IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION

ELISHEBA RENEE HARRIS, Administratrix of the Estate of DESHAYLA E. HARRIS, Deceased, Plaintiffs, v. **CITY OF VIRGINIA BEACH,** **and** **JOHN DOE,** Defendants.	CASE NO.: 2:23-cv-00116

DEFENDANT CITY OF VIRGINIA BEACH'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COMES NOW Defendant City of Virginia Beach ("City"), by counsel, and for its Memorandum of Law in Support of Motion to Dismiss Plaintiff's Complaint, states as follows:

INTRODUCTION

March 26, 2021, was a tragic night in the City of Virginia Beach. At least three instances of gunfire near the Virginia Beach Oceanfront resulted in multiple casualties, including the death of Deshayla Harris ("Harris"). Officers of the Virginia Beach Police Department ("VBPD") responded to that evening's gun violence with speed and valor, likely saving many lives. Unfortunately, their efforts could not save the life of Harris, who was an innocent bystander struck and killed by a bullet fired from the gun of a presently unknown

shooter. The VBPD continues its diligent efforts to find and apprehend the person responsible for Harris's death and bring them to justice. This lawsuit distracts from and undermines those efforts, and misguidedly attempts to pin the blame for Harris's tragic death on the VBPD – including those officers who bravely came to her aid.

Although Plaintiff's profound loss is worthy of sympathy, her claims against the City are without merit. First, Plaintiff improperly uses the "John Doe" designation to represent either an individual or an unknown number of individuals who are not described with any specificity. Further, by the Plaintiff's own telling, the primary "John Doe" may or may not even be a police officer. The Complaint's "catch all" use of fictitious party pleading is not permitted in federal courts. In addition, Plaintiff brings claims against the City without providing a sufficient factual basis, relying instead upon boilerplate language and speculation. Finally, by well-established law, the City is immune from the several Virginia state law claims alleged against it. For these reasons, all of Plaintiff's claims against the City should be summarily dismissed by the Court.

FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

On March 26, 2021, an unusually large number of people visited Virginia Beach's Oceanfront area. (ECF No. 1, ¶ 17.) In the course of the evening, shooting broke out. The VBPD responded to at least three instances of gunfire occurring at different places along the Oceanfront. (ECF No. 1, ¶ 25.) During one exchange of gunfire, Harris, an innocent bystander, was killed by a stray bullet. (ECF No. 1, ¶¶ 47-52.)

Elisheba Renee Harris ("Plaintiff"), the administratrix of the Estate of Deshayla Harris, filed her Complaint against the City of Virginia Beach and "John Doe" on March 24, 2023 – two days before the second anniversary of Harris's tragic death. (ECF No. 1.) The

Complaint conveys the chaos of an evening marred by gun violence at the oceanfront. (ECF No. 1.) Plaintiff alleges that, after the shooting began, "VBPD Officers rushed to the crime scene, in some instances pointing their weapons through the windows of occupied cars, to investigate the source of shooting." (ECF No. 1 at 3.) Immediately prior to Harris being shot, the Complaint alleges, "It was very loud and many rounds were flying around Deshayla and her friends. People were screaming, and cars were crashing." (ECF No. 1, ⁋ 33.)

The Complaint further alleges that Harris was killed "by an unidentified person who, upon information and belief, is either a [VBPD] officer, or another party, John Doe. While the shooter remains unknown currently after nearly two years, some evidence reasonably points to the shooter potentially being a VBPD Officer." (ECF No. 1 at 2.) The Complaint does not specify what actual evidence, if any, might support that a VBPD officer fired the bullet that struck and killed Harris. (See generally, ECF No. 1.) Further, the Complaint identifies "John Doe" as an "individual, upon information and belief, who fired the firearm round that unlawfully killed Deshayla. Upon information and belief, John Doe may possibly be a VBPD Police Officer." (ECF No. 1, ⁋13.)

Plaintiff alleges that, earlier in the evening, and after gunfire had already broken out, "Deshalya and her friends observed a group of VBPD cars to their right near the traffic light. Some officers were on foot, others were in their cars." (ECF No. 1, ⁋ 30.) The Complaint does not allege any interaction between any VBPD officers and Harris prior to her being shot. (See generally, ECF No. 1.)

After Harris was shot, the Complaint alleges that Harris's friend screamed for help and that a VBPD officer responded and "removed Deshayla from the bushes, positioned her on her back, and began checking for a pulse." (ECF No. 1, ⁋⁋ 41-43.) Plaintiff also alleges

that "[t]he police wrapped Deshayla's head with gauze and several officers stood around her and her friends with guns drawn." (ECF No. 1, ¶ 49.) The Complaint further alleges that "[s]oon thereafter" emergency medical technicians arrived and unsuccessfully performed CPR on Harris, pronouncing her dead at the scene. (ECF No. 1, ¶ 51.)

Count I of the Complaint "is brought against officers present at the waterfront on the evening of March 26, 2021," and alleges that such officers were grossly negligent in their response to the shooting at the oceanfront, leading to Ms. Harris's death, "[r]egardless of the identity of Deshayla Harris's shooter." (ECF No. 1, ¶¶ 77-86.) Count I is a Virginia state law claim.

Count II is brought pursuant to 42 U.S.C. § 1983, and alleges the City failed to train and supervise its police officers, "ma[king] it substantially more likely that innocent individuals like Deshayla would be subjected to unreasonable and/or deadly force by Virginia Beach Police Officers." (ECF No. 1, ¶ 90.) Count III is an excessive force claim "brought against the yet to be identified shooter reasonably believed to be a VBPD Officer acting in his official capacity. . ." (ECF No. 1, ¶ 92.) The alleged constitutional violation in Count III appears to be the predicate of Count II—though not expressly alleged in the Complaint.

Count IV is a Virginia state law claim "brought against Virginia Beach Police Department, and its agents." Count IV alleges that, "In the event Deshayla Harris was shot by a bullet fired from a VBPD-issued firearm, VBPD officers committed an assault and battery against Deshayla." (ECF No. 1, ¶ 103.)

Counts V, VI, and VII are not independent causes of action but instead assert a survivorship claim, a wrongful death claim, and entitlement to punitive damages, respectively.

Count XIII is brought against the VBPD and the City, accusing them of intentional infliction of emotional distress. In support of this claim, Plaintiff accuses the City or its agents of committing acts including the following: failing to make an arrest for Harris' killing; refusing to release a ballistics report; "fail[ing] to send any on-call clergy member or community services officer to check on the mental health or well-being of the Plaintiff;" and "gross negligence in diligently pursuing the investigation into Ms. Harris's unlawful killing." (ECF No. 1 ¶¶ 126-139.)

STANDARD OF REVIEW

Rule 8 of the Federal Rules of Civil Procedure requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). However, a complaint must include enough facts "to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citation omitted). Pleadings that contain nothing more than "a formulaic recitation of the elements of a cause of action" do not meet Rule 8 standards, nor do pleadings suffice that are based merely upon "labels and conclusions" or "naked assertion[s]" without supporting factual allegations. Id. at 555, 557.

To survive a motion to dismiss pursuant to Rule 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." Id. 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." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Although "[t]he plausibility standard is not akin to a 'probability requirement,'" the complaint must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." Id. A plausible claim for relief requires "enough fact[s] to raise a reasonable

expectation that discovery will reveal evidence" to support the claim. Twombly, 550 U.S. at 556. "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." Id. at 545. When evaluating a claim, "a court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff" but does not consider "legal conclusions, elements of a cause of action, . . . bare assertions devoid of further factual enhancement[,]… unwarranted inferences, unreasonable conclusions, or arguments." Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009) (internal citations and quotations omitted). Therefore, if a court determines that a complaint does not state a plausible claim for relief, the matter is due to be dismissed.

"[W]hen deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court considers only the complaint and any attached documents 'integral to the complaint.'" Peters v. City of Mt. Rainier, 2014 U.S. Dist. LEXIS 137146 at *5 (D. Md. Sept. 29, 2015) (quoting Sec'y of State for Defence v. Trimble Navigation Ltd., 484 F.3d 700, 705 (4th Cir. 2007)).

ARGUMENT

I. The Lack of Any Reasonably Identifiable John Doe Is an Abuse of Fictitious Party Pleading and Is Characteristic of the Insufficiencies of the Complaint.

