UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PATRICIA SCOTT FLEMING, as Administratrix of the Estate of Patrick Fleming,

Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

……X

Civil Case No. 1:18-cv-4866 (GBD)

MEMORANDUM OF LAW IN REPLY TO DEFENDANTS' OPPOSITION TO MOTION TO COMPEL *MONELL* DISCOVERY

Eden P. Quainton
QUAINTON LAW, PLLC
Attorneys for Plaintiff
Patricia Fleming, as Administratrix
of the Estate of Patrick Fleming
2 Park Avenue, 20th Floor
New York, New York 10016
(212) 419-0575
Email: equainton@gmail.com

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PRELIMINARY STATEMENT

The Memorandum of Law in Opposition to Plaintiff's Motion to Compel *Monell* Discovery (the "Opp.") filed by the City of New York, Joseph Ponte and Rikers' Island Correctional Officers (collectively, the "City") rests on a flawed analysis of the law in the Second Circuit with respect to bifurcation of discovery and trial under *Monell v Department of Social Services*, 436 U.S. 658 (1978). Contrary to the City's core argument, even if Plaintiff fails to establish the liability of individual named defendants, trial of *Monell* claims *can* proceed if the Plaintiff has suffered constitutional harm at the hands of municipal agents or employees. *See Askins v. Doe No. 1*, 727 F.3d 248, 253-254 (2d Cir. 2013); *see also*, *Lopez v. City of New York, et al.*, No. 20-CV-2502 (LJL), 2021 WL 2739058, at *2 (S.D.N.Y. July 1, 2021); *Small v. City of New York*, No. 09-CV-1912 (RA), 2022 WL 1261739, at *12 (S.D.N.Y. Apr. 28, 2022). There is thus no gain in judicial economy in bifurcating individual and *Monell* claims, since a second trial would be necessary regardless of the outcome of the first trial, requiring the duplicate presentation of evidence, a double burden on individual witnesses, and an unnecessary expenditure of the Court's and the parties' time and resources. As to Plaintiff's specific *Monell* requests, despite numerous meet and confer sessions and the issuance of several deficiency letters, the City has refused to produce a *single* document in response to Plaintiff's requests without making any effort to seek a protective order or file a motion to bifurcate.[1] The City continues to obfuscate and delay, including with respect to Plaintiff's clear request for information relating to the six inmates named in the Second Amended Complaint (the "SAC"), whose inclusion in the pleadings

[1] The City's Opp. is defective procedurally since it does not cross-move the Court to bifurcate. This procedural defect is prejudicial to Plaintiff and appears to be an attempt to game the system, since Plaintiff would have a full 25 pages to oppose a cross motion, but is limited to 10 pages on reply to what amounts to a new motion.

persuaded this Court to permit Plaintiff's *Monell* claims to proceed. *See* Memorandum and Decision, dated July 29, 2020, Dkt.149 (the "July Order"), at 8-9.

LEGAL ARUMENT

I. THE COURT SHOULD DENY DEFENDANTS' REQUEST FOR A BIFURCATION OF DISCOVERY AND TRIAL

A. Defendants' Request to Bifurcate Individual and *Monell* Claims is Based on a Misunderstanding of the Relationship Between Municipal Actors and Municipalities and Runs Counter to the Clear Trend of the Law.

The City's argument for bifurcating *Monell* claims and staying discovery on municipal liability is based on a fundamental misunderstanding of the relationship between municipal actors and municipalities in the context of a *Monell* claim. *See, e.g.*, *Askins*, 727 F. 3d at 253-254; *Barrett v. Orange Cnty. Human Rights Comm'n,* 194 F. 3d. 341, 349-350 (2d Cir. 1999); *Amato v. City of Sarasota Springs,* 170 F.3d 311, 321 n.9 (2d Cir. 1999); *Small v. City of New York*, No. 09-CV-1912 (RA), 2022 WL 1261739, at *12 (S.D.N.Y. Apr. 28, 2022); *Ambrose v. City of New York*, 523 F. Supp.2d 454, 479-480 (S.D.N.Y. 2009); *Lopez,* 2021 WL 2739058, at *2. All these cases make clear that "a successful defense by the individual defendants does *not* necessarily preclude a successful claim against the municipality." *Lopez*, 2021 WLA2739058, at *2. As a result, the City's central argument that bifurcation will be more efficient and conserve resources because the trial of individual claims may obviate the need for trial of *Monell* claims is based on an incorrect premise and is contrary to controlling authority in the Second Circuit.

Askins, which establishes the controlling law in this area, is particularly instructive. In *Askins*, the district court granted defendants' motion for summary judgment and dismissed the claims against the named defendant and a number of unnamed John Does, finding that the former was entitled to qualified immunity and that the complaint could not be amended to name the Doe defendants because the statute of limitations had run. *Id*. at 251–52. The district court then dismissed the *Monell* claim against the City of New York. Reversing, the Second Circuit found

that the district court's ruling "reflect[ed] a misunderstanding of the relationship between the liability of individual actors and municipal liability for purposes of *Monell*." *Id.* at 253. The Second Circuit underscored that is "is irrelevant to the liability of the municipality" that the individual defendants are found not to be liable for a plaintiff's injury, or are found to be entitled to immunity, or that claims against them are time-barred. *Id.* at 254. A plaintiff is only required to prove that *some* municipal actor was responsible for committing a constitutional tort against him, and that the municipal actor was acting pursuant to some municipal policy or custom. *Id.* at 253; *see also Barrett,* 194 F.3d at 349–350.

Here, Plaintiff has named a number of correctional officers allegedly liable for excessive for incidents on June 8, 2015, and August 16, 2015. *See* Second Amended Complaint, Dkt.161 (the "SAC"), ¶¶ 63-65, 75-81. In addition, Plaintiff identified a number of John Does whose identity she was unable to ascertain before the City began its document production, by which time the statute of limitations, barring any tolling argument, would have run against these individuals. The City has stated that it intends to oppose the naming of the John Does on statute of limitations grounds. Opp. at 23. Assuming, *arguendo*, the City is successful in opposing the naming of these John Does and assuming further no liability is found against the named officers, *Askins* makes clear that a *Monell* claim <u>*can*</u> still proceed against the City with respect to the October 19 incident as part of the alleged pattern and practice of excessive force on Rikers Island expressly sustained as viable by the Court. Memorandum Decision and Order dated July 29, 2020, Dkt.149 (the "July Order"), at 8-9. But this incident is intimately intertwined with the issue of medical malpractice also alleged by Plaintiff, because HHC has stated that the "initial staging" of salvage chemotherapy was "hampered" by internal bleeding from trauma, Declaration of Eden P. Quainton (the "Quainton Decl."), Ex. A, a clear reference to Patrick's three weeks of hospitalization for internal bleeding following the October 19, 2016 alleged assault. Quainton

Decl., Ex. B. Thus, even if this case is bifurcated and there is a separate trial for the claims against the individual defendants, and even if all of the individually named defendants are found to be not liable for violating Plaintiff's constitutional rights, a second trial to adjudicate the *Monell* claims against the City would *still* be necessary, with duplicative testimony of the medical providers and correctional officers involved. Such a result would not further judicial economy. *See e.g.*, *Carter v. City of New York*, No. 08 Civ. 5799 (PAC), 2013 WL 553759, at *1 (S.D.N.Y. Feb. 8, 2013).[2]

In support of their bifurcation argument, Defendants recycle cases purporting to show that courts in the Second Circuit favor bifurcation of *Monell* and individual claims. Opp. at 5-6. However, the clear trend of the law in the Second Circuit is to deny bifurcation of *Monell* and individual claims. *See, Ambrose*, 623 F. Supp. 2d at 480; *Carter* 2013 WL 553759; *Lopez* 2021 WL 2739058; *Small* 2022 WL 1261739. Virtually all the cases cited by the City are inapposite. The string cite of cases referenced in footnote 2 on page 5 all predate *Atkins* and are thus based on an invalid premise. The other cases cited are of no help to the City. *Padilla v. City of New York*, No. 92 CIV. 1212 (MBM), 1993 WL 5833, at *1 (S.D.N.Y. Jan. 4, 1993), Opp. at 6, rests on a flawed statement of the law that "if the verdict is in favor of the individual defendants, that ends the case." *Ismail v. Cohen*, 706 F. Supp. 243, 251 (S.D.N.Y. 1989), *aff'd*, 899 F.2d 183 (2d Cir. 1990), Opp. at 6, is inapposite because it is limited by its terms to cases in which both the individual and municipal claims rested solely on vicarious liability theories, which is not the case

