IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:23-cv-00219-BO-RJ

MONICA FAITH USSERY, Plaintiff vs. LORRIN FREEMAN, in her individual and official capacity as Wake County District Attorney; HONORABLE ERIK A. HOOKS, is his individual and official capacity as Secretary of the North Carolina Department of Public Safety; CASSANDRA DECK-BROWN, in her individual and official capacity as Chief of the City of Raleigh Police Department; DEDRIC BOND, in his individual and official capacity as City of Raleigh Police Department Captain; ROGER "CHIP" HAWLEY, in his individual and official capacity as Chief of North Carolina State Capitol Police; MARTIN BROCK, in his individual and official capacity as Chief of the North Carolina General Assembly Police Department; DERICK PROCTOR, in his individual and official capacity as an officer of North Carolina State Capitol Police; TITO FINK, in his individual and official capacity as an officer of the North Carolina State Capitol Police; The City of Raleigh; City of Raleigh Police Officers, John and Jane Does 1-4; Defendants.	**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT BY THE CITY OF RALEIGH**

NOW COMES defendant, the City of Raleigh (hereinafter, the "City"),by and through undersigned counsel, and offers this Memorandum of Law in Support of its Motion to Dismiss Plaintiff's Second Amended Complaint.

NATURE OF THE CASE

Plaintiff commenced this action by filing a Complaint on April 21, 2023. [D.E. 1.] Plaintiff filed an Amended Complaint on May 1, 2023 [D.E. 11], and a Second Amended Complaint on November 15, 2023 [D.E. 50]. The Amended Complaint was served on the City on May 4, 2023. The City moved to dismiss the Amended Complaint on July 5, 2023. [D.E. 28.] Plaintiff moved for leave to file a second amended complaint on September 8, 2023. [D.E. 42.] On November 8, 2023, the Court entered an order granting Plaintiff leave to file a second amended complaint and denying the City's motion to dismiss as moot. [D.E. 48.] Plaintiff filed the Second Amended Complaint on November 15, 2023. [D.E. 50.]

The Second Amended Complaint names as defendants the City, City of Raleigh Police Chief, Cassandra Deck-Brown (retired) (hereinafter, "Chief Deck-Brown); City of Raleigh Police Captain, Dedrick Bond (retired) (hereinafter, "Captain Bond"); four unnamed City of Raleigh Police Officers (hereinafter, "Officer Does 1-4"); North Carolina Governor, Roy Cooper (hereinafter, "Governor Cooper"); Wake County District Attorney, Lorrin Freeman (hereinafter, "D.A. Freeman"); the Secretary of the North Carolina Department of Public Safety; and several officers of the North Carolina State Capitol Police and North Carolina General Assembly Police Department. The Second Amended Complaint contains purported claims pursuant to 42 U.S.C. § 1983 for alleged violations of Plaintiff's constitutional rights under the First and Fourteenth Amendments; and a claim that Defendants conspired to deprive her of her rights in violation of the North Carolina Constitution. On November 29, 2023, the Court entered an order extending the deadline to file pleadings in response to the Second Amended Complaint until December 20, 2023. [D.E. 52.]

For the reasons set forth herein, the City has filed a Motion to Dismiss Plaintiff's claims against the City. The City's Motion to Dismiss the Second Amended Complaint is ripe for adjudication and, as explained below, should be granted.

STATEMENT OF FACTS

The present action arises from Plaintiff's arrest on April 14, 2020. [2d Amnd. Compl., D.E. 50.] On that date, Plaintiff was participating in a public demonstration to protest various Executive Orders issued by North Carolina Governor, Roy Cooper, in response to the COVID-19 pandemic. [Id. ¶¶ 28-31.]

On March 27, 2020, Governor Cooper issued Executive Order No. 121 (hereinafter, E.O. 121") which ordered "all individuals currently in the State of North Carolina" to "stay at home" except for limited purposes provided in the order, and limited "mass gatherings" to groups of ten or fewer individuals when gathered in a "confined indoor or outdoor space." [Id. ¶ 28.] According to the Second Amended Complaint, sometime after noon on April 14, 2020, Captain Bond advised the crowd of demonstrators that they were in violation of the Governor's Executive Order and asked them to disburse. [Id. ¶ 35.] After issuing three (3) warnings, law enforcement officers began walking through the parking lot to disperse the crowd. [Id. ¶ 36.] Plaintiff was arrested by officers of the Raleigh Police Department (hereinafter, the "RPD"). [Id. ¶ 41.] Plaintiff was patted down by a female officer with the Wake County Sheriff's office before being transported to the Wake County Detention Facility by Defendant Derick Proctor and Defendant Tito Fink. [Id. ¶ 42.]