Before addressing deficiencies regarding the specific causes of action brought against the City, Plaintiff's misuse of fictitious party (or "John Doe") pleading and attempt to ascribe blame to the City for Plaintiff's utter lack of factual support for her claims requires discussion. Plaintiff's attempt to use "John Doe" to preserve any and all causes of action that could possibly exist against hypothetical parties does not meet the narrow circumstances

where federal courts allow a John Doe to stand in for a readily ascertainable individual.

a. *The identities of "John Doe," their total number, and the actions attributable to them are amorphous.*

The "John Doe" named in the case caption of the Complaint is not a specifically identifiable individual or discrete set of individuals, as required. Harris v. Suntrust Mortg., Inc., 2013 U.S. Dist. LEXIS 36732 at *30-31 (M.D.N.C. Mar. 18, 2013.) In fact, the Complaint does not even reveal how many John Does there are – naming as a party a *singular* "John Doe" that apparently is intended to include any individual against whom Plaintiff *may* have a cause of action. According to the Complaint, "John Doe may possibly be a VBPD Police Officer." (ECF No. 1, ¶ 13) (emphasis added). If, as the Complaint acknowledges may well be the case, a VBPD officer did not kill Ms. Harris, the putative officer-shooter John Doe does not even exist. For this apparent reason, Plaintiff also states that the "unidentified person" who killed Ms. Harris "is either" a police officer "or another party, John Doe." (ECF No. 1 at 2) (emphasis added). Stated differently, John Doe encompasses potentially one or more VBPD officers and/or non-VBPD officers.

Further, the Complaint does not identify any police officer by name, and John Doe also purports to include all "officers present at the waterfront on the evening of March 26, 2021." (ECF No. 1, ¶ 77.) There are miles of "waterfront" (or "Oceanfront") in Virginia Beach, and the Complaint does not attempt to delineate the geographic boundaries of an enormous area potentially covering many square miles to which dozens of officers responded to a chaotic night of shooting. Nor does the Complaint endeavor to ascribe specific blameworthy actions to any particular "John Doe" officer, but instead impliedly advances the inherently incredible theory that all VBPD officers who responded to multiple shootings (or

were anywhere in the vicinity) all acted in a manner that incurs civil liability. Some of the rare concrete allegations in the Complaint are these: unspecified numbers of officers "rushed" to the scene and were frantically searching for the shooters on the night in question; after Harris was shot, an officer attended to Harris between rounds of gunfire; one or more officers "wrapped Deshayla's head with gauze and several officers stood around her and friends with guns drawn." (ECF No. 1, ¶¶ 24, 27, 42-44, 49.) Each of these officers apparently are John Does, as they were present at the Oceanfront. However, these specific, and seemingly heroic, actions are not a basis for alleged liability.

District Courts in the Fourth Circuit have delineated the narrow contexts in which fictitious party pleading is appropriate. "Fictitious party pleading is generally not permitted in federal court, and the court may dismiss fictitious-party claims *sua sponte* except when the plaintiff provides a specific description of the defendant such that process can be served." Harris v. Suntrust Mortg., Inc., 2013 U.S. Dist. LEXIS 36732 at *30-31. Further, Courts distinguish between the permissible use of John Doe as a "placeholder" for reasonably identifiable individuals and its improper designation "as a catch-all provision, designed to encompass any individual with a potential connection to the harms suffered…" Farmer v. Wilson, 2014 U.S. Dist. LEXIS 128638, at *46 (S.D.W.V. Sept. 15, 2014). Another District Court found that fictitious party pleading is only allowed "when the plaintiff's description of the defendant is so specific as to be 'at the very worst, surplusage.'" Uppal v. Wells Fargo Bank, NA, 2019 U.S. Dist. LEXIS 195765 at *18 (quoting Dean v. Barber, 951 F.2d 1210, 1215-16 (11th Cir. 1992)) (dismissing fictious parties based upon allegations of forgery of loan documents).

Plaintiff's attempt to preserve her right to bring claims against unnamed, unspecified

individuals in the final hours before statutes of limitation expire is an improper use of fictitious party pleading. Instead of providing a "specific description" of defendants, the Complaint impermissibly lumps all individuals who possibly could be responsible for Harris's death under myriad hypothetical – and mutually exclusive – scenarios into one amorphous John Doe. Plaintiff's attribution of a host of undefined actions to an unspecified number of John Does, including one putative defendant described as not to being a VBPD officer (or City agent), is the quintessential example of using fictitious party pleading as a "catch-all" device. Such pleading is impermissible.

b. The City is not responsible for Plaintiff's failure to set forth a plausible claim.

