannot agree that its instructions and verdict form confused the jury.

The Court's deliberate-indifference instruction closely tracked the Seventh Circuit's pattern instruction and clearly stated that the City could not be held liable unless LaPorta proved by a preponderance of the evidence that:

> [t]he Chicago City Council knew that because one or more of the [alleged policies] existed and was allowed to continue, it was highly predictable that its off-duty officers would violate the bodily integrity of persons they came into contact with because there was a pattern of similar constitutional violations or it was highly predictable even without a pattern of similar constitutional violations.

(Jury Instructions 18, Dkt. 444; *accord* Seventh Circuit Civil Pattern Jury Instruction 7.25 (propounding substantially similar model instruction).) This language properly instructed the jury concerning the issues before it. The absence of the specific words "deliberate inference," which are likewise notably absent from the Seventh Circuit's pattern instruction, does not confound the charge. And the absence of an additional interrogatory on the verdict form asking after this instruction does not create an error serious enough to mislead the jurors and work prejudice upon the City. *See McGershick*, 9 F.3d at 1232. When viewing the instructions and the form together, the jury was properly advised of the task before them. That suffices. The Motion for New Trial is denied in relevant part.

2. Jury Instructions Concerning Standard for Evaluating Kelly's Conduct

Chicago next contends a new trial is warranted by the Court's alleged error in instructing the jury that LaPorta had to prove Kelly intentionally *or with reckless indifference* shot LaPorta. As the emphasis suggests, it is the second phrase with which Chicago takes issue. The City submits that "reckless indifference" is simply inapt here, and the Court should have instead instructed the jury on a "shocks the conscience" standard of culpability under *City of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998). Before advancing to the merits of this dispute, the Court notes that as above, LaPorta charges that Chicago waived this objection. The Court and both parties discussed this and the other proposed instructions at length in chambers and, as Chicago now recounts, it there objected to the reckless indifference instruction. However, the City failed to reiterate that objection with clarity on the record the following morning (*see* Tr. 3356:1-3372:22) as required to avoid waiver under Rule 51. *Schobert*, 304 F.3d at 729 (proposing an alternative instruction is not enough to overcome waiver when objection not clearly stated). Still, there is an exception to this formal-objection requirement: The objection may survive waiver if (1) the party's position was made clear to the court and (2) any further objection would have been unavailing and futile. *See Carter v. Chi. Police Officers*, 165 F.3d 1071, 1078 (7th Cir. 1998) (citations omitted). Chicago made its objection clear off-record, it just simply failed to rearticulate that objection the next day. The Court is thus loath to charge Chicago with waiver here, where defense counsel might have

presumed—albeit unwisely, given Rule 51's requirements—that reiterating the objections would be futile given the Court's earlier, off-the-record rulings.

Ultimately, whether the Court is lenient on this point does not affect the success of Chicago's objection. The objection fails, whether on the plain error standard applied to forfeited objections, *Lewis*, 590 F.3d at 433 (citing FED. R. CIV. P. 51(d)(2)), or on the prejudice standard applied to typical, and not waived, allegations of error, *McGershick*, 9 F.3d at 1232.

There is nothing inherent to a failure-to-discipline *Monell* claim demanding that the plaintiff prove the specific officer who effectuated the harm acted in a way that shocked the conscience, or was even reckless. *See generally Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Such claims assert that the municipality itself is the state actor; it is the municipality's action in maintaining a deficient policy that supplies § 1983's "color of law requirement," *Gibson v. City of Chicago*, 910 F.2d 1510, 1519 (7th Cir. 1990), and it is the municipality's deliberate indifference that is the lynchpin for liability, *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1029-30 (7th Cir. 2006) (citations omitted).

This particular suit, however, calls for an examination of Kelly's mental state because of LaPorta's particular theory of the case: that Chicago's administrative failings caused Kelly to believe he could act with impunity, including on the occasion of the shooting. Kelly cannot both have acted feeling free of consequences *and* acted negligently; something more than negligence was required. Had LaPorta

instead theorized that Kelly accidentally shot him as a result of the City's deliberate indifference with respect to its failures to train officers to handle their firearms safely, LaPorta would only need to prove Kelly shot LaPorta negligently. Chicago no doubt objects to this hypothetical on the basis that negligence cannot violate the Due Process Clause. *See Ruehman v. Sheahan*, 34 F.3d 525, 528 (7th Cir. 1994) ("Negligence . . . does not violate the due process clause."). But in this case, the constitutionally-violative mental state is supplied by the deliberately-indifferent City, not by the officer who implements the harms the City ignores. Kelly's mental state is only spurred onto the stage by LaPorta's particular theory of why (or how) Kelly acted the way he did. With this in mind, the Court instructed the jury on a reckless indifference standard. *Compare* Jury Instructions 18, Dkt. 444, *with Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988) ("An act is reckless in the pertinent sense when it reflects complete indifference to risk[.]"). In the context of this case, that instruction was not improper.

In the final twist to this argument, Chicago contends that even if it was not error to instruct the jury that the City could not be held liable unless Kelly acted with at least reckless indifference, the Court still erred by failing to define "reckless indifference." The City complains that without that further clarification, the jury might have understood the City could be held liable so long as Kelly acted "recklessly"—*i.e.*, like a "loose cannon" (Roy Tr. 957:1-959:10)—irrespective of Kelly's *intent* in so acting. The Court disagrees.

Before addressing the merits of this argument, the Court notes that Chicago did not raise this objection at trial. Though, as laid out above, the Court is disinclined to label as forfeit those arguments extensively developed in chambers, the Court will not extend the same leniency to jury-instruction objections that Chicago never introduced until present. If Chicago found the deliberate indifference instruction to be opaque, the onus was on the City to say so before the Court delivered it to the jury. FED. R. CIV. P. 51(b)-(c). The Court accordingly reviews Chicago's argument on a plain error standard. United *States v. Medley*, 913 F.2d 1248, 1260 (7th Cir. 1990) (citation omitted).

When reviewing a challenge to a jury instruction, courts "must view the instruction as a whole and consider the challenged instruction 'both in the context of the other instructions given and in light of the allegations of the complaint, opening and closing arguments and the evidence of record.'" *U.S. ex rel. Tyson v. Amerigroup Ill., Inc.*, 488 F. Supp. 2d 719, 727 (N.D. Ill. 2007) (quoting *Sims v. Mulcahy*, 902 F.2d 524, 533 (7th Cir. 1990)). From the Complaint onward, LaPorta's case always turned upon the idea that Kelly felt empowered to act with impunity—that he could engage in wrongdoing without facing the consequences. (*See, e.g.*, 7th Am. Compl. ¶ 77 ("[Chicago's administrative failings] caused Patrick Kelly, and other officers similarly situated, to act with impunity and to feel and act as though their acts of misconduct would go unpunished and uninvestigated.").) Plaintiff's counsel framed the case in that way from beginning, (Pl.'s Opening Tr. 152:3-6 ("Kelly [] repeatedly acted with impunity because he

learned that misconduct, regardless of how severe or even criminal, it goes unpunished"), 197:14-16 ("[T]he City is liable because Patrick Kelly knew that he could mess around and get away with it")), to end, (Pl. Closing Tr. 3439:16-22 ("[Kelly] was not disciplined for any of his acts of violence or domestic battery, even after the City had notice time after time of his propensity for this violent, reckless, bad behavior. . . . Officer Kelly was acting with impunity in a way in which he knew he was immune from consequences without fear of repercussion.")). The Court believes that within the context of this suit, the jury understood that Kelly's awareness of his own misconduct was the fulcrum upon which the merits turned. Chicago's suggestion that the "reckless indifference" instruction would somehow dupe the jury into ignoring this otherwise omnipresent theory of liability is not credible enough for the Court to agree the City suffered a "miscarriage of justice." *Medley*, 913 F.2d at 1260 (reciting plain error standard). Providing that instruction without further clarification did not constitute plain error in this case.

3. Spoliation and Probable Cause Instructions

Chicago also asserts it suffered prejudice because the Court erroneously instructed the jury as to spoliation of three pieces of evidence: Kelly's phone and text messages; Kelly's service weapon, and a CPD-created video of the shooting scene. After describing those pieces of evidence, the Court instructed the jury:

> [T]he City of Chicago contends that it had no lawful basis to obtain Kelly's texts and no texts occurred after the 911 call; Kelly's

> service weapon was returned after all possible ISP testing was completed; and a video never existed.
>
> You may assume that such evidence would have been unfavorable to the City of Chicago if you find by a preponderance of the evidence that: One, the City of Chicago intentionally failed to preserve the evidence or permitted the evidence to be destroyed; and two, the City of Chicago intentionally failed to preserve the evidence or permitted the evidence to be destroyed in bad faith.

(Jury Instructions 16, Dkt. 444.) Chicago does not object to the language of this instruction—and wisely so, given how closely the instruction tracks the Seventh Circuit's pattern instruction. (*Compare id.*, *with* Seventh Cir. Pattern Instruction 1.20.) The City simply contends the instruction should not have been given at all. The Court disagrees.

Before giving a spoliation instruction, courts require "a showing of an intentional act by the party in possession of the allegedly lost or destroyed evidence[.]" *Spesco, Inc. v. General Elec. Co.*, 719 F.2d 233, 239 (7th Cir. 1983). Absent such a showing, the instruction can be unduly argumentative. *Id.* LaPorta made the requisite showing here. One senior officer at the scene of the shooting testified that he "wanted [the scene] worked up as if it were a homicide." (McNicholas Tr. 719:10-12.) Another said at the scene that Kelly should be considered a suspect in the shooting. (Doherty Tr. 2585:6-15.) Despite this clear acknowledgment of the need to investigate Kelly's involvement, Chicago and its officers failed to take the

routine step of preserving that suspect's phone and messages—a failure made more suspect by the City's corresponding preservation of *LaPorta's* phone as part of CPD's investigation into the crime of attempt suicide. (Weber Tr. 1036:12-1037:20.)

As for the missing video: Chicago simply contends it never existed. (*See* Kaput Tr. 7902-791:10; Barsch Tr. 2966:12-17 (both representing that no video was created to their knowledge).) But LaPorta produced CPD documents obtained in discovery that state the contrary. (CPD Case Supplementary Report, Trial Ex. PTX 126 at 7, Dkt. 508-11 (reciting among "evidence": "O/A and C/U video of scene").) The spoliation instruction identified the respective parties' positions and then properly permitted the jury to weigh the credibility of the conflicting evidence and determine whether an adverse inference was appropriate. This is exactly the mechanism anticipated by the Pattern Instructions, and it was not error to apply it here.

Finally, the gun. According to LaPorta's trial exhibits, CPD seized Kelly's firearm on January 13, 2010. But then, on June 7, 2013, more than two years after LaPorta filed this case in state court, CPD simply gave the gun back. (CPD Property Inventory Record, Trial Ex. PTX 98, Dkt. 508-3.) Chicago contends it had no duty to hold on to Kelly's firearm. This strains credulity. The gun was the operative piece of evidence in what had, by the time of CPD's surrender of the weapon, already been alleged to be an intentional shooting. These facts certainly suffice for the requisite showing to warrant the spoliation instruction.

In sum, LaPorta passed the bar for an instruction on all three pieces of evidence. And even if that were

not the case, Chicago has failed to demonstrate that this error—if one existed—so confused the jury's understanding of the issues as to work serious prejudice upon the City. *McGershick*, 9 F.3d at 1232.

Chicago adds to its spoliation objection a perfunctory claim that it suffered prejudice from the Court's refusal to instruct the jury on the meaning of probable cause. The City contends that without this instruction, the spoliation instruction could have improperly led the jury to conclude that the City had a duty to retain the three pieces of evidence discussed above. First, the Court is not persuaded by the jury-confusion argument: As already set forth, the spoliation instruction adequately explained what task the jury faced. Second, no part of the jury's verdict hinged upon probable cause determinations, so their understanding of this legal issue is oblique to their verdict in this case. The probable cause instruction was properly refused.

4. Patricia LaPorta Damages Instruction

The City next contends the Court erred in refusing to instruct the jury that LaPorta's mother, Patricia, has no claim for damages in this case and that testimony concerning her pain and suffering should not be considered when reaching the damages verdict. LaPorta responds that the Court instructed the jury to determine damages based on harms sustained by LaPorta alone, so a further "Patricia instruction" was not necessary. The Court agrees. Not only was the jury charged with calculating only *LaPorta's* damages, the verdict form itemized the potentially compensable areas of injury, and none of

those mentioned Patricia. This argument cannot justify the Court ordering a new trial.

In conclusion, the Court finds that none of the above instructions, when taken either in isolation or all together, constitute prejudicial error warranting a new trial.

B. Evidentiary Rulings

Chicago takes issue with several of the Court's evidentiary rulings throughout the trial and contends that even if not independently, these errors cumulatively amount to prejudice against the City and thus justify a new trial. A new trial may be ordered when an evidentiary error had a "substantial influence over the jury, and the result reached was inconsistent with substantial justice." *EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 440 (7th Cir. 2012) (citation and internal quotation marks omitted). When a party seeking a new trial makes a cumulative-effect argument, that movant must show: "(1) that multiple errors occurred at trial; and (2) those errors, in the context of the entire trial, were so severe as to have rendered [the] trial fundamentally unfair." *Christmas v. City of Chicago*, 682 F.3d 632, 643 (7th Cir. 2012) (citation and internal quotation marks omitted). The cumulative-effect analysis requires an examination of the entire record, paying particular attention to the nature and number of alleged errors committed; their interrelationship, if any, and their combined effect; how the court dealt with the errors during trial, including the efficacy of any remedial measures; and the strength of the winning party's case. *Id.*

1. Kelly's Invocation of the Fifth Amendment

In a civil case, "the jury is permitted to hear evidence of a witness's invocation of the privilege and may draw an adverse inference from it." *Hillmann v. City of Chicago*, 834 F.3d 787, 793 (7th Cir. 2016) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify[.]")) (citations omitted). Such inferences may be drawn even when the witness invoking the privilege is a nonparty. *Cf. Fujisawa Pharm. Co. v. Kapoor*, No. 92 C 5508, 1999 WL 543166, at *9 (N.D. Ill. July 21, 1999) (stating that drawing an adverse inference from a nonparty's silence against a party is permissible when the two share an identity of interests) (citing *Daniels v. Pipefitters' Ass'n Local Union No. 597*, 983 F.2d 800, 802 (7th Cir. 1993); *Kontos v. Kontos*, 968 F. Supp. 400, 406 (S.D. Ind. 1997)). As with most evidentiary rulings, the decision whether to permit the inference falls within the district court's broad discretion. *Evans v. City of Chicago*, 513 F.3d 735, 740 (7th Cir. 2008) (citation omitted).

The City objects that the Court's instruction permitted the jury to draw an adverse inference against the City itself, which Chicago contends to be a prejudicial error. First, Chicago's interpretation of the instruction is contrary to its clear language, which permitted the jury to draw said inference against only Kelly. (Jury Instructions 15, Dkt. 444 (instructing that when a person asserts his Fifth Amendment rights, "you are permitted to assume that his testimony

would be unfavorable to *him* in any manner that you deem reasonable and supported by the evidence" (emphasis added)).) Second, even if this instruction permitted the jury to take an adverse inference against the City—which it did not—there would still be no error here. One party's Fifth Amendment invocation may be imputed to another party when the two share certain allied interests sufficient to justify the inference's trustworthiness and advance the search for truth. *See Kontos*, 968 F. Supp. at 406 (quoting *LiButti v. United States*, 107 F.3d 110, 124 (2d Cir. 1997)). Courts engaging in this inquiry have eschewed bright-line rules in favor of a case-by-case analysis demanding that the party urging the inference justify it. *State Farm Mut. Auto. Ins. Co. v. Abrams*, No. 96 C 6365, 2000 U.S. Dist. LEXIS 6837, *21 (N.D. Ill. May 11, 2000) (collecting cases).

LaPorta justified the inference here. He could not prove *Monell* liability unless he could first establish that Kelly shot LaPorta with at least reckless indifference. Thus, when Kelly took the stand, his interests and the City's aligned. If Kelly admitted to shooting LaPorta deliberately, he would have exposed himself to criminal liability and the City to civil liability under *Monell*. The relevant interests were in lockstep. The Court agrees with LaPorta that in these circumstances, the adverse inference from Kelly's invocation could have been permitted against the City. Though, as stated above, the Court did not go this far; the instruction permitted an adverse inference only against Kelly, not Chicago. In this regard, the City has fallen short of carrying its heavy burden in justifying a new trial. *See BP Amoco Chem. Co. v. Flint Hills*

Res., LLC, 697 F. Supp. 2d 1001, 1025 (N.D. Ill. 2010) (citations omitted).

2. LaPorta's Competency to Testify

Chicago contends that the shooting stripped LaPorta of his competency and as such the Court should not have allowed him to testify. The City argued as much in its motions *in limine*, but the Court believes now, as it did then, that LaPorta was competent to give testimony. Federal Rule of Evidence 601 "creates a broad presumption of competency." *Estate of Suskovich v. Anthem Health Plans of Va., Inc.*, 553 F.3d 559, 570 (7th Cir. 2009). "Competency of a witness to testify . . . is a limited threshold decision . . . as to whether a proffered witness is capable of testifying in any meaningful fashion whatsoever." *Sauer v. Exelon Generation Co., LLC*, 280 F.R.D. 404, 407 (N.D. Ill. 2012) (quoting *United States v. Banks*, 520 F.2d 627, 630 (7th Cir. 1975)). Indeed, the Advisory Committee's note to Rule 601 clarifies that "[n]o mental or moral qualifications for testifying as a witness are specified . . . . *A witness wholly without capacity is difficult to imagine.* The question is one particularly suited to the jury as one of weight and credibility[.]" FED. R. EV. 601 (emphasis added). That note also remarks that "[d]iscretion is regularly exercised in favor of allowing the testimony" over capacity objections. *Id.*

Witness-capacity objections face long odds, though the City contends those odds should have played out in its favor here. Dr. Heilbronner testified that LaPorta's injuries undermined his capacity to recall reliably the events leading up the shooting. (Heilbronner Tr. 3037:1-3047:8.) But the doctor also

testified that it is "really difficult to say with any certainty exactly when [LaPorta's] memories are reliable and when they aren't"; he also conceded that it was not impossible that LaPorta remembered the events leading up to the shooting. (*Id.* 3046:1-3052:18.) The question, ultimately, is whether LaPorta's professed memories of the relevant events were reliable. That question goes to the proper weight to be afforded to LaPorta's recollections, which makes this a question for the jury. *See* FED. R. EV. 601; *see also United States v. Dawson*, 434 F.3d 956, 958 (7th Cir. 2006) (stating that Committee notes to the rules of evidence are "entitled to our respectful consideration"). There is no error here.

3. Admission of the DOJ and PATF Reports

The heart of the next debate is Federal Rule of Evidence 803(8), which creates a hearsay exception for records or statements of a public office. Reports fit within that exception when they contain factual findings resulting from a legally authorized investigation, so long as the party seeking to exclude the report has not shown it lacks trustworthiness. *See Daniel v. Cook Cty.*, 833 F.3d 728, 740 (7th Cir. 2016); *Lockwood v. McMillan*, 237 F. Supp. 3d 840, 846-49 (S.D. Ind. 2017). Permissible reports may contain both opinions and conclusions. *Daniel*, 833 F.3d at 740 (citation omitted). Still, hearsay statements contained within an admissible report are not themselves made admissible by Rule 803(8). *See Lockwood*, 237 F. Supp. 3d at 849. At trial, the Court found that the DOJ and PATF reports fell within the 803(8) exception and accordingly permitted Plaintiff's counsel to read portions of each into the record. For a number of

reasons, Chicago contends that was prejudicial error, though notably the City does not contend that these reports lacked trustworthiness. The Court is not persuaded by any of Chicago's arguments.

First, the City contends that the Court impermissibly allowed counsel to read into the record hearsay statements from the reports under the guise of 803(8). But the City points to zero instances of hearsay in its briefing—indeed, while the read-in portions of the reports recited some hearsay *sources* (*see, e.g.*, Tr. 2240:1-2242:3 (DOJ report summarizing report writers having met with a range of lay and expert sources)), those selections do not actually include the hearsay *statements* to which they allude.

Chicago also contends the factual and legal issues represented in these reports lack a "close fit" to the issues present in LaPorta's suit. *See Daniel*, 833 F.3d at 742. This second objection largely centers on the reports' allegedly irrelevant temporal focus: Neither report focuses on those years leading up to the January 2010 shooting, Chicago claims, so they cannot substantiate LaPorta's claims concerning the City's policies predating that event. But the PATF report reviewed IPRA records dating back to 2007. (*See* Tr. 2350:1-7 (recounting data reviewed in PATF report); Emanuel Statement Tr. 250:7-18 (summarizing scope of PATF report).) Chicago's timeliness argument has more traction with the DOJ report, which professes to be based on data dating back to December 2010. (*Compare* Tr. 2242 (describing report's review of police misconduct complaints during the five years preceding the DOJ investigation), *with* Tr. 2238:12-22 (stating investigation began in

December 2015).) However, the DOJ report findings do not limit themselves to these data, but rather express "*longstanding, systemic* deficiencies" in CPD policies. (Tr. 2249:1-7.) The Court thus again finds the report, which, much like the PATF report, consists of directly-relevant subject material, a close enough fit to the issues at bar in the case to fall within 803(8).

And even if this ruling was made in error, the Court believes it was harmless. The portions of the DOJ report read into the record espouse substantially similar conclusions to those reached in the PATF report. The jury would have heard the PATF conclusions whether or not the DOJ report was admitted, so the addition of the cumulative, second report does not rise to the level of prejudicial error. *Cf. United States v. Pessefall*, 27 F.3d 511, 516 (11th Cir. 1994) (finding no reasonable probability of prejudice stemming from jury's consideration of extrinsic, but cumulative, evidence); *United States v. Pitman*, 475 F.2d 1335, 1337 (9th Cir. 1973) (rejecting argument for reversal predicated upon inadmissible evidence allowed in at trial that was cumulative of other, admissible evidence, and the record did not otherwise reflect prejudice against appellant).

Finally, Chicago objects that the PATF report cannot qualify under the 803(8) exception because PATF did not receive City funding and does not speak for the City. This argument fails. The City created PATF for the express purpose of reviewing the system for accountability, oversight, and training in place for Chicago's police officers. The resulting findings, summarized in the PATF report, were thus "made by a public officer resulting from a legally authorized

investigation," and the incidental inclusion in PATF of non-governmental personnel is "beside the point." *Simmons v. City of Chicago*, No. 14 C 9042, 2017 WL 3704844, at *8 (N.D. Ill. Aug. 28, 2017) (ruling on *motion in limine* that the PATF report fit the exception under 803(8).)

4. Expert Testimony

Next, Chicago argued the Court committed prejudicial error in admitting certain expert testimony from two witnesses, Dr. Ziejewski, LaPorta's biomechanics expert, and David Balash, LaPorta's crime-scene forensics expert.

Three parts of Dr. Ziejewski's testimony offend the City: (1) Ziejewski's testimony that it was unlikely that LaPorta, who generally used his right hand to shoot guns while hunting, would have used his left hand to shoot himself; (2) Ziejewski's participation with LaPorta's counsel in an in-court demonstration exemplifying the doctor's opinion of details concerning the shooting; (3) Ziejewski's testimony concerning the gunshot's angle of trajectory.

The first of these challenges zeroes in on eleven lines of Ziejewski's testimony:

> Q. What's your second opinion—I'm sorry, third?
>
> A. This would be unlikely for Mr. LaPorta with right-handed gun handling habit to use his left hand on January 12th, 2010.
>
> Q. Did you review deposition testimony of his family?
>
> A. Yes.

> Q. And did that deposition testimony reveal that he had a habit or a tendency to use a hand when operating a gun or a rifle?
>
> A. Yes.
>
> Q. Which was that?
>
> A. Right hand.

(Ziejewski Tr. 626:5-15.)

The City contends that this opinion went beyond the scope of the expert's testimony. But as the Court held in ruling on the motions *in limine*, an expert on human body biomechanics such as Dr. Ziejewski can rely on statements by LaPorta's family for the basic fact that LaPorta is right-hand dominant. (Mot in Limine Tr. 17:7-19.) "The soundness of the factual underpinnings of the expert's analysis and the correctness of the expert's conclusion based on that analysis are factual matters to be determined by the trier of fact[.]" *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000).

Next, the City objects to the doctor's in-court demonstration of the shooting, contending that said demonstration was not properly disclosed in advance of trial. But as LaPorta points out, the demonstration simply consolidated physical evidence already described and relied upon by the doctor—all of which he discussed without objection from Chicago. (*See, e.g.*, Ziejewski Tr. 614:1-618:14 (testifying concerning LaPorta's body position, the blood evidence, tissue recovered at the scene, and gunshot residue).) The Court committed no error by permitting that demonstration to go forward.

Finally, but in the same vein, the City contends that the doctor should not have been permitted to testify that the bullet traveled at an angle of somewhere between 35 and 45 degrees because this opinion, too, went undisclosed before trial. The doctor conceded on the stand that he had not previously testified to this angle; he also clarified that he derived that figure by measuring the path of the bony fragments depicted in LaPorta's CT scan. (*Id.* 633:5-633:23, 634:3-11.) If allowing this testimony constituted error, however, it was not prejudicial. LaPorta also adduced testimony from his forensic science expert, David Balash, who provided substantially similar shooting-angle testimony. (*See* Balash Tr. 1900:18-1901:9.) Delayed disclosures are prejudicial when said delay impacts the receiving party's ability to prepare for trial. *Cf. Mid-Am. Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1363 (7th Cir. 1996) (upholding pre-trial refusal to exclude tardily-disclosed evidence when party seeking exclusion could not demonstrate any prejudice); *LG Elecs. v. Whirlpool Corp.*, No. 08 C 242, 2010 WL 9506787, at *2 (N.D. Ill. Sept. 7, 2010) (granting pretrial motion to exclude tardily-disclosed evidence because the delay prejudiced opponent's ability to prepare for trial). No such prejudice arose from LaPorta's late disclosure here. Because Balash's substantially similar opinion was timely disclosed, the City did not want for advance notice of this cross-examination topic. The danger of prejudice from an at-trial surprise was thus extinguished, as the disclosure of Dr. Ziejewski's opinion would have been cumulative.

As for David Balash, Chicago lodges two complaints, concerning: (1) Balash's testimony regarding the flaws in CPD's investigation of the LaPorta shooting; and (2) his comments that the prosecuting state's attorney had a faulty understanding of gunshot residue ("GSR") evidence.

With the first challenge, the City focuses on Balash's critiques of a number of shortcomings in the CPD investigation, including the failure to collect and preserve evidence and the belief that because the CPD improperly labeled the shooting as a suicide, the investigation necessarily received shorter shrift in the department than it would have had it been labeled as a possible homicide. LaPorta introduced Balash as an expert in crime-scene forensics; during his 25 years as a police officer, Balash frequently processed crime scenes, meaning he had made a career of observing, collecting, and preserving evidence in investigations which included both suicides and homicides. (Balash Tr. 1857:19-1858:25, 1860:9-24.) Given this breadth of experience, Balash was certainly qualified to opine on the best practices for evidence collection and crime-scene processing, which is all Chicago objects to here.

Chicago's objection to Balash's testimony concerning the prosecutor's understanding of GSR evidence similarly falls short. The City complains that Balash predicated this opinion on a misunderstanding of a form the prosecutor filled out in documenting her decision not to approve criminal charges against Kelly. Indeed, Balash conceded at trial that he did not review that prosecutor's deposition transcript, and so he lacked insight into her later-provided clarifications of her thinking at the time she filled out the contested

form. (Balash Tr. 1993:5-8.) But this is prime grounds for cross-examination, not disqualification of an otherwise expert opinion. Ultimately, this is a battle of the proper weight to be afforded to Balash's testimony on this score, and it is within the jury's province to make such determinations. The Motion for New Trial is denied insofar as it objects to expert testimony presented by either Dr. Ziejewski or Mr. Balash.

5. Miscellaneous Objections

Chicago levies two additional challenges to this Court's rulings which do not fit neatly under any of the above headings. The first of these is the City's belief that the Court should have bifurcated the trial: the refusal to do so amounted to an abuse of discretion, Chicago contends, as it allowed the jury to hear and be swayed by evidence of LaPorta's extensive damages even before the City had been found liable. But bifurcation is the exception and not the rule. *See Real v. Bunn-O-Matic Corp.*, 195 F.R.D. 618, 620 (N.D. Ill. 2000) (collecting cases). And the decision to bifurcate rests soundly within the trial court's discretion. *Krocka v. City of Chicago*, 203 F.3d 507, 516 (7th Cir. 2000). In this case, the Court properly instructed the jury to perform its duty impartially and to put the issue of damages to the side unless and until it concluded Chicago was liable. (Tr. 3580:2-14, 3588:19-25.) As always, the Court presumes that "jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions . . . and strive to understand, make sense of, and follow the instruction given them." *United States v. Puckett*, 405 F.3d 589, 599 (7th Cir. 2005) (citation omitted); *see*

Pickett v. Sheridan Health Care Ctr., 610 F.3d 434, 446 (7th Cir. 2010) (applying same presumption in a civil case). It cannot be that bifurcation is required every time a plaintiff's injuries are severe, and Chicago has not provided any authority suggesting as much. The bifurcation ruling is not grounds for a new trial.

Second, Chicago contends it was error for the Court to allow LaPorta's counsel to read a letter, written by counsel in LaPorta's voice, to the jury in closing argument. In this letter "from LaPorta" to LaPorta's family, counsel demonstrated what counsel understood to be LaPorta's wishes and regrets after the shooting. (Tr. 3492:1-21.) Chicago argues the letter was designed only to stir the jury's passions, was not based on any evidence, and amounted to an improper and prejudicial request for sympathy. *See Cole v. Bertsch Vending Co.*, 766 F.2d 327, 334 (7th Cir. 1985) (stating, in case where attorney "openly asked the jury to feel sympathetic towards his clients," that "[r]equesting sympathy for a defendant is improper especially where such argument may have a prejudicial impact upon the result") (citations omitted). First off, the Seventh Circuit has "repeatedly explained that improper comments during closing argument rarely rise to the level of reversible error." *Soltys v. Costello*, 520 F.3d 737, 745 (7th Cir. 2008) (citation and internal quotation marks omitted). "To constitute reversible error and warrant a new trial, statements made during closing argument must be 'plainly unwarranted and clearly injurious.'" *Warfield v. City of Chicago*, 679 F. Supp. 2d 876, 888 (N.D. Ill. 2010) (quoting *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 730 (7th Cir. 1999)). The letter at issue here,

though creative, does not rise to that prejudicial level. It was not spun from whole cloth, but rather based on evidence concerning LaPorta's desire and inability to have a family (P. LaPorta Tr. 1361:10-21), his ambition to run his father's company (*id.* 1342:4-25), and the details of daily care LaPorta now requires (*id.* 1381:3-1388:20; Howland Tr. 2006:2008-10). Beyond this, the Court properly advised the jury that closing argument is not evidence. (Tr. 3582:11-15; *Soltys*, 520 F.3d at 745 ("[C]urative instructions to the jury mitigate harm that may otherwise have resulted from improper comments during closing argument. . . . [And when such instructions are given,] we presume that the jury obeyed the court.") (citations and internal quotation marks omitted).) Reading this letter was not plainly unwarranted and clearly injurious; it provides no basis for a new trial.

In sum, the Court finds that none of the evidentiary-ruling errors Chicago alleges, whether considered discretely or cumulatively, worked prejudice upon the City warranting a new trial. The new trial Motion is denied in relevant part.

C. Jury Findings Were Against the Manifest Weight of the Evidence

Under Federal Rule of Civil Procedure 59(a), this Court will set aside a verdict as contrary to the manifest weight of the evidence "only if no rational jury could have rendered the verdict." *Marcus & Millichap Inv. Servs. of Chi., Inc. v. Sekulovski*, 639 F.3d 301, 314 (7th Cir. 2011) (citation and internal quotation omitted). In seeking to carry this hefty burden, Chicago largely repackages those arguments

it raised in its renewed JMOL Motion. As before, those arguments find no purchase here.

Chicago objects, first, to the jury's finding that the City failed to maintain an Early Warning System, or "EWS." As before, the City contends that LaPorta's evidence focused on an irrelevant time frame; zeroed in too much on Kelly, particularly, and failed to speak to a citywide failure, generally; and demonstrated that even Reiter, LaPorta's own police-practices expert, believed the City's EWS to be adequate. The Court has already reviewed and found each of these arguments unpersuasive or simply inaccurate and sees no need to recycle that analysis. Through Reiter especially, LaPorta adduced evidence that Chicago had historic and system deficiencies in failing to implement an EWS; the jury's ultimate agreement with him is not against the manifest weight of the evidence.

Next, Chicago takes issue with the jury's finding that the City failed to discipline its officers when appropriate. Chicago argues that LaPorta only ever adduced evidence concerning the City's failures to discipline after *allegations* of misconduct were made, as opposed to any *findings* of misconduct. Such evidence, according to Chicago, fits only within LaPorta's failure-to-*investigate* theory, and has no place in the failure-to-*discipline* theory. There are two problems with that argument. First, it is too clever by half: Though these two theories are discrete, it is not true that the evidence in support of one cannot also support the other. If, for example, the City never investigated any officer accused of misconduct, that fact would support both theories: The City failed to investigate all allegations and, because of that

systemic nonfeasance, never disciplined any deserving officer. Second, Chicago's argument simply misstates the evidence. As explained above, LaPorta indeed adduced evidence showcasing the City's "opaque, drawn-out, and unscrutinized disciplinary process" that frequently enabled officers "to avoid meaningful consequences." (Tr. 2350; *see supra* at Part I.D.) On this basis, a rational jury could have reached the verdict returned in this case; no new trial is warranted.

III. LaPORTA'S BILL OF COSTS

Federal Rule of Civil Procedure 54(d)(1) provides that a prevailing party may obtain reimbursement for certain litigation costs at the conclusion of a lawsuit. The Rule establishes a "presumption that the prevailing party will recover costs, and the losing party bears the burden of an affirmative showing that taxed costs are not appropriate." *Beamon v. Marshall & Ilsley Trust Co.*, 411 F.3d 854, 864 (7th Cir. 2005) (citing *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1409 (7th Cir. 1991)). In evaluating an application for costs, the Court must first determine whether the claimed expenses are recoverable and, second, whether the costs requested are reasonable. *Majeske v. City of Chicago*, 218 F.3d 816, 824 (7th Cir. 2000) (citation omitted). "The prevailing party bears the burden of demonstrating the amount of its recoverable costs because the prevailing party knows, for example, how much it paid for copying and for what purpose the copies were used." *Telular Corp. v. Mentor Graphics Corp.*, No.01 C 431, 2006 WL 1722375, at *1 (N.D. Ill. June 16, 2006). Given the burden on the prevailing party, requested costs should not be

awarded when they cannot be reasonably obtained by reference to the submitted, supporting documentation. *Harkins v. Riverboard Servs., Inc.*, 286 F. Supp. 2d 976, 980 (N.D. Ill. 2003). The Court has "wide latitude" in fixing a reasonable award. *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 345 (7th Cir. 1995) (citations omitted).

LaPorta seeks $748,979.03 in costs. In what proves to be a recurring theme, however, LaPorta often falls short of his burden to show these costs with the minimal particularity required for the Court to determine whether they are reasonably necessary and thus compensable. LaPorta submits, principally, two filings in support of its bill of costs: a 13-page summary spreadsheet and 550 pages of check requests, receipts, and invoices. Those latter documents are not organized, as far as the Court can see, according to any particular scheme: Neither date nor subject matter governs them, and the summary spreadsheet does not provide any cross-references to them. This submission often further obscures an already-translucent costs analysis, as set forth below.

A. Costs for Experts

LaPorta seeks $590,725.04 in costs under this umbrella. Those costs comprise three subcategories: (1) expert witness fees; (2) "attorney fees" for potential—but ultimately never called upon—expert witness Gregory E. Kulis; and (3) costs associated with a focus group or "mock jury" preparation. The first two of these can be handled in one fell swoop. Recovery for expert expenses in § 1983 cases is limited to fees provided by § 1920 and § 1821. *Fields v. City of Chicago*, No. 10 C 1168, 2018 WL 253716, at *11 (N.D.

Ill. 2018) (reducing expert costs to $40-per-day witness fee permitted by 28 U.S.C. § 1821(b)). LaPorta's submissions do not clarify how many days each of his experts spent toiling on his case, nor even how many experts LaPorta actually retained. For what it is worth, LaPorta contends in his reply that he retained twelve. (Bill of Costs Reply at 2, Dkt. 545.) In his submissions, however, the Court counts nineteen: Gregory E. Kulis and Associates, Ltd. (though listed under "Attorney Fees" in LaPorta's submissions, Chicago points out, and LaPorta does not contradict, that Kulis was not retained as counsel but rather as an expert in this case); Baron Epstein; David E. Balash; Edward D. Rothman; Howland Health Consulting, Inc.; Independent Forensics; Law Enforcement Risk Management Group; Legal and Liability Risk Management Institution; Mark R. Perez; MicroTrace, LLC; MZ Engineering; Neurological Professionals; Noble Consulting & Expert Witness Service; Ricardo G. Senno; Richard B. Lazar; Robert L. Heilbronner; Vincent DiMaio; Vocational Economics, Inc.; and WD Forensic, Inc. (Exs. to Chicago's Bill of Costs Objections at 9-11, Dkt. 516.) To any extent, the Court presumes LaPorta knows best who he did and did not retain, no matter what his submissions say; in the absence of further detail, the Court awards LaPorta $40 in fees for 3 days for each of the 12 experts he says he retained in this matter. Awarding $120 per expert accounts for each expert's testimony and some reasonable time spent preparing. *Se-Kure Controls, Inc. v. Vanguard Prod. Grp., Inc.*, 873 F. Supp. 2d 939, 956 (N.D. Ill. 2012) (permitting recovery for expert witness preparation

time). In sum, that expert fee award amounts to $1,440.00.

As for LaPorta's mock trial(s)/focus group(s): Chicago contends that the sought-after costs within this subcategory total $35,338.27. (*See* Bill of Costs Objections at 5.) The Court reaches a different figure, calculating $60,570.25 by adding together the five line items in LaPorta's bill of costs labeled as either "mock trial" or "focus group." (Exs. to Chicago's Bill of Costs Objections at 12-14, Dkt. 517.) To any extent, while the attorney time for such practice sessions is billable as reasonable attorney fees in complex cases such as this one, *Wells v. City of Chicago*, 925 F. Supp. 2d 1036, 1046 (N.D. Ill. 2013), the other affiliated costs are not recoverable. Presumably, LaPorta accounted for the related billables in his petition for attorneys' fees, which the Court takes up below. That is left for later. For now, none of the $60,570.25 will be awarded as costs.

B. Travel and Lodging for Witnesses and Counsel

Sections 1821 and 1920(3) authorize the award of costs to reimburse witness for their reasonable travel, lodging, and subsistence expenses. 28 U.S.C. §§ 1821, 1920(3). Travel costs for attorneys, however, are not recoverable, *Movitz v. First Nat'l Bank of Chi.*, 982 F. Supp. 571, 577 (N.D. Ill. 1997) (citing 18 U.S.C. § 1920), so those costs will not be allowed, *see, e.g.*, Bill of Costs Objections at 1, 9-12 (expenses for attorney Gould's Uber ride; for Gould and attorney Romanucci's car rentals; and for Romanucci's travel to Los Angeles and Phoenix for depositions). Further, a number of LaPorta's line entries reflect travel expenses of

witnesses (often for depositions) presumably to avoid imposing the same costs on attorneys. (*See, e.g., id.* at 9 (witness Balash travels to Chicago four months before the start of trial).) Because, absent that cost-shifting, the attorney would have borne the cost of travel in non-compensable fashion, these witness costs will not be permitted. *Movitz*, 982 F. Supp. at 577 (citation omitted).

The Court will, however, allow reasonable travel, lodging, and subsistence expenses for witnesses who traveled to Chicago *for trial*. From the Court's review of LaPorta's submissions, such travel expenses total $667.03, reflecting trial travel expenses for Dr. Rothman and Howland Health Consulting, Inc. (Bill of Costs Objections at 12.) Chicago has not raised any specific objections to these costs, and the Court finds them to be reasonable. They shall be allowed.

As for the sought-after lodging and subsistence costs: "A subsistence allowance may be paid to a witness when an overnight stay is required at the place of attendance, up to the maximum per diem amount prescribed by the Administrator of General Services, in accordance with 5 U.S.C § 5702(a)." *Richman v. Sheahan*, No. 98 C 7350, 2010 WL 2889126, at *3 (N.D. Ill. July 14, 2010) (citing 28 U.S.C. § 1821(d)(1)-(d)(3)). The maximum *per diem* rate allowable in Chicago in October and November of 2017, when this trial occurred, was $300, which included fees for lodging, meals, and incidental expenses. *See* U.S. General Services Administration, Fiscal Year 2018 Domestic Per Diem Rates, (2018), *available at https://www.gsa.gov/travel/plan-book/per-diem-rates/per-diem-rates-lookup/?action=perdi*

ems_report&state=IL&fiscal_year=2018&zip=&city=; *cf. Richman*, 2010 WL 2889126, at *3 (conducting similar *per diem* inquiry). The Court will not allow subsistence costs above that amount, and accordingly awards as follows, which are the witness expenses supported by the submitted documentation: $600.00 for Dr. Ziejewski's two-day stay in Chicago; $900.00 for Mr. Rothman's three-day stay; $900.00 for Mr. Reiter's three-day stay; and $900.00 for Ms. Howland's three-day stay, all for a total of $3,300.00. (*See* Bill of Costs Objections at 11.) Those expenses for meals and lodging recited in LaPorta's documents but exceeding these values shall not be allowed. (*See id.* at 11-12.)

Finally, LaPorta seeks costs for attorneys' meals. But such expenses are not compensable and will be denied. *Fields*, 2018 WL 253716, at *11 ("[P]resumably those involved would have had to eat even had they not been involved in this case.").

C. Deposition Transcript Costs

LaPorta claims $66,081.59 in costs under this umbrella. A prevailing party may recover "[f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case." 28 U.S.C. § 1920(2). Local Rule 54.1(b) provides for recovery of the transcript at a cost not to exceed "the regular copy rate as established by the Judicial Conference of the United States and in effect at the time the transcript or deposition was filed unless some other rate was previously provided for by order of court." *DSM Desotech, Inc. v. 3D Sys. Corp.*, No. 08 CV 1531, 2013 WL 3168730, at *4 (N.D. Ill. June 20, 2013).

Chicago objects to these costs, arguing that they represent numerous non-compensable expenses and, further, that the lion's share of these costs should be denied because the documentation LaPorta submitted is neither specific nor organized enough to permit the City or the Court to parse the compensable expenses from those that are not. As a general matter, many of Chicago's objections have merit. First, costs for deposition transcript word indexes are not recoverable absent a showing that they were reasonably necessary in this case—a showing LaPorta has not made. *Porter v. City of Chicago*, No. 8 C 7165, 2014 WL 3805681, at *2 (N.D. Ill. Aug. 1, 2014) (collecting cases). Costs for deposition exhibits likewise must be established as reasonably necessary, but LaPorta failed to muster a specific explanation for these as well. *See Lewis v. City of Chicago*, No. 04 C 6050, 2012 WL 6720411, at *7 (N.D. Ill. Dec. 21, 2012). Next, costs for electronic copies or "e-transcripts" are not recoverable, *see The Medicines Co. v. Mylan Inc.*, No. 11 CV 1285, 2017 WL 4882379, at *4 (N.D. Ill. Oct. 30, 2017) (citation omitted), nor are delivery or handling costs, *Correa v. Ill. Dep't of Corrections*, No. 05 C 3791, 2008 WL 299078, at *2 (N.D. Ill. Jan. 29, 2008); *Riley v. UOP LLC*, 258 F. Supp. 2d 841, 845 (N.D. Ill. 2003). LaPorta also seeks costs for video recording of depositions, but generally, "[c]ourts in this circuit will not award costs for videotaping depositions where a transcript was also purchased." *Martinez v. City of Chicago*, No. 14 CV 369, 2017 WL 1178233, at *20 (N.D. Ill. Mar. 30, 2017) (citation and internal quotation marks omitted) (brackets in original). LaPorta ordered transcripts for each of the depositions for which he seeks videotaping costs, but he cannot

recover both expenses; the videotaping costs will not be allowed.

What remains after the above have been subtracted are simply costs for the deposition transcripts themselves (*sans* the indexes). But as foreshadowed, most of LaPorta's invoices fail to break out the non-recoverable costs for word indexes, thus blocking the Court from determining which portion of those invoices should be allowed as costs and which refused. Nor does LaPorta's summary spreadsheet provide useful clarification. That sheet presents four pertinent data for each entry: the date (of what, it is not clear, although the Court assumes these are invoice dates); the "source name," meaning the payee; "memo," meaning the subject of the transcript; and the total cost for that transcript. These entries omit, however, any helpful means of actually navigating the muddled batch of 550 pages of invoices, receipts, and check requests LaPorta submits in support of his bill of costs. (*See* Ex. A to LaPorta's Bill of Costs, Dkts. 465-467 (receipts filed across three different docket entries).) If LaPorta's summary spreadsheet at least included pincite references to these documents for each expenditure, the Court could compare and review them. Absent this, the Court is left largely to guess which transcripts were reasonably necessary and thus compensable, and guesswork is not a proper method for fixing costs.

Notably, even after Chicago levied these objections, LaPorta made no effort in reply to clarify which receipts correspond to which transcripts, or to explain what portion of each of those opaque invoices represents non-recoverable word indexes. Given that

failure, LaPorta has not met his burden to show the amount of his recoverable costs as far as these invoices are concerned. None of the costs reflected therein will be allowed. Eliminating those indecipherable invoices leaves behind twenty-seven invoices which, as Chicago points out, actually itemize their respective index costs. Of the $9,448.45 total those itemized invoices represent, $334.00 is for word indexes, $350.00 for electronic copies, $294.00 for processing and handling, and $145.20 for exhibits. After subtracting these non-recoverable expenses from the $9,448.45 (see collected cases, above), we are left with $8,325.25 and, because all of the prices-per-page reflected in these invoices come in below the limits set by the Judicial Conference, *see* Local Rule 54.1(b) (permitting recovery of transcript costs only up to the Judicial Conference per-page limit); *Mylan*, 2017 WL 4882379, at *4 (summarizing limits), the Court will allow this remaining sum.

D. Hearing Transcripts

LaPorta seeks $232.05 in costs for seven pre-trial hearing transcripts. "Courts in this District have generally awarded costs for transcripts of [relatively routine motion hearings] only when the prevailing party articulates some specific necessity—for example, where the written record of the status call or motion hearing was the basis for, or relevant to, some subsequent motion or filing, or to supply out-of-state counsel with a record of the proceedings." *Hillmann v. City of Chicago*, No. 04 C 6671, 2017 WL 3521098, at *7 (N.D. Ill. Aug. 16, 2017) (collecting cases). LaPorta makes no effort to explain his need for these transcripts, and, absent some explanation of a specific

need, the Court, having reviewed the transcripts at issue (insofar as the Court was able to identify them from LaPorta's submissions), believes "careful notes by counsel" would have sufficed. *See id.* These pre-trial transcript costs will not be allowed.

E. Copying and Exemplification

The Court may allow costs fees for copying and exemplification of papers necessarily obtained for use in the case. 28 U.S.C. § 1920(4). But to receive its copying costs, LaPorta must "identify the nature of each document copied, the number of copies of each document prepared, the copying cost per page, and the total copying cost." *Druckzentrum Harry Jung GmbH & Co. KG v. Motorola, Inc.*, No. 09 CV 7231, 2013 WL 147014, at *7 (N.D. Ill. Jan. 11, 2013) (citation and internal quotation marks omitted). This LaPorta failed to do. Instead, he simply provided a base calculation indicating that he paid for 70,961 black and white pages at $0.05 per page and 1,492 color pages at $0.15 per page for a total of $3,771.85. This threadbare recitation in no way informs the Court as to the nature of these documents or as to how many copies of each document were ordered. But, acknowledging that LaPorta certainly must have reasonably copied some materials during this seven-year litigation, the Court will allow 50% of the sought-after copying costs, or $1,885.93.

As for exemplification: LaPorta is correct that many types of presentations may fall within the allowable exemplification costs contemplated by § 1920(4). *See Cefalu v. Village of Elk Grove*, 211 F.3d 416, 428 (7th Cir. 2000). But first, the Court must determine whether the exemplification was "vital to

the presentation" or "merely a convenience or, worse, an extravagance." *Id.* (citation omitted). "Among the factors that the judge might consider in evaluating the necessity of a particular type of exemplification is whether the nature and context of the information being presented genuinely called for the means of illustration that the party employed." *Id.* When the prevailing party fails to identify the exhibits for which it claims costs, this exercise becomes impossible, and courts deny the award of costs. *See Trading Techs. Int'l, Inc. v. eSpeed, Inc.*, 750 F. Supp. 2d 962, 981 (N.D. Ill. 2010) (citing *Vigortone Ag Products, Inc. v. PM Ag Products, Inc.*, No. 99 C 7049, 2004 WL 1899882, at *8 (N.D. Ill. Aug. 12, 2004)). Such is the shortcoming for nearly all of LaPorta's sought-after exemplification costs, which comprise: unspecified "trial boards," "3-D Graphics," five generic "video" costs, and $1,500.00 for the "Day in the Life" video shown at trial. (*See* Exs. to Chicago's Bill of Costs Objections at 2-3, Dkt. 517.) All but the last of these are too generically labeled for the Court to determine whether they were vital and thus compensable. The last depicted the difficulties LaPorta faces each day as a result of his injuries. The Court agrees that these difficulties were best laid out for the jury in video form, and so, because the subject matter called for videographic means of illustration, the associated $1,500.00 in associated exemplification costs will be allowed.

F. Service of Process

LaPorta initially sought $3,125.96 in costs for subpoena service fees. But Chicago pointed out this number should be reduced by $1,083.85 because

service fees cannot exceed $55.00 per hour, *see Specht v. Google Inc.*, No. 09 C 2572, 2011 WL 2565666, at *4 (N.D. Ill. June 27, 2011), and also because LaPorta sought costs for service upon individuals who never actually testified (at deposition or otherwise). In reply, LaPorta concedes to Chicago's objections and agrees his service of process costs should be reduced by $1,083.85. The Court has reviewed the applicable supporting documents and concurs, so LaPorta shall be awarded $2,042.11 under this category.

G. Miscellaneous Costs

LaPorta seeks $2,306.25 for videoconferencing costs accrued from the long-distance deposition of Illana Rosenweig, who lives in Singapore. But courts in this District have declined to award such costs, be they for phone charges or room rentals. *See Hillmann*, 2017 WL 3521098, at *5-6 (collecting cases). This cost is declined.

Next are LaPorta's $4,391.14 in "case costs" from Salvato & O'Toole. LaPorta universally fails to describe these costs with the specificity needed for this Court to determine their reasonable necessity. These costs are also declined.

Three other costs are similarly vague and must be declined: $12.76 for unspecified "Daley Center Copies"; $17.78 for some "supplies"; and $9,252.00 for a nowhere-explained "investigation."

Based on the above, the Court allows LaPorta $19,160.32 in total costs.

IV. LaPORTA'S PETITION FOR ATTORNEYS' FEES

The Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988, allows the award of reasonable attorney's fees to the prevailing party in various kinds of civil rights cases, including suits brought under § 1983. *Fox v. Vice*, 563 U.S. 826, 832-33 (2011) (citation and internal quotation marks omitted). The statute serves the dual purpose of reimbursing plaintiffs for vindicating important civil rights and holding accountable violators of federal law. *See id.* However, a defendant "need only compensate plaintiff for fees to the extent plaintiff succeeds; losing claims are not compensable." *Kurowski v. Krajewski*, 848 F.2d 767, 776-77 (7th Cir. 1988).

In awarding fees under § 1988, a court's first step is to determine whether the party seeking fees is entitled to "prevailing party" status. *Gibson v. City of Chicago*, 873 F. Supp. 2d 975, 982 (N.D. Ill. 2012). Under one formulation approved by the Supreme Court, "plaintiffs may be considered prevailing parties for the purpose of awarding attorneys' fees if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit." *Baker v. Lindgren*, 856 F.3d 498, 503 (7th Cir. 2017) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). This is not a close question here, where LaPorta won a $44.7 million verdict on his *Monell* claims. He is clearly the prevailing party in this litigation.

To calculate reasonable attorneys' fees under § 1988, courts apply the "lodestar method," which multiplies the attorneys' reasonable hourly rates by

the number of hours they reasonably expended. *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 90 F.3d 1307, 1310 (7th Cir. 1996) (citing *Hensley*, 461 U.S. at 433). The party requesting fees carries the burden of establishing their reasonableness. *McNabola v. Chi. Transit Auth.*, 10 F.3d 501, 518 (7th Cir. 1993). Once the Court has arrived at a base lodestar figure, it may enhance that figure in the rare instance that the lodestar fails to "take into account a factor that may properly be considered in determining a reasonable fee." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553-54 (2010).

Plaintiff seeks a total of $4,515,567.50 in attorneys' fees, calculated as follows:

Attorney	*Hourly Rate*	*Hours*	*Total per Attorney*
from Romanucci & Blandin			
Antonio Romanucci	$750	2021.55	$1,516,162.50
Stephan Blandin	$750	288.30	$216,225.00
Gina DeBoni	$500	7.40	$3,700.00
Debra Thomas	$500	2788.25	$1,394,125.00
Michael Holden	$425	7.05	$2,996.25
Bruno Marasso	$400	278.00	$111,200.00

Bhavani Raveendran	$350	28.55	$9,992.50
Martin Gould	$350	1410.70	$493,745.00
Nicolette Ward	$350	661.45	$231,507.50
Rebekah Williams	$350	57.40	$20,090.00
Kelly Armstrong	$350	16.70	$5,845.00
from Salvato & O'Toole:			
Carl Salvato	$600	466.60	$279,960.00
Paul O'Toole	$600	3.00	$1,800.00
Jason E. Hammond	$400	3.00	$1,200.00
Matt Popp	$350	18.50	$6,475.00
from Schiller Preyar:			
Brendan Schiller	$500	51.90	$29,950.00
Susan Ritatta	$350	20.60	$7,210.00
Lillian McCartin	$400	10.90	$4,360.00
Tia Haywood	$350	30.70	$10,745.00

Across All Firms:			
Law Clerks	$125	700.25	$87,531.25
Paralegals	$125	675.08	$84,385.00
Admin. Staff	$125	42.90	$5,362.50

A. Hourly Rates

The Court begins by examining counsels' claimed hourly rates. In determining a reasonable hourly rate, attorneys' fees awarded under Section 1988 "are to be based on market rates for services rendered." *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 283 (1989) (citations omitted). "The attorney's actual billing rate for comparable work is 'presumptively appropriate' to use as the market rate." *People Who Care*, 90 F.3d at 1310 (quoting *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993)). The next best evidence of a reasonable fee is the rate charged by lawyers in the community of comparable skill, experience, and reputation. *Id.* Previous fee awards are also "useful for establishing a reasonable market rate." *Jeffboat, LLC v. Dir., Office of Workers' Comp. Programs*, 553 F.3d 487, 491 (7th Cir. 2009).

At the outset, Chicago contends, correctly, that LaPorta's efforts to justify the proposed rates largely miss the mark. LaPorta submits affidavits from two Chicago-based, class-action litigators, who both attest to the reasonableness of the proposed figures. (*See generally* Exs. 24, 25, Cherry & Zolna Decls., Dkts. 549-1.) But while the rates charged by other community lawyers can be helpful benchmarks, those attorneys' attestations to what rates are and are not

reasonable is less persuasive. And to any extent, the two attorneys in question are class-action counsel, not civil-rights litigators. This distinction matters: "The reasonable fee is capped at the prevailing market rate for lawyers engaged in the type of litigation in which the fee is being sought." *Cooper v. Casey*, 97 F.3d 914, 920 (7th Cir. 1996) (citation omitted).

LaPorta tries to prop up his suggested billing rates by reference to lawsuits having nothing to do with police misconduct or even, in many cases, Chicago. First, the costs of lawyering are not uniform across the country, which is why market rate comparisons should be made to lawyers of comparable skill, experience, and reputation *in the same community*. *Jeffboat*, 553 F.3d at 491. And second, as Judge Matthew Kennelly recently observed in a similar case, "the relevant frame of reference is civil rights / police misconduct litigation, not commercial litigation." *Fields*, 2018 WL 253716, at *3.

Last, LaPorta points out that his proposed rates fall within the *Laffey* matrix, "a chart of hourly rates for attorneys and paralegals in the Washington, D.C. area that was prepared by the United States Attorney's Office for the District of Columbia to be used in fee-shifting cases." *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 649 (7th Cir. 2011). But as this Court has pointed out, the Seventh Circuit has not formally adopted the *Laffey* matrix, and the rates charges therein are "significantly higher than those charged in this district." *Baker v. Ghidotti*, No. 11 C 4197, 2015 WL 1888004, at *3 (N.D. Ill. Apr. 24, 2015) (quoting *Gibson*, 873 F. Supp. 2d at 984), *aff'd in part,*

vacated in part sub nom. Baker v. Lindgren, 856 F.3d 498 (7th Cir. 2017).

Beyond this and a few arguments concerning the propriety of the proposed rates for his lead counsel, LaPorta does not offer any specific arguments concerning the rates for his individual lawyers. He largely allows those attorneys' affidavits to speak for themselves. Chicago, however, makes several attorney-specific arguments. Against this backdrop, the Court must determine what rates are reasonable.

Antonio Romanucci and Stephan Blandin. Neither attorney provides specific rates they actually charged any past or present client. Rather, Romanucci suggests that he effectively charged $1000/hour in a set-fee matter. The Court finds more useful than this Chicago's identification of *Fields*, in which the court awarded attorney Jon Loevy a rate of $550 for his work on a multi-year civil rights case that involved *Monell* claims against the City and culminated in a month-long trial. 2018 WL 253716, at *3. The *Fields* court took care to note that Mr. Loevy is "one of the top (if not *the* top) plaintiff's attorneys for police misconduct suits in Chicago." *Id.* at 3 (emphasis in original). Based on this comparison and factoring in Romanucci's attested-to lengthy experience in civil-rights litigation, the Court sets his rate equal to Mr. Lovey's at $550 an hour. The Court sets Blandin's rate at $450 per hour, with the discount from Romanucci's rate reflecting Blandin's lesser experience with police misconduct litigation. (*See* Blandin Aff. at 86-88, Dkt. 549-1.)

Michael Holden. Holden, like attorneys Steven Art and Cindy Tsai in the *Fields* case, has about eight

years of litigation experience. Those attorneys' rates were set at $325 per hour in *Fields*, and the Court will set the same rate for Holden here.

Bruno Marasso. Unlike Holden, who has been practicing for ten years, Marasso started working as a lawyer in 2012. The two attorneys in *Fields* with a similar range of experience received hourly rates of $275. The Court does not see the same distinction as does the City between those attorneys' degrees of specialization and Marasso's, so the Court will adopt the $275/hour rate.

Martin Gould. Gould has a few years' less experience than Marasso. His rate shall be set at $225/hour.

Nicolette Ward. Ward has been a member of the bar since only 2016—two years less than Gould—though she avers that she has spent the majority of that brief time in practice working on police misconduct matters. The Court sets her rate at $200/hour.

Gina DeBoni. Chicago contends DeBoni should be compensated at a depressed rate because her work amounts to drafting letters and reviewing documents. But DeBoni's affidavit indicates that she was a managing attorney at the firm during this case and her work included communicating with opposing counsel and participating in case strategy sessions. These are not the tasks of a paralegal and should not be reduced to such. Based on her 15+ years of practice but relatively little civil-rights experience, the Court sets her rate at $350.

Rebekah Williams & Kelly Armstrong. LaPorta has not produced an affidavit for either of these

attorneys nor any description of who they are or what their background is. The Court thus cannot determine a reasonable fee nor say that LaPorta has met his burden of producing evidence to support the proposed rates for these attorneys. The Court will not award fees for either.

Bhavani Raveendran. Raveendran has been an attorney about as long as Marasso and has as much civil-rights litigation experience, if not more. His rate will be set at $275/hour.

Debra Thomas. Thomas has been practicing since 2002. In this case she appears to have focused her efforts on discovery review and organization, as well as some witness preparation. Her affidavit does not evince much experience with civil rights litigation beyond her participation in this case. Though she has more lawyering years under her belt than some, her experience falls short of Blandin's or Romanucci's. The Court sets her rate at $300/hour.

Law Clerks & Paralegals. Both parties agree that this hourly rate should be $125. This rate is supported by case law, and the Court will adopt it. *See Awalt v. Marketti*, No. 11 C 6142, 2018 WL 2332072, at *4 (N.D. Ill. May 23, 2018).

Staff Assistants & Office Managers. Fees for such employees are non-compensable overhead. *See Fields*, 2018 WL 253716, at *5. These fees will not be awarded.

Carl Salvato & Paul O'Toole. These attorneys originated this litigation but quickly referred it to Romanucci & Baldwin, who acted as counsel in this case and took it to trial. Though experienced litigators, neither Salvato nor O'Toole has any attested-to

experience with civil-rights litigation. Both attorneys' rates are set at $300/hour.

Jason E. Hammond & Matt Popp. As with Rebekah Williams & Kelly Armstrong, LaPorta has not provided an affidavit or other explanatory documentation for either of these attorneys. The Court cannot assess the reasonableness of their rates, therefore, and will not award their fees.

Brendan Shiller. A few years ago, another court in this district considered Shiller's experience at some length in a different civil rights suit and settled on a rate of $385/hour, even though Shiller had done "none of the trial work" in that case. *Montanez v. Chi. Police Officers Fico (Star No. 6284), Simon (Star No. 16497)*, 931 F. Supp. 2d 869, 875-76 (N.D. Ill. 2013), *aff'd sub nom. Montanez v. Simon*, 755 F.3d 547 (7th Cir. 2014). The Court finds that discussion and Shiller's decade-plus of litigation experience instructive and sets his rate at $385/hour.

Susan Ritatta, Lillian McCartin, & Tia Haywood. The billing entries provided for these three associates suggest that nearly all of their work in this case consisted of providing deposition abstracts to Romanucci & Blandin. Such tasks are generally "left to legal assistants, who bill their time at a much lesser rate than a member of the Bar." *Lockrey v. Leavitt Tube Employees' Profit Sharing Plan*, No. 88 C 8017, 1991 WL 255466, at *6 (N.D. Ill. Nov 22, 1991) (Rovner, J.). The Court will accordingly set each of these attorneys' rates at $125/hour, an appropriate number for such work.

B. Hours Billed

The hours-worked component of the lodestar calculation excludes hours "not reasonably expended," such as hours that are "excessive, redundant, or otherwise unnecessary," *Awalt*, 2018 WL 2332072, at *1 (quoting *Hensley*, 461 U.S. at 434), as well as hours expended by counsel on tasks "that are easily delegable to non-professional assistance," *Evans v. Portfolio Recovery Assocs., LLC*, No. 15 C 4498, 2017 WL 2973441, at *3 (N.D. Ill. July 12, 2017) (quoting *Spegon v. Catholic Bishop of Chi.*, 175 F.3d 544, 553 (7th Cir. 1999)). The prevailing party has the burden of proving the reasonableness of the time expended in litigation, *Fields*, 2018 WL 253716, at *2 (citing *Hensley*, 461 U.S. at 433, 437), and that party's billing records must be sufficient to allow the court to determine as much, *Gibson*, 873 F. Supp. 2d at 986.

Chicago starts by arguing that LaPorta should not be able to recover for those hours billed before LaPorta added the *Monell* claims (after which the City removed the matter from state court). Before that point, LaPorta pursued claims against the City for "willful and wanton conduct," against Kelly for negligence, and against those bars LaPorta and Kelly visited prior to the shooting for dram shop violations. (*See generally* State Ct. Compl., Dkt. 1-1.) The City contends that the hours spent litigating these issues in state court were not reasonably related to LaPorta's ultimate success on the *Monell* claims and should be excluded from the lodestar calculation. The Court disagrees.

Though LaPorta did not take his initially-brought, state-law claims to trial, the inquiry for determining fees in light of partial success is still

instructive. That inquiry asks whether the unsuccessful (or, here, the un-pursued) claims involve "a common core of facts or [are] based on related legal theories." *Wallace v. Mulholland*, 957 F.2d 333, 339 (7th Cir. 1992) (citation and internal quotation marks omitted). In a practical sense, this inquiry contemplates how much less time LaPorta's counsel might have expended had he brought the *Monell* claim from the beginning. *See Flanagan v. Office of the Chief Judge of the Circuit Court of Cook Cty.*, 663 F. Supp. 2d 662, 670 (N.D. Ill. 2009). Though LaPorta's pre-*Monell* suit involved claims grounded in different legal theories, most of them focused on a common core of facts, and counsels' development of these facts related directly to the ultimately-raised § 1983 action. These efforts included depositions of relevant fact witnesses, including LaPorta's father and Kelly, successful litigation over the production of Kelly's IPRA file, and investigations into the shooting and LaPorta's subsequent injuries. Counsel used the fruits of all of these efforts at trial on the *Monell* claims, and the Court will not cut out the hours billed in their production. *See Gilfand v. Planey*, No. 07 C 2566, 2012 WL 5845530, at *10 (N.D. Ill. Nov. 19, 2012) (citations omitted).