[2] The letter response filed by the Medical Defendants, Dkt.228, misses the mark as well. A second trial on *Monell* issues would also impose an unnecessary burden on medical witnesses who would be required to testify twice. The Medical Defendants ignore entirely the recent trend in the law and rely on out-date or inapposite case law Dkt.228-2. The Medical Defendants' one recent case, *Oliver v. City of New York*, No. 19-CV-11219, 2021 WL 2007444 (S.D.N.Y. May 20, 2021) is of no help because the Court in that case agreed only to stage *Monell* discovery while a motion to dismiss was pending. The motion was ultimately denied. *Oliver,* 2022 WL 455851, at *32 (S.D.N.Y. Feb. 15, 2022). Here, of course, the Court has held Plaintiff's *Monell* claims can proceed. Moreover, there is no basis to believe that *Monell* discovery will impose "great expense and burden" on the Medical Defendants, Dkt.228-2, as the *Monell* claim is directed only at the City of New York.

here. *Amato* 170 F.3d at 316 (2d Cir. 1999) actually *undermines* the City's "heads I win/tails you lose argument" (discussed *infra* at 5-6) that there should not be a second trial whether or not Plaintiff prevails. Contrary to the City's theory, *Amato* holds that a successful result against individual defendants does *not* preclude recovery of damages against a municipality. In *Mineo v. City of New York*, No. 09-CV-2261 RRM MDG, 2013 WL 1334322, at *1 (E.D.N.Y. Mar. 29, 2013) the plaintiff *consented* to a bifurcation of individual and *Monell* claims, which limits its precedential value. In *Brown v. City of New York*, No. 13-CV-6912 (TPG), 2016 WL 616396, at *2 (S.D.N.Y. Feb. 16, 2016), Opp. at 5, the Court rejected a belated reconsideration challenge brought 11 months after an oral bifurcation order and misstated the current state of the law. *See supra* at 2-3. In sum, while courts have the discretion to bifurcate cases involving *Monell* and individual liability, Defendants fail to overcome the well-established preference for a single trial of all claims.[3] The specific arguments raised by the City, discussed below, are unpersuasive.

B. Bifurcation Will Not Foster Convenience and Efficiency.

First, the City spills considerable ink belaboring the faulty proposition that separate trials may be unnecessary because a resolution of individual issues would render a *Monell* trial unnecessary. Opp. 6-12. As discussed, this argument is fundamentally flawed. *See supra* at 2-3. To bolster its legally and factually unsound argument, the City advances a "heads I win/tails you lose argument" and claims Plaintiff should be barred from pursuing her claims against the City not only if she loses her individual claims but even if she *prevails* on these claims. Opp. at 10.

[3] "It is only in exceptional instances where there are special and persuasive reasons for departing from this practice [of trying all issues in a single trial] that distinct causes of action asserted in the same case may be made the subject of separate trials." *Jeanty v. Cnty. of Orange*, 379 F. Supp. 2d 533, 549 (S.D.N.Y 2005)(quoting *Miller v. Am. Bonding Co.*, 257 U.S. 304 (1921). *See also Buscemi v. Pepsico*, 736 F. Supp. 1267, 1271 (S.D.N.Y. 1990) ("for reasons of efficient judicial administration courts favor having only one trial whenever possible").

Unsurprisingly, the City does not offer any support for this astonishing claim, which runs directly counter to the policy purposes of *Monell* and the relevant case law. As the Supreme Court has stated, "by making the deprivation of such ['absolute' constitutional] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). The Second Circuit has since elaborated on the Supreme Court's holding in *Carey* and concluded that a *Monell* trial for nominal damages is appropriate on policy grounds even if Plaintiff has prevailed on her individual claims. *Amato*, 170 F.3d at 318–20.

Second, the City claims that *Monell* discovery would be unduly burdensome given the complexity of *Monell* litigation. This claim is unpersuasive. *Monell* discovery is inevitable at some stage. The only issue is *when* discovery should occur. Deferring discovery until after the trial of the individual claims would not only be highly inefficient for the reasons indicated, it would also potentially create additional and unnecessary burdens. *Monell* discovery at this stage could result in summary judgment that would render a second trial unnecessary or Plaintiff could perceive weaknesses of proof in her claim against the City and elect not to proceed with the *Monell* claim.

More fundamentally, the City's argument that Monell discovery would be unduly burdensome and disproportionate to the needs of the case is not an argument for *no* discovery. *Lopez,* 2021 WL 2739058, at *3 (Court has "wide latitude to determine the scope of discovery" issues with respect "to the scope of discovery at this stage are best dealt with pursuant to the standards under Federal Rule of Civil Procedure 26(b) rather than through a stay or bifurcation of discovery.").[4]

[4] Although Plaintiff cited *Lopez* repeatedly in her Motion to Compel Monell Discovery, Dkt.214 at 19, 21, 23, 24, 25, the City ignores the case entirely.

Third, there is no merit to the City's argument that *Plaintiff* would not be prejudiced by the need to conduct two separate trials, with overlapping evidence and witnesses. Opp. at 11. As noted, with respect to the October 19 incident, in a second trial, Plaintiff would be required to call the relevant correctional officers, Rikers medical staff and Elmhurst doctors to *re-testify* as to the severity of Plaintiff's injuries, the extent of the trauma suffered, and the causal connection between the trauma observed at Elmhurst and the force used by the officers in the cell extraction, while also addressing the appropriateness of the force used to extract an emaciated prisoner with advanced cancer from his cell. In addition, the proposed Third Amended Complaint adds an additional incident of excessive force of which Plaintiff only became aware during discovery—a use of force that occurred while Patrick was in solitary confinement in May of 2016 and recovering from chemotherapy. *See* Dkt.271 ¶¶ 138-39.[5] As with the October 19 incident, Plaintiff's claim may be time-barred as to the individual officer, but it is clearly relevant to a pattern and practice of excessive force and allegedly caused Patrick injury, thus satisfying the standing requirement with respect to the *Monell* claims generally. It would be highly prejudicial to separate certain instances of abuse into two separate trials, thus unfairly limiting Plaintiff's ability to paint a complete picture for the jury.

C. Any Prejudice to Defendants or Risk of Juror Confusion Can be Addressed with Appropriate Limiting Instructions.

The City unpersuasively asserts it would suffer potential prejudice and that jurors could be confused if the individual claims and tried together with Plaintiff's *Monell* claims. Opp at 12-17. This underestimates the power of the Court to fashion appropriate remedies and the ability of the jury to separate issues. Any potential prejudice to the City can be mitigated by appropriate jury instructions. *See, e.g.*, *Small*, 2022 WL 1261739, at *13; *Lopez*, 2021 WL 2739058 at *3;

Ambrose, 623 F. Supp. 2d at 480; *Rosa v. Town of E. Hartford,* No. 00–CV–1367, 2005 WL 752206, at *5 (D. Conn. Mar. 31, 2005). Moreover, "cases brought against both individual and institutional or corporate defendants are routinely tried at the same time, and juries are frequently tasked with applying different standards to different parties." *Small*, 2022 WL 1261739 at *13. Juries have repeatedly demonstrated their ability to separate individual and corporate claims appropriately. *See Velez v. City of N.Y.*, 730 F.3d 128 (2d Cir. 2013); *Lee v. City of Syracuse*, 446 F. App'x 319 (2d Cir. 2011); *Martinez v. Port Auth.*, No. 01 Civ. 721 (S.D.N.Y. Nov. 18, 2004); *Leather v. Ten Eyck*, 2 F. App'x 145 (2d Cir. 2001); *Gentile v. Cty. of Suffolk*, 926 F.2d 142 (2d Cir. 1991). With appropriate instructions, there is no reason to believe that jurors cannot do their job properly.

II. THE COURT SHOULD COMPEL THE CITY TO PRODUCE DOCUMENTS IN RESPONSE TO PLAINTIFF'S *MONELL* DISCOVERY REQUESTS

In opposing production of Monell-related discovery, the City disingenuously fails to inform the Court that it has refused to produce *any* documents in response to Plaintiff's requests. Plaintiff has attempted to narrow her requests on multiple requests, but has not been able to meaningly meet and confer because the City has flatly refused any production. The City should not now be heard to claim that Plaintiff's requests are overly broad and burdensome when the City failed to cooperate in narrowing the scope of discovery.

Plaintiff's requests thus reflect an attempt to play tennis with herself. Without a willing interlocutor, Plaintiff has sought to narrow her requests to the extent possible and the Opp. is a product of the City's continuing stonewalling that verges on bad faith.