The frequent use of qualifying language throughout the Complaint reflects Plaintiff's inability to plead specific facts in support of her claims. For example, the Complaint alleges "VBPD Officers possibly" used force and repeatedly employs the phrase "provided Ms. Harris was shot by a VBPD Officer" or similar language. (ECF No. 1, ¶¶ 94, 98-100, 103, 110, 115, 117, 121). The Complaint even admits that Ms. Harris's shooter "remains unknown" and that there exists the very real possibility that "Ms. Harris was not killed by a VBPD Officer," as the City contends. (ECF No. 1, at 2.) To excuse this pleading defect, Plaintiff unfairly attempts to place blame on the City for her inability to "know every fact and circumstance of Deshayla's killing," ignoring that Plaintiff does not even have *some* facts to support a plausible legal theory against the City. This Court must reject Plaintiff's invitation to relax Rule 8's pleading standard.

Consider, for example, the Complaint's allegation that the VBPD and City "continue to withhold from the Plaintiff and the public the Ballistics Report" pertaining to the shooting." (ECF No. 1., ¶¶ 70-71.) Plaintiff's suggestion that the City is wrongfully

withholding information is false, ignores the imperative to not publicly reveal information that might allow the actual shooter to avoid apprehension or destroy key evidence, and does nothing to cure the Complaint's many deficiencies. A careful examination of the documents attached to the Complaint – considered in the context of what is not alleged in the Complaint – undermines Plaintiff's attempt to blame the City.

Among the documents attached to the Complaint is a July 23, 2021 letter from the City Attorney to Plaintiff's former legal counsel, Joshua J. Coe ("Coe"), that acknowledges receipt of notice of claim letter received by the City on July 20, 2021. (ECF No. 1-2.) This letter demonstrates that Plaintiff contemplated bringing a lawsuit against the City almost two years ago. Plaintiff also attaches a letter from the City's FOIA technician ("FOIA Response"), also dated July 23, 2021, and directed to Coe. (ECF No. 1-7.) The FOIA Response indicates that, on Plaintiff's behalf, Coe had made a FOIA request for a copy of the police report regarding Ms. Harris's killing. (ECF No. 1-7.) The FOIA Response includes a public copy of the police report that includes a few publicly disclosable details and reports the case status as "ACTIVE-PENDING." (ECF No. 1-7.) Plaintiff also includes a March 14, 2023 letter from Plaintiff's current counsel to legal counsel for the City – dated 10 days prior to the filing of this suit – requesting the City provide them all reports and evidence relating to Ms. Harris's killing. (ECF No. 1-8.) The March 14, 2023 letter states, "The VBPD Records Office has rejected her many FOIA requests claiming that they could not share any information regarding an ongoing criminal investigation." (ECF No. 1-8.)

Notably, neither the Complaint nor the attached correspondence includes any averment that the basis cited for withholding materials from the City's FOIA responses – an ongoing criminal investigation – is untrue, unlawful, or improper. To the contrary, the City

invoked a lawful exception to the disclosure requirements of FOIA to preserve the integrity of an ongoing criminal investigation. If Plaintiff believed any of the City's FOIA responses were legally insufficient, the responses could have been challenged in court. They made no such challenge. The Court should decline Plaintiff's implied invitation to relax Rule 8's pleading standards where the inadequacy of the Complaint's allegations is no fault of the City.

II. Count I - Gross Negligence

Count I is a Virginia state law claim regarding which Plaintiff does not facially name the City as a defendant. However, Plaintiff curiously alleges this count is brought "against officers present at the waterfront on the evening of March 26, 2021 in their individual capacities and their official capacity as police officers of the VBPD. (ECF No. 1, 77 (emphasis added)). Plaintiff's assertion that the unnamed officers are being sued in their "official capacities" may evidence her intent to assert a case against the City as an entity.

In any case, Plaintiff does not allege any facts supporting City liability for gross negligence, whether as the employer of these "waterfront" officers or otherwise. And even if some set of plausible facts were alleged, the Virginia Supreme Court has plainly and repeatedly held that "a municipality is immune from liability for a police officer's negligence in the performance of his duties as a police officer." Niese v. City of Alexandria, 264 Va. 230, 239 (2002) (noting prior case law precedent for municipal immunity for negligence and extending such immunity to intentional torts committed by a municipal employee). There is no plausible claim against the City for gross negligence, and Count I should be dismissed with prejudice.

III. Count II and III – Excessive Force and Failure to Train and Supervise

Count III of the Complaint is an excessive force claim, pursuant to 42 U.S.C. § 1983, "brought against the yet to be identified shooter reasonably believed to be a VBPD Officer…" Count II is a so-called *Monell* claim, which alleges that the City maintained inadequate training and supervision policies that "made it substantially more likely that innocent individuals like Deshayla would be subjected to unreasonable and/or deadly force by Virginia Beach Police Officers." (ECF No. 1, ⁋ 90.) Count III appears to be the underlying predicate § 1983 claim for Count II. But in any case, Plaintiff's purported *Monell* claim fails on multiple grounds.

a. Count III does not adequately plead an underlying constitutional violation to support Count II's Monell *claim against the City.*

The most obvious flaw in Count II is that no underlying constitutional violation is sufficiently pleaded in Count III. The Complaint's allegations regarding excessive force, where it is not even clearly alleged that a Virginia Beach police officer caused Harris' shooting death, reveal that they are entirely speculative.

In naming the Parties, the Complaint alleges that "John Doe may possibly be a VBPD Police Officer." (ECF No. 1, ⁋ 13) (emphasis added). The Complaint includes no specific facts supporting that a VBPD officer actually shot Ms. Harris—much less under circumstances that would constitute a violation of her Fourth Amendment rights. Count III thus repeatedly qualifies its allegations with the word, "provided." For example, "Provided Ms. Harris was struck by a bullet from a VBPD-issued firearm, VBPD acted willfully, knowingly, and with specific intent to deprive Ms. Harris of her constitutional rights…" (ECF No. 1, ⁋100.) This allegation is remarkable in that despite (1) a failure to identify (even by description) any specific officer as Ms. Harris's shooter, (2) the absence of supporting

facts that *any* officer was the shooter, and (3) the Complaint's express acknowledgment that the shooter may well not have been a VBPD officer, the Plaintiff claims to know *the intent* of the officer-shooter – if that person even exists. Plaintiff's unsupported hypothesis that a VBPD officer may have shot Ms. Harris patently fails to demonstrate "more than a sheer possibility that a defendant has acted unlawfully." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The factual allegations also do not "raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007).

Plaintiff's underlying excessive force claim against an altogether unknown John Doe is insufficiently pleaded. Therefore, the Monell claim against the City also fails.

b. *Plaintiff's use of boilerplate language regarding VBPD's alleged failure to train and supervise does not support a* Monell *claim against the City.*

Even were Count III adequately pleaded against an unidentified John Doe police officer, Count III still would not satisfy the pleading standard.

In Monell v. Department of Social Services, the Supreme Court held that local governments are not generally liable under § 1983 for actions taken by individual employees, limiting such governments' liability to those situations where an official policy or custom resulted in a constitutional or statutory violation. 436 U.S. 658 (1978). The Court held the following:

> A municipality cannot be held liable solely because it employs a tortfeasor, in other words, a municipality cannot be held liable under Section 1983 on a *respondeat superior* theory . . . It is when execution of a government's policy or custom, whether made by its lawmakers or by those whose ethics or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983.

436 U.S. at 691, 694 (1978).

The United States Court of Appeals for the Fourth Circuit has summarized the ways in which municipal liability can be imposed because of official policy or custom:

> (1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure to properly train officers, that 'manifest[s] deliberate indifference to the rights of citizens'; or (4) through a practice that is so 'persistent and widespread' as to constitute a 'custom or usage with the force of law.'

Lytle v. Doyle, 326 F.3d 463, 471 (4th Cir. 2003) (quoting Carter v. Morris, 164 F.3d 215 (1999)). See also Heywood v. Va. Peninsula Reg. Jail Auth., 217 F. Supp. 3d 896 (E.D. Va. 2016) (mere negligence of policy makers is not sufficient); Moody v. City of Newport News, 93 F. Supp. 3d 516 (E.D. Va. 2015) (analyzing all four factors to determine whether complaint sufficiently stated that the city had an official policy or custom that led to unconstitutional use of excessive force by the city's police officers).

The Supreme Court has described the narrow conditions where a municipality may be liable under § 1983 for an alleged failure to train. In Connick v. Thompson, the Court held as follows:

> In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983. A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to deliberate indifference to the rights of persons with whom the [untrained employees] come into contact. Only then can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." Id., at 389, 109 S. Ct. 1197, 103 L. Ed. 2d 412.

563 U.S. 51, 61 (2011) (emphases added) (citations omitted). In addition, the Supreme

Court has held that, "the identified deficiency in a city's training program must be closely related to the ultimate injury" so as to have "actually caused" the alleged injury. City of Canton v. Harris, 489 U.S. 378, 391 (1989) (emphases added).

District courts in the Fourth Circuit have held that plaintiffs asserting a Monell claim based upon an alleged failure to train must in their complaint state "facts revealing (1) the nature of the training, (2) that the training was a 'deliberate or conscious' choice by the municipality, and (3) that the officer's conduct resulted from said training." Lewis v. Simms, Civil Action No. AW-11-cv-2172, 2012 U.S. Dist. LEXIS 9052 at *3 (D. Md. Jan. 26, 2012) (emphasis added) (quoting Drewry v. Stevenson, No. WDQ-09-2340, 2010 U.S. Dist. LEXIS 856, at *4 (D. Md. Jan. 6, 2010)), aff'd, 582 F. App'x 180 (4th Cir. 2014)).

The Complaint contains no allegation whatsoever about the City's supervision of police officers. Moreover, although the Plaintiff avers that the VBPD was "aware" that its policies made incidents of unreasonable force "substantially more likely," Plaintiff does not allege that any policy was actually a proximate cause of Ms. Harris's death. (ECF No. 1, ¶¶ 87-90. Beyond the absence of any averment that the City's policies were a "moving force" behind Ms. Harris's death, Plaintiff's allegation of failure to train consists of nothing more than a paragraph of boilerplate language: a litany of the City's failures to train that could be cut and pasted into any such claim, not a single specific detail of the actual nature of VBPD's training, and repeated use of "or" and "and/or" that renders the allegations all the more vague. (ECF No. 1, ¶ 89.)

Courts in the Fourth Circuit have routinely held that such vague, conclusory allegations do not satisfy Rule 8's pleading standard. In Peters, the plaintiff alleged that the

city "fail[ed] to use due care in the hiring of officers; fail[ed] to properly train and supervise its officers; fail[ed] to implement effective procedures for investigating allegations of police misconduct; fail[ed] to discipline officers who violate the Constitutional rights of private citizens through false arrests, malicious prosecutions, and brutal conduct; and generally fail[ed] to provide safeguards against Constitutional abuses by its overzealous officers." Peters, 2014 U.S. Dist. LEXIS 137146, at *14. The allegations in Peters – like those in the case at bar – undeniably describe a constitutional violation *in general terms*, but they are not sufficiently specific or concrete to support an inference that one exists. In dismissing the claim, the District Court opined that the complaint should reveal "the nature of the training" in question but that the plaintiff "ha[d] simply stated in broad, conclusory terms and in a variety of different ways that the City failed to train and supervise its officers." Id. at *13-14.

Similarly, in Hall v. Fabrizio, the Maryland District Court dismissed a complaint that "d[id] not allege any facts regarding the sort of training that Baltimore police officers actually receive or how that training reflects the decision of any municipal policymaker." Hall, 2012 U.S. Dist. LEXIS 97396 at *6 (D. Md. July 13, 2012). The court noted that "merely reciting the elements of municipal liability does not state a claim under § 1983." Id.

McDougald v. Spinnato, 2019 U.S. Dist. LEXIS 42520 (D. Md., Mar. 15, 2019), is another instructive case. In evaluating the allegations regarding failure-to-train, the court apparently was mindful of the Supreme Court's admonition that *de facto respondeat superior* was strictly prohibited in the § 1983 context, opining, "Locating a 'policy' ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." McDougald, 2019 U.S. Dist. LEXIS 42520 at *21. In ruling that plaintiff

had failed to state a claim upon which relief could be granted, the McDougald court noted that plaintiff "failed to identify a particular BPD training practice or any specific defect or omission in the BPD training program, and failed to draw a connection between the incident with Mr. Woodson and any precise shortcoming in the BPD training program." Id. at *36. Plaintiff's failure to pinpoint the specific nature of the alleged training deficiencies was, the court ruled, a "defect" that "cannot be ignored." Id.

Likewise, Plaintiff's failure to pinpoint any precise shortcomings in VBPD's training or supervision of its officers is a defect that cannot be ignored. Relying on a generalized refrain of "failure to train" and "failure to supervise" amounts to boilerplate pleading that does not meet the requirements of Rule 8 or the pleading requirements of *Monell* claim as informed by applicable case law. This pleading deficiency is compounded the Complaint's failure to plausibly allege a direct causal link between a specific training or supervision shortcoming of VBPD to the death of Ms. Harris. Individually and together, these pleading failures constitute a second independent basis upon which Count II should be dismissed.

IV. Count IV - Assault and Battery

Count IV is another Virginia state law claim, which Plaintiff brings against the City presumably for the conduct of VBPD and its agents. As an initial matter, the VBPD is not itself an entity that can sue or be sued. Muniz v. Fairfax County Police Dep't, 2005 U.S. Dist. LEXIS 48176 at *4 (E.D.Va., Aug. 2, 2005). However, to the extent Plaintiff alleges assault and battery against the City, her claim fails.

First, a municipal corporation cannot assault or batter anyone, and the Complaint fails to actually identify any agent of the City that committed an assault and battery. Moreover, the Virginia Supreme Court has held that municipalities which operate police departments are

immune from intentional torts committed by the employees of such departments, specifically including police officers. Niese v. City of Alexandria, 264 Va. 230, 239 (2002) ("We agree with the reasoning of the Fourth Circuit and hold that a municipality is immune from liability for intentional torts committed by an employee during the performance of a governmental function.") (emphasis added). There is no plausible claim for assault and battery against the City where the City has an unqualified immunity from such claims and Count IV therefore should be dismissed.

V. Survivorship, Wrongful Death, and Punitive Damages

Counts V, VI, and VII – respectively alleging a survivorship claim, a wrongful death claim, and punitive damages – do not advance independent causes of action. In any event, the City is immune from punitive damages for any § 1983 claim as a matter of law. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) (holding "that a municipality is immune from punitive damages under 42 U.S.C. § 1983."). None of the underlying claims against the City entitle Plaintiff to relief, and therefore Counts V, VI, and VII also should be dismissed.

VI. Count VIII - Intentional Infliction of Emotional Distress

Plaintiff's allegation in Count VIII that the City and its agents perpetrated intentional infliction of emotional distress ("IIED") is also entirely without merit. First, as stated *supra*, "a municipality is immune from liability for intentional torts committed by an employee during the performance of a governmental function." Niese v. City of Alexandria, 264 Va. 230, 239 (2002). On that basis alone, Count VIII should be dismissed.

Count VIII also fails on additional grounds. Only in rare cases can plaintiffs in Virginia establish the elements of an IIED claim against individual defendants. The Virginia Supreme

Court has opined thusly on its skepticism of IIED claims:

> [T]he tort of intentional infliction of emotional distress is "not favored" in the law. A primary reason for the tort's disfavored status is that because the prohibited conduct cannot be defined objectively, clear guidance is lacking, both to those wishing to avoid committing the tort, and to those who must evaluate whether certain alleged conduct satisfies all elements of the tort.

Almy v. Grisham, 273 Va. 68, 81 (2007) (citations omitted).

The Virginia Supreme Court has also held that IIED claims require plaintiffs to prove the following four elements: "1) the wrongdoer's conduct was intentional or reckless; 2) the conduct was outrageous or intolerable; 3) there was a causal connection between the wrongdoer's conduct and the resulting emotional distress; and 4) the resulting emotional distress was severe." Id. at 77 (dismissing IIED claimed based upon the alleged writing of a false report).

In addition, the conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id. at 78 (quoting Russo v White, 241 Va. at 23, 27 (1991)). In attempting to establish an IIED claim based upon actions including an alleged failure to make an arrest and refusal to release a ballistics report, Plaintiff asks the Court to dramatically remake Virginia law.

Moreover, the Complaint's compilation of offense-giving actions or omissions, alleged to have been committed by a variety of unidentified individuals suggests a conspiracy to commit an IIED, which Virginia law looks even more unfavorably upon than a garden-variety IIED claim. (Id. at 81) ("If we were to recognize a conspiracy claim based on an agreement to commit this tort, the difficulties resulting from this absence of clear guidance would be compounded.").

Plaintiff brings a novel IIED claim that has no basis whatsoever in law against an entity that is, in any case, immune from liability for intentional torts committed by its employees. As such, Count VIII should be dismissed.

CONCLUSION

WHEREFORE, for the reasons stated herein, Defendant City of Virginia Beach respectfully moves this Court to enter an Order granting this Motion and dismissing all Counts brought against it with prejudice and without leave to amend and for such other and further relief as the Court deems appropriate.

CITY OF VIRGINIA BEACH,

By: /s/ Joseph M. Kurt
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed and electronically mailed this 5th day of June 2023 to:

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