Chicago's second objection carries more weight. "When a fee petition is vague or inadequately documented, a district court may either strike the problematic entries or (in recognition of the impracticalities of requiring courts to do an item-by-item accounting) reduce the proposed fee by a reasonable percentage." *Harper v. City of Chi. Heights*, 223 F.3d 593, 605 (7th Cir. 2000). The City contends that counsels' billing entries are plagued by vague and

improper entries and, as a result, should be cut from the proposed 9,588.78 hours down to 5,862.20. Though the Court disagrees with the magnitude of the City's proposed reduction, some downward adjustment is proper. What follows is a consideration of the City's objections; when LaPorta meaningfully replied to these objections, the Court considered and noted them also. When subtractions are made to specific paralegals or law clerks, the Court factored those subtractions into the "law clerk" or "paralegal" categories, given that all members of each category bill at the same rate and there was no need to break this category down by individual biller.

1. Antonio Romanucci

The City objects to 646.13 of the requested 2021.55 hours for Mr. Romanucci. The first gripe is for 400 hours he billed from 2010-2017 for emailing. Chicago suggests, and LaPorta does not contest, that Romanucci arrived at this figure by searching his inbox for emails related to this case and multiplying the resulting 4,000 emails by 0.1 hours a piece. But many of the emails required zero of Romanucci's efforts and should not be awarded, including: notices of docket entries, notices that people within Romanucci's office accepted calendar invitations for meetings, and extraneous communications unrelated to the LaPorta case. The Court sees many meritorious emails in these records, however, and attorneys must be able to communicate with the opposition and their peers in litigating a case. The Court accordingly reduces these 400 email hours by 25%, allowing 300 of them.

Next, Chicago requests that the Court cut Romanucci's 128.5 hours billed in the pre-*Monell*, state-court case, for the same reasons discussed above. As above, the Court will allow those hours over Chicago's objection.

Third, the Court agrees with Chicago that Romanucci cannot bill the 110.33 hours that are attended by only a blank time-entry.

Fourth, aside from the blank entries, Chicago objects to 18.9 hours as vague. The Court agrees; the entries Chicago identifies (*e.g.*, "Preparation of Letterhead-Blank" and "all about msj today") lack a description sufficient for the Court to judge their reasonableness. These 18.9 hours will not be allowed.

Fifth, Romanucci billed 100 hours for travel to depositions. "The presumption . . . should be that a reasonable attorney's fee includes reasonable travel time billed at the same hourly rate as the lawyer's normal working time." *Henry v. Webermeier*, 738 F.2d 188, 194 (7th Cir. 1984). However, some of Romanucci's entries seem to reflect more travel time than was warranted. In one, perhaps simply clumsy, entry, Romanucci bills 36 hours for one day's worth of combined travel, deposition, and preparation. (*See* Pl. Ex. 29A5, 1/24/17.) There are other entries in which Romanucci similarly failed to break out travel from deposition and prep time; those entries, even assuming 10 hours of prep time, still include upwards of 10 hours of travel for each. Romanucci does not clarify any of these in reply, so the Court reduces these 100 hours to 50.

Sixth, perhaps showcasing Chicago's attentiveness to Romanucci's records, the City objects

to 0.65 hours comprising three entries for "Preparation of Check Request." The Court agrees this is a ministerial task best left to an administrative assistant. The 0.65 hours will be subtracted.

Last, Romanucci billed 2.0 hours for preparing Mr. and Mrs. LaPorta for a television interview. These hours will be subtracted as well.

In all, the Court subtracts 281.88 from Romanucci's total, leaving a sum of 1,739.67 billable hours.

2. Stephan Blandin

Chicago objects to 228.3 of Blandin's 288.3 billed hours, largely on the basis that Blandin had relatively little speaking time during trial. But Blandin, a founding partner of his firm and an experienced litigator, billed for "trial strategy support" and "witness trial prep," both legitimate uses of his time, even though neither requires an in-court speaking role. That time will be allowed. Chicago concedes that the remaining 60 hours of Blandin's time, representing preparation for and participation in actual trial proceedings, are reasonable. For those reasons, all 288.3 of Blandin's hours will be allowed.

3. Gina DeBoni

Chicago attempts to nibble at the margins once more by objecting to 0.7 hours of DeBoni's 7.40 total hours for time spent reviewing a letter regarding "hand delivery of motions," for preparing a letterhead, and for reviewing her firm's retention agreement with LaPorta. Reviewing the letter and discussing the retention agreement with her client are billable tasks.

The balance are administrative and are not. The Court strikes 0.15 hours, allowing DeBoni a total of 7.25.

4. Debra Thomas

The 2,788.25 billable hours for Thomas present a sticking point for the parties; after Chicago levied its objections to her time, LaPorta expended eight pages of his thirty-five-page reply trying to knock those objections down. The Court has reviewed Thomas's underlying timesheets and agrees that her time must be substantially reduced. These hours consist of over 13,000 entries spanning 725 pages, so the Court necessarily discusses them here absent a granular level of detail. At least 12% of the entries are overly vague (including entries marked simply "work on discovery matters"), and another 8% are duplicative. In reply, LaPorta explains that Thomas was an integral part of his strategy team. But if her work was as substantive as LaPorta says, then these vague and duplicative billing entries needed to say as much. Those entries are what the client sees and form the basis for what the client pays. The Court doubts that many clients would stomach consistently vague entries attended by later, parol explanations. Chicago's other objection centers on Thomas's 72 billed hours for deposition prep, which the City contends to be superfluous given that Thomas attended only one deposition in this case. But there is no requirement that the attorneys who work on the preparation for a deposition need to actually attend. There are many tasks—writing deposition outlines prime among them—that may be completed and properly billed by an attorney other than the one who ultimately conducts the deposition. These 72 hours

will not be stricken, but the Court will reduce Thomas's hours, given the above, by 20%, resulting in an allowed total of 2,230.6 hours.

5. Michael Holden

1.45 hours of Holden's billing entries are either blank or represent simple, clerical tasks. These hours are excluded, leaving a total of 5.6 hours.

6. Bruno Marasso

The Court will not deduct any of Marasso's hours. They provide sufficient insight into his activities and, contrary to Chicago's assertions, his hours should not be docked for including internal firm conferences. Nor is Marasso's habit of block-billing prohibited (though the Court notes it is not ideal). *See Farfaras v. Citizens Bank & Tr. of Chi.*, 433 F.3d 558, 569 (7th Cir. 2006) ("Although 'block billing' does not provide the best possible description of attorneys' fees, it is not a prohibited practice."). The full 278 hours will be awarded.

7. Bhavani Raveendran

Chicago does not object to Raveendran's hours, and the Court sees in her billing sheets no reason for a deduction. Her 28.55 billable hours are allowed.

8. Martin Gould

Chicago objects to 309.85 of the requested 1,410.7 hours for Gould, but these objections are overstated: For the same reasons expressed already, the Court will not dock Gould for his time billed for intrafirm conferences or for reasonable travel time to depositions. However, Gould bills 175.3 hours all under the single description "Emails Sent: 2014-2017," which provides the Court no insight into what

Gould was communicating about, or with whom. Given Romanucci's seemingly inadvertent inclusion of irrelevant emails in his own email-time calculation, and the fact that he and Gould are attorneys at the same firm and thus are likely to share billing practices, some reduction is appropriate. As with Romanucci, the court reduces Gould's email time by 25%, resulting in 131.48 hours. The Court deducts 5% from the non-email billables for vague entries. Accounting for these subtractions, the Court allows Gould 1,305.11 hours.

9. Nicolette Ward

Ward billed 661.45 hours in this case. 41.05 of those hours had originally been attended by blank entries; upon request from the City, Ward clarified that each of those entries should read "Review of Email Correspondence." This suffers from the same deficiencies as Gould and Romanucci's email entries. The Court accordingly cuts those 41.05 hours by 25%. According to Chicago's detailed review, Ward's time also includes 118.4 hours of duplicative entries and 6.55 hours of administrative tasks (*i.e.*, "docketing"). LaPorta does not dispute those characterizations. Though the Court has not crawled through every single entry as Chicago professes to have done, the Court's review of Ward's records confirms the general accuracy of the City's count. The Court thus subtracts 50 hours for duplicative entries, as well as the 6.55 hours for administrative tasks. The result is 594.64 billable hours.

10. Law Clerk Bryce Hensley

Only one of Chicago's objections holds sway for this biller. On October 26, 2017, Hensley billed 9 hours

for "Trial/Closing." But there were no closings that day; instead, the jury deliberated in the morning and rendered their verdict in mid-afternoon. Absent any clarification from Hensley, the Court strikes 8 of those 9 hours on the understanding that Hensley came to court for the delivery of the verdict. His total allowed hours are 691.05.

11. Paralegal Keocco Larry

The Court agrees with Chicago that there are a few duplicative entries for Larry and accordingly reduces the claimed 46.6 hours to 40.6.

12. Paralegal Karle Longnion

To start, Longnion's billables will be reduced by 139.25 hours, which comprise non-compensable time for printing, scanning, preparing binders, and filing documents. *See Delgado*, 2006 WL 3147695, at *2. LaPorta also seeks recompense for 116.5 hours for the undated and unspecified preparation and issuing of subpoenas and notices. Even over lengthy litigation like this one, it strains credulity that Longnion spent over 14 days in combined manhours cranking out subpoenas. Though she might have reasonably done so, the Court cannot say she did given the sparsity of her time entries. The Court cuts the 116.5 hours by half. Finally, Longnion block-billed 174.5 hours for "preparing for and assisting at trial," again without specifying the dates or actual tasks she completed. The Court cuts these 174.5 hours by half as well. In sum, LaPorta may bill the City for 170.75 of Longnion's claimed 455.50 hours.

13. Paralegal Matt Dominguez

The City objects to one entry in which Dominguez claims to have worked 23 hours in one day on "preparing and issuing trial subpoenas." Though the City is incredulous, it is of course possible that Dominguez worked these hours in one day. But because some specificity would have been helpful to the Court's inquiry of determining whether this is a reasonable fee, however, the Court will cut those 23 by 10%. Chicago also seeks to exclude 14.73 of Dominguez's hours submitted by LaPorta only after he sought to fix other deficient entries. These the Court will not exclude. The total allowance for Dominguez is 110.88 hours.

14. Carl Salvato

Chicago's first objection to Salvato's time focuses again on those hours spent in pre-*Monell*, state-court litigation. As described above, that litigation was related to the *Monell* claims ultimately pursued in this Court, so the state-court hours will not be stricken. Next, Chicago contends that Salvato's 212.8 hours for deposition prep and attendance should be stricken because Salvato did not participate in those depositions. But again, the fact that Salvato did not conduct these depositions does not mean he played no role in preparing co-counsel or the witness for the same. These hours will be left intact. The Court will strike 3 hours relating to a meeting with press and fundraisers which bears no direct connection to litigating LaPorta's claims. LaPorta is entitled to fees for 463.6 of Salvato's 466.6 billable hours.

15. Paul O'Toole

O'Toole billed only 3 hours—these represent his meeting with the LaPorta family and walking them through signing a retainer, power of attorney, and a medical authorization form. These 3 hours are reasonable.

16. Jason Hammond & Matt Popp

As described above, the Court has set both Hammond and Popp's reasonable rates at $0/hour, so their time will be disallowed entirely.

17. Attorneys at Shiller Preyer

Brendan Shiller himself billed 51.9 hours for work on motions *in limine* and jury instructions, reviewing transcripts, and case management. His 51.9 hours will not be reduced. Nor will the collective 102.7 hours for his coworkers (attorneys Ritatta, McCartin, and Haywood, as well as paralegals), whose rates have been uniformly set at $125/hour in recognition that nearly all of their work consisted of working on deposition abstracts. *See Lockrey*, 1991 WL 255466, at *6.

C. Lodestar Adjustment

Based on the corrected hourly rates, Plaintiff's lodestar is recalculated as $2,558,991.50:

Attorney	*Hourly Rate*	*Hours*	*Total per Attorney*
from Romanucci & Blandin			
Antonio Romanucci	$550	1,739.67	$956,818.50

Stephan Blandin	$450	288.30	$129,735.00
Gina DeBoni	$350	7.25	$2,537.50
Debra Thomas	$300	2230.60	$669,180.00
Michael Holden	$325	5.60	$1,820.00
Bruno Marasso	$275	278.00	$76,450.00
Bhavani Raveendran	$275	28.55	$7,851.25
Martin Gould	$225	1305.11	$293,649.75
Nicolette Ward	$200	594.64	$118,928.00
Rebekah Williams	$0	0.00	$0.00
Kelly Armstrong	$0	0.00	$0.00
from Salvato & O'Toole:			
Carl Salvato	$300	463.60	$139,080.00
Paul O'Toole	$300	3.00	$900.00
Jason E. Hammond	$0	0.00	$0.00
Matt Popp	$0	0.00	$0.00

from Schiller Preyar:			
Brendan Schiller	$385	51.90	$19,981.50
Susan Ritatta	$125	20.60	$2,575.00
Lillian McCartin	$125	10.90	$1,362.50
Tia Haywood	$125	30.70	$3,837.50
Across All Firms:			
Law Clerks	$125	692.25	$86,531.25
Paralegals	$125	382.03	$47,753.75
Admin. Staff	$0	0.00	$0.00

Having determined the lodestar, the Court must contend with LaPorta's request for a 200% lodestar enhancement. For LaPorta, as for any prevailing party, this is a tough road to hoe. The Supreme Court has made clear that there is a "strong presumption" that the lodestar figure is reasonable, and that presumption may be overcome only "in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553-54 (2010). The party seeking enhancement bears the burden of proof and can shoulder that burden only by presenting "specific evidence that the lodestar fee would not have been 'adequate to attract competent

counsel.'" *Id.* at 554 (quoting *Blum v. Stenson*, 465 U.S. 886, 897 (1984) (citation omitted)).

LaPorta presents no such evidence but argues instead that the sizeable verdict he won reflects the excellence of his counsel, which should be rewarded with an enhancement. But "a 'reasonable' fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case. . . . not [one providing] 'a form of economic relief to improve the financial lot of attorneys.'" *Id.* at 552 (quoting *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 555 (1987)). Beyond this, the Perdue Court cautioned that neither the novelty and complexity of a case nor the quality of an attorney's performance should be used as the basis for enhancement because such considerations are normally already accounted for in the reasonable hourly rate. *Id.* at 553 (citing *Del. Valley*, 478 U.S. at 566).

In brief, LaPorta has fallen short of carrying his burden to show that this is one of those rare instances in which the reasonable fee award is not fairly calculated by the lodestar method. The request for enhancement is denied.

Absent any enhancement, the total attorneys' fee award is $2,558,991.50, as laid out above.

V. CHICAGO'S MOTION FOR REMITTITUR

Finally, Chicago moves for remittitur, arguing the $44.7 million damages award should be reduced to $28.13 million. Traditionally, trial courts may only disturb damage awards that are monstrously excessive, born of passion and prejudice, or not rationally connected to the evidence. *Fleming v. Cty.*

of Kane, 898 F.2d 553, 561 (7th Cir. 1990) (citing *Cygnar v. City of Chicago*, 865 F.2d 827, 847 (7th Cir. 1989)). Beyond this, courts must also consider whether the award is out of line with awards in similar cases. *Id.* (citations omitted). In considering Chicago's Motion, the Court keeps in mind the Seventh Circuit's admonition that the jury's verdict is entitled to deference given that the measure of damages is inherently "an exercise in fact-finding," which is the jury's province. *Matter of Innovative Constr. Sys.*, 793 F.2d 875, 877-88 (7th Cir. 1986) (citation and internal quotation marks omitted).

Specifically, the jury awarded: $12 million for past and future medical expenses; $1.5 million for past and future lost earnings; $100,000 for disfigurement; $100,000 for increased risk of harm; $12 million for past and future pain and suffering; $15 million for past and future loss of a normal life; and $4 million for shortened life expectancy. Chicago objects to the last three sums only, contending they should be remitted to $5.32 million, $7.45 million, and $1.6 million, respectively. In support of its Motion, Chicago marshals two main arguments: First, Chicago contends the jury improperly sought to punish the City, rather than simply make LaPorta whole; and second, Chicago contends that these awards are too far afield of damages awards in comparable cases. As described below, the Court is not convinced that the jury's verdict should be disturbed.

A. Whether the Jury Enhanced the Damages Award to "Send Chicago a Message"

As a municipality, Chicago is immune from punitive damages in § 1983 actions. *City of Newport v.*

Fact Concerts, Inc., 453 U.S. 247, 271 (1981). This means that when faced with a municipal defendant, juries may award only compensatory damages supported by the evidence. *See Joan W. v. City of Chicago*, 771 F.2d 1020, 1025 (7th Cir. 1985). Chicago contends that the jury in this case transgressed this rule upon invitation of LaPorta's counsel, who said the following during closing argument:

> The message has to be sent: You cannot do this again, whether it's with Patrick Kelly or any of the other officers that rise about him in the number of complaints because there are many, many more officers out there, ladies and gentleman, that are worse that Patrick Kelly.
>
> . . .
>
> And if you do not fully compensate Mike LaPorta for the harms that the City of Chicago caused, your message then will fall on deaf ears. That's what you have to do. If you want to stop and staunch the violation of constitutional rights and actually stop cases like this from coming into a courtroom, you will then award full compensation.

(Tr. 3446:4-3448:13.) Chicago objected to these selections of counsel's closing. (*Id.*) The City's argument really consists of two parts: First, that LaPorta's counsel should not have made these comments; and second, that as a result of counsel's closing sentiments or otherwise, the jury inflated their verdict to "send a message" to the City.

The Court agrees with Chicago as far as the first part of this argument is concerned. Asking the jury to send a message, even within the context of "fully compensat[ing] LaPorta, was not proper. "[C]ompensatory damages," which is all LaPorta is entitled to in this case, "are limited to actual losses and the argument that the jury should 'send a message' is a punitive damages argument." *Smith v. Rosebud Farmstand*, No. 11 CV 9147, 2017 WL 3008095, at *24 (N.D. Ill. July 14, 2017) (granting remittitur motion) (citation and internal quotation marks omitted), *aff'd sub nom. Smith v. Rosebud Farm, Inc.*, No. 17-2626, 2018 WL 3655147 (7th Cir. Aug. 2, 2018); *Martinez v. City of Chicago*, No. 14 CV 369, 2016 WL 3538823, at *14 (N.D. Ill. June 29, 2016) (ruling on motion *in limine* that plaintiff cannot ask jury to "send a message" to the City) (citations omitted). But the fact that counsel made this argument in closing does not necessarily mean the jury took up the invitation.

In *Smith*, for example, the court granted remittitur after counsel urged the jury to "send a strong message." 2017 WL 3008095, at *24. But it was not that snippet of argument alone that motivated the court to remit the damages award. Rather, the court found the improper argument likely influenced the jury based on the size of the compensatory award and "the lack of specific, articulable injuries" the plaintiff had demonstrated. *Id.* Neither of those indications is present here. As the Court discusses at some length in the section below, LaPorta's damages award, while high, was not excessive. Further, LaPorta's injuries provide a stark contrast to *Smith*. LaPorta adduced evidence at trial making pellucid the extent of his

severe and permanent injuries. Though the comments his attorney made in closing were not appropriate, the record and the verdict simply do not support the City's conclusion that the jury took those comments to heart and factored punitive damages into their compensatory award. The Court will not grant remittitur on this basis.

B. Comparison to Other Damage Awards

Though the verdict's comparison to other awards is a helpful benchmark and one the Court must consider, *Fleming*, 898 F.2d at 561; *see Deloughery v. City of Chicago*, 422 F.3d 611, 619 (7th Cir. 2005) (reciting said comparisons among other considerations generally reflected upon in ruling on remittitur motions), this factor "is not as important as the review of the evidence in the case at hand," *Adams v. City of Chicago*, 798 F.3d 539, 545 (7th Cir. 2015).

> The problem [with comparing damage awards in other cases] is that one can always find excessive force cases with verdicts at different levels. This amounts to anecdotal evidence at best. Even that kind of evidence might show that it is hard to find a single case with damages as high as the one before the court (or as low, if the appeal is taken from an allegedly inadequate verdict), but caution should be the byword when looking at past awards.

Id.

First, the predicate for comparison: At trial, the jury received evidence that since the shooting, LaPorta requires round-the-clock care. (*See, e.g.*,

P. LaPorta Tr. 1360:3-1371:7.) He has undergone nine surgeries (P. LaPorta Tr. 1357:18-20) and is afflicted with what his life-care planner described as an "all-encompassing and devastating injury" (Howland Tr. 2001:10-15). The shooting caused a traumatic brain injury, reducing LaPorta to a spastic triplegic. (Valika Tr. 1421:5-20; Howland Tr. 1997:12-17.) He is blind in one eye and deaf in one ear, and, though his condition has improved since the immediate aftermath of the shooting, he will suffer pain for the rest of his life. (P. LaPorta Tr. 1388:10-15.) Dr. Senno testified that LaPorta's life expectancy fell somewhere between 6 and 17 years. (Senno Tr. 2411:7-2412:22.)

Now, Chicago cites to a litany of comparisons for each of the three awards it challenges, though the Court is not convinced these cases demonstrate the contrast Chicago contends. The Court summarizes a selection of comparison cases below, having adjusted the verdict amounts in each to 2017 dollars—the year of LaPorta's judgment—to account for inflation.

The City argues the pain and suffering award should be reduced from $15 million to $5.32 million. Verdicts on roughly comparable facts include:

- *Christensen v. Sherman Hospital* (Ill. Cir. Ct. 2003): Quadriplegic plaintiff awarded $9.32 million for pain and suffering. (Grp. Ex. B to Remittitur Resp. at 6-7, Dtk. 460-1.)
- *Darden v. City of Chicago* (Ill. Cir. Ct. 2017): Quadriplegic plaintiff suffered a severed spinal cord, paralysis below the waist, and severe neuropathic pain and was awarded $40 million for pain and suffering, though the parties thereafter settled before the state

appellate court could weigh in on the verdict. (Grp. Ex. B at 14-15.)

- *Garner v. Carter* (Ill. Cir. Ct. 2002): Quadriplegic plaintiff without any cognitive deficits awarded $70.6M, of which $10.2M was for pain and suffering. (Grp. Ex. B at 10-11.)
- *Peterson v. Ress Enters. Inc.* (Ill. Cir. Ct. 1995): Quadriplegic plaintiff requiring 24-hour care awarded $9.7 million for pain and suffering. (Grp. Ex. B at 39-40.)

LaPorta's award for loss of a normal life was $15 million; the City contends that sum should be remitted to $7.25 million. Comparisons include:

- *Darden v. City of Chicago* (Ill. Cir. Ct. 2017): Plaintiff described above awarded $61 million for loss of a normal life. (Grp. Ex. B at 14-15.)
- *Bun v. Provena Health* (Ill. Cir. Ct. 2006): Plaintiff awarded $15.2 for loss of a normal life after a brain injury resulted in spastic quadriparesis, the inability to speak or eat, and a reduction to a vegetative state. (Grp. Ex. C at 25-26, Dkt. 460-1.)
- *White v. Christ Hospital* (Ill. Cir. Ct. 1997): Plaintiff who suffered loss of use of left arm and partial paralysis in the other arm awarded $3.05 million for loss of normal life. (Grp. Ex. C at 6.)
- *Hoffman v. Crane* (Ill. Cir. Ct. 2012): Plaintiff suffered paraplegia, vision impairment, permanent colostomy and bladder catheter, and the jury awarded her $10.66 million for loss of normal life. (Grp. Ex. C at 7-8.)

Finally, the jury awarded LaPorta $4 million for his shortened life expectancy, though they did not specify by exactly how many years they believed the shooting had shortened LaPorta's life. Dr. Senno testified that he expected LaPorta to lose 6-17 years of life. (Senno Tr. 2411:7-2412:22.) Presuming the jury credited this evidence, their award reflects somewhere between $666,666 and $235,294 per year. Chicago contends this $4 million award should be trimmed to $1.6 million, citing:

- *Skorek v. Edward-Elmhurst Healthcare* (Ill. Cir. Ct. 2017): Plaintiff awarded $7 million for 24-year loss of expected life, or roughly $292,000 per year. (Grp. Ex. D at 55-56, Dkt. 460-1.)
- *Ewing v. University of Chicago Medical Center* (Ill. Cir. Ct. 2016): Plaintiff awarded $2.83 million for loss of 18 years, or about $154,000 per year. (Grp. Ex. D at 1-2.)
- *Maldonado v. United States*, (N.D. Ill. 2010): Plaintiff awarded $505,850.00 for loss of three years, or about $169,000 per year. (Grp. Ex. D at 57.)

Within each category of damages described above, LaPorta's verdicts are among the higher awards listed, but they are not out of bounds. His pain and suffering award is about 50% higher than most of the awards described and yet is dwarfed by the $40 million award in *Darden*. Chicago contends the *Darden* plaintiff's injuries were more severe than LaPorta's, but the Court is not so sure; to any extent, that plaintiff's injuries do not seem to be LaPorta's injuries thrice-over, which is what the award amount

suggests. This type of *ex post* second-guessing is exactly the danger inherent to comparing verdicts; the exercise necessarily invites courts to step, often inappropriately, into the shoes of the jurors who already weighed the facts. This holds true for the Court's consideration of the loss of normal life award—LaPorta's award is in line with *Bun*, although that plaintiff was reduced to a vegetative state, a fate which LaPorta has evaded—and the loss of life expectancy award. The final award is particularly problematic for the Court to review given that the jury did not state with precision how many years they believed LaPorta has lost. If they believe he lost 17, then they awarded him $235,294 per year—within the range of these comparisons. If the jury believed instead that LaPorta has lost 6 years, their $666,666 per-year award is above the high end of these past verdicts. But without more guidance from the jury, the Court is left to guess after how they weighed the evidence. The Court should not and cannot take up this mantle. "'[A]wards in other cases provide a reference point that assists the court in assessing reasonableness; they do not establish a range beyond which awards are necessarily excessive.' To require that a jury's damages award be no bigger than previous awards in similar cases would make every such award ripe for remittitur. There must be room for a jury's award to exceed the relevant range of cases when the facts warrant." *Adams*, 798 F.3d at 545 (quoting *Farfaras*, 433 F.3d at 566).

In short, as described throughout this opinion, the jury heard extensive testimony concerning LaPorta's severe and permanent injuries. The Court cannot say that their award decisions were not rationally

connected to the evidence nor that they were monstrously excessive, so the remittitur motion is denied. *See Fleming*, 898 F.2d at 561.

VI. CONCLUSION

For the reasons stated herein, Chicago's Renewed Motion for JMOL (Dkt. 499) and Motion for a New Trial (Dkt. 500) are denied. LaPorta's Bill of Costs (Dkt. 490) and Petition for Fees (Dkt. 549) are both granted in part and denied in part: The Court allows LaPorta $19,160.32 in costs and awards him $2,558,991.50 in attorneys' fees. Chicago's Motion for Remittitur (Dkt. 498) is denied.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court

Dated: 8/29/2018

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

No. 14 C 9665
Judge Harry D. Leinenweber

MICHAEL A. LAPORTA, as Gardian of the Estate and Person of Michael D. LaPorta, a Disabled Person,

Plaintiff,

v.

CITY OF CHICAGO, a Municipal Corporation; and GORDON LOUNGE, INC. d/b/a BREWBAKERS,

Defendants.

September 29, 2017
ECF No. 405

MEMORANDUM OPINION AND ORDER

In a Seventh Amended Complaint, Plaintiff Michael A. LaPorta, as guardian of his disabled son Michael D. LaPorta, brings eight counts against Defendant City of Chicago ("the City") and one count against Defendant Gordon Lounge, Inc. d/b/a Brewbakers ("Brewbakers") that is not at issue here. Counts I and IX are state-law tort claims against the City, whereas Plaintiff brings Counts III through VIII under 42 U.S.C. § 1983 and *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978). Plaintiff has moved for partial summary judgment on the *Monell* claims [ECF No. 238], and the City has cross-

moved on all eight of Plaintiff's claims against it [ECF No. 241]. For the reasons to follow, the Court denies both Motions with the exception of the City's Motion as to state law Counts I and IX, which is granted. In addition, the Court bifurcates the trial so that adjudication of Count III will commence only after the jury returns a verdict on the other claims against the City.

I. BACKGROUND

The facts of this case lend themselves to an Alcoholics Anonymous pamphlet. In the wee hours of January 12, 2010, off-duty Chicago Police Officer Patrick Kelly ("Kelly") and his lifelong friend, Michael D. LaPorta ("LaPorta"), were hanging out alone at Kelly's house after a night of heavy drinking at various bars, including Brewbakers. Kelly's Sig Sauer P226 service weapon somehow discharged a single bullet into LaPorta's head, about two inches above and behind his left ear, causing LaPorta to sustain grave injuries that have left him paralyzed. (ECF No. 283 ("Def.'s Resp.") ¶ 13; ECF No. 301 ("Def.'s Resp. to Pl.'s SAUF") ¶ 2.) LaPorta maintains that Kelly shot him; Kelly and the City claim that LaPorta attempted to commit suicide using Kelly's gun; both men give sharply conflicting accounts of the events at Kelly's house on the night in question. (*See, e.g., id.* ¶ 4; ECF No. 268 ("Pl.'s Resp.") ¶ 10.) The following facts are undisputed unless otherwise noted.

Around 4:35 a.m. on January 12, 2010, Kelly placed two calls to emergency services for help, identifying himself as an off-duty officer and shouting "abusive" profanities when imploring emergency personnel to hurry. (Def.'s Resp. ¶ 14.) Kelly appeared

intoxicated to the responding paramedics and officers. (Def.'s Resp. ¶ 18.) He tried to access the ambulance by banging on its windows, causing a paramedic to fear for her safety and prompting her to yell at the other officers to secure the scene and Kelly. (*Id.* ¶¶ 19-20.) Kelly refused to step away from the ambulance; instead, he got in the face of the officer-in-charge, Sergeant Charmane Kielbasa, and hurled unsavory epithets at her (*i.e.*, "north side bitch," "whore," "motherfucker," "fucking cunt"). (*Id.* ¶ 21.) Sergeant Kielbasa detected a strong odor of alcohol on Kelly, felt threatened by him, and thought he was going to strike her. (*Id.* ¶ 23.) At approximately 4:52 a.m., Kelly was placed under arrest for assaulting her, resisted arrest, and was then tackled to the ground. (*Id.* ¶ 24.) Once placed in the back of a cruiser, Kelly tried to kick out the rear window of the vehicle and subsequently refused to heed the commands of the arresting officers, whom he deemed of insufficient rank. (*Id.* ¶ 25.) Although charged with assault, Kelly was never charged with aggravated assault or resisting arrest. (*Id.* ¶ 27.) (The court ultimately entered a directed verdict for Kelly in the assault case. (Pl.'s Resp. ¶ 37.))

Phone records indicate that, at various times just before and after the LaPorta shooting, Kelly placed and received calls from friends and personal acquaintances affiliated with CPD. The detective-in-charge on the scene eventually noticed the presence of Allyson Bogdalek, a fellow officer who had been drinking with LaPorta and Kelly the night before; he recognized her because he had previously worked for Bogdalek's father, a Chicago Police Department ("CPD") sergeant. (Def.'s Resp. to Pl.'s SAUF ¶ 31.) Melissa Spagnola, Kelly's former girlfriend, also

appeared on the scene with her uncle, a retired CPD officer, who spoke with an investigating officer about Kelly. (*Id.* ¶ 34.) Whereas LaPorta's cell phone was inventoried—and his text messages reviewed—as part of the investigation, Kelly's was not. (Def.'s Resp. ¶ 30.)

Kelly was at the scene for over an hour before he was taken to the police station and placed in a detention room. After his requests to wash his hands and use the bathroom were repeatedly denied, Kelly urinated in a corner of the detention room. (Def.'s Resp. ¶¶ 35, 37; *see also*, Pl.'s Ex. 73.) Within twenty minutes of Kelly urinating, CPD investigator Joseph Dunigan performed a gunshot residue test on Kelly's hands. (Def.'s Resp. ¶ 35; *see also*, Pl.'s Ex. 73.) Dunigan voiced disapproval that Kelly had already urinated because, as Dunigan put it, some suspects "piss on their hand" to confound the residue test. (Pl.'s Ex. 73 at 6:54.) Although the results of the test did not indicate that Kelly had gunshot residue particles on his hands, they left open the possibility that particles could have been "removed by activity." (Pl.'s Resp. ¶ 24.) Kelly then demanded that the officers call his father, John Kelly, so that his father could call a lawyer. This prompted the officers to ask, "Was your father police?" Kelly responded that "he was." (Def.'s Resp. ¶ 35.) (Kelly's father served as a CPD patrol officer from 1971 to 1979. (Pl.'s Resp. to Def.'s SAUF ¶ 14.)) Approximately eight hours after the incident—at 12:17 p.m. on January 12, 2010—Kelly took a breathalyzer test and blew a 0.093. (Def.'s Resp. ¶¶ 11, 38.) From this, Illinois State Police extrapolated Kelly's blood alcohol content to have been between 0.169 and 0.246 at the time of the shooting. (*Id.* ¶ 39.)

CPD officers interviewed a friend of LaPorta, Matthew Remegi ("Remegi"), and attempted to convince him that LaPorta shot himself. Remegi thrice responded that LaPorta would never have attempted to kill himself and eventually ended the interview because the officers persisted in their suicide theory. (Def.'s Resp. ¶¶ 42, 77.) Separately, Kelly told detectives that LaPorta was having difficulties in his personal life, including problems with his then live-in girlfriend and possible abuse of pain pills he had been prescribed in connection with a previous injury. (Pl.'s Resp. ¶ 22.)

Kelly was released from custody at around 1:20 p.m. on January 12, 2010 and did not make his compelled statement to the Independent Police Review Authority ("IPRA") until January 11, 2011—364 days after the shooting. (Def.'s Resp. ¶ 43.) Kelly told the IPRA investigator that he was an alcoholic but that he did not believe he was intoxicated on the night of the shooting. (*Id.* ¶¶ 39, 50; ECF No. 304 ("Pl.'s Resp. to Def.'s SAUF") ¶ 11.) Forensic analysis of the bullet extracted from LaPorta's skull determined that it and the fifteen bullets remaining in Kelly's service weapon were "9mm Luger + P cartridges," one of several CPD-approved types of ammunition. (Def.'s Resp. to Pl.'s SAUF ¶ 36.) The Complaint Register log for the LaPorta incident alleged that Kelly was (1) "intoxicated while off duty"; (2) "[f]ailed to secure his weapon"; (3) "[a]ssaulted Sergeant Kielbasa"; (4) "[v]erbally abused" her"; (5) "[b]rought discredit on the Department, in that he interfered with the Chicago Fire Department personnel that were attempting to treat Michael La Porta [*sic*]"; (6) "[s]hot Michael La Porta [*sic*]"; and (7) "[p]rovided false

statements to investigating police officers and detectives regarding this incident when he indicated that Michael La Porta [sic] shot himself." (Def.'s Resp. ¶ 28; Pl.'s Resp. ¶ 30.) Allegations 1 through 5 of the Complaint Register ("CR") were sustained against Kelly, meaning that they were "supported by substantial evidence to justify disciplinary action." (Def.'s Resp. ¶ 28; Pl.'s Resp. ¶ 40.) Allegations 6 and 7 were added after the IPRA investigator interviewed LaPorta's uncle, who opined that Kelly's account was not consistent with how the Sig Sauer P226 operates; neither allegation was sustained, and no criminal charges were brought against Kelly other than the aforementioned assault count. (Pl.'s Resp. ¶¶ 33-38, 41.)

The IPRA investigator ultimately recommended that Kelly receive a 180-day suspension for the sustained violations pertaining to the LaPorta shooting, but IPRA Chief Administrator Ilana Rosenzweig without any explanation commuted Kelly's suspension to 60 days. (Def.'s Resp. ¶ 49; Pl.'s Resp. ¶ 39.) In April 2010, Kelly was referred by CPD for a fitness-for-duty evaluation, and the evaluating psychologist deemed him unfit for duty. In July 2010, Kelly was re-evaluated and found fit for duty. (Pl.'s Resp. ¶ 28.) IPRA suspended its investigation into the LaPorta shooting on July 26, 2012 but moved to re-open it on July 26, 2016 after years of civil litigation. (Def.'s Resp. ¶ 47.) Kelly remains employed as a CPD officer to this day. (Def.'s Resp. ¶ 50.)

A. Kelly's History Prior to the LaPorta Shooting

Kelly began his career as a police officer on January 26, 2004, when he entered CPD's police

academy. (Pl.'s Resp. ¶ 59.) Before he could begin at the academy, Kelly had to procure an approved firearm to serve as his duty weapon pursuant to CPD general orders, and he in fact purchased the same Sig Sauer P226 used to shoot LaPorta. (*Id.* ¶¶ 46, 60.) Kelly's employee training records indicate that he passed a "Firearms Safety – Gun Locks" course on April 24, 2006. (*Ibid.*)

Kelly has a checkered history on the police force; he accumulated at least eighteen (18) CRs in the five years prior to the LaPorta shooting. (Def.'s Resp. ¶ 51.) As suggested above, there are several possible dispositions of CRs: exonerated, meaning that the incident occurred but the actions of the accused were lawful and proper; unfounded, which means that an allegation is false or not factual; not sustained, indicating insufficient evidence either to prove or disprove the allegation; no affidavit, signifying that the investigation was terminated because a sworn affidavit from the complainant was not received within a certain time; and sustained, meaning that "the allegation is supported by substantial evidence to justify disciplinary action." (Def.'s Resp. ¶¶ 62-63; Pl.'s Resp. to Def.'s SAUF ¶ 17.) The following graph lists each of Kelly's CRs prior to the LaPorta shooting alongside the date on which they were filed, the allegation, and the outcome:

No.	Incident Date	Allegation	*Disposition*/ Outcome
1	01/02/2005	Excessive force – kicking, punching, and choking arrestee	Unfounded and not sustained

2	01/19/2005	Unbecoming conduct in issuing citation	Not sustained
3	06/22/2005	False arrest	Unfounded; letter of declination signed
4	08/04/2005	Excessive force during arrest	Exonerated
5	09/19/2005	Off-duty domestic battery of Fran Brogan	Sustained, then overridden to not sustained
6	04/21/2006	Excessive force	No affidavit
7	05/13/2006	Failure to make arrest	No affidavit
8	06/12/2006	Off-duty battery of Patrick Brogan	No affidavit; letter of declination signed
9	10/08/2006	Verbal threats to citizen	No affidavit
10	10/17/2006	False traffic citation	Not sustained
11	12/05/2006	False citation	Closed and included in non-disciplinary intervention program

12	07/28/2007	Excessive force – 1 of 2 officers who kicked complainant on ground	Unfounded, but the subject of a 2008 civil lawsuit
13	08/19/2007	Unlawful search	No affidavit
14	09/05/2007	False arrest	No affidavit
15	05/18/2008	Called woman a bad mother and threatened to mace her son	Closed and included in non-disciplinary intervention program
16	06/03/2008	Failure to inventory property	No affidavit
17	12/30/2008	Excessive force – pepper spray	Unfounded
18	07/27/2009	Derogatory and racist statements	No affidavit

(Pl.'s Resp. ¶¶ 61, 64; *see also*, Pl.'s Exs. 47-48.) In addition, Kelly may have been the subject of a further CR regarding an incident on September 23, 2008 in which five complainants alleged that officers unknown physically mistreated them and forced one of them onto the ground, stepped on his neck, and handcuffed him too tightly. (Pl.'s Resp. ¶¶ 61-63; Pl.'s Ex. 47 at RFC-LaPorta 21088-89.) That CR was closed because of "no affidavit." (Pl.'s Ex. 47 at RFC-LaPorta 21090.)

CRs 5 and 8 concern two instances of Kelly's off-duty violent conduct. The predicate of CR 5 was a

domestic violence incident in which Kelly first shoved to the street his then-girlfriend, Fran Brogan, with whom he was living, after the two had been out drinking at a bar. A sergeant and two officers were in the vicinity, witnessed the incident, confronted Kelly, and told him to go home. When Brogan returned home from the bar, Kelly pushed her to the ground, kicked her, and struck her with some sort of object. The beating left Brogan bloodied; she sustained an abrasion on her nose, a contusion on her right elbow, and a head wound that ultimately required stitches. (Def.'s Resp. ¶ 61; Pl.'s Resp. ¶¶ 67-68; *see also*, Pl.'s Ex. 49.) Brogan signed an affidavit to move the CR forward with the Office of Professional Standards ("OPS"), the precursor to IPRA; but she declined to pursue criminal charges against Kelly. Under Illinois law and CPD policy, officers can still make arrests for domestic battery in the absence of a criminal complaint if there are visible injuries. (Def.'s Resp. ¶ 71.) An OPS official investigated the CR, interviewed both Kelly and Brogan, and noted that Kelly's "responses regarding the unknown officers confronting him on the street bring question to his overall credibility" and that his "responses regarding the physical altercation inside the residence also bring question to his overall credibility." (Pl.'s Resp. ¶ 69; *see also*, Pl.'s Ex. 52 ("Morris Dep.") at 80:17-81:9 (reciting three instances in which OPS investigators found Kelly's credibility lacking).) This official recommended that Brogan's CR be sustained, and his supervisor agreed. (Def.'s Resp. ¶ 62.) However, OPS Chief Administrator Tisa Morris overrode their recommendation, deciding not to sustain the CR but providing no specific evidentiary basis for doing so.

(Def.'s Resp. ¶ 63; Pl.'s Resp. ¶ 70; Pl.'s Ex. 53; *see*, Morris Dep. at 122:9-14.) Kelly was never arrested or subjected to criminal prosecution for this incident.

CR 8 pertains to a second off-duty episode of alcohol-induced violence, this time involving Kelly and Fran Brogan's brother, Patrick Brogan. Kelly was out at a bar drinking with both Brogans but went home early to Fran Brogan's house. When the others returned, Kelly and Patrick Brogan got into a verbal argument; Kelly threw a TV remote at his head, resulting in a broken nose and a laceration above his right eye. (Def.'s Resp. ¶ 68; Pl.'s Resp. ¶ 72.) Kelly was arrested for simple battery, and Patrick Brogan signed off on a criminal complaint for battery. However, Patrick Brogan decided not to proceed with the CR, refusing about eight days after the incident to sign a sworn affidavit and instead signing a letter declining to pursue the matter further. (Def.'s Resp. ¶ 69; *see*, Def.'s Ex. 55.) The charges against Kelly were dropped.

For none of the 18 (or potentially 19) CRs recited above was Kelly disciplined. (Def.'s Resp. ¶ 55; Def.'s Resp. to Pl.'s SAUF ¶ 7.) Kelly was recommended for CPD's Behavioral Intervention System ("BIS") after CRs 5 and 8 but never for its Personnel Controls ("PC") program; both programs are non-disciplinary systems that seek to identify officers with a pattern of behavioral problems and provide them with corrective counseling. (Def.'s Resp. ¶¶ 56-58, 103.) The PC program, however, addresses and tracks more serious conduct for later disciplinary action. (*Id.* ¶ 103.) At some point after CRs 5 and 8, Kelly was referred for a fitness-for-duty evaluation and found unfit for duty on

June 30, 2006. (Pl.'s Resp. ¶¶ 73-74.) Pursuant to applicable provisions of the operative collective bargaining agreement ("CBA"), Kelly then obtained his own psychological evaluation to challenge the unfitness finding and convinced an arbitrator that he was fit for duty. (*Ibid.*)

Evidence in the record points to other indications prior to the LaPorta shooting that Kelly's drinking problem imperiled both his work as a police officer and his obligation to secure his gun. For instance, LaPorta's mother testified that Kelly bragged to her "about attending a motor vehicle test for the Chicago Police Department while being very intoxicated and, as a result, injuring his foot." (Def.'s Resp. ¶ 77; Pl.'s Ex. 58 ("P. LaPorta Dep.") at 120:1-8; *see*, FED. R. EVID. 801(d)(2)(D).) LaPorta's mother also overhead conversations between Kelly and LaPorta in 2006, 2007, and 2008 in which Kelly, after realizing that he had left his service weapon at Brewbakers the night before, asked LaPorta to accompany him to the bar to retrieve it. (Def.'s Resp. ¶ 77; P. LaPorta Dep. at 126:17-131:17; *see*, FED. R. EVID. 803(1).) The extent of the City's knowledge of this behavior is unclear.

B. Evidence Concerning CPD's Policies and Practices

Rule 14 of CPD's Rules and Regulations prohibits false reporting. Of the 203 CPD employees with sustained Rule 14 CRs from 2004-2011, 60 of them (approximately 30 percent) resigned or were discharged. The others suffered no sanction, were reprimanded, or were suspended. (Def.'s Resp. ¶ 82; Pl.'s Resp. to Def.'s SAUF ¶¶ 21, 26.) Rule 15 prohibits "intoxication on or off duty." (Def.'s Resp. ¶ 10.) Rule

22 prohibits failure to report to the CPD any violation of Rules or Regulations or other improper conduct that is contrary to the policies, orders, or directives of the department. (Pl.'s Resp. to Def.'s SAUF ¶ 26.) General Order U04-02 provides that an officer is to "secure their prescribed duty weapon when the prescribed duty weapon is not on their person." (*Id.* ¶ 12; Pl.'s Resp. ¶ 46.)

According to Chicago records, over 45 percent of complaints against CPD officers between 2004 and 2011 closed with a finding of "no affidavit." (Def.'s Resp. ¶ 94; Def.'s Resp. to Pl.'s SAUF ¶ 15.) Of the 968 domestic battery complaints lodged against CPD officers from 2004-2011, 22 percent were dismissed for no affidavit and 17 percent were sustained. Approximately 20 percent of these sustained CRs resulted in the resignation or discharge of the officer involved; the other 80 percent entailed discipline ranging from no action to reprimand to days of suspension. Thus, 3 percent of all domestic battery CRs during this timeframe resulted in the accused officer's separation from CPD employment. (Def.'s Resp. ¶ 81.)

The operative CBA negotiated between the City Council and the Fraternal Order of Police provides—consonant with Illinois law—that any complaint against an officer must be supported by a sworn affidavit from the complaining witness. (Def.'s Resp. ¶ 90.) The CBA also requires removal from an officer's record of any sustained complaint of misconduct not accompanied by disciplinary action within the last year. (*Id.* ¶ 94.) The CBA further affords an officer 24 hours after an officer-involved shooting to give a

statement and permits officers to review audio and video evidence before doing so. (*Id.* ¶ 95; Def.'s Resp. to Pl.'s SAUF ¶ 16.) Under the CBA, Internal Affairs investigators cannot look back at an officer's complaint history unless a complaint is sustained and may only use a sustained complaint for progressive discipline. (*Id.* ¶ 108.) In 2010 and years prior, officers accused of non-shooting misconduct were not interviewed until the end of the investigation—after all other evidence had been gathered. (*Id.* ¶ 96.)

Chicago Mayor Rahm Emmanuel in a 2015 speech to the City Council admitted that a "code of silence" pervades CPD pursuant to which certain officers exhibit a "tendency to ignore, deny or in some cases cover up the bad actions of a colleague or colleagues." (Def.'s Resp. ¶¶ 83-85; Def.'s Resp. to Pl.'s SAUF ¶ 11.) Additionally, the City created the Police Accountability Task Force ("PATF") to review CPD's system of training, oversight, discipline, and transparency. PATF released a report with its recommendations for reform in April 2016, finding "that the code of silence is not just an unwritten rule, or an unfortunate element of police culture past and present," but instead is "institutionalized and reinforced by CPD rules and policies that are also baked into the labor agreements between the various police unions." Other witnesses in this case, including Assistant State's Attorney Lynn McCarthy, have prosecuted cases involving police officers committing official misconduct, obstruction of justice, or perjury to cover up for themselves or other officers. (Def.'s Resp. ¶ 88; Def.'s Resp. to Pl.'s SAUF ¶ 13.) The City produced a Rule 30(b)(6) deponent on behalf of the City Council (as policymaker for the City), Alderman

Joseph Moore, who admitted to the existence of the code of silence within the CPD prior to 2011. In his estimation, "it would be a safe bet" that many members of the City Council would have been familiar with the code of silence as far back as 2007. (Def.'s Resp. ¶¶ 89, 98; Moore Dep. 161:1-5.) Yet Tisa Morris, Chief Administrator of OPS from 2004 to 2007, testified in this case that she had "never thought about [the code of silence]." (Def.'s Resp. ¶ 87.)

Alderman Moore testified in this case that the City Council created IPRA ostensibly to "tighten up the procedures" with respect to officers exhibiting patterns of abuse. (Def.'s Resp. ¶ 97.) Yet, since IPRA's inception, the rate of sustained CRs against officers in excessive force cases has decreased, and less than 1 percent of officer-involved shootings from 2007 through 2014 were found unjustified. (Def.'s Resp. ¶ 99.) Alderman Moore recalled that "[w]e certainly were aware" of "concerns that the union contract impeded the ability of OPS to conduct fair and thorough investigations." (*Ibid.*; Pl.'s Ex. 66 ("Moore Dep.") at 149:3-24.) He stated that IPRA was similarly "impeded somewhat by the police contract that prevented referencing previous complaints, unfounded—you know, complaints that were either not pursued or were deemed unfounded." (Def.'s Resp. to Pl.'s SAUF ¶ 17.)

Between 2004 and 2007, OPS did not have an early warning system in place (although the Bureau of Internal Affairs may have assumed similar functions), and attempts in 2006 to put a new BIS in place met with resistance from the Fraternal Order of Police. (Def.'s Resp. ¶ 104.) After IPRA set up its own BIS and

PC programs in 2007, participation plummeted: in 2007, 276 officers were included in one of the two programs; in 2008, this number dropped to 219 and continued to plunge so that, by 2013, no officers were being actively managed through either program. (*Id.* ¶ 105.) An IPRA deponent in this case stated that he was unaware of an early warning system in place at IPRA, and Morris testified that she does not know what a behavioral intervention system is. (*Id.* ¶ 106.) What is more, an IPRA supervisor also testified that she has never received training on how to identify patterns of officer misconduct. (Def.'s Resp. to Pl.'s SAUF ¶ 28.)

Finally, on January 13, 2017, the United States Department of Justice and United States Attorney's Office for the Northern District of Illinois issued a report entitled "Investigation of the Chicago Police Department" (the "DOJ report"). Among other things, the DOJ report found that CPD's "early intervention system" exists in name only, does not assist in identifying or correcting problematic behavior, and does not use "long-available supervisory tools, such as a comprehensive early intervention system (EIS), to identify patterns of concerning officer behavior and prevent patterns of misconduct and poor policing from developing or persisting." (Def.'s Resp. ¶ 110.) Advances in technology and reform for the BIS and PC programs were allowed to "wither on the vine" or were never implemented. (*Id.* ¶ 103.) The report further concluded that "[t]he City, police officers, and leadership within CPD and its police officer union acknowledge that a code of silence among Chicago police officers exists, extending to lying and affirmative efforts to conceal evidence." (*Id.* ¶ 100;

Def.'s Resp. to Pl.'s SAUF ¶ 14.) It noted that IPRA "treat[s] such efforts to hide evidence as ancillary and unexceptional misconduct, and often do[es] not investigate it, causing officers to believe there is not much to lose if they lie to cover up misconduct." (*Id.* ¶ 101.) The entities of accountability, according to the DOJ report, accept the "cover-up culture" as "an immutable fact rather than something to root out." (*Id.* ¶ 102.)

II. LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating summary judgment motions, the Court must view the facts and draw reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). It does not make credibility determinations as to whose story is more believable, *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 704 (7th Cir. 2011), and considers only evidence that can be "presented in a form that would be admissible." FED. R. CIV. P. 56(c)(2).

III. ANALYSIS

Plaintiff asserts five separate *Monell* claims against the City, alleging that the existence of the following widespread policies, practices, or customs of the City proximately caused LaPorta's injury: a code of silence that conceals officer misconduct (Count IV); failure to maintain an early warning system

(Count V); failure to investigate officer misconduct (Count VI); failure to discipline officers who commit misconduct (Count VII); and failure to terminate Kelly for misconduct (Count VIII). Plaintiff's attempt to establish liability of the City involves showing a "widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well-settled as to constitute a 'custom or usage' with the force of law." *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1013 (7th Cir. 2000). Along with those *Monell* claims, Plaintiff brings against the City a count under 42 U.S.C. § 1983 for denial of his right to access the courts (Count III) and two state-law tort claims (Counts I and IX).

Plaintiff has moved for summary judgment on all five *Monell* claims, and the City has cross-moved on all Plaintiff's claims against it.

A. Plaintiff's Motion for Partial Summary Judgment

To establish a *Monell* claim, a plaintiff must show that he or she suffered a deprivation of a constitutional right proximately caused by either (1) an express municipal policy; (2) a widespread common practice that by virtue of its ubiquity constitutes a *de facto* custom or usage with the force of law; or (3) a deliberate act of a decision-maker with final policymaking authority. *See, Rossi v. City of Chicago*, 790 F.3d 729, 737 (7th Cir. 2015). In addition to showing that the municipality acted culpably in one of those three ways, the plaintiff must prove causation by demonstrating that the municipality "is the 'moving force' behind the deprivation of constitutional

rights." *Glisson v. Ind. Dep't of Corrs.*, 813 F.3d 662, 667 (7th Cir. 2016) (quotation omitted).

Plaintiff's five *Monell* claims against the City challenge separate facets of the City's relevant conduct towards officers in general and Kelly in particular. The nub of these claims is that CPD's code of silence and its failure to investigate officer misconduct and impose appropriate discipline, including termination, were pervasive *de facto* policies, practices, or customs that encouraged and emboldened Kelly to continue committing off-duty alcohol-fueled violence against people close to him. Thus, the gravamen of Plaintiff's *Monell* theory is "that it is the unwritten policy and practice in the CPD to protect and shield off-duty police officers who commit violence against citizens, and that because of this institutionalized differential treatment, off-duty officers are encouraged to believe that they can use violence with impunity." *Garcia v. City of Chicago*, No. 01 C 8945, 2003 WL 1715621, at *6 (N.D. Ill. Mar. 20, 2003).

Plaintiff's Motion for Partial Summary Judgment founders on the threshold § 1983 requirement of a constitutional injury. *See, e.g., Sims v. Mulcahy*, 902 F.2d 524, 538 (7th Cir. 1990) ("[A]n essential element of recovery under 42 U.S.C. § 1983 is the demonstration of a deprivation of a constitutionally protected right."). The crux of the case for *Monell* liability here—although the issue tellingly receives short shrift in Plaintiff's briefs—is that LaPorta's substantive due process right to bodily integrity was violated when he was shot in the head. (*See*, ECF No. ("Pl.'s Mem.") at 6-7.) While true that "[t]he

protections of substantive due process have for the most part been accorded to matters relating to . . . the right to bodily integrity," *Albright v. Oliver*, 510 U.S. 266, 272 (1994), a particular bodily invasion triggers substantive due process protections only if a governmental actor can be said to have committed it. *See, e.g., Wragg v. Village of Thornton*, 604 F.3d 464, 467 (7th Cir. 2010) ("Klaczak was a governmental actor, not a private actor, as he undisputedly committed the abusive acts against Wragg in the line of his duty as a fire chief. So Wragg had a substantive due process right not to be harmed by Klaczak.") (internal citation omitted); *Strong v. Wisconsin*, 544 F.Supp.2d 748, 760 (W.D. Wis. 2008) ("[T]he 'liberty' guaranteed by the Fourteenth Amendment includes freedom from personal intrusion *by the government* . . . .") (emphasis added) (citations omitted). And even a bodily invasion by a government actor does not necessarily suffice for a constitutional violation. For example, it is not the fact of being shot by a police officer but the circumstances giving rise to the shooting that determine whether the victim suffered deprivation of a constitutional right. *See, e.g., Jenkins v. Bartlett*, 487 F.3d 482, 491-93 (7th Cir. 2007) (affirming preclusion of plaintiff's *Monell* claim in light of jury's finding that police shooting victim's constitutional rights were not violated when officer shot and killed him as he attempted to flee custody); *accord, Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 853-54 (1998) (holding that high-speed police chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to § 1983 liability under Fourteenth Amendment for deprivation of substantive due process).

At the heart of this case is whether Kelly (either accidentally or intentionally) shot LaPorta with his service weapon or whether LaPorta attempted to commit suicide by shooting himself with Kelly's (either secured or unsecured) service weapon. Both parties proffer expert testimony on the question of who shot whom, the weight of which is for the jury to evaluate. What is pellucid is that this pointed factual dispute dooms Plaintiff's Motion because "a municipality cannot be liable under *Monell* when there is no underlying constitutional violation by a municipal employee." *Sallenger v. City of Springfield, Ill.*, 630 F.3d 499, 504 (7th Cir. 2010); *see also*, *Los Angeles v. Heller*, 475 U.S. 796 (1986). Plaintiff has pointed to no authority for the proposition that an individual's choice to harm himself can as a matter of law constitute a substantive due process violation. *See, Reno v. Flores*, 507 U.S. 292, 303 (1993) ("The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it."). Indeed, the only cases the Court could uncover involving § 1983 claims arising out of a plaintiff's suicide occurred in the context of detention officials alleged to have violated the *Eighth* Amendment because they were subjectively aware that a detainee constituted a suicide risk, *see, e.g., Collins v. Seeman*, 462 F.3d 757 (7th Cir. 2006), or exposed the detainee to a greater risk of suicide, *see, e.g., Collignon v. Milwaukee Cnty.*, 163 F.3d 982 (7th Cir. 1998). Such a "special relationship" of custody is conspicuously absent here.

Doubtless Plaintiff will object that, at the motion-to-dismiss stage, the Court found sufficient to state a claim the allegations that "Kelly's service weapon discharged while Kelly and LaPorta were alone at

Kelly's residence, and that a bullet from the weapon struck LaPorta in the back of the head." *LaPorta v. City of Chicago*, 102 F.Supp.3d 1014, 1020 (N.D. Ill. 2015). However, a claim's plausibility is different in kind from its sufficiency to entitle the plaintiff to summary judgment. Consistent with the Court's prior analysis, "a serious injury resulting in disability" does indeed "rise[] above a trivial battery" and can suffice to establish a violation of the "constitutionally protected right to bodily integrity." *Ibid.* But the evidence at summary judgment must suffice to show that the alleged battery was, in fact, a battery—that is, an unconsented-to offensive touching of the plaintiff by another.

The Court acknowledges some authority cabining *Heller*'s rule that a municipality is not liable in damages for its employees' actions that inflicted no constitutional harm. In some circumstances, an individual official or employee need not deprive the plaintiff of constitutional rights for *Monell* liability to attach to the municipality for its deprivation of the plaintiff's constitutional rights. For example, in *Fagan v. City of Vineland*, 22 F.3d 1283 (3d Cir. 1994), the court held that "a municipality can be liable under section 1983 and the Fourteenth Amendment for a failure to train its police officers with respect to high-speed automobile chases, even if no individual officer participating in the chase violated the Constitution." *Id.* at 1292-94. Nonetheless, the court firmly reiterated that "[t]he plaintiff must also show that the city's policy actually caused a constitutional injury." *Id.* at 1291 (citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389-90, 392 (1989)). Similarly, in *Speer v. City of Wynne, Ark.*, 276 F.3d 980 (8th Cir. 2002), the

court noted that "situations may arise where the combined actions of multiple officials or employees may give rise to a constitutional violation, supporting municipal liability, but where no individual's actions are sufficient to establish personal liability for the violation." *Id.* at 986; *cf., Alexander v. City of South Bend*, 433 F.3d 550, 557 (7th Cir. 2006) (noting that a municipality may not be held liable under *Monell* for failure to supervise its police officers when the plaintiff fails to demonstrate *any* constitutional violation); *Mendez v. Vill. of Tinley Park*, No. 07 C 6498, 2008 WL 427791, at *2 (N.D. Ill. Feb. 14, 2008) ("However, since *the incident* did not involve a deprivation of a federally guaranteed right, the facts do not support a *Monell* claim.") (Leinenweber, J.) (emphasis added).

Viewed in the light most favorable to the non-movant—here, the City—the undisputed facts here present no analogue to Fagan or Speer. First, if Kelly culpably failed to secure his service weapon at his home, then unlike in *Fagan*, he was not "following a city policy reflecting the city policymakers' deliberate indifference to constitutional rights." *Fagan*, 22 F.3d at 1292. On the contrary, no one disputes that the City *de jure* requires off-duty officers to secure their service weapons. Second, even if the jury were to find that Kelly failed to secure his service weapon pursuant to some negligent non-enforcement of the City's express gun storage policy, there would still be no colorable claim that this policy deprived LaPorta of a substantive due process right. *See, e.g., Lewis*, 523 U.S. at 848-49 ("We have . . . rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have

held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.") (citation omitted); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197 (1989) ("[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."). Alas, the Supreme Court has "always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins v. Harker Heights, Tex.*, 503 U.S. 115, 125 (1992) (citation omitted). Third, whatever it demonstrates about the City's knowledge of Kelly's penchant for on-duty misconduct and off-duty drunken violence, the record does not clearly establish that the City was deliberately indifferent to the harm that might befall suicidal persons with whom Kelly came into contact. *Board of Cnty. Comm'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 410 (1997) ("[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.") (internal quotation marks omitted). Specific to Kelly, Plaintiff has adduced no evidence that anyone other than LaPorta and his mother knew of his history of improperly leaving his service weapon at bars or that any of his CRs prior to the LaPorta shooting concerned improperly securing his firearm.

What is more, the Seventh Circuit has distinguished *Heller* based on *Speer* in a fashion that shows why Plaintiff is not entitled to summary judgment. In *Thomas v. Cook Cnty. Sheriff's Dep't*, 604

F.3d 293 (7th Cir. 2010), the court rejected the defendant's argument that *Heller* precludes finding a municipality liable under *Monell* where none of its employees violated the plaintiff's constitutional rights. The court noted *Heller*'s absence of "any affirmative defenses that the individual officer may have asserted":

> The absence of these defenses is significant. If, for instance, the officer had pled an affirmative defense such as good faith, then the jury might have found that the plaintiff's constitutional rights were indeed violated, but that the officer could not be held liable. In that case, one can still argue that the City's policies caused the harm, even if the officer was not individually culpable. Without any affirmative defenses, a verdict in favor of the officer necessarily meant that the jury did not believe the officer violated the plaintiff's constitutional rights. And since the City's liability was based on the officer's actions, it too was entitled to a verdict in its favor.

Id. at 304-05 (citation omitted). Hence the Seventh Circuit's holding in *Thomas* that "the jury could have found that the CMTs were not deliberately indifferent to Smith's medical needs, but simply could not respond adequately because of the well-documented breakdowns in the County's policies for retrieving medical request forms." *Ibid.* Irrespective of any municipal employee's conduct, the plaintiff in *Thomas* still suffered a cognizable deprivation of his substantive due process rights at the hands of the challenged City policy. Yet these two facets of *Thomas*

do not obtain in this case. As explained above, absent being shot by Kelly, LaPorta was not deprived of his right to bodily integrity merely because shortcomings in the City's enforcement of its gun storage policy may have enabled him to access Kelly's service weapon more readily. And if Kelly did pull the trigger, then he could have no recourse to the kind of good faith or qualified immunity defenses that would otherwise suspend *Heller*'s operation.

Even holding all this in abeyance, there remains at the very least a substantial question whether the City's challenged policies were the "moving force" behind any purported constitutional violation. Such questions of proximate causation are best left to the jury outside of extreme cases lacking any quantum of causation evidence. *Thomas*, 604 F.3d at 303 ("[T]he jury must make a factual determination as to whether the evidence demonstrates that the [City] had a widespread practice that [caused] the alleged constitutional harm.").

Because the City can be liable only if it or Kelly violated one of LaPorta's constitutionally guaranteed rights—and the undisputed facts in the record do not establish that LaPorta suffered deprivation of a constitutional right—Plaintiff is not entitled to judgment as a matter of law on any of his *Monell* claims. Thus, Plaintiff's Motion for Partial Summary Judgment is denied.

B. The City's Motion for Summary Judgment

1. The Federal Section 1983 Claims (Counts III through VIII)

a. The *Monell* Claims (Counts IV through VIII)

As stated above, Plaintiff challenges CPD's code of silence and its failure to investigate officer misconduct and impose appropriate discipline as pervasive *de facto* policies, practices, or customs that encouraged and emboldened Kelly to continue committing off-duty violence against people close to him. Plaintiff factors heavily in the causation calculus Kelly's incident of domestic violence against Fran Brogan; because this alone furnished grounds for criminally prosecuting or at the very least firing Kelly, Plaintiff claims, Kelly would not have had his service weapon on the night in question.

The City parries the lunge of Plaintiff's *Monell* claims with a mélange of arguments. The City contends that LaPorta suffered no deprivation of a due process right because, regardless of who shot LaPorta, Kelly was not acting under color of law and there is no duty to protect citizens from private violence. The City also argues that Plaintiff fails to adduce evidence sufficient to show the existence of the policies, practices, or customs in question—namely, the code of silence and the lack of sufficient supervisory and disciplinary measures. Next, according to the City, Plaintiff fails to show that the City acted with deliberate indifference, as required for Plaintiff to make out a *prima facie* case on his failure-to-discipline *Monell* claim. Finally, the City argues that no reasonable jury could find that any of its policies,

practices, or customs proximately caused LaPorta's injuries.

I. Constitutional deprivation

The City first levels a challenge to Plaintiff's showing of a constitutional deprivation. Per the Court's earlier analysis, the summary judgment record only permits imposing liability on the City if Kelly shot LaPorta; a non-detained individual's self-harm is not an actionable constitutional harm. The City repeatedly maintains that the identity of LaPorta's shooter is not a material fact because, even if it was Kelly, he was not acting under color of law at the time, a requirement of § 1983. Because Kelly was thus a private citizen, the City claims, it had no affirmative duty to protect LaPorta from Kelly's acts under *DeShaney*.

The City's color-of-law argument dies a swift death at the hands of *Gibson v. City of Chicago*, 910 F.2d 1510, 1519 (7th Cir. 1990). In that § 1983 action, the Seventh Circuit found that a police officer on medical leave as mentally unfit for duty and in receipt of a specific order to cease using police powers was not acting under color of law when he shot the victim. It nonetheless held that the City was not entitled to summary judgment because it was the City's policy of allowing the deranged police officer to retain his service revolver and bullets that the plaintiff challenged under *Monell*. *See, id.* at 1517-20 ("Gibson contends that the City's policy of allowing a deranged police officer to retain his service revolver and bullets is the state action that deprived him of his life. Consequently, the City is not entitled to summary judgment on the ground that [the officer] did not act

under color of state law.") As the Seventh Circuit noted, the officer need not have been acting under color of law at the time of the accident because, in this flavor of *Monell*, the "municipality itself is the state actor and its action in maintaining the alleged policy at issue supplies the 'color of law' requirement under § 1983." *Id.* at 1519.

The City characterizes *Gibson* as either bad law or factually distinguishable from the case at bar. (*See*, Def.'s Mem. at 10-13 (arguing that "*Gibson* is a derelict in the stream of the law" (internal quotation marks omitted)).). But all the salient data points plot a course consistent with *Gibson*, declining to impose a color-of-law requirement where the municipal policy under which the official proceeded is alleged to have itself caused the injury. *See, e.g., Cazares v. Frugoli*, No. 13 C 5626, 2017 WL 1196978, at *13-14 (N.D. Ill. Mar. 31, 2017) (holding that *Gibson* precluded any color-of-law escape hatch where plaintiff claimed under *Monell* that the City's code of silence and failure to investigate and impose discipline for officer misconduct emboldened an off-duty officer to drive drunk in his personal car, thereby causing the injuries of victims whom he struck and killed); *Almaguer v. Cook Cnty.*, No. 08 C 587, 2012 WL 4498097, at *6 (N.D. Ill. Sept. 27, 2012) ("A conclusion that an individual state employee did not act under color of state law does not allow for summary judgment on a municipal liability claim."), *on reconsideration in part*, No. 08 C 587, 2013 WL 388992 (N.D. Ill. Jan. 31, 2013), *aff'd sub nom. Wilson v. Cook Cnty.*, 742 F.3d 775 (7th Cir. 2014); *Obrycka v. City of Chicago*, No. 07 C 2372, 2012 WL 601810, at *6 (N.D. Ill. Feb. 23, 2012) (holding that, in a *Monell* claim, "the municipality

itself is the state actor and its action in maintaining the alleged policy at issue supplies the 'color of law' requirement under § 1983.") (citing *Gibson*, 910 F.2d at 1519-20); *Garcia*, 2003 WL 1845397, at *2 (same).

In the same vein, the City's invocation of *DeShaney* for the principle that it had no duty to protect LaPorta from purely private violence misconstrues Plaintiff's *Monell* claim. "*DeShaney* is not the appropriate legal framework with which to analyze Plaintiffs' *Monell* claims, which allege that the City's policies caused the harm." *Cazares*, 2017 WL 1196978, at *14-15; *see also*, *Rossi*, 790 F.3d at 734, 737 (declining to evaluate under *DeShaney* plaintiff's *Monell* claims that CPD's code of silence "shields police officers from investigation and promotes a culture of misconduct among police that contributed to his assault"); *Obrycka*, 2012 WL 601810, at *6 (examining plaintiff's claims that CPD's code of silence caused her constitutional deprivation "under the *Monell* framework and not *DeShaney*"). While *DeShaney* may retain force on the City's version of the disputed facts, in which LaPorta attempted to commit suicide by shooting himself with Kelly's gun, this is not the litmus test for summary judgment to the City.

Wilson-Trattner v. Campbell, 863 F.3d 589 (7th Cir. 2017), is not to the contrary. There, the Seventh Circuit upheld the district court's grant of summary judgment to individual officers on the plaintiff's substantive due process claim under the *DeShaney* framework. But that case is distinguishable both legally and factually. The court there never once mentioned "*Monell*" liability or the plaintiff's claims

against the officers' police departments; this is because the district court was presented only with the summary judgment motions of the individual officers. Factually, too, *Wilson-Trattner* does not control here; there, the plaintiff challenged the adequacy of defendants' response to her repeated complaints of domestic abuse at the hands of an off-duty police officer. As the Court more fully explores in adjudicating Plaintiff's state-law claims, this case does not involve the structural adequacy of police responses to emergencies. (*See*, Section III.B.2, *infra*.)

Thus, the Court does not analyze Plaintiff's *Monell* claims under *DeShaney*'s state-created danger exception. Instead, to establish liability against the City, Plaintiff need only show that LaPorta suffered a deprivation of a constitutional right, the "moving force" behind which was the challenged City policy, practice, or custom. *Teesdale v. City of Chicago*, 690 F.3d 829, 833 (7th Cir. 2012) (quotation omitted). Because whether LaPorta's substantive due process right to bodily integrity was violated is thus a disputed issue of material fact precluding summary judgment, the Court next turns to the City's arguments concerning the policies themselves and proximate causation.

II. Widespread customs, policies, or practices

Plaintiff attempts to establish his *Monell* claims by presenting evidence that the City has a well-settled, widespread practice or custom of impeding or interfering with police misconduct investigations and that an attendant code of silence pervades CPD whereby officers conceal each other's misconduct in contravention of their sworn duties. Plaintiff submits

that the *de facto* policies and code of silence trace to CPD's and the City's failures to investigate allegations of police misconduct, to maintain an early warning system, to enforce regulations against its own officers related to assaulting citizens and being intoxicated, to accept citizen complaints against police officers more readily, to interview suspected officers promptly or take witness statements and preserve evidence, and to discipline officers adequately. According to Plaintiff, many of these failures are exacerbated by or attributable to provisions of the operative CBA between the City Council and the Fraternal Order of Police that require, for example, a sworn affidavit of the complainant for CR investigations to proceed and removal of sustained complaints of misconduct from a CPD officer's records if they are accompanied by no disciplinary action.

The City, however, contends that there is no genuine issue of material fact as to whether it had a widespread custom, policy, or practice of failing to investigate and discipline officers or a code of silence. It claims that Plaintiff has not shown the code of silence at work during the investigation of the LaPorta shooting, in other complaints against Kelly, or in other facets of CPD's operation.

Viewing the facts and the inferences therefrom in the light most favorable to Plaintiff (the non-movant), the Court first finds that the aftermath of the LaPorta shooting supports a reasonable inference that CPD officers engaged in the code of silence when interacting with Kelly. For example, Plaintiff has adduced evidence that Kelly should have been charged with aggravated assault and resisting arrest for his

actions associated with Sergeant Kielbasa. There is also disputed evidence that Kelly placed several calls after the shooting to individuals variously connected with law enforcement and CPD, leading to the presence and intercession of some of these individuals on the scene. *See, e.g., Obrycka*, 2012 WL 601910, at *8 ("Moreover, other evidence in the record supports Obrycka's code of silence theory, including the fact that after [the officer] punched and kicked Obrycka and realized that his conduct was videotaped, [the officer] and his partner made dozens of telephone calls to each other and other Chicago police officers, including police detectives.") Plaintiff also adduced evidence that Kelly's conduct at the police station prior to administration of the gunshot residue test—particularly, his urinating in the detention room—would have been viewed with far greater scrutiny had Kelly not been a CPD officer. Another salient piece of evidence is the repeated overtures by CPD officers to LaPorta's friend, Matthew Remegi, in an attempt to elicit his statement that LaPorta was suicidal. Finally, it is undisputed that Kelly was not breathalyzed until approximately eight hours after the incident took place—and over six hours after Kelly was taken to the police station. Plaintiff offers expert testimony that these and other investigative shortcomings attending the LaPorta shooting violated the protocol that otherwise would have applied to civilians and constituted manifestations of a code of silence. This panoply of evidence suffices to create a jury question on whether the code of silence was at work during the investigation into the LaPorta shooting.

With respect to investigation and disposition of Kelly's other CRs, Plaintiff has again offered evidence

sufficient to create a genuine dispute of material fact as to whether CPD's challenged policies were at work. Apart from expert testimony directed to the adequacy of these investigations, there is undisputed factual evidence that an independent OPS investigator and his supervisor determined that Kelly's statements with respect to the Fran Brogan CR lacked credibility and recommended that the CR be sustained against Kelly. Yet this recommendation was summarily overturned, and OPS's Tia Morris could provide no concrete rationale for doing so. That none of Kelly's 18 or 19 CRs incurred prior to the LaPorta incident resulted in a sustained finding is further evidence from which a reasonable juror could infer that Kelly was reaping the benefits of the code of silence even before the LaPorta shooting. *See, e.g., Beck v. City of Pittsburgh*, 89 F.3d 966, 970 (3d Cir. 1996) ("None of the . . . complaints was sustained and none of them resulted in discipline. None of these dispositions was overruled by the Chief of Police or his assistant."); *Cazares*, 2017 WL 1196978, at *18 (finding that evidence of benefiting from the code of silence included CPD's failure to investigate two specific off-duty accidents "and the fact that [the officer] was the subject of 18 CRs . . . none of [which] were sustained").

Finally, and contrary to the City's argument, Plaintiff has adduced evidence sufficient to create a jury question as to whether there is a code of silence writ large shielding officers other than Kelly and adversely affecting others besides LaPorta. In the Seventh Circuit, while "there is no clear consensus as to how frequently [a practice] must occur to impose *Monell* liability," there must be sufficient evidence "that there is a policy at issue rather than a random

event." *Thomas*, 604 F.3d at 303. The City's main argument is that, absent hearsay evidence inadmissible at trial, Plaintiff brings evidence only specific to LaPorta's experience. This is flatly incorrect. Whereas the Mayor's statements and the contents of the City-commissioned PATF report constitute admissions of a party opponent under FED. R. EVID. 801(d)(2)(D), *see, Nekolny v. Painter*, 653 F.2d 1164, 1171 (7th Cir. 1981) (requiring only that the statement "concern a matter within the scope of agency or employment"); *Sadrud-Din v. City of Chicago*, 883 F.Supp. 270, 273-74 (N.D. Ill. 1995) (finding statements of non-party police officers in newspaper reporter's notes and published article admissible as statements of party opponents), hearsay contents of the PATF and DOJ reports are admissible as "factual findings from a legally authorized investigation." FED. R. EVID. 803(8)(A)(iii); *see, e.g., Daniel v. Cook County*, 833 F.3d 728, 740-42 (7th Cir. 2016) ("As noted above, a plaintiff cannot ultimately prove a *Monell* claim based on only his own case or even a handful of others. . . . Yet such systemic failings are exactly what the Department of Justice experts were looking for and found in Cook County."); *Dixon v. Cnty. of Cook*, 819 F.3d 343, 349 (7th Cir. 2016) (reversing grant of summary judgment to Cook County because, based on a DOJ report, "a reasonable jury could find that pervasive systematic deficiencies in the detention center's healthcare system were the moving force behind Dixon's injury"); *Martinez v. Cook County*, 2012 WL 6186601, at *4 n.7 (N.D. Ill. Dec. 12, 2012) ("[C]ourts have found Department of Justice letters of this exact type, when relevant, admissible under Federal Rule of Evidence 803(8).") (collecting

cases). As in *Cazares*, "the Mayor's acknowledgment of a code of silence, along with the findings of the City's Police Accountability Task Force and the DOJ's report, provide further, significant evidence regarding the existence of a code of silence within the CPD." *Cazares*, 2017 WL 1196978, at *18.

To the City's various "deliberate indifference" arguments for summary judgment based on *Moore v. City of Chicago*, No. 02 C 5130, 2007 WL 3037121 (N.D. Ill. Oct. 15, 2007), in which the court granted summary judgment to the City in large part based on the City's efforts to address insufficient disciplinary procedures, the Court responds that subsequent cases have declined to follow *Moore* in the presence of evidence that such efforts amounted to mere "lip service" to an acknowledged oversight problem. *See, Johnson v. City of Chicago*, No. 05 C 6545, 2009 WL 1657547, at *9-10 (N.D. Ill. June 9, 2009) (finding that the plaintiff adduced sufficient evidence "to suggest that the City's efforts are merely cosmetic and not truly intended to address the alleged widespread practice of failing to investigate and discipline rogue police officers"); *Arias v. Allegretti*, No. 05 C 5940, 2008 WL 191185, at *3-4 (N.D. Ill. Jan. 22, 2008) (same). Plaintiff has adduced comparable evidence that the City knew its steps to address the code of silence had been widely ignored, ineffectual, or unimplemented. For example, according to CPD's own statistics, with the change from OPS to IPRA in 2007 came a decrease in the number of sustained findings against CPD officers. Similarly, key personnel tasked with administering the City's claimed early warning system testified that they had received no training on

how to identify problematic patterns of behavior among officers.

Nor is the City immunized by Kelly's referral for a fitness-for-duty evaluation at some point after the off-duty CRs or the fact that his CRs were disposed of as unfounded, not sustained, or lacking an affidavit. *See, e.g., Vann v. City of N.Y.*, 72 F.3d 1040, 1049 (2d Cir. 1995) ("[D]eliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall further incidents."); *id.* at 1050 ("[A]fter a problem officer was restored to full-duty status, the Department's supervisory units paid virtually no attention to the filing of new complaints against such officers even though such filings should have been red-flag warnings of possibly renewed and future misconduct.") As the *Vann* court held, any "contention that the Department's treatment of all three postreinstatement complaints against [the officer] did not bespeak indifference because the complaints were 'unsubstantiated' is a matter for argument to the jury." *Ibid.* To the extent Plaintiff is required to show the City's deliberate indifference with respect to CPD's investigating, supervising, and disciplining its officers, he survives summary judgment on the issue by introducing a plethora of statistical evidence, public statements and/or testimony of CPD and City officials, expert analyses, and governmental reports evincing the City Council's knowledge of the constitutional violations attending the City's *de facto* policies and CPD's code of silence. *See, e.g., Quade v. Kaplan*, No. 06 C 1505, 2008 WL 905187, at *18 ("A custom of failing to discipline police officers can be shown to be deliberately indifferent if the need for

further discipline is so obvious and disciplinary procedures so inadequate as to be likely to result in the violation of constitutional rights that a jury could attribute to the policymakers a deliberate indifference to the need to discipline the police force.") (internal quotation marks and citation omitted); *see also*, *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006 (7th Cir. 2006) (noting that a plaintiff may prove deliberate indifference by showing "failure to act in response to repeated complaints of constitutional violations by its officers") (citations omitted); *cf., Green v. City of Chicago*, No. 11 C 7067, 2015 WL 2194174, at *8 (N.D. Ill. May 7, 2015) ("Plaintiffs cannot prove that the City's final policymakers acted with 'deliberate indifference' or turned a blind eye to a pattern of violations when the Plaintiffs have offered no evidence to show that the final policymakers had reason to be aware that the policies or practices posed any risks.") (citation omitted).

In any event, the Court doubts whether the concept of deliberate indifference has much purchase where, as here, the plaintiff does not attack a facially lawful policy or municipal action but instead alleges unlawful, *de facto* policies of impeding and interfering with police misconduct investigations. *See, Obrycka*, 2012 WL 601810, at *9-10. Rather than deliberate indifference, the degree of fault in such scenarios is better defined with reference to the "state of mind required to prove the underlying violation." *Bryan Cnty.*, 520 U.S. at 407-08. Because Plaintiff has coupled *Monell* allegations with invocation of LaPorta's fundamental liberty interest in bodily integrity, recovery on substantive due process grounds depends on whether the municipality "exercised its

power without reasonable justification in a manner that 'shocks the conscience.'" *Bettendorf v. St. Croix Cnty.*, 631 F.3d 421, 426 (7th Cir. 2011). Plaintiff easily clears this hurdle by presenting evidence of widespread policies and a code of silence "that allow for police misconduct and brutality without the fear of repercussions, thus affording 'brutality the cloak of law.'" *Obrycka*, 2012 WL 601810, at *10 (citing *Rochin v. California*, 342 U.S. 165, 173 (1952)). Thus, Plaintiff has raised a genuine issue of material fact regarding the culpability requirement—namely, that the City's policies and code of silence "shock the conscience" because they are "intended to injure in some way unjustifiable by any government interest." *Lewis*, 523 U.S. at 849.

Taken in the light most favorable to Plaintiff, the factual record creates a genuine dispute of material fact as to the existence of a pervasive code of silence within CPD and other *de facto* policies that would lead Kelly to believe he could inflict alcohol-fueled violence with impunity in his personal life.

III. Causation

Plaintiff's argument for proximate causation is bipartite. First, Plaintiff claims that the City's *de facto* policies and code of silence emboldened Kelly to continue committing off-duty acts of alcohol-fueled violence, proximately causing him to drink to excess and shoot LaPorta with his service weapon. Second, Plaintiff claims that, had the City properly disciplined Kelly for his infractions—particularly the domestic violence incident with Fran Brogan—he would not have had access to his service weapon because he would have at least been fired and, if convicted

criminally, ineligible under federal law even to carry a firearm. (In 1996, the Lautenberg Amendment established specific elements that would bar possession of firearms and ammunition for anyone convicted of a domestic violence-related crime. 18 U.S.C. § 922(g)(9). The law provides no exception for law enforcement officers.)

The City, on the other hand, maintains that Plaintiff's *Monell* claims are improper attempts to hold it vicariously liable for Kelly's private acts and that Plaintiff's assertions of how the City's *de facto* policies and code of silence proximately caused his injury are speculative. The City places particular emphasis on the fact that Kelly owned his service weapon outright, the inference being that even Kelly's termination from CPD would not have changed the fact that he would nonetheless have still possessed the same gun used to shoot Kelly on the night in question.

The critical question is whether the City's *de facto* policies—with CPD's attendant code of silence—were the "moving force" behind Kelly's actions such that execution of the policies "inflicts the injuries that the government as an entity is responsible [for] under § 1983." *Estate of Novack ex rel. Turbin v. Cnty. of Wood*, 226 F.3d 525, 531 (7th Cir. 2000) (quotation omitted). There must be a "direct causal link" between the alleged policy or practice and the constitutional violation. *Obrycka*, 2012 WL 601810, at *9. "As long as the causal link is not too tenuous, the question whether the municipal policy or custom proximately caused the constitutional infringement should be left to the jury." *Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3d Cir. 1990).

Viewing the evidence in the light most favorable to Plaintiff, the Court concludes that a reasonable jury could find that Kelly's off-duty decisions to drink to excess and shoot LaPorta with his service weapon were caused by a belief that he was impervious to consequences due to CPD's administrative lapses and willingness to tolerate a code of silence. This is so despite the fact that Kelly's prior CRs did not involve use of a gun to injure others. In fact, there is a much closer nexus here—between LaPorta's injury and Kelly's CRs for on-duty excessive force and off-duty drunken violence—than in other cases where the City was nonetheless denied summary judgment. *See, e.g., Cazares*, 2017 WL 1196978 ("Before the fatal accident, [the officer] had been the subject of numerous citizen complaints, none of which were sustained or resulted in discipline. Although none of these allegations related to [the officer's] use of alcohol, a reasonable jury could infer that the lack of investigation or discipline resulting from these official investigations led [the officer] to believe that he was immune from discipline for any of his actions, on or off-duty."). Indeed, "a reasonable fact-finder, viewing the facts in the light most favorable to Plaintiff[], could very well believe that [Kelly] routinely engaged in violent and dangerous 'off-duty' conduct, in particular while drinking and dealing with situations involving his family" and/or close friends. *Panas v. City of Philadelphia*, 871 F.Supp.2d 370, 379 (E.D. Pa. 2012); *see also*, *Bielevicz*, 915 F.2d at 851-52 ("[I]t is logical to assume that continued official tolerance of repeated misconduct facilitates similar unlawful actions in the future."). Thus, a fact-finder could reasonably infer that the pervasive tolerance of and lack of

accountability for Kelly's behavior emboldened him to continue misbehaving throughout his tenure as a police officer. *See, e.g., Brandon v. Holt*, 469 U.S. 464, 467 (1985) (upholding judgment against municipality under § 1983 where plaintiffs alleged that they were attacked by officer whose dangerous propensities were well-known within his precinct and deficient procedures for discovering officer misconduct prevented police chief from learning of officer's past violent behavior). Like the off-duty officer in *Cazares*, a jury could reasonably infer that Kelly felt emboldened and able to act with impunity after 19 separate allegations of misconduct, including two for the alcohol-induced batteries of his then-live-in girlfriend and her brother, respectively, resulted in no sustained CRs, no behavioral intervention or modification, and no civil or administrative sanction.

Similarly, there is a material dispute of fact concerning whether Kelly would *not* have possessed his service weapon had he been discharged from employment with CPD as a result of his many on- and off-duty infractions or criminally prosecuted as a result of the domestic violence incident with Fran Brogan. The City protests that it is speculation to assume that a criminal investigation of Kelly's domestic battery of Fran Brogan—as opposed to an administrative finding sustaining the CR—would have ensued absent the City's *de facto* policies and code of silence. The City then points to evidence that there is no set protocol for handling CPD officers administratively found to have committed domestic violence. Yet what defeats summary judgment is precisely this indeterminacy—along with the woefully underdeveloped nature of the factual record on the

issue of what confiscation protocols the City follows *vis-à-vis* a discharged CPD officer's service weapon and/or ammunition. Left for the trier of fact is the potential applicability of the *Cazares* court's proximate cause analysis: when coupled with other facts suggesting application of the code of silence to an officer's past behavior, that "the law regarding DUI in Illinois [] would have suspended his driver's license if the Chicago police officers" had dealt with the officer as the plaintiff urged made it "even more likely" that the City's *de facto* policies and code of silence caused the plaintiffs' injuries. *Cazares*, 2017 WL 1196978, at *19. Here, Plaintiff presses that, had the Fran Brogan CR been properly investigated or resulted in criminal prosecution of Kelly, police regulations or federal law, respectively, would have prevented Kelly from accessing his service weapon on the night in question.

The Court acknowledges the lack of any substantive due process right to have someone else prosecuted. *See, e.g., Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 768 (2005) ("[T]he benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."). But Plaintiff's claim is not that the City's failure to prosecute Kelly itself deprived him of constitutional rights. His (actionable) claim is that Kelly's deprivation of his constitutional rights was caused by the City's *de facto* policies and code of silence, perhaps the most crucial manifestation of which was the City's failure to at least find Kelly administratively culpable for the battery and potentially to prosecute him criminally. Consequently,

there remains a genuine dispute of material fact whether applicable regulations or federal law would have prohibited Kelly from possessing a firearm at the time of the LaPorta shooting if he "was an average citizen, not protected by the code of silence." *Cazares*, 2017 WL 1196978, at *16.

The City cites *Othman v. City of Chicago*, 2014 WL 6566357 (N.D. Ill. Nov. 20, 2014), to argue that Kelly's ownership of his service weapon scuttles Plaintiff's prima facie causation showing. Although the court in Othman did mention that the defendant officer owned the firearm used to shoot the plaintiff, this was only one of a multitude of facts that undercut the tenability of the causal chain. *See, Othman*, 2014 WL 6566357, at *7-9 (granting summary judgment to the City on plaintiff's *Monell* claim where the City had neither reason to know of constitutionally deficient practices *nor authority to retrieve the defendant officer's weapon from him while he was merely on medical leave*, and plaintiff argued that "the 14 shots fired by [the defendant officer] constitute a 'series of bad acts' that provided the City's final policymakers with notice of the purported constitutional violations") (emphasis added). Clearly, the only commonality between *Othman* and this case is the (alleged) shooter's ownership of his service weapon. That does not suffice to take the proximate cause inquiry into the realm of "extreme circumstances" and out of the hands of the jury, where it belongs. *See, e.g., Gayton v. McCoy*, 593 F.3d 610, 624 (7th Cir. 2010) ("While generally the issue of proximate cause is a jury question, in extreme circumstances . . . the question of proximate cause is an issue of law properly resolved by a court."). The causation question is the bailiwick

of the jury where, "as in *Gibson*, the City 'affirmatively trained and outfitted one of its employees with the means to exercise deadly force, yet failed to recover that equipment from its employee even after it [allegedly knew] that the employee was unfit to exercise police authority.'" *Sadrud-Din v. City of Chicago*, 883 F.Supp. 270, 278 (N.D. Ill. 1995) (citations omitted).

* * *

Therefore, genuine disputes of material fact foreclose the City's entitlement to summary judgment on Plaintiff's *Monell* claims. Accordingly, the Court denies the City's Motion for Summary Judgment in relevant part.

b. Denial of Right to Judicial Access (Count III)

Plaintiff in Count III alleges that the City's defense of this lawsuit and general foot-dragging in disclosing Kelly's files and CR records were calculated to cover up or shield it from liability, thereby depriving Plaintiff of access to the courts. The relief Plaintiff seeks on this claim mirrors that for which he prays under each of the five *Monell* claims. (*Compare*, ECF No. 220 ("7AC") at Count III, *with, id.* at Counts IV-VIII.) To sustain this cause of action, Plaintiff's operative Complaint points to two buckets of information that the City failed timely to disclose.

First, although Plaintiff knew soon after initiating his 2010 state court lawsuit that repeated complaints had been filed against Kelly, it was only after *Kalven v. City of Chicago*, 7 N.E.3d 741 (Ill. App. 2014), which established the necessity of disclosing such information in response to Freedom of

Information Act requests, that Plaintiff learned of the City's widespread policy of condoning such misconduct. Plaintiff then added the City as a defendant in the state court action, and the City removed the case to this Court on December 3, 2014.

Second, Plaintiff's operative complaint characterizes five efforts by the City to "conceal, suppress, and/or stall its investigation into the [LaPorta shooting], as well as conceal, suppress, and/or stall its findings from that investigation, forcing Plaintiff to repeatedly file Motions to Compel Evidence and Motions for Sanctions." (7AC ¶ 158.) According to Plaintiff, the City knowingly failed "to seasonably update discovery to disclose ongoing CRs against Kelly"; in addition, the City knowingly failed "to disclose to Plaintiff a 2014 officer-involved shooting by Kelly, which Plaintiff did not discover until June 25, 2016, resulting in a belated FOIA request to the Chicago Police Department and the City of Chicago"; third, the City knowingly failed "to disclose at least 9 additional known CRs registered against Kelly prior to" the LaPorta shooting; fourth, the City knowingly failed to disclose "eight additional Summary Punishment Action Request ('SPAR') files and additional 8 IPRA log files, of which Plaintiff first became aware in July 2016, more than six years into the litigation"; and fifth, the City did not produce the IPRA file regarding the shooting until two years after IPRA had administratively closed the case. (*Id.* ¶ 159.) Highlighting the City's statute-of-limitations affirmative defense in its operative Answer, Plaintiff notes the potential for prejudice if the Court or the jury finds that the *Monell* claims are time-barred. (*See, id.* ¶ 163.)

The City responds that Plaintiff cannot sustain a right-of-access claim because Plaintiff has no proof of harm, "which can only come from a dispositive ruling on the antecedent cause of action." (ECF No. 241 ("Def.'s Mem.") at 40.) Grounding this argument is the requirement that the concealment of evidence was "to some extent successful in that it prevented him from pursuing his legal actions, contributed to the failure of those actions, or reduced the value of his actions." *Garcia*, 2003 WL 1715621, at *9 (citing *Vasquez v. Hernandez*, 60 F.3d 325, 328-29 (7th Cir. 1995)). Failing evidence that its conduct reduced the value of his legal actions or directly contributed to their failure, the City urges, Plaintiff's claim "is not even ripe for adjudication because it has not yet even accrued." (Def.'s Mem. at 41.)

The First and Fourteenth Amendments protect "the right of individuals to seek legal redress for claims that have a reasonable basis in law." *Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002). Interference with the right of court access by state agents who intentionally conceal the true facts about a crime may be actionable as a deprivation of constitutional rights under § 1983. *Bounds v. Smith*, 430 U.S. 817, 822 (1977). Cognizable access-to-courts actions fall into two categories: (1) claims that official action frustrates a plaintiff or plaintiff class "in preparing and filing suits at the present time" and that seek "to place the plaintiff in a position to pursue a separate claim for relief once the frustrating condition has been removed"; and (2) claims "not in aid of a class of suits yet to be litigated, but of specific cases that cannot now be tried (or tried with all

material evidence), no matter what official action may be in the future." *Id.* at 412-14.

This case does not implicate the first category, as Plaintiff does not allege that the City's obstruction is frustrating his "preparing and filing suits at the present time." To be actionable, then, Plaintiff's claim must fall within the second category of cases in which "[t]he official acts claimed to have denied access may allegedly have caused the loss or inadequate settlement of a meritorious case, the loss of an opportunity to sue, or the loss of an opportunity to seek some particular order of relief." *Christopher*, 536 U.S. at 414 (internal citations omitted). These cases "do not look forward to a class of future litigation, but backward to a time when specific litigation ended poorly, or could not have commenced, or could have produced a remedy subsequently unobtainable." *Ibid.* And because such claims are brought to secure relief "unobtainable in other suits, the remedy sought must itself be identified to hedge against the risk that an access claim be tried all the way through, only to find that the court can award no remedy that the plaintiff could not have been awarded on a presently existing claim." *Id.* at 416.

In this case, Plaintiff has offered no facts or argument indicating that he lost a claim or accepted a lowball settlement as a result of the City's litigation conduct and disclosure delays. *See, Bell v. City of Milwaukee*, 746 F.2d 1205, 1262-65 (7th Cir. 1984), *overruled on other grounds*, *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005). Nothing has yet ended "poorly" for Plaintiff. *Christopher*, 536 U.S. at 414. And because Plaintiff's right-of-access action seeks the same relief

against the same defendant as do his *Monell* claims, it does not appear viable at present. *See, id.* at 416 n.13 (noting that an underlying action may have "already been tried to an inadequate result due to missing or fabricated evidence in an official cover-up, *or the claim may still be timely and subject to trial, but for a different remedy than the one sought under the access claim, or against different defendants*") (emphasis added) (citing *Bell v. Milwaukee*, 746 F.2d 1205, 1223 (7th Cir. 1984)). So if Plaintiff prevails on the legal actions that he alleges were delayed and frustrated by the City's conduct, then the harm from that delay and frustration can be redressed by inclusion of appropriate interest in any damages computation, a well-taken motion for sanctions, and an award of attorneys' fees under the fee-shifting mechanism governing successful § 1983 claims. *See*, 42 U.S.C. § 1988(b). Only if Plaintiff loses on statute-of-limitations grounds will he have suffered anything more than the sort of inconvenient delay that the Seventh Circuit has found insufficient to constitute actionable harm to a plaintiff's right of access. *See, Vasquez v. Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995) (finding no constitutional violation for denial of judicial access where culpable police cover-up delayed by six months plaintiff's nonetheless timely lawsuit, with eventual corrective measures and disclosure providing information vital to plaintiff's case).

Because it can only be determined whether the City's complained-of conduct "render[ed] hollow [Plaintiff's] right to seek redress" after adjudication of the underlying claims, *Vasquez*, 60 F.3d at 328, the Court hereby bifurcates trial into two phases such that Plaintiff's right-of-access claim can be tried once the

jury has returned a verdict for or against the City. *See, Lynch v. Barrett*, 703 F.3d 1153, 1157 n.1 (10th Cir. 2013) ("Where a plaintiff prior to filing an underlying claim knows of facts suggesting an evidentiary cover-up by government officials, the underlying claim and the denial-of-access claim generally should be joined in the same action even if *that requires bifurcated trials*.") (emphasis added) (citing *Christopher*, 536 U.S. at 416); *Gaffney v. Riverboat Servs. of Ind., Inc.*, 451 F.3d 424, 442 (7th Cir. 2006) ("[B]ifurcation under Rule 42(b) is appropriate where claims are factually interlinked, such that a separate trial may be appropriate, but final resolution of one claim affects the resolution of the other.") (citation omitted).

The Court accordingly denies summary judgment to the City on Count III and instead bifurcates Plaintiff's right-of-access claim from the balance of the trial.

2. The State Law Claims (Counts I and IX)

Finally, Plaintiff asserts two claims under Illinois law against the City. Count I alleges that the City engaged in willful and wanton conduct when, with knowledge of Kelly's propensity for violence, it allowed Kelly to carry his service weapon while off duty and failed to train or supervise him regarding weapon storage. Willful and wanton conduct is a strain of fault that shares some commonalities with ordinary negligence but is distinct in that it evinces "a course of action that showed a deliberate intention to harm or an utter indifference to or conscious disregard for the plaintiff's welfare." *Floyd v. Rockford Park Dist.*, 823 N.E.2d 1004, 1009 (Ill. App. 2005) (internal citations

omitted). The second state-law claim, Count IX, alleges negligent retention and supervision of Kelly.

The City launches a dual attack on Plaintiff's state-law claims that it believes entitle it to summary judgment even if Kelly shot LaPorta. First, the City argues that there is no proximate causation. Second, the City contends that it has immunity under various provisions of Illinois's Local Governmental and Governmental Employees Tort Immunity Act, 745 Ill. Comp. Stat. 10 *et seq*. (the "Act"). Because the immunity analysis is persuasive, the Court need not consider the issue of proximate causation.

The City argues that three separate provisions of the Act immunize it from liability. First, the City contends that section 2-109 grants it absolute immunity from both Plaintiff's ordinary negligence and willful and wanton claims. Section 2-109 provides that 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 Ill. Comp. Stat. 10/2-109. But this section doesn't advance the ball on the City's Motion for Summary Judgment because there is a genuine dispute of material fact as to whether Kelly shot LaPorta—and thus whether Kelly committed a tort. That Plaintiff has already settled with Kelly does not change the analysis, because "the release of an individual defendant through settlement does not automatically trigger a public entity's immunity under Section 2-109." *LaPorta*, 102 F.Supp.3d at 1020 (citing *Whitney v. City of Chicago*, 508 N.E.2d 293, 297 (Ill. App. 1987) (allowing negligent hiring claim to proceed even though individual defendants had settled)).

Next, the City points to section 4-102, which states that public entities are not liable "for failure to provide adequate police protection or service, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals." Ill Comp. Stat. 10/4-102. This provision mirrors the "public duty rule" under which a municipality cannot be held liable for its failure to provide routine governmental services, such as police and fire protection, absent a special duty to a particular individual. *Harinek v. 161 N. Clark St. Ltd. P'ship*, 692 N.E.2d 1177, 1183 (Ill. 1998). But section 4-102 cannot ride to the City's rescue here because Plaintiff's claim is not that the City breached its duty to him by failing to provide adequate police protection. *See, e.g., Colon v. Town of Cicero*, No. 12 C 5481, 2015 WL 9268208, at *2 (N.D. Ill. Dec. 21, 2015) (finding that "plaintiff's negligent hiring and supervision claims do not arise from an alleged failure to provide police protection" and so are not barred by § 4-102; distinguishing cases to the contrary on the grounds that they involved "the failure to investigate an accident and the failure to report an arrest"). On the contrary, Plaintiff's claim is that the City breached its duty by retaining an officer who posed a threat to the public—a duty which exists independently of its duty to furnish police protection. *See, Bates v. Doria*, 502 N.E.2d 454, 458 (Ill. App. 1986).

However, the City's invocation of section 2-201 is well taken. That section of the Act provides that "a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the

exercise of such discretion even though abused." 745 Ill. Comp. Stat 10/2-201. While section 2-201 refers to a public employee, local governments are also clothed with immunity if their employees are not liable for the injury resulting from their acts or omissions. *See, Arteman v. Clinton Comm. Unit Sch. Dist. No. 15*, 763 N.E.2d 756, 762-63 (Ill. 2002) ("Because a local public entity is not liable for an injury resulting from an act or omission of its employees where the employee is not liable, this broad discretionary immunity applies to the entities themselves.") (internal quotation marks omitted) (citing 745 Ill. Comp. Stat. 10/2-109, 10/2-201). The Illinois Supreme Court has interpreted section 2-201 to require that the public employee's actions be "*both* a determination of policy and an exercise of discretion" for immunity to attach. *Van Meter v. Darien Park Dist.*, 799 N.E.2d 273, 283 (Ill. 2003) (emphasis added) (internal citation marks and citation omitted); *accord, Harinek*, 692 N.E.2d at 1181 ("The employee's position . . . may be one which involves either determining policy or exercising discretion, but . . . the act or omission must be both a determination of policy and an exercise of discretion."). Conduct may be a determination of policy even if it does not occur at the planning level or involve the formulation of principles to achieve a common public benefit. *Harrison v. Hardin Co. Comm. Unit Sch. Dist. No. 1*, 758 N.E.2d 848, 853 (Ill. 2001) (characterizing actions towards one person as within the ambit of policy determinations). By contrast, section 2-201 does not cover the performance of ministerial actions—that is, those acts performed on a given state of facts in a prescribed manner, under the mandate of legal authority, and without reference to

the official's discretion regarding the propriety of the act. *See, In re Chicago Flood Litig.*, 680 N.E.2d 265, 272 (Ill. 1997) (holding that ministerial acts implicate execution of set task that is "absolute, certain, and imperative"); *Snyder v. Curran T'ship*, 657 N.E.2d 988, 989 (Ill. 1995).

Plaintiff claims that the challenged municipal decisions to retain Kelly, allow him to carry his gun, and to supervise him insufficiently were ministerial functions—executed by rote adherence to a monolithic code of silence with no room for deviation. The Court first notes the cognitive dissonance required to claim, with one breath, that CPD's failure to discipline and supervise police officers has erected a widespread municipal policy actionable under *Monell* and, with the other, to claim that deciding whether and whom to discipline and supervise is not a policymaking function. Perhaps Plaintiff would enjoy more state-law slack if his *Monell* claims derived from an *express* City Council policy by which officials and police agencies act negligently, or with willful and wanton disregard for rights, or strictly in keeping with the code of silence. But that's clearly irreconcilable with the arguments in this case and common sense (*i.e.*, the definition of "negligent"). The second problem confronting Plaintiff is that the mere presence of an overarching schema or plan for hiring, supervising, disciplining, or discharging employees does not render such tasks ministerial. *See, e.g., In re Chicago Flood Litig.*, 680 N.E.2d at 273 ("We agree with the appellate court that the City's supervision of Great Lakes' pile driving [after approving the pile driving plan] was discretionary rather than ministerial."); *Reed v. City of Chicago*, No. 01 C 7865, 2002 WL 406983, at *3

(N.D. Ill. Mar. 14, 2002) ("While there are most likely guidelines in hiring, training and supervising employees, all three acts still require discretion, balancing of interests, and judgment calls."); *Johnson v. Mers*, 664 N.E.2d 668, 675 (Ill. App. 1996) ("While [the municipality] did devise a hiring plan which would include the application process, a polygraph examination, psychological testing, physical testing, and interviews, the decision to hire an officer ultimately required the exercise of discretion."). In any event, the facts before the Court simply furnish no basis for characterizing the challenged decisions, either those at the highest level of the City Council or CPD's specific conduct with respect to Kelly, as those whose execution was "absolute, certain, and imperative," "in obedience to legal authority and without reference to the official's discretion as to the propriety of the act." *In re Chicago Flood Litig.*, 680 N.E.2d at 272; *Snyder*, 657 N.E.2d at 993.

Plaintiff offers no examples of other courts finding on summary judgment that such decisions are ministerial and beyond the reach of the Act's immunity. Although the Court acknowledges that "more recent case law rejects" determining *from the allegations of the complaint* whether a particular municipal function implicates a determination of policy and an exercise of discretion, this case is at the summary judgment stage. Plaintiff's admonitions to avoid adjudicating "whether the complaint itself establishes as a matter of law that statutory immunity" applies are therefore immaterial here. *McDonald v. Camarillo*, No. 10 C 1233, 2010 WL 4483314, at *2 (N.D. Ill. Nov. 1, 2010). Rather than deciding immunity "on the basis of intuition," the

Court has the "benefit" of boxes of exhibits concerning investigations of and discipline for CPD officer misconduct. *Patton v. Chicago Heights*, No. 09 C 5566, 2010 WL 1813478, at *3 (N.D. Ill. May 3, 2010).

Myriad cases decided on summary judgment characterize municipal decisions regarding discipline, supervision, and retention of an employee as discretionary and indebted to policymaking. *See, e.g., Mers*, 664 N.E.2d at 675 ("The decision to hire or not to hire a police officer is an inherently discretionary act and, thus, is subject to the immunities contained in the Immunity Act."), *cited with approval*, *Doe v. Vill. of Arlington Hts.*, 782 F.3d 911, 922 (7th Cir. 2015); *Brooks v. Daley*, 29 N.E.3d 1108, 1116-17 (Ill. App. 2015) ("Here, when Brooks was accused of sexual harassment, defendants made a decision concerning the effect that the allegations would have on efficacy and harmony in the workplace. Such a judgment call is both a policy determination and a discretionary action, since the outcome is not predetermined but left to defendants' judgment."); *Albert v. Bd. of Educ. of City of Chicago*, 24 N.E.3d 28, 46 (Ill. App. 2014) (affirming the lower court's reasoning that "[t]he act and omissions alleged on the part of the Board here involve decisions with regard to administering student discipline and punishment involve [*sic*] the determination of policy and an exercise of discretion" because the "Board had to balance competing interests and make a judgment call, thus engaging in policy determination") (internal quotation marks omitted); *Hanania v. Loren-Maltese*, 319 F.Supp.2d 814, 834-36 (N.D. Ill. 2004) (holding that the city of Cicero was immune from liability for decisions to reduce the powers of the town collector's office and to fire its town

collector); *Mann v. City of Chicago*, 182 F.3d 922 (Tbl.) (N.D. Ill. 1999) (affirming summary judgment on immunity grounds in favor of defendants because "Illinois appellate courts have held that the hiring and firing of employees is inherently discretionary, within the meaning of § 2-201 of the Tort Immunity Act") (citations omitted).

Because neither the facts nor the case law supports characterizing the municipal decisions at issue as ministerial, the City is entitled to judgment as a matter of law that it enjoys section 2-201 immunity from Plaintiff's state law claims. This conclusion applies with equal force to Plaintiff's willful-and-wanton claim, because there is no exception in section 2-201 for willful and wanton conduct. *See, e.g., In re Chicago Flood Litig.*, 680 N.E.2d at 273 ("The plain language of section 2-201 is unambiguous. That provision does not contain an immunity exception for willful and wanton misconduct."); *Mers*, 664 N.E.2d at 675 ("The absence of language excepting wilful [*sic*] and wanton conduct in sections 2-201 and 3-108, where such language is contained in other sections, demonstrates that there is no exception for wilful [*sic*] and wanton conduct contained in sections 2-201 and 3-108."); *see also*, *Hanania*, 319 F.Supp.2d at 836 (finding no exception in section 2-201 for actions performed with "corrupt or malicious motives") (citing *Vill. of Bloomingdale v. CDG Enters., Inc.*, 752 N.E.2d 1090, 1098 (Ill. 2001)); *but see, Smith v. Waukegan Park Dist.*, 896 N.E.2d 232, (Ill. 2008) ("[W]e declare, under established Illinois law, [that] public entities possess no immunized discretion to discharge employees for exercising their workers' compensation rights.").

As such, the Court grants summary judgment to the City on Plaintiff's state law claims (Counts I and IX).

IV. CONCLUSION

For the reasons stated herein, Plaintiff's Motion for Partial Summary Judgment [ECF No. 238] is denied, and Defendant City of Chicago's Motion for Summary Judgment [ECF No. 241] is granted in part as to Counts I and IX but denied as to the remaining counts.

Additionally, the Court bifurcates the trial so that adjudication of Count III will commence only after the jury returns a verdict on the other claims against the City.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court

Dated: September 29, 2017

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-3049

FIRST MIDWEST BANK, Guardian of the Estate of Michael D. LaPorta, a disabled person,

Plaintiff-Appellee,

v.

CITY OF CHICAGO, a municipal corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 14 C 9665 — Harry D. Leinenweber, *Judge*.

April 14, 2021
ECF No. 72

Before
Diane S. Sykes, *Chief Judge*
Michael S. Kanne, *Circuit Judge*.

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service requested a vote on the petition for rehearing en banc,[1]

[1] Circuit Judge Ilana D. Rovner did not participate in the consideration of this petition for rehearing.

and both judges on the original panel voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is **DENIED**.