Most glaringly, the City *omits entirely* from the Opp. any discussion of Plaintiff's targeted request for discovery *relating specifically* to the inmates whose inclusion in the SAC persuaded the Court to allow Plaintiff's Monell claim to proceed. Plaintiff's Motion to Compel specifically highlights Plaintiff's discovery relating to these inmates by name:

> Request 12. Full inmate folders, 24-Hour reports, UOF Package Accountability Sheet items, audio-visual recordings including all investigative interviews, audio-visual materials and investigative reports, for (1) every inmate involved in a use of force incident at Rikers Island for the period from January 1, 2015 to June 30, 2017, for which video surveillance exists; and (2) *for four of the six inmates identified by name in the SAC: Darnell Freeman, Romario Burke, Evan Huss and Patrick Hoover.*

Motion to Compel Monell Discovery, Dkt.214 at 5-6, 10-12.[6]

The City's objection to this request focuses on 12(1) and ignores 12(2). Opp. at 24. At an absolute minimum, the City must be ordered to produce the requested information with respect to the inmates named in the SAC and relied upon by the Court in authorizing Plaintiff's *Monell* claim. The City attempts to confuse the issue by separately objecting to Request No. 12 from Plaintiff's *First* Request for the Production of Documents (the "First Request"). Opp at 19-20. But Request No. 12 quoted above relates to Plaintiff's *Second* Request for the Production of Documents. Motion to Compel *Monell* Discovery, at 4-5. The phrasing of the request makes clear that such information is sought *in addition* to the inmate folders. Again, the City's gamesmanship here should not be rewarded. In addition, the assertion that the disclosure of such information is prohibited by New York Criminal Procedure Law § 160.50 is meritless, as shown in the Motion to Compel, at 11-12. If pushed to its logical conclusion, the City's position would make it impossible for Plaintiff to conduct any *Monell* discovery, frustrating the purpose of the Court's July Order.[7]

The City's remaining objections are not well taken. With respect to Request No. 11, the City must, at a minimum, produce disciplinary records of the named individuals covering at least

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[6] Plaintiff also made clear that her previous requests clearly subsumed identical information for the remaining two inmates identified by name in the SAC and relied on by the Court in the July Order: James Thomas and Alfonso Harris. *Id.* at 5 and note 2.

[7] The City should also be ordered to produce the additional information requested, covering an additional 60-70 files. The City claims this disclosure will take "months" to produce, Opp, at 24, but Plaintiff should not be faulted for the City's stonewalling for nearly a year that has required Plaintiff to expend substantial resources in seeking relief from the Court. *See* Motion to Compel at 4.

the matters the Court has already ruled must be disclosed in the context of Plaintiff's individual discovery demands. *See* Dkt.226 at 2. With respect to the two inmate folders that the Court has stated should not be produced in the context of Plaintiff's individual claims, these folders are unquestionably relevant to Plaintiff's *Monell* claims and must be produced. With respect to incidents of excessive force that occurred on June 8, 2015, August 16, 2015, and October 19, 2015, Plaintiff seeks discovery of incidents on these days because, based on the information that was already produced in discovery relating to Patrick, Plaintiff has reason to believe that additional incidents of excessive force occurred on those days. Motion to Compel at 13-15. Contrary to the City's claims, Plaintiff does not believe that "every reported incident of a use of force necessarily involves excessive force." Opp. at 22. Rather, Plaintiff believes the best way to isolate incidents revealing "excessive" force is to review documented use of force incidents to determine which situations can be most persuasive for judge and jury, while remaining as "minimally invasive" as possible in the context of *Monell*. Motion to Compel at 14. This goal is best served by building on existing discovery, as Plaintiff has sought to do.

CONCLUSION

The City's request for bifurcation of discovery and/or trial should be denied, and the City should be ordered to produce the relevant discovery demanded and pay Plaintiff's attorneys' fees incurred in connection with the present motion.

Dated: New York, New York,
August 30, 2022

QUAINTON LAW, PLLC

By: Eden P. Quainton
Attorneys for Plaintiff
Patricia Fleming, as Administratrix
of the Estate of Patrick Fleming
2 Park Ave., 20th Floor
New York, New York 10016
(212) 419-0575
Email: equainton@gmail.com

CERTIFICATE OF SERVICE

The undersigned certifies that on August 30, 2022, the foregoing document was filed through the CM/ECF system and thereby served electronically on counsel for (1) the City of New York, Joseph Ponte and the Correctional Officers identified in the Second Amended Complaint, and (2) New York City Health and Hospitals Corporation, Corizon Health Inc., Physician Affiliates Group of New York and the other Medical Defendants identified in the Second Amended Complaint.

Dated: August 30, 2022

/s/ *Eden P. Quainton*
QUAINTON LAW, PLLC
Attorneys for Plaintiff
Patricia Fleming, as Administratrix
of the Estate of Patrick Fleming
2 Park Avenue, 20th Floor
New York, New York 10016
(212) 419-0575
Email: equainton@gmail.com