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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

Benjamin Mann and Samantha M. Wade,	)	
Plaintiffs,	)	
v.	)	No.: 17-cv-2300
City of Urbana Police Officers Jennifer Difanis, Colby G. Wright, Sara M. Links, Seth R. King, Jay Loschen, Chad Burnett, Don C. McClellan, Adam Marcotte, John Franquemont, Sgt. Zach Makalik, and as yet Unknown Officers, the City of Urbana, a municipal corporation, University of Illinois Police Officer Chris Elston, and Board of Trustees of the University of Illinois,	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS

NOW COME the Defendants, JENNIFER DIFANIS, COLBY G. WRIGHT, SARAH M. LINKS, SETH R. KING, JAY LOSCHEN, CHAD BURNETT, DON C. MCCLELLAN, ADAM MARCOTTE, JOHN FRANQUEMONT, SGT. ZACH MAKALIK, THE CITY OF URBANA (Hereinafter "Urbana"), A MUNICIPAL CORPORATION, CHRIS ELSTON, AND BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS (hereinafter "BOT"), by Keith E. Fruehling of Heyl, Royster, Voelker & Allen, P.C., their attorneys, and for their Motion To Dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), and state as follows:

I. INTRODUCTION:

Plaintiffs, Benjamin Mann and Samantha Wade, have sued the above-named Defendant individual police officers, the City of Urbana (Urbana) and the Board of Trustees of the University of Illinois (BOT), alleging that both their Constitutional and state common law rights were violated.

Specifically, Mann alleges that that his First Amendment rights were violated by every individual Defendant officer and both entities when they allegedly harassed him by responding to two separate dispatches to the location of the Plaintiffs on unique dates over four months apart as retaliation for a completely unrelated prior civil legal action Mann brought against a completely distinct, separate and unrelated governmental entity and an employee of that entity. Those two incidents form the factual basis for the entire suit.

He also alleges that his Fourth Amendment rights were violated by the same individual officers on those two separate occasions, including the conclusion that they allegedly fabricated evidence. In addition, Mann alleges that Urbana violated the Constitution when it had a practice or procedure that was unconstitutional and that it and the BOT are vicariously responsible for the actions of their respective officers. Next, Plaintiff alleges that various individual officers committed the state torts of malicious prosecution and intentional infliction of emotional distress all arising from the two incidents described above. Finally, Plaintiff Mann seeks to assert both federal and state based claims for conspiracy against the individual officers.

Plaintiff Wade makes no First Amendment claim. Wade, however, does seek to make the other same Constitutional violations Mann made but limits her claims primarily to the first incident described above. Consequently, her section 1983 claims are directed primarily at Officer Group # 1, namely: Difanis, Wright, Links, King, Loschen and Burnett – all Urbana officers. Wade does make a Fourth Amendment Illegal search claim against the officers that comprise what Plaintiff deems "Group # 2", namely: Difanis, Burnett, McClellan, Marcotte, Franquemont, Mikalik – all Urbana officers - and Elston, of the University of Illinois Police. She too asserts the state law torts of malicious prosecution and intentional infliction of emotional distress all arising from the two

incidents described above, but only does so against Urbana officers from Group # 1. Wade – like Mann seeks to assert both federal and state based claims for conspiracy against the individual officers.

Plaintiff's Section 1983 and state tort claims should be dismissed because: (1) as an arm of the state, the BOT is not a "person" that can be sued under Section 1983; and (2) Eleventh Amendment immunity bars this claim. In addition, the Section 1983 claims against the individual officers must be dismissed because Plaintiff fails to state a claim and due to qualified immunity.

Plaintiff's Section 1983 claims should be dismissed for the additional reason that both Plaintiffs have not pled facts demonstrating a plausible claim against any of the individual defendant officers, Urbana or the BOT. To plead a Section 1983 claim, a plaintiff must allege the induvial defendant officers directly participated or engaged in constitutionally unlawful conduct. Here, the Complaint contains insufficient allegations of unconstitutional conduct by all of the Defendants. The details of Plaintiffs insufficiently pled allegations are set forth in detail below. However, the only factual basis for their claim once the court is made aware of the irrefutable reality that probable cause to arrest Plaintiff Mann existed at the time of the second incident, is the March 19, 2017 incident. An incident that the police were summoned to by the Plaintiff himself, conducted an investigation and developed probable cause to arrest both Mann and Wade. Plaintiffs' federal and state conspiracy claims are ill-pled with insufficient fact, as are is their state law claims.

In short, Plaintiffs seek to state an insufficient limited number of facts which fail to support their broad conclusory allegations while simultaneously asserting facts regarding a lack of probable cause for the July 30, 2017 event that are simply untrue. For the reasons that follow in

detail, this Court should enter on Order dismissing the Plaintiffs' Complaint pursuant to FRCP 12(b)(1) and (6).

II. ARGUMENT

A. Standard:

Federal Rule of Civil Procedure 12(b)(6) permits a Motion to Dismiss for failing to state a claim for which relief can be granted. To state such a claim, Rule 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitled to relief." This means that the complaint "must describe the claim in sufficient detail to give the defendant 'fair notice of what. . . the claim is and the grounds upon which it rests.'" *EEOC v. Concentra Health Services, Inc.*, 496 F.3d 773, 776 (7th Cir. 2007); (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). The complaint must actually "suggest that the plaintiff has a right to relief, raising that possibility above a 'speculative level'; if they do not, the plaintiff pleads itself out of court." *Id.* (citation omitted). While Rule 8 does not require detailed factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). "Factual allegations must be enough to raise a right to relief above the speculation level." *Twombly*, 550 U.S. at 555.

"To survive a motion to dismiss, a complaint must contain sufficient factual matters, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer

possibility that a defendant acted unlawfully." *Id.* (citation omitted). "A plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964-65 (2007) (citation omitted); see also *Perkins v. Silverstein*, 939 F.2d 463, 466-67 (7th Cir. 1991); *Jackson v. City of Joliet*, No. 03-C-4088, 2004 WL 542523, at *2 (N.D. Ill. March 14, 2008).

In determining whether the plaintiff's complaint survives a motion to dismiss, the court must employ a two step process. First, a court must identify the "allegations in the complaint that are not entitled to the assumption of truth." *Iqbal,* 129 S. Ct. at 1951. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 1949. Conclusory allegations are "not entitled to be assumed true" and cannot be considered for purposes of determining whether the complaint states a claim for relief. *Id.* at 1951. Once the court determines those allegations which can be considered, it must then determine whether such allegations "state[] a plausible claim for relief..." *Id.* at 1950. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]-'that the pleader is entitled to relief.'" *Id.* (quoting FED. R. CIV. P. 8(a)(2)).

Consistent with *Twombly* and *Iqbal,* the Seventh Circuit has recognized that "[r]ecent decisions of the Supreme Court emphasize the importance of prompt dismissal of unmeritorious cases even if they are not frivolous." *Milam v. Dominick's Finer Foods, Inc.*, 588 F.3d 955, 959 (7th Cir. 2009)(*citing Ashcroft,* 129 S. Ct. at 1952; *Twombly,* 127 S. Ct. 1955). Accordingly, "[i]n the interest of justice and economy, every effort should be made by the district court from the start

of a case to determine its likely merit and guide it to a swift conclusion as is consistent with doing justice to the parties." *Milam,* 588 F.3d at 958-59.

B. Plaintiffs' Claims in Counts I, IX and X must be dismissed to the extent they are directed at the Board of Trustees (hereinafter "BOT") Because They are Barred by the Eleventh Amendment

1. The BOT is not a person amenable to suit under Section 1983

"State governments and State officials are *not* 'persons' within the ambit of Section 1983." *Snyder v. King*, 745 F.3d 242, 247 (7th Cir. 2014)(citations omitted). "Because this Court has determined in previous § 1983 actions that a state university is an alter ego of the state, and, under *Will*, a 'State is not a person' under § 1983, it follows that a state university is not a person within the meaning of § 1983 and therefore not subject to suits brought under § 1983." *Kaimowitz v. Bd. of Trs. of Univ. of Ill.*, 951 F.2d 765, 767 (7th Cir. 1991). Accordingly, the BOT is not a person amenable to suit under Section 1983. Therefore, plaintiff's claims against the BOT fail for lack of federal court subject matter jurisdiction. *See Toledo v. Peoria & Western R.R. Co., Ill. Dep't of Transp.*, 744 F.2d 1296, 1298-99 (7th Cir. 1984). Pursuant to Fed. R. Civ. P. 12(b)(1), plaintiff's claims against the BOT should be dismissed for lack of subject matter jurisdiction.

2. The BOT is protected by sovereign immunity under the Eleventh Amendment

Under the Eleventh Amendment, unconsenting states are generally immune from lawsuits brought in federal court by their own citizens. *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 121, 104 S. Ct. 900, 701 L.Ed.2d 67 (1984). Boards of trustees of state universities are state agencies, and are completely immune from suits brought in federal court under Section 1983. *Kroll v. Bd. of Trs. of Univ. of Ill.,* 934 F.2d 904, 907 (7th Cir.)(en banc), *cert. denied,* 112 S. Ct. 377 (1991); *Keri v. Bd. of Trs. of Purdue Univ.,* 458 F.3d 620, 641 (7th Cir.

2006)(overruled on other grounds by *Hill v. Tangherlini,* 724 F.3d 965, 968, n. 1 (7th Cir. 2013); *Mutter v. Madigan,* 13-cv-8580, 2014 WL 562017, at *3 (N.D. Ill. Feb. 3, 2014); *Rittenhouse v. Bd. of Trs. of S. Ill. Univ.,* 628 F.Supp.2d 887, 893 (S.D. Ill. 2008).

The BOT is an arm of the State. *Harden v. Bd. of Trs. of E. Ill. Univ.,* 12-cv-2199, 2013 WL 6248500, at *5 (C.D. Ill. Dec. 2, 2013); *Kashani v. Purdue University*, 813 F.2d 843, 845 (7th Cir. 1987)("the vast majority of cases considering the issue have found state universities to be forfended by the Eleventh Amendment"), *cert. denied*, 484 U.S. 846 (1987); *Moore v. Watson*, 838 F.Supp.2d 735, 753, n. 26 (N.D. Ill. 2012)("Illinois state universities are arms of the state for purposes of Eleventh Amendment analysis"). *See also Grimes v. E. Ill. Univ.,* 710 F.2d 386, 387 (7th Cir. 1983) (stating Eastern Illinois University is a public university); *Bd. of Regents of Regency Univ. Sys. v. Reynard,* 292 Ill.App.3d 968, 978 (4th Dist. 1997) (citing an Illinois Attorney General opinion stating Eastern Illinois University is a public corporation subject to the Open Meetings Act and the Freedom of Information Act).

Due to the protections afforded to the BOT under the Eleventh Amendment of the U.S. Constitution, this Court lacks subject matter jurisdiction over all of plaintiffs' claims brought against it under Section 1983. As such, the BOT should be dismissed completely from this Complaint pursuant to Fed. R. Civ. P. 12(b)(1). *See, e.g., Hudson v. Ill. Dep't of Human Servs.,* 02-c-9227, 2003 WL 22839819, at *1 (N.D. Ill. 2003)(noting a Rule 12(b)(1) motion to dismiss requires a court to dismiss any action for which it lacks subject matter jurisdiction and that the Seventh Circuit considers Eleventh Amendment immunity to be a jurisdictional bar).

C. Counts I through V and VII through X of Plaintiff's Complaint Should be Dismissed for Failure to State a Claim Upon Which Relief May Be Granted Because Plaintiff Has Not Alleged Any Facts Plausibly Showing The

Necessary Participation Or Involvement By The Individual Defendants for the Various Theories Asserted

Even if plaintiff's Section 1983 claims set forth in Counts I, II, III and IX against the individual defendants were not barred by the Eleventh Amendment, dismissal is still required of those Counts and the others referenced above because no plausible Section 1983 claim has been pled. To state a cause of action under Section 1983 against an individual, the plaintiff must allege the individual had "personal involvement in the alleged constitutional deprivation to support a viable claim." *Palmer v. Marion County,* 327 F.3d 588, 599 (7th Cir. 2003); *Eberhardt v. Brown,* No. 11-C-8877, 2012 WL 5878426, at * 5 (N.D. Ill. Nov. 20, 2012).

Section 1983 liability is premised on individualized fault; a plaintiff therefore cannot simply "lump [] each of the individual Defendants together without regard to their respective roles" in the alleged constitutional violation which is at issue. *Harrison v. Ill. Dep't of Transp.*, 10-cv-4674, 2011 WL 2470626, at *6 (N.D. Ill. June 21, 2011). Where there are no allegations "to plausibly suggest personal involvement" in the "alleged constitutional violation," dismissal for failure to state a claim is warranted. *Eberhardt,* 2012 WL 5878426, at *5; *Nieman,* 706 F.Supp.2d at 909-910; *Sheikh v. Lichtman,* No. 11 C 2334, 2012 WL 3042922, at *3 (N.D. Ill. July 25, 2012)(complaint dismissed where plaintiff alleged no facts suggesting plaintiffs were directly involved in any of the discriminatory acts).

1. Plaintiff's claims against All Defendants should be dismissed because the Complaint does not state any plausible claim against any of them.

First, Plaintiffs' Complaint is structured and pled in a manner that federal Courts have forbidden. Rather than make out a case for each theory against each of the individual officers, Plaintiff lumps the individuals together in groups, namely: Groups 1 and 2. Thereafter, Plaintiff

fails to allege any individual wrongful against any all individual defendants, except Difanis and King, for anything.

Second, Plaintiff only identifies one specific act of alleged improper conduct on the parts of Officer Difanis in Counts I and III; and, one of the same against Officer King relating to the March 19, 2017 incident in Counts I and V. No other acts are specifically alleged against any individual Defendant in any count, much less allege facts sufficient to meet a prima facie case of the theory Plaintiffs seek to advance.

Rather, Plaintiff alleges against all Defendants that both groups of officers took the actions "because they were aware that they will not be disciplined for violating the rights of citizens and because they wanted to retaliate against Mr. Mann for filing a civil rights lawsuit against their fellow officers from the Champaign-Urbana enforcement community." (Par. 53)

In sum, plaintiff's alleged group acts by the individual Defendant Officers must fail. While fact-pleading is not required, Plaintiffs still must plead sufficient facts to show his/her claims are plausible. Here, there are no specific allegations of any individual wrongdoing on the part of Officers Colby G. Wright, Sara M. Links, Jay Loschen, Chad Burnett, Don C. McClellan, Adam Marcotte, John Franquemont, Zachary Makalik, Chris Elston, the City of Urbana, or the BOT at all that could conceivably sufficient to support the any of the theories advanced in any of the Counts. The remaining facts also fail to state a cause against Officers Difanis and King.

2. Count I Must Be Dismissed Because Plaintiff fails to Establish a Sufficient Factual Basis to Allege Harassment of Plaintiff Mann on the part of any Individual Defendant As a Retaliation For the Exercise of His First Amendment Rights

In addition to the foregoing, Count I Must Be Dismissed because there are no facts pleaded that form a plausible basis for the conclusions necessary for the Plaintiff to state his

cause of action. All of the allegations supporting theories of recovery in Plaintiffs' Complaint rely upon facts stemming from events that allegedly took place on two specific dates and thus, serve as the factual basis for Plaintiffs' various causes. The two events allegedly took place on March 19, 2017 and July 30, 2017. Plaintiffs offer no additional specific dates, times or places that any of the individual officers making up the Officer Groups 1 and 2 acted to violate Plaintiff's rights or engaged in wrong-doing. Therefore, any basis for all of the Plaintiffs theories must flow from these dates and must constitute the harassment Plaintiff Mann claims he received as a result of his exercise of his First Amendment Rights.

Count I is premised wholly on an illogical conclusion that Defendant officers' behavior was "retaliatory" in nature without any supporting facts sufficient to give rise to said conclusion. Plaintiff's conclusions imply that Defendant Officers somehow targeted him. The basis for Plaintiff's theory in Count I is that because there is geographic proximity of the City of Urbana, the University of Illinois and the City of Champaign there is some degree of cooperation amongst law enforcement. Moreover, as a result of that interaction anything at all that can be characterized as an "attack" (what is an "attack" is never defined by Plaintiffs) on one or more officers or the governmental entities will necessarily result in all individual officers for any and all of the other governmental entities to always perceive said "attacks" as a personal unidentified "attack" on each and every other officer from each and every other governmental entity. Where are the facts to support that series of conclusions?

The sum and substance of Plaintiff's factual basis for the above alleged perception is that the Defendant officers here were acting in retaliation for Plaintiff Mann filing a prior civil rights lawsuit against one or more officers employed by a different agency – a/k/a the "attack".

Plaintiff offers absolutely no facts that give rise to the direct conclusion or even a plausible inference that this conclusion is reasonable. Not only does Plaintiff not allege that any one of the individual Defendants here actually know any of the Defendants in that other unidentified civil rights suit, Plaintiff fails to even allege any basis of a familiarity with the unidentified civil rights suit by any Defendant. Moreover, Plaintiff identifies no facts that provide any basis for the reasonable direct or implicit conclusion that any of the individual officer Defendants here had ever taken action consistent with that alleged by Plaintiff in any other setting or were aware others had. Given the lack of these fundamentally necessary facts, Plaintiff's Count I amounts to only far-fetched conclusions which seek to state prima facie elements to a First Amendment claim unsupported by legitimate facts. Under federal law, this effort must fail and Count I must be dismissed.

There is yet another basis for further addressing the limited "facts" Plaintiff asserts in Count I. As indicated above, Plaintiff references events on March 19, 2017 and July 30, 2017 as a factual basis for the Complaint, including Count I. What Plaintiffs have not included completely in their Complaint are two important facts that they were no doubt aware of at time they filed their Complaint.

First, with respect to the both incidents, the individual Defendant officers were dispatched to the location where the Plaintiffs were, they did not target or harass either Plaintiff, specifically Mann. Specifically, METCAD-911 received calls seeking police intervention and following dispatch the officers responded to the locations where METCAD-911 directed them to respond to. The March 19, 2017 call to METCAD-911 seeking law enforcement came from Mr. Mann himself as he admits in Paragraph #18 of the Complaint. In other words, he brought the

police to him. They didn't target him for harassment. The July 30, 2017 incident involved an unrelated citizen calling METCAD-911 to report loud yelling, crying and screaming, and other suspicious noises generating the concern for another's well-being. That is what brought the Defendant officers to the Plaintiffs location on that date. Again, the officers were not targeting Mann for harassment.

Second, with respect to the July 30, 2017 incident, Plaintiffs go to great lengths to demonize all of the officer's "group" behavior as misconduct devoid of any probable cause. What Plaintiffs fail to reveal to the Court is that from the moment that they arrived at the location of the Plaintiffs on that date, there was an outstanding writ warrant for Plaintiff Mann's arrest. Attached to this motion is Exhibit A, a certified copy of the Order for Writ of Body Attachment dated May 17, 2017 issued by a judge of the Circuit Court of Dekalb County, Illinois – Twentieth Judicial Circuit authorizing Mr. Mann's arrest. These Defendants ask this Court to take judicial notice of the judicial Order; and, corresponding existence of probable cause.

In the case of an outstanding arrest warrant, the warrant and body attachment provide probable cause for the arrest. See *U.S. v. Thornton*, 463 F.3d 693, 698 (7th Cir. 2006) (outstanding arrest warrant supports probable cause for arrest whether or not it was correct); *Strack v. Donahue*, 535 F.Supp. 772, 774 (N.D. Ill. 1981) (order of contempt and issuance of body attachment in prior divorce proceedings support probable cause allowing for custodial arrest). Having the warrant provides the officers with a document upon which a neutral judicial officer has already reviewed the factors and has made a determination that probable cause exists to arrest. See *Steagald v. United States*, 451 U.S. 204, 212, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981). The warrant serves as a protection for the individual, preventing that person from an

"unreasonable" seizure. Id. at 212-13. Because such a determination has been made, once an arrest warrant is issued by a neutral judge, the officer executing the warrant is not responsible for making a probable cause determination or questioning the validity of the warrant. See *Jones v. Wilhelm*, 425 F.3d 455, 462 (7th Cir. 2005) ("Absent exigent circumstances, nothing-neither the determination of probable cause nor the confirmation that a warrant is sufficiently particular-is meant to be left to the discretion of police officers executing a warrant").

Given that the Defendant officers were dispatched to the July 30, 2017 incident where they discovered Plaintiff Mann, they cannot be said to have been attempting to find him to harass him for any reason. Moreover, since they possessed probable cause to arrest him, the facts reflecting interaction with Mann on July 30, 2017 associated with responding to the scene per dispatch and arresting Mann cannot be deemed facts consistent with "harassment" for any retaliatory reason. When you remove the July 30, 2017 event as a basis for the Plaintiff's claim, and reflect on the fact that Plaintiff himself brought the Defendant officers to his location on March 19, 2017, there is no basis for alleging harassment, and, certainly no pattern of it.

3. Counts I, II, III and IV must Be Dismissed Against the Individual Officers Because the they are Entitled to Qualified Immunity Due to the Existence of Probable Cause

Last, the individual Defendants are entitled to a dismissal based on qualified immunity. Qualified immunity protects officials performing discretionary functions who are sued in their individual capacities against liability for monetary damages so long as their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Behrens v. Pelletier,* 516 U.S. 299, 305 (1996)(quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 326 (1992)). Plaintiff fails to state a claim that the

individual defendants violated his constitutional rights in any way. Specifically, the officers had probable cause to Moreover, plaintiff fails to articulate the procedure, rules, regulations and/or manuals that were followed and how those procedures, rules, regulations, and/or manuals are constitutionally deficient, much less that the applicable constitutional standards were clearly established at the time in question. Therefore, these defendants are entitled to qualified immunity.

Given Plaintiff's allegations and the valid arrest warrant, none of the officers could have been aware that their response to the scene and subsequent investigation leading to probable cause and arrest of Mann could have a constitutional violation much less one that was reasonably well established. Since the individual officers enjoy immunity, Count I must be dismissed against them with prejudice. Certainly, the officers from "Group 2" should be dismissed.

4. Count I must Be Dismissed Against the City of Urbana Because Plaintiff fails to Allege and Support with fact Any Alleged Policy of Harassment

Nowhere in the Plaintiffs' Complaint do they make any specific allegations that the City of Urbana had any policy, practice or procedure consistent with allowing its employees to engage in any harassment of anyone. Specifically, Plaintiffs Complaint fails to allege that the City had any policy that its individual police officers were allowed to take retaliatory actions against anyone for any reason, much less that it had a policy directing or allowing retaliatory behavior against anyone for exercising their First Amendment rights.

Moreover, Plaintiff has no allegations asserting that the City of Urbana had any other form of practice or procedure authorizing the same. Plaintiff's Complaint lacks any facts to

support the claim that there is any pattern or practice of allowing this very behavior. As such, pursuant to the *Monell* law cited in response to Count VIII below, Count I against the City of Urbana must be dismissed.

5. Plaintiff Mann's False Arrest claim in Count II Must Be Dismissed Against Officers Difanis, Burnett, McClellan, Marcote, Franquemont, Elston and Sgt. Mikalik With Respect to the July 30, 2017 Event Due to the Existence of Probable Cause to Arrest Mr. Mann.

Plaintiff Mann also alleges that "Group 2" of the defendant officers (listed individually above) falsely arrested him. Fundamentally, there can be no "false arrest" when the defendant officers have probable cause. *McNamara v Handler*, 2008 U.S. Dist. LEXIS 101753, at *6–7 (N.D. Ill. 2008) (citing *Lopez v. City of Chi.*, 464 F.3d 711, 718 (7th Cir. 2006)). Police officers have probable cause to arrest an individual when there is an outstanding arrest warrant for the same individual. *Id.* *7 (citing cases). Entering a domicile police have reason to believe the suspect is within is also permitted to execute an arrest warrant. *United States v. Jackson*, 576 F.3d 465, 467–68 (7th Cir. 2009).

Here, Plaintiff Mann claims the Defendant Officers lacked probable cause for the July 30, 2017 incident, and had no warrant to search the Plaintiffs' home. (Compl. ¶ 39, 90). Please see attached Exhibit A, which was an outstanding warrant for Plaintiff Mann's arrest at the time in question. Police, therefore, *had* probable cause and operated within the Fourth Amendment when they arrested Mann at the Plaintiffs' home. Plaintiff Mann's claim therefore fails, and should be dismissed.

6. Count III Must Be Dismissed Because Plaintiff Fails To Plead a Prima facie Case Asserting an Actionable Fabrication of Evidence Claim

A "fabrication of evidence" is a recognized Due Process violation in this Circuit. *Whitlock v. Brueggemann*, 682 F.3d 567, 580, 585–86 (7th Cir. 2012). However, the alleged fabrication of evidence by police officers can only violate Due Process when said evidence is *used* to deprive the victim of liberty. *Id.* The Seventh Circuit has already concluded that merely having to attend court and/or be detained on charges does *not* constitute a sufficient liberty deprivation when the jury acquits. *Saunders-El v. Rohde*, 778 F.3d 556, 561 (7th Cir. 2015). Indeed, the Plaintiffs' burden is even *less* when the charges are voluntarily dismissed against them. *Cairel v. Alderden*, 821 F.3d 823, 831 (7th Cir. 2016). For the alleged March 19, 2017 incident, Plaintiffs' claim that Defendants "turned their dash cameras off . . . or intentionally failed to initiate recording of their dash cameras" does not constitute "fabrication of evidence." (Compl. ¶ 18). Fabrication requires the officer to "manufacture" false evidence. *Whitlock v. Brueggemann*, 682 F.3d 567, 580, 585–86 (7th Cir. 2012).

Plaintiff fails to assert what evidence was fabricated. While claiming generally that they fabricated it, they do so by merely alleging that the officers created false testimony sufficient to justify arrest and prosecution. There is no difference between the conclusion that the individual officers created false testimony and/or evidence than saying the fabricated evidence. Plaintiff fails to provide one fact consistent with that other than suggesting unlawful contact by Wade and resisting arrest by Mann. Moreover, based on the existence of probable cause in the form of a valid arrest warrant out for Mann at the time that the individual officers in "Group 2" acted to arrest him, eliminates the validity of any conclusion that there was any need to fabricate anything to arrest Mann on July 30, 2017. Since the Plaintiffs fail to support their Complaint

with legitimate facts necessary to state a cause of action for fabrication of evidence, Count III must be dismissed. At the very least it must be dismissed against the Group 2 officers.

7. Count IV Must Be Dismissed Because The "Group 2" Defendant Officers Had Probable Cause to Arrest Mr. Mann at His Home at that Time

As set forth above, Exhibit A establishes the Officers had a valid Order to Arrest Plaintiff issued as of May 17, 2017 at the incident of July 30, 2017. As Plaintiffs allege in Paragraphs 36 through 71, Mr. Mann came to the door of his home and personally responded to the officers by opening the door. At that time, he refused to open the door notwithstanding their direction and as alleged tried to close the door on the officers that possessed a valid Order authorizing Mr. Mann's arrest at that time. The officers had every right to pursue the fugitive Mann pursuant to that arrest warrant at his home. Consequently, Count IV must be dismissed in its entirely with prejudice.

8. Count V fails to Meet the Heightened Pleading Requirement Under Both Federal and State Law When It Comes to Asserting a Conspiracy Claim and Therefore Fails to State a Cause of Action and Must Be Dismissed

Civil conspiracy, be it under federal statute or state common law, requires more from a pleading than Rule 8 – indeed, this was true "[e]ven before [*Twombly*] and [*Iqbal*]." *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009)). This is because a "bare allegation of conspiracy" was simply "too facile an allegation." *Id.*; *see also Cain v. Burge*, 2012 U.S Dist. LEXIS 88530, at *27 (N.D. Ill. 2012). The pleading demands are all the more stringent when defendants could become enmeshed in discovery on the basis of a complaint alleging "a vast, encompassing conspiracy." *Id.* Therefore, to simply state the elements of conspiracy—i.e., the members and their roles, the

purpose, the date of agreement, and the acts to progress the conspiracy—and say the defendant did them is insufficient to survive a 12(b)(6) motion. *Ryan v. Mary Immaculate Queen Ctr.*, 188 F.3d 857, 860 (7th Cir. 1999); *Cain*, 2012 U.S Dist. 88530, at *27.

That is all the Plaintiff offers here: "vague and conclusory" allegations that defendants conspired. *Boyd v. City of Chi.*, 225 F. Supp. 3d 708, 726 (N.D. Ill. 2016). To start, paragraphs 110–113 of the complaint are naked statements of the claim's elements, and therefore clearly short of the pleading standard. Additionally, paragraph 109 simply says Defendant Officer Group 2 "conspired" without specifying the "when" and/or "how" of the, much less the details of an "existence" of an agreement. Paragraphs 106–108 have the benefit of more detail, but still fall short of conspiracy's pleading standard. For example, the *role* of any member in the alleged conspiracy is never made clear. *See Ryan*, 188 F.3d at 860 (dismissing conspiracy complaint that failed to allege what conspiracy's "terms were except that they somehow included a search of the premises occupied by the plaintiffs" and what the defendant's role in the conspiracy was). This is especially so when the real tort of the conspiracy is the alleged fabrication of evidence a/k/a fraud. Therefore, Count V fails to meet the heightened standard and fails to state a cause of action and must be dismissed.

9. Plaintiff Mann's Claim In Count VII Against "Group 2" Defendants Must Be Dismissed Because Said Defendants Had Probable Cause to Arrest Him

Plaintiff must show that: (1) defendant's conduct was extreme and outrageous; (2) the defendant either intended or knew with a high probability that his conduct would cause severe emotional distress; and (3) the defendant's conduct actually caused emotional distress. *Doe v. Calumet City*, 161 Ill.2d 374, 392 (1994). When determining what conduct is "extreme and

outrageous," more latitude is given to a defendant—such as a police officer—who reasonably believed that his objective was legitimate. *Id.* at 393. This is not a total immunity, however. *Id.*

Here, Plaintiff Mann cannot ever establish that the Group 2 Defendants ever engaged in in "extreme and outrageous" behavior when they arrested him on July 30, 2017 because they had an Order commanding them to arrest Mr. Mann. Accordingly, all "Group 2" Defendants should be dismissed from this Count.

10. Count VIII against The City of Urbana Must Be Dismissed Because the Plaintiffs Fail to Identify Their Cause And Thereafter Fail to State a Viable Cause of Action Premised on Section 1983 Against the City of Urbana

Plaintiffs fail to assert just what cause of action they are attempting to state in Count VIII. While the Plaintiff allege a duty to develop various rules and regulations, Plaintiff fails to cite any authority for that claim. Further, Plaintiff asserts that it was the Defendant's responsibility to train and supervise with respect to the rules and regulations referenced above. Presumably, Plaintiffs are attempting to premise this Count on Section 1983 *Monell* jurisprudence. They have failed to state a cause of action because they have not sufficiently pled deliberate indifference and/or a sufficient pattern of unconstitutional behavior.

In Section 1983 claims, *respondeat superior* cannot be used to impose liability upon municipalities and other local governmental entities. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691 (1978); *Thompson v. Boggs*, 33 F.3d 847, 859, n. 11 (7th Cir. 1994). "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983." *Monell,* 436 U.S. at 694. "In other words, to maintain a Section 1983 claim against a municipality, one must

establish the requisite culpability (a 'policy or custom' attributable to municipal policymakers) and the requisite causation (the policy or custom was the 'moving force' behind the constitutional deprivation)." *Gable v. City of Chicago*, 296 F.3d 531, 537 (7th Cir. 2002) (citation omitted); see also *Estate of Novack v. County of Wood*, 226 F.3d 525, 530 (7th Cir. 2000) (noting that for plaintiff to prevail, he must show that the policy was the "direct cause" of or "moving force" behind the constitutional violation).

A plaintiff can establish a "policy or custom" by showing: "(1) an express policy that, when enforced, causes a constitutional deprivation; (2) 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; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority." *Baxter v. Vigo County School Corp.*, 26 F.3d 728, 735 (7th Cir. 1994) (internal citations and quotations omitted) (superseded by statute on other grounds).

The failure to develop or implement necessary policies and procedures can constitute a policy or custom for purposes of a *Monell* claim, but only if that failure causes a constitutional violation. *Harris v. City of Marion, Indiana*, 79 F.3d 56, 58 (7th Cir. 1996); see also *Catchings v. City of Chicago,* 04 C 6110, 2006 WL 1371440, at 5 (N.D. Ill. May 15, 2006). "In those situations, however, the plaintiff generally must allege a pattern or series of incidents of unconstitutional conduct or a clear constitutional duty to take action because the situation was certain to recur." *Harris,* 79 F.3d at 58-59 (citation omitted). "In addition, the municipality's inaction must amount to deliberate indifference, so that it is fair to infer that the inaction is itself a 'policy.'" *Id.* at 59 (citation omitted).

The allegations of Count VIII and Plaintiff's Complaint amount to nothing more than a recitation of the elements of a *Monell* claim supported solely by conclusory statements that Defendant City of Urbana's policies and procedures regarding conducting arrests based on resisting and obstructing behavior are not "adequate." There are no factual allegations or other support to provide notice to Champaign County as to what about its policies and procedures are inadequate. Moreover, the Plaintiff's attempt to establish the "pattern and practice" is insufficient as well. Other than one example in Paragraph 133 that isn't temporally referenced relative to the allegations involving these Plaintiffs, there is nothing alleged remotely resembling an established "pattern and practice".

Knowing their allegations are inadequate, Plaintiffs try to bolster their case by not referencing the Defendant's officers' alleged "pattern and practice" but turn to a completely distinct governmental entity who has no power to effect anything with the Defendant. Given the allegations of Plaintiff's Complaint and their tacit admission that they do not have a good faith factual basis to plead a pattern and practice against this Defendant, Count VIII must be dismissed.

11. Count IX Must Be Dismissed As to Defendant City of Urbana as to Counts I, II, III, and IV Because the City Cannot Be Vicariously Liable For Constitutional Violations and as to Count VIII Because there are no Improper acts by any Individual Actors Alleged as to Count VIII

Counts I, II, III and IV are include alleged violations against individual officers premised upon Section 1983. Per the law cited in # 10 above, namely: "In Section 1983 claims, *respondeat superior* cannot be used to impose liability upon municipalities and other local governmental entities. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691 (1978);

Thompson v. Boggs, 33 F.3d 847, 859, n. 11 (7th Cir. 1994)." Since Counts I, II, III and IV are premised on Section 1983 against individuals, there can be no *respondeat superior* liability.

As for Count VIII, Plaintiffs seek to make a direct claim against the City of Urbana and therefore there can be no vicarious liability. No individual actor's misconduct is alleged as the basis for indirect liability. Count VIII must be dismissed.

WHEREFORE, the Defendants, JENNIFER DIFANIS, COLBY G. WRIGHT, SARAH M. LINKS, SETH R. KING, JAY LOSCHEN, CHAD BURNETT, DON C. MCCLELLAN, ADAM MARCOTTE, JOHN FRANQUEMONT, SGT. ZACH MAKALIK, THE CITY OF URBANA, A MUNICIPAL CORPORATION, CHRIS ELSTON, AND BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS , respectfully pray that this Court enter an Order dismissing all Defendants from the case while dismissing each and every Count of the Plaintiffs', BENJAMIN MANN and SAMANTHA WADE, Complaint, for costs and any other relief this Court deems equitable and just.

Respectfully submitted,

Jennifer Difanis, Colby G. Wright, Sara M. Links, Seth R. King, Jay Loschen, Chad Burnett, Don C. McClellan, Adam Marcotte, John Franquemont, Sgt. Zach Makalik, the City of Urbana, a municipal corporation, Chris Elston, and Board of Trustees of the University of Illinois, Defendants

s/Keith E. Fruehling
Keith E. Fruehling, IL ARDC #: 6216098
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PROOF OF SERVICE

I hereby certify that on 1/12/18, I electronically filed the foregoing MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Shneur Z. Nathan – snathan@nklawllp.com
Avi T. Kamiomski – akamionski@nklawllp.com
Nathan & Kamionski LLP
140 S. Dearborn, Suite 1510
Chicago, IL 60603

I also hereby certify that I have mailed by United States Postal Service the foregoing to the following non-CM/ECF participants: None

s/Keith E. Fruehling
Heyl, Royster, Voelker & Allen

33564783_1

Arrested by Champaign Co Sheriff on 7/30/17 and posted Bond #650 7/30/17, and 8/21/17 9am court date DeKalb County Courthouse Sycamore and released by Champaign Co Sheriff's 7/30/17.

IN THE CIRCUIT COURT OF THE TWENTY—THIRD JUDICIAL CIRCUIT
DEKALB COUNTY, ILLINOIS

ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES ex rel Lonisha Lawrence, PLAINTIFF,	FILED IN OPEN COURT MAY 17 2017 Maureen A. Josh Clerk of the Circuit Court DeKalb County, Illinois	DOCKET NO. 02 F 164
vs.		
Benjamin Mann, DEFENDANT,		IV—D NO. C1286488

ORDER FOR WRIT OF BODY ATTACHMENT FTA
TO ALL PEACE OFFICERS OF THE STATE OF ILLINOIS:

DEFENDANT: Benjamin Mann

ADDRESS: 807 S. Urbana Ave, Urbana, IL 61820

DOB: 5/27/81 SEX: M RACE: BK HEIGHT: 5'09" WEIGHT: 175

HAIR: BK EYES: Brown

This matter having come before the Court, upon the motion of the Plaintiff for issuance of a Writ of Body Attachment for the Defendant herein on the charge of Contempt of Court, and upon consideration of said motion, the Court finding:

That this Court has jurisdiction of the parties hereto and the subject matter hereof; that the Defendant hereinafter named, failed to appear before this Court as commanded. That said Defendant has failed, neglected, and refused to comply with said Order, or to show any just cause for failure to do so.

NOW THEREFORE:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that you attach the above named Defendant, Benjamin Mann, so as to have the body of said Defendant before this Court forthwith, but no later than 11-15-17 @ 9:00am, at the hour of 9:00 a.m. at which time this Writ of attachment is returnable before this Court. When brought before this Court, the Defendant shall then and there answer to the charge of Contempt of this Court for failure to comply with, and obey, the aforesaid orders of this Court.

Bond on this Writ is hereby set at $ 600.00, full cash bond to apply.

at the next available court bond call

EXHIBIT A
ALL-STATE LEGAL®

A true copy of the original on file in my office
Attested to this 17th day of May 20 17
MAUREEN A. JOSH
Clerk of the Circuit Court
23rd Judicial Circuit
DeKalb County, Illinois
By Maureen A. Josh
Circuit Clerk

Office of Attorney General
Winnebago County
(815) 987-7981

DATE: 5.17.17

ENTER: [signature]

I, KATIE M. BLAKEMAN, Clerk of the Circuit Court in and for the County of Champaign, State of Illinois, do hereby certify that the foregoing is a true, correct and complete copy of the instrument as it appears of record and on file In my office, this 5th day of Jan. 20 18.

Katie M. Blakeman

Clerk of the Circuit Court
Sixth Judicial Circuit
Champaign County, Illinois