After processing Plaintiff at the Wake County Detention Center, Defendant Derick Proctor presented probable cause to a Wake County Magistrate, who found that probable cause existed to believe that Plaintiff had violated E.O. 121 in violation of N.C.G.S. § 14-288.20(2). [Id. ¶ 43.]

Plaintiff was detained for approximately one hour and ordered to appear in Wake County District Court on June 25, 2020. [Id. ¶ 44.] When Plaintiff was tried in Wake County District Court, she was found guilty of violating E.O. 121 and of criminal trespass for remaining on the premise of 100 East Jones Street, Raleigh, North Carolina after being notified not to be there by RPD Captain Barnes. [Id. ¶ 62.] As a result, Plaintiff was fined $300 plus court costs. Id.

ARGUMENT

When considering a Rule 12(b)(6) motion to dismiss, the court must accept as true the facts alleged in the complaint and view them in a light most favorable to the plaintiff. Ostrzenski v. Seigel, 177 F.3d 245, l251 (4th Cir. 1999). However, the court "need not accept the legal conclusions drawn from the facts [nor] accept as true unwarranted inferences, unreasonable conclusions or arguments." Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir.2008) (quotations omitted). Further, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Although "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," a pleading that merely offers "labels and conclusions," or "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. Likewise, "a complaint [will not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancements.'" Iqbal, 556 U.S. at 678 (*quoting Twombly,* 550 U.S. at 557). Because the Second Amended Complaint offers no more than these in support of Plaintiff's claims against the City, these claims should be dismissed.

I. THE SECOND AMENDED COMPLAINT FAILS TO RAISE A PLAUSIBLE *MONELL* CLAIM AGAINST THE CITY.

The Second Amended Complaint argues that the City should be held liable to the Plaintiff pursuant to 42 U.S.C. § 1983 for violating Plaintiff's free speech and free assembly rights secured by the First Amendment, as well as Plaintiff's guarantees of due process and equal protection secured by the Fourteenth Amendment. [2d Amnd. Compl., D.E. 50 ¶¶ 113-147, 160-183.] However, the Second Amended Complaint lacks sufficient factual material to support a plausible *Monell* claim against the City.

"[U]nder *Monell*, a municipality is liable only for its own illegal acts." Owens v. Baltimore City State's Attorney's Office, 767 F.3d 379, 402 (4th Cir. 2014), cert. denied, 575 U.S. 983 (2015) (citing *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978)). Liability is limited to those instances in which the municipal policy or custom itself causes a deprivation of constitutional rights. Holloman v. Markowski, 661 F. App'x 797, 800 (4th Cir. 2016) (*unpublished – previously filed as D.E. 28-3*), cert. denied, _ U.S. _, 137 S. Ct. 1342, 197 L. Ed. 2d 531 (2017) (citing *Monell*, 436 U.S. at 690-91). "[A] municipality cannot be held liable solely because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." Monell, 436 U.S. at 691. Instead, the Supreme Court has admonished "that a municipality can be liable under § 1983 only where its policies are the moving force [behind] the constitutional violation." City of Canton, Ohio v. Harris, 489 U.S. 378, 389 (1989) (emphasis added).

For a municipality to be liable under § 1983, a plaintiff must establish that local officials violated the plaintiff's constitutional rights by following an official policy or custom which caused the violation. Lytle v. Doyle, 326 F.3d 463, 471 (4th Cir. 2003). The Fourth Circuit has explained that a "policy or custom" manifests in four ways:

> (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."

Id. (quoting *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999)).

"This official policy requirement is intended to make clear that municipal liability is limited to action for which the municipality is actually responsible. Thus, municipal liability under Section 1983 attaches where - and only where - a deliberate choice to follow a course of action is made from among various alternatives by city policymakers." Bruce & Tanya & Assocs., Inc. v. Bd. of Supervisors of Fairfax Cnty., Virginia, 854 F. App'x 521, 529 (4th Cir. 2021) (internal punctuation and citations omitted) (unpublished – copy attached). While the Fourth Circuit has not "definitively addressed whether *Monell* liability can be predicated on a local government's policy of enforcing state law," the majority of circuits that have decided the question "have suggested that a local government can be subjected to *Monell* liability if it makes an independent choice to enforce or follow parameters set by state law, rather than being obliged to do so." Id.

On the question of whether a municipality can be held liable for a policy of enforcing state law, the Fourth Circuit has relied on *Vives v. City of New York*, 524 F.3d 346, 349 (2d Cir. 2008). Id., 854 F. App'x at 530. In *Vives*, New York City police arrested the plaintiff for violating a state statute later found to infringe the First Amendment. Id. "[New York City] argued it was not subject to *Monell* liability because a municipality does not implement or execute a policy officially adopted and promulgated by its officers when it merely enforces the Penal Law of the State that created it." Id. "The *Vives* court reasoned that freedom to act is inherent in the concept of 'choice, and a state law mandating enforcement by local government officials cannot be considered the product of a conscious choice." Id. "In sum, whether a local government entity's policy of

enforcing a state statute renders it susceptible to *Monell* liability turns on whether a municipal policymaker has made a meaningful and conscious choice that caused a constitutional injury." Id.; see also, Elabanjo v. Bellevance, No. 1:11CV349, 2012 WL 4327090, at *5 (M.D.N.C. Sept. 18, 2012), report and recommendation adopted, No. 1:11CV349, 2012 WL 5864004 (M.D.N.C. Nov. 19, 2012) ("The enforcement of a state statute by a municipality does not qualify as a municipal policy or custom sufficient to support § 1983 liability.") (unpublished – copy attached).

Like any other claim, to survive a motion to dismiss, a complaint asserting a *Monell* claim must provide "enough facts to state a claim to relief that is plausible on its face." 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." Iqbal, 556 U.S. at 678.

Relying solely upon a post on Twitter, the Second Amended Complaint alleges that the City "created a policy that protesting was a nonessential activity subject to arrest and prosecution under N.C. Gen. Stat. § 14-288.20(2)." [D.E. 50 ¶¶ 37, 88.] However, the Second Amended Complaint and its exhibits show that the City was merely complying with the plain language of E.O. 121.

On March 10, 2020, Governor Cooper declared a State of Emergency to coordinate the State's response and protective actions in response to the COVID-19 public health emergency and to provide for the health, safety, and welfare of residents and visitors located in North Carolina. [Ex. 1 to 2d Amnd. Compl., EO 121, D.E. 50-1 at 1.] In the following days, the World Health Organization declared COVID-19 a global pandemic, and the President of the United States declared that the COVID-19 pandemic constituted a national emergency. [Id.] Hospital administrators and health care providers were concerned that existing health care facilities might

be insufficient unless the spread of COVID-19 could be limited, and Governor Cooper determined that it was necessary to limit unnecessary person-to-person contact in order to reduce the burden on the state's health care providers and facilities,. [Id. at 1-2.]

Invoking the authority granted by N.C. Gen. Stat. § 166A-19.30(c), on March 27, 2020, Governor Cooper issued E.O. 121 which ordered "all individuals currently in the State of North Carolina" to "stay at home" except for limited purposes provided in the order and limited "mass gatherings" to groups of ten or fewer individuals when gathered in a "confined indoor or outdoor space." [2d Amnd. Compl., D.E. 50; Ex. 1 to 2d Amnd. Compl., EO 121, D.E. 50-1.] While E.O. 121 established certain exceptions, it was silent as citizens' right to peacefully assemble to petition their government for redress of grievances. [2d Amnd. Compl., D.E. 50 ¶ 28.] Finally, E.O. 121 concluded, "[p]ursuant to N.C. Gen. Stat. § 166A-19.30(a)(2), **shall** be enforced by state and local law enforcement officers." [EO 121, D.E. 50-1 at 10 (emphasis added).]

"Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." Maine Cmty. Health Options v. United States, 140 S. Ct. 1308, 1320, 206 L. Ed. 2d 764 (2020); Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty., 368 N.C. 360, 365–66, 777 S.E.2d 733, 737 (2015) ("It is well established that the word 'shall' is generally imperative or mandatory when used in our statutes.") Thus, the gravity of the circumstances described in E.O. 121 as well as use of the mandatory term "shall" left little doubt that Governor Cooper intended that local government enforcement of the social distancing and mass gathering limitations was mandatory.

E.O. 121 contained no exception for public demonstrations. [2d Amnd. Compl., D.E. 50 ¶ 28.] Moreover, "District Attorney Lorrin Freeman reiterated that the Raleigh department's read of the stay-at-home orders is "technically correct". [Id. ¶ 47.] Therefore, while Plaintiff attempts to

argue that the City had consciously adopted an official policy designating public demonstrations as subject to E.O. 121, this alleged "policy" was merely to abide by the Governor's mandate. In fact, the charges brought against Plaintiff and the charges for which she was convicted were violations of the mandatory limitations contained in E.O. 121.[1]

As in *Vives*, because the City was required to enforce North Carolina state law, it could not have been considered to have made a "meaningful and conscious choice" and such enforcement could not qualify as a policy or custom sufficient to support § 1983 liability. Bruce & Tanya & Assocs., Inc., 854 F. App'x at 529; Vives, 524 F.3d at 349.

With the exception of an alleged policy to comply with mandatory directives to enforce state law, the Second Amended Complaint contains no mention whatsoever of any official City policy which could have plausibly caused the alleged constitutional violations. Boilerplate allegations and generalized claims without "details about [the] policies and practices and how they are inadequate, inaccurate, or ineffective" are insufficient as a matter of law to establish a custom or practice claim under *Monell*. I.P. by Newsome v. Pierce, 5:19-CV-228-M, 2020 WL 1231809, at *6 (E.D.N.C. Mar. 9, 2020) (*unpublished – previously filed as D.E. 28-4*); Lyles v. Prawdzik, No. PWG-15-1056, 2016 WL 3418847, at *5 (D. Md. June 22, 2016) (*unpublished – previously filed as D.E. 28-5*); Barrett v. Board of Educ. of Johnston County, 13 F. Supp. 3d 502, 511 (E.D.N.C. April 9, 2014), affirmed, 590 F. App'x 208 (November 6, 2014) ("This is nothing more than a formulaic recitation of the legal standard for finding municipal liability under § 1983. The

[1] A Wake County magistrate found that probable cause existed to believe that Plaintiff had violated E.O. 121 in violation of N.C.G.S. § 14-288.20(2). [2d Amnd. Compl., D.E. 50 ¶ 43.] Plaintff was tried in Wake County District Court on June 4, 2021 and found guilty for violating Executive Order 121. [Id. ¶ 62.]

complaint offers no non-conclusory factual allegations . . .. Indeed, plaintiffs point to no particular policy at all.").

The Amended Complaint is likewise silent regarding the existence of "informal ad hoc policy choices or decisions of municipal officials authorized to make and implement municipal policy." Edwards v. City of Goldsboro, 178 F.3d 231, 244-45 (4th Cir. 1999) (quoting *Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir.1987)). Even if the Amended Complaint contained factual allegations sufficient to infer the existence of such informal policy choices or decisions, any such practices would not rise to the level of official policy or custom unless they were "so persistent and widespread as to practically have the force of law." Connick v. Thompson, 563 U.S. 51, 61 (2011). A claimant must point to a persistent and widespread practice by municipal officials with sufficient duration and frequency to establish the required elements—for both knowledge and failure to act. Holloman, 661 F. App'x at 797. "Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." City of Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985). By contrast, "where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." Id. at 824. The Amended Complaint fails to allege any other instance in which any RPD officer violated the constitutional rights of any other individual.

"Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee."

Carter, 164 F.3d at 218. Further, "[a] close fit is required between the identified policy and the constitutional violation, and liability arises only if the policy or custom suffers such specific deficiency or deficiencies that make the specific violation almost bound to happen, sooner or later, rather than merely likely to happen in the long run." Id. The Second Amended Complaint's only additional support for City liability under *Monell* is Plaintiff's narrative of the acts of Captain Bond and other unidentified RPD officers on a single day. [2d Amnd. Compl., D.E. 50 ¶¶ 15, 20, 34-41, 85-86, 89-90, 93-98.]

In addition to lacking any allegation concerning the existence of a deficient City policy, the Amended Complaint also contains no facts showing that any such policy caused any deprivation of Plaintiff's rights. "Without such heft, the plaintiff's claims cannot establish a valid entitlement to relief, as facts that are merely consistent with a defendant's liability, fail to nudge claims across the line from conceivable to plausible." Nemet Chevrolet, Ltd., 591 F.3d at 256 (citations and punctuation omitted).

The Second Amended Complaint falls far short of the facts necessary to support the elements of any cognizable *Monell* claim against the City. While detailed factual allegations are not required, "the complaint must, however, plead sufficient facts to allow a court, drawing on judicial experience and common sense, to infer more than the mere possibility of misconduct." Nemet Chevrolet, Ltd., 591 F.3d at 256 (citations and punctuation omitted). Because the Second Amended Complaint lacks factual content giving rise to a plausible inference that the allegedly unconstitutional actions of any City employee were taken pursuant to official City custom or policy, Plaintiff's claims against the City must be dismissed. See Jackson v. Long, 102 F.3d 722, 731 (4th Cir. 1996) (affirming dismissal of claim against sheriff in his official capacity where complaint failed to allege "a Sheriff's Department regulation, policy, or practice that authorized

any constitutionally proscribed action taken against [the plaintiff]"); Cochran v. Morris, 73 F.3d 1310, 1316 (4th Cir. 1996) (affirming dismissal upon frivolity review of claims based upon conclusory allegations against prison officials).

II. THE EXISTENCE OF ADEQUATE STATE LAW REMEDIES BARS PLAINTIFF'S DIRECT CLAIM UNDER THE STATE CONSTITUTION.

Count One of the Amended Complaint alleges that the Defendants engaged in a conspiracy that violated her rights under the North Carolina Constitution. [2d Amnd. Compl., D.E. 50 ¶¶ 76-112.] Direct claims for monetary relief under the North Carolina Constitution are commonly called *Corum* claims. See Corum v. University of North Carolina, 330 N.C. 761, 413 S.E.2d 276, cert. denied sub nom. Durham v. Corum, 506 U.S. 985 (1992). While *Corum* recognized the possibility of direct action under the North Carolina Constitution against the state and its officials, it imposed important limits.

> When called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, ... the judiciary must recognize two critical limitations. First, *it must bow to established claims and remedies* where these provide an alternative to the extraordinary exercise of its inherent constitutional power. Second, in exercising that power, *the judiciary must minimize the encroachment upon other branches of government*—in appearance and in fact—*by seeking the least intrusive remedy* available and necessary to right the wrong.

Corum, 330 N.C. at 784, 413 S.E.2d at 291 (emphasis added) (internal citations omitted). "Ultimately, the implementation of the constitutional mechanism used to allow a *Corum* claim to proceed is extraordinary." Taylor v. Wake Cnty., 258 N.C. App. 178, 191–92, 811 S.E.2d 648, 657–58 (2018). "In *Corum,* our Supreme Court held that one whose state constitutional rights have been abridged has a direct claim under the appropriate constitutional provision. A claim is available, however, only in the absence of an adequate state remedy." Phillips v. Gray, 163 N.C.

App. 52, 58, 592 S.E.2d 229, 233 (2004) (emphasis added), rev. denied, 358 N.C. 545, 599 S.E.2d 406 (2004).

Although the *Corum* case involved claims against the State and its officials, its principles apply equally to claims against municipalities. Glenn-Robinson v. Acker, 140 N.C. App. 606, 631-632, 538 S.E.2d 601, 619 (2000), rev. denied, 353 N.C. 372, 547 S.E.2d 811 (2001). Thus, a plaintiff who has remedies available under State law cannot assert a *Corum* claim against a local government. Id.; Davis v. Town of Southern Pines, 116 N.C. App. 663, 675-676, 449 S.E.2d 240, 247-248 (1994), rev. denied, 339 N.C. 737, 454 S.E.2d 648 (1995) (summary judgment for town appropriate as State constitutional rights adequately protected by common law claim of false imprisonment). As in Wilkerson v. Duke Univ., "[b]ecause state law gives plaintiff the opportunity to present his claims and provides the possibility of relief under the circumstances, plaintiff's state constitutional claims must fail." Wilkerson v. Duke Univ., 229 N.C. App. 670, 676, 748 S.E.2d 154, 159 (2013).

Plaintiff herein alleges that the Defendants violated her North Carolina Constitutional rights by conspiring to arrest her [2d Amnd. Compl., D.E. 50 ¶¶ 89] before subjecting her to abuse of process and malicious prosecution [Id. ¶ 107]. Under North Carolina law, the claim of false imprisonment bars direct action under the State Constitution because the constitutional right to be free from restraint is the same interest protected by the common law tort. Rousselo v. Starling, 128 N.C. App. 439, 447, 495 S.E.2d 725, 731 (1998). The tort of malicious prosecution likewise provides an adequate remedy barring direct constitutional claims. Swick v. Wilde, 2012 WL 3780350, 31-32 (M.D.N.C. 2012) appeal dismissed and remanded, 2013 WL 3037515 (4th Cir. 2013)(malicious prosecution grants an adequate remedy barring a direct claim under the State Constitution) (*unpublished – previously filed as D.E. 28-6*); DeBaun v. Kuszaj, 2013 WL 4007747,

7 (N.C. Ct. App. 2013) (claim of malicious prosecution bars direct cause of action under the State Constitution against either the [city] or [the city's officer] in his official capacity) (*unpublished – previously filed as D.E. 28-2*). State law claims directed at punitive conduct allegedly taken in order to infringe upon free speech also provide an adequate remedy foreclosing a direct claim under the North Carolina Constitution. See, Iglesias v. Wolford, 539 F. Supp. 2d 831, 838–39 (E.D.N.C. 2008) (claim for wrongful discharge provides adequate state law remedy barring free speech claim under the North Carolina Constitution); Phillips v. Gray, 163 N.C. App. 52, 58, 592 S.E.2d 229, 233 (2004) (because plaintiff's rights to free speech are adequately protected by a wrongful discharge claim, a direct constitutional claim is not warranted); Helm v. Appalachian State Univ., 363 N.C. 366, 677 S.E.2d 454 (2009) (adopting the dissenting opinion from the Court of Appeals that concluded that the Whistleblower Act provided an adequate state law remedy for plaintiff's free speech claim); Swain v. Elfland, 145 N.C.App. 383, 550 S.E.2d 530 (2001) (holding that the availability of an administrative hearing provided an adequate state remedy for the plaintiff's free speech claim).

Further, because these common law claims may also be brought against the individually named defendants in their individual capacities, Plaintiff has an additional source of adequate common law remedies. As the North Carolina Court of Appeals stated in *Rousselo*, "*Corum* did not hold that there had to be a remedy against the State of North Carolina in order to foreclose a direct constitutional claim. We agree . . . that the existence of an adequate alternate remedy is premised on whether there is a remedy available to plaintiff for the violation, not on whether there is a right to obtain that remedy from the State in a common law tort action." Rousselo, 128 N.C. App. at 448, 495 S.E.2d at 731 ; see also, Edwards v. City of Concord, 827 F.Supp.2d 517, 522-524 (M.D.N.C. 2011). In the present case, the Plaintiff had the option to assert common law claims

against the individually named defendants. These claims, if meritorious, could have provided Plaintiff with an adequate state law remedy.

Plaintiff's potential claims against the individually named defendants in their individual capacities could have provided an adequate state law remedy even if Plaintiff would have been required to prove malice, corruption, or conduct outside the scope of employment in order to prevail. As the *Rousselo* court stated, "[w]e decline to hold that [plaintiff] has no adequate remedy merely because the existing common law claim might require more of him." Rousselo, 128 N.C. App. at 448-449, 495 S.E.2d at 731-732; see also, Edwards v. City of Concord, 827 F.Supp.2d 517, 522-524 (M.D.N.C. 2011) ("plaintiff does not lack an adequate remedy merely because his burden of proof on his available claim may be different"); DeBaun, 2013 WL 4007747, 7 (N.C. Ct. App. 2013) ("The fact that plaintiff must overcome the affirmative defense of public officer immunity to succeed on his tort claims does not negate their adequacy as a channel through which plaintiff could seek relief").

Therefore, because there are common law claims that could have adequately protected Plaintiff's rights under the North Carolina Constitution, and companion claims against the individually named defendants in their individual capacities could have provided alternative sources of an adequate remedy, Plaintiff's direct claims under the North Carolina Constitution against the City should be dismissed. Likewise, Plaintiff's direct claims under the North Carolina Constitution against Chief Deck-Brown and Captain Bond in their official capacities should also be dismissed.

III. PLAINTIFF'S OFFICIAL CAPACITY CLAIMS ARE REDUNDANT AND SHOULD BE DISMISSED.

The purported claims against the City are also directed against Chief Deck-Brown and Captain Bond in their official capacities. An action against officers in their official capacities is

simply another way of bringing suit against a municipal employer. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). Further, vicarious liability does not apply in actions brought under 42 U.S.C. § 1983. Monell v. Department of Social Services, 436 U.S. 658 (1978); Carter v. Morris, 164 F.3d 215, 218 (4th Cir. 1999). Thus, there is no difference between suing the individual defendants in their official capacities and suing the City itself. Will, 491 U.S. at 71. The Fourth Circuit has held that official capacity claims are essentially the same as claims against the entity, and should be dismissed as duplicative when the entity (such as the employing municipality) is also named as a defendant. See Love-Lane v. Martin, 355 F.3d 766, 783 (4th Cir. 2004). Judicial economy and efficiency are best served by proceeding solely against the City. See Brissett v. Paul, 141 F.3d 1157, 1998 WL 195945 (4th Cir. 1998) (*unpublished – previously filed as D.E. 28-1*); Newbrough v. Piedmont Regional Jail Authority, 822 F. Supp. 2d 558, 574 (E.D.N.C. 2011).

The same rule applies to Plaintiff's claim under the North Carolina Constitution. North Carolina state courts have held that when governmental employees are sued in their official capacities, "the claim is against the office the employee holds rather than the particular individual who occupies the office." May v. City of Durham, 136 N.C. App. 578, 584, 525 S.E.2d 223, 229 (2000) (citing *Kentucky v. Graham*, 473 U.S. 159 (1985)). "Therefore, in a suit where the plaintiff asserts a claim against a governmental entity, a suit against those individuals working in their official capacity for this governmental entity is redundant." Id. (citing *Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997).

CONCLUSION

For the reasons set forth herein, the City respectfully requests that the Court grant its motion and dismiss Plaintiff's claims against the City in their entirety.

This the 20th day of December 2023.

CITY OF RALEIGH
Karen McDonald
Interim City Attorney

By: /s/ Hunt K. Choi
HUNT K. CHOI
Deputy City Attorney
NC State Bar No. 24172
Post Office Box 590
Raleigh, North Carolina 27602
Telephone: (919) 996-6560
Facsimile: (919) 996-7021
Email: hunt.choi@raleighnc.gov
Counsel for Defendant City of Raleigh

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Anthony J. Biller
Envisage Law
2601 Oberlin Road, Suite 100
Raleigh, NC 27608
919-414-0313
Fax: 919-782-0452
Email: ajbiller@envisage.law
Counsel for Plaintiff

James R. Lawrence , III
Envisage Law Partnership
2601 Oberlin Rd, Ste 100
Raleigh, NC 27608
919-755-1317
Email: jlawrence@envisage.law
Counsel for Plaintiff

Danielle Eng Rose
Envisage Law
2601 Oberlin Road, Suite 100
Raleigh, NC 27608
919-527-3315
Fax: 919-782-0452
Email: drose@envisage.law
Counsel for Plaintiff

Adam Patterson Banks
Envisage Law
2601 Oberlin Road, Suite 100
Raleigh, NC 27608
919-755-1317
Fax: 919-782-0452
Email: abanks@envisage.law
Counsel for Plaintiff

Matthew Tulchin
NC Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
919-716-6911
Fax: 919-716-6764
Email: mtulchin@ncdoj.gov
Counsel for Erik A. Hooks
Counsel for Roy Cooper
Counsel for Martin Brock
Counsel for Derick Proctor
Counsel for Tito Fink

Elizabeth Curran O'Brien
N.C. Dept. of Justice
Post Office Box 629
Raleigh, NC 27602-0629
919-716-0091
Email: eobrien@ncdoj.gov
Counsel for Lorrin Freeman

Joseph Finarelli
N.C. Dept. of Justice
P.O. Box 629
Raleigh, NC 27602
919-716-6531
Fax: 919-716-6761
Email: jfinarelli@ncdoj.gov
Counsel for Lorrin Freeman

And I hereby certify that I have mailed the document to the following non CM/ECF participants:

N/A

Respectfully submitted,

CITY OF RALEIGH
Karen McDonald
Interim City Attorney

By: /s/ Hunt K. Choi
HUNT K. CHOI
Deputy City Attorney
NC State Bar No. 24172
Post Office Box 590
Raleigh, North Carolina 27602
Telephone: (919) 996-6560
Facsimile: (919) 996-7021
Email: hunt.choi@raleighnc.gov
Counsel for Defendant City of Raleigh