United States District Court for the Western District of Texas
Austin Division

Sam Kirsch,	§	
Plaintiff,	§	
	§	Case no. _____
v.	§	
	§	
City of Austin and	§	
John Doe,	§	
Defendants.	§	

Plaintiff's Complaint and Request for Jury Trial

To the Honorable Court:

I. Introduction

This is a lawsuit about an as-yet unidentified Austin police officer who shot Plaintiff Sam Kirsch in the face to punish him for participating in a peaceful protest against police brutality on Interstate 35. Officer Doe shot Sam in the head with a so-called "less lethal" projectile moments after Sam had been peacefully exercising his constitutional right to assemble with like-minded people and protest the government. Shockingly, Officer Doe shot Sam *while* Sam was following police commands to disburse and *after* Sam had stopped protesting and had already left the highway.

This lawsuit is also about the City of Austin's appalling response to protests—especially its pattern of violently violating demonstrators' civil rights—during the weekend of May 30-31, 2020. The City compounded its mishandling of the situation by failing to investigate or attempt to deter further misconduct by Officer Doe and other police. Sam described the events of May 31 in detail at a City Council meeting attended by the police chief and his assistant chiefs on June 4. A month later, on July 2, Austin police denied knowing anything about Sam or his injury.

Finally, based on multiple credible sources, the City caused severe injuries by allowing its stockpile of "less-lethal" munitions to expire, and thus harden, and then arming its police with these expired munitions for crowd control during peaceful demonstrations.

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II. Parties

1. Sam Kirsch is a resident of Austin, Texas.

2. The City of Austin is a Texas municipal corporation in the Western District of Texas. Brian Manley is Austin's policymaker when it comes to policing.

3. Defendant John Doe is an as-yet unidentified (to Sam or the Austin community, anyway) Austin police officer. The City knows who shot Sam but has refused to identify Officer Doe even though it has been over five months since he shot Sam. Upon information and belief, Officer Doe is Jeffrey Teng or Eric Heim. *See* https://www.fox7austin.com/news/two-more-apd-officers-placed-on-administrative-leave-in-connection-to-may-protest-incidents.

III. Jurisdiction

4. This Court has federal question subject matter jurisdiction over this 42 U.S.C. § 1983 lawsuit under 28 U.S.C. § 1331.

5. This Court has general personal jurisdiction over Officer Doe because he works and lives in Texas. The City of Austin is subject to general personal jurisdiction because it is a Texas municipality.

6. This Court has specific personal jurisdiction over Officer Doe and the City because this case is about their conduct that occurred here in Austin, Texas.

IV. Venue

7. Under 28 U.S.C. § 1391(b), the Western District of Texas is the correct venue for this lawsuit because the events described above and below occurred in Austin.

V. Facts

A. Officer Doe shot Sam Kirsch even though Sam was doing nothing wrong.

8. On May 31, 2020 at 4:00pm, Sam Kirsch was peacefully exercising his constitutional right to assemble and protest the government. This picture from KXAN shows Sam sitting in the northbound lanes of Interstate 35 adjacent to Austin police headquarters with a large crowd of peaceful protesters:

9. At 4:00 pm, Austin police began tear gassing the protesters. Moments later police began ordering demonstrators to clear the highway and simultaneously began shooting so-called “less lethal” projectiles at various protestors. This screenshot of drone video shows

the scene when the tear gas started:

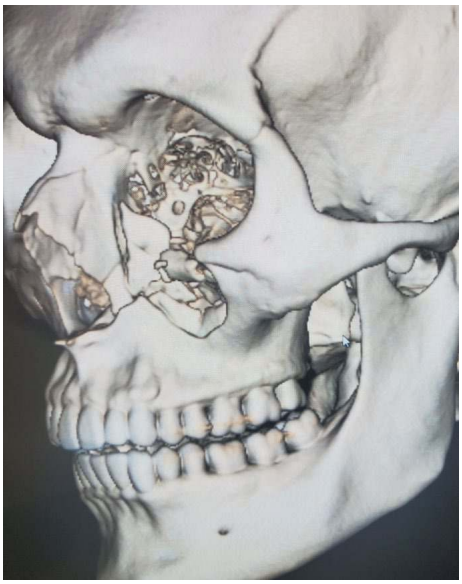
10. In response to the tear gas, Sam, like everyone else, scrambled to get off the highway. He opened an umbrella he had in his backpack and held it on the side of his body that was closest to the police for protection as he ran:

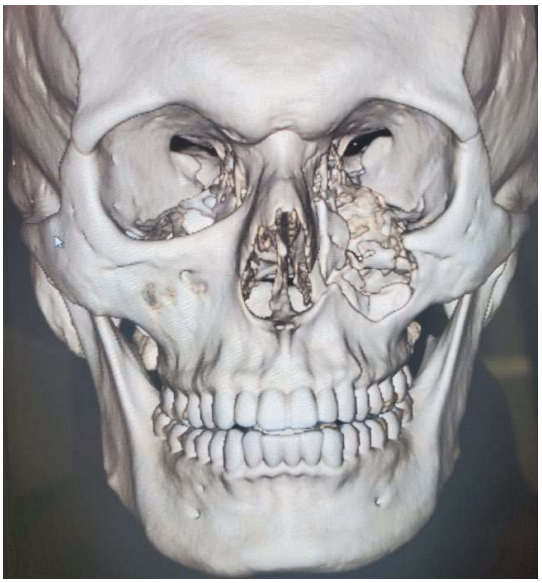
11. As Sam ran up the steep grassy median between the northbound lanes of the Interstate and the northbound frontage road, he turned and looked back over his shoulder. In doing so, he lowered his umbrella, and, in that moment, Officer Doe shot him in the head. Sam fell forward and downhill onto the ground when he was shot:

12. Multiple protesters who had been running up the hill to escape the shooting, turned back to help Sam who was bleeding profusely and was blinded. The group of Good Samaritans worked together to get Sam up the hill and further away from police:

13. One of the Good Samaritans pulled her car adjacent to where the group was tending to Sam and the group loaded Sam into the back seat. Two women drove Sam to the emergency room at Dell Seton Medical Center.

14. Sam was admitted to the hospital and underwent the first of his three surgeries to date (there will likely be more surgeries to try to preserve Sam's remaining eyesight). These pictures of Sam's skull taken on May 31, 2020 show the hole that Officer Doe shot into Sam's orbital cavity and cheekbone:





15. Sam's surgeon made this mold of Sam's face to practice fitting the metal implants before Sam underwent Open Reduction Internal Fixation (ORIF) surgery on June 9 (the second of Sam's three surgeries to date):

This is an image of Sam's face with the metal implants after the ORIF surgery on June 9:

16. The metal implants in Sam's face are permanent. The structure of Sam's face and his eyesight will never fully heal. Officer Doe's excessive and unjustified use of force permanently disabled Sam.

17. On May 31, *Texas Tribune* journalists collected spent munitions fired by Austin police at demonstrators, including Sam, that day:

https://www.texastribune.org/2020/06/03/texas-police-force-protests-george-floyd/.

18. Austin police Chief Brian Manley later identified the types of munitions that he ordered his officers to carry and use on May 31. Under questioning from the Austin City Council—and referring to the picture of expended projectiles collected by *Texas Tribune* journalists (above)—he stated:

> And then since you've got these pictures up here, what I see is the 12-gauge munition is the one on the direct left. That is a foam baton round, and so that -- rubber bullets are -- and I guess maybe it's a misnomer -- rubber bullets are also from a 12-gauge shotgun something you do as a skip round into the answering or something. That is a foam baton round that we also have access and use of. That's what that larger one is that's being held there. And then of course the one in the middle is a gas can, and I don't know whether that is smoke or whether that was the cs can.

https://www.austintexas.gov/edims/document.cfm?id=341786 (Transcript Austin City Council, June 4, 2020).

19. Upon information and belief, Officer Doe shot Sam with a 40mm "foam baton" round or a 12-gage round filled with lead pellets.

20. Upon information and belief, the City armed its police on May 30 and May 31 with expired munitions which had hardened over time and thus caused more severe injuries than munitions used within the manufacturers' recommended time frames.

B. At best, the City tried to ignore what happened to Sam.

21. At the same City Council meeting where Brian Manley gave the testimony above, Sam testified in detail about what happened to him:

> >> The next speaker is Samuel kirsch. You have three minutes.
> >> Sam: Hello. This is Sam. Can you all hear me?
> >> Yes.
> >> Sam: Hello?
> >> Mayor Adler: Yes. Please proceed.
> >> Sam: Okay, thank you. First of all, I want to thank mayor Adler and the city council for allowing me to speak today. So I was peacefully protesting on Sunday, may 31st, in solidarity with black lives matter. When I was near I-35, police started

> using what I believe was smoke grenades, which is when I started running away. While I was on the grass, while I was running away, I was shot with what I believe to be either a rubber bullet or a beanbag. I was hit in my face. If I were not wearing sunglasses at the time, I have no doubt in my mind that I would be blind right now. I immediately hit the ground and was dragged away by fellow protesters and I was rushed to the hospital. There was blood all over my chest, and my hands. It felt like a war zone. I did not know what was going on, and it all happened extremely quickly. The damage that I took was a very large laceration due to the cut from the sunglasses, from the bullet hitting them. I suffered a broken nose. I believe it was also five or six broken bones near my upper cheek and the bone supporting my eye. I also have hopefully temporary retinal bruising. I have to undergo another surgery in a week. That surgery is risky, because I will be getting multiple titanium plates to support my eye. There's a risk for the -- for my body to reject those plates. There's a risk for infection with those plates. There's also a risk of going blind from the surgery, because when they do the surgery, they have to make an incision in my lower left eyelid. And there's also a significant risk, I was told by an ophthalmologist, of permanent vision loss, either temporary or -- either partial or permanent, even if the surgery goes well. I'm currently unable to eat anything except pureeed food, I have to drink through a straw. I have double vision, I have no depth perception, I am in enormous pain, both physically, emotionally and soon to be financially. And I would like to thank some of those councilmembers that have called out the police chief for not showing his face, and for not having sufficient answers to using these, quote unquote, less lethal rounds on people, protesters. I think it was wrong in any scenario. So I'm open to any questions if you have them. And thank you for allowing me to speak today.

https://www.austintexas.gov/edims/document.cfm?id=341786 (Transcript Austin City Council, June 4, 2020).

22. Brian Manley and his assistant chiefs attended the June 4 City council meeting and heard straight from Sam about what had happened. Nonetheless, Austin police denied having even heard of Sam Kirsch or his injury one month later, on July 2.

23. It was over another month before police investigators even spoke to Sam. At Sam's police interview on August 13, the lead investigator (despite having the drone footage and Sam's hospital records) stated that he did not yet have probable cause to investigate any police officer for injuring Sam. The lead investigator expressed his

skepticism that Sam's injuries were caused by an Austin police officer and he attempted to have Sam implicate other protesters in his injury instead.

24. Five months after Sam was shot, on October 29, the City placed Officer Doe on administrative leave indicating that Officer Doe was the subject of administrative and criminal investigations. Upon information and belief, the City continued to assign Officer Doe to staff demonstrations and protests in the five months between when he shot Sam and when he was placed on administrative leave.

C. Other protesters were also severely injured.

25. A group of emergency room doctors who had treated Austinites injured by police on May 30 and May 31 at Dell Seton Medical Center, published an op-ed in *The New England Journal of Medicine* about their observations. The doctors unequivocally concluded that these munitions should not be used for crowd control, stating:

> In Austin, Texas, tensions culminated in 2 days of vigorous protest, during which police used beanbag munitions for crowd control, resulting in numerous clinically significant injuries.
> . . .
> At the closest level 1 trauma center, located blocks from the protests in Austin, we treated 19 patients who sustained beanbag injuries over these 2 days.
> . . .
> Four patients had intracranial hemorrhages. One patient presented with a depressed parietal skull fracture with associated subdural and subarachnoid hemorrhages, leading to emergency intubation, decompressive craniectomy, and a prolonged stay in the intensive care unit. Another patient presented with a depressed frontal bone fracture with retained beanbag, which was treated with an emergency craniotomy and cranioplasty.
> . . .
> Although our report reflects the experience at only one center during a short period and we cannot determine the frequency of injuries when these munitions are used, these findings highlight the fact that beanbag munitions can cause serious harm and are not appropriate for use in crowd control. Beanbag rounds have since been abandoned by our local law enforcement in this context.

https://www.nejm.org/doi/full/10.1056/NEJMc2025923. The doctors listed Sam's injuries among the most serious head injuries:

The NEW ENGLAND JOURNAL of MEDICINE

Table 1. Patients with Beanbag Injuries during the 2020 Protests in Austin, Texas.*

Type of Injury, Sex, and Age	Details of Injury	Course
Head injury		
F, 26 yr	5-mm Subdural hematoma, hemotympanum	Admitted to ICU, treated without operative intervention, discharged on hospital day 3
M, 20 yr	Displaced right parietal skull fracture, subarachnoid hemorrhage, 5-mm subdural hematoma	Intubated, taken to OR for craniectomy and cranioplasty, admitted to ICU, given a tracheostomy, discharged on hospital day 23 to rehabilitation facility
M, 18 yr	6-cm Scalp laceration, subarachnoid hemorrhage	Treated with washout and laceration repair, admitted to medical–surgical floor, discharged on hospital day 1
M, 16 yr	Midline comminuted, depressed frontal bone fracture; retained beanbag; bifrontal intraparenchymal hemorrhage; subarachnoid hemorrhage; subdural hematoma	Taken to OR for foreign-body removal, bifrontal craniotomy, cranioplasty, and complex wound closure; admitted to ICU; given a psychiatric consultation; discharged on hospital day 6
M, 25 yr	Inner canthus laceration; comminuted, displaced fractures of the maxilla and orbital floor	Taken to OR for washout and laceration repair, discharged on hospital day 2, given delayed ORIF for facial fractures
Facial fracture		
F, 29 yr	Open facial wound with retained beanbag in masticator space; comminuted, displaced mandibular and maxillary fractures; facial nerve palsy	Taken to OR for foreign-body removal, washout, and débridement; discharged on hospital day 1; treated with healing by secondary intention (i.e., the wound was left open to heal under a dressing)
M, 23 yr	Comminuted, displaced mandibular body fracture; avulsed teeth; complex lip and gingival lacerations	Taken to OR for closed reduction, washout, débridement, and laceration repair; discharged on hospital day 1
Other injuries		
F, 29 yr	Penetrating soft-tissue injury to chest and breast, retained beanbag	Taken to OR for foreign-body removal, washout, and débridement; discharged on hospital day 1; treated with healing by secondary intention
F, 19 yr	Open fracture of the olecranon with retained foreign bodies	Taken to OR for ORIF, débridement, and foreign-body removal; discharged on hospital day 2
M, 54 yr	Lacerations to torso and shin	Received washout and laceration repair, discharged
F, 19 yr	Laceration to eyebrow	Received washout and laceration repair, discharged
F, 43 yr	Tuft fracture	Received splinting, discharged
M, 36 yr	Abdominal abrasion, contusion	Discharged
M, 31 yr	Elbow laceration	Received washout and laceration repair, discharged
M, 22 yr	Olecranon fracture	Received sling, discharged
M, 16 yr	Contusion to forearm and leg	Discharged
F, 24 yr	Contusion to abdomen	Discharged
M, 20 yr	Contusion to abdomen, ear laceration	Received washout and laceration repair, discharged
F, 19 yr	Scalp laceration	Received washout and laceration repair, discharged

VI. Claims

A. Officer Doe violated Sam Kirsch's First Amendment rights when he shot Sam in retaliation for protesting police misconduct.

26. Sam Kirsch incorporates sections I through V above into his First Amendment claim.

27. Sam brings this claim under 42 U.S.C. § 1983.

28. Sam exercised his right to free speech and his right to assemble with other demonstrators to protest police brutality on May 31, 2020.

29. Officer Doe shot Sam because Sam was protesting Austin police and other police departments around the country for their habitual use of excessive force. Officer Doe was acting under color of law when he shot Sam as retribution for Sam exercising his First Amendment rights. Officer Doe was acting under color of law when he directly and proximately caused Sam's injuries.

B. Officer Doe violated Sam Kirsch's Fourth and Fourteenth Amendment rights when he shot Sam without justification.

30. Sam Kirsch incorporates sections I through VI.A above into his Fourth and Fourteenth Amendment claims.

31. Sam brings this claim under 42 U.S.C. § 1983.

32. Officer Doe was acting under color of law when he shot Sam as he scrambled to disburse. Officer Doe shot Sam even though Sam did not pose a danger to anyone and *after* Sam had complied with police commands and left the highway.

C. Officer Doe acted with such impunity and reckless disregard for civil rights, this case warrants damages that will deter this type of misconduct in the future.

33. Sam Kirsch incorporates sections I through VI.B above into his punitive damages claim.

34. Officer Doe's actions and conduct were egregious, reckless, and endangered numerous peaceful protesters and bystanders. Sam seeks punitive damages to deter this type of retaliation and excessive force against protesters who demonstrate against police brutality in the future.

D. The City of Austin's policy of using excessive violence to control demonstration crowds violated protesters' First, Fourth, and Fourteenth Amendment rights.

35. Sam Kirsch incorporates sections I through VI.C above into his *Monell* claim.

36. Sam brings this claim under 42 U.S.C. § 1983.

37. Austin had these policies, practices, and customs on May 30-31, 2020:

a. Using dangerous kinetic projectiles that caused severe and permanent injuries to control peaceful demonstrations,

b. Using excessive force against non-violent demonstrators,

c. Failing to adequately train officers regarding civil rights protected by the United States Constitution,

d. Failing to adequately train officers in crowd control during non-violent protests,

e. Failing to adequately supervise officers doing crowd control during non-violent protests,

f. Failing to intervene to stop excessive force and civil rights violations by its officers during non-violent protests,

g. Failing to investigate excessive violence by its officers against peaceful protesters, and

h. Failing to adequately discipline officers for—and deter officers from—using excessive force and violating protesters' civil rights during demonstrations.

38. The City and Brian Manley knew about these policies and directed Austin police to comply with them. The City and Brian Manley developed and issued these policing policies with deliberate indifference to Sam's and other peaceful demonstrators' civil rights.

39. The City and Brian Manley were aware of the obvious consequences of these policies. Implementation of these policies made it predictable that Sam's constitutional rights would be violated in the manner they were, and the City and Brian Manley knew that was likely to occur. It was obvious that these policies would injure more people on May 31 because they injured so many people on May 30. The City and Brian Manley condoned and ratified the civil rights violations and the conduct that caused injuries on May 30 by continuing to mandate the same policies on May 31.

40. These polices were the moving force behind Officer Doe's violation of Sam's civil rights and thus, proximately caused Sam's severe injury and permanent disability.

E. The City was negligent when it used expired munitions against protesters.

41. Sam Kirsch incorporates sections I through VI.D above into his negligence claim.

42. The City had a duty to every Austinite, including Sam, to maintain and keep its stockpiles of police equipment functional and up to date. The City had a duty to Sam and every other protester not to arm its police with expired munitions that become more dangerous with age when its police were sent to control crowds during demonstrations. Nonetheless, upon information and belief, the City knowingly armed its police with expired munitions on May 30 and May 31, 2020 and thus breached its duty to Austinites including Sam.

43. Upon information and belief, Sam's injuries were more serious because the projectile was expired and had hardened. Upon information and belief, the City's failure to

maintain unexpired munitions stores and the deliberate decision to use expired munitions against Sam and other protesters directly and proximately caused Sam's injuries.

VII. Damages

44. Sam Kirsch incorporates sections I through VI above into this section on damages.

45. Sam seeks recovery for all of his damages including past and future pain, past and future mental anguish, past and future disfigurement, past and future physical impairment, past and future loss of enjoyment of life, past and future medical expenses, past and future lost income, past and future loss of consortium, past and future loss of services, miscellaneous other economic damages including out-of-pocket expenses, pre and post judgment interest, attorney's fees, expenses, and costs.

VIII. Request for jury trial

46. Plaintiff requests a jury trial.

IX. Prayer

47. For all these reasons, Sam Kirsch requests that the City of Austin and Officer Doe be summoned to appear and answer Sam's allegations. After a jury trial regarding his claims, Sam seeks to recover the damages listed above in an amount to be determined by the jury and any other relief to which he is entitled.

Respectfully submitted,
Hendler Flores Law, PLLC

_____
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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, *Plaintiff,*	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-01113-RP**
CITY OF AUSTIN AND JOHN DOE, *Defendants.*	§	

DEFENDANT CITY OF AUSTIN'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant City of Austin files this Answer and Affirmative Defenses to Plaintiffs' Original Complaint (Doc. No. 1). Pursuant to Rules 8 and 12 of the Federal Rules of Civil Procedure, Defendant respectfully shows the Court the following:

ORIGINAL ANSWER

Pursuant to Federal Rule of Civil Procedure 8(b), Defendant responds to each of the specific averments in Plaintiffs' First Amended Complaint as set forth below. To the extent that Defendant does not address a specific averment made by Plaintiff, Defendant expressly denies that averment. [1]

This Defendant denies the allegations contained in the first paragraph labeled "Introduction" in Plaintiff's Original Complaint.

PARTIES

1. Upon information and belief, Defendant admits the allegations contained in Paragraph 1.

2. Defendant admits the allegations contained in Paragraph 2.

[1] Paragraph numbers in Defendant's Answer correspond to the paragraphs in Plaintiffs' Original Complaint.

3. Defendant denies the allegations contained in Paragraph 3.

JURISDICTION

4. Defendant admits the allegations contained in Paragraph 4.

5. Defendant admits the allegations contained in Paragraph 5.

6. Defendant admits the allegations contained in Paragraph 6.

VENUE

7. Defendant admits the allegations contained in Paragraph 7.

FACTS

8. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 8 of the Original Complaint and therefore denies same.

9. Defendant denies the allegations contained in Paragraph 9.

10. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 10 of the Original Complaint and therefore denies same.

11. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 11 of the Original Complaint and therefore denies same.

12. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 12 of the Original Complaint and therefore denies same.

13. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 13 of the Original Complaint and therefore denies same.

14. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 14 of the Original Complaint and therefore denies same.

15. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 15 of the Original Complaint and therefore denies same.

16. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 16 of the Original Complaint and therefore denies the same.

17. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 17 of the Original Complaint and therefore denies the same.

18. Upon information and belief, Defendant admits the allegations contained in Paragraph 18.

19. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 19 of the Original Complaint and therefore denies same.

20. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 20 of the Original Complaint and therefore denies same.

21. Upon information and belief, Defendant admits the allegations contained in Paragraph 21.

22. Defendant admits the allegations contained in the first sentence of Paragraph 22. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in the remainder of Paragraph 22 of the Original Complaint and therefore denies same.

23. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 23 of the Original Complaint and therefore denies same.

24. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 24 of the Original Complaint and therefore denies same.

25. Upon information and belief, Defendant admits the allegations contained in the first sentence of Paragraph 25. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations contained in Paragraph 25 of the Original Complaint and therefore denies same.

CLAIMS

26. Defendant adopts and incorporates its responses to the previous paragraphs of the Complaint.

27. Defendant admits the allegations contained in Paragraph 27.

28. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 28 of the Original Complaint and therefore denies same.

29. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 29 of the Original Complaint and therefore denies same.

30. Defendant adopts and incorporates its responses to the previous paragraphs of the Complaint.

31. Defendant admits the allegations contained in Paragraph 31.

32. Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 32 of the Complaint and therefore denies same.

33. Defendant adopts and incorporates its responses to the previous paragraphs of the Complaint.

34. Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations contained in Paragraph 34 of the Complaint and therefore denies same.

35. Defendant adopts and incorporates its responses to the previous paragraphs of the Complaint.

36. Defendant admits the allegations contained in Paragraph 36.

37. Defendant denies the allegations contained in Paragraph 37.

38. Defendant denies the allegations contained in Paragraph 38.

39. Defendant denies the allegations contained in Paragraph 39.

40. Defendant denies the allegations contained in Paragraph 40.

41. Defendant adopts and incorporates its responses to the previous paragraphs of the Complaint.

42. Defendant denies the allegations contained in Paragraph 42.

43. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in the first sentence of Paragraph 43 of the Original Complaint and therefore denies same. Defendant denies the remaining allegations contained in Paragraph 43.

44. Defendant adopts and incorporates its responses to the previous allegations contained in the Original Complaint.

45. Defendant denies the allegations contained in Paragraph 45.

46. Paragraph 46 is a request for a trial by jury and does not contain allegations that require Defendant to admit or deny.

47. Defendant denies the allegations contained in Paragraph 47 and specifically denies that the Plaintiff is entitled to any relief whatsoever of and from the Defendant.

AFFIRMATIVE DEFENSES

1. Defendant City of Austin asserts the affirmative defense of governmental immunity as a municipal corporation entitled to immunity while acting in the performance of its governmental functions, absent express waiver.

2. Defendant City of Austin asserts the affirmative defense of governmental immunity since its employees are entitled to qualified/official immunity for actions taken in the course and scope of their employment, absent express waiver.

3. As a political subdivision, Defendant City of Austin denies that it can be liable for exemplary/punitive damages under 42 U.S.C. § 1983.

4. Defendant reserves the right to assert additional affirmative defenses throughout the development of the case.

DEFENDANT'S PRAYER

Defendant City of Austin prays that all relief requested by Plaintiff be denied, that the Court dismiss this case with prejudice, and that the Court award Defendant costs and attorney's fees, and any additional relief to which it is entitled under law or equity.

RESPECTFULLY SUBMITTED,
ANNE L. MORGAN, CITY ATTORNEY
MEGHAN RILEY, CHIEF, LITIGATION
/s/ H. Gray Laird
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ATTORNEYS FOR DEFENDANT CITY OF AUSTIN

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this 8th day of January, 2021

Via ECF/e-filing:

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/s/ H. Gray Laird III
H. GRAY LAIRD III

United States District Court for the Western District of Texas
Austin Division

Sam Kirsch,	§	
Plaintiff,	§	
	§	Case no. 1:20-cv-01113-RP
v.	§	
	§	
City of Austin and	§	
Officer Rolan Roman Rast,	§	
Defendants.	§	

Plaintiff's First Amended Complaint

To the Honorable Court:

I. Introduction

This is a lawsuit about Officer Rolan Roman Rast who shot Plaintiff Sam Kirsch in the face to punish him for participating in a peaceful protest against police brutality on Interstate 35. Officer Rast shot Sam in the head with a so-called "less lethal" projectile moments after Sam had been peacefully exercising his constitutional right to assemble with like-minded people and protest the government. Shockingly, Officer Rast shot Sam *while* Sam was following police commands to disburse and *after* Sam had stopped protesting and had already left the highway.

This lawsuit is also about the City of Austin's appalling response to protests—especially its pattern of violently violating demonstrators' civil rights—during the weekend of May 30-31, 2020. The City compounded its mishandling of the situation by failing to investigate or attempt to deter further misconduct by Officer Rast and other police. Sam described the events of May 31 in detail at a City Council meeting attended by the police chief and his assistant chiefs on June 4. A month later, on July 2, Austin police denied knowing anything about Sam or his injury.

Finally, based on multiple credible sources, the City caused severe injuries by allowing its stockpile of "less-lethal" munitions to expire, and thus harden, and then arming its police with these expired munitions for crowd control during peaceful demonstrations.

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II. Parties

1. Sam Kirsch is a resident of Austin, Texas.

2. The City of Austin is a Texas municipal corporation in the Western District of Texas. Brian Manley is Austin's policymaker when it comes to policing.

3. Officer Rolan Roman Rast is the Austin police officer who shot Sam.

III. Jurisdiction

4. This Court has federal question subject matter jurisdiction over this 42 U.S.C. § 1983 lawsuit under 28 U.S.C. § 1331.

5. This Court has general personal jurisdiction over Officer Rast because he works and lives in Texas. The City of Austin is subject to general personal jurisdiction because it is a Texas municipality.

6. This Court has specific personal jurisdiction over Officer Rast and the City because this case is about their conduct that occurred here in Austin, Texas.

IV. Venue

7. Under 28 U.S.C. § 1391(b), the Western District of Texas is the correct venue for this lawsuit because the events described above and below occurred in Austin.

V. Facts

A. Officer Rast shot Sam Kirsch even though Sam was doing nothing wrong.

8. On May 31, 2020 at 4:00pm, Sam Kirsch was peacefully exercising his constitutional right to assemble and protest the government. This picture from KXAN shows Sam sitting in the northbound lanes of Interstate 35 adjacent to Austin police headquarters with a large crowd of peaceful protesters:

9. At 4:00 pm, Austin police began tear gassing the protesters. Moments later police began ordering demonstrators to clear the highway and simultaneously began shooting so-called “less lethal” projectiles at various protestors. This screenshot of drone video shows

the scene when the tear gas started:

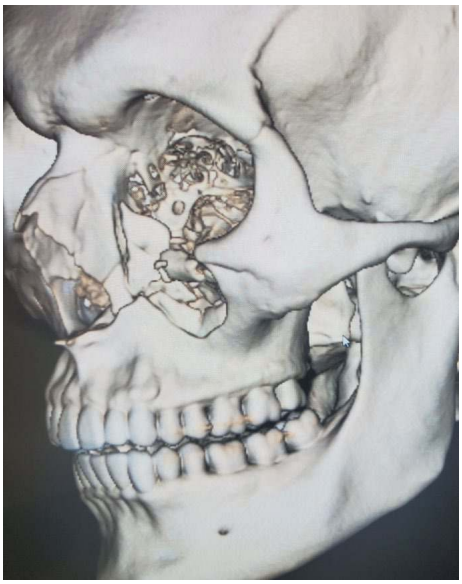
10. In response to the tear gas, Sam, like everyone else, scrambled to get off the highway. He opened an umbrella he had in his backpack and held it on the side of his body that was closest to the police for protection as he ran:

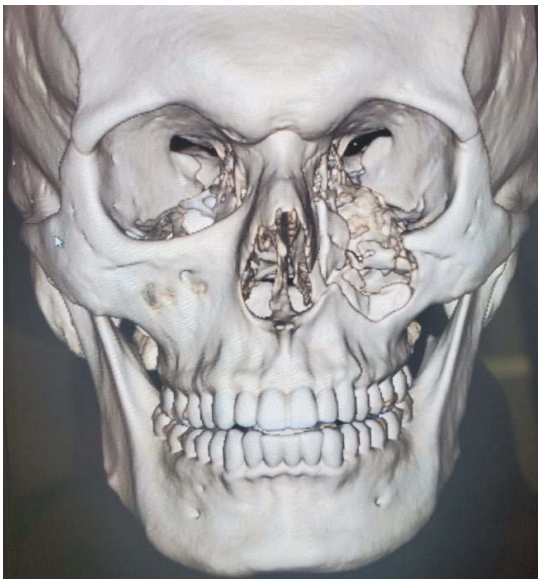
11. As Sam ran up the steep grassy median between the northbound lanes of the Interstate and the northbound frontage road, he turned and looked back over his shoulder. In doing so, he lowered his umbrella, and, in that moment, Officer Rast shot him in the head. Sam fell forward and downhill onto the ground when he was shot:

12. Multiple protesters who had been running up the hill to escape the shooting, turned back to help Sam who was bleeding profusely and was blinded. The group of Good Samaritans worked together to get Sam up the hill and further away from police:

13. One of the Good Samaritans pulled her car adjacent to where the group was tending to Sam and the group loaded Sam into the back seat. Two women drove Sam to the emergency room at Dell Seton Medical Center.

14. Sam was admitted to the hospital and underwent the first of his three surgeries to date (there will likely be more surgeries to try to preserve Sam's remaining eyesight). These pictures of Sam's skull taken on May 31, 2020 show the hole that Officer Rast shot into Sam's orbital cavity and cheekbone:





15. Sam's surgeon made this mold of Sam's face to practice fitting the metal implants before Sam underwent Open Reduction Internal Fixation (ORIF) surgery on June 9 (the second of Sam's three surgeries to date):

This is an image of Sam's face with the metal implants after the ORIF surgery on June 9:

16. The metal implants in Sam's face are permanent. The structure of Sam's face and his eyesight will never fully heal. Officer Rast's excessive and unjustified use of force permanently disabled Sam.

17. On May 31, *Texas Tribune* journalists collected spent munitions fired by Austin police at demonstrators, including Sam, that day:

https://www.texastribune.org/2020/06/03/texas-police-force-protests-george-floyd/.

18. Austin police Chief Brian Manley later identified the types of munitions that he ordered his officers to carry and use on May 31. Under questioning from the Austin City Council—and referring to the picture of expended projectiles collected by *Texas Tribune* journalists (above)—he stated:

> And then since you've got these pictures up here, what I see is the 12-gauge munition is the one on the direct left. That is a foam baton round, and so that -- rubber bullets are -- and I guess maybe it's a misnomer -- rubber bullets are also from a 12-gauge shotgun something you do as a skip round into the answering or something. That is a foam baton round that we also have access and use of. That's what that larger one is that's being held there. And then of course the one in the middle is a gas can, and I don't know whether that is smoke or whether that was the cs can.

https://www.austintexas.gov/edims/document.cfm?id=341786 (Transcript Austin City Council, June 4, 2020).

19. Upon information and belief, Officer Rast shot Sam with a 40mm "foam baton" round or a 12-gage round filled with lead pellets.

20. Upon information and belief, the City armed its police on May 30 and May 31 with expired munitions which had hardened over time and thus caused more severe injuries than munitions used within the manufacturers' recommended time frames.

B. At best, the City tried to ignore what happened to Sam.

21. At the same City Council meeting where Brian Manley gave the testimony above, Sam testified in detail about what happened to him:

> >> The next speaker is Samuel kirsch. You have three minutes.
> >> Sam: Hello. This is Sam. Can you all hear me?
> >> Yes.
> >> Sam: Hello?
> >> Mayor Adler: Yes. Please proceed.
> >> Sam: Okay, thank you. First of all, I want to thank mayor Adler and the city council for allowing me to speak today. So I was peacefully protesting on Sunday, may 31st, in solidarity with black lives matter. When I was near I-35, police started

> using what I believe was smoke grenades, which is when I started running away. While I was on the grass, while I was running away, I was shot with what I believe to be either a rubber bullet or a beanbag. I was hit in my face. If I were not wearing sunglasses at the time, I have no doubt in my mind that I would be blind right now. I immediately hit the ground and was dragged away by fellow protesters and I was rushed to the hospital. There was blood all over my chest, and my hands. It felt like a war zone. I did not know what was going on, and it all happened extremely quickly. The damage that I took was a very large laceration due to the cut from the sunglasses, from the bullet hitting them. I suffered a broken nose. I believe it was also five or six broken bones near my upper cheek and the bone supporting my eye. I also have hopefully temporary retinal bruising. I have to undergo another surgery in a week. That surgery is risky, because I will be getting multiple titanium plates to support my eye. There's a risk for the -- for my body to reject those plates. There's a risk for infection with those plates. There's also a risk of going blind from the surgery, because when they do the surgery, they have to make an incision in my lower left eyelid. And there's also a significant risk, I was told by an ophthalmologist, of permanent vision loss, either temporary or -- either partial or permanent, even if the surgery goes well. I'm currently unable to eat anything except pureeed food, I have to drink through a straw. I have double vision, I have no depth perception, I am in enormous pain, both physically, emotionally and soon to be financially. And I would like to thank some of those councilmembers that have called out the police chief for not showing his face, and for not having sufficient answers to using these, quote unquote, less lethal rounds on people, protesters. I think it was wrong in any scenario. So I'm open to any questions if you have them. And thank you for allowing me to speak today.

https://www.austintexas.gov/edims/document.cfm?id=341786 (Transcript Austin City Council, June 4, 2020).

22. Brian Manley and his assistant chiefs attended the June 4 City council meeting and heard straight from Sam about what had happened. Nonetheless, Austin police denied having even heard of Sam Kirsch or his injury one month later, on July 2.

23. It was over another month before police investigators even spoke to Sam. At Sam's police interview on August 13, the lead investigator (despite having the drone footage and Sam's hospital records) stated that he did not yet have probable cause to investigate any police officer for injuring Sam. The lead investigator expressed his

skepticism that Sam's injuries were caused by an Austin police officer and he attempted to have Sam implicate other protesters in his injury instead.

C. Other protesters were also severely injured.

24. A group of emergency room doctors who had treated Austinites injured by police on May 30 and May 31 at Dell Seton Medical Center, published an op-ed in *The New England Journal of Medicine* about their observations. The doctors unequivocally concluded that these munitions should not be used for crowd control, stating:

> In Austin, Texas, tensions culminated in 2 days of vigorous protest, during which police used beanbag munitions for crowd control, resulting in numerous clinically significant injuries.
> . . .
> At the closest level 1 trauma center, located blocks from the protests in Austin, we treated 19 patients who sustained beanbag injuries over these 2 days.
> . . .
> Four patients had intracranial hemorrhages. One patient presented with a depressed parietal skull fracture with associated subdural and subarachnoid hemorrhages, leading to emergency intubation, decompressive craniectomy, and a prolonged stay in the intensive care unit. Another patient presented with a depressed frontal bone fracture with retained beanbag, which was treated with an emergency craniotomy and cranioplasty.
> . . .
> Although our report reflects the experience at only one center during a short period and we cannot determine the frequency of injuries when these munitions are used, these findings highlight the fact that beanbag munitions can cause serious harm and are not appropriate for use in crowd control. Beanbag rounds have since been abandoned by our local law enforcement in this context.

https://www.nejm.org/doi/full/10.1056/NEJMc2025923. The doctors listed Sam's injuries among the most serious head injuries:

Table 1. Patients with Beanbag Injuries during the 2020 Protests in Austin, Texas.*

Type of Injury, Sex, and Age	Details of Injury	Course
Head injury		
F, 26 yr	5-mm Subdural hematoma, hemotympanum	Admitted to ICU, treated without operative intervention, discharged on hospital day 3
M, 20 yr	Displaced right parietal skull fracture, subarachnoid hemorrhage, 5-mm subdural hematoma	Intubated, taken to OR for craniectomy and cranioplasty, admitted to ICU, given a tracheostomy, discharged on hospital day 23 to rehabilitation facility
M, 18 yr	6-cm Scalp laceration, subarachnoid hemorrhage	Treated with washout and laceration repair, admitted to medical–surgical floor, discharged on hospital day 1
M, 16 yr	Midline comminuted, depressed frontal bone fracture; retained beanbag; bifrontal intraparenchymal hemorrhage; subarachnoid hemorrhage; subdural hematoma	Taken to OR for foreign-body removal, bifrontal craniotomy, cranioplasty, and complex wound closure; admitted to ICU; given a psychiatric consultation; discharged on hospital day 6
M, 25 yr	Inner canthus laceration; comminuted, displaced fractures of the maxilla and orbital floor	Taken to OR for washout and laceration repair, discharged on hospital day 2, given delayed ORIF for facial fractures
Facial fracture		
F, 29 yr	Open facial wound with retained beanbag in masticator space; comminuted, displaced mandibular and maxillary fractures; facial nerve palsy	Taken to OR for foreign-body removal, washout, and débridement; discharged on hospital day 1; treated with healing by secondary intention (i.e., the wound was left open to heal under a dressing)
M, 23 yr	Comminuted, displaced mandibular body fracture; avulsed teeth; complex lip and gingival lacerations	Taken to OR for closed reduction, washout, débridement, and laceration repair; discharged on hospital day 1
Other injuries		
F, 29 yr	Penetrating soft-tissue injury to chest and breast, retained beanbag	Taken to OR for foreign-body removal, washout, and débridement; discharged on hospital day 1; treated with healing by secondary intention
F, 19 yr	Open fracture of the olecranon with retained foreign bodies	Taken to OR for ORIF, débridement, and foreign-body removal; discharged on hospital day 2
M, 54 yr	Lacerations to torso and shin	Received washout and laceration repair, discharged
F, 19 yr	Laceration to eyebrow	Received washout and laceration repair, discharged
F, 43 yr	Tuft fracture	Received splinting, discharged
M, 36 yr	Abdominal abrasion, contusion	Discharged
M, 31 yr	Elbow laceration	Received washout and laceration repair, discharged
M, 22 yr	Olecranon fracture	Received sling, discharged
M, 16 yr	Contusion to forearm and leg	Discharged
F, 24 yr	Contusion to abdomen	Discharged
M, 20 yr	Contusion to abdomen, ear laceration	Received washout and laceration repair, discharged
F, 19 yr	Scalp laceration	Received washout and laceration repair, discharged

VI. Claims

A. Officer Rast violated Sam Kirsch's First Amendment rights when he shot Sam in retaliation for protesting police misconduct.

25. Sam Kirsch incorporates sections I through V above into his First Amendment claim.

26. Sam brings this claim under 42 U.S.C. § 1983.

27. Sam exercised his right to free speech and his right to assemble with other demonstrators to protest police brutality on May 31, 2020.

28. Officer Rast shot Sam because Sam was protesting Austin police and other police departments around the country for their habitual use of excessive force. Officer Rast was acting under color of law when he shot Sam as retribution for Sam exercising his First Amendment rights. Officer Rast was acting under color of law when he directly and proximately caused Sam's injuries.

B. Officer Rast violated Sam Kirsch's Fourth and Fourteenth Amendment rights when he shot Sam without justification.

29. Sam Kirsch incorporates sections I through VI.A above into his Fourth and Fourteenth Amendment claims.

30. Sam brings this claim under 42 U.S.C. § 1983.

31. Officer Rast was acting under color of law when he shot Sam as he scrambled to disburse. Officer Rast shot Sam even though Sam did not pose a danger to anyone and *after* Sam had complied with police commands and left the highway.

C. Officer Rast acted with such impunity and reckless disregard for civil rights, this case warrants damages that will deter this type of misconduct in the future.

32. Sam Kirsch incorporates sections I through VI.B above into his punitive damages claim.

33. Officer Rast's actions and conduct were egregious, reckless, and endangered numerous peaceful protesters and bystanders. Sam seeks punitive damages to deter this type of retaliation and excessive force against protesters who demonstrate against police brutality in the future.

D. The City of Austin's policy of using excessive violence to control demonstration crowds violated protesters' First, Fourth, and Fourteenth Amendment rights.

34. Sam Kirsch incorporates sections I through VI.C above into his *Monell* claim.

35. Sam brings this claim under 42 U.S.C. § 1983.

36. Austin had these policies, practices, and customs on May 30-31, 2020:

a. Using dangerous kinetic projectiles that caused severe and permanent injuries to control peaceful demonstrations,

b. Using excessive force against non-violent demonstrators,

c. Failing to adequately train officers regarding civil rights protected by the United States Constitution,

d. Failing to adequately train officers in crowd control during non-violent protests,

e. Failing to adequately supervise officers doing crowd control during non-violent protests,

f. Failing to intervene to stop excessive force and civil rights violations by its officers during non-violent protests,

g. Failing to investigate excessive violence by its officers against peaceful protesters, and

h. Failing to adequately discipline officers for—and deter officers from—using excessive force and violating protesters' civil rights during demonstrations.

37. The City and Brian Manley knew about these policies and directed Austin police to comply with them. The City and Brian Manley developed and issued these policing policies with deliberate indifference to Sam's and other peaceful demonstrators' civil rights.

38. The City and Brian Manley were aware of the obvious consequences of these policies. Implementation of these policies made it predictable that Sam's constitutional rights would be violated in the manner they were, and the City and Brian Manley knew that was likely to occur. It was obvious that these policies would injure more people on May 31 because they injured so many people on May 30. The City and Brian Manley condoned and ratified the civil rights violations and the conduct that caused injuries on May 30 by continuing to mandate the same policies on May 31.

39. These polices were the moving force behind Officer Rast's violation of Sam's civil rights and thus, proximately caused Sam's severe injury and permanent disability.

E. The City was negligent when it used expired munitions against protesters.

40. Sam Kirsch incorporates sections I through VI.D above into his negligence claim.

41. The City had a duty to every Austinite, including Sam, to maintain and keep its stockpiles of police equipment functional and up to date. The City had a duty to Sam and every other protester not to arm its police with expired munitions that become more dangerous with age when its police were sent to control crowds during demonstrations. Nonetheless, upon information and belief, the City knowingly armed its police with expired munitions on May 30 and May 31, 2020 and thus breached its duty to Austinites including Sam.

42. Upon information and belief, Sam's injuries were more serious because the projectile was expired and had hardened. Upon information and belief, the City's failure to

maintain unexpired munitions stores and the deliberate decision to use expired munitions against Sam and other protesters directly and proximately caused Sam's injuries.

VII. Damages

43. Sam Kirsch incorporates sections I through VI above into this section on damages.

44. Sam seeks recovery for all of his damages including past and future pain, past and future mental anguish, past and future disfigurement, past and future physical impairment, past and future loss of enjoyment of life, past and future medical expenses, past and future lost income, past and future loss of consortium, past and future loss of services, miscellaneous other economic damages including out-of-pocket expenses, pre and post judgment interest, attorney's fees, expenses, and costs.

VIII. Request for jury trial

45. Plaintiff requests a jury trial.

IX. Prayer

46. For all these reasons, Sam Kirsch requests that the City of Austin and Officer Rast be summoned to appear and answer Sam's allegations. After a jury trial regarding his claims, Sam seeks to recover the damages listed above in an amount to be determined by the jury and any other relief to which he is entitled.

Respectfully submitted,
Hendler Flores Law, PLLC

_____
Rebecca Webber

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Scott M. Hendler
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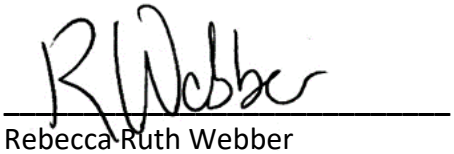
Telephone: 512-439-3202
Facsimile: 512-439-3201

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I certify that Plaintiff's First Amended Complaint was filed on January 21, 2021 via the Court's CM/ECF which will serve all counsel of record.



Rebecca Ruth Webber

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, *Plaintiff,*	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-01113-RP**
CITY OF AUSTIN AND OFFICER ROLAN ROMAN RAST, *Defendants.*	§	

DEFENDANT CITY OF AUSTIN'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant City of Austin files this Answer and Affirmative Defenses to Plaintiff's First Amended Complaint (Doc. No. 4). Pursuant to Rules 8 and 12 of the Federal Rules of Civil Procedure, Defendant respectfully shows the Court the following:

ORIGINAL ANSWER

Pursuant to Federal Rule of Civil Procedure 8(b), Defendant responds to each of the specific averments in Plaintiff's First Amended Complaint as set forth below. To the extent that Defendant does not address a specific averment made by Plaintiff, Defendant expressly denies that averment. [1]

This Defendant denies the allegations contained in the first section labeled "Introduction" in Plaintiff's Amended Complaint.

PARTIES

1. Upon information and belief, Defendant admits the allegations contained in Paragraph 1.

[1] Paragraph numbers in Defendant's Answer correspond to the paragraphs in Plaintiffs' Original Complaint.

2. Defendant admits the allegations contained in Paragraph 2.

3. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 3 and therefore denies same.

JURISDICTION

4. Defendant admits the allegations contained in Paragraph 4.

5. Defendant admits the allegations contained in Paragraph 5.

6. Defendant admits the allegations contained in Paragraph 6.

VENUE

7. Defendant admits the allegations contained in Paragraph 7.

FACTS

8. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 8 of the Amended Complaint and therefore denies same.

9. Defendant denies the allegations contained in Paragraph 9.

10. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 10 of the Amended Complaint and therefore denies same.

11. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 11 of the Amended Complaint and therefore denies same.

12. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 12 of the Amended Complaint and therefore denies same.

13. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 13 of the Amended Complaint and therefore denies same.

14. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 14 of the Amended Complaint and therefore denies same.

15. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 15 of the Amended Complaint and therefore denies same.

16. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 16 of the Amended Complaint and therefore denies the same.

17. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 17 of the Amended Complaint and therefore denies the same.

18. Upon information and belief, Defendant admits the allegations contained in Paragraph 18.

19. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 19 of the Amended Complaint and therefore denies same.

20. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 20 of the Amended Complaint and therefore denies same.

21. Upon information and belief, Defendant admits that Plaintiff made the comments which are quoted in Paragraph 21. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in the remainder of Paragraph 21 of the Amended Complaint and therefore denies same.

22. Defendant admits the allegations contained in the first sentence of Paragraph 22. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in the remainder of Paragraph 22 of the Amended Complaint and therefore denies same.

23. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 23 of the Amended Complaint and therefore denies same.

24. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 24 of the Amended Complaint and therefore denies same.

25. Defendant adopts and incorporates its responses to the previous paragraphs of the Amended Complaint.

26. Defendant admits the allegations contained in Paragraph 26.

27. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 27 of the Amended Complaint and therefore denies same.

28. Defendant denies the allegations contained in Paragraph 28.

29. Defendant adopts and incorporates its responses to the previous paragraphs of the Amended Complaint.

30. Defendant admits the allegations contained in Paragraph 30.

31. Defendant denies the allegations contained in Paragraph 31.

32. Defendant adopts and incorporates its responses to the previous paragraphs of the Amended Complaint.

33. Defendant denies the allegations contained in Paragraph 33.

34. Defendant adopts and incorporates its responses to the previous paragraphs of the Amended Complaint.

35. Defendant admits the allegations contained in Paragraph 35.

36. Defendant denies the allegations contained in Paragraph 36.

37. Defendant denies the allegations contained in Paragraph 37.

38. Defendant denies the allegations contained in Paragraph 38.

39. Defendant denies the allegations contained in Paragraph 39.

40. Defendant adopts and incorporates its responses to the previous paragraphs of the Amended Complaint.

41. Defendant denies the allegations contained in Paragraph 41.

42. Defendant denies the allegations contained in Paragraph 42.

43. Defendant adopts and incorporates its responses to the previous allegations contained in the Amended Complaint.

44. Defendant denies the allegations contained in Paragraph 44.

45. Paragraph 45 is a request for a trial by jury and does not contain allegations that require Defendant to admit or deny.

46. Defendant denies the allegations contained in Paragraph 46 and specifically denies that the Plaintiff is entitled to any relief whatsoever of and from the Defendant.

AFFIRMATIVE DEFENSES

1. Defendant City of Austin asserts the affirmative defense of governmental immunity as a municipal corporation entitled to immunity while acting in the performance of its governmental functions, absent express waiver.

2. Defendant City of Austin asserts the affirmative defense of governmental immunity since its employees are entitled to qualified/official immunity for actions taken in the course and scope of their employment, absent express waiver.

3. As a political subdivision, Defendant City of Austin denies that it can be liable for exemplary/punitive damages under 42 U.S.C. § 1983.

4. Defendant reserves the right to assert additional affirmative defenses throughout the development of the case.

DEFENDANT'S PRAYER

Defendant City of Austin prays that all relief requested by Plaintiff be denied, that the Court dismiss this case with prejudice, and that the Court award Defendant costs and attorney's fees, and any additional relief to which it is entitled under law or equity.

RESPECTFULLY SUBMITTED,
ANNE L. MORGAN, CITY ATTORNEY
MEGHAN RILEY, CHIEF, LITIGATION
/s/ H. Gray Laird
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ATTORNEYS FOR DEFENDANT CITY OF AUSTIN

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this 1st day of February, 2021.

Via ECF/e-filing:

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/s/ H. Gray Laird III
H. GRAY LAIRD III

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, Plaintiff, v. THE CITY OF AUSTIN, and ROLAN ROMAN RAST, Defendants.	§ § § § § § § § § §	CIVIL ACTION NO. 1:20-CV-01113-RP

DEFENDANT ROLAN RAST'S ORIGINAL ANSWER

Defendant Rolan Rast ("Rast") files this Original Answer in response to the allegations and causes of action asserted in the First Amended Complaint (Dkt. 4) filed by Plaintiff Sam Kirsch ("Plaintiff"). Pursuant to Federal Rules of Civil Procedure 8 and 12, Rast would show the Court as follows:

ORIGINAL ANSWER

Pursuant to Federal Rule of Civil Procedure 8(b), Rast responds to each of the specific allegations made in Plaintiff's First Amended Complaint as set forth below. Any specific allegation in the First Amended Complaint not addressed below is denied.

Rast denies the allegations in the unnumbered preamble paragraph of the First Amended Complaint under the header "Introduction," in the "Table of Contents," and in all other headers in the First Amended Complaint.

1. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 1, and therefore denies the same.

2. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 2, and therefore denies the same.

3. With respect to the allegations in Paragraph 3, Rast admits that he is police officer employed by the City of Austin Police Department, and otherwise denies the remaining allegations.

4. Rast admits the allegations in Paragraph 4.

5. Rast admits the allegations in Paragraph 5 as to him, but is without sufficient knowledge to form a belief as to the truth of the remaining allegations, and therefore denies the same.

6. Rast admits the allegation in Paragraph 6 that the Court has personal jurisdiction over him, and otherwise denies the remaining allegations.

7. Rast admits the allegation in Paragraph 7 that the Court has venue over the lawsuit, and otherwise denies the remaining allegations.

8. Rast denies the general allegation in Paragraph 8 about "protestors" being "peaceful." Rast is without sufficient knowledge to form a belief as to the truth of the remaining allegations in Paragraph 8, and therefore denies the same.

9. Rast denies the allegations in Paragraph 9.

10. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 10, and therefore denies the same.

11. Rast denies the allegation in Paragraph 11 that he shot Plaintiff. Rast is without sufficient knowledge to form a belief as to the truth of the remaining allegations in Paragraph 11, and therefore denies the same.

12. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 12, and therefore denies the same.

13. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 13, and therefore denies the same.

14. Rast denies the allegation in Paragraph 14 that he shot Plaintiff. Rast is without sufficient knowledge to form a belief as to the truth of the remaining allegations in Paragraph 14, and therefore denies the same.

15. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 15, and therefore denies the same.

16. Rast denies the allegation in Paragraph 16 that he used "excessive and unjustified use of force." Rast is without sufficient knowledge to form a belief as to the truth of the remaining allegations in Paragraph 16, and therefore denies the same.

17. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 17, and therefore denies the same.

18. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 18, and therefore denies the same.

19. Rast denies the allegations in Paragraph 19.

20. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 20, and therefore denies the same.

21. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 21, and therefore denies the same.

22. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 22, and therefore denies the same.

23. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 23, and therefore denies the same.

24. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 24, and therefore denies the same.

25. Rast incorporates his responses above in response to Paragraph 25.

26. No response is required to Paragraph 26, as it does not contain any factual allegations.

27. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 27, and therefore denies the same.

28. Rast denies the allegations in Paragraph 28.

29. Rast incorporates his responses above in response to Paragraph 29.

30. No response is required to Paragraph 30, as it does not contain any factual allegations.

31. Rast denies the allegations in Paragraph 31.

32. Rast incorporates his responses above in response to Paragraph 32.

33. Rast denies the allegations in Paragraph 33.

34. Rast incorporates his responses above in response to Paragraph 34.

35. No response is required to Paragraph 35, as it does not contain any factual allegations.

36. Rast denies the allegations in Paragraph 36.

37. Rast denies the allegations in Paragraph 37.

38. Rast denies the allegations in Paragraph 38.

39. Rast denies the allegations in Paragraph 39.

40. Rast incorporates his responses above in response to Paragraph 40.

41. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 41, and therefore denies the same.

42. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 42, and therefore denies the same.

43. Rast incorporates his responses above in response to Paragraph 43.

44. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 44, and therefore denies the same.

45. No response is required to Paragraph 45, as it does not contain any factual allegations.

46. To the extent any response is required, Rast denies the allegations in Paragraph 46, and denies that Plaintiff has any valid or supportable basis for any recovery from him.

AFFIRMATIVE DEFENSES

1. Rast asserts the defense of qualified immunity. Specifically, any and all actions by Rast that may be the subject of Plaintiff's claims did not violate clearly established statutory or constitutional rights of Plaintiff about which a reasonable person would have known.

2. Rast asserts the defense of official immunity. Specifically, any and all actions by Rast that may be the subject of Plaintiff's claims involved discretionary duties within the scope of Rast's authority performed in good faith.

3. Rast reserves the right to assert additional affirmative defenses in accordance with the Federal Rules of Civil Procedure and any orders of this Court.

PRAYER

Rast respectfully requests that the Court deny all relief requested by Plaintiff; enter a take-nothing judgment in favor of Rast; award Rast his costs; and award Rast any further relief to which he may show himself to be entitled.

Respectfully submitted,

BUTLER SNOW LLP

By: */s/ Karson Thompson*

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ATTORNEYS FOR DEFENDANT ROLAN RAST

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2021, a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system, as well as by sending a copy to lead counsel by email.

/s/ Karson Thompson
Karson Thompson

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, Plaintiff, v. THE CITY OF AUSTIN and ROLAN ROMAN RAST, Defendants.	§ § § § § § § § § §	CIVIL ACTION NO. 1:20-CV-01113-RP

DEFENDANT ROLAN RAST'S MOTION TO STAY FURTHER PROCEEDINGS

Defendant Officer Rolan Rast ("Officer Rast") files this motion to stay further proceedings, including remaining discovery, dispositive motion deadlines, and trial, until Officer Rast's parallel criminal proceeding in state court is resolved. As part of the broader request for relief, Officer Rast also seeks a protective order with respect to his deposition, which Plaintiff unilaterally noticed for June 22, 2022.

SUMMARY

Austin Police Department Officer Rast is under indictment—as one of a host of criminal cases highly publicized by the Travis County District Attorney's Office—for alleged actions taken in response to conduct by protesters in May 2020. The Travis County District Attorney announced the indictment of Officer Rast (and 18 other APD officers) publicly in February of this year, among other ways through a frequently updated press release that contains the introduction:

> The following is a list of each officer-involved use of force or other misconduct matter involving injury to any person currently pending in the Office's Civil Rights Unit.

See, e.g., **Ex. E**, at 1. The criminal case pending against Officer Rast unequivocally involves the same conduct at issue in this civil case.

The criminal case against Officer Rast remains pending on backlogged Travis County criminal dockets.

This civil case was filed on November 9, 2020, naming the City and a "John Doe" officer. (Dkt. 1.). Plaintiff alleged the "John Doe" was either Officer Jeffrey Teng or Officer Eric Heim. (Dkt. 1, ¶3). Plaintiff amended his pleading in January 2021 to substitute Officer Rast for the "John Doe" defendant. (Dkt. 4). The Travis County DA's Office subsequently updated its regular press release, in May 2021, to name Officer Rast as the officer under investigation with respect to the protest incident involving Plaintiff. *See* **Ex. E**, at 43 (May 7, 2021 press release). (Prior to that time, the DA's Office press release referred as early as January 2021—just days after the current elected DA first took office—to the protest-related matter involving Plaintiff as being under investigation through his office, with the description "SUBJECT OFFICER: NOT IDENTIFIED." *See id.* at 5, 11.)

Officer Rast did not file a motion to stay this civil case in light of the pending criminal investigation and later indictment until his rights and ability to defend himself in this civil litigation—while maintaining his rights against self-incrimination—including his ability to develop a record on and present a qualified immunity defense came to be in jeopardy. That time of jeopardy has now arrived. Paper and deposition discovery concerning materials available through the City, over such things as personnel and training records, City policies, and the APD internal investigation of the incident, has been conducted. Plaintiff now seeks to take the deposition of Officer Rast, as well as other officers who worked alongside him in response to the protests on May 31, 2020. The purpose of such depositions—to solicit invocations of self-incrimination privilege—is apparent. Everyone understands Officer Rast—and potentially others on duty with him on the day of the incident whom Plaintiff seeks to depose—will assert federal

and state-law privileges against self-incrimination, *see* **Ex. B (Toland Dec.)**, including a Fifth Amendment right which exists to "protect *innocent* men who otherwise might be ensnared by ambiguous circumstances," *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (cleaned up).

Asserting that privilege is not only the officer's constitutional right; it is also a necessary defense to avoid giving a prosecutor additional evidence to use for the prosecution, or an otherwise unobtainable window into the officer's criminal defense strategy. Everyone understands, or should understand, that Plaintiff will gain no useful knowledge about the underlying facts of the case from additional discovery he seeks, including Officer Rast's deposition, but will instead merely generate invocations of the privilege to be used by Plaintiff or others to seek to imply guilt or civil liability. Furthermore, because of the simultaneous criminal and civil proceedings over the same conduct, Officer Rast is being deprived of the opportunity and right to develop a record on which he can establish and assert his defense of qualified immunity from this civil suit.

Officer Rast therefore asks this Court to stay this case, as this Court and other federal courts across Texas have done in similar circumstances. The stay is important not only for Officer Rast, but also for the City as well as non-defendant officers who may still face potential criminal liability arising out of the incident made the basis of this lawsuit.

BACKGROUND

This is a civil rights case brought under 42 U.S.C. § 1983. Plaintiff has brought free speech and excessive force claims arising out of injuries he sustained while participating in protests in 2020. Plaintiff's live complaint alleges that Officer Rast shot him in the head with a beanbag projectile while Plaintiff was demonstrating at those protests.

Travis County District Attorney Jose Garza ("DA Garza"), who took office on January 1, 2021, publicly campaigned on prosecution of law enforcement officers. *See, e.g.*, "Law

Enforcement Accountability Policy," Jose for DA, *available at* https://www.joseforda.com/law-enforcement-accountability. Campaign ads for DA Garza included footage from Austin's May 2020 protests, showing protestors displaying signs reading "ACAB" ("All Cops Are Bastards") while DA Garza provides voiceover criticizing the incumbent District Attorney for failing to prosecute law enforcement. *E.g.*, "Jose Garza for Travis County District Attorney," Bernie Sanders YouTube (June 16, 2020), *available at* https://www.youtube.com/watch?v=yMtzEAYWAuI. Protestors like Kirsch volunteered and helped DA Garza get elected on this platform. **Ex. F** (Plaintiff's resume identifying work as a "Volunteer Field Organizer" for the Garza campaign).

DA Garza followed through on his campaign promises to prosecute law enforcement officers. DA Garza has trumpeted a number of indictments against members of law enforcement, including many arising out of the May 2020 protests. *See, e.g.*, Travis County DA Jose Garza discusses cases related to May 2020 protests," KXAN (Feb. 17, 2022), *available at* https://www.youtube.com/watch?v=yWY1bugSBlQ; **Ex. G** ("19 Austin police officers accused of excessive force during 2020 protests are indicted"); **Ex. Q** ("Here's what we know about APD officers facing charges for using beanbag rounds in 2020 protests"). DA Garza has also implemented policies within his office to put law enforcement conduct before grand juries as a matter of course. *See, e.g.*, **Ex. H** (describing DA Garza's "promise to [the community] to take all officer involved excessive force cases to the grand jury"); **Ex. I** (reporting on recruiting email from Travis County DA's Office supervisor reading "I am reaching out in the hopes that you may be looking to prosecute police officers or that you know someone who is").

The criminal prosecution of Officer Rast (among others) fell in line with the campaign promises and the actions taken by DA Garza immediately upon taking office. The incident

involving Plaintiff was included as a matter under investigation in the first "list of each officer-involved use of force or other misconduct matter involving injury to any person currently pending in the Office's Civil Rights Unit," as first compiled and broadcast by the Travis County DA's Office on January 11, 2021. **Ex. E**, at 1. The incident involving Plaintiff continued to be included in the publicly issued list—which has often been updated more than once a month—and in April 2021 DA Garza identified Officer Rast by name as being a person under criminal investigation in connection with that incident. *Id.* at 36. Through the paper discovery taken in this matter it has since become clear that Plaintiff's counsel has been involved in communications with the Travis County DA's Office about the incident, even putting an incident reconstruction expert they retained in touch with the prosecutor's office. **Ex. L**.

Based on a grand jury presentation that remains secret under Texas law—such that it is impossible to know what evidence, if any, the Travis County DA's Office presented to that grand jury—a Travis County grand jury returned an indictment against Officer Rast in February 2022 for allegedly firing the non-lethal round that struck Plaintiff. **Ex. A**. The Travis County DA's Office then updated the list of "officer-involved use of force and other misconduct" press release to reflect the addition of the indictment against Officer Rast, among others. **Ex. E**, at 112 (March 7, 2022 press release).[1]

Following the indictment, limited discovery in this civil case continued. That limited discovery included the deposition of another APD officer on duty with Officer Rast on the day of the incident. Notwithstanding the allegations in both that indictment and Kirsch's own complaint,

[1]DA Garza's zeal to make good on campaign promises to prosecute law enforcement officers for their conduct in connection with the May 2020 protests is also reflected in the fact that Officer Rast is not even properly named in the updated press releases, which to this day provide a description of the case brought against Officer Rast that includes not Officer Rast's name, but that of another APD officer. *See, e.g.*, **Ex. E**, at 112, 123, 131, 142, 149, 158.

Kirsch's counsel took the position that Officer Rast did *not* shoot Kirsch. Here is Kirsch's counsel proclaiming she "know[s] who shot Sam Kirsch" and pointing to *someone other than Officer Rast* as having fired the round that struck Plaintiff:

Q. Okay. You shot Sam Kirsch, and so I'm wondering why you know you didn't?

MR. LAIRD: Well, what --
MS. WEBBER: Excuse me.
MR. LAIRD: If -- if you stop --
MS. WEBBER: No. No. No. No.
MR. LAIRD: Oh, yes. Yes. Yes.
MS. WEBBER: Do you have an objection, sir?
MR. LAIRD: Well, if you've -- if you've got some evidence that shows it, then, I mean --
MS. WEBBER: That I -- you really want to see it; don't you? Like, that's not an objection, Gray. I know who shot Sam Kirsch.
Q. (By Ms. Webber) Detective, you're sure it wasn't you, right?
A. From my vantage point, I was targeting the individual described in my report.

See **Ex. D** (B. Pietrowski Depo., 4/20/2022), at 189:24-190:16. Moments later, during the same deposition, during a discussion about video footage of the underlying incident, Plaintiff's counsel explained that DA Garza got the "wrong guy" indicted for the incident involving Plaintiff:

MS. WEBBER: Boline did this, too. He testified that he synched these videos, so you can get it from him. This is --

MR. LAIRD: The synched videos that -- well --

MS. WEBBER: Well, he did a crap job, and that's why --

MR. LAIRD: We can --

MS. WEBBER: -- you know, Officer Rast got indicted. The wrong guy got indicted, but that doesn't mean that I have to give you my work product just because it's better.

Id. at 196:2-13. Just a few weeks ago counsel told this Court the same thing, explaining in a pleading that the video footage "belies [the other officer's] firm belief that he did not shoot Sam." *See* Pl.'s Resp. to City's Motion to Compel (Dkt. 44), at 8. In a recent meet-and-confer on this motion, Plaintiff's counsel affirmed that they have now changed their position again, and that they once again contend that Officer Rast fired the non-lethal munition that struck Plaintiff.

Throughout the flip-flopping on who fired the non-lethal munition that struck Plaintiff, Officer Rast's position throughout this litigation has been consistent and clear: while he has not opposed all discovery in the case, he has always opposed any effort to force him to testify (whether through written discovery responses or deposition) while his criminal case is pending. He has also been consistent and clear—as was obvious to all participants in the civil case—that he had and has a right to defend himself in this civil case, including by making a record on and presenting through appropriate motions his defense of qualified immunity. *See* Officer Rast's Original Answer (Dkt. 9), at 6.

Until recently, the parties had proceeded with discovery under this understanding of Officer Rast's position, and Plaintiff and the City have engaged in document discovery and limited depositions, including the one quoted from above. During a recent meet-and-confer call regarding the parties' request to extend the dispositive motions deadline, counsel for Plaintiff and Officer Rast again discussed Officer Rast's position that any deposition should be delayed until after the resolution of the parallel criminal proceeding. Counsel agreed that Plaintiff would notice Officer Rast's deposition for a date in July after the parties' scheduled July 12 mediation, with the understanding that if the case continued after mediation Officer Rast would seek relief from the Court to prevent his deposition from moving forward. On May 26, 2022, Plaintiff noticed Officer Rast's deposition for July 20, 2022.

On June 2, 2022, Plaintiff unilaterally re-noticed Officer Rast's deposition for June 22, 2022. *See* **Ex. C** (Plaintiff's First Amended Notice of Video Deposition of Rolan Rast). The purported basis for rescheduling Officer Rast's deposition was that Officer Rast is a named plaintiff in a separate civil lawsuit filed in state court against the City of Austin and various other defendants, including DA Garza, related to the same 2020 protests.[2] Accordingly, Officer Rast now seeks the relief that all parties understood would be requested from the Court once his rights to defend himself in this civil case were precluded by the pendency of the parallel criminal proceeding.

[2]Although that case was apparently filed at the latest possible time to avoid statute of limitations issues, the original petition filed on behalf of Officer Rast and others itself includes a request to stay the suit pending the outcome of the named plaintiff officers' criminal trials. *See* Pls.' Original Petition, *Jackson v. City of Austin*, No. D-1-GN-22-002502 (201st Dist. Ct., Travis Cnty., Tex.) (filed May 31, 2022, 11:50 PM), copy attached as **Exhibit J**. The need to invoke self-incrimination protections obviously does not foreclose Officer Rast's ability to protect his right to pursue such affirmative claims. *E.g., Wehling v. Columbia Broadcasting System,* 608 F.2d 1084, 1086-88 (5th Cir. 1979).

ARGUMENT

Under controlling Fifth Circuit precedent, Officer Rast is entitled to a complete stay of this case pending resolution of his parallel criminal proceeding. Officer Rast did not file this motion preemptively, while the incident was on DA Garza's list of "unindicted" "officer-involved use of force or other misconduct" cases. This allowed the parties to make progress in paper discovery and limited deposition discovery without directly implicating Officer Rast's rights to defend himself in the case. Now that this non-infringing discovery has been completed, and now that Plaintiff is pressing for Officer Rast's deposition, Officer Rast now seeks a stay to prevent his and other depositions from occurring and to prevent the case from progressing to and past critical deadlines, including disclosures of experts, dispositive motions, and trial, before Officer Rast can prepare and mount a fulsome defense to the civil allegations against him.

I. This Court has the authority to stay discovery.

As this Court knows, federal courts often stay civil proceedings to allow overlapping and parallel criminal proceedings to run their course. Judges in the Austin Division have encountered this issue with increasing frequency in the last few years and have issued such stays. Last year, Judge Yeakel stayed a civil suit arising from the death of Javier Ambler so that criminal proceedings arising from Ambler's death could be resolved first. *See Javier Ambler et al. v. Williamson County et al.*, No. 1:20-CV-1068-LY, Order Staying Case (Dkt. 89) (W.D. Tex. July 27, 2021) (copy attached as **Ex. K**). A few months ago, Magistrate Judge Hightower stayed all discovery in a civil case arising from the death of Mauris DeSilva so that criminal proceedings arising from that incident could be resolved first. *DeSilva v. Taylor*, No. 1:21:cv-00129-RP, 2022 WL 545063 (W.D. Tex. Feb. 23, 2022). Sister courts throughout the Western District have recently stayed discovery on this basis. *See, e.g.*, *SEC v. Mueller*, No. 21-cv-00785-XR, 2022 WL

818678, at *4 (W.D. Tex. Mar. 17, 2022) (staying discovery against individual defendant facing parallel criminal investigation). Other federal courts in the state have done the same. *See, e.g.*, *Jean v. City of Dallas, Texas*, No. 3:18-CV-2862-M, 2019 WL 4597580, at *5 (N.D. Tex. Sept. 22, 2019) (staying civil case against officer indicted for and eventually convicted of murder of Botham Jean). This case presents the same issue and also warrants a stay.

Federal district courts have "broad discretion to stay proceedings as an incident to [their] power to control [their] own docket[s]." *Clinton v. Jones*, 520 U.S. 681, 707 (1997). The United States Supreme Court has recognized that there are "special circumstances" in which "the interests of justice" support or even require temporary stays. *United States v. Kordel*, 397 U.S. 1, 12 & n.27 (1970); *SEC v. First Fin. Grp. of Tex., Inc.*, 659 F.2d 660, 668 (5th Cir. 1981) (stays may be necessary "to prevent a party from suffering substantial and irreparable prejudice"). In particular, stays are "common practice" when civil and criminal liability arise from the same incident because "criminal prosecutions often take priority over civil actions." *Wallace v. Kato*, 549 U.S. 384, 394 (2007); *In re Grand Jury Subpoena*, 866 F.3d 231, 234 (5th Cir. 2017); *Kmart Corp v. Aronds*, 123 F.3d 297, 300 (5th Cir. 1997).

The existence of parallel civil and criminal proceedings poses a unique constitutional danger to a civil litigant because every person facing criminal liability has the constitutional right against self-incrimination provided by the Fifth Amendment. *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1087-88 (5th Cir. 1979). At the same time, every person facing civil liability has a due process right to have that matter fully and fairly adjudicated. *Id.* Courts must avoid scenarios that "require a party to surrender one constitutional right in order to assert another." *Id.* at 1088. A civil defendant invoking his Fifth Amendment rights "should suffer no penalty for his silence." *Id.* (citing *Spevack v. Klein*, 385 U.S. 511, 515 (1967)). Temporary stays protect these

competing rights by allowing the criminal process to resolve before the civil process. *Id.* at 1089 (reversing district court for refusing to stay case "for approximately three years" while criminal process was resolved).

When tasked with determining the propriety of a stay in these situations, courts generally consider six factors: "(1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the criminal case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously, weighed against the prejudice to the plaintiffs caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; and (6) the public interest." *Bean v. Alcorta*, 220 F.3d 772, 775 (W.D. Tex. 2016); *Meyers v. Pamerleau*, No. 5:15-CV-524-DAE, 2016 WL 393552, at *5 (W.D. Tex. Feb. 1, 2016); *Shaw v. Hardberger*, No. SA-06-CA-751-XR, 2007 WL 1465850, at *2 (W.D. Tex. May 16, 2007).

II. The Court should stay discovery to protect Officer Rast's constitutional rights.

Each of the six factors identified above supports a temporary stay of discovery in this case. As in *Ambler*, *DeSilva*, and other cases in which stays have been granted, the individual law enforcement officer named as a defendant here is facing criminal prosecution regarding the same conduct at issue in the civil case. *See Ambler* Order, **Ex. K**; *DeSilva*, 2022 WL 545063, at *3. Forcing the officer to choose between asserting one constitutional right in defense of his criminal case or enforcing another constitutional right in his civil case is unnecessary, prejudicial, and wholly avoidable.

A. There is complete overlap between the civil and criminal cases.

There can be no dispute that there is complete overlap between Plaintiff's allegations in this case and the allegations that form the basis of Officer Rast's indictment. Plaintiff alleges

Officer Rast "shot him in the head" at a protest on May 31, 2020 causing serious injury. *E.g.*, Pl.'s 1st Am. Compl. (Dkt. 4), ¶¶ 8-14. The indictment similarly alleges that on that same date, Officer Rast shot Plaintiff with a firearm, causing bodily injury. *See* **Ex. A**. This overlap in theories is also reflected in the fact that Plaintiff's counsel helped DA Garza's office coordinate with at least one of Plaintiff's retained experts prior to the return of the indictment against Officer Rast. *See* **Ex. L**.

This complete overlap of subject matter supports a stay because "[w]here there is significant overlap, self-incrimination is more likely" and Fifth Amendment concerns are at their greatest. *Bean*, 220 F. Supp. 3d at 776 ("significant and perhaps even complete overlap" between criminal and civil proceedings "weighs strongly in favor of staying the case"); *Meyers*, 2016 WL 393552, at *6 (factor favored stay where civil and criminal lawsuits arose "from the same facts"); *Shaw*, 2007 WL 1465850, at *2 (civil and criminal allegations "aris[ing] from the same set of operative facts . . . weighs heavily in favor of granting a stay"). For this reason, courts often describe this factor as the "most important" consideration for issuing a stay. *E.g.*, *DeSilva*, 2022 WL 545063, at *3 ("Because there is significant overlap between the issue presented in this case and Defendants' criminal proceedings . . . . [t]he first and most important factor weighs strongly in favor of staying the case."); *Frierson v. City of Terrell*, No. 3:02CV2340-H, 2003 WL 21355969, at *3 (N.D. Tex. June 6, 2003) (staying case); *Librado v. M.S. Carriers, Inc.*, No. 3:02-CV-2095D, 2002 WL 31495988, at *2 (N.D. Tex. Nov. 5, 2002) (staying case).

B. Officer Rast was indicted and still faces criminal liability.

Officer Rast was indicted in February 2022 for the same conduct that forms the basis of Plaintiff's claims in this case. **Ex. A**. "A stay of a civil case is more appropriate where a party to the civil case has already been indicted for the same conduct." *Bean*, 220 F. Supp. 3d at 776

(staying case where defendant's criminal conviction was pending on appeal); *DeSilva*, 2022 WL 545063, at *3 ("Because [the officer defendants] have been indicted, the second factor also weighs in favor of a stay."); *Meyers*, 2016 WL 393552, at *6 (staying case where defendant was indicted); *Shaw*, 2007 WL 1465850, at *2 (staying case where plaintiffs were indicted).

C. Plaintiff will suffer no prejudice beyond mere delay.

Stays by their very nature delay proceedings. To avoid a stay, courts require plaintiffs to (among other things) demonstrate "more prejudice than simply a delay" in resolving their pending claims. *DeSilva*, 2022 WL 545063, at *3; *Bean*, 220 F. Supp. 3d at 776; *Meyers*, 2016 WL 393552, at *6. To meet this burden, a plaintiff could identify some specific "discovery that is available now but would be unavailable later should a stay be granted," or identify specific "witnesses [who] will be unable to testify" after a stay is lifted. *DeSilva*, 2022 WL 545063, at *3. There is no such discovery here. Moreover, any such discovery concerns are mitigated by the discovery the parties have already conducted in the case. This includes production of the available documentary and video records of the incident and subsequent investigation and deposition testimony from the Austin Police Department's lead investigator as well as from an officer Plaintiff's counsel alleged during the deposition actually fired the round that struck Plaintiff. **Ex. D**.

Furthermore, any claims of prejudice to Plaintiff from such a delay should ring hollow. Plaintiff's counsel have actively encouraged and participated in DA Garza's efforts to prosecute Officer Rast along with other officers on duty during the May 2020 protests. Having encouraged prosecution, Plaintiff cannot effectively argue against delay in the resolution of his civil claims resulting from that criminal prosecution.

Officer Rast and his counsel cannot predict with certainty how long the stay will need to last to allow the criminal process to complete. The Travis County criminal district courts resumed

in-person criminal jury trials in March 2022, after a nearly two-year-long hiatus. **Ex. M** ("Travis County District Attorney's Office Restarts In-Person Criminal Jury Trials"). Officer Rast's case has not been set for trial. **Ex. B**. A stay of remaining discovery and deadlines is appropriate under these circumstances. The Fifth Circuit has reversed a district court for refusing to stay a case even when the delay caused by the stay would have been *three years*. *Wehling*, 608 F.2d at 1089. Any mere delay caused by a stay of this case is not so prejudicial as to weigh against a stay. *DeSilva*, 2022 WL 545063, at *3.

D. Proceeding with civil discovery is highly prejudicial and potentially wasteful.

One of the fundamental goals of stays in this context is avoiding the natural prejudice that arises from forcing parties to defend litigation while simultaneously asserting their Fifth Amendment rights. The Fifth Amendment "privileges [a person] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976). A person cannot be compelled "to answer deposition questions, over a valid assertion of his Fifth Amendment right." *Pillsbury Co. v. Conboy*, 459 U.S. 248, 256–57 (1983).

If this case continues, including through deposition of Officer Rast and on to disclosures of experts, filing of dispositive motions, and trial, these Fifth Amendment concerns will be directly implicated. Officer Rast will face "a conflict between asserting his Fifth Amendment rights and fulfilling his legal obligations as a witness" and defendant in this civil case. *DeSilva*, 2022 WL 545063, at *4. Officer Rast has an interest in preventing his defense in this civil case from providing evidence that the Travis County DA's Office may use in his prosecution, and from prematurely disclosing to DA Garza's office his defense in the criminal case. *Id.* ("Defendants have an interest in staying the civil trial to avoid exposing their criminal defense strategies to the

prosecution."). This factor weighs in favor of a stay. *Id.*; *Bean*, 220 F. Supp. 3d at 777; *Meyers*, 2016 WL 393552, at *7 & n.3 (noting the potential for plaintiffs to use civil discovery as a means of prejudicing criminal defendants); *Librado*, 2002 WL 31495988 at *3.

E. A stay supports the Court's interests.

A stay also favors judicial economy and this Court's management of its docket. *Bean*, 220 F. Supp. 3d at 777; *Meyers*, 2016 WL 393552, at *7; *Librado*, 2002 WL 31495988, at *3. If the civil case continues, Officer Rast will be placed in a position to assert his Fifth Amendment rights. If the prospect of criminal liability has been eliminated by the time of trial, he would likely then be in a position of withdrawing the privilege and testifying in his own defense. *Davis-Lynch, Inc. v. Moreno*, 667 F.3d 539, 547-48 (5th Cir. 2012) (discussing circumstances in which "a party may withdraw its assertion of the Fifth Amendment privilege, even at a late stage in the litigation"). That withdrawal may raise new concerns of prejudice and delay, the prospect of additional depositions, extensions of expert discovery or *Daubert* deadlines, and more. *See id.* This Court can avoid any need to raise or resolve those legal questions by temporarily staying the proceedings. *See DeSilva*, 2022 WL 545063, at *4 (noting the possibility that resolution of the criminal case may also resolve or eliminate issues in the civil trial).

F. A stay supports the public's interests.

The public "has an interest in protecting the constitutional rights of criminal defendants" as well as in seeing both civil and criminal cases resolved promptly. *Bean*, 220 F. Supp. 3d at 778. The public interest factor weighs against a stay "only where, unlike here, a civil case is pending and no criminal investigation has begun." *DeSilva*, 2022 WL 545063, at *4; *Meyers*, 2016 WL 393552, at *7. Here, the public's interests are best served by temporarily staying civil discovery until the criminal process concludes so Officer Rast's constitutional rights can be protected, along

with the City's rights to defend the City against claims for damages with all available evidence, including evidence from Officer Rast. *DeSilva*, 2022 WL 545063, at *4; *Bean*, 220 F. Supp. 3d at 778; *Meyers*, 2016 WL 393552, at *7; *Shaw*, 2007 WL 1465850, at *2; *Librado*, 2002 WL 31495988.

The public is also served by both criminal and civil matters being resolved fairly and accurately. DA Garza has told the public that it is important to ensure his office is "bringing the right person to trial with the right charges." *See* **Ex. N**. For example, the Travis County DA's Office previously dismissed an indictment it obtained against an officer after a prosecutor apparently "uncovered" exculpatory evidence from the prosecution's own expert opining that the officer's conduct was "justified and lawful." *See* **Ex. O**; **Ex. P** (DA Garza offering previously indicted officer his "sincere apologies" for wrongfully indicting him). Similarly, in this case, the same civil plaintiff who worked to get DA Garza elected, and whose counsel encouraged the indictment of Officer Rast, has claimed that DA Garza indicted the "wrong guy." *See* **Ex. D**; **Ex. F**; **Ex. L**. The public has an interest in seeing these accusations against the City, against Officer Rast, and against other non-defendant officers resolved based on all the evidence, not based on a rush to prosecute, much less inaccurate allegations or inferences drawn from assertions of constitutional rights. That can only occur if the criminal process is allowed to play out first.

III. The Court should stay these proceedings so that Officer Rast can defend himself, including through developing and presenting qualified immunity defense.

As the Court knows, the defense of qualified immunity "provides government officials with immunity from suit so long as they do not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Hutcheson v. Dallas Cnty., Tex.*, 994 F.3d 477, 480 (5th Cir. 2021) (internal quotations omitted). Officer Rast will be entitled to qualified immunity unless Plaintiff can prove both (1) that Officer Rast violated his

constitutional rights, and (2) that Officer Rast's actions were objectively unreasonable in light of clearly established law at the time. *Id.* This qualified immunity analysis obviously includes a consideration of what actions Officer Rast actually took on the day in question: a matter on which he has knowledge, but to which he cannot testify without abrogating his rights against self-incrimination in light of the ongoing criminal case.

In addition, one of the constitutional rights Plaintiff alleges Officer Rast violated was his First Amendment right to freedom of speech. Plaintiff's First Amendment retaliation claim requires him to prove (1) that he was engaged in a constitutionally protected activity; (2) that Officer Rast's actions caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that Officer Rast's actions were "substantially motivated" against Plaintiff's exercise of his constitutionally protected conduct. *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). The last element is critically important to the qualified immunity analysis, because the fifth Circuit has held that "government retaliation against a private citizen for exercise of First Amendment rights cannot be objectively reasonable." *Id.* at 261 & n.7.

To establish his qualified immunity defense, then, Officer Rast must present evidence of (1) what his actions on the day in question were, and (2) that if he in fact fired the shot that hit Kirsch, he was *not* "substantially motivated" by Kirsch's legitimate activities as a protestor. *See, e.g.*, *Singleton v. Darby*, 609 Fed. App'x 190, 194 (5th Cir. 2015) (unpublished) (qualified immunity warranted where evidence showed officer pepper sprayed protestors "not because they were protesting, but because they were blocking traffic in violation of Texas law"). Officer Rast cannot develop that evidentiary record, such as through a declaration or answers in a deposition, prior to the resolution of the parallel criminal case, without sacrificing his rights against self-incrimination.

IV. As part of the broader stay, the Court should grant protection against Officer Rast's deposition moving forward pending the resolution of the criminal case.

Federal Rule of Civil Procedure 26(c) authorizes "[a] party . . . from whom discovery is sought [to] move for a protective order" to forbid or specify terms for a sought deposition. FED. R. CIV. P. 26(c)(1). A court may place restrictions on discovery "for good cause . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Cazorla v. Koch Foods of Miss., LLC*, 838 F.3d 540, 549 (5th Cir. 2016) (quoting FED. R. CIV. P. 26(c)(1)).

As part of the broader stay of proceedings and further discovery, Officer Rast is entitled to protection from his deposition occurring prior to the resolution of the parallel criminal proceeding for the reasons explained above. Even if that were not enough—which it is—Officer Rast would otherwise be entitled to protection from the deposition occurring on the noticed date of June 22, 2022. Plaintiff noticed the deposition for that date unilaterally, without agreement from Officer Rast, three hours after requesting by email that Officer Rast be made available for deposition that week. Officer Rast was and is scheduled to be out of the country from June 20 through July 11, 2022, as his counsel informed Plaintiff's counsel following issuance of the notice. Thus, Officer Rast would not be available to participate in any deposition on the noticed June 22, 2022 date, regardless of the broader requested stay of proceedings and discovery in the case.

CONCLUSION

For the foregoing reasons, Officer Rast respectfully requests the Court grant this motion and stay all further proceedings in this matter, including but not limited to the noticed deposition of Officer Rast, until after the resolution of the pending parallel criminal proceeding styled *The State of Texas v. Rolan Rast*, No. D-1-DC-20-900080 (331st Crim. Dist. Ct., Travis Cnty., Tex.). Officer Rast would also respectfully request that the Court conduct a hearing on this motion,

following the completion of briefing, and all other relief to which he may show himself to be entitled in connection with this motion.

Respectfully submitted,

BUTLER SNOW LLP

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ATTORNEYS FOR DEFENDANT ROLAN RAST

CERTIFICATE OF CONFERENCE

I hereby certify that I have repeatedly conferred with counsel for Plaintiff about the relief sought in this motion by Zoom video conference. Most recently, meet-and-confer discussions were held on June 14, 2022 and on June 8, 2022. Following those discussions, Plaintiff remains opposed to the relief sought in this motion and remains opposed to withdrawing the notice for Officer Rast's deposition to occur on June 22, 2022. I have also conferred with counsel for Defendant the City of Austin, and the City does not oppose the relief requested in the motion.

/s/ Eric J.R. Nichols
Eric J.R. Nichols

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2022, a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system.

/s/ Karson Thompson
Karson Thompson

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, Plaintiff, v. THE CITY OF AUSTIN and ROLAN ROMAN RAST, Defendants.	§ § § § § § § § § §	CIVIL ACTION NO. 1:20-CV-01113-RP

DEFENDANT ROLAN RAST'S MOTION TO STAY FURTHER PROCEEDINGS

Defendant Officer Rolan Rast ("Officer Rast") files this motion to stay further proceedings, including remaining discovery, dispositive motion deadlines, and trial, until Officer Rast's parallel criminal proceeding in state court is resolved. As part of the broader request for relief, Officer Rast also seeks a protective order with respect to his deposition, which Plaintiff unilaterally noticed for June 22, 2022.

SUMMARY

Austin Police Department Officer Rast is under indictment—as one of a host of criminal cases highly publicized by the Travis County District Attorney's Office—for alleged actions taken in response to conduct by protesters in May 2020. The Travis County District Attorney announced the indictment of Officer Rast (and 18 other APD officers) publicly in February of this year, among other ways through a frequently updated press release that contains the introduction:

> The following is a list of each officer-involved use of force or other misconduct matter involving injury to any person currently pending in the Office's Civil Rights Unit.

See, e.g., **Ex. E**, at 1. The criminal case pending against Officer Rast unequivocally involves the same conduct at issue in this civil case.

The criminal case against Officer Rast remains pending on backlogged Travis County criminal dockets.

This civil case was filed on November 9, 2020, naming the City and a "John Doe" officer. (Dkt. 1.). Plaintiff alleged the "John Doe" was either Officer Jeffrey Teng or Officer Eric Heim. (Dkt. 1, ¶3). Plaintiff amended his pleading in January 2021 to substitute Officer Rast for the "John Doe" defendant. (Dkt. 4). The Travis County DA's Office subsequently updated its regular press release, in May 2021, to name Officer Rast as the officer under investigation with respect to the protest incident involving Plaintiff. *See* **Ex. E**, at 43 (May 7, 2021 press release). (Prior to that time, the DA's Office press release referred as early as January 2021—just days after the current elected DA first took office—to the protest-related matter involving Plaintiff as being under investigation through his office, with the description "SUBJECT OFFICER: NOT IDENTIFIED." *See id.* at 5, 11.)

Officer Rast did not file a motion to stay this civil case in light of the pending criminal investigation and later indictment until his rights and ability to defend himself in this civil litigation—while maintaining his rights against self-incrimination—including his ability to develop a record on and present a qualified immunity defense came to be in jeopardy. That time of jeopardy has now arrived. Paper and deposition discovery concerning materials available through the City, over such things as personnel and training records, City policies, and the APD internal investigation of the incident, has been conducted. Plaintiff now seeks to take the deposition of Officer Rast, as well as other officers who worked alongside him in response to the protests on May 31, 2020. The purpose of such depositions—to solicit invocations of self-incrimination privilege—is apparent. Everyone understands Officer Rast—and potentially others on duty with him on the day of the incident whom Plaintiff seeks to depose—will assert federal

and state-law privileges against self-incrimination, *see* **Ex. B (Toland Dec.)**, including a Fifth Amendment right which exists to "protect *innocent* men who otherwise might be ensnared by ambiguous circumstances," *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (cleaned up).

Asserting that privilege is not only the officer's constitutional right; it is also a necessary defense to avoid giving a prosecutor additional evidence to use for the prosecution, or an otherwise unobtainable window into the officer's criminal defense strategy. Everyone understands, or should understand, that Plaintiff will gain no useful knowledge about the underlying facts of the case from additional discovery he seeks, including Officer Rast's deposition, but will instead merely generate invocations of the privilege to be used by Plaintiff or others to seek to imply guilt or civil liability. Furthermore, because of the simultaneous criminal and civil proceedings over the same conduct, Officer Rast is being deprived of the opportunity and right to develop a record on which he can establish and assert his defense of qualified immunity from this civil suit.

Officer Rast therefore asks this Court to stay this case, as this Court and other federal courts across Texas have done in similar circumstances. The stay is important not only for Officer Rast, but also for the City as well as non-defendant officers who may still face potential criminal liability arising out of the incident made the basis of this lawsuit.

BACKGROUND

This is a civil rights case brought under 42 U.S.C. § 1983. Plaintiff has brought free speech and excessive force claims arising out of injuries he sustained while participating in protests in 2020. Plaintiff's live complaint alleges that Officer Rast shot him in the head with a beanbag projectile while Plaintiff was demonstrating at those protests.

Travis County District Attorney Jose Garza ("DA Garza"), who took office on January 1, 2021, publicly campaigned on prosecution of law enforcement officers. *See, e.g.*, "Law

Enforcement Accountability Policy," Jose for DA, *available at* https://www.joseforda.com/law-enforcement-accountability. Campaign ads for DA Garza included footage from Austin's May 2020 protests, showing protestors displaying signs reading "ACAB" ("All Cops Are Bastards") while DA Garza provides voiceover criticizing the incumbent District Attorney for failing to prosecute law enforcement. *E.g.*, "Jose Garza for Travis County District Attorney," Bernie Sanders YouTube (June 16, 2020), *available at* https://www.youtube.com/watch?v=yMtzEAYWAuI. Protestors like Kirsch volunteered and helped DA Garza get elected on this platform. **Ex. F** (Plaintiff's resume identifying work as a "Volunteer Field Organizer" for the Garza campaign).

DA Garza followed through on his campaign promises to prosecute law enforcement officers. DA Garza has trumpeted a number of indictments against members of law enforcement, including many arising out of the May 2020 protests. *See, e.g.*, Travis County DA Jose Garza discusses cases related to May 2020 protests," KXAN (Feb. 17, 2022), *available at* https://www.youtube.com/watch?v=yWY1bugSBlQ; **Ex. G** ("19 Austin police officers accused of excessive force during 2020 protests are indicted"); **Ex. Q** ("Here's what we know about APD officers facing charges for using beanbag rounds in 2020 protests"). DA Garza has also implemented policies within his office to put law enforcement conduct before grand juries as a matter of course. *See, e.g.*, **Ex. H** (describing DA Garza's "promise to [the community] to take all officer involved excessive force cases to the grand jury"); **Ex. I** (reporting on recruiting email from Travis County DA's Office supervisor reading "I am reaching out in the hopes that you may be looking to prosecute police officers or that you know someone who is").

The criminal prosecution of Officer Rast (among others) fell in line with the campaign promises and the actions taken by DA Garza immediately upon taking office. The incident

involving Plaintiff was included as a matter under investigation in the first "list of each officer-involved use of force or other misconduct matter involving injury to any person currently pending in the Office's Civil Rights Unit," as first compiled and broadcast by the Travis County DA's Office on January 11, 2021. **Ex. E**, at 1. The incident involving Plaintiff continued to be included in the publicly issued list—which has often been updated more than once a month—and in April 2021 DA Garza identified Officer Rast by name as being a person under criminal investigation in connection with that incident. *Id.* at 36. Through the paper discovery taken in this matter it has since become clear that Plaintiff's counsel has been involved in communications with the Travis County DA's Office about the incident, even putting an incident reconstruction expert they retained in touch with the prosecutor's office. **Ex. L**.

Based on a grand jury presentation that remains secret under Texas law—such that it is impossible to know what evidence, if any, the Travis County DA's Office presented to that grand jury—a Travis County grand jury returned an indictment against Officer Rast in February 2022 for allegedly firing the non-lethal round that struck Plaintiff. **Ex. A**. The Travis County DA's Office then updated the list of "officer-involved use of force and other misconduct" press release to reflect the addition of the indictment against Officer Rast, among others. **Ex. E**, at 112 (March 7, 2022 press release).[1]

Following the indictment, limited discovery in this civil case continued. That limited discovery included the deposition of another APD officer on duty with Officer Rast on the day of the incident. Notwithstanding the allegations in both that indictment and Kirsch's own complaint,

[1]DA Garza's zeal to make good on campaign promises to prosecute law enforcement officers for their conduct in connection with the May 2020 protests is also reflected in the fact that Officer Rast is not even properly named in the updated press releases, which to this day provide a description of the case brought against Officer Rast that includes not Officer Rast's name, but that of another APD officer. *See, e.g.*, **Ex. E**, at 112, 123, 131, 142, 149, 158.

Kirsch's counsel took the position that Officer Rast did *not* shoot Kirsch. Here is Kirsch's counsel proclaiming she "know[s] who shot Sam Kirsch" and pointing to *someone other than Officer Rast* as having fired the round that struck Plaintiff:

Q. Okay. You shot Sam Kirsch, and so I'm wondering why you know you didn't?

MR. LAIRD: Well, what --
MS. WEBBER: Excuse me.
MR. LAIRD: If -- if you stop --
MS. WEBBER: No. No. No. No.
MR. LAIRD: Oh, yes. Yes. Yes.
MS. WEBBER: Do you have an objection, sir?
MR. LAIRD: Well, if you've -- if you've got some evidence that shows it, then, I mean --
MS. WEBBER: That I -- you really want to see it; don't you? Like, that's not an objection, Gray. I know who shot Sam Kirsch.
Q. (By Ms. Webber) Detective, you're sure it wasn't you, right?
A. From my vantage point, I was targeting the individual described in my report.

See **Ex. D** (B. Pietrowski Depo., 4/20/2022), at 189:24-190:16. Moments later, during the same deposition, during a discussion about video footage of the underlying incident, Plaintiff's counsel explained that DA Garza got the "wrong guy" indicted for the incident involving Plaintiff:

MS. WEBBER: Boline did this, too. He testified that he synched these videos, so you can get it from him. This is --

MR. LAIRD: The synched videos that -- well --

MS. WEBBER: Well, he did a crap job, and that's why --

MR. LAIRD: We can --

MS. WEBBER: -- you know, Officer Rast got indicted. The wrong guy got indicted, but that doesn't mean that I have to give you my work product just because it's better.

Id. at 196:2-13. Just a few weeks ago counsel told this Court the same thing, explaining in a pleading that the video footage "belies [the other officer's] firm belief that he did not shoot Sam." *See* Pl.'s Resp. to City's Motion to Compel (Dkt. 44), at 8. In a recent meet-and-confer on this motion, Plaintiff's counsel affirmed that they have now changed their position again, and that they once again contend that Officer Rast fired the non-lethal munition that struck Plaintiff.

Throughout the flip-flopping on who fired the non-lethal munition that struck Plaintiff, Officer Rast's position throughout this litigation has been consistent and clear: while he has not opposed all discovery in the case, he has always opposed any effort to force him to testify (whether through written discovery responses or deposition) while his criminal case is pending. He has also been consistent and clear—as was obvious to all participants in the civil case—that he had and has a right to defend himself in this civil case, including by making a record on and presenting through appropriate motions his defense of qualified immunity. *See* Officer Rast's Original Answer (Dkt. 9), at 6.

Until recently, the parties had proceeded with discovery under this understanding of Officer Rast's position, and Plaintiff and the City have engaged in document discovery and limited depositions, including the one quoted from above. During a recent meet-and-confer call regarding the parties' request to extend the dispositive motions deadline, counsel for Plaintiff and Officer Rast again discussed Officer Rast's position that any deposition should be delayed until after the resolution of the parallel criminal proceeding. Counsel agreed that Plaintiff would notice Officer Rast's deposition for a date in July after the parties' scheduled July 12 mediation, with the understanding that if the case continued after mediation Officer Rast would seek relief from the Court to prevent his deposition from moving forward. On May 26, 2022, Plaintiff noticed Officer Rast's deposition for July 20, 2022.

On June 2, 2022, Plaintiff unilaterally re-noticed Officer Rast's deposition for June 22, 2022. *See* **Ex. C** (Plaintiff's First Amended Notice of Video Deposition of Rolan Rast). The purported basis for rescheduling Officer Rast's deposition was that Officer Rast is a named plaintiff in a separate civil lawsuit filed in state court against the City of Austin and various other defendants, including DA Garza, related to the same 2020 protests.[2] Accordingly, Officer Rast now seeks the relief that all parties understood would be requested from the Court once his rights to defend himself in this civil case were precluded by the pendency of the parallel criminal proceeding.

[2]Although that case was apparently filed at the latest possible time to avoid statute of limitations issues, the original petition filed on behalf of Officer Rast and others itself includes a request to stay the suit pending the outcome of the named plaintiff officers' criminal trials. *See* Pls.' Original Petition, *Jackson v. City of Austin*, No. D-1-GN-22-002502 (201st Dist. Ct., Travis Cnty., Tex.) (filed May 31, 2022, 11:50 PM), copy attached as **Exhibit J**. The need to invoke self-incrimination protections obviously does not foreclose Officer Rast's ability to protect his right to pursue such affirmative claims. *E.g., Wehling v. Columbia Broadcasting System,* 608 F.2d 1084, 1086-88 (5th Cir. 1979).

ARGUMENT

Under controlling Fifth Circuit precedent, Officer Rast is entitled to a complete stay of this case pending resolution of his parallel criminal proceeding. Officer Rast did not file this motion preemptively, while the incident was on DA Garza's list of "unindicted" "officer-involved use of force or other misconduct" cases. This allowed the parties to make progress in paper discovery and limited deposition discovery without directly implicating Officer Rast's rights to defend himself in the case. Now that this non-infringing discovery has been completed, and now that Plaintiff is pressing for Officer Rast's deposition, Officer Rast now seeks a stay to prevent his and other depositions from occurring and to prevent the case from progressing to and past critical deadlines, including disclosures of experts, dispositive motions, and trial, before Officer Rast can prepare and mount a fulsome defense to the civil allegations against him.

I. This Court has the authority to stay discovery.

As this Court knows, federal courts often stay civil proceedings to allow overlapping and parallel criminal proceedings to run their course. Judges in the Austin Division have encountered this issue with increasing frequency in the last few years and have issued such stays. Last year, Judge Yeakel stayed a civil suit arising from the death of Javier Ambler so that criminal proceedings arising from Ambler's death could be resolved first. *See Javier Ambler et al. v. Williamson County et al.*, No. 1:20-CV-1068-LY, Order Staying Case (Dkt. 89) (W.D. Tex. July 27, 2021) (copy attached as **Ex. K**). A few months ago, Magistrate Judge Hightower stayed all discovery in a civil case arising from the death of Mauris DeSilva so that criminal proceedings arising from that incident could be resolved first. *DeSilva v. Taylor*, No. 1:21:cv-00129-RP, 2022 WL 545063 (W.D. Tex. Feb. 23, 2022). Sister courts throughout the Western District have recently stayed discovery on this basis. *See, e.g.*, *SEC v. Mueller*, No. 21-cv-00785-XR, 2022 WL

818678, at *4 (W.D. Tex. Mar. 17, 2022) (staying discovery against individual defendant facing parallel criminal investigation). Other federal courts in the state have done the same. *See, e.g.*, *Jean v. City of Dallas, Texas*, No. 3:18-CV-2862-M, 2019 WL 4597580, at *5 (N.D. Tex. Sept. 22, 2019) (staying civil case against officer indicted for and eventually convicted of murder of Botham Jean). This case presents the same issue and also warrants a stay.

Federal district courts have "broad discretion to stay proceedings as an incident to [their] power to control [their] own docket[s]." *Clinton v. Jones*, 520 U.S. 681, 707 (1997). The United States Supreme Court has recognized that there are "special circumstances" in which "the interests of justice" support or even require temporary stays. *United States v. Kordel*, 397 U.S. 1, 12 & n.27 (1970); *SEC v. First Fin. Grp. of Tex., Inc.*, 659 F.2d 660, 668 (5th Cir. 1981) (stays may be necessary "to prevent a party from suffering substantial and irreparable prejudice"). In particular, stays are "common practice" when civil and criminal liability arise from the same incident because "criminal prosecutions often take priority over civil actions." *Wallace v. Kato*, 549 U.S. 384, 394 (2007); *In re Grand Jury Subpoena*, 866 F.3d 231, 234 (5th Cir. 2017); *Kmart Corp v. Aronds*, 123 F.3d 297, 300 (5th Cir. 1997).

The existence of parallel civil and criminal proceedings poses a unique constitutional danger to a civil litigant because every person facing criminal liability has the constitutional right against self-incrimination provided by the Fifth Amendment. *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1087-88 (5th Cir. 1979). At the same time, every person facing civil liability has a due process right to have that matter fully and fairly adjudicated. *Id.* Courts must avoid scenarios that "require a party to surrender one constitutional right in order to assert another." *Id.* at 1088. A civil defendant invoking his Fifth Amendment rights "should suffer no penalty for his silence." *Id.* (citing *Spevack v. Klein*, 385 U.S. 511, 515 (1967)). Temporary stays protect these

competing rights by allowing the criminal process to resolve before the civil process. *Id.* at 1089 (reversing district court for refusing to stay case "for approximately three years" while criminal process was resolved).

When tasked with determining the propriety of a stay in these situations, courts generally consider six factors: "(1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the criminal case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously, weighed against the prejudice to the plaintiffs caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; and (6) the public interest." *Bean v. Alcorta*, 220 F.3d 772, 775 (W.D. Tex. 2016); *Meyers v. Pamerleau*, No. 5:15-CV-524-DAE, 2016 WL 393552, at *5 (W.D. Tex. Feb. 1, 2016); *Shaw v. Hardberger*, No. SA-06-CA-751-XR, 2007 WL 1465850, at *2 (W.D. Tex. May 16, 2007).

II. The Court should stay discovery to protect Officer Rast's constitutional rights.

Each of the six factors identified above supports a temporary stay of discovery in this case. As in *Ambler*, *DeSilva*, and other cases in which stays have been granted, the individual law enforcement officer named as a defendant here is facing criminal prosecution regarding the same conduct at issue in the civil case. *See Ambler* Order, **Ex. K**; *DeSilva*, 2022 WL 545063, at *3. Forcing the officer to choose between asserting one constitutional right in defense of his criminal case or enforcing another constitutional right in his civil case is unnecessary, prejudicial, and wholly avoidable.

A. There is complete overlap between the civil and criminal cases.

There can be no dispute that there is complete overlap between Plaintiff's allegations in this case and the allegations that form the basis of Officer Rast's indictment. Plaintiff alleges

Officer Rast "shot him in the head" at a protest on May 31, 2020 causing serious injury. *E.g.*, Pl.'s 1st Am. Compl. (Dkt. 4), ¶¶ 8-14. The indictment similarly alleges that on that same date, Officer Rast shot Plaintiff with a firearm, causing bodily injury. *See* **Ex. A**. This overlap in theories is also reflected in the fact that Plaintiff's counsel helped DA Garza's office coordinate with at least one of Plaintiff's retained experts prior to the return of the indictment against Officer Rast. *See* **Ex. L**.

This complete overlap of subject matter supports a stay because "[w]here there is significant overlap, self-incrimination is more likely" and Fifth Amendment concerns are at their greatest. *Bean*, 220 F. Supp. 3d at 776 ("significant and perhaps even complete overlap" between criminal and civil proceedings "weighs strongly in favor of staying the case"); *Meyers*, 2016 WL 393552, at *6 (factor favored stay where civil and criminal lawsuits arose "from the same facts"); *Shaw*, 2007 WL 1465850, at *2 (civil and criminal allegations "aris[ing] from the same set of operative facts . . . weighs heavily in favor of granting a stay"). For this reason, courts often describe this factor as the "most important" consideration for issuing a stay. *E.g.*, *DeSilva*, 2022 WL 545063, at *3 ("Because there is significant overlap between the issue presented in this case and Defendants' criminal proceedings . . . . [t]he first and most important factor weighs strongly in favor of staying the case."); *Frierson v. City of Terrell*, No. 3:02CV2340-H, 2003 WL 21355969, at *3 (N.D. Tex. June 6, 2003) (staying case); *Librado v. M.S. Carriers, Inc.*, No. 3:02-CV-2095D, 2002 WL 31495988, at *2 (N.D. Tex. Nov. 5, 2002) (staying case).

B. Officer Rast was indicted and still faces criminal liability.

Officer Rast was indicted in February 2022 for the same conduct that forms the basis of Plaintiff's claims in this case. **Ex. A**. "A stay of a civil case is more appropriate where a party to the civil case has already been indicted for the same conduct." *Bean*, 220 F. Supp. 3d at 776

(staying case where defendant's criminal conviction was pending on appeal); *DeSilva*, 2022 WL 545063, at *3 ("Because [the officer defendants] have been indicted, the second factor also weighs in favor of a stay."); *Meyers*, 2016 WL 393552, at *6 (staying case where defendant was indicted); *Shaw*, 2007 WL 1465850, at *2 (staying case where plaintiffs were indicted).

C. Plaintiff will suffer no prejudice beyond mere delay.

Stays by their very nature delay proceedings. To avoid a stay, courts require plaintiffs to (among other things) demonstrate "more prejudice than simply a delay" in resolving their pending claims. *DeSilva*, 2022 WL 545063, at *3; *Bean*, 220 F. Supp. 3d at 776; *Meyers*, 2016 WL 393552, at *6. To meet this burden, a plaintiff could identify some specific "discovery that is available now but would be unavailable later should a stay be granted," or identify specific "witnesses [who] will be unable to testify" after a stay is lifted. *DeSilva*, 2022 WL 545063, at *3. There is no such discovery here. Moreover, any such discovery concerns are mitigated by the discovery the parties have already conducted in the case. This includes production of the available documentary and video records of the incident and subsequent investigation and deposition testimony from the Austin Police Department's lead investigator as well as from an officer Plaintiff's counsel alleged during the deposition actually fired the round that struck Plaintiff. **Ex. D**.

Furthermore, any claims of prejudice to Plaintiff from such a delay should ring hollow. Plaintiff's counsel have actively encouraged and participated in DA Garza's efforts to prosecute Officer Rast along with other officers on duty during the May 2020 protests. Having encouraged prosecution, Plaintiff cannot effectively argue against delay in the resolution of his civil claims resulting from that criminal prosecution.

Officer Rast and his counsel cannot predict with certainty how long the stay will need to last to allow the criminal process to complete. The Travis County criminal district courts resumed

in-person criminal jury trials in March 2022, after a nearly two-year-long hiatus. **Ex. M** ("Travis County District Attorney's Office Restarts In-Person Criminal Jury Trials"). Officer Rast's case has not been set for trial. **Ex. B**. A stay of remaining discovery and deadlines is appropriate under these circumstances. The Fifth Circuit has reversed a district court for refusing to stay a case even when the delay caused by the stay would have been *three years*. *Wehling*, 608 F.2d at 1089. Any mere delay caused by a stay of this case is not so prejudicial as to weigh against a stay. *DeSilva*, 2022 WL 545063, at *3.

D. Proceeding with civil discovery is highly prejudicial and potentially wasteful.

One of the fundamental goals of stays in this context is avoiding the natural prejudice that arises from forcing parties to defend litigation while simultaneously asserting their Fifth Amendment rights. The Fifth Amendment "privileges [a person] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976). A person cannot be compelled "to answer deposition questions, over a valid assertion of his Fifth Amendment right." *Pillsbury Co. v. Conboy*, 459 U.S. 248, 256–57 (1983).

If this case continues, including through deposition of Officer Rast and on to disclosures of experts, filing of dispositive motions, and trial, these Fifth Amendment concerns will be directly implicated. Officer Rast will face "a conflict between asserting his Fifth Amendment rights and fulfilling his legal obligations as a witness" and defendant in this civil case. *DeSilva*, 2022 WL 545063, at *4. Officer Rast has an interest in preventing his defense in this civil case from providing evidence that the Travis County DA's Office may use in his prosecution, and from prematurely disclosing to DA Garza's office his defense in the criminal case. *Id.* ("Defendants have an interest in staying the civil trial to avoid exposing their criminal defense strategies to the

prosecution."). This factor weighs in favor of a stay. *Id.*; *Bean*, 220 F. Supp. 3d at 777; *Meyers*, 2016 WL 393552, at *7 & n.3 (noting the potential for plaintiffs to use civil discovery as a means of prejudicing criminal defendants); *Librado*, 2002 WL 31495988 at *3.

E. A stay supports the Court's interests.

A stay also favors judicial economy and this Court's management of its docket. *Bean*, 220 F. Supp. 3d at 777; *Meyers*, 2016 WL 393552, at *7; *Librado*, 2002 WL 31495988, at *3. If the civil case continues, Officer Rast will be placed in a position to assert his Fifth Amendment rights. If the prospect of criminal liability has been eliminated by the time of trial, he would likely then be in a position of withdrawing the privilege and testifying in his own defense. *Davis-Lynch, Inc. v. Moreno*, 667 F.3d 539, 547-48 (5th Cir. 2012) (discussing circumstances in which "a party may withdraw its assertion of the Fifth Amendment privilege, even at a late stage in the litigation"). That withdrawal may raise new concerns of prejudice and delay, the prospect of additional depositions, extensions of expert discovery or *Daubert* deadlines, and more. *See id.* This Court can avoid any need to raise or resolve those legal questions by temporarily staying the proceedings. *See DeSilva*, 2022 WL 545063, at *4 (noting the possibility that resolution of the criminal case may also resolve or eliminate issues in the civil trial).

F. A stay supports the public's interests.

The public "has an interest in protecting the constitutional rights of criminal defendants" as well as in seeing both civil and criminal cases resolved promptly. *Bean*, 220 F. Supp. 3d at 778. The public interest factor weighs against a stay "only where, unlike here, a civil case is pending and no criminal investigation has begun." *DeSilva*, 2022 WL 545063, at *4; *Meyers*, 2016 WL 393552, at *7. Here, the public's interests are best served by temporarily staying civil discovery until the criminal process concludes so Officer Rast's constitutional rights can be protected, along

with the City's rights to defend the City against claims for damages with all available evidence, including evidence from Officer Rast. *DeSilva*, 2022 WL 545063, at *4; *Bean*, 220 F. Supp. 3d at 778; *Meyers*, 2016 WL 393552, at *7; *Shaw*, 2007 WL 1465850, at *2; *Librado*, 2002 WL 31495988.

The public is also served by both criminal and civil matters being resolved fairly and accurately. DA Garza has told the public that it is important to ensure his office is "bringing the right person to trial with the right charges." *See* **Ex. N**. For example, the Travis County DA's Office previously dismissed an indictment it obtained against an officer after a prosecutor apparently "uncovered" exculpatory evidence from the prosecution's own expert opining that the officer's conduct was "justified and lawful." *See* **Ex. O**; **Ex. P** (DA Garza offering previously indicted officer his "sincere apologies" for wrongfully indicting him). Similarly, in this case, the same civil plaintiff who worked to get DA Garza elected, and whose counsel encouraged the indictment of Officer Rast, has claimed that DA Garza indicted the "wrong guy." *See* **Ex. D**; **Ex. F**; **Ex. L**. The public has an interest in seeing these accusations against the City, against Officer Rast, and against other non-defendant officers resolved based on all the evidence, not based on a rush to prosecute, much less inaccurate allegations or inferences drawn from assertions of constitutional rights. That can only occur if the criminal process is allowed to play out first.

III. The Court should stay these proceedings so that Officer Rast can defend himself, including through developing and presenting qualified immunity defense.

As the Court knows, the defense of qualified immunity "provides government officials with immunity from suit so long as they do not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Hutcheson v. Dallas Cnty., Tex.*, 994 F.3d 477, 480 (5th Cir. 2021) (internal quotations omitted). Officer Rast will be entitled to qualified immunity unless Plaintiff can prove both (1) that Officer Rast violated his

constitutional rights, and (2) that Officer Rast's actions were objectively unreasonable in light of clearly established law at the time. *Id.* This qualified immunity analysis obviously includes a consideration of what actions Officer Rast actually took on the day in question: a matter on which he has knowledge, but to which he cannot testify without abrogating his rights against self-incrimination in light of the ongoing criminal case.

In addition, one of the constitutional rights Plaintiff alleges Officer Rast violated was his First Amendment right to freedom of speech. Plaintiff's First Amendment retaliation claim requires him to prove (1) that he was engaged in a constitutionally protected activity; (2) that Officer Rast's actions caused him to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that Officer Rast's actions were "substantially motivated" against Plaintiff's exercise of his constitutionally protected conduct. *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). The last element is critically important to the qualified immunity analysis, because the fifth Circuit has held that "government retaliation against a private citizen for exercise of First Amendment rights cannot be objectively reasonable." *Id.* at 261 & n.7.

To establish his qualified immunity defense, then, Officer Rast must present evidence of (1) what his actions on the day in question were, and (2) that if he in fact fired the shot that hit Kirsch, he was *not* "substantially motivated" by Kirsch's legitimate activities as a protestor. *See, e.g.*, *Singleton v. Darby*, 609 Fed. App'x 190, 194 (5th Cir. 2015) (unpublished) (qualified immunity warranted where evidence showed officer pepper sprayed protestors "not because they were protesting, but because they were blocking traffic in violation of Texas law"). Officer Rast cannot develop that evidentiary record, such as through a declaration or answers in a deposition, prior to the resolution of the parallel criminal case, without sacrificing his rights against self-incrimination.

IV. As part of the broader stay, the Court should grant protection against Officer Rast's deposition moving forward pending the resolution of the criminal case.

Federal Rule of Civil Procedure 26(c) authorizes "[a] party . . . from whom discovery is sought [to] move for a protective order" to forbid or specify terms for a sought deposition. FED. R. CIV. P. 26(c)(1). A court may place restrictions on discovery "for good cause . . . to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Cazorla v. Koch Foods of Miss., LLC*, 838 F.3d 540, 549 (5th Cir. 2016) (quoting FED. R. CIV. P. 26(c)(1)).

As part of the broader stay of proceedings and further discovery, Officer Rast is entitled to protection from his deposition occurring prior to the resolution of the parallel criminal proceeding for the reasons explained above. Even if that were not enough—which it is—Officer Rast would otherwise be entitled to protection from the deposition occurring on the noticed date of June 22, 2022. Plaintiff noticed the deposition for that date unilaterally, without agreement from Officer Rast, three hours after requesting by email that Officer Rast be made available for deposition that week. Officer Rast was and is scheduled to be out of the country from June 20 through July 11, 2022, as his counsel informed Plaintiff's counsel following issuance of the notice. Thus, Officer Rast would not be available to participate in any deposition on the noticed June 22, 2022 date, regardless of the broader requested stay of proceedings and discovery in the case.

CONCLUSION

For the foregoing reasons, Officer Rast respectfully requests the Court grant this motion and stay all further proceedings in this matter, including but not limited to the noticed deposition of Officer Rast, until after the resolution of the pending parallel criminal proceeding styled *The State of Texas v. Rolan Rast*, No. D-1-DC-20-900080 (331st Crim. Dist. Ct., Travis Cnty., Tex.). Officer Rast would also respectfully request that the Court conduct a hearing on this motion,

following the completion of briefing, and all other relief to which he may show himself to be entitled in connection with this motion.

Respectfully submitted,

BUTLER SNOW LLP

By: */s/ Karson Thompson*
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ATTORNEYS FOR DEFENDANT ROLAN RAST

CERTIFICATE OF CONFERENCE

I hereby certify that I have repeatedly conferred with counsel for Plaintiff about the relief sought in this motion by Zoom video conference. Most recently, meet-and-confer discussions were held on June 14, 2022 and on June 8, 2022. Following those discussions, Plaintiff remains opposed to the relief sought in this motion and remains opposed to withdrawing the notice for Officer Rast's deposition to occur on June 22, 2022. I have also conferred with counsel for Defendant the City of Austin, and the City does not oppose the relief requested in the motion.

/s/ Eric J.R. Nichols
Eric J.R. Nichols

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2022, a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system.

/s/ Karson Thompson
Karson Thompson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, *Plaintiff*	§	
v.	§	**No. A-20-CV-01113-RP**
CITY OF AUSTIN, ROLAN ROMAN RAST, *Defendants*	§	

ORDER

Before the Court are Defendant Rolan Rast's Motion to Stay Further Proceedings (Dkts. 51 & 53).[1] In these motions, Rast requests the Court to stay further proceedings in this case, including remaining discovery, dispositive motion deadlines, and trial, until Officer Rast's parallel criminal proceeding in state court is resolved. As part of the broader request for relief, Officer Rast also seeks a protective order with respect to his deposition, which Plaintiff unilaterally noticed for June 22, 2022.

These motions were filed on June15, 2022, and referred to the undersigned on June 17, 2022, and responses have yet to be filed. In light of the nature of the requested relief now referred to the undersigned, and the date of the impending deposition, the undersigned enters the following Order.

[1] Also before the undersigned is Defendant City of Austin's Motion to Compel and Motion for Expedited Protective Order. Dkt. 41.

It is **ORDERED** that Defendant Rolan Rast's deposition, scheduled for June 22, 2022, is **STAYED** until the referred motions to stay and other pending referred discovery motions are resolved.

SIGNED June 21, 2022.

DUSTIN M. HOWELL
UNITED STATES MAGISTRATGE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

SAM KIRSCH, *Plaintiff,*	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-01113-RP**
CITY OF AUSTIN AND ROLAN RAST, *Defendants.*	§	

DEFENDANT CITY OF AUSTIN'S MOTION TO STAY FURTHER PROCEEDINGS

Defendant City of Austin (the "City") files this motion to stay further proceedings and corresponding scheduling order deadlines in this matter, including discovery, pretrial exchanges, dispositive motion deadlines, and trial, pending resolution of the criminal proceeding related to this case that remains pending in Travis County criminal district court.

SUMMARY

This civil case has proceeded as far as it reasonably can before an overarching and inevitable question has been reached: How can the City effectively prepare its defenses, at summary judgment or trial, given the pendency of related criminal proceedings? As the Court is well aware, Defendant Rolan Rast, and numerous other Austin Police Department officers named as individual defendants in similar protest-related cases are under indictment in Travis County district court for alleged actions taken in response to conduct by protesters in Austin in May 2020. The overlapping nature of the criminal cases in this and other federal civil rights cases is plain from the federal and state dockets and corresponding pleadings:

Civil Case Name:	Officers under indictment:	Criminal Docket Number:
Jason Gallagher (No. 1:20-CV-00901)	1. John Siegel	1. D-1-DC-20-900072

Alyssa Sanders (No. 1:22-CV-314)	1. Eric Heim	1. D-1-DC-20-900076
Steven Arawn (No. 1:20-CV-1118-RP)	1. Joshua Jackson 2. John Siegel 3. Nicholas Gebhart 4. Justin Berry	1. D-1-DC-22-900010 2. D-1-DC-20-900072 3. D-1-DC-20-900060 4. D-1-DC-20-900055
Nicole Underwood (No. 1:22-CV-00032)	1. John Siegel	1. D-1-DC-20-900072
Samuel Kirsch (No. 1:20-CV-01113-RP)	1. Rolan Rast	1. D-1-DC-20-900080 2. D-1-DC-23-900062
Jose Herrera (No. 1:20-CV-01134-RP)	1. James Morgan	1. D-1-DC-22-900053
Bomani Ray Barton (No. 1:22-CV-00221-RP)	1. Kyu An	1. D-1-DC-20-900057
Meredith Drake (No. 1:20-CV-00956-RP)	1. Chance Bretches	1. D-1-DC-20-900056
Anthony Evans (No. 1:20-CV-01057-RP)	1. Kyle Felton	1. D-1-DC-20-900054
Justin Howell (No. 1:21-CV-00749-RP)	1. Kyle Felton 2. Jeffrey Teng	1. D-1-DC-20-900059 2. D-1-DC-23-900066 3. D-1-DC-22-900005 4. D-1-DC-23-900065
Meredith Williams (No. 1:22-CV-00042-RP)	1. Joseph Cast	1. D-1-DC-20-900061
Christen Warkoczewski (No. 1:21-CV-00739-RP)	1. Brett Tableriou 2. Jeremy Fisher 3. Christopher Irwin 4. Todd Gilbertson 5. Alexander Lomovstev 6. Joshua Blake 7. Joshua Jackson 8. Stanley Vick 9. Justin Berry	1. D-1-DC-22-900018 2. D-1-DC-22-900011 3. D-1-DC-22-900012 4. D-1-DC-21-900125 5. D-1-DC-21-900126 6. D-1-DC-22-900019 7. D-1-DC-21-900010 8. D-1-DC-22-900009 9. D-1-DC-20-900055
Ge'Micah Volter-Jones (No. 1:22-CV-00511)	1. Edward Boudreau 2. Derrick Lehman	1. D-1-DC-22-900020 2. D-1-DC-20-900071
Brenda Ramos (No. 1:20-CV-01256-RP)	3. Christopher Taylor	3. D-1-DC-20-900048
Maurice DeSilva (No. 1:21-CV-00129- RP)	4. Christopher Taylor 5. Karl Krycia	4. D-1-DC-19-900111 5. D-1-DC-21-900071
Paul Mannie (No. 1:21-CV-00202-JRN)	6. Chance Bretches	6. D-1-DC-20-900091

Copies of the state criminal indictments of Rast are attached as Exhibits 1 and 2.

Plaintiff has brought excessive force claims against the officer defendant arising out of injuries Plaintiff alleges he sustained while participating in the protests in 2020 and has brought related *Monell* claims against the City over claimed policies and practices, among others, concerning use of force and protest response.

The Travis County District Attorney's Office ("TCDAO") announced the indictment of 19 APD officers publicly in February 2022—including the indictment of the officer defendant in this case—among other ways through an often-updated press release that contains the following introduction:

> The following is a list of each officer-involved use of force or other misconduct matter involving injury to any person currently pending in the Office's Civil Rights Unit.

Ex. 3. The TCDAO press release was most recently updated on April 19, 2023.

Recently, another five indictments have been returned against Austin Police Department officers arising out of the protests, including an indictment for deadly conduct discharge firearm against Defendant Rolan Rast arising out of the incident which is the subject of this lawsuit. (Ex. 2) Among these five indictments is an indictment charging Officer Joseph Peche with deadly conduct discharge firearm. (Ex. 4) This indictment states that Peche: "did then and there knowingly discharge a firearm at or in the direction of one or more individuals, namely: Samuel Kirsch." (Ex. 4)

None of the pending Travis County criminal cases related to the protests—including the one pending against the officer defendant in this case—has resulted in a trial or other disposition. There is no dispute, nor can there be, that the subject matter of the pending Travis County criminal cases against the officer defendant here overlaps with the subject matter of

Plaintiff's civil rights case. **Ex. 1**; **Ex. 2**; **Ex. 3.**

Keeping in mind the differences between claims against the individual officer and the City,[1] the City has participated in as much discovery and pretrial proceedings as it reasonably can before getting to the point of confronting the inevitable question of how it can prepare and present its defenses in light of the pending criminal cases. The City has produced over 4,000 pages of documents in this case along with approximately one million documents in similar protest-related cases in this court. The bulk of this production consists of internal Austin Police Department personnel and investigation files, emails from within APD and other City departments, and multimedia files. The City has also participated in myriad depositions in this and other cases. As has been shown along the way, discovery involving the individual officers—who are critical fact witnesses under indictment—has forced upon the individual officers the impossible choice of invoking their Fifth Amendment rights in light of the pending criminal cases or defending themselves against civil liability by waiving those rights and testifying.

Given the dilemma presented by the parallel proceedings, this Court recently granted the City's motions to stay further proceedings in *Sanders v. City of Austin. See* Order (Dkt. 72), *Sanders v. City of Austin*, No. 1:22-cv-00314-RP (W.D. Tex. May 12, 2023) (Howell, M.J.) and *Volter-Jones v. City of Austin, et al.* See Order (Dkt. 26), *Volter-Jones v. City of Austin, et al.,* No. 1:22-cv-00511-RP (W.D. Tex. June 8, 2023)(Howell, M.J.). Additionally, the Court has entered stays of discovery and/or other proceedings in recent matters arising out of the May 2020 protests, as well as in other cases involving parallel civil and criminal

[1] *E.g., Martin v. Dallas County*, 822 F.2d 553, 555-56 (5th Cir. 1987); *Beltran v. City of Austin*, 2022 WL 11455897 (W.D. Tex. 2022); *Ramirez v. Escajeda*, 2022 WL 1744454 (W.D. Tex. 2022); *Rhoten v. Stroman*, 2020 WL 3545661 (W.D. Tex. 2020).

proceedings over officer conduct. *See, e.g.*, Order (Dkt. 39), *Sanders v. City of Austin*, No. 1:22-cv-00314-RP (W.D. Tex. Nov. 15, 2022) (Howell, M.J.) (staying all discovery against officer defendant); *Doe v. City of Austin*, No. 1:22- CV-00299-RP, 2022 WL 4234954, at *8 (W.D. Tex. Sept. 14, 2022) (Hightower, M.J.) (staying all discovery against city and officer defendant); *Kirsch v. City of Austin*, No. A-20-CV-01113- RP, 2022 WL 4280908, at *3 (W.D. Tex. Aug. 5, 2022) (Howell, M.J.) (staying all discovery against officer defendant); *DeSilva v. Taylor*, No. 1:21:cv-00129-RP, 2022 WL 545063, at *4 (W.D. Tex. Feb. 23, 2022) (Hightower, M.J.) (staying all discovery against officer defendants); Text Order dated May 30, 2023 Granting Agreed Motion to Stay Further Proceedings, *Griffith v. City of Austin, et al.,* No. 1:21-cv-01170-DII; Order Staying Case (Dkt. 89), *Ambler v. Williamson Cnty.*, No. 1:20-CV-1068-LY (W.D. Tex. July 27, 2021) (staying entire case).

Given the lack of resolution of the criminal case that factually overlaps this one, it has now become readily apparent that the parties (including the City) will not be able to conduct additional and necessary discovery that is unavailable while the criminal case is pending. It has likewise become apparent that it is not possible to conduct expert discovery without the necessary and currently unavailable testimony of essential fact witnesses, as well as physical and other evidence in the possession of the TCDAO. It has become readily apparent that without this unavailable testimony and other evidence, the City will not be able to prepare its defenses for summary judgment, much less for trial. The practical effects of the parallel criminal proceedings preclude the completion of expert disclosures and reports, summary judgment briefing, trial preparation, and presentation of the claims and defenses at trial. These roadblocks to a full and fair defense constitute a due process issue for the City.

The City therefore moves to stay all further proceedings in this case until the resolution

of the corresponding parallel criminal proceedings pending against the officer defendant. Once the overlapping criminal matters are resolved, the parties will be able to complete remaining discovery, summary judgment proceedings, and any pretrial preparations.

ARGUMENT

The City requests a stay of further proceedings in this matter pending resolution of the parallel criminal proceeding. The City did not file this motion immediately upon the case having been filed, or when the officer defendant was added to the case.[2] This allowed the parties to make progress in paper discovery and limited deposition discovery without directly implicating an officer's right to defend himself in parallel criminal cases, or the City's ultimate ability to prepare and present its defenses. The discovery and proceedings have reached the point at which the City cannot prepare and mount a full and fair defense to the civil allegations against it.

I. This Court has the authority to stay discovery.

As this Court knows, federal courts often stay civil proceedings to allow overlapping and parallel criminal proceedings to run their course. As indicated above, this has been the case with this Court having recently imposed a stay with respect to proceedings against not only individual law enforcement officers but also the government entities with which the officers were employed during the time period at issue. *See cases cited supra at pp 4-5.*

This case presents the same issue and also warrants a stay. Federal district courts have "broad discretion to stay proceedings as an incident to [their] power to control [their] own docket[s]." *Clinton v. Jones*, 520 U.S. 681, 707 (1997). The United States Supreme Court has recognized that there are "special circumstances" in which "the interests of justice" support or even require temporary stays. *United States v. Kordel*, 397 U.S. 1, 12 & n.27 (1970); *SEC v.*

[2] The officer defendant was added in the First Amended Complaint, which was filed January 21, 2021. Dkt. 4.

First Fin. Grp. of Tex., Inc., 659 F.2d 660, 668 (5th Cir. 1981) (stays may be necessary "to prevent a party from suffering substantial and irreparable prejudice"). In particular, stays are "common practice" when civil and criminal liability arise from the same incident because "criminal prosecutions often take priority over civil actions." *Wallace v. Kato*, 549 U.S. 384, 394 (2007); *In re Grand Jury Subpoena*, 866 F.3d 231, 234 (5th Cir. 2017); *Kmart Corp v. Aronds*, 123 F.3d 297, 300 (5th Cir. 1997); *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983) ("Certainly, a district court may stay a civil proceeding during the pendency of a parallel criminal proceeding.").

The existence of parallel civil and criminal proceedings poses a unique constitutional danger because every person facing criminal liability has the constitutional right against self-incrimination provided by the Fifth Amendment. *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1087-88 (5th Cir. 1979). At the same time, every person facing civil liability has a due process right to have that matter fully and fairly adjudicated. *Id.* Courts must avoid scenarios that "require a party to surrender one constitutional right in order to assert another." *Id.* at 1088. A civil defendant invoking his Fifth Amendment rights "should suffer no penalty for his silence." *Id.* (citing *Spevack v. Klein*, 385 U.S. 511, 515 (1967)). Temporary stays protect these competing rights by allowing the criminal process to resolve before the civil process. *Id.* at 1089 (reversing district court for refusing to stay case "for approximately three years" while criminal process was resolved).

Here, Plaintiff's theories of municipal liability depend on a requested finding that the officer violated the constitutional rights of persons who participated in the protests. First Am. Complaint (Dkt. 4) at 13-14 ("Officer Rast shot Sam because Sam was protesting Austin police and other police departments around the country for their habitual use of excessive

force. Officer Rast was acting under color of law when he shot Sam as retribution for Sam exercising his First Amendment rights. Officer Rast was acting under color of law when he directly and proximately caused Sam's injuries."). As pled and discovered to date, it is clear that the alleged actions of the individual officer is the source of the claimed harm at issue in this case and the other protest-related civil cases. Testimony from those officers, including the officer defendant in this case, is not currently available, and testimony from other officers who were present and have been indicted is just as unreachable. The witness officers' right against self-incrimination is therefore just as likely to prevent usable testimony. Without that essential testimony, from both defendants and witnesses, the City is precluded from essential factual information that would demonstrate that "a person has suffered no constitutional injury at the hands of the individual police officer." *City of Los Angeles v. Heller*, 106 S. Ct. 1571, 1573 (1986). As the Supreme Court has stated:

> But this was an action for damages, and neither *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm.

Id.

In the circumstances of these cases, the City is precluded—by virtue of the lack of access to an indicted officer's testimony—from completing discovery that would allow it to marshal its defenses. Thus, a stay as to the City on Plaintiff's *Monell* claims is appropriate. *See Doe*, 2022 WL 4234954 at * 7; *see also*, *e.g., Anderson v. City of Chicago*, 2016 WL 7240765 (N.D. Ill. 2016) ("Even if the City had a policy or practice of permitting its officers' to coerce false confessions through force, the harm caused by the policy could only manifest itself through the officers' actions."); *Williams v. City of Chicago*, 315 F. Supp. 3d 1060, 1080 (N.D.

Ill. 2018) ("Even if the City had a policy or practice of permitting its officers to coerce false testimony or to create false investigative reports, the harm caused by the practice could only manifest itself through the officers' actions.")

When tasked with determining the propriety of a stay in light of parallel civil and criminal proceedings, courts generally consider six factors:

> "(1) the extent to which the issues in the criminal case overlap with those presented in the civil case;
>
> (2) the status of the criminal case, including whether the defendants have been indicted;
>
> (3) the private interests of the plaintiffs in proceeding expeditiously, weighed against the prejudice to the plaintiffs caused by the delay;
>
> (4) the private interests of and burden on the defendants;
>
> (5) the interests of the courts; and
>
> (6) the public interest."

Bean v. Alcorta, 220 F.3d 772, 775 (W.D. Tex. 2016); *Doe*, 2022 WL 4234954, at *4.

II. The Court should stay further proceedings here.

Each of the six factors identified above supports a stay of further proceedings here. As in *Doe*, *Sanders*, *Kirsch*, *DeSilva*, and other cases in which stays have been granted, the individual law enforcement officer named as a defendant here is facing criminal prosecution regarding the same conduct at issue in the civil case. *See Doe*, 2022 WL 4234954, at *5; *Kirsch*, 2022 WL 4280908, at *2; *DeSilva*, 2022 WL 545063, at *3. When previously faced with that overlap between civil and criminal issues, this Court has chosen to stay the civil cases, for both the officers and the City, based largely on that overlap and the resulting danger of civil discovery forcing the officers to incriminate themselves. *See Sanders v. City of Austin.*

See Order (Dkt. 72), *Sanders v. City of Austin*, No. 1:22-cv-00314-RP (W.D. Tex. May 12, 2023) (Howell, M.J.), *Doe*, 2022 WL 4234954, at *6-7; *see also Ambler*, No. 1:20-CV-1068-LY (W.D. Tex. July 27, 2021) (staying entire case in light of officers' indictment for crimes arising from facts similar to the civil case). The Court should exercise its discretion in favor of a stay in this case as well.

A. There is complete overlap between the civil and criminal cases.

There is no dispute that there is complete overlap between the Plaintiff's allegations in this civil case and the allegations that undergird the indictment against the APD officer named as a co- defendant with the City. The civil allegations in the First Amended Complaint and the criminal allegations contained in the indictment arise from the same set of facts and essentially mirror each other. "The question is simple: do the facts overlap? Here, they undeniably do." *See* Order (Dkt. 39), at 4, *Sanders v. City of Austin*, No. 1:22-cv-00314-RP (W.D. Tex. Nov. 15, 2022) (Howell, M.J.).

This complete overlap of subject matter supports a stay because "[w]here there is significant overlap, self-incrimination is more likely" and Fifth Amendment concerns are at their greatest. *Bean*, 220 F. Supp. 3d at 776 ("significant and perhaps even complete overlap" between criminal and civil proceedings "weighs strongly in favor of staying the case"); *Meyers*, 2016 WL 393552, at *6 (factor favored stay where civil and criminal lawsuits arose "from the same facts"); *Shaw*, 2007 WL 1465850, at *2 (civil and criminal allegations "aris[ing] from the same set of operative facts . . . weighs heavily in favor of granting a stay"). For this reason, courts often describe this factor as the "most important" consideration for issuing a stay. *E.g.*, *Doe*, 2022 WL 4234954, at *5; *DeSilva*, 2022 WL 545063, at *3 ("Because there is significant overlap between the issue presented in this case and

Defendants' criminal proceedings . . . . [t]he first and most important factor weighs strongly in favor of staying the case."); *Frierson v. City of Terrell*, No. 3:02CV2340-H, 2003 WL 21355969, at *3 (N.D. Tex. June 6, 2003) (staying case); *Librado v. M.S. Carriers, Inc.*, No. 3:02-CV-2095D, 2002 WL 31495988, at *2 (N.D. Tex. Nov. 5, 2002)

(staying case).

It is no answer to this analysis to say that the City itself is not facing criminal charges. This Court rejected that argument in *Doe*. "Although the City is not a party to the criminal proceedings, the Court finds that Dodds' oppression charge substantially overlaps with Doe's *Monell* claims against the City." *Doe*, 2022 WL 4234954, at *5. The same is true here. The *Monell* claims against the City allege that various City policies resulted in officers engaging in the exact conduct that undergirds the individual excessive force claims and the basis of the criminal charges. *See, e.g.*, First Am. Compl. (Dkt. 4) ¶¶ 36-39. And as in *Doe,* "the first and most important factor weighs strongly in favor of staying this case." *Doe*, 2022 WL 4234954, at *5.

B. The officer defendant has been indicted and still faces criminal liability.

As noted above, the individual officer defendant in this case has been indicted for aggravated assault by a public servant and deadly conduct discharge firearm. **Ex. 1; Ex. 2**. "A stay of a civil case is more appropriate where a party to the civil case has already been indicted for the same conduct." *Bean*, 220 F. Supp. 3d at 776 (staying case when defendant's criminal conviction was pending on appeal); *Doe*, 2022 WL 4234954, at *5 (staying case when indictment issued while motion to stay was pending); *Kirsch*, 2022 WL 4280908, at *2 (staying case when defendant was indicted); *DeSilva*, 2022 WL 545063, at *3 (same); *Meyers*, 2016 WL 393552, at *6 (same); *Shaw*, 2007 WL 1465850, at *2 (staying case when

plaintiffs were indicted).

C. Plaintiff will suffer no prejudice beyond mere delay.

Stays by their very nature delay proceedings. A claim that stays cause delay or result in witness memories fading over time is not enough to affect the analysis. As this Court has recognized, that "is true in any case in which a stay is granted." *Kirsch*, 2022 WL 4280908, at *2; *see also* Order (Dkt. 39), at 5, *Sanders v. City of Austin*, No. 1:22-cv-00314-RP (W.D. Tex. Nov. 15, 2022)(Howell, M.J.)(rejecting arguments about "a COVID-19 induced backlog of criminal cases" in Travis County).

Instead, to avoid a stay, courts require plaintiffs to, *inter alia*, demonstrate "more prejudice than simply a delay" in resolving their pending claims. *DeSilva*, 2022 WL 545063, at *3; *Doe*, 2022 WL 4234954, at *5-6; *Bean*, 220 F. Supp. 3d at 776; *Meyers*, 2016 WL 393552, at *6. To meet this burden, a plaintiff could identify some specific "discovery that is available now but would be unavailable later should a stay be granted," or identify specific "witnesses [who] will be unable to testify" after a stay is lifted. *DeSilva*, 2022 WL 545063, at *3.

Plaintiff cannot establish such prejudice here. Moreover, any discovery concerns are mitigated by the discovery the parties have already conducted in the case. This includes extensive production of the available documentary and multimedia records of the incidents and later investigations, the evidentiary value of which will not decay over time. To the contrary, the massive amount of reporting and video and audio evidence of the conduct at issue in this and similar cases means the parties are less likely to need to rely exclusively on witnesses' memories than in other types of cases in which stays might be more prejudicial.

D. Proceeding with the civil case further would be highly prejudicial and potentially wasteful.

One of the fundamental goals of stays in this context is avoiding the natural prejudice that arises from forcing parties to defend litigation while also asserting their Fifth Amendment rights. The Fifth Amendment "privileges [a person] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976). A person cannot be compelled "to answer deposition questions, over a valid assertion of his Fifth Amendment right." *Pillsbury Co. v. Conboy*, 459 U.S. 248, 256–57 (1983).

If this case continues, including through further officer depositions and on to disclosures of experts, filing of dispositive motions, and trial, these Fifth Amendment concerns will continue to be directly implicated. Each of the officer defendants in the protest-related cases—including the officer defendant named in this case—will face "a conflict between asserting his Fifth Amendment rights and fulfilling his legal obligations as a witness" and defendant in this civil case. *DeSilva*, 2022 WL 545063, at *4. The officers have an interest in preventing their defenses in these civil cases from providing evidence that the TCDAO may use in its prosecutions, and from prematurely disclosing to the TCDAO their defenses in the criminal cases. *Id.* ("Defendants have an interest in staying the civil trial to avoid exposing their criminal defense strategies to the prosecution."). While these concerns are present—as they continue to play out indisputably with officers refusing to testify—the prejudice to the City in preparing its defenses continues.

The prejudice the parties, including but not limited to the City, face is further illustrated by a recent letter from the TCDAO. Unsurprisingly, the TCDAO is in possession of physical evidence relevant to both his criminal prosecution and to these civil cases. *See* **Ex. 5**

("including 12-gauge shotguns, 40MM launchers, and 'less lethal' ammunition rounds"). The TCDAO is refusing to allow experts retained in these civil cases to access, inspect, or test this evidence until "the pending criminal investigations and matters collectively referred to as 'The Protest Cases'" are resolved. *Id.* No party to these civil proceedings, including the City, can adequately prepare for trial without access to the relevant evidence, including evidence currently being held under the exclusive control of the District Attorney. Thus, it is not only lack of access to the testimony of the officers facing criminal charges but also lack of access to critical physical evidence that creates the prejudice to the City's efforts to prepare its defenses.

This factor favors a stay. *Id.*; *Doe*, 2022 WL 4234954, at *6; *Kirsch*, 2022 WL 4280908, at *3; *Bean*, 220 F. Supp. 3d at 777; *Meyers*, 2016 WL 393552, at *7 & n.3 (noting the potential for plaintiffs to use civil discovery to prejudice criminal defendants); *Librado*, 2002 WL 31495988, at *3.

E. A stay supports the Court's interests.

A stay also favors judicial economy and this Court's management of its docket. *Bean*, 220 F. Supp. 3d at 777; *Meyers*, 2016 WL 393552, at *7; *Librado*, 2002 WL 31495988, at *3. If the civil cases continue, more officers will be placed in a position to assert their Fifth Amendment rights. If the prospect of criminal liability has been eliminated before trial, they would likely then be in a position of withdrawing the privilege and testifying in their own defense and on behalf of the City in support of its defenses. *Davis-Lynch, Inc. v. Moreno*, 667 F.3d 539, 547-48 (5th Cir. 2012) (discussing circumstances in which "a party may withdraw its assertion of the Fifth Amendment privilege, even at a late stage in the litigation"). That withdrawal may raise new concerns of prejudice and delay, the prospect of additional depositions, extensions of expert discovery or *Daubert* deadlines, and more. *See id.* This Court

can avoid any need to raise or resolve those legal questions by temporarily staying the proceedings. *See DeSilva*, 2022 WL 545063, at *4 (noting the possibility that resolution of the criminal case may also resolve or eliminate issues in the civil trial). Additionally, resolution of the criminal proceedings may help resolve the civil cases as well, in whole or in part, through encouraging settlement or through potential estoppel- or preclusion-type rulings. *Kirsch*, 2022 WL 4280908, at *3.

F. A stay supports the public's interests.

The public "has an interest in protecting the constitutional rights of criminal defendants" as well as in seeing both civil and criminal cases resolved promptly. *Bean*, 220 F. Supp. 3d at 778. The public interest factor weighs *against* a stay "only where, unlike here, a civil case is pending and no criminal investigation has begun." *DeSilva*, 2022 WL 545063, at *4; *Meyers*, 2016 WL 393552, at *7. Here, the public's interests are best served by temporarily staying civil discovery until the criminal process concludes so officers' constitutional rights can be protected, along with the City's rights to defend itself against claims for damages with all available evidence, including evidence from the officers. *DeSilva*, 2022 WL 545063, at *4; *Bean*, 220 F. Supp. 3d at 778; *Meyers*, 2016 WL 393552, at *7; *Shaw*, 2007 WL 1465850, at *2; *Librado*, 2002 WL 31495988.

The public has an interest in seeing these accusations against the City, against the officers, and against other non-defendant officers resolved based on all the evidence, not based on any rush to prosecute. The public also has an interest in avoiding a situation in which the City's rights to defend itself are limited by the pendency of the criminal cases. This interest can and should be protected by allowing the remaining criminal process to play out first.

III. The Court should stay these proceedings so the defendants can fully defend themselves, including through developing and presenting defenses.

The City, just like any other defendant, has a right to defend itself. A cornerstone of its defense will be whether the officer involved in the above-captioned civil rights case (or any other officers implicated in conduct Plaintiff claims affected him) committed a constitutional injury. If they did not, the related *Monell* claims against the City may fail. *See Lucky Tunes #3, L.L.C. v. Smith*, 812 Fed. Appx. 176, 183 (5th Cir. 2020) (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)). With the lack of access to the officer testimony and essential physical evidence, the City's defense will be hopelessly hamstrung.

A municipality cannot be found liable on a *Monell* claim if the plaintiff cannot show that the municipality's employees, here the officers, violated the Constitution. *Heller*, 475 U.S. at 796; *Malbrough v. Stelly*, 814 Fed. Appx. 798, n. 15 (5th Cir. 2020). The claims against the officers are thus linked by a common core of evidence to the claims against the City. *Doe*, 2022 WL 4232954, at *7. As the Court knows, the defense of qualified immunity "provides government officials with immunity from suit so long as they do not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Hutcheson v. Dallas Cnty., Tex.*, 994 F.3d 477, 480 (5th Cir. 2021) (internal quotations omitted). In this matter, the officer also has a right to pursue a qualified immunity defense, which will protect him against liability unless Plaintiff can prove both (1) that the officer involved violated his constitutional rights, and (2) that the officer's actions were objectively unreasonable in light of clearly established law at the time. *Id.* This analysis includes what actions the officer took on the day in question—a matter on which the officer has unique personal knowledge, but to which he cannot testify without abrogating his rights against self-incrimination given the ongoing criminal case.

Defending against a *Monell* claim that is based on claims of inadequate policies regarding the use of force and protest response, while the officer at issue is under criminal indictment awaiting trial, puts the City in an untenable position. The evidence the City needs to defend itself is evidence and testimony from the officers who, under advice of their counsel, have invoked and will continue to invoke their rights against self-incrimination. As this Court has noted before, when self-incrimination is at issue, neither the Plaintiff nor the City will be able to obtain the necessary discovery to prove, or disprove, their claims or defenses. *Doe*, 2022 WL 4232954, at *7. The only equitable solution at this point is a stay.

Other courts, presented with similar situations and facts, have chosen to stay *Monell* claims. *See, e.g.*, *Trent v. Wade*, 3:12-cv-01244-P, 2013 WL 12176988, at *3 (N.D. Tex. 2013). A stay under these circumstances would be based in equity and due process. If the underlying issue of whether a constitutional violation occurred or not cannot be determined because of the threat of self-incrimination faced by essential witnesses, the correct response is not to force the issue and make either side litigate with half the facts. The correct response is a stay. *Doe*, 2022 WL 4232954, at *7.

CONCLUSION

For all these reasons, Defendant City of Austin respectfully requests the Court grant this motion, stay all further proceedings in each of these matters until after the resolution of the pending parallel criminal proceeding, and award the City all other relief to which it may show itself to be entitled in connection with this motion.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN L. RILEY, LITIGATION DIVISION CHIEF

/s/ H. Gray Laird III
H. GRAY LAIRD III
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ATTORNEYS FOR DEFENDANT CITY OF AUSTIN

CERTIFICATE OF CONFERENCE

I hereby certify that I have conferred with counsel for Plaintiff and he is opposed to the relief sought in this motion. We have also conferred with counsel for co-defendant Rolan Rast and understand that the co-defendant is unopposed to the relief requested in this motion.

/s/ *H. Gray Laird III*
H. GRAY LAIRD III

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2023, a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system.

/s/ *H. Gray Laird III*
H. GRAY LAIRD III

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH,	§	
Plaintiff,	§	
v.	§	
CITY OF AUSTIN AND ROLAN RAST,	§	**CIVIL ACTION NO. 1:20-cv-01113-RP**
Defendants.	§	

PLAINTIFF'S RESPONSE PARTIALLY OPPOSING DEFENDANT CITY OF AUSTIN'S MOTION TO STAY FURTHER PROCEEDINGS

TO THE HONORABLE ROBERT PITMAN:

Plaintiff respectfully opposes *Defendant City of Austin's Motion to Stay Further Proceedings* (doc. 87) as to his state law negligence claim. Plaintiff concedes that this Court's recent ruling in the *Sanders* protest injury case is indistinguishable from the situation here and thus, the constitutional claims should be stayed pending resolution of Officer Rast's indictments.

1. **Kirsch has a negligence claim in addition to constitutional claims.**

Plaintiff's state law claim is pursuant to the Texas Tort Claims Act. "A governmental unit in the state is liable for . . . personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Tex. Civ. Prac. & Rem. Code § 101.021(2).

Plaintiff alleges that the City negligently maintained its stockpile of less lethal munitions and armed its police officers with defective munitions on May 31, 2020. (Doc. 4, at p. 15).

> 41. The City had a duty to every Austinite, including Sam, to maintain and keep its stockpiles of police equipment functional and up to date. The City had a duty to Sam and every other protester not to arm its police with expired munitions that become more dangerous with age when its police were sent to control crowds during demonstrations. Nonetheless, upon information and belief, the City knowingly armed its police with expired munitions on May 30 and May 31, 2020 and thus breached its duty to Austinites including Sam.

In other words, the substandard condition of tangible personal property (*ie* the less lethal shotgun rounds) caused Plaintiff's injuries.

2. There is little overlap between Kirsch's negligence claim and Rast's indictments.

Other than the fact that Plaintiff was impacted by one of the City's less lethal munitions, the events of May 31, 2020 are not relevant to Plaintiff's negligence claim. It doesn't matter for purposes of the TTCA claim who shot Kirsch or why they shot him or whether their use of force was justified or excessive. Plaintiff does not need to depose Officer Rast or any of the other indicted officers to prove his negligence claim.

If allowed to proceed with discovery related to the City's negligence, Plaintiff's requests will focus on the City's pre-May 31, 2020 purchase, storage, and maintenance of the munitions that were used on May 31, 2020. None of that has anything to do with the indicted officers and their Fifth Amendment rights.

3. The protracted criminal prosecutions weigh in favor of allowing the negligence claim to proceed on its own.

If Rast's criminal case was set for trial sometime in the next six to 12 months, that might be a reason to keep Plaintiff's constitutional claims and TTCA claim on the same schedule. But the fact that there is no end to the criminal cases in sight means that the Court's, public's, and parties' interests are better served by allowing the negligence case to proceed to resolution. *See* Rule 42 ("For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more

separate issues"). It is certainly possible that resolution of the negligence claim will lead to a resolution of all Kirsch's claims.

For these reasons, Plaintiff respectfully requests that the Court deny the City's motion as to his negligence claim and allow it to proceed under the current scheduling order.

Dated: July 5, 2023

Respectfully submitted,

/s/ Rebecca Webber
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ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed on July 5, 2023 via the Court's CM/ECF system, which will serve all counsel of record.

/s/ Rebecca Webber
Rebecca Webber

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

SAM KIRSCH, *Plaintiff,*	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-01113-RP**
CITY OF AUSTIN AND ROLAN RAST, *Defendants.*	§	

DEFENDANT CITY OF AUSTIN'S REPLY IN SUPPORT OF ITS MOTION TO STAY FURTHER PROCEEDINGS

Defendant City of Austin (the "City") files this Reply in Support of its Motion to Stay Further Proceedings (Doc. 87) as follows:

ARGUMENT AND AUTHORITIES

In his response, Plaintiff concedes that his constitutional claims should be stayed pending resolution of Officer Rast's indictments. Plaintiff contends that his state law negligence claim regarding the alleged substandard condition of the less-lethal shotgun rounds should not be stayed.

Plaintiff's argument is without merit. Plaintiff essentially argues that he can conduct discovery on the negligence claim in a vacuum without affecting the constitutional claims since he purportedly does not need to depose Officer Rast or any other indicted officer to prove his negligence claim. He argues that his discovery will focus solely on the City's purchase, storage and maintenance of the less-lethal munitions. However, Plaintiff ignores the fact that the need for a stay is not based only on the discovery Plaintiff needs to pursue his claims, but also on the discovery the Defendants need to defend the claims.

For example, although the Plaintiff may not need to depose the officers on the negligence claim, it is certainly reasonable in the City's defense of the negligence claim for it to consider

deposing the officers and questioning them about their knowledge of the condition of the munitions and their observations of the performance of the munitions when they deployed them during training and during the protests. If the negligence claim is not stayed, the officers likely would invoke their Fifth Amendment rights in response to this line of questioning. As a result, the City would be precluded from discovering factual information useful in the defense of the negligence claim.

Conducting discovery in piecemeal fashion in this manner does not protect the interests of the Court, parties or public. It also does not advance potential resolution of the claims since it would likely lead to piecemeal expert designations and dispositive motions practice, neither of which will aid in any ultimate resolution of the claims. The interests of the Court, parties and public are better served by a stay of the entire case pending resolution of the criminal proceedings. Upon resolution of the criminal proceedings, the parties can adequately and properly prosecute and defend all the claims in the normal course.

CONCLUSION

For all these reasons, Defendant City of Austin respectfully requests the Court grant the Motion to Stay and award the City all other relief to which it may show itself to be entitled in connection with this motion.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN L. RILEY, LITIGATION DIVISION CHIEF

/s/ H. Gray Laird III
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ATTORNEYS FOR DEFENDANT CITY OF AUSTIN

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2023, a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system.

/s/ H. Gray Laird III
H. GRAY LAIRD III

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, *Plaintiff*	§	
v.	§	**No. 1:20-CV-01113-RP**
CITY OF AUSTIN, ROLAN ROMAN RAST, *Defendants*	§	

ORDER

Defendant City of Austin moves to stay all further proceedings in its litigation with Plaintiff Sam Kirsch until the resolution of criminal proceedings currently pending against several Austin Police Department Officers, including Defendant Officer Roman Rast. Dkt. 87. Kirsch only partially opposes the proposed stay, conceding that the Court should grant the stay in part as to his pending constitutional claims, but asks for his negligence claim against the City to continue forward through discovery and on to trial. Dkt. 88. Having considered the record, arguments in the parties' filings, and the applicable law, the Court grants the City's motion in full and stays all further proceedings involving the City until further order from the Court.

I. BACKGROUND

Kirsch asserts various claims against Officer Rast and the City of Austin alleging violations of Kirsch's constitutional rights that allegedly occurred during his participation in a protest in downtown Austin in May 2020. Dkt. 4. Kirsch asserts two claims against the City. *Id.* at 14-16. The first arises under 42 U.S.C. § 1983,

asserting municipal liability in connection with Austin Police Department officers' use of "kinetic projectiles" (also referred to as munitions) to disperse the protesters in a manner that violated their constitutional rights. *Id.* at 14-15. This same conduct led the Travis County District Attorney to obtain criminal indictments against several of the officers, including Defendant Officer Rast.[1] *See* Dkt. 53-1. The undersigned has already granted Officer Rast's motion to stay the claims against him based on this same conduct, Dkt. 63, and Kirsch concedes that his § 1983 claim against the City arising from this incident should also be stayed, Dkt. 88, at 1.

But Kirsch asserts another claim against this City, this one for negligence, claiming that "[t]he City was negligent when it used expired munitions against protesters" like Kirsch and that Kirsch's injuries were more serious than they otherwise would have been because the allegedly expired munitions had "hardened." Dkt. 4, at 15-16. Kirsch opposes the City's motion to stay all proceedings related to his negligence claim. Dkt. 88.

II. LEGAL STANDARD

"The Court has broad discretion to stay proceedings in the interest of justice and in order to control its docket." *Raymond v. J.P. Morgan Chase Bank*, No. SA-20-CA-161-OLG, 2020 WL 10731935, at *1 (W.D. Tex. Sept. 24, 2020). "Proper use of this authority calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* (internal quotation marks omitted). "When a defendant in a civil case is facing criminal charges, a district court may, in its

[1] The criminal case against Officer Rast is styled *The State of Texas v. Rolan Rast*, No. D-1-DC-20-900080 (331st Crim. Dist. Ct., Travis Cnty., Tex.).

discretion, stay the civil action." *U.S. ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, 571 F. Supp. 2d 758, 761 (W.D. Tex. 2008); *see also United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983) ("Certainly, a district court may stay a civil proceeding during the pendency of a parallel criminal proceeding."). Such a stay contemplates "special circumstances" and the need to avoid "substantial and irreparable prejudice." *Little Al*, 712 F.2d at 136.

When deciding whether "special circumstances" warrant a stay, courts in the Fifth Circuit have found the following factors relevant: (1) the extent to which the issues in the criminal and civil cases overlap, (2) the status of the criminal case, (3) the private interests of the plaintiffs in proceeding expeditiously, (4) the burden on the defendants, (5) the interest of the courts, and (6) the public interest. *Olson ex rel. H.J. v. City of Burnet*, No. A-20-CV-00162-JRN, 2020 WL 9076545, at *1 (W.D. Tex. July 17, 2020) (citing *Alcala v. Texas Webb Cnty.*, 625 F. Supp. 2d 391, 397-98 (S.D. Tex. 2009)). Courts have found special circumstances where a defendant attempts to preserve his Fifth Amendment right against self-incrimination and must resolve "the conflict he would face between asserting this right and defending the civil action." *Bean v. Alcorta*, 220 F. Supp. 3d 772, 775 (W.D. Tex. 2016) (quoting *Alcala*, 625 F. Supp. 2d at 397); *see also, e.g.*, *In re Grand Jury Subpoena*, 866 F.3d 231, 234 (5th Cir. 2017) (observing that "less restrictive civil discovery could undermine an ongoing criminal investigation and subsequent criminal case").

III. DISCUSSION

Kirsch devotes less than one page of argument to his opposition. First, he contends that the facts underlying his civil negligence claim and the criminal case pending against the officers do not overlap significantly. Without any discussion or explanation, Kirsch also argues that the officers' criminal prosecution will likely drag on and that thus, "the Court's, public's, and parties' interests are better served by allowing the negligence case to proceed to resolution." Dkt. 88, at 2. While the Court agrees that there is little overlap between the facts underlying the claims, and that certainly *Kirsch*'s interests would be benefitted by allowing the negligence case to go forward, the undersigned concludes that the other factors outweigh these interests and therefore finds that the requested stay is appropriate.

A. Overlap

Kirsch contends that the facts giving rise to his negligence claim all focus on the City's actions prior to the alleged constitutional violations, focusing instead on "the City's pre-May 31, 2020[,] purchase, storage, and maintenance of the munitions that were used [during the protests]" and that this discovery and an ultimate trial on this discrete claim would not implicate the indicted officers' Fifth Amendment rights. *Id.* The City responds that Kirsch ignores the fact that while his own discovery might focus on pre-protest activity, the City, in preparing its defense, might need to depose its officers and that certain lines of questioning might stray into material that would lead an officer to invoke his Fifth Amendment rights, depriving the City of facts it might need to defend itself. The City's concern, however, is short on specifics, and the

undersigned cannot conceive of how the City's defense of this discrete claim could implicate the indicted officers' Fifth Amendment rights in any significant manner. The Court, therefore, agrees with Kirsch that this factor weighs in his favor.

B. The Parties', Public's, and Court's Interests

Kirsch undoubtedly would benefit from expeditious resolution of his claim against the City, and, even setting aside the City's concerns expressed above, the City would undoubtedly be prejudiced by being forced to litigate these claims separately, given the double-expenditure of resources it would incur. In the Court's view, these factors cancel each other out. And the undersigned sees the public's interest here as neutral (and neither party meaningfully addressed this factor).

The Court's interest, however, strongly favors trying all of Kirsch's claims in a single lawsuit. The Court has already stayed all proceedings related to Kirsch's claims against Officer Rast. And Kirsch himself concedes that his constitutional claim against the City should also be stayed. These already-stayed claims will represent the vast majority of litigation in this suit, from discovery, motion practice, and ultimately the evidence presented at trial. While it may be true that Kirsch's negligence claim *could* be carved out, the economies of scale achieved by litigating all of these claims together would be lost entirely. The parties and the Court would be forced to engage in full-blown fact and expert discovery (and any attendant motion practice), dispositive and *Daubert* motions, and a jury trial, only to do it all over again once the stay is lifted over what no one could dispute is the "main" part of the case. The undersigned cannot conclude that in this case, such an expenditure of judicial

resources, not to mention the parties', is appropriate to achieve the end proposed by Kirsch.

Having considered the factors governing the stay requested by the City, the Court concludes that the stay should be granted in full and that all proceedings in this case should be stayed until further order from the Court.

IV. ORDER

The Court **GRANTS** the City's motion, Dkt. 87, and **ORDERS** that all discovery and further proceedings in this case are **STAYED** until further order of this Court.

The Court **FURTHER ORDERS** that the City is now subject to the same obligation set out in its previous order requiring Officer Rast to periodically notify the Court of the status of the criminal proceedings pending against the indicted officers. *See* Dkt. 63, at 8. Defendants can comply with their obligations under this order by filing joint notices going forward.

SIGNED August 8, 2023.

DUSTIN M. HOWELL
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 1:20-CV-01113-RP
	§	
THE CITY OF AUSTIN and ROLAN ROMAN RAST,	§	
	§	
	§	
Defendants.	§	

DEFENDANTS THE CITY OF AUSTIN'S AND ROLAN RAST'S FIRST JOINT STATUS REPORT

Pursuant to the Court's orders (Dkts. 63, 86), Defendants The City of Austin and Rolan Rast file this First Joint Status Report.

As of the date of this report, the parallel state criminal proceeding *State of Texas v. Rolan Rast*, No. D-1-DC-23-900062, remains pending in the 331st Judicial District Court of Travis County, Texas. The next court setting—a pre-trial appearance—is scheduled for October 30, 2023.

Defendants therefore do not believe the Court's existing stay orders need to be modified at this time. Per the Court's orders, Defendants will file their next joint status report with the Court on Dec. 1, 2023.

Respectfully submitted,

BUTLER SNOW LLP

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ATTORNEYS FOR DEFENDANT CITY OF AUSTIN

CERTIFICATE OF SERVICE

I hereby certify that on September12, 2023, a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system.

/s/ Eric J.R. Nichols

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, *Plaintiff,*	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-01113-RP**
CITY OF AUSTIN AND ROLAN RAST, *Defendants.*	§	

PLAINTIFF'S MOTION TO LIFT STAY

COMES NOW, Plaintiff Sam Kirsch, by and through the undersigned counsel of record, and respectfully files this opposed Motion to Lift Stay. Plaintiff files this Motion because Defendant Rast is no longer subject to criminal prosecution for his shooting of Sam Kirsch.

As of October 16, 2023, all criminal charges against Defendant Rast have been dismissed. Ex. A, Aug. 1, 2023 Dismissal Order in Cause No. D-1-DC-20-900080; Ex. B, Oct. 16, 2023 Dismissal Order in Cause No. D-1-DC-23900062. Rast's criminal dismissal neutralizes all the factors the Court found justified staying the proceedings against Rast—overlap between the criminal and civil cases, status of the criminal case against Rast, burden on Defendant Rast, and the interests of the Court and the public. *See* Order Granting Rast's Motion to Stay (Dkt. 63) at 5-7. Officer Rast is no longer at risk of potentially making incriminating statements in his civil case that could be used against him in his criminal case. *See id.* at 5 (citing *DeSilva v. Taylor*, No. 1:21-CV-00129-RP, 2022 WL 545063, at *3 (W.D. Tex. Feb. 23, 2022)). Nor does Rast face a conflict between his Fifth Amendment rights and fulfilling his legal obligations as a witness and defendant in this case. *Id.* at 6.

None of the remaining indicted officers with current criminal proceedings pending against them for their actions during the 2020 protests are defendants in this case. The interest of the Court and the public interest now tip in favor of an expeditious resolution of this case. Because the Court based the stay of proceedings against the City of Austin on the Rast criminal trial and stay, both stays should now be lifted, and the case allowed to proceed. *See* Order Granting City of Austin's Motion to Stay (Dkt. 91) at 4-6.

For the reasons stated herein, Plaintiff respectfully requests the Court lift the stay of this case and allow litigation to proceed fully so that his claims against Defendants Rast and the City of Austin may be resolved.

Dated: November 3, 2023

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF CONFERENCE

I certify that the following took place before the filing of this Motion: Counsel for Plaintiff emailed counsel for both defendants on October 20, 2023, and again on October 23, 2023, to discuss lifting the stay based on the dismissal of the Rast criminal case. Counsel for both defendants responded via email on October 24, 2023, stating their opposition. The undersigned attempted to reach counsel for both defendants via telephone on November 2, 2023 to further discuss their positions. The undersigned spoke with counsel for Officer Rast on November 3, 2023, at which time he reiterated his opposition. The undersigned was not able to reach counsel for the City of Austin via telephone.

/s/ Leigh Joseph
Leigh A. Joseph

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing served on all counsel of record via the electronic mail on November 3, 2023.

/s/ Leigh Joseph
Leigh A. Joseph

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, Plaintiff, v. THE CITY OF AUSTIN and ROLAN ROMAN RAST, Defendants.	§ § § § § § § § § §	CIVIL ACTION NO. 1:20-CV-01113-RP

DEFENDANTS' JOINT RESPONSE TO PLAINTIFF'S MOTION TO LIFT STAY

Defendant The City of Austin (the "City") and Officer Defendant Rolan Roman Rast ("Officer Rast") (collectively, "Defendants") file this joint response opposing the motion by Plaintiff Sam Kirsch ("Plaintiff") to lift the stay currently in place in this matter (Dkt. 94).

SUMMARY

Plaintiff's page-and-a-half motion does not provide sufficient grounds on which to lift the stay currently in place for this civil case. The motion wholly fails to address the core principle that the Defendants cannot defend themselves while officers whose testimony is crucial to address Plaintiff's claims and the Defendants' defenses are under indictment. Plaintiff seeks to impose civil liability on the Defendants with respect to conduct over which Austin Police Department officers still face pending criminal charges. This includes the 2020 protest incident allegedly involving Kirsch, as well as other incidents for which Plaintiff seeks to establish a "pattern" on which he claims the City is liable under a *Monell* theory.

The Court, when staying this case first as to Officer Rast and then as to the City of Austin, recognized that the charges against Officer Rast were not the sole basis for the stay. Instead, there

were and are current criminal indictments and investigations against Austin Police Department officers which prevent potentially necessary witnesses from testifying in this civil matter.

Civil Case Name:	Officers under indictment:	Criminal Docket Number:
Jason Gallagher (NO. 1:20-CV-00901)	1. John Siegel	1. D-1-DC-20-900072
Alyssa Sanders (NO. 1:22-CV-314)	1. Eric Heim	1. D-1-DC-20-900076
Steven Arawn (NO. 1:20-CV-1118-RP)	1. Joshua Jackson 2. John Siegel 3. Justin Berry	1. D-1-DC-22-900010 2. D-1-DC-20-900072 3. D-1-DC-20-900055
Nicole Underwood (NO. 1:22-CV-00032)	1. John Siegel	1. D-1-DC-20-900072
Jose Herrera (No. 1:20-CV-01134-RP)	1. James Morgan	1. D-1-DC-22-900053
Bomani Ray Barton (No. 1:22-CV-00221-RP)	1. Kyu An	1. D-1-DC-20-900057
Meredith Drake (No. 1:20-CV-00956-RP)	1. Chance Bretches	1. D-1-DC-20-900056
Anthony Evans (No. 1:20-CV-01057-RP)	1. Kyle Felton	1. D-1-DC-20-900054
Justin Howell (No. 1:21-CV-00749-RP)	1. Kyle Felton 2. Jeffrey Teng	1. D-1-DC-23-900066 2. D-1-DC-23-900065
Meredith Williams (No. 1:22-CV-00042-RP)	1. Joseph Cast	1. D-1-DC-20-900061
Christen Warkoczewski (No. 1:21-CV-00739-RP)	1. Brett Tableriou 2. Jeremy Fisher 3. Christopher Irwin 4. Todd Gilbertson 5. Alexander Lomovstev 6. Joshua Blake 7. Joshua Jackson 8. Stanley Vick 9. Justin Berry	1. D-1-DC-22-900018 2. D-1-DC-22-900011 3. D-1-DC-22-900012 4. D-1-DC-21-900125 5. D-1-DC-21-900126 6. D-1-DC-22-900019 7. D-1-DC-22-900010 8. D-1-DC-22-900009 9. D-1-DC-20-900055
Ge'Micah Volter-Jones (No. 1:22-CV-00511)	1. Edward Boudreau 2. Derrick Lehman	1. D-1-DC-22-900020 2. D-1-DC-20-900071

See also **Ex. 1** (TCDAO Civil Right's Unit's Case Summary Press Release).

The pending criminal cases prevent key witnesses from testifying in this civil case, which in turn prevents Defendants from working up, much less presenting, a full defense against the civil claims. In addition, physical evidence related to the pending charges is held under the control of the Travis County District Attorney's Office. Regardless of Officer Rast's ability to testify in this matter, both he and the City will need access to testimony and evidence that is currently unavailable due to these ongoing criminal proceedings. There is no proper basis at this time for a motion to lift the Court's stay.

BACKGROUND AND ARGUMENT AND AUTHORITIES

In his amended complaint (Dkt. 4), Plaintiff asserted claims against both Officer Rast and the City. Plaintiff's claims against Officer Rast focus on Officer Rast's alleged violation of Plaintiff's constitutional rights. *Id*. at 13-14. Plaintiff asserted two claims against the City; one for negligence relating to the storage and handling of the munitions used by the Austin Police Department during the protests, and the other a *Monell* claim that alleged a litany of failures by the City, including failure to train, failure to supervise, failure to intervene, failure to investigate, and a failure to discipline. *Id*. at 14-15. The *Monell* claim's allegations reach far beyond Officer Rast into the Austin Police Department. *See id*.

After Plaintiff filed his complaint against the City and Officer Rast, the TCDAO indicted Rast for conduct allegedly involving Plaintiff. **Ex. 2** (Feb. 2022 Indictment for two counts of Aggravated Assault by a Public Servant). Based on his indictment, Officer Rast moved to stay the entire case in June 2022. (Dkt. 51.) The Court granted the motion, staying all discovery and further proceedings against Officer Rast. (Dkt. 63.) In reaching that decision, the Court noted that Kirsch's claims ". . . are based almost entirely on the conduct forming the basis of the indictment

pending against him . . .” *Id*. at 4. That overlap between the indictment and Kirsch’s claims favored a stay. *Id*.

In May 2023, after the Court stayed this case as to Officer Rast, the TCDAO reindicted Officer Rast, as well as other two Austin Police Departments officers—Officer Joseph Peche (“Officer Peche”) and Officer Joseph Murray (“Officer Murray”), for allegedly discharging a firearm at Kirsch. **Exs. 3-5** (Indictments of Officer Rast, Officer Peche, and Officer Murray for Deadly Conduct Discharge Firearm).

A month after the new indictments, the City moved to stay the remainder of the case. (Dkt. 87.) Since the issuance of the first stay, the City had worked to conduct discovery as much as possibly but ran eventually ran into the same wall that still exists: evidence and testimony necessary to its defense was unobtainable due to potential criminal liability and ongoing criminal actions and investigations. In its motion, the City expanded on this issue, specifically arguing that Officer Rast’s indictment and threat of criminal liability prevented it from obtaining testimony and evidence necessary to defend itself but also urging the Court to look beyond Officer Rast to the numerous other Austin Police Department officers who had been indicted by the TCDAO, or who at the time were still under investigation by the TCDAO Civil Rights Unit. The City argued that the criminal indictments and investigations of those officers overlapped with Plaintiff’s *Monell* allegations to an extent that was actively preventing the City from obtaining necessary testimony and evidence. *See id*. at 2-5. This conflict between the individual officer’s rights against self-incrimination and the City’s right to defend itself thus warranted a stay.

The Court agreed. (Dkt. 91.) In its order, the Court noted that Plaintiff’s *Monell* claim involves “the same conduct [that] led the Travis County District Attorney to obtain criminal indictments against *several* of the officers, including Defendant Officer Rast.” *Id*. at 2 (emphasis

added). It also expressed that its interest "strongly favors trying all of Kirsch's claims in a single lawsuit" and that the *Monell* claim and the individual Section 1983 claims against Officer Rast "represent the vast majority of litigation in this suit, from discovery, motion practice, and ultimately the evidence presented at trial." *Id*. at 5. That decision mirrored the analysis the Court has applied to other motions to stay filed by the City in other civil claims arising out of the 2020 protest response, such as in *Sanders v. City of Austin*, No. 1-22-CV-00314-RP.

On October 16, 2023, the TCDAO dismissed its indictment against Officer Rast. **Ex. 6** (Dismissal of Indictment), **Ex. 7** (docket sheet). The indictments against Officer Murray and Officer Peche, which also alleged deadly conduct with respect to Plaintiff, were not dismissed and remain pending. **Ex. 8** (docket sheet from Officer Murray's criminal proceeding); **Ex. 9** (docket sheet from Officer Peche's criminal proceeding). So do the other indictments as listed above filed against other officers involved in the 2020 protest response.

After Officer Rast's indictment was dismissed, Plaintiff moved to lift the Court's entire stay, based solely on the argument that "Defendant Rast is no longer subject to criminal prosecution for his shooting of Sam Kirsch." (Dkt. 94.) Plaintiff does not attempt to address the City's previous arguments, or the Court's findings, that other Austin Police Department officers who are either currently indicted—like Officer Murray and Officer Peche, who are indicted for actions allegedly taken against Plaintiff during the protests—or who are facing criminal indictments arising out of other incidents that form the basis of Plaintiff's claims and cannot be called to testify without fear of self-incrimination. He instead attempts to hand-wave that issue away by noting that no officers other than Officer Rast have been named as defendants in this case. *Id*. Defendants now file this response opposing Plaintiff's motion.

The Court's prior analysis staying this case was clear: on balance, the applicable factors favored staying this case in light of the ongoing overlap between criminal indictments and investigations of Austin Police Department officers—including but not limited to Officer Rast—and the claims in this case. The fact that an indictment against one officer was dismissed does not change that analysis, nor does the fact that the officer in question is a named defendant in this case and the other officers are not. Defendants' position, argued in previous motions in this matter and in similar issues in other related cases before this Court, is unchanged: civil matters arising out of the 2020 protests should be stayed until *all* pending criminal issues connected to this case are resolved.

There is no dispute that there are Austin Police Department officers who still face the potential criminal liability for actions taken during the 2020 protests, actions which this Court has noted are part and parcel of Plaintiff's claims in this case. There is also no dispute that there are Austin Police Department officers who are currently under indictment with respect to actions allegedly taken with respect to Plaintiff. And there is no dispute that the pending criminal cases investigations against all those officers overlap with the subject matter of this case. Plaintiff's motion thus fails to address the Court's full reasoning for staying this matter in the first place.

Instead, Plaintiff concludes in summary fashion that Officer Rast's dismissal "neutralizes" all the factors the Court found "justifying" its current stay. (Dkt. 94.) Kirsch wholly fails to address the aspect of the Court's order that is based on the Defendants' ability to present an adequate defense against his claims. Officer Rast is one witness among many relevant to the sweeping nature of Kirsch's claims.

The relevant law that underlies the Court's order has not changed either. "The Court has broad discretion to stay proceedings in the interest of justice and in order to control its docket."

Raymond v. J.P. Morgan Chase Bank, No. SA-20- CA-161-OLG, 2020 WL 10731935, at *1 (W.D. Tex. Sept. 24, 2020). "Proper use of this authority calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id*. (internal quotation marks omitted); *see also United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983) ("Certainly, a district court may stay a civil proceeding during the pendency of a parallel criminal proceeding."). Such a stay contemplates "special circumstances" and the need to avoid "substantial and irreparable prejudice." *Little Al*, 712 F.2d at 136. When deciding whether "special circumstances" warrant a stay, courts in the Fifth Circuit have found the following factors relevant: (1) the extent to which the issues in the criminal and civil cases overlap, (2) the status of the criminal case, (3) the private interests of the plaintiffs in proceeding expeditiously, (4) the burden on the defendants, (5) the interest of the courts, and (6) the public interest. *Olson ex rel. H.J. v. City of Burnet*, No. A-20-CV-00162-JRN, 2020 WL 9076545, at *1 (W.D. Tex. July 17, 2020) (citing *Alcala v. Texas Webb Cnty*., 625 F. Supp. 2d 391, 397-98 (S.D. Tex. 2009)); *see also, e.g., In re Grand Jury Subpoena*, 866 F.3d 231, 234 (5th Cir. 2017) (observing that "less restrictive civil discovery could undermine an ongoing criminal investigation and subsequent criminal case").

1. <u>Overlap</u>

"The extent to which issues in the criminal case overlap with those presented in the civil case generally is regarded as the most important factor in the analysis." *DeSilva v. Taylor*, No. 1:21-CV-00129-RP, 2022 WL 545063, at *3 (W.D. Tex. Feb. 23, 2022) (internal quotation marks omitted). The overlap between this civil matter and parallel ongoing criminal investigations and prosecutions is well-documented, in both this matter and in similar protests cases in front of this Court. The Court itself acknowledged this in granting Officer Rast's motion to stay. (Dkt. 63 at 4.)

The problem this overlap creates is also well-documented. *See, e.g.*, **Ex. 10** (Excerpt of Deposition of Officer K. An) at 12:10-22. Officers called to testify about the actions, events, orders, and training surrounding 2020 protests have and will continue to invoke their Fifth Amendment rights against self-incrimination. The threat of criminal liability on essential witnesses is not ephemeral or illusory—it is real.

This presents a problem for both the City and for Officer Rast. For the City, testimony of officers besides Officer Rast is essential to defending itself against Plaintiff's *Monell* claim. For Officer Rast, testimony from those same officers will be necessary to present a full defense against Plaintiff's claims of alleged constitutional violations; those officers who have and would likely invoke their right against self-incrimination are the same individuals who could be called as witnesses to testify to the conduct of the protest crowd (allegedly including Plaintiff) and responding officers (alleged including Officers Rast, Murray, and Peche), as well as a number of other relevant issues in this case, such as officer deployment, training, and tactics. This conundrum is particularly apparent for Officer Murray and Officer Peche; like Officer Rast, they were indicted for Deadly Conduct Discharge of Firearm. Specifically, all three were charged in indictments carrying the identical language: "on or about the 31st day of May, 2020 . . . did then and there knowingly discharge a firearm at or in the direction of one or more individuals, namely: SAMUEL KIRSCH." **Exs. 4-5** (emphasis added). In other words, Officers Murray and Peche are under active indictment for the alleged conduct that underlies Kirsch's claims against Officer Rast.

2. <u>The Status of the Criminal Cases</u>

Officer Murray's and Officer's Peches's criminal cases are ongoing. So too are many other indictments against Austin Police Department officers for actions taken in the 2020 protests, and

more are under investigation by the TCDAO for potential indictment. These ongoing indictments and investigations, which have already been shown to be impediments to these cases, favor a stay.

3. The Parties' and the Public's Interest

Kirsch obviously has an interest in having his claims against the City and Officer Rast proceed. (Dkt. 63 at 5; Dkt. 91 at 5.) But Officer Rast and the City have a countervailing interest in being allowed to defend themselves against those claims, with testimony and physical evidence. The Court's prior conclusion that these interests weighed equally was sound then, and remains so in light of the indisputably pending criminal proceedings. (Dkt. 91.)

4. The Court's Interests

The Court has been clear that it will try all of Kirsch's claims together. (Dkt. 91 at 5.) When it has been asked to sever claims within this suit and parse which may proceed and which should be stayed, it has declined to do so, citing the unnecessary potential expenditure of judicial resources. *Id*. Regardless of the status of Officer Rast's personal indictment, neither Defendant can present a full defense of all claims brought by Kirsch at this time. As such, lifting the stay, even as to only one party or one claim, would breach the line the Court has already set. It also invites subsequent motion practice and wasted resources as individual witnesses make the decision on whether to invoke their right against self-incrimination and the parties fight about which are necessary to this case and which are not. The Court's prior resolution on suggestions of piecemeal litigation was sound then and is sound now. The stay should remain in place.

CONCLUSION

For all these reasons, and those briefed in connection with the stay issues, Defendants The City of Austin and Rolan Roman Rast respectfully request that the Court deny Plaintiff Sam

Kirsch's motion, keep the stay in this case, and award the City all other relief to which it may show itself to be entitled in connection with this motion.

.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT ROLAN ROMAN RAST

CERTIFICATE OF SERVICE

I hereby certify that November 10, 2023, a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system.

/s/ Eric J.R. Nichols
Eric J.R. Nichols

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, *Plaintiff,*	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-01113-RP**
CITY OF AUSTIN AND ROLAN RAST, *Defendants.*	§	

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO LIFT STAY

COMES NOW, Plaintiff Sam Kirsch, by and through the undersigned counsel of record, and respectfully files his Reply in Support of Motion to Lift Stay (Dkt. 94).

I. Introduction

Defendants' Joint Response to Motion to Lift Stay (Dkt. 95) calls out Plaintiff's Motion for its brevity. Plaintiff's simple Motion addresses a simple issue: Does Rast's criminal dismissal justify lifting the stay in this case? Yes, it does. With the dismissal of the criminal proceedings against Rast, the balance of factors now weighs in favor of lifting the stay and proceeding with this case.

Defendants sweep distinctions between Rast and other indicted officers aside, encouraging the Court to see circumstances supporting the stay in this case as largely unchanged. But the circumstances today differ vastly from those at the time the Court granted the stay. The individual Defendant (Rast) may now participate fully without concern for revealing incriminating information that could be used against him in criminal proceedings. That a handful of the hundreds of Austin police officers who participated in the protest response remain under indictment does not support a continued stay of this case.

II. Legal Standard

As the Court is well-aware, even in parallel civil and criminal proceedings (which are no longer present here), there is no general rule barring simultaneous prosecution. *Bean v. Alcorta*, 220 F. Supp. 3d 772, 775 (W.D. Tex. 2016) (citing *Buehler v. City of Gonzales*, No. 5:15–CV–198, 2015 WL 3651573, at *1 (W.D. Tex. June 11, 2015) (quoting *Sec. Exch. Comm'n v. First Fin. Grp. of Tex., Inc.*, 659 F.2d 660, 666 (5th Cir. 1981))). Courts use their judicial discretion to grant such stays based on "special circumstances" and "the need to avoid substantial and irreparable prejudice." *Id.* (quoting *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962); *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983)).

One such circumstance (no longer present in this case) "is to preserve a defendant's Fifth Amendment right against self-incrimination and to resolve the conflict he would face between asserting this right and defending the civil action." *Id.* (quoting *Alcala v. Tex. Webb Cty.*, 625 F.Supp.2d 391, 397 (S.D. Tex. 2009)) (emphasis added). However, "[a] mere relationship between civil and criminal proceedings ... does not necessarily warrant a stay." *Id.* (quoting *United States ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, 571 F.Supp.2d 758, 762 (W.D. Tex. 2008)).

III. Argument and Authorities

A. The Court Originally Stayed this Case Based on Rast's Indictment.

Defendants repeatedly insinuate throughout their response that the Court based the current stay on the indictment, not only of Rast, but also of other officers for their actions during the 2020 protests. This does not appear to be the case. The stay of this case occurred in two parts.

First, the Court stayed the case against Officer Rast only based on the substantial overlap with the criminal indictment against Rast and the conflict Rast therefore faced between his Fifth Amendment Rights and civil legal obligations. Order Granting Stay (Dkt. 63) at 4-6. Those factors

also led the Court to find that both judicial economy and the public interest weighed in favor of staying the civil case. *Id.* at 6-7. In granting the stay, the Court expressly relied on authority specifically contemplating a defendant facing criminal charges. *Id.* at 3.

Second, the Court stayed the case against the City based on its own interest in the judicial economy of litigating all of Kirsch's claims together.[1] Order Granting Stay (Dkt. 91) at 4-5 (finding other factors neutral or in Kirsch's favor). In other words, the Court based the stay against the City on the stay of proceedings against Rast.

The dismissal of criminal proceedings against Rast eliminated the basis for a stay of the civil proceedings against him. With no basis for a stay of Kirsch's claims against Rast, it follows that there is also no basis for a stay of Kirsch's claims against the City.

B. Indictments Against Non-Party Officers do not Justify a Continued Stay.

Even if the Court did consider the indictments against other officers when initially granting the stay, in the absence of criminal proceedings against Rast, those other indictments alone are insufficient to support a further stay. Many of the indictments identified by Defendants relate to conduct that occurred on a different day and/or at a different location from the shooting of Kirsch, and Defendants have made no showing as to why they would support a stay of these proceedings.[2]

Defendants may elect to depose any number of other officers present at the scene of Kirsch's shooting who are not under indictment. The City already identified two of them in its initial disclosures—Dustin Turner and Bryan Andrew Pietrowski. Ex. 1, City of Austin Initial Disclosures, at 2. And even if Defendants somehow believed the indicted officers to be essential

[1] The Court declined to evaluate whether Kirsch's constitutional claims against the City warranted a stay on their own because Plaintiff conceded that those claims would appropriately follow the stay of his claims against Rast. Dkt. 91 at 5.

[2] *E.g.,* Edward Boudreau and Derrick Lehman, indicted for conduct occurring on May 30, 2020 heading downtown from Riverside Drive.

to their case, the Court has previously determined that they can participate in this case without significant implication of their Fifth Amendment rights.

The Court considered and rejected Defendants' argument that "the City, in preparing its defense, might need to depose its officers and that certain lines of questioning might stray into material that would lead an officer to invoke his Fifth Amendment rights, depriving the City of facts it might need to defend itself." Dkt. 91 at 4. In response to that argument, the Court held, "The City's concern, however, is short on specifics, and the undersigned cannot conceive of how the City's defense of this discrete claim could implicate the indicted officers' Fifth Amendment rights in any significant manner." *Id.* at 4-5.

C. Defendants Attempt to Entangle Murray and Peche into this Lawsuit is a Red Herring.

Despite Defendants' arguments, Officers Murray and Peche are positioned no differently with respect to this lawsuit than any of the other non-party indicted officers. Plaintiff has brought no claims against them, and they are not parties to this case. Therefore, their indictments do not justify a stay. Even more, neither of them is criminally accused of injuring Plaintiff, only of shooting in his direction. Defs.'Joint Response (Dkt. 95) Exs. 4, 5. This is distinct from most of the other indictments Defendants reference, wherein the officer is accused of causing serious bodily injury to a particular named individual. Ex. 2, Collected Indictments. Further, as mentioned above, the City used the exact same language it used to identify Murray and Peche to identify two other officers—Dustin Turner and Bryan Andrew Pietrowski—who have not been indicted. With regard to each of the four officers' knowledge of the facts underlying the case, the City states that the officer "was in the vicinity of I-35 on the date of this incident and may have knowledge of the crowd's actions in the vicinity and APD officers' efforts at crowd control." Ex. 1 at 2 (emphasis

added). As non-parties, Murray and Peche do not hold any special status as witnesses in this case that would support a stay based on their indictments.

IV. Conclusion

For the reasons stated herein, Plaintiff respectfully requests the Court lift the stay of this case and allow litigation related to the life-altering injury Officer Rast and the Austin Police Department inflicted upon him more than three years ago to proceed fully.

Dated: December 1, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing served on all counsel of record via the electronic mail on December 1, 2023.

/s/ Leigh Joseph
Leigh A. Joseph

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, *Plaintiff,*	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-01113-RP**
CITY OF AUSTIN AND ROLAN RAST, *Defendants.*	§	

JOINT ADVISORY REGARDING MOTION TO LIFT STAY

Plaintiff's Motion to Lift Stay (Dkt. 94) is currently set for hearing on January 22, 2024. The parties file this joint advisory to inform the Court that Defendants withdraw their opposition to the Motion. Because Defendants no longer oppose the Motion, a hearing is not necessary. A proposed order lifting the stay is being filed concurrently with this Joint Advisory. The parties agree that a new scheduling order is necessary and are working on a new proposed schedule, which the parties will submit separately to the Court.

Dated: January 18, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing served on all counsel of record via the electronic mail on January 18, 2024.

/s/ Leigh Joseph
Leigh A. Joseph

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH,	§	
	§	
Plaintiff,	§	
	§	
v.	§	1:20-CV-1113-RP
	§	
CITY OF AUSTIN and ROLAN RAST,	§	
	§	
Defendants.	§	

ORDER

On August 5, 2022, United States Magistrate Judge Dustin Howell granted Defendant Rolan Rast's ("Officer Rast") motions to stay the case with respect to himself, (Dkts. 51, 53). (Dkt. 63). On August 8, 2023, Judge Howell granted Defendant City of Austin's (the "City") motion to stay the case with respect to itself, (Dkt. 87). (Dkt. 91). On November 3, 2023, Plaintiff Sam Kirsch ("Kirsch") filed an opposed motion to lift the stay with respect to all parties, indicating that criminal proceedings against Officer Rast have been dismissed. (Dkt. 94). Officer Rast and the City filed a response in opposition, (Dkt. 95), and Kirsch filed a reply, (Dkt. 98). On January 18, 2024, the parties filed a "joint advisory to inform the Court that Defendants withdraw their opposition to" Kirsch's motion to lift the stay. (Dkt. 102).

Accordingly, **IT IS ORDERED** that the stays are **LIFTED** with respect to both the City and Officer Rast.

IT IS FURTHER ORDERED that the hearing on the motion to lift the stay set for January 22, 2024, (Dkt. 100), is **CANCELED**.

IT IS FURTHER ORDERED that the parties file a revised joint proposed scheduling order on or before **February 2, 2024**. The parties should consult the website for the U.S. District

Court for the Western District of Texas (www.txwd.uscourts.gov), select the "Judges' Info" tab, "Standing Orders," "Austin Division," and file the joint proposed scheduling order utilizing District Judge Robert Pitman's form.

SIGNED on January 19, 2024.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, *Plaintiff,*	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-01113-RP**
CITY OF AUSTIN AND ROLAN RAST, *Defendants.*	§	

PLAINTIFF'S SECOND AMENDED COMPLAINT

TO THE HONORABLE COURT:

I. Introduction

This is a lawsuit about Officer Rolan Roman Rast who shot Plaintiff Sam Kirsch in the face to punish him for participating in a peaceful protest against police brutality on Interstate 35. Officer Rast shot Sam in the head with a so-called "less lethal" projectile moments after Sam had been peacefully exercising his constitutional right to assemble with like-minded people and protest the government. Shockingly, Officer Rast shot Sam *while* Sam was following police commands to disburse and *after* Sam had stopped protesting and had already left the highway.

This lawsuit is also about the City of Austin's appalling response to protests—especially its pattern of violently violating demonstrators' civil rights—during the weekend of May 30-31, 2020. The City compounded its mishandling of the situation by failing to investigate or attempt to deter further misconduct by Officer Rast and other police. Sam described the events of May 31 in detail at a City Council meeting attended by the police chief and his assistant chiefs on June 4. A month later, on July 2, Austin police denied knowing anything about Sam or his injury.

Finally, based on multiple credible sources, the City caused severe injuries by allowing its stockpile of "less-lethal" munitions to expire, and thus harden, and then arming its police with these expired munitions for crowd control during peaceful demonstrations.

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II. Parties

1. Sam Kirsch is a resident of Austin, Texas.

2. The City of Austin is a Texas municipal corporation in the Western District of Texas. At the time of the events at issue, Brian Manley was Austin's policymaker when it comes to policing.

3. Officer Rolan Roman Rast is the Austin police officer who shot Sam.

4. Newly added Defendant Safariland, LLC is a foreign limited liability company. Defendant Safariland, LLC may be served with process upon its registered agent CT Corporation System at 1999 Bryan St. Suite 900, Dallas, Texas 75201.

5. Newly added Defendant Defense Technology is a foreign limited liability company. Defendant Defense Technology, LLC may be served with process upon its registered agent CT Corporation System at 1999 Bryan St. Suite 900, Dallas, Texas 7520l.

6. Newly added Defendant CSI Combined Systems, Incorporated is a foreign corporation located at 388 Kinsman Road, Jamestown, Pennsylvania. Defendant CSI Combined Systems may be served with process through the Texas Secretary of State.

III. Jurisdiction

7. This Court has federal question subject matter jurisdiction over this 42 U.S.C. § 1983 lawsuit under 28 U.S.C. § 1331.

8. This Court has general personal jurisdiction over Officer Rast because he works and lives in Texas. The City of Austin is subject to general personal jurisdiction because it is a Texas municipality.

9. This Court has specific personal jurisdiction over Officer Rast and the City because this case is about their conduct that occurred here in Austin, Texas.

10. This Court has jurisdiction over Safariland, LLC, Defense Technology, and CSI Combined Systems, Incorporated because said Defendants do business in the State of Texas.

IV. Venue

11. Under 28 U.S.C. § 1391(b), the Western District of Texas is the correct venue for this lawsuit because the events described above and below occurred in Austin.

V. Facts

A. Officer Rast shot Sam Kirsch even though Sam was doing nothing wrong.

12. On May 31, 2020 at 4:00pm, Sam Kirsch was peacefully exercising his constitutional right to assemble and protest the government. This picture from KXAN shows Sam sitting in the northbound lanes of Interstate 35 adjacent to Austin police headquarters with a large crowd of peaceful protesters:

13. At 4:00 pm, Austin police began tear-gassing the protesters. Moments later police began ordering demonstrators to clear the highway and simultaneously began shooting so-called "less lethal" projectiles at various protestors. This screenshot of drone video shows the scene when the tear gas started:

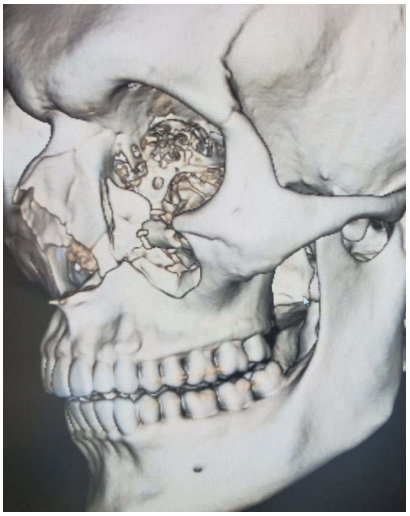
14. In response to the tear gas, Sam, like everyone else, scrambled to get off the highway. He opened an umbrella he had in his backpack and held it on the side of his body that was closest to the police for protection as he ran:

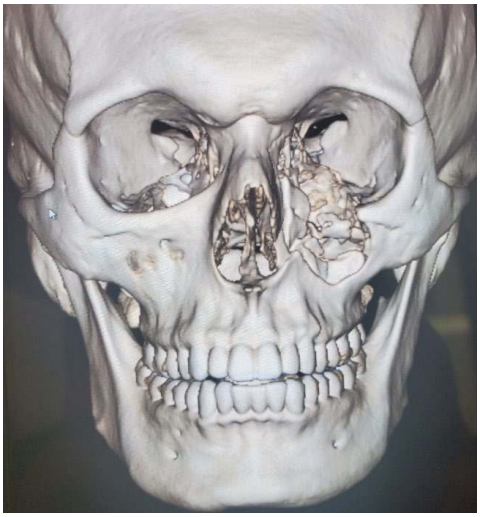
15. As Sam ran up the steep grassy median between the northbound lanes of the Interstate and the northbound frontage road, he turned and looked back over his shoulder. In doing so, he lowered his umbrella, and, in that moment, Officer Rast shot him in the head. Sam fell forward and downhill onto the ground when he was shot:

16. Multiple protesters who had been running up the hill to escape the shooting, turned back to help Sam who was bleeding profusely and was blinded. The group of Good Samaritans worked together to get Sam up the hill and further away from police:

17. One of the Good Samaritans pulled her car adjacent to where the group was tending to Sam and the group loaded Sam into the back seat. Two women drove Sam to the emergency room at Dell Seton Medical Center.

18. Sam was admitted to the hospital and underwent the first of his three surgeries to date (there will likely be more surgeries to try to preserve Sam's remaining eyesight). These pictures of Sam's skull taken on May 31, 2020 show the hole that Officer Rast shot into Sam's orbital cavity and cheekbone:





19. Sam's surgeon made this mold of Sam's face to practice fitting the metal implants before Sam underwent Open Reduction Internal Fixation (ORIF) surgery on June 9 (the second of Sam's three surgeries to date):

This is an image of Sam's face with the metal implants after the ORIF surgery on June 9:

20. The metal implants in Sam's face are permanent. The structure of Sam's face and his eyesight will never fully heal. Officer Rast's excessive and unjustified use of force permanently disabled Sam.

21. On May 31, *Texas Tribune* journalists collected spent munitions fired by Austin police at demonstrators, including Sam, that day:

https://www.texastribune.org/2020/06/03/texas-police-force-protests-george-floyd/.

22. Austin police Chief Brian Manley later identified the types of munitions that he ordered his officers to carry and use on May 31. Under questioning from the Austin City Council—and referring to the picture of expended projectiles collected by *Texas Tribune* journalists (above)—he stated:

> And then since you've got these pictures up here, what I see is the 12-gauge munition is the one on the direct left. That is a foam baton round, and so that -- rubber bullets are -- and I guess maybe it's a misnomer -- rubber bullets are also from a 12-gauge shotgun something you do as a skip round into the answering or something. That is a foam baton round that we also have access and use of. That's what that larger one is that's being held there. And then of course the one in the middle is a gas can, and I don't know whether that is smoke or whether that was the cs can.

https://www.austintexas.gov/edims/document.cfm?id=341786 (Transcript Austin City Council, June 4, 2020).

23. Upon information and belief, Officer Rast shot Sam with a 40mm "foam baton" round or a 12-gauge round filled with lead pellets.

24. Upon information and belief, the City armed its police on May 30 and May 31 with expired munitions which had hardened over time and thus caused more severe injuries than munitions used within the manufacturers' recommended time frames.

B. At best, the City tried to ignore what happened to Sam.

25. At the same City Council meeting where Brian Manley gave the testimony above, Sam testified in detail about what happened to him:

> >> The next speaker is Samuel kirsch. You have three minutes.
> >> Sam: Hello. This is Sam. Can you all hear me?
> >> Yes.
> >> Sam: Hello?
> >> Mayor Adler: Yes. Please proceed.
> >> Sam: Okay, thank you. First of all, I want to thank mayor Adler and the city council for allowing me to speak today. So I was peacefully protesting on Sunday, may 31st, in solidarity with black lives matter. When I was near I-35, police started using what I believe was smoke grenades, which is when I started running away. While I was on the grass, while I was running away, I was shot with what I believe to be either a rubber bullet or a beanbag. I was hit in my face. If I were not wearing

> sunglasses at the time, I have no doubt in my mind that I would be blind right now. I immediately hit the ground and was dragged away by fellow protesters and I was rushed to the hospital. There was blood all over my chest, and my hands. It felt like a war zone. I did not know what was going on, and it all happened extremely quickly. The damage that I took was a very large laceration due to the cut from the sunglasses, from the bullet hitting them. I suffered a broken nose. I believe it was also five or six broken bones near my upper cheek and the bone supporting my eye. I also have hopefully temporary retinal bruising. I have to undergo another surgery in a week. That surgery is risky, because I will be getting multiple titanium plates to support my eye. There's a risk for the -- for my body to reject those plates. There's a risk for infection with those plates. There's also a risk of going blind from the surgery, because when they do the surgery, they have to make an incision in my lower left eyelid. And there's also a significant risk, I was told by an ophthalmologist, of permanent vision loss, either temporary or -- either partial or permanent, even if the surgery goes well. I'm currently unable to eat anything except pureeed food, I have to drink through a straw. I have double vision, I have no depth perception, I am in enormous pain, both physically, emotionally and soon to be financially. And I would like to thank some of those councilmembers that have called out the police chief for not showing his face, and for not having sufficient answers to using these, quote unquote, less lethal rounds on people, protesters. I think it was wrong in any scenario. So I'm open to any questions if you have them. And thank you for allowing me to speak today.

https://www.austintexas.gov/edims/document.cfm?id=341786 (Transcript Austin City Council, June 4, 2020).

26. Brian Manley and his assistant chiefs attended the June 4 City council meeting and heard straight from Sam about what had happened. Nonetheless, Austin police denied having even heard of Sam Kirsch or his injury one month later, on July 2.

27. It was over another month before police investigators even spoke to Sam. At Sam's police interview on August 13, the lead investigator (despite having the drone footage and Sam's hospital records) stated that he did not yet have probable cause to investigate any police officer for injuring Sam. The lead investigator expressed his skepticism that Sam's injuries were caused by an Austin police officer and he attempted to have Sam implicate other protesters in his injury instead.

C. Other protesters were also severely injured.

28. A group of emergency room doctors who had treated Austinites injured by police on May 30 and May 31 at Dell Seton Medical Center, published an op-ed in *The New England Journal of Medicine* about their observations. The doctors unequivocally concluded that these munitions should not be used for crowd control, stating:

> In Austin, Texas, tensions culminated in 2 days of vigorous protest, during which police used beanbag munitions for crowd control, resulting in numerous clinically significant injuries.
> . . .
> At the closest level 1 trauma center, located blocks from the protests in Austin, we treated 19 patients who sustained beanbag injuries over these 2 days.
> . . .
> Four patients had intracranial hemorrhages. One patient presented with a depressed parietal skull fracture with associated subdural and subarachnoid hemorrhages, leading to emergency intubation, decompressive craniectomy, and a prolonged stay in the intensive care unit. Another patient presented with a depressed frontal bone fracture with retained beanbag, which was treated with an emergency craniotomy and cranioplasty.
> . . .
> Although our report reflects the experience at only one center during a short period and we cannot determine the frequency of injuries when these munitions are used, these findings highlight the fact that beanbag munitions can cause serious harm and are not appropriate for use in crowd control. Beanbag rounds have since been abandoned by our local law enforcement in this context.

https://www.nejm.org/doi/full/10.1056/NEJMc2025923. The doctors listed Sam's injuries among the most serious head injuries:

Table 1. Patients with Beanbag Injuries during the 2020 Protests in Austin, Texas.*

Type of Injury, Sex, and Age	Details of Injury	Course
Head injury		
F, 26 yr	5-mm Subdural hematoma, hemotympanum	Admitted to ICU, treated without operative intervention, discharged on hospital day 3
M, 20 yr	Displaced right parietal skull fracture, subarachnoid hemorrhage, 5-mm subdural hematoma	Intubated, taken to OR for craniectomy and cranioplasty, admitted to ICU, given a tracheostomy, discharged on hospital day 23 to rehabilitation facility
M, 18 yr	6-cm Scalp laceration, subarachnoid hemorrhage	Treated with washout and laceration repair, admitted to medical–surgical floor, discharged on hospital day 1
M, 16 yr	Midline comminuted, depressed frontal bone fracture; retained beanbag; bifrontal intraparenchymal hemorrhage; subarachnoid hemorrhage; subdural hematoma	Taken to OR for foreign-body removal, bifrontal craniotomy, cranioplasty, and complex wound closure; admitted to ICU; given a psychiatric consultation; discharged on hospital day 6
M, 25 yr	Inner canthus laceration; comminuted, displaced fractures of the maxilla and orbital floor	Taken to OR for washout and laceration repair, discharged on hospital day 2, given delayed ORIF for facial fractures
Facial fracture		
F, 29 yr	Open facial wound with retained beanbag in masticator space; comminuted, displaced mandibular and maxillary fractures; facial nerve palsy	Taken to OR for foreign-body removal, washout, and débridement; discharged on hospital day 1; treated with healing by secondary intention (i.e., the wound was left open to heal under a dressing)
M, 23 yr	Comminuted, displaced mandibular body fracture; avulsed teeth; complex lip and gingival lacerations	Taken to OR for closed reduction, washout, débridement, and laceration repair; discharged on hospital day 1
Other injuries		
F, 29 yr	Penetrating soft-tissue injury to chest and breast, retained beanbag	Taken to OR for foreign-body removal, washout, and débridement; discharged on hospital day 1; treated with healing by secondary intention
F, 19 yr	Open fracture of the olecranon with retained foreign bodies	Taken to OR for ORIF, débridement, and foreign-body removal; discharged on hospital day 2
M, 54 yr	Lacerations to torso and shin	Received washout and laceration repair, discharged
F, 19 yr	Laceration to eyebrow	Received washout and laceration repair, discharged
F, 43 yr	Tuft fracture	Received splinting, discharged
M, 36 yr	Abdominal abrasion, contusion	Discharged
M, 31 yr	Elbow laceration	Received washout and laceration repair, discharged
M, 22 yr	Olecranon fracture	Received sling, discharged
M, 16 yr	Contusion to forearm and leg	Discharged
F, 24 yr	Contusion to abdomen	Discharged
M, 20 yr	Contusion to abdomen, ear laceration	Received washout and laceration repair, discharged
F, 19 yr	Scalp laceration	Received washout and laceration repair, discharged

D. Defective munitions and/or labeling and warnings on munitions increased the severity of Plaintiff's injuries.

29. On March 15, 2024, Plaintiff obtained new information that enabled him to discover his newly added claims against Defense Technology, LLC, Safariland, LLC, and/or CSI Combined Systems, Incorporated (collectively, the "Beanbag Defendants").

30. Defense Technology, LLC, and Safariland, LLC, manufactured the beanbag rounds used by Defendant Rast when shooting at Plaintiff.

31. The Beanbag Defendants sold the beanbag rounds at issue to the City of Austin.

32. The specific beanbag round used against Plaintiff is the 12-Gauge Drag Stabilized Round, Model 3027 ("Model 3027"). The Model 3027 beanbag is a 12-gauge shell loaded with a 40-gram, tear-shaped bag (the "beanbag") made from a cotton and ballistic material and filled with #9 buckshot. The Model 3027 beanbag round comes with manufacturer's specifications and warnings, but none that warn the end users (law enforcement officers) that the round may become hardened and unsuitable for its intended purpose past a certain date of its manufacture or under certain conditions.

33. When the Model 3027 beanbag works properly, the tear-shaped beanbag disseminates the projectile's kinetic energy upon impact over an area of the circumference of the beanbag because the buckshot remains motile. When a subject is struck with a properly working Model 3027 beanbag, the subject is incapacitated, but not seriously injured. When the Model 3027 beanbag doesn't work as intended, the #9 buckshot in the beanbag becomes a solid mass (in effect a heavy projectile slug) whose kinetic energy is not disseminated and can cause serious bodily injuries including the penetration of skin.

34. The beanbag round that hit Plaintiff did not work properly—due to faulty design or otherwise—and as a result, Plaintiff suffered serious bodily injuries.

35. Alternatively the beanbag round that hit Plaintiff was not used properly, as a result of marketing and packaging defects. As a result, Plaintiff suffered serious bodily injuries.

VI. Claims

A. Officer Rast violated Sam Kirsch's First Amendment rights when he shot Sam in retaliation for protesting police misconduct.

36. Sam Kirsch incorporates sections I through V above into his First Amendment claim.

37. Sam brings this claim under 42 U.S.C. § 1983.

38. Sam exercised his right to free speech and his right to assemble with other demonstrators to protest police brutality on May 31, 2020.

39. Officer Rast shot Sam because Sam was protesting Austin police and other police departments around the country for their habitual use of excessive force. Officer Rast was acting under color of law when he shot Sam as retribution for Sam exercising his First Amendment rights. Officer Rast was acting under color of law when he directly and proximately caused Sam's injuries.

B. Officer Rast violated Sam Kirsch's Fourth and Fourteenth Amendment rights when he shot Sam without justification.

40. Sam Kirsch incorporates sections I through VI.A above into his Fourth and Fourteenth Amendment claims.

41. Sam brings this claim under 42 U.S.C. § 1983.

42. Officer Rast was acting under color of law when he shot Sam as he scrambled to disburse. Officer Rast shot Sam even though Sam did not pose a danger to anyone and *after* Sam had complied with police commands and left the highway.

C. Officer Rast acted with such impunity and reckless disregard for civil rights, this case warrants damages that will deter this type of misconduct in the future.

43. Sam Kirsch incorporates sections I through VI.B above into his punitive damages claim.

44. Officer Rast's actions and conduct were egregious, reckless, and endangered numerous peaceful protesters and bystanders. Sam seeks punitive damages to deter this type of retaliation and excessive force against protesters who demonstrate against police brutality in the future.

D. The City of Austin's policy of using excessive violence to control demonstration crowds violated protesters' First, Fourth, and Fourteenth Amendment rights.

45. Sam Kirsch incorporates sections I through VI.C above into his *Monell* claim.

46. Sam brings this claim under 42 U.S.C. § 1983.

47. Austin had these policies, practices, and customs on May 30-31, 2020:

a. Using dangerous kinetic projectiles that caused severe and permanent injuries to control peaceful demonstrations,

b. Using excessive force against non-violent demonstrators,

c. Failing to adequately train officers regarding civil rights protected by the United States Constitution,

d. Failing to adequately train officers in crowd control during non-violent protests,

e. Failing to adequately supervise officers doing crowd control during non-violent protests,

f. Failing to intervene to stop excessive force and civil rights violations by its officers during non-violent protests,

g. Failing to investigate excessive violence by its officers against peaceful protesters, and

h. Failing to adequately discipline officers for—and deter officers from—using excessive force and violating protesters' civil rights during demonstrations.

48. The City and Brian Manley knew about these policies and directed Austin police to comply with them. The City and Brian Manley developed and issued these policing policies with deliberate indifference to Sam's and other peaceful demonstrators' civil rights.

49. The City and Brian Manley were aware of the obvious consequences of these policies. Implementation of these policies made it predictable that Sam's constitutional rights would be violated in the manner they were, and the City and Brian Manley knew that was likely to occur. It was obvious that these policies would injure more people on May 31 because they injured so many people on May 30. The City and Brian Manley condoned and ratified the civil rights violations and the conduct that caused injuries on May 30 by continuing to mandate the same policies on May 31.

50. These polices were the moving force behind Officer Rast's violation of Sam's civil rights and thus, proximately caused Sam's severe injury and permanent disability.

E. The City was negligent when it used expired munitions against protesters.

51. Sam Kirsch incorporates sections I through VI.D above into his negligence claim.

52. The City had a duty to every Austinite, including Sam, to maintain and keep its stockpiles of police equipment functional and up to date. The City had a duty to Sam and every other protester not to arm its police with expired munitions that become more dangerous with age when its police were sent to control crowds during demonstrations. Nonetheless, upon information and belief, the City knowingly armed its police with expired munitions on May 30 and May 31, 2020 and thus breached its duty to Austinites including Sam.

53. Upon information and belief, Sam's injuries were more serious because the projectile was expired and had hardened. Upon information and belief, the City's failure to

maintain unexpired munitions stores and the deliberate decision to use expired munitions against Sam and other protesters directly and proximately caused Sam's injuries.

F. The Beanbag Defendants also bear responsibility for Plaintiff's injuries.

54. The Beanbag Defendants owe a duty of care to those who will eventually be impacted by the beanbags they manufacture and distribute. This includes a duty to manufacture rounds that work properly as well as a duty to provide adequate labeling and warnings to users of the rounds.

55. The Beanbag Defendants breached this duty and were negligent when they manufactured and distributed faulty rounds, failed to adequately label the rounds themselves and the packaging of the rounds, and/or failed to provide adequate warnings about the dangers of the beanbags expiring or becoming hard or more dangerous in certain storage conditions or after a certain period of time.

56. The Beanbag Defendants' conduct proximately caused Plaintiff's damages, including severe physical and emotional injuries, when Plaintiff was shot with one of these beanbag rounds by Defendant Rast.

57. In addition, pursuant to Texas Civil Practice and Remedies Code Chapter 82, the Beanbag Defendants are strictly liable as manufacturers and/or sellers of defective beanbag rounds, including for inadequate warnings or instructions. The defective warnings and/or marketing rendered the beanbag rounds unreasonably dangerous for their intended and foreseeable uses, thereby proximately causing Plaintiff's injuries and damages.

VII. Damages

58. Sam Kirsch incorporates sections I through VI above into this section on damages.

59. Sam seeks recovery for all of his damages including past and future pain, past and future mental anguish, past and future disfigurement, past and future physical impairment, past and future loss of enjoyment of life, past and future medical expenses, past and future lost income, past and future loss of consortium, past and future loss of services, miscellaneous other economic damages including out-of-pocket expenses, pre and post judgment interest, attorney's fees, expenses, and costs.

VIII. Request for jury trial

60. Plaintiff requests a jury trial.

IX. Prayer

61. For all these reasons, Plaintiff requests that newly added Defendants Defense Technology, LLC, Safariland, LLC, and CSI Combined Systems, Incorporated be summoned to appear and answer Plaintiff's allegations. After a jury trial regarding his claims, Plaintiff seeks to recover the damages listed above in an amount to be determined by the jury along with any other relief to which he is entitled.

Respectfully submitted,
HENDLER FLORES LAW, PLLC

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served to all counsel of record on April 3, 2024 via the Court's CM/ECF system.

Leigh A. Joseph

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH,	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-01113-RP**
	§	
CITY OF AUSTIN AND OFFICER	§	
ROLAN ROMAN RAST,	§	
Defendants.	§	

DEFENDANT CITY OF AUSTIN'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S SECOND COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant City of Austin files this Answer and Affirmative Defenses to Plaintiff's Second Amended Complaint (Doc. No. 118). Pursuant to Rules 8 and 12 of the Federal Rules of Civil Procedure, Defendant respectfully shows the Court the following:

ORIGINAL ANSWER

Pursuant to Federal Rule of Civil Procedure 8(b), Defendant responds to each of the specific averments in Plaintiff's Second Amended Complaint as set forth below. To the extent that Defendant does not address a specific averment made by Plaintiff, Defendant expressly denies that averment. [1]

This Defendant denies the allegations contained in the first section labeled "Introduction" in Plaintiff's Second Complaint.

PARTIES

1. Upon information and belief, Defendant admits the allegations contained in Paragraph 1.

2. Defendant admits the allegations contained in Paragraph 2.

[1] Paragraph numbers in Defendant's Answer correspond to the paragraphs in Plaintiffs' Second Amended Complaint.

3. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 3 and therefore denies same.

4. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 4 and therefore denies same.

5. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 5 and therefore denies same.

6. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 6 and therefore denies same.

JURISDICTION

7. Defendant admits the allegations contained in Paragraph 7.

8. Defendant admits the allegations contained in Paragraph 8.

9. Defendant admits the allegations contained in Paragraph 9.

10. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 10 and therefore denies same.

VENUE

11. Defendant admits the allegations contained in Paragraph 11.

FACTS

12. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 12 of the Second Amended Complaint and therefore denies same.

13. Defendant denies the allegations contained in Paragraph 13.

14. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 14 of the Second Amended Complaint and therefore denies same.

15. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations

contained in Paragraph 15 of the Second Amended Complaint and therefore denies same.

16. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 16 of the Second Amended Complaint and therefore denies same.

17. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 17 of the Second Amended Complaint and therefore denies same.

18. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 18 of the Second Amended Complaint and therefore denies same.

19. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 19 of the Second Amended Complaint and therefore denies same.

20. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 20 of the Second Amended Complaint and therefore denies the same.

21. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 21 of the Second Amended Complaint and therefore denies the same.

22. Upon information and belief, Defendant admits the allegations contained in Paragraph 22.

23. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 23 of the Second Amended Complaint and therefore denies same.

24. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 24 of the Amended Complaint and therefore denies same.

25. Upon information and belief, Defendant admits that Plaintiff made the comments which are quoted in Paragraph 25. Defendant is without sufficient knowledge to form a belief as

to the truth of the allegations contained in the remainder of Paragraph 25 of the Second Amended Complaint and therefore denies same.

26. Defendant admits the allegations contained in the first sentence of Paragraph 26. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in the remainder of Paragraph 26 of the Second Amended Complaint and therefore denies same.

27. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 27 of the Second Amended Complaint and therefore denies same.

28. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 28 of the Second Amended Complaint and therefore denies same.

29. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 29 and therefore denies same.

30. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 30 and therefore denies same.

31. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 31 of the Second Amended Complaint and therefore denies same.

32. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 32 and therefore denies same.

33. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 33 and therefore denies same.

34. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 34 and therefore denies same.

35. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 35 and therefore denies same.

36. Defendant adopts and incorporates its responses to the previous paragraphs of the Second Amended Complaint.

37. Defendant denies the allegations contained in Paragraph 37.

38. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 38 and therefore denies same.

39. Defendant denies the allegations contained in Paragraph 39.

40. Defendant adopts and incorporates its responses to the previous paragraphs of the Second Amended Complaint.

41. Defendant denies the allegations contained in Paragraph 41.

42. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in Paragraph 42 and therefore denies same.

43. Defendant adopts and incorporates its responses to the previous paragraphs of the Second Amended Complaint.

44. Defendant denies the allegations contained in Paragraph 44.

45. Defendant adopts and incorporates its responses to the previous paragraphs of the Second Amended Complaint.

46. Defendant denies the allegations contained in Paragraph 46.

47. Defendant denies the allegations contained in Paragraph 47.

48. Defendant denies the allegations contained in Paragraph 48.

49. Defendant denies the allegations contained in Paragraph 49.

50. Defendant denies the allegations contained in Paragraph 50.

51. Defendant adopts and incorporates its responses to the previous paragraphs of the Second Amended Complaint.

52. Defendant denies the allegations contained in Paragraph 52.

53. Defendant denies the allegations contained in Paragraph 53.

54. The allegations of this paragraph do not appear to contain factual allegations against this Defendant and therefore no response is required of this Defendant. If any allegations are construed to be allegations asserted against this Defendant, this Defendant denies those allegations.

55. The allegations of this paragraph do not appear to contain factual allegations against this Defendant and therefore no response is required of this Defendant. If any allegations are construed to be allegations asserted against this Defendant, this Defendant denies those allegations.

56. The allegations of this paragraph do not appear to contain factual allegations against this Defendant and therefore no response is required of this Defendant. If any allegations are construed to be allegations asserted against this Defendant, this Defendant denies those allegations.

57. The allegations of this paragraph do not appear to contain factual allegations against this Defendant and therefore no response is required of this Defendant. If any allegations are construed to be allegations asserted against this Defendant, this Defendant denies those allegations.

58. Defendant adopts and incorporates its responses to the previous paragraphs of the Second Amended Complaint.

59. Defendant denies the allegations contained in Paragraph 59.

60. Paragraph 60 merely contains Plaintiff's request for a jury trial and thus no response is required of this Defendant.

61. Defendant denies the allegations contained in Paragraph 61 and specifically denies that Plaintiff is entitled to any relief whatsoever from Defendant City of Austin.

AFFIRMATIVE DEFENSES

1. Defendant City of Austin asserts the affirmative defense of governmental immunity as a municipal corporation entitled to immunity while acting in the performance of its governmental functions, absent express waiver.

2. Defendant City of Austin asserts the affirmative defense of governmental immunity since its employees are entitled to qualified/official immunity for actions taken in the course and scope of their employment, absent express waiver.

3. As a political subdivision, Defendant City of Austin denies that it can be liable for exemplary/punitive damages under 42 U.S.C. § 1983.

4. Defendant reserves the right to assert additional affirmative defenses throughout the development of the case.

DEFENDANT'S PRAYER

Defendant City of Austin prays that all relief requested by Plaintiff be denied, that the Court dismiss this case with prejudice, and that the Court award Defendant costs and attorney's fees, and any additional relief to which it is entitled under law or equity.

RESPECTFULLY SUBMITTED,
ANNE L. MORGAN, CITY ATTORNEY
MEGHAN RILEY, CHIEF, LITIGATION

/s/ H. Gray Laird
H. GRAY LAIRD III
State Bar No. 24087054
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City of Austin
P. O. Box 1546
Austin, Texas 78767-1546
Telephone (512) 974-1342
Facsimile (512) 974-1311

ATTORNEYS FOR DEFENDANT CITY OF AUSTIN

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, via ECF/e-filing, this 23rd day of April, 2024.

/s/ H. Gray Laird III
H. GRAY LAIRD III

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 1:20-CV-01113-RP
	§	
THE CITY OF AUSTIN, and	§	
ROLAN ROMAN RAST,	§	
	§	
Defendants.	§	

DEFENDANT ROLAN RAST'S ANSWER AND
AFFIRMATIVE DEFENSES TO PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendant Rolan Rast ("Rast") files this Answer in response to the allegations and causes of action asserted in the Second Amended Complaint (Dkt. 118) filed by Plaintiff Sam Kirsch ("Plaintiff"). Pursuant to Federal Rules of Civil Procedure 8 and 12, Rast would show the Court as follows:

Pursuant to Federal Rule of Civil Procedure 8(b), Rast responds to each of the specific allegations made in Plaintiff's Second Amended Complaint as set forth below. Any specific allegation in the Second Amended Complaint not addressed below is denied.

Rast denies the allegations in the unnumbered preamble paragraph of the Second Amended Complaint under the header "Introduction," in the "Table of Contents," and in all other headers in the Second Amended Complaint.

1. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 1, and therefore denies the same.

2. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 2, and therefore denies the same.

3. With respect to the allegations in Paragraph 3, Rast admits that he is police officer employed by the City of Austin Police Department, and otherwise denies the remaining allegations.

4. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 4, and therefore denies the same.

5. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 5, and therefore denies the same.

6. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 4, and therefore denies the same.

7. Rast admits the allegations in Paragraph 7.

8. Rast admits the allegations in Paragraph 8 as to him, but is without sufficient knowledge to form a belief as to the truth of the remaining allegations, and therefore denies the same.

9. Rast admits the allegation in Paragraph 9 that the Court has personal jurisdiction over him, and otherwise denies the remaining allegations.

10. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 10, and therefore denies the same.

11. Rast admits the allegation in Paragraph 11 that the Court has venue over the lawsuit, and otherwise denies the remaining allegations.

12. Rast denies the general allegation in Paragraph 12 about "protestors" being "peaceful." Rast is without sufficient knowledge to form a belief as to the truth of the remaining allegations in Paragraph 12, and therefore denies the same.

13. Rast denies the allegations in Paragraph 13.

14. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 14, and therefore denies the same.

15. Rast denies the allegation in Paragraph 15 that he shot Plaintiff. Rast is without sufficient knowledge to form a belief as to the truth of the remaining allegations in Paragraph 15, and therefore denies the same.

16. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 16, and therefore denies the same.

17. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 17, and therefore denies the same.

18. Rast denies the allegation in Paragraph 18 that he shot Plaintiff. Rast is without sufficient knowledge to form a belief as to the truth of the remaining allegations in Paragraph 18, and therefore denies the same.

19. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 19, and therefore denies the same.

20. Rast denies the allegation in Paragraph 20 that he used "excessive and unjustified use of force." Rast is without sufficient knowledge to form a belief as to the truth of the remaining allegations in Paragraph 20, and therefore denies the same.

21. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 21, and therefore denies the same.

22. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 22, and therefore denies the same.

23. Rast denies the allegations in Paragraph 23.

24. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 24, and therefore denies the same.

25. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 25, and therefore denies the same.

26. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 26, and therefore denies the same.

27. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 27, and therefore denies the same.

28. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 28, and therefore denies the same.

29. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 29, and therefore denies the same.

30. Rast denies the allegation in Paragraph 30 that he shot Plaintiff. Rast is without sufficient knowledge to form a belief as to the truth of the remaining allegations in Paragraph 30, and therefore denies the same.

31. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 31 and therefore denies the same.

32. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 32 and therefore denies the same.

33. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 33 and therefore denies the same.

34. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 34 and therefore denies the same.

35. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 35 and therefore denies the same.

36. Rast incorporates his responses above in response to Paragraph 36.

37. No response is required to Paragraph 37, as it does not contain any factual allegations.

38. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 38, and therefore denies the same.

39. Rast denies the allegations in Paragraph 39.

40. Rast incorporates his responses above in response to Paragraph 40.

41. No response is required to Paragraph 41, as it does not contain any factual allegations.

42. Rast denies the allegations in Paragraph 42.

43. Rast incorporates his responses above in response to Paragraph 43.

44. Rast denies the allegations in Paragraph 44.

45. Rast incorporates his responses above in response to Paragraph 45.

46. No response is required to Paragraph 46, as it does not contain any factual allegations.

47. Rast denies the allegations in Paragraph 47 and all subparts therein.

48. Rast denies the allegations in Paragraph 48.

49. Rast denies the allegations in Paragraph 49.

50. Rast denies the allegations in Paragraph 50.

51. Rast incorporates his responses above in response to Paragraph 51.

52. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 52, and therefore denies the same.

53. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 53, and therefore denies the same.

54. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 54 and therefore denies the same.

55. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 55 and therefore denies the same.

56. Rast denies the allegation in Paragraph 56 that he shot Plaintiff. Rast is without sufficient knowledge to form a belief as to the truth of the remaining allegations in Paragraph 56, and therefore denies the same.

57. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 57 and therefore denies the same.

58. Rast incorporates his responses above in response to Paragraph 58.

59. Rast is without sufficient knowledge to form a belief as to the truth of the allegations in Paragraph 59, and therefore denies the same.

60. No response is required to Paragraph 60, as it does not contain any factual allegations.

61. To the extent any response is required, Rast denies the allegations in Paragraph 61, and denies that Plaintiff has any valid or supportable basis for any recovery from him.

AFFIRMATIVE DEFENSES

1. Rast asserts the defense of qualified immunity. Specifically, any and all actions by Rast that may be the subject of Plaintiff's claims did not violate clearly established statutory or constitutional rights of Plaintiff about which a reasonable person would have known.

2. Rast asserts the defense of official immunity. Specifically, any and all actions by Rast that may be the subject of Plaintiff's claims involved discretionary duties within the scope of Rast's authority performed in good faith.

3. Rast reserves the right to assert additional affirmative defenses in accordance with the Federal Rules of Civil Procedure and any orders of this Court.

PRAYER

Rast respectfully requests that the Court deny all relief requested by Plaintiff; enter a take-nothing judgment in favor of Rast; award Rast his costs; and award Rast any further relief to which he may show himself to be entitled.

Respectfully submitted,

BUTLER SNOW LLP

By: */s/ Eric J.R. Nichols*

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ATTORNEYS FOR DEFENDANT ROLAN RAST

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2024, a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system, as well as by sending a copy to lead counsel by email.

/s/ Jordan Jarreau
Jordan Jarreau

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

SAM KIRSCH	§	
Plaintiff	§	
	§	
V.	§	**CIVIL NO. 1:20-cv-1113-RP**
	§	
CITY OF AUSTIN, ROLAN RAST, SAFARILAND, LLC, DEFENSE TECHNOLOGY, AND COMBINED SYSTEMS, INC.	§	
Defendants	§	

MOTION TO DISMISS BY COMBINED SYSTEMS, INC.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant COMBINED SYSTEMS, INC., a defendant named herein, and makes and files this, its Motion to Dismiss under Rule 12(b), for lack of jurisdiction and/or failure to state a claim upon which relief can be granted, and in support thereof would respectfully show as follows:

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PRELIMINARY STATEMENT

Plaintiff, an individual who participated in the highly volatile and antagonistic George Floyd protests that occurred in Austin, Texas in late-May of 2020, seeks to hold Combined Systems, Inc. (hereinafter "CSI") legally responsible for a law enforcement agency's alleged unlawful use of less lethal munitions during the protests, munitions that were allegedly manufactured by a wholly separate defendant. Plaintiff's Second Amended Complaint and the two claims asserted against CSI therein are time barred, fail to establish jurisdiction over this defendant, and otherwise fail to state a claim as a matter of law.

First, Plaintiff's claims are untimely and barred by the applicable statute of limitations. In this regard, Plaintiff claims he suffered injuries after officers deployed less-than-lethal beanbag rounds at the May 31, 2020 protests. Since the inception of this lawsuit in November of 2020, Plaintiff has alleged that the beanbag rounds which struck him were expired and had hardened that resulted in more serious injuries. At no point after the litigation's inception did Plaintiff attempt to bring claims against the manufacturer of the beanbag rounds. Now, Plaintiff makes a perfunctory attempt to invoke the discovery rule in an effort to toll the statute of limitations accrual date. As set forth herein, the discovery rule is not applicable in this case insofar as Plaintiff's injury was not inherently undiscoverable and, even if it were, it could have been discovered through the exercise of due diligence.

Second, even if timely, the claims would still fail because the Second Amended Complaint demonstrates that CSI has no relationship to the events at issue in this case. In this regard, the Second Amended Complaint is devoid of any factual allegations that demonstrate CSI conducted business related to the events in this case such that there is no basis for liability against this defendant. The Second Amended Complaint therefore either fails to establish jurisdiction over

CSI, or alternatively, it fails to state a claim for relief. At a minimum, the Second Amended Complaint is inadequately plead in violation of *Iqbal/Twombly*.

Finally, even if not time-barred, and even if Plaintiff had a basis for liability against CSI that was sufficiently articulated in the Second Amended Complaint, the claims against CSI are subject to dismissal as a matter of law because Plaintiff's claims are barred by the Protection of Lawful Commerce in Arms Act.

STATEMENT OF FACTS

Plaintiff was a participant in the May 2020 protests in Austin, Texas. [ECF 118, par. 12].[1] In particular, Plaintiff alleges that on May 31, 2020, he was sitting in the northbound lane of Interstate 35 adjacent to Austin police headquarters with a large crowd of peaceful protesters when an Austin Police Department officer shot him in the head with a less lethal projectile identified as a 12-Gauge Drag Stabilized Round, Model 3027. [ECF 118, pars. 12-18, 32]. It is alleged that Plaintiff was shot while following police commands to disperse and only after Plaintiff had stopped protesting and had already left the highway. [*Id.*] Plaintiff further alleges that, as a result of being shot by this projectile, he was injured. [ECF 1, pars. 9-16, 20, 39; ECF 4, pars. 9-16, 20, 28,; ECF 118, pars. 13-20, 24, 34, 39]. That injury occurred on May 31, 2020. [ECF 1, par. 8, 14, 18, 39; ECF 4, pars. 8, 14, 18, 38; ECF 118, pars. 12, 18, 24, 49, 52].

Plaintiff sued the City of Austin and a then-unidentified Austin Police officer on November 9, 2020. [ECF 1]. Plaintiff alleged that the unidentified Austin Police officer utilized "excessive and unjustified use of force" in violating his civil rights by shooting Plaintiff in the head while peacefully demonstrating and only after he had left the highway. [*Id.* at pars. 10-11, 16, 32, 39, 34, 37]. Plaintiff identified the projectile that hit him as either a 40 mm foam baton round or a 12-

1 CSI requests that the Court take judicial notice of the pleadings filed in the above-captioned matter.

gauge beanbag round filled with lead pellets. [*Id*. at par. 19]. Further, Plaintiff alleged that the City of Austin was negligent when it used "expired munitions that [became] more dangerous with age." [*Id*. at par. 42]. It was alleged at that time that Plaintiff's injuries were "more serious" because "the projectile [that he was struck with] was expired and had hardened" and was not used "within the manufacturers' recommended time frames," directly and proximately causing his injuries. [ECF 1, pars. 20, 42].

On January 21, 2021, Plaintiff amended his complaint to identify Austin Police officer Rolan Roman Rast ("Officer Rast") as the officer who shot him in May 2020. [ECF 4]. Plaintiff continued to allege that Officer Rast acted with "excessive and unjustified use of force" in violating his civil rights, that City of Austin was negligent when it armed officers with "expired munitions that [became] more dangerous with age," and that Plaintiff's resulting injuries were more serious as a result thereof." [*Id*. at pars. 16, 19-20, 28, 31, 33, 36, 41-42].

On April 9, 2024, Plaintiff filed a Second Amended Complaint, nearly four (4) years after the occurrence of his alleged injuries, in an attempt to bring untimely claims against CSI and co-defendants Defense Technology, LLC and Safariland, LLC ("the Safariland defendants") for negligence and strict products liability. [ECF 118]. Plaintiff ***continues*** to allege Officer Rast acted with "excessive and unjustified use of force" in violating his civil rights by shooting Plaintiff in the head while peacefully demonstrating and only after he had left the highway. [*Id*. at pars. 20, 23, 32, 39, 42, 44, 47.] Plaintiff ***continues*** to allege that the City "caused severe injuries by allowing its stockpile of 'less-lethal' munitions to expire, and thus harden, and then arming its police with the expired munitions for crowd control during peaceful demonstrations." [*Id*. at p. 1; pars. 23-24]. The Second Amended Complaint confirms the beanbag round that Officer Rast used to shoot Plaintiff was the aforementioned 12-gauge beanbag round, now identified as a 12-Gauge

Drag Stabilized Round, Model 3027 manufactured by the Safariland Defendants and sold to Austin Police Department. [*Id*. at par. 30-32].

With respect to CSI, the body of the Second Amended Complaint itself contains only four paragraphs referencing CSI as a standalone entity, two of which address jurisdiction and one of which is located in the prayer for relief. [ECF 118, pars. 6, 10, 29, 61]. The remaining paragraph merely states "[o]n March 15, 2024, Plaintiff obtained new information that enabled him to discover his newly alleged claims against Defense Technology, LLC, Safariland, LLC, and/or CSI Combined Systems, Incorporated (collectively 'the Beanbag Defendants')." [*Id*. at par. 29]. The Second Amended Complaint then alleges the Safariland co-defendants manufactured "the beanbag rounds used by Defendant Rast when shooting at Plaintiff." [*Id*. at par. 30]. Thereafter the Second Amended Complaint vaguely alleges "The Beanbag Defendants sold the beanbag rounds at issue to the City of Austin." [*Id*. at par. 31.] There is no further discussion of CSI or any potential involvement it may have in this case. *See generally Id.*

STANDARD OF REVIEW

FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) provides for dismissal if a plaintiff fails "to state a claim upon which relief can be granted." In *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007), the Supreme Court confirmed that Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *Twombly*, 550 U.S. at 555; *see also* FED. R. CIV. P. 8(a)(2). To avoid dismissal, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. A mere inference of the plausibility of misconduct is insufficient. *Id*. at 555-556. In particular, "a complaint must include 'more than labels and conclusions, and a

formulaic recitation of the elements of a cause of action will not do.'" *Lincoln v. Turner*, 874 F.3d 833, 839 (5th Cir. 2017), *quoting Twombly*, 550 U.S. at 555.

In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court explained that the pleading standard of Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." *Id.*; *see also Southland Sec. Corp. v. Inspire Ins. Solutions, Inc*., 365 F.3d 353, 370 (5th Cir. 2004). "Nor does a complaint suffice if it tenders 'naked assertions[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678.

Likewise, a limitations-based dismissal is warranted "where it is evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like.'" *SB Intern., Inc. v. Jindal*, No. CIV A 306-CV-1174-G, 2007 WL 1411042, at *3 (N.D. Tex. May 14, 2007) (internal quotations omitted). Such a dismissal is warranted "'where it is evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like.'" *Id*. (quoting *Jones v. Alcoa, Inc*., 339 F.3d 359, 366 (5th Cir. 2003)). "'[F]ailure to plead facts demonstrating the applicability of the discovery rule constitutes a waiver of the discovery rule as a defense.'" *Irma Blas v. Rosen*, No. DR-18-CV-66-Am, 2019 WL 5199284, at *6 (W.D. Tex. July 16, 2019) (quoting *Resolution Tr. Corp. v. Boyar, Norton & Blair*, 796 F. Supp. 1010, 1013 (S.D. Tex. 1992)). "Conclusory allegations and unwarranted factual deductions will not suffice to avoid a motion to dismiss." *SB Intern*., 2007 WL 1411042 at *2.

In deciding a motion to dismiss, a court may consider documents attached to the pleadings and/or those referred to in the plaintiff's complaint which are central to his claims. *See Morlock*

LLC v. JP Morgan Chase Bank, N.A., 587 Fed. App'x 86, 89 n.3 (5th Cir. 2014) (citation omitted); *Kaye v. Lone Star Fund V (U.S.), L.P.*, 453 B.R. 645, 662 (N.D. Tex. 2011) (*quoting Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000)). A court may also take judicial notice of matters of public record in deciding a motion for judgment on the pleadings. *See Norris v. Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir. 2007).

ARGUMENT

I. Plaintiff's Claims Against CSI Are Time-Barred

Plaintiff alleges causes of action against CSI for (1) negligence, and (2) strict products liability. [ECF 118, at pars. 54-57]. The Texas statute of limitations for negligence and product liability claims is two (2) years. TEX. CIV. PRAC. & REM. CODE 16.003. Plaintiff's claims in this case are untimely and therefore must be dismissed with prejudice.

"[A] cause of action accrues and the statute of limitations begins to run when facts come into existence that authorize a party to seek judicial remedy." *McGowan v. S. Methodist Univ.*, No. 3:18-CV-00141-N, 2024 WL 455340, at *2 (N.D. Tex. Feb. 5. 2024) (internal quotations omitted). "More specifically, accrual occurs when a wrongful act causes a legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred." *Id.* (internal quotations omitted).

Plaintiff alleges he was injured on May 31, 2020, when he was shot in the head. [ECF 118, at pars. 13-20, 23-24, 30-35, 39]. As a result, the accrual date is May 31, 2020, because Plaintiff knew he was injured seconds after (if not the instant) it occurred, and the applicable statute of limitations expired on May 31, 2022. Notably, Plaintiff did not sue CSI until April 9, 2024, almost two (2) years after the statute of limitations had expired. Therefore, Plaintiff's claims against CSI are time-barred on the face of the pleadings. *SB Intern., Inc.*, 2007 WL 1411042 at *2-3.

On April 9, 2024, Plaintiff filed his Second Amended Complaint, nearly four (4) years after his alleged injuries, in an attempt to bring untimely claims against CSI for negligence and products liability. [ECF 118, at pars. 54-57]. Plaintiff still maintains, as he did previously, that Officer Rast acted with "excessive and unjustified use of force" in violating his civil rights by shooting Plaintiff with the beanbag round at issue. [ECF 118, at pars. 20, 39, 44, 47]. Plaintiff still claims that the City "caused severe injuries by allowing its stockpile of 'less-lethal' munitions to expire, and thus harden, and then arming its police with the expired munitions for crowd control during peaceful demonstrations." [*Id*. at p. 1; *id* at pars. 23-24]. Plaintiff still alleges that Officer Rast shot him with either a 40mm foam baton round or a 12-Gauge Drag Stabilized Round. [*Id*. at pars. 23, 32]. It is only now that Plaintiff confirms the beanbag round at issue was a 12-Gauge beanbag round manufactured by the Safariland Defendants. [ECF 118, par. 30]. The alleged defects are that the Beanbag Round "may become hardened and unsuitable for its intended purpose past a certain date of its manufacture or under certain conditions" and become "a solid mass" which "can cause serious bodily injuries" "due to a faulty design or otherwise." *Id*. at pars. 24, 32-34, 51-53, 54-57. This is identical to the previous allegation that the City of Austin was negligent because it employed munitions that were expired, had "hardened over time," and became "more dangerous with age." [ECF 1, pars. 20, 41-43; ECF 4, pars. 20, 40-42; ECF 118, pars. 24, 32-34, 51-57].

Plaintiff now makes a woefully inadequate attempt to plead the discovery rule, alleging that he "obtained new information that enabled him to discover his newly added claims" against CSI. [ECF 118, par. 29]. This "new" information is not identified, nor does Plaintiff set forth his due diligence in discovering his injury, which he was obviously aware of on the day it occurred four (4) years ago. To the contrary, as discussed below, Plaintiff is incapable of demonstrating his alleged injury was inherently undiscoverable, or that he acted with due diligence.

a. Plaintiff's alleged injury was not inherently undiscoverable

The discovery rule only applies in situations where the "nature of the plaintiff's injury is both inherently undiscoverable and objectively verifiable."[2] *Irma Blas*, 2019 WL 5199284 at *6 (internal quotations omitted). "An injury is inherently undiscoverable if it is, by its nature, unlikely to be discovered within the prescribed limitations period despite due diligence." *Id*. As a result, "[t]he discovery rule is rarely applicable in assault cases because a plaintiff will almost always be aware of his bodily injury." *Bradley*, 527 F. Supp. 2d at 640.

It is undisputed that Plaintiff discovered his alleged injuries on the date of the protest – May 31, 2020. [ECF 1, pars. 8-16, 18; ECF 4, pars. 8-16, 18; ECF 118, pars. 12-20, 22]. Specifically, Plaintiff repeatedly alleges that, on May 31, 2020, Austin Police Department shot him in the head with a projectile, which resulted in injury. *Id*. Despite this, Plaintiff now alleges that "[o]n March 15, 2024, Plaintiff obtained new information that enabled him to discover his newly added claims against Defense Technology, LLC, Safariland, LLC, and/or CSI Combined Systems, Incorporated." [ECF 118, par. 29]. There is nothing else, nor is any of the "new information" identified. *Id*. Importantly, the discovery rule does not require the discovery of "claims" or specific tortfeasors. *Bradley*, 527 F. Supp. 2d at 640-41. Rather, it concerns the discovery of *injuries*, and Plaintiff's current and prior pleadings allege facts establishing that he knew he was injured on May 31, 2020, and that he knew both how and why that injury occurred.

b. Plaintiff did not use due diligence

2 The discovery rule only applies to the discovery of the injury and the general cause; not the identity of the tortfeasor or cause-in-fact. *Bradley v. Phillips Petroleum Co*., 527 F. Supp. 2d 625, 640-41 (S.D. Tex. 2007), aff'd sub nom. *Bradley v. Phillips Chem. Co*., 337 Fed. Appx. 397 (5th Cir. 2009) ("All that is required to commence the running of the limitations period is the discovery of the injury and its general cause, not the exact cause in fact and the specific parties responsible.") (citing *Bayour Bend Towers Council of Co-Owners v. Manhattan Constr. Co*., 866 S.W.3d 740, 743 (Tex. App.-Houston [14th Dist.] 1993), writ denied.

The discovery rule "defers accrual of a cause of action until the plaintiff knows or, by exercising reasonable diligence, should know of the facts giving rise to the claim." *Irma Blas*., 2019 WL 5199284 at *6 (internal quotations omitted). "[D]iligence is the cornerstone of . . . the discovery rule." *Champlin v. Manpower Inc*., No. 4:16-CV-00421, 2018 WL 572997, at *4 (S.D. Tex. Jan. 24, 2018). "The discovery rule requires the plaintiff to diligently pursue the facts surrounding his injury." *Id*.

Initially, Plaintiff does not allege any sort of diligence. [*See generally* ECF 118]. To the contrary, Plaintiff has repeatedly alleged a defect and cause-in-fact: (1) shot by a less-than-lethal round on May 31, 2020; (2) "expired munitions that [became] more dangerous with age"; and (3) resulting injury. [ECF 1, pars. 8-16, 18-20, 29, 39, 42-43; ECF 4, pars. 8-16, 18-20, 28, 38, 41-42; ECF 118, pars. 12-20, 23-24, 32-34, 39, 49, 51-57]. Indeed, since the inception of this case Plaintiff has included photos of munitions gathered at the scene of the protests [ECF 1, par. 17; ECF 4, par. 17; ECF 118, par. 21] and identified the specific type of munitions that struck him. [ECF 1, pars. 18, 19; ECF 4, par. 19; ECF 118, pars. 23, 29-35]. Thus, the only missing element from the first two of Plaintiff's complaints was the *identity of the purported manufacturer* – who in this case, is not even CSI. [ECF 118, at par. 30]. Nor could Plaintiff reasonably plead due diligence. Plaintiff had two very obvious and easy ways to obtain this information: (1) an open records request, or (2) a request for production or interrogatory to the City of Austin (a party to this litigation). The former was available to Plaintiff beginning almost immediately after his injury on May 31, 2020, yet he waited for almost four (4) years to add CSI. The latter avenue to discovery had been available to Plaintiff anytime between November 9, 2020 (when he first filed this lawsuit) and May 31, 2022 (when the limitations period expired). His failure to propound any discovery tool seeking documentation or identification of the manufacturer of the beanbag round at issue during that 19-

month period disproves due diligence as a matter of law. Furthermore, due diligence would have uncovered a lawsuit brought by police officers making the exact same allegations that Plaintiff now seeks to bring. *See* Plaintiffs' Original Petition, filed May 31, 2022, styled *Joshua Jackson et al v. Safariland LLC, Defense Technology, et al*, Cause No. D-1-GN-22-002502 in the 201st Judicial District Court of Travis County, Texas[3].

Given that Plaintiff did not and could not allege due diligence, Plaintiff cannot invoke the discovery rule to toll the statute of limitations in this case.

II. Defendant is Not a Proper Party to This Lawsuit, or, Alternatively, the Operative Complaint Fails to Satisfy *Iqbal/Twombly*

Even if Plaintiff's claims against Combined Systems, Inc. were timely, which they are not, a review of Plaintiff's Second Amended Complaint confirms the lack of any factual allegations that would support a viable claim against CSI. Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, this Court lacks jurisdiction over CSI, or alternatively, the Second Amended Complaint fails to state a claim for relief. To the extent Plaintiff alleges CSI has some tie to this lawsuit, the vague and conclusory allegations set forth in the Second Amended Complaint fail to satisfy the basic pleading requirements of Rule 8 and should be dismissed.

It is well-established that Rule 8 requires a complaint must contain sufficient facts "that will give the defendant fair notice of what plaintiff's claim is and the grounds upon which it rests." *See, Davis v Nissan Motor Acceptance Corp.*, 2009 U.S. Dist. LEXIS 96331 (N.D. Texas 2009) *citing Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). The Supreme Court has articulated a two-pronged approach for determining whether a pleading meets this standard. First, a District Court is to identify and disregard legal conclusions,

3 CSI also asks the Court take judicial notice of the existence of this lawsuit.

as they "are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. Second, with what remains of the pleadings, the District Court must "consider the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief." *Id*. at 681.

From Plaintiff's Second Amended Complaint there is no way for CSI to determine what it allegedly did that resulted in legal harm to Plaintiff. Even the most liberal application of Rule 8 would leave CSI to guess, speculate, make unreasonable inferences, or fill in the blanks as to what Plaintiff *might* be pleading against CSI. *Davis*, 2009 U.S. Dist. LEXIS at *7. In this regard, the Second Amended Complaint alleges that Plaintiff obtained new information on March 15, 2024 that enabled him to add claims against the Beanbag Defendants; however, there is no further elaboration as to what information was discovered. [ECF 118, par. 29]. Moreover, despite Plaintiff's conclusory allegation, the Second Amended Complaint fails to plead any facts that would support a claim against CSI- regardless of the theory of liability. This is particularly so given that CSI did not make the product at issue, and Plaintiff's Second Amended Complaint readily concedes that the product at issue was made by an entirely separate company. [ECF 118, at par. 30]. Although Plaintiff vaguely alleges that "the Beanbag Defendants" sold the beanbag rounds at issue to the City of Austin, there is no distinction drawn between Defense Technology, LLC and Safariland, LLC – who is alleged to have made the product, and CSI – who did not make the product. [ECF 118, at par. 31]. Likewise, there is no discussion of CSI as a company or how it is involved in this case. To the extent that Plaintiff suggests that CSI somehow distributed to the City of Austin the beanbag round at issue, this is implausible insofar as the beanbag round at issue was not a CSI product. Any such contention is at most a speculative legal conclusion devoid of any factual support and it is insufficient to put CSI on notice of the basis for Plaintiff's claim against it. Presumably these facts are not alleged because they do not exist.

Insofar as the Second Amended Complaint concedes the round at issue was not a CSI product, and there are no other allegations that would plausibly provide a basis for CSI's status as a party to this case, the only reasonable inference is that CSI has no liability as a matter of law. The Second Amended Complaint must therefore be dismissed against CSI for lack of jurisdiction, or alternatively, for Plaintiff's failure to state a claim. At a minimum, the Complaint fails to satisfy Rule 8 insofar as it fails to provide fair notice as to Plaintiff's claims against CSI.

III. Defendant is Entitled to Immunity Under the Protection of Lawful Commerce in Arms Act

Even if Plaintiff's claims were timely and sufficiently identified a basis for a claim against CSI, Plaintiff's claims against CSI are still subject to dismissal for lack of jurisdiction and/or failure to state a claim for relief because the claims are barred by the Protection of Lawful Commerce in Arms Act ("PLCAA"). In 2005, Congress enacted the PLCAA to prohibit precisely the type of claims asserted against CSI in this case. The PLCAA generally bars any "qualified civil liability action" from being "brought" in "any Federal or State court," including any claim "against a manufacturer or seller of a [firearm]" based on harms "resulting from the criminal or unlawful misuse of a [firearm] by . . . a third party." 15 U.S.C. §§ 7902(a), 7903(5)(A). Congress even took the step of mandating that any such claims pending on the PLCAA's effective date in 2005 "shall be immediately dismissed." *Id*. § 7902(b).

Courts across the country have recognized that the PLCAA provides threshold immunity from suit (as opposed to being merely a defense to ultimate liability). *See, e.g., City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 398 (2d Cir. 2008) (PLCAA bars "the commencement or the prosecution of qualified civil liability actions."); *see also, e.g., In re Acad., Ltd.*, 625 S.W.3d 19, 32-36 (Tex. 2021) (directing judgment for defendant based on PLCAA immunity from suit, finding that trial "'would defeat the substantive right' granted by the PLCAA."); *Ileto v. Glock,*

Inc., 565 F.3d 1126, 1142 (9th Cir. 2009) (PLCAA "creates a substantive rule of law granting immunity to certain parties against certain types of claims."); *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216 (D. Colo. 2015) (dismissing claim that seller violated ban on ammunition sales to users of controlled substances based on PLCAA immunity); *Jefferies v. District of Columbia*, 916 F. Supp. 2d 42, 47 (D.D.C. 2013) (PLCAA reflects congressional intent to "weed out, expeditiously, claims the PLCAA bars."); *Est. of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 388-89 (Alaska 2013) (PLCAA bars any qualified civil liability action not falling within a statutory exception).

a. Congress Enacted the PLCAA to Bar This Type of Suit

"The PLCAA was considered and passed at a time when victims of shooting incidents," along with various government entities, "brought civil suits seeking damages and injunctive relief against out-of-state manufacturers and sellers of firearms." Vivian S. Chu, CONG. RSCH. SERV., R42871, The Protection of Lawful Commerce in Arms Act: An Overview of Limiting Tort Liability of Gun Manufacturers 1 (2012). To bring these claims, plaintiffs invoked novel interpretations of generally applicable theories of liability, including "strict liability for abnormally dangerous activities," "strict product liability for defective design," "negligent marketing," "public nuisance," and "deceptive trade practices." Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries*, 65 Mo. L. Rev. 1, 6-50 (2000).

In light of this trend, Congress recognized that the firearms industry was "in danger of being overwhelmed by the cost of defending itself against these suits." H.R. REP. NO. 109-124, at 12 (2005). Consequently, Congress enacted the PLCAA to immunize federally licensed firearms manufacturers and sellers from actions seeking "money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals." 15 U.S.C. § 7901(a)(3).

Congress expressly noted in the law that the manufacture and sale of firearms are already "heavily regulated by Federal, State, and local laws," including "the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act." *Id*. § 7901(a)(4). In light of this existing oversight and control, Congress declared that "[b]usinesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms . . . are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products . . . that function as designed and intended." *Id*. § 7901(a)(5).

b. The Protection of the Lawful Commerce in Arms Act Applies in This Case

The PLCAA generally bars the commencement or prosecution of any "qualified civil liability action" from being "brought" in "any Federal or State court." 15 U.S.C. § 7902(a). Such actions include claims "brought by any person against a manufacturer or seller of a qualified product…for damages…resulting from the criminal or unlawful misuse of a qualified product by the person or a third party…" *Id*. § 7903(5)(A).

This Case is a Qualified Civil Liability Action

Based on the allegations in the Second Amended Complaint, there is no doubt that this case is a civil action presumptively barred by the PLCAA. First, clearly Plaintiff is a "person" under the statute. Likewise, although not well-delineated within the Second Amended Complaint, CSI is a manufacturer and/or seller as defined under the PLCAA. *See generally*, ECF 118; *see also, Doyle v. Combined Sys*., 2023 U.S. Dist. LEXIS 161087 (N.D. Tex. Sept. 11, 2023) (recognizing this defendant, CSI, was a manufacturer or seller of a separate qualified product under the PLCAA). Third, it is clear that the subject munitions are a "qualified product" under the applicable statutes given that a qualified product includes a firearm, *ammunition*, and any component part thereof. 15

U.S.C. § 7903(4) (emphasis added); *see also Santos v. City of Providence,* 2024 U.S. Dist. LEXIS 51411 (D.R.I. 2024) (noting there was no dispute kinetic impact projectiles are qualified products); *Doyle*, 2023 U.S. Dist. LEXIS 161087 at *20 (acknowledging that rubber bullets are "ammunition" which is a "qualified product"). Finally, Plaintiff's Second Amended Complaint alleges that Officer Rast's "excessive and unjustified" use of force resulted in Plaintiff's injuries, and that his "actions and conduct were egregious, reckless, and endangered numerous peaceful protesters and bystanders." [ECF 118, pars. 20, 44]. It is further alleged that "Shockingly, Officer Rast shot [plaintiff] *while* plaintiff was following police commands to disburse and *after* [plaintiff] had stopped protesting and had already left the highway." [ECF 118, at p. 1]. Plaintiff specifically seeks punitive damages "to deter this type of retaliation and excessive force against protesters . . ." [ECF 118, at pars. 20, 44, 47]. Thus, accepting these allegations as true for the purposes of this motion only, as required on a motion to dismiss, all of the "damages" sought in this case "result[] from" the "unlawful misuse of" firearms by "third part[ies]." 15 U.S.C. § 7903(5)(A).

c. <u>None of the Exceptions to the PLCAA Are Applicable in This Case</u>

The broad immunity conferred by the PLCAA is subject to narrowly defined exceptions set forth in 15 U.S.C. § 7903(5). Although unclear, Defendant anticipates Plaintiff will attempt to rely on the design defect exception. For the reasons set forth below, the exception does not apply.

The fifth exception to the PLCAA is the design defect exception, which excludes from the definition of a prohibited qualified civil liability action "an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner…" 15 U.S.C. § 7903(5)(A)(v). Notably, the design defect exception includes an exception to this exception, which states that "where the discharge of the product was caused by a volitional act that constituted a criminal offense, then

such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage…" *Id*.

Plaintiff's claims in this case do not meet the requirements for the design defect exception for four reasons: first, CSI is not alleged to have manufactured or designed the product; second, Plaintiff's claims against CSI, as a non-manufacturer, appear to be rooted in an "information defect" or "inadequate warning" theory which is precisely the type of claim Congress sought to bar under the PLCAA; third, the discharge of the subject round was caused by a volitional act that constituted an unlawful offense; and fourth, Plaintiff's injuries do not result "directly from" a defect in design or manufacture of the product at issue.

First, the design defect exception to the PLCAA cannot reasonably be applied because CSI is not alleged to have manufactured or designed the beanbag round at issue. There is no basis to infer from the Second Amended Complaint that any CSI product was used against Plaintiff in this case and in fact the Complaint unambiguously confirms otherwise. [ECF 118, at par. 30].

Notwithstanding the above, the design defect exception still does not apply because Plaintiff's claims are the exact tort theories that Congress sought to preclude in passing the PLCAA. Specifically, Plaintiff's Second Amended Complaint alleges that the beanbag round at issue "comes with manufacturer's specifications and warnings, but none that warn the end users (law enforcement officers) that the round may become hardened . . .". [ECF 118, at par. 32]. Indeed, the Second Amended Complaint repeatedly alleges "the Beanbag Defendants" failed to provide adequate labeling and warnings to users of the rounds. [ECF 118 at pars. 32, 54, 55, 57].

In *Travieso v. Glock, Inc*., 526 F.Supp.3d 533 (D.Ariz. 2021) the Arizona District Court had occasion to consider the potential applicability of the design defect exception to the PLCAA. In that case, which again involved a child shot by another child, the plaintiff sued Glock as the

handgun manufacturer under theories of negligence and strict liability based on design defect, negligent marketing, inadequate warnings, and information defects. *See Travieso*, 526 F.Supp.3d at 536-37. The federal district court held that the PLCAA barred common law causes of action such as those being asserted by the plaintiff, and therefore, the plaintiff was precluded from bringing suit unless one of the exceptions applied. In rejecting plaintiff's claim that the design defect exception applied, the court held that the PLCAA's exception for "damage resulting from a defect in design or manufacture of the product" demonstrated that Congress had no intention to include "information defect" or "inadequate warning" claims in the design defect exception. *Id*. at 545. The reasoning for this was succinctly stated as follows:

> "[T]his Court concludes that even if the 'product liability' exception allows Plaintiff's claim for design defect, it does not allow his claims of information defect or for inadequate warnings... "while the PLCAA specifically creates an exception for 'action[s] for... damage resulting directly from a defect in design or manufacture of the product', it has no similar exclusion for actions resulting from defective instruction or inadequate warnings. The inclusion of the 'products liability' exception in 15 U.S.C. § 7903(5)(A)(v) 'demonstrates that Congress consciously considered how to treat [products liability] claims.' The fact that Congress carved out an exception specifically allowing cases based on defective design and manufacture without creating a similar exception for 'information defect' and 'inadequate warning' claims can only lead this Court to presume the omission was intentional. As such, the Court concludes that even if it adopts Plaintiff's construction of the 'products liability' exception, the scope of that exception will not allow Plaintiff's information defect and inadequate warning claims to go forward." *Id*. (internal citations omitted).

More recently, other courts have echoed the court's holding in *Traveiso*. In *Santos v. City of Providence*, 2024 U.S. Dist. LEXIS 51411 (D.R.I. 2024), a factually analogous case arising out of a police officer's alleged improper use of a kinetic impact projectile, the Court held that the PLCAA barred plaintiff's claims for failure to warn and for negligent marketing. In holding that the design defect exception did not apply, the Court noted that product liability claims generally

rely on one of three theories: 1) design defects; 2) manufacturing defects; or 3) defects based on inadequate warnings. *Id*. at *9. The court reasoned the PLCAA's product liability exception only includes "damage resulting directly from a defect in design or manufacture of the product", and therefore, the exception did not apply, reasoning that "[t]he fact that Congress carved out an exception specifically allowing cases based on defective design and manufacture without creating a similar exception for 'information defect' and 'inadequate warning' claims only lead this Court to presume the omission was intentional." *Id*. at *9-11. As CSI did not manufacture the round at issue it cannot be held liable for a design or manufacturing defect. Separately, any information defect or inadequate warning theory is not within the ambit of the design defect exception.

Third, the PLCAA is clear that the design defect exception does not apply when there is a volitional act that constitutes a criminal offense. *See, Santos*, 2024 U.S. Dist. LEXIS 51411 at *9-10; *Jefferies v. District of Columbia*, 916 F.Supp. 2d 42, 46 (D.D.C. 2013) (dismissing case sua sponte pursuant to PLCAA when it was "uncontroverted that a third party discharged the assault rifle, during the commission of a criminal act," where only the design defect exception could possibly apply because that "exception does not apply 'where the discharge of the product was caused by a volitional act that constituted a criminal offense.'"). In *Santos*, the Court held that even if the design defect could be interpreted to encompass a claim for information defects or inadequate warnings, which the court rejected, the design defect exception would otherwise not apply because the officer's purported use of the kinetic impact projectile on the protester constituted a "criminal offense" under the statute. The court reasoned that plaintiff was alleging the officer purposefully aimed and fired a kinetic impact projectile at plaintiff, who was an innocent bystander, without warning, and that such conduct clearly fell within the ambit of a "criminal offense" for purposes of the PLCAA. *Id*. at *10. The Court specifically noted that neither a criminal charge nor a criminal

conviction is required under this exception. Instead, "[t]he inquiry centers on the criminal nature of the volitional act, rather than on whether the user of the firearm was charged or convicted of an offense. *Id*. at *9-10, citing *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc*., 633 F.Supp. 3d 425, 450 (D. Mass. 2022), rev'd on other grounds, 91 F.4th 511 (1st Cir. 2024); *see also Travieso,* 526 F.Supp.3d at 546-547; *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009); *Ryan v. Hughes-Ortiz*, 959 N.E.2d 1000 (Ma. Ct. App. 2012).

Much like in *Santos*, here there is no doubt that the claims set forth in the Complaint allege a criminal offense by the Austin police officer. The volitional act, according to the Complaint, consisted of the Austin Police "shooting so-called 'less lethal' projectiles" at the protesters. [ECF 118, at par. 13]. In this regard, the Complaint alleges Officer Rast, a member of the Austin Police Department, "shot Plaintiff Sam Kirsch in the face" to "punish him" for participating in a peaceful protest. [ECF 118, at p. 1]. Further, it is alleged Officer Rast used "excessive and unjustified force" and violated his civil rights by shooting Plaintiff while Plaintiff was following police commands to disburse and after Plaintiff had stopped protesting and had left the highway area. [ECF 118, pars. 20, 23, 32, 39, 42, 44, 47]. Accepting Plaintiff's allegations as true, Plaintiff has alleged a volitional act that constitutes a criminal offense for purposes of the PLCAA.

Finally, the design defect exception does not apply because it's application only contemplates situations where the alleged injuries result "directly from" a defect in design or manufacture of the product. Here, the Second Amended Complaint makes clear that any alleged injuries to Plaintiff did not result "directly from" a defect in design or manufacture for which CSI is liable. As an initial point, CSI did not manufacture the product at issue. [ECF 118, at par. 30]. Even if it had, which it did not, the Second Amended Complaint alleges that "the City armed its police . . . with expired munitions which had hardened over time" [ECF 118, at par. 24], and that

"the City's failure to maintain unexpired munitions stores and the deliberate decision to use expired munitions against [Plaintiff] and other protesters directly and proximately caused [Plaintiff's] injuries. [ECF 118, par. 53]. Accepting these allegations as true for this motion, Plaintiff's injuries were the result of expired munitions, not any involvement by CSI.

Based on the above, Plaintiff's Second Amended Complaint must be immediately dismissed pursuant to the PLCAA because this is a qualified civil liability action, in that damages of which Plaintiff complains resulted from the criminal or unlawful misuse (the shooting of Plaintiff) of a qualified product (the subject beanbag round) by a third party (a member of the Austin Police Department), and it fails to satisfy any of the PLCAA's narrow exceptions.

III. CONCLUSION

The foregoing premises considered, Defendant Combined Systems, Inc. requests that the Court dismiss the claims against it under Rule 12(b) for the reasons set forth herein.

Respectfully submitted,

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ATTORNEY FOR DEFENDANT COMBINED SYSTEMS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was served on all counsel of record in accordance with the Texas Rules of Civil Procedure on this the 27th day of June 2024.

Clark Aspy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH,	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-01113-RP**
	§	
CITY OF AUSTIN, ROLAN RAST,	§	
SAFARILAND, LLC, DEFENSE TECHNOLOGY,	§	
AND CSI COMBINED SYSTEMS, INC.,	§	
Defendants.	§	
	§	

PLAINTIFF'S COMBINED RESPONSE TO BEANBAG DEFENDANTS' MOTIONS TO DISMISS

Plaintiff Sam Kirsch respectfully files this combined response in opposition to three newly added Defendants', Safariland, LLC, Defense Technology, and CSI Combined Systems, Inc. (the Beanbag Defendants), Motions to Dismiss (docs. 139, 142).

I. Introduction

The Court should deny the Beanbag Defendants' Motion to Dismiss because Plaintiff properly and sufficiently invoked the Discovery Rule by alleging that he learned of the Beanbag Defendants' liabilities in March 2024, weeks after an investigative report by the *Austin American-Statesman*. This gives rise to a fact issue of when Mr. Kirsch should have discovered in the exercise of reasonable diligence the marketing and manufacturing product defects in the beanbag munitions used by Austin Police one of which caused the grievous injuries to Mr. Kirsch. Plaintiff's injury by the Beanbag Defendants' product(s) was not inherently discoverable before the news report because this case was under a Stay until January 2024. Plaintiff

demonstrated due diligence by filing this suit within two months of the disclosure of the defective products by the *Austin American-Statesman* reports.

Furthermore, Plaintiff has met the federal pleading standard in alleging his claims against Defendant CSI and the Court should deny Defendant CSI's motion for failure to state a claim.

Finally, Defendant CSI's claim of complete immunity under the federal Protection of Lawful Commerce in Arms Act is not persuasive because this case clearly meets the design defect exception to that law.

II. The Discovery Rule applies to Plaintiff's Claims.

A. Plaintiff sufficiently invoked the Discovery Rule in his Second Amended Complaint.

This Court recently stated the "Discovery Rule" as it applies to a motion to dismiss at the pleading stage of a lawsuit:

> Under federal law, an action accrues when the plaintiff becomes aware of both the existence of an injury and its cause. The "discovery rule" delays the accrual period until the plaintiff knew of the injury and its cause or should have discovered the injury and its cause through reasonable diligence.

Hurdsman v. Gleason, case no. 1:22-CV-254-RP (W.D. Tex. June 5, 2024) (internal quotations omitted) (Citing *Weeks v. Collier*, No. 22-10126, 2023 WL 7703823, at *2 (5th Cir. Nov. 15, 2023) (citing *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 646 F.3d 185, 190 (5th Cir. 2011), abrogated on other grounds by *United States v. Wong*, 575 U.S. 402 (2015)). As in the *Hurdsman* case where the plaintiff discovered new information in approx. 2021, Plaintiff has pleaded that he learned of new information on March 15, 2024. "Viewing the allegations in the complaint in the light most favorable to [Plaintiff], he has adequately pled that the discovery rule exception

applies to the statute of limitations of each of his claims." *Hurdsman*, at Section III.A.2 "Statute of Limitations".

The new information that Plaintiff discovered in March 2024 was that a Fall 2023 investigation by Defendant City of Austin found that several Austin Police Department personnel had reasons to believe that the Beanbag Defendants' products were causing greater injuries than expected. On Feb. 1, 2024, in a joint investigative report, the *Austin American-Statesman* and *KVUE Defenders* first disclosed the existence of the internal APD report with the following headline: "EXCLUSIVE: APD report says higher-ups knew of projectile dangers before 2020 protests". *Available at*, https://www.statesman.com/story/news/local/2024/02/01/apd-austin-police-less-lethal-projectiles-2020-protests-report-higher-ups-knew-of-dangers/72433963007/. This new, internal City of Austin report "formally documented for the first time concerns raised by several employees". *Id.*

The new information in the report was substantial enough to lead the Travis County District Attorney to dismiss all but four of the 21 pending indictments against police officers who had fired such munitions at protesters. *See* Plohetski, "Travis County DA calls for DOJ investigation of Austin police after 'less-lethal rounds' report: The report, first obtained by the KVUE Defenders, concludes Austin police knew of the safety concerns about the 'less-lethal ammunition'", KVUE (Feb. 8, 2024), *available at*, https://www.kvue.com/article/news/local/doj-investigation-austin-texas-police-after-bean-bag-rounds-used-in-2020-protests/269-0aad4a72-9d8a-41b3-a800-3622b43d020c.

Other regional news outlets widely reported the *Austin American-Statesman* and *KVUE* investigation. *See, e.g.*, "Austin PD report says higher-ups knew of projectile dangers before

2020 protests", HARVEY KRONBERG'S QUORUM REPORT (Feb. 2, 2024), *available at*, https://quorumreport.com/quorum_report_newsclips_2024/austin_pd_report_says_higher-ups_knew_of_projectil_newsiid313683.html; Andrew Weber, "Austin police knew 'less-lethal' rounds could seriously injure people. They used them anyway.", AUSTIN MONITOR (May 31, 2024), *available at*, https://www.austinmonitor.com/stories/2024/05/austin-police-knew-less-lethal-rounds-could-seriously-injure-people-they-used-them-anyway/.

Plaintiff respectfully requests that the Court take judicial notice of these news reports. As this Court has noted, "the Court may take judicial notice of matters of public record". *Terry Black's Barbecue v. State Auto. Mutual Ins.*, 514 F. Supp. 3d 896, at 900 n.2 (W.D. Tex. 2021) (citing *Firefighters' Retirement Sys., v. EisnerAmper*, 898 F.3d 553, 558 n.2 (5th Cir. 2018). "A court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, 'documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.'" *Tex. Tribune v. Caldwell Co., Tex.*, case no. 1:23-CV-910-RP, at Section II.B "Motion to Dismiss" (W.D. Tex. Feb. 5, 2024) (quoting *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008)).

B. The defects in the Beanbag Defendants' products were not inherently discoverable until the February 2024 disclosure of the City of Austin's Dec. 2023 internal investigation.

The Beanbag Defendants misstate the Discovery Rule standard and try to limit its application to cases where plaintiffs did not know they had an injury. Under the Beanbag Defendants' interpretation of the Discovery Rule, if a plaintiff knows he has been injured, the Rule does not apply. This is not the standard. *See Hurdsman* citations, *supra*.

It is true that Plaintiff knew he was injured when he was shot in the head on May 31, 2020. And it is true that the Austin Police Officer Plaintiffs in the state court case alleged product defects back in 2022. While it is very possible that the Austin Police Officer Plaintiffs' 2022 state court lawsuit was based on inside information available to them about product defects, Plaintiff in this case did not have access to that information, nor any reason to know that the state court Police Officer Plaintiffs possessed such information. In fact, up until a copy of the internal 2023 investigation report surfaced in the public domain and, there was no legitimate good faith basis to accept the veracity of the police officers' allegations; their pleadings appeared strained. And Plaintiff could not pursue discovery from the Ctiy of Austin regarding those allegations because of the Stay this Court put in place in this case at the behest of Defendants.

In the Police Offices state court case, nearly all the Defendants had been dismissed and the Plaintiffs had not sought any written discovery from the Beanbag Defendants in that case. The fact that some litigants have pled a product defect does not make that product defect inherently discoverable to all injured persons. Regardless of how or when the state court Plaintiffs learned about the Beanbag Defendants' defective products, Plaintiff learned that there were defects in the products from the disclosure of the internal Austin Police Department report in February 2024.

As this Court ruled in the Baylor sexual assault litigation last year, Plaintiff's Discovery Rule allegation is adequate if he shows evidence that he "was not aware of the causal connection between [his] injuries and [Defendants'] conduct". *See* *Lozano v. Baylor University*, case no. 6:16-CV-403-RP, at n.4 (W.D. Tex. Nov. 21, 2023).

C. Plaintiff has not previously pled a product defect.

Because Plaintiff did not know that there was any evidence of a product defect until February 2024, he did not plead a product defect in his prior complaints. The Beanbag Defendants are incorrect that Plaintiff previously pled a product defect. Rather, Plaintiff pled that Defendant City of Austin was negligent in how it stored, maintained, and tracked the munitions and that the City's negligent use of "expired" munitions caused Plaintiff's injuries. This is very different from alleging the product is defective and that it was the manufacturers' and sellers' responsibility.

Plaintiff made the following allegations in his Original Complaint (doc. 1) and First Amended Complaint (doc. 4) (emphasis added to quotes below):

¶ 42 (doc. 1), ¶ 42 (doc. 4):

> The City had a duty to every Austinite, including Sam, to maintain and keep its stockpiles of police equipment functional and up to date. The City had a duty to Sam and every other protester not to arm its police with *expired* munitions that become more dangerous with age when its police were sent to control crowds during demonstrations. Nonetheless, upon information and belief, the City knowingly armed its police with *expired* munitions on May 30 and May 31, 2020 and thus breached its duty to Austinites including Sam.

¶ 43 (doc. 1), ¶ 41 (doc. 4):

> Upon information and belief, Sam's injuries were more serious because the projectile was *expired* and had hardened. Upon information and belief, the City's failure to maintain *unexpired* munitions stores and the deliberate decision to use *expired* munitions against Sam and other protesters directly and proximately caused Sam's injuries.

D. Plaintiff has demonstrated due diligence.

This Court granted the City of Austin's opposed Motion to Stay discovery (doc. 87) on Aug. 8, 2023. (Doc. 91). This was one day after it was first reported that the City had banned all use of beanbag munitions. *See* Tony Plohetski, "Austin police completely stop use of beanbag

rounds after using munitions on 15-year-old girl", AUSTIN AMERICAN-STATESMAN (Aug. 7, 2023), available at, https://www.statesman.com/story/news/local/2023/08/07/austin-police-stop-using-beanbag-rounds-less-lethal-shotguns-black-lives-matter-protests/70545414007/; see also Austin Police Department Special Order # 2023-002, "Cease the use of Less Lethal Shotguns and their ammunition", (Effective Aug. 16, 2023), *available at*, https://www.austintexas.gov/sites/default/files/files/Police/General%20Orders/GO%2008.25.23/Special%20Order%20-%20Less%20Lethal%20Shotgun.pdf.

The Stay prevented Plaintiff from seeking discovery about the reasons why the City of Austin ceased using the Beanbag Defendants' products. This was also about the time that the Austin Police Department initiated its recently disclosed internal investigation into the less lethal defects of the munitions. *See* Plohetski, "EXCLUSIVE: APD report says higher-ups knew of projectile dangers before 2020 protests", AUSTIN AMERICAN-STATESMAN (Feb. 1, 2024), available at, https://www.statesman.com/story/news/local/2024/02/01/apd-austin-police-less-lethal-projectiles-2020-protests-report-higher-ups-knew-of-dangers/72433963007/:

> Assistant Police Chief Jeff Greenwalt, who serves as the department's chief of staff, requested the investigation last fall. It says city lawyers asked Greenwalt to testify in an upcoming deposition, and that, as he began studying materials related to the protests, he saw information indicating officers had expressed concerns about the munitions.

The Court lifted the Stay in this case on Jan. 19, 2024. (Doc. 103). Two weeks later, news reports disclosed, for the first time, the internal investigation into the defect of the munitions. Plaintiff's promptly served discovery requests for the report of the investigation in companion cases and received the responsive information on March 15, 2024. Plaintiff amended his Complaint to add the Beanbag Defendants on April 9, 2024. (Doc. 118).

In addition, Plaintiffs could not have brought his products defect claims against the Beanbag Defendants while Defendant Rast's indictment was pending. Officer Rast was indicted on Feb. 17, 2021, and his indictment was dismissed on Oct. 16, 2023. The Beanbag Defendants were arguably immune from products liability suits while Defendant Rast was under indictment because aggravated assault is "a volitional act that constituted a criminal offense". The federal Protection of Lawful Commerce in Arms Act states that if a shooter is guilty of crime when shooting a victim, then the shooter is the sole proximate cause of the victim's injuries:

> an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.

15 U.S.C. § 7903(5)(A)(v).

III. Plaintiff has met the pleading standard as to Defendant CSI.

Plaintiff's Second Amended Complaint defines the Beanbag Defendants as "Defense Technology, LLC, Safariland, LLC, and/or CSI Combined Systems, Incorporated (collectively, the "Beanbag Defendants")". (Doc. 118, at ¶ 29). Defendant CSI's supposed bewilderment about what Plaintiff has alleged against it is belied by paragraphs 54-57 of the Second Amended Complaint which state Plaintiff's allegations against the Beanbag Defendants as follows:

> ¶ 54. The Beanbag Defendants owe a duty of care to those who will eventually be impacted by the beanbags they manufacture and distribute. This includes a duty to manufacture rounds that work properly as well as a duty to provide adequate labeling and warnings to users of the rounds.
>
> ¶ 55. The Beanbag Defendants breached this duty and were negligent when they manufactured and distributed faulty rounds, failed to adequately label the rounds themselves and the packaging of the rounds, and/or failed to provide adequate

> warnings about the dangers of the beanbags expiring or becoming hard or more dangerous in certain storage conditions or after a certain period of time.
>
> ¶ 56. The Beanbag Defendants' conduct proximately caused Plaintiff's damages, including severe physical and emotional injuries, when Plaintiff was shot with one of these beanbag rounds by Defendant Rast.
>
> ¶ 57. In addition, pursuant to Texas Civil Practice and Remedies Code Chapter 82, the Beanbag Defendants are strictly liable as manufacturers and/or sellers of defective beanbag rounds, including for inadequate warnings or instructions. The defective warnings and/or marketing rendered the beanbag rounds unreasonably dangerous for their intended and foreseeable uses, thereby proximately causing Plaintiff's injuries and damages.

Defendant CSI's argument that "there is no way for CSI to determine what it allegedly did that resulted in legal harm to Plaintiff" is a formulaic 12(b)(6) assertion that lacks a good faith foundation and id contradicted by Plaintiff's allegation that CSI "manufactured and distributed faulty rounds, failed to adequately label the rounds themselves and the packaging of the rounds, and/or failed to provide adequate warnings about the dangers of the beanbags".

IV. Defendant CSI is not entitled to immunity under the Protection of Lawful Commerce in Arms Act.

The Protection of Lawful Commerce in Arms Act does not apply to this case because as stated above, Defendant Rast is no longer under criminal indictment (and has not been convicted of any crime). Plaintiff's Second Amended Complaint accuses Officer Rast of unconstitutional excessive force, but Officer Rast claims he is entitled to Qualified Immunity and Official Immunity:

> ¶ 1 of Affirmative Defenses
>
> Rast asserts the defense of qualified immunity. Specifically, any and all actions by Rast that may be the subject of Plaintiff's claims did not violate clearly established statutory or constitutional rights of Plaintiff about which a reasonable person would have known.
>
> ¶ 2 of Affirmative Defenses

> Rast asserts the defense of official immunity. Specifically, any and all actions by Rast that may be the subject of Plaintiff's claims involved discretionary duties within the scope of Rast's authority performed in good faith.

(Doc. 9). If Rast succeeds in his affirmative defenses, it will be clear that the Act does not apply. Right now, it is enough that Plaintiff has adequately pled the design defect exception to the Act's immunity. *See* 15 U.S.C. § 7903(5)(A)(v).

Additionally, as discussed above, Defendant CSI's interpretation of the Second Amended Complaint as not alleging it manufactured or sold the munitions is disproven by paragraph 55 ("The Beanbag Defendants breached this duty and were negligent when they manufactured and distributed faulty rounds"). That same paragraph disproves CSI's claim that Plaintiff's claims against CSI are "rooted in an information defect". On the contrary, Plaintiff has alleged a *product* defect as allowed under the Act.

V. Conclusion

For all these reasons, Plaintiff Sam Kirsch respectfully requests that the Court deny the Beanbag Defendants' motions to dismiss.

Dated: July 8, 2024

Respectfully submitted,
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Certificate of Service

I certify that I filed Plaintiff's Response via the Court's CM/ECF system on July 8, 2024, which will serve all counsel of record.

/s/ Rebecca Webber
Rebecca Webber

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

SAM KIRSCH	§	
Plaintiff	§	
	§	
V.	§	**CIVIL NO. 1:20-cv-1113-RP**
	§	
CITY OF AUSTIN, ROLAN RAST, SAFARILAND, LLC, DEFENSE TECHNOLOGY, AND COMBINED SYSTEMS, INC.	§	
Defendants	§	

REPLY BRIEF IN FURTHER SUPPORT OF MOTION TO DISMISS BY COMBINED SYSTEMS, INC.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW COMBINED SYSTEMS, INC., a defendant named herein, and makes and files this, its Reply Brief in Further Support of its Motion to Dismiss under Rule 12(b), for lack of jurisdiction and/or failure to state a claim upon which relief can be granted, and in further support thereof would respectfully show as follows:

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I. The Discovery Rule Does Not Save Plaintiff's Claims Against CSI

Plaintiff's purported reliance on the Discovery Rule is unpersuasive. It is apparent that the Discovery Rule does not apply to the instant case and does not save Plaintiff's claims. Plaintiff's claims against CSI are therefore time-barred and subject to dismissal.

It is well-established under Texas law, "a person must bring suit for . . . personal injury . . . no later than two years after the day the cause of action accrues." Tex. Civ. Prac. & Rem. Code. Ann. § 16.003(a). A cause of action accrues when "a wrongful act causes a legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred." *Litvinov v. Bowtech, Inc*., 2023 U.S. Dist. LEXIS 199533 (S.D.Tex. 2023), citing *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 721 (Tex. 2016). In general, "the limitations clock is running, even if the claimant does not yet know: the specific cause of the injury; the party responsible for it; the full extent of it; or the chances of avoiding it." *Id*., citing *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 93-94 (Tex. 2004). Although the discovery rule allows a plaintiff to sue outside of the two-year limitations period "if they could not have discovered their injuries (with reasonable diligence) within that period", it only applies when "the nature of the *injury* incurred is inherently undiscoverable and the evidence of the *injury* is objectively verifiable." *Id*. (emphasis added); see also *Gutierrez v. Ethicon, Inc.,* 535 F. Supp. 3d 608, 619 (W.D. Tex. 2021).

The focus of the Discovery Rule is therefore on "whether or not the injury is 'the type of injury that could be discovered through the exercise of reasonable diligence.'" *McGowan v. SMU*, 2024 U.S. Dist. LEXIS 20349, at *12-13 (N.D.Tex. 2024). It is typically applied in cases of latent injuries. *Id*. at 13. For example, in *Childs v. Haussecker*, 974 S.W.2d 31 (Tex. 1998),

the plaintiff worked as a sandblaster for two years beginning in 1961. Almost 30 years later, after seeking

medical treatment from multiple doctors who rejected the plaintiff's suspicions about the cause of his symptoms, he was diagnosed with "work-related silicosis." *Id.* at 35-36. The Texas Supreme Court held that, because reasonable minds could differ on whether the plaintiff should have known of the injury during the period of exposure, the defendant was not entitled to judgment as a matter of law based on the statute of limitations. *Id.* at 46. Similarly, in *Bulox v. CooperSurgical, Inc.*, 2022 U.S. Dist. LEXIS 106112 (S.D. Tex. 2022), the plaintiff had a birth control device implanted in her abdomen. *Id.* at *2. Nine years later, she required surgery after the device migrated and caused her pain. *Id.* The court applied the discovery rule, finding that her injury was "inherently undiscoverable" because neither the plaintiff nor her doctors knew or had reason to know that the device implanted almost a decade earlier was causing her pain. *Id.*

As succinctly stated by the Supreme Court of Texas,

> "The discovery rule does not linger until a claimant learns of actual causes and possible cures. Instead, it tolls limitations only until a claimant learns of a wrongful injury. Thereafter, the limitations clock is running, even if the claimant does not yet know the specific cause of the injury, the party responsible for it, the full extent of it, or the chances of avoiding it."

See, PPG Indus. v. JMB/Houston Ctrs. Ltd. P'ship, 146 S.W.3d 79 (Tx. 2004).

Further, it has been said that "when a plaintiff knows that he has been injured, he 'must exercise reasonable diligence to investigate the suspected harm and file suit, if at all, within the limitations period.'" *Gutierrez v. Tractor Supply Company*, 2018 U.S. Dist. LEXIS 125061 (S.D. Tex. 2018), *citing Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 202 (Tex. 2011). In this regard, "[t]he discovery rule is rarely applicable in assault cases because a plaintiff will almost always be aware of his bodily injury." *Bradley v. Phillips Petroleum Co.*, 527 F. Supp. 2d 625, 640-41 (S.D. Tex. 2007), aff'd sub nom. *Bradley v. Phillips Chem. Co.*, 337 Fed. Appx. 397 (5th Cir. 2009). "All that is required to commence the running of the limitations period

is the discovery of the injury and its general cause, not the exact cause in fact and the specific parties responsible." *Id*., citing *Bayour Bend Towers Council of Co-Owners v. Manhattan Constr. Co*., 866 S.W.3d 740, 743 (Tex. App.-Houston [14th Dist.] 1993).

The court's analysis in the case of *McGowan v. SMU*, 2024 U.S. Dist. LEXIS 20349 (N.D.Tex. 2024) is instructive. In that case, the plaintiffs, former rowing athletes at Southern Methodist University ("SMU") brought suit after suffering hip injuries incurred while members of the rowing team. *Id*. at *1-2. In particular, the plaintiffs alleged SMU was negligent in providing inferior resources to its female rowers that resulted in the development of their hip injuries. *Id*. Plaintiffs contended that their injuries were inherently undiscoverable for statute of limitations purposes prior to their discovery of a report studying these findings known as the Eaton Report. *Id*. In holding that the discovery rule did not save the plaintiffs' claims, the court held that the discovery rule did not apply because the plaintiffs' injuries were not inherently undiscoverable. *Id*. at *11. In particular, [t]heir hip injuries were not "by nature unlikely to be discovered . . . despite due diligence." *Id*. (citations omitted). Instead, the plaintiffs had knowledge of their hip injuries at the time of their occurrence and knew that the injuries were sustained while participating in SMU rowing activities. *Id*. Although the plaintiffs asserted that they did not and could not know their hip injuries were related to the defendant's wrongful conduct until after the release of the Eaton Report which made the findings known, the court correctly noted the plaintiffs "did not need to have every piece of information regarding SMU's rowing program to know that they suffered injury." *Id*. at 12.

The instant case is analogous to *McGowan*. In fact, Plaintiff in this case had knowledge of both (1) his injuries and (2) the general cause of his injuries – that is, being shot with less-lethal munitions – no later than May 31, 2020. He therefore had knowledge of an alleged

wrongful injury as of May 31, 2020, at which time the statute of limitations began to run and he was under an obligation to investigate any claims related to his alleged wrongful injury. Plaintiff's reliance on the internal investigative report disclosed by the Austin Police Department in February 2024 [ECF 143, at p. 5] is irrelevant because, as the court correctly noted in *McGowan*, Plaintiff "did not need every piece of information regarding [the rounds at issue] to know that [he] suffered injury." *McGowan*, 2024 U.S. Dist. LEXIS 20349 at *12.

As a further matter, it is worth pointing out that Plaintiff's attempts to suggest (i) the newly-added claims were inherently undiscoverable prior to February 2024, or (ii) that he acted with due diligence prior to that time, are unavailing. At the outset, although Plaintiff's original Complaint does not assert a formal product defect claim against any alleged product manufacturers, the original Complaint very clearly includes the allegation that the beanbag rounds at issue did not function as intended such that Plaintiff had a duty to investigate this claim. [ECF 1 at pars. 20, 43]. In particular, Plaintiff alleged that his injuries were made more serious because the projectile was "expired and had hardened". *Id*. at 43; *see also* par. 20 ("…the City armed its police on May 30 and 31 with expired munitions which had hardened over time and thus caused more severe injuries…"). Plaintiff evidently believed the product did not function as intended based of a defect related to the City's failure to maintain unexpired munitions rather than a defect in the manufacturing or design of the product. *Id.* at pars. 20, 43. Regardless, it cannot reasonably be disputed that Plaintiff had a belief that the product did not function as intended at the time the original Complaint was filed in November 2020. [ECF 1]. Plaintiff simply failed to investigate and develop any other theories of liability until the limitations period had expired.

Likewise, regardless of whether Plaintiff had access to the same information that the Austin Police Officers did when they filed the State Court action, it cannot reasonably be disputed that a lawsuit by Austin Police Department named less-lethal munitions manufacturers as defendants in a lawsuit filed in May 2022 that alleged product defect claims. *See* Plaintiffs' Original Petition (filed May 31, 2022) styled, *Joshua Jackson et al vs. Safariland LLC, Defense Technology, et al*, Cause No. D-1-GN-22-002502 in the 201st Judicial District Court of Travis County, Texas. This was publicly available information to which Plaintiff had access and apparently did not consider. That Plaintiff apparently believed the claims were "strained" is not a basis for tolling the statute of limitations under the Discovery Rule. [ECF 143, at p. 5].

Finally, whether or not there was a stay of discovery in this case is also not relevant. [ECF 143, at p. 5]. Regardless of whether a stay was in place in this case, Plaintiff certainly had other avenues to investigate his claims, including a Freedom of Information Act request, a subpoena to the less-lethal manufacturer defendants, or basic internet research. There is no indication Plaintiff took any steps to investigate in a timely fashion.

II. Both Plaintiff's Second Amended Complaint and Plaintiff's Opposition to the Instant Motion Fail to Establish a Basis For a Claim Against CSI

Next, Plaintiff argues, in conclusory fashion, that it has met the pleading standard as to CSI. In support of this argument, Plaintiff relies almost exclusively on allegations made against the less lethal munition defendants collectively, lumping them all together as if a single entity. Plaintiff's efforts are woefully inadequate and establish CSI's entitlement to dismissal.

A pleading stating a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief..." *Ashcroft v. Iqbal*, 556 U.S. 662, 663-64 (2009), citing Fed. R. Civ. P. 8(a)(2). The statement must be sufficiently specific to "give the Defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

Atuahene v. City of Hartford, 10 Fed. App'x. 33, 34 (2d Cir. 2001). Courts have routinely noted that "[a] complaint does not satisfy the requirements of *Iqbal* and *Twombly* by lumping together all defendants, while providing no factual basis to distinguish their conduct." *See Callier v. Nat'l. United Grp., LLC,* 2021 U.S. Dist. LEXIS 223278 (W.D.Tex. 2021), citing *Cobarobio v. Midland Cty.,* 2015 U.S. Dist. LEXIS 193948 (W.D.Tex. 2015); *see also, Del Castillo v. PMI Holdings, N. Am., Inc*., 2015 U.S. Dist. LEXIS 80301 (S.D.Tex. 2015), citing *Atuahene v. City of Hartford*, 10 Fed. App'x. 33, 34 (2d Cir. 2001) (granting a motion to dismiss for failure to provide fair notice under Rule 8 in part because "[t]he complaint failed to differentiate among the defendants, alleging instead violations by 'the defendants' and failed to identify any factual basis for the legal claims made"); *Euramerica Gas v. Britlind Energy, LLC*, 2018 U.S. Dist. LEXIS 244669 (N.D.Tex. 2018); *Medina v. Bauer*, No. 02 Civ. 8837(DC), 2004 U.S. Dist. LEXIS 910, at *6 (S.D.N.Y. Jan. 27, 2004) ("By lumping all the defendants together and failing to distinguish their conduct, plaintiff's amended complaint fails to satisfy the requirements of Rule 8. Specifically, the allegations fail to give adequate notice to these defendants as to what they did wrong.").

Here, Plaintiff's Second Amended Complaint confirms that the rounds used against Plaintiff that are at issue in this case were manufactured by the co-defendants, not CSI, such that CSI and Defense Technology/Safariland are dissimilarly situated. [ECF 118 at par. 30] (confirming "Defense Technology, LLC and Safariland, LLC, manufactured the beanbag rounds used by Defendant Rast when shooting at Plaintiff."). Plaintiff cannot therefore group CSI in under the title of "the Beanbag Defendants" and use this as the basis for any alleged claim against CSI. In this regard, Plaintiff argues in Opposition that he has satisfied the pleading standard as to CSI because he has defined "the Beanbag Defendants" as "Defense Technology,

LLC, Safariland, LLC, and/or CSI Combined Systems, Incorporated (collectively, the 'Beanbag Defendants')". [ECF 14, at pp. 8-9]. Plaintiff then refers to a series of paragraphs lumping "the Beanbag Defendants" together and offering boilerplate recitations of the elements of the causes of action at issue. *Id.* The glaring omission in Plaintiff's Second Amended Complaint – and Plaintiff's Opposition for that matter – is the lack of any factual basis connecting CSI to this case. Certainly there are no allegations that would put CSI on fair notice of the claims against it. This is particularly so given that the Second Amended Complaint unambiguously confirms that the rounds used against Plaintiff that are the subject of this case were manufactured by the co-defendant beanbag manufacturers, Defense Technology, LLC/Safariland, LLC. [ECF 118 at par. 30].

Plaintiff has presented no evidence demonstrating why CSI is a proper party to this case, particularly given that the Second Amended Complaint concedes the rounds at issue were not a CSI product. CSI is therefore entitled to dismissal for this reason alone.

III. CSI Is Entitled to Dismissal Under the PLCAA

Plaintiff's Opposition to CSI's motion to dismiss based on the applicability of the Protection of Lawful Commerce in Arms Act appears to be based almost exclusively on the mistaken premise that the PLCAA cannot be applied where the user of the qualified product is not subject to a criminal indictment. [ECF 143, at pp. 9-10]. In particular, Plaintiff contends that the PLCAA does not apply to this case because Defendant Rast "is no longer under indictment (and has not been convicted of any crime). [ECF 143, at p. 9]. Plaintiff further contends that if Officer Rast succeeds on his Qualified and Official Immunity defenses then "it will be clear that the Act does not apply" *Id*. at p. 10. Plaintiff's assertion is not only inaccurate, it is belied by the universe of case law which has repeatedly rejected this proposition. Separately, the allegations in

the Second Amended Complaint dispel any notion that the design defect exception to the PLCAA could be applied to CSI in this case.

In suggesting that application of the PLCAA requires a criminal conviction, Plaintiff ignores the body of case law cited in CSI's initial motion papers which very clearly rejects any such requirement. Plaintiff makes no effort to address these cases, nor do they cite to a single piece of authority that would support their position. The failure to do so only bolsters CSI's position. Indeed, it is well-established that a criminal conviction is not required to support a PLCAA claim. *See Santos v. City of Providence*, 2024 U.S. Dist. LEXIS 51411 (D.R.I. 2024); *Estados Unidos Mexicanos v. Smith & Wesson Brands, Inc*., 633 F.Supp. 3d 425, 450 (D. Mass. 2022), rev'd on other grounds, 91 F.4th 511 (1st Cir. 2024); *Travieso v. Glock, Inc*., 526 F.Supp.3d 533 (D.Ariz. 2021); *Jeffries v. District of Columbia*, 916 F.Supp. 2d 42, 46 (D.D.C. 2013); *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009).

Santos v. City of Providence is on point. In *Santos*, the plaintiff commenced a civil rights action after allegedly sustaining severe injuries when a Providence police officer shot him in the face with a "less-than-lethal munition". *See Santos*, 2024 U.S. Dist. LEXIS at *1. The less lethal munition manufacturer moved to dismiss the Complaint on the basis that the PLCAA precluded plaintiff's claims. *Id*. The Court agreed, finding that the Officer was alleged to have used the products at issue in a criminal or unlawful manner such that the PLCAA applied. *Id*. at 7-8. Specifically, the Court explained "the Amended Complaint expressly alleges that Officer Comella used excessive force against Santos, which violated his constitutional rights. Thus, because the Court must assume that those allegations are true, Plaintiff's claims . . . trigger the PLCAA's general prohibition on civil liability actions. *Id*., citing *Doyle v. Combined Sys. Inc*., 2023 U.S. Dist. LEXIS 161087, at *7 (N.D. Tex. 2023). The Court specifically explained that

"the inquiry centers on the criminal nature of the volitional act, rather than on whether the user of the firearm was charged or convicted of an offense." *Id*. at *9-10.

Likewise, *Travieso v. Glock, Inc*., is also instructive. In *Travieso*, a fourteen year old girl inadvertently discharged a handgun while riding in the backseat of a van that struck Plaintiff who was riding in the front seat. *Travieso*, 526 F. Supp. 3d at 536. No criminal charges were filed. *Id*. Plaintiff brought suit against the gun manufacturer, and the gun manufacturer moved to dismiss the Complaint based on the applicability of the PLCAA. In granting the defendant's motion to dismiss, the Court rejected plaintiff's suggestion that the PLCAA could not apply because there was no criminal charge or conviction. The Court clearly stated "the PLCAA's product liability preemption is triggered by the criminal nature of the act, not whether the actor is or can be charged with the crime." *Id*. at 547.

Here, as set forth in CSI's initial motion papers, it is apparent from the Second Amended Complaint that Plaintiff is alleging Officer Rast acted in a criminal or unlawful manner. In particular, the Second Amended Complaint alleges that Officer Rast acted with excessive force in violation of Plaintiff's rights. [ECF 118, pars. 20, 23, 32, 39, 44, 47, 118; *see also*, ECF 118 at p. 1]. Whether or not there are criminal charges or a criminal conviction is not relevant. Instead, it is the nature of the act alleged that is the relevant inquiry, and here Plaintiff has clearly alleged an unlawful act in violation of his rights. Thus, "because the Court must assume that those allegations are true, Plaintiff's claims . . . trigger the PLCAA's general prohibition on civil liability action." *See Santos*, 2024 U.S. Dist. LEXIS at *7-8.

Similarly, any assertion that the design defect exception to the PLCAA could be applied against CSI is specious. The only support Plaintiff points to for the suggestion that the design defect exception applies against CSI is a single, vague statement within the Second Amended

Complaint that states "[t]he Beanbag Defendants breached this duty and were negligent when they manufactured and distributed faulty rounds". [ECF 143, at p. 10]. As set forth above, it is improper for Plaintiff to group "the Beanbag Defendants" together for purposes of this case given that the Second Amended Complaint conclusively establishes that the particular rounds used against Plaintiff were made by Defense Technology/Safariland. [ECF 118, at par. 30] ("Defense Technology, LLC, and Safariland, LLC manufactured the beanbag rounds used by Defendant Rast when shooting at Plaintiff."). Thus, Plaintiff's sole reliance on a boilerplate statement that "the Beanbag Defendants" were negligent in manufacturing and distributing faulty rounds is nothing more than a blatant attempt to manipulate their own pleadings and ignore their prior acknowledgement that CSI did not make the particular rounds at issue in this case. Therefore, there is no basis to apply the design defect exception against CSI.

CONCLUSION

The foregoing premises considered, Defendant Combined Systems, Inc. requests that the Court dismiss the claims against it under Rule 12(b) with prejudice.

Respectfully submitted,

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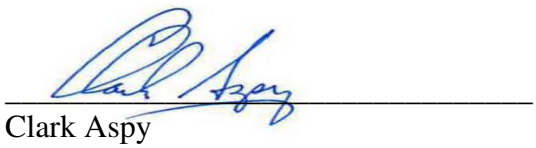
By: _____
P. Clark Aspy
State Bar Number 01394170

ATTORNEY FOR DEFENDANT COMBINED SYSTEMS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was served on all counsel of record in accordance with the Texas Rules of Civil Procedure on this the _____ day of July, 2024.



Clark Aspy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH,	§	
	§	
Plaintiff,	§	
	§	
	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-1113-RP**
	§	
CITY OF AUSTIN, ROLAN RAST SAFARILAND, LLC, DEFENSE TECHNOLOGY, AND CSI COMBINED SYSTEMS, INC.	§	
	§	
Defendants.	§	

DEFENDANTS SAFARILAND, LLC AND DEFENSE TECHNOLOGY, LLC'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

Defendants Safariland, LLC ("**Safariland**") and Defense Technology, LLC ("**Defense Technology**") (the "**Safariland Defendants**") file this Reply in Support of Their Motion to Dismiss (the "**Reply**") [ECF 139], and in support would show the Court as follows:

I. INTRODUCTION

Plaintiff Sam Kirsch's ("**Plaintiff**") claims against the Safariland Defendants expired on May 31, 2022. Plaintiff seeks to invoke the discovery rule, but this effort suffers from several fatal flaws. First, Plaintiff's injury was not inherently undiscoverable—a fact Plaintiff concedes. Second, the cause of Plaintiff's injury was not inherently undiscoverable, and Plaintiff has alleged for years that he knew what caused his injury. Plaintiff's attempt to shift the inquiry to the discoverability of the alleged defect is not supported by the applicable law. In any event, Plaintiff has alleged, since his original Complaint and Request for Jury Trial (the "**Complaint**"), that a defect existed in the munitions. Third, Plaintiff has not adequately alleged due diligence. Plaintiff's Second Amended Complaint (the "**Second Amended Complaint**") sets forth a single,

generic allegation about "new information." This is insufficient as a matter of law. Moreover, Plaintiff's attempt to bootstrap an inference of due diligence by citing news reports is legally impermissible, and further fails because such effort ignores that earlier news reports triggered his duty to investigate long before he filed suit.

Plaintiff has not and cannot invoke the discovery rule. As a result, Plaintiff's claims against the Safariland Defendants should be dismissed with prejudice as time-barred.

II. ARGUMENTS AND AUTHORITIES

A. Plaintiff Does Not Dispute That His Claims Against the Safariland Defendants Are Time-Barred.

The Safariland Defendants set forth in their Motion to Dismiss (the "**Motion**") that Plaintiff's claims are time-barred. [ECF 139, at pp. 5-6]. In Plaintiff's Combined Response to Beanbag Defendants' Motion to Dismiss (the "**Response**"), Plaintiff does not dispute his claims are time-barred. [ECF 143, at pp. 1-8]. Instead, Plaintiff limits his discussion to the discovery rule. [*Id*.]. Thus, the only issues for the Court to decide with regard to the Safariland Defendants are (1) whether the discovery rule is available to Plaintiff and, (2) if so, whether it was properly invoked. For the reasons set forth in the Motion and herein, the discovery rule is neither available nor properly invoked.

B. The Discovery Rule Does Not Apply Because Plaintiff's Injury is Not Inherently Undiscoverable.

1. Whether or not Plaintiff's injury was inherently undiscoverable is the threshold inquiry.

The discovery rule only applies in situations where the "nature of the plaintiff s [sic] injury is both inherently undiscoverable and objectively verifiable." *Irma Blas v. Rosen*, No. DR-18-CV-66-AM, 2019 WL 5199284, at *6 (W.D. Tex. July 16, 2019) (internal quotations omitted). "An injury is inherently undiscoverable if it is, by its nature, unlikely to be discovered within the

prescribed limitations period despite due diligence." *Id*. (internal quotations omitted). As a result, "[t]he discovery rule is rarely applicable in assault cases because a plaintiff will almost always be aware of his bodily injury." *Bradley v. Phillips Petroleum Co.*, 527 F. Supp. 2d 625, 640 (S.D. Tex. 2007), aff'd sub nom. *Bradley v. Phillips Chem. Co.*, 337 Fed. Appx. 397 (5th Cir. 2009). Importantly, the discovery rule does not require the discovery of "claims" or specific tortfeasors. *Id*. at 640-41. Rather, it concerns the discovery of *injuries*, and Plaintiff's current and prior pleadings allege facts establishing that he knew he was injured on May 31, 2020, and that he knew both how and why that injury occurred. [*See* ECF 139, at p. 7 (citing ECF 1, ¶¶ 8-16, 20, 29, 39; ECF 4, ¶¶ 9-16, 18, 20, 28, 38; ECF 118, ¶¶ 12-20, 23-24, 34-35, 39, 49, 52)]. Specifically, Plaintiff repeatedly alleges that, on May 31, 2020, the Austin Police Department shot him in the head with a projectile, which resulted in injury. [*Id*.].

In his Response, Plaintiff does not argue that his injury was inherently undiscoverable. [*See generally* ECF 143]. In fact Plaintiff concedes that "[i]t is true that Plaintiff knew he was injured when he was shot in the head on May 31, 2020." [*Id*. at p. 5]. This concession is fatal to his claims against the Safariland Defendants, which should therefore be dismissed.

2. Plaintiff instead focuses on the discoverability of an alleged defect, which is not proper.

Plaintiff asserts that "[t]he defects in the Beanbag Defendant's products were not inherently undiscoverable…." [ECF 143, at p. 4]. Plaintiff seeks to improperly shift the inquiry from whether or not his *injury* was inherently undiscoverable. This is contrary to the well-known rules governing the application of the Texas discovery rule. Even if the inquiry was proper, Plaintiff's allegations preclude the application of the discovery rule.

As set forth above, the Texas discovery rule applies when *injuries* are inherently undiscoverable. This Court has repeatedly dismissed state law claims after determining that the

injuries were not inherently undiscoverable. *See, e.g.*, *Toth Enterprises II, P.A. v. Forage*, No. 1:23-CV-542-RP, 2023 WL 8723199, at *9 (W.D. Tex. Dec. 18, 2023) (dismissing conversion claim under Texas law because "Plaintiffs' injury was not inherently undiscoverable"); *Rodrigue v. Am. Towers, LLC*, No. 1-16-CV-064 RP, 2016 WL 2853574, at *4 (W.D. Tex. May 13, 2016) (dismissing fraud claim under Texas law because Plaintiff's "injury was both discoverable and verifiable well before the expiration of the four year limitations period").

Plaintiff relies on two cases for the proposition that his failure to discover a causal connection between the alleged defect and his injury support the application of the discovery rule. [ECF 143, at pp. 2, 5 (citing *Hurdsman v. Gleason*, No. 1:22-CV-254-RP, 2024 WL 2848674 (W.D. Tex. June 5, 2024) and *Lozano v. Baylor Univ.*, No. 6:16-CV-403-RP, 2023 WL 8103167 (W.D. Tex. Nov. 21, 2023)]. *Hurdsman* is inapposite because it involves the recording of an inmate's privileged phone calls at the jail, which injury was inherently undiscoverable until the prisoner "became aware at the beginning of 2021 that his phone calls had been recorded." *Hurdsman*, 2024 WL 2848674 at *5. *Lozano* was decided on a motion for judgment as a matter of law after a trial, as opposed to a motion to dismiss under Rule 12(b)(6). *Lozano*, 2023 WL 8103167 at *1 (seeking motion for a judgment as a matter of law on defendant's statute of limitation defense). Moreover, Baylor argued that Lozano lacked evidence to support tolling under the discovery rule or fraudulent concealment doctrine, and that Lozano "suspected that football players got special treatment," but this Court concluded that Baylor "failed to meet its burden by pointing to evidentiary support" for that argument. *Id*. at *4.

Plaintiff's argument that he had to discover the specific design defect, as opposed to the general cause of his injury, is simply wrong. *See Vaught v. Showa Denko K.K.*, 107 F.3d 1137, 1141-42 (5th Cir. 1997) (affirming dismissal where plaintiff "made a connection between her

physical symptoms, EMS, and the ingestion of L-tryptophan" because "Texas has declined to construe the discovery rule to toll limitations period until a plaintiff discovers a specific cause of action against a specific defendant") (internal quotation omitted). In *Perez*, the court provided a useful summation of the Texas discovery rule: "In the products liability context, this means that the statute of limitations is tolled until the plaintiff discovers or should have discovered a causal connection between her injury ***and the allegedly defective product***." *Perez v. Am. Med. Sys. Inc.*, 461 F. Supp. 3d 488, 495 (W.D. Tex. 2020) (emphasis added). In other words, Plaintiff need only have been aware that his injury was caused by a beanbag munition, a fact of which he was aware.

Plaintiff's Complaint is replete with allegations that his injury was caused by a beanbag munition, which he also happens to allege was defective. [ECF 1, at ¶ 19 (identifying projectile as 12-gauge beanbag rounds filled with lead pellets); *id*. at ¶¶ 20, 43 (injuries were "more serious" because "the projectile [that he was struck with] was ***expired and had hardened***" and was not used "within the manufacturers' recommended time frames"); *id*. at ¶ 42 (the City of Austin was negligent when it used "expired munitions that [became] more dangerous with age"); *see also id*. at ¶¶ 9-16, 20]. Plaintiff's allegations preclude the application of the discovery rule.[1]

3. Plaintiff did not use due diligence.

"[D]iligence is the cornerstone of … the discovery rule." *Champlin v. Manpower Inc.*, No. 4:16-CV-00421, 2018 WL 572997, at *4 (S.D. Tex. Jan. 24, 2018). "The discovery rule requires the plaintiff to diligently pursue the facts surrounding his [] injury." *Id*. As set forth in the Motion,

[1] Plaintiff argues in response that he "has not previously pled a product defect." [ECF 143, at p. 6]. While it is true that Plaintiff did not bring a products liability claim in fact (hence the time bar to his claims against the Safariland Defendants), Plaintiff cites to his allegations that "the projectile was expired and had hardened." [*Id*. (citing ECF 1, at ¶ 43 and ECF 4, at ¶ 41)]. Plaintiff acknowledged the alleged cause of his injury since the inception of this lawsuit—a hardened munition. [*Id*.]. This was sufficient to trigger his duty to investigate. After all, Plaintiff also alleged that the munitions originally contained lead pellets, which he then alleged hardened, indicating that the munition underwent some transformation that caused his injury. [*Id*.; ECF 1, at ¶ 19].

Plaintiff does not allege any sort of diligence apart from the conclusory allegation that he "obtained new information that enabled him to discover his newly added claims." [*See* ECF 139, at pp. 7-9; ECF 118, at ¶ 29].

In Response, Plaintiff cites to, and asks the Court to take judicial notice of, a flurry of news reports. [*See* ECF 143, at pp. 3-4, 6-7]. There are several flaws in this approach. First, and most importantly, Plaintiff did not allege that any of this information is in fact the "new information that enabled him to discover his newly added claims." [*Id.*; *see* ECF 118, at ¶ 29]. While that argument appears in the Response, there is no way to tie (nor does Plaintiff attempt to tie) a single one of the identified news reports to Plaintiff's allegation of "new information" because the allegation does not specifically identify any "new information" in his Second Amended Complaint. [*Id.*].

Second, Plaintiff requested the Court take judicial notice of these new reports as "matters of public record." [ECF 143, at p. 4]. However, Plaintiff has not established that the accuracy of these articles could not reasonably be questioned nor that the facts in the articles are generally known within this Court's jurisdiction. *See Petrobas American, Inc. v. Samsung Heavy Indus. Co., Ltd.*, 9 F.4th 247, 255 (5th Cir. 2021) (declining to take judicial notice of newspaper articles); *Ambler v. Williamson Cnty., Tex.*, No. 1-20-CV-1068-LY, 2021 WL 769667, fn. 8 (W.D. Tex. Feb. 25, 2021) ("Courts routinely have declined to take judicial notice of facts asserted in news reports and newspapers because they are not a source whose accuracy cannot be questioned.") (internal quotation omitted). Moreover, they are not public records. *Ambler*, 2021 WL 769667 at *4 ("The Fifth Circuit has found it proper to judicially notice certain public records, such as court proceedings and rulings; decisions of governmental agencies; arbitration records; and published reports of administrative agencies."). In *Ambler*, the court refused to take judicial notice of a police bodycam video posted on a news website. *Id.* at *4-*5.

Third, if Plaintiff's news articles are subject to judicial notice, Plaintiff ignores similar earlier news reports that triggered his duty to investigate, such that limitations would bar his claims against the Safariland Defendants. For example, on February 25, 2022 (more than two years before suing the Safariland Defendants), the Austin NBC affiliate, KXAN, published a story on its website about the recently-indicted police officers, which stated that "the beanbag rounds officers used for crowd control didn't work as intended" and characterized those munitions as "unknowingly defective." KXAN, (Feb. 25, 2022), *available at*, https://www.kxan.com/news/local/austin/attorneys-for-8-indicted-apd-officers-say-beanbag-rounds-used-during-protests-were-unknowingly-defective/.[2]

In the end, Plaintiff could have obtained the necessary information via an open records request any time during the two (2) years between his injury and the expiration of the limitations period. Plaintiff wholly fails to respond to this argument because there was no impediment to issuing such a request. [*See generally* ECF 143]. With respect to taking discovery in the above-captioned lawsuit, Plaintiff blames the stay issued by the Court on August 8, 2023. [*Id*. at pp. 1, 5-8 (citing ECF 91)]. Yet, he does not explain why he did not issue such a discovery request between November 9, 2020 (when he first filed this lawsuit) [ECF 1] and August 8, 2023 (when the stay was issued). [ECF 91]. Plaintiff also ignores that he did not have to sue the Safariland Defendants in this same proceeding. Rather, he could have brought a separate lawsuit against the Safariland Defendants (and the other purported manufacturer, CSI Combined Systems, Inc.).[3]

[2] A copy of the article is also attached hereto as **Exhibit A**. If the Court intends to take judicial notice of Plaintiff's cited news articles, the Safariland Defendants respectfully request the Court take judicial notice of this article, too.

[3] Plaintiff also could have initiated a Rule 202 proceeding against the City of Austin or the Safariland Defendants. TEX. R. CIV. P. 202 (allowing for pre-suit depositions).

Finally, Plaintiff makes several excuses in his Response, none of which have any legal or factual merit. [*See* ECF 143, at pp. 1-8]. Again, and most importantly, Plaintiff ignores that none of those excuses are actually alleged in his Second Amended Complaint. [ECF 118]. Plaintiff must make sufficient allegations to invoke the discovery rule, including due diligence. Yet, Plaintiff wholly fails to allege that he engaged in due diligence apart from the sole allegation that he "obtained new information that enabled him to discover his newly added claims" against the Safariland Defendants. [ECF 118, at ¶ 29]. As such, he is not entitled to rely on the discovery rule.

C. Plaintiff's Argument Regarding the Protection of Lawful Commerce in Arms Act Makes No Sense.

Plaintiff contends that he could not assert his claims against the Safariland Defendants while the indictment of Officer Rolan Rast (one of the defendants in this proceeding) was pending due to the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7903(5)(A)(v) (the "**PLCAA**"). [ECF 143, at p. 8]. The application of the PLCAA is going be an issue in this lawsuit even in the absence of the indictment, whether at the dismissal, summary judgment, and/or trial phase of the litigation. To argue that claims were not brought because the Safariland Defendants were "arguably immune" is akin to arguing that Plaintiff could not bring his claims against the Safariland Defendants because they are "arguably time-barred." [ECF 143, at p. 8]. In any event, it certainly does not justify the application of the discovery rule or excuse Plaintiff's failure to exercise due diligence.

III. CONCLUSION

For the foregoing reasons, the Safariland Defendants respectfully pray the Court grant their Motion, dismiss Plaintiff's claims against the Safariland Defendants with prejudice, and grant the

Safariland Defendants such other or further relief, in law or in equity, which the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on July 15, 2024, I served all counsel of record electronically or by another manner authorized under Federal Rule of Civil Procedure 5(b)(2).

/s/ Mallory B. Williams
Mallory B. Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH,	§	
	§	
Plaintiff,	§	
	§	
v.	§	1:20-CV-1113-RP
	§	
CITY OF AUSTIN, et al.,	§	
	§	
Defendants.	§	

ORDER

Before the Court are motions to dismiss the second amended complaint filed by Defendants Safariland, LLC ("Safariland") and Defense Technology ("DT"), (Dkt. 139), and by Defendant CSI Combined Systems, Incorporated ("CSI"), (Dkt. 142). Plaintiff Sam Kirsch ("Kirsch") filed a combined response in opposition. (Dkt. 143). Safariland and DT filed a reply, (Dkt. 145), as did CSI, (Dkt. 144). Having considered the parties' submissions, the record, and the applicable law, the Court will deny the motions to dismiss.

I. BACKGROUND

This case arises from several alleged violations of Kirsch's constitutional rights that allegedly occurred during his participation in a protest in downtown Austin in May 2020, in the aftermath of the murder of George Floyd by Minneapolis police officers. (2d Am. Compl., Dkt. 118, at 1). Specifically, Austin Police Department ("APD") Officer Rolan Rast ("Officer Rast") allegedly shot Kirsch in the head with a "less lethal" projectile shortly after Kirsch had finished protesting on Interstate Highway 35, during APD's attempt to disperse protesters on the highway. (*Id.*). Kirsch contends that Officer Rast shot Kirsh in the face "with a 40mm 'foam baton' round or a 12-gauge round filled with lead pellets." (*Id.* at 9). This injury allegedly required three surgeries and resulted in

injuries to Kirsch's orbital cavity, cheekbone, and eyesight that have left Kirsch permanently disabled. (*Id.* at 7–8).

Kirsch filed suit against the City of Austin (the "City") and an unidentified officer on November 9, 2020. (Dkt. 1). Kirsch amended his complaint for the first time on January 21, 2021, to identify Rast as the officer who allegedly shot him. (Dkt. 4). Kirsch brought First Amendment and Fourth Amendment claims against both the City and Officer Rast, and a negligence claim against the City. (*Id.*). The City answered the first amended complaint on February 1, 2021, (Dkt. 8), and Officer Rast answered on March 26, 2021, (Dkt. 9).

In February 2022, Officer Rast was indicted in a parallel criminal proceeding in state court. Specifically, the Travis County District Attorney's Office obtained an indictment against Officer Rast, along with 18 other APD officers, in connection with their conduct during the May 2020 protests. (Dkt. 53, at 1). On August 5, 2022, United States Magistrate Judge Dustin Howell granted Officer Rast's motions to stay the case with respect to himself until the resolution of his criminal proceedings, (Dkts. 51, 53). (Order, Dkt. 63). On August 8, 2023, Judge Howell granted the City's motion to stay the case with respect to itself until the resolution of criminal proceedings pending against several APD Officers, (Dkt. 87). (Order, Dkt. 91).

On November 3, 2023, Kirsch filed an opposed motion to lift the stay with respect to all parties, indicating that criminal proceedings against Officer Rast have been dismissed. (Dkt. 94). Officer Rast and the City filed a response in opposition, (Dkt. 95), and Kirsch filed a reply, (Dkt. 98). On January 18, 2024, the parties filed a "joint advisory to inform the Court that Defendants withdraw their opposition to" Kirsch's motion to lift the stay. (Dkt. 102). Accordingly, on January 19, 2024, the Court lifted the stays with respect to both the City and Officer Rast. (Order, Dkt. 103).

On April 3, 2024, Kirsch filed an unopposed motion to amend his complaint. (Dkt. 116). The Court granted the motion as unopposed on April 9, 2024. (Text Order dated Apr. 9, 2024).

Kirsch's second amended complaint added three new Defendants, in addition to the City and Officer Rast: Safariland and DT, which allegedly manufactured and distributed the rounds used by Officer Rast, and CSI, which allegedly distributed the rounds. (2d Am. Compl., Dkt. 118, at 13–14). Kirsch's second amended complaint asserts three claims against Officer Rast: (1) a claim under 42 U.S.C. § 1983 that Officer Rast violated Kirsch's First Amendment rights to free speech and to peaceably assemble; (2) a claim under 42 U.S.C. § 1983 that Officer Rast used excessive force, in violation of Kirsch's rights under the Fourth and Fourteenth Amendments; and (3) for punitive damages. (*Id.* at 14–15). Kirsch's second amended complaint asserts two claims against the City: (1) for municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), in connection with APD officers' use of "kinetic projectiles" (munitions) to disperse the protesters in a manner that allegedly violated their constitutional rights; and (2) for negligently using expired, "hardened" munitions against protestors, including Kirsch. (*Id.* at 15–17). The City and Rast answered the second amended complaint on April 23, 2024. (Dkts. 126, 127, respectively).

Kirsch's second amended complaint also brought claims for negligence and strict product liability against Safariland, DT, and CSI as manufacturers and/or sellers of defective rounds. (2d Am. Compl., Dkt. 118, at 17). On June 10, 2024, Safariland and DT moved to dismiss the second amended complaint, (Dkt. 139), and CSI so moved on June 27, 2024, (Dkt. 142). On July 8, 2024, Kirsch filed a combined response in opposition. (Dkt. 143). On July 15, 2024, Safariland and DT filed a reply, (Dkt. 145), as did CSI, (Dkt. 144).

II. LEGAL STANDARD

Pursuant to Rule 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a 12(b)(6) motion, a "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Martin K. Eby Constr. Co. v. Dall. Area*

Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004)). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). That is, "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 *Twombly*, 550 U.S. at 570).

A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* A court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Dorsey v. Portfolio Equities, Inc.,* 540 F.3d 333, 338 (5th Cir. 2008) (citations and internal quotation marks omitted). A court may also consider documents that a defendant attaches to a motion to dismiss "if they are referred to in the plaintiff's complaint and are central to her claim." *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004). But because the court reviews only the well-pleaded facts in the complaint, it may not consider new factual allegations made outside the complaint. *Dorsey,* 540 F.3d at 338. "[A] motion to dismiss under 12(b)(6) 'is viewed with disfavor and is rarely granted.'" *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (quoting *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009)).

III. DISCUSSION

Safariland and DT seek to dismiss the second amended complaint on the basis that Kirsch's claims are barred by the applicable statutes of limitations. (Mot., Dkt. 139). CSI similarly seeks to dismiss the second amended complaint on the basis that Kirsch's claims are barred by the applicable statutes of limitations; CSI also seeks dismissal for failure to state a claim. (Mot., Dkt. 142). The Court will first address the three Defendants' arguments regarding the applicable statutes of limitations.

A. Kirsch Has Adequately Pled the Discovery Rule

Kirsch's second amended complaint states that "[o]n March 15, 2024, Plaintiff obtained new information that enabled him to discover his newly added claims against" Safariland, DT, and CSI. (2d Am. Compl., Dkt. 118, at 13). Safariland, DT, and CSI argue that Kirsch's claims are time-barred and that the discovery rule does not provide him an end-around the applicable statutes of limitations. (Mot., Dkt. 139, at 5–9; Mot., Dkt. 142, at 6–10). Specifically, Safariland, DT, and CSI contend that Kirsch knew that the munitions were expired and hardened at the time he filed suit, and therefore, he could have brought his claims before the two-year statute of limitations expired. (Mot., Dkt. 139, at 5–6 (citing Tex. Civ. Prac. & Rem. Code § 16.003); Mot., Dkt. 142, at 6–7 (same)). In response, Kirsch argues that he sufficiently invoked the discovery rule. (Resp., Dkt. 143, at 2–8). He notes that an article was published in February 2024 which detailed the results of a fall 2023 investigation, in which the City discovered that a number of APD personnel were aware that Safariland, DT, and CSI's products were causing greater injuries than they should have. (*Id.* at 3).

The Court finds that Kirsch has adequately pled the discovery rule exception to the statutes of limitations. While the two-year statute of limitations expired two years after Kirsch was injured (at the end of May 2022), Kirsch has sufficiently alleged that he only became aware of the defects in March 2024. Texas courts recognize an exception to their codified statutes of limitations when

certain elements are met. "The discovery rule exception operates to defer accrual of a cause of action until the plaintiff knows or, by exercising reasonable diligence, should know of the facts giving rise to the claim." *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 734 (Tex. 2001). The discovery rule exception is very limited and should only be employed when "the nature of the plaintiff's injury is both inherently undiscoverable and objectively verifiable." *Id.* at 735; *see also Beavers v. Metro. Life Ins.*, 566 F.3d 436 (5th Cir. 2009). To decide if an injury is "inherently undiscoverable," the court should ask whether the injury is "the type of injury that generally is discoverable by the exercise of reasonable diligence." *Id.* (citing *HECI Expl. Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998)). While Kirsch was certainly aware of his life-altering injury at the end of May 2020, Kirsch has adequately alleged that he only became aware of the cause of his injury in March 2024. Although Kirsch's original complaint and first amended complaint discussed the expiration of the munitions that allegedly caused his and other protestors' more severe injuries, (*see* Dkts. 1, 4), it was not until February 2024 that an article was published detailing how the City's fall 2023 investigation found that the munitions may have been defective and that APD personnel may have been aware of these alleged defects, (Resp., Dkt. 143, at 3). Accordingly, Kirsch has adequately pled that he only discovered that the munitions at issue in this case were potentially defective in March 2024. While Kirsch was aware that the munitions may have been *expired* and therefore *hardened* at the time of filing suit, he has adequately pled that he was unaware that the munitions were potentially *defective* until March 2024; thus, Kirsch has alleged that he was unaware of the causal connection between his injury and the alleged defects in the munitions until this time. Contrary to Safariland, DT, and CSI's contentions, (Mot., Dkt. 139, at 7–9; Mot., Dkt. 142, at 9–10), the Court finds that Kirsch was reasonably diligent in discovering this information soon after it became available. Even if the Court were to find that Kirsch should have discovered this information when it was published in February 2024, not a month later, the discovery rule would still provide him relief from the

applicable statutes of limitations. Accordingly, viewing the allegations in the second amended complaint as true, Kirsch has adequately pled that the discovery rule exception applies to the statute of limitations for his claims against Safariland, DT, and CSI. Therefore, the Court will deny Safariland and DT's motion to dismiss and will proceed to analyze CSI's remaining arguments for dismissal.

B. Kirsch Has Adequately Pled Claims Against CSI

CSI also argues that: (1) CSI is either not a proper party to the lawsuit or Kirsch fails to plead a claim against it, and (2) the Protection of Lawful Commerce in Arms Act (the "PLCAA") bars Kirsch's claims against CSI.

The Court first addresses CSI's contention that it is either not a proper party to the lawsuit or Kirsch fails to plead a claim against it. (Mot., Dkt. 142, at 10–12). In response, Kirsch argues that he has pled sufficient facts about his claims against CSI. (Resp., Dkt. 143, at 8–9). While Kirsch's second amended complaint is relatively sparse on detail when it comes to CSI, the Court finds that Kirsch has adequately alleged enough information about CSI's alleged liability. Kirsch alleges that CSI, alongside Safariland and DT, "sold the beanbag rounds at issue to the City of Austin." (2d Am. Compl., Dkt. 118, at 13). Kirsch also alleges that CSI, alongside Safariland and DT, "were negligent when they manufactured and distributed faulty rounds, failed to adequately label the rounds themselves and the packaging of the rounds, and/or failed to provide adequate warnings about the dangers of the beanbags expiring or becoming hard or more dangerous in certain storage conditions or after a certain period of time." (*Id.* at 17). Kirsch also alleges that the three new "Defendants are strictly liable as manufacturers and/or sellers of defective beanbag rounds, including for inadequate warnings or instructions." (*Id.*). Thus, while Kirsch has not laid out CSI's individual liability in great detail, he has adequately alleged that CSI was involved in the manufacture or distribution of the munitions at issue in the case. CSI is appropriately on notice as to Kirsch's claims against it. The

Court expects that fact discovery will provide the parties with further information. Indeed, in April 2024, Kirsch sought to compel testing of the less lethal munitions at issue in the case. (Mot., Dkt. 124). The Court denied the motion without prejudice on the basis that it was premature, as the three new Defendants had not yet appeared. (Order, Dkt. 137). Without access to the munitions, Kirsch may well have been unable to provide further detail in his second amended complaint, but he has adequately alleged CSI's involvement for the purposes of a motion to dismiss under Rule 12(b). Accordingly, the Court will deny CSI's motion to dismiss on this basis.

CSI also argues that the PLCAA bars Kirsch's claims against CSI. (Mot., Dkt. 142, at 12–20). In response, Kirsch argues that the PLCAA does not apply to this case. (Resp., Dkt. 143, at 9–10). The PLCAA, 15 U.S.C. §§ 7901–7903, preempts certain tort suits against gun manufacturers, specifically:

> a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include [specified enumerated exceptions].

15 U.S.C. § 7903(5)(A). The term "qualified product" means firearms, ammunition, or components of firearms or ammunition shipped or transported in interstate or foreign commerce. 15 U.S.C. § 7903(4). "The PLCAA preempts specified types of liability actions; it does not provide a blanket protection to specified types of defendants." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1145 (9th Cir. 2009) (citing 15 U.S.C. § 7902(a) ("A qualified civil liability action may not be brought in any Federal or State court."")). A qualified civil liability action includes claims "brought by any person against a manufacturer or seller of a qualified product" for any relief "resulting from the criminal or unlawful misuse of a qualified product by the person or a third party." 15 U.S.C. § 7903(5)(A). One exception to PLCAA preemption is when an action is based on "physical injuries . . . resulting directly from a

defect in design or manufacture of the product," so long as the firearm was "used as intended or in a reasonably foreseeable manner[.]" 15 U.S.C. § 7903(5)(A)(v). However, this product liability exception will not apply if "the discharge of the product was caused by a volitional act that constituted a criminal offense" because that act will "be considered the sole proximate cause of any resulting … personal injuries[.]" *Id.*

First, the Court considers whether the PLCAA applies. Here, there is no dispute that the less lethal munitions are qualified products, so the Court need only address whether they were used in a criminal or unlawful manner. As discussed above, the criminal indictment of Officer Rast was dismissed, so there is no criminal conduct at issue. "Unlawful misuse" means "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product." 15 U.S.C. § 7903(9). Kirsch has alleged that Officer Rast violated his constitutional rights in firing the munitions at him. Accordingly, the Court finds that unlawful misuse has been alleged. Therefore, the PLCAA applies.

Second, the Court considers whether an exception to the PLCAA exists. Kirsch has alleged that there was a defect in the less lethal munitions and that CSI was a manufacturer of the munitions. Because the indictment against Officer Rast was dropped, there are no current criminal proceedings relating to the events at issue—and a key part of Kirsch's second amended complaint is his contention that a defect in the less lethal munitions may have caused a greater injury than otherwise expected from Officer Rast's actions. (2d Am. Compl., Dkt. 118, at 13–14). Accordingly, the Court finds that the design or manufacturing defect exception to the PLCAA applies. Therefore, the Court will deny CSI's motion to dismiss the second amended complaint on the basis of PLCAA preemption.

IV. CONCLUSION

For these reasons, **IT IS ORDERED** that Safariland and DT's motion to dismiss the second amended complaint, (Dkt. 139), is **DENIED**.

IT IS FURTHER ORDERED that CSI's motion to dismiss the second amended complaint, (Dkt. 142), is **DENIED**.

IT IS FINALLY ORDERED that CSI's motion to stay discovery, (Dkt. 150), is **MOOT**.

SIGNED on September 18, 2024.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

SAM KIRSCH,	§	
	§	
Plaintiff,	§	
	§	
	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-1113-RP**
	§	
CITY OF AUSTIN, ROLAN RAST SAFARILAND, LLC, DEFENSE TECHNOLOGY, AND CSI COMBINED SYSTEMS, INC.	§	
	§	
Defendant.	§	

DEFENDANTS' ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendants Safariland, LLC ("**Safariland**") and Defense Technology, LLC ("**Defense Technology**" and, together with Safariland, "**Defendants**") file their *Answer to Plaintiff's Second Amended Complaint* (the "**Complaint**"), and would respectfully show the Court the following:

I. INTRODUCTION

Defendants deny all factual allegations contained in Section I of the Complaint, including the introductory paragraphs and the Table of Contents.

Defendants further deny any and all factual allegations contained within the headings in the Complaint.

Relative to each of the specific allegations in the Complaint, Defendants hereby respond in the following numbered paragraphs, each of which corresponds to the same numbered paragraph in the Complaint unless stated otherwise.

II. PARTIES AND SERVICE

1. Admit.

2. Defendants admit the first sentence in Paragraph 2. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in the second sentence of Paragraph 2, therefore the allegations are denied.

3. Defendants admit that Officer Rolan Roman Rast was an Austin police officer. Defendants deny the remaining allegations in Paragraph 3.

4. Defendants admit that Safariland is a foreign limited liability company, and that its registered agent is CT Corporation System at 1999 Bryan St. Suite 900, Dallas, Texas 75201. The remainder of the allegations in Paragraph 4 are legal conclusions regarding service to which no response is required. Any remaining allegations are denied.

5. Defendants admit that Defense Technology is a foreign limited liability company, and that its registered agent is CT Corporation System at 1999 Bryan St. Suite 900, Dallas, Texas 75201. The remainder of the allegations in Paragraph 5 are legal conclusions regarding service to which no response is required. Any remaining allegations are denied.

6. Defendants lack the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 6, therefore the allegations are denied.

III. JURISDICTION

7. Paragraph 7 contains legal conclusions regarding subject matter jurisdiction for which no response is required. To the extent further response is required or the allegations are considered to be factual allegations, Defendants deny such allegations.

8. Paragraph 8 contains legal conclusions regarding personal jurisdiction for which no response is required. Defendants lack the knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in Paragraph 8, therefore the allegations are

denied.

9. Paragraph 9 contains legal conclusions regarding specific personal jurisdiction for which no response is required. Defendants admit that the protests underlying this lawsuit occurred in Austin, Texas. Defendants lack the knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in Paragraph 9, therefore the allegations are denied.

10. Defendants admit that the Defendants do business in the State of Texas, however, the remainder of Paragraph 10 contains conclusions of law regarding jurisdiction for which no response is required. To the extent further response is required or the allegations are considered to be factual allegations, Defendants deny the allegations.

IV. VENUE

11. Paragraph 11 contains legal conclusions regarding venue for which no response is required. Defendants admit that the protests underlying this lawsuit occurred in Austin, Texas. To the extent further response is required or the allegations are considered to be factual allegations, Defendants deny the allegations.

V. FACTS

12. Defendants lack the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 12, including the authenticity of the included photograph, and therefore the allegations are denied.

13. Defendants lack the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 13, including the authenticity of the included photograph, and therefore the allegations are denied.

14. Defendants lack the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 14, including the authenticity of the included

photograph, and therefore the allegations are denied.

15. Defendants lack the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 15, including the authenticity of the included photograph, and therefore the allegations are denied.

16. Defendants lack the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 16, including the authenticity of the included photograph, and therefore the allegations are denied.

17. Defendants lack the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 17, therefore the allegations are denied.

18. Defendants lack the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 18, including the authenticity of the included photograph, and therefore the allegations are denied.

19. Defendants lack the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 19, including the authenticity of the included photographs, and therefore the allegations are denied.

20. Defendants lack the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 20, therefore the allegations are denied.

21. Defendants lack the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 21, including the authenticity of the included photograph, and therefore the allegations are denied.

22. Defendants admit that the quoted statement appears in the linked City Council Special Called Meeting Transcript dated June 4, 2020. Defendants lack the knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in

Paragraph 22, therefore the allegations are denied.

23. Defendants lack the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 23, therefore the allegations are denied.

24. Defendants lack the knowledge or information sufficient to form a belief about the truth of the allegation that the City armed its police officers with expired munitions, therefore the allegations are denied. Defendants deny the remainder of the allegations contained in Paragraph 24.

25. Defendants admit that the quoted statement appears in the linked City Council Special Meeting Transcript dated June 4, 2020, except that the transcript does not contain identifiers of the speakers, such as "Sam:" and "Mayor Adler:" as inserted into the text in Paragraph 25, and Paragraph 25 omits the time stamps present within the transcript. Defendants lack the knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in Paragraph 25, therefore the allegations are denied.

26. Defendant admits that the transcript linked in Paragraphs 22 and 25 indicated that Chief Brian Manley attended the June 4 City Council meeting, where Plaintiff also spoke. Defendants lack the knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in Paragraph 26, therefore the allegations are denied.

27. Defendants lack the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 27, therefore the allegations are denied.

28. Defendants admit that the quoted text appears in The New England Journal of Medicine article linked in Paragraph 28, and that the accompanying Table 1 in Paragraph 28 may be found at that link. Defendants lack the knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in Paragraph 28, therefore the allegations

are denied.

29. Defendants deny the allegations in Paragraph 29.

30. Defendants admit that they, or their subsidiaries, manufacture Model 3027 beanbag rounds (as defined below). Defendants lack the knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in Paragraph 30, therefore the allegations are denied.

31. Defendants admit that the City of Austin has purchased Model 3027 rounds manufactured by the Defendants or their subsidiaries. Defendants lack the knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in Paragraph 31, therefore the allegations are denied.

32. Defendants admit that 12-Gauge Drag Stabilized Round, Model 3027 beanbag rounds (the "**Model 3027**") are sold and/or manufactured by Defendants, and that the Model 3027 are 12-gauge shells loaded with a 40-gram, tear shaped bag made from a cotton and ballistic material blend and filled with #9 shot. Defendants further admit that specifications and warnings for the Model 3027 are available publicly on Defense Technology's website. Defendants deny the remaining allegations in paragraph 32.

33. Defendants deny the allegations in Paragraph 33.

34. Defendants deny the allegations in Paragraph 34.

35. Defendants deny the allegations in Paragraph 35.

VI. CLAIMS

A. First Amendment (Rolan Rast)

36. Defendants incorporate their previous responses to all preceding paragraphs.

37. Defendants acknowledge, on the face of the Complaint, that Plaintiff alleges and

asserts a claim under 42 U.S.C. § 1983. Defendant deny any remaining allegations in Paragraph 37.

38. Paragraph 38 contains legal conclusions regarding rights of free speech and assembly for which no response is required. To the extent further response is required or the allegations are considered to be factual allegations, Defendants lack the knowledge or sufficient information to form a belief about the truth of the remaining allegations in Paragraph 38, therefore the allegations are denied.

39. Paragraph 39 contains legal conclusions regarding right to free speech and assembly for which no response is required. To the extent further response is required or the allegations are considered to be factual allegations, Defendants lack the knowledge or information sufficient to form a belief about the truth of the remaining allegations, therefore the allegations are denied.

B. Fourth and Fourteenth Amendments (Rolan Rast)

40. Defendants incorporate their previous responses from all preceding paragraphs.

41. Defendants acknowledge, on the face of the Complaint, that Plaintiff alleges and asserts a claim under 42 U.S.C. § 1983. Defendants deny any remaining allegations in Paragraph 37.

42. Paragraph 42 contains legal conclusions for which no response is required or other statements to which Defendants are not called upon to respond. To the extent further response is required or the allegations are considered to be factual allegations, Defendants lack the knowledge or information sufficient to form a belief of the truth of the allegations contained in Paragraph 42, therefore the allegations are denied.

C. Exemplary Damages (Rolan Rast)

43. Defendants incorporate their previous responses to all preceding paragraphs.

44. Paragraph 44 contains legal conclusions regarding damages for which no response is required. Defendants acknowledge that, on the face of the Complaint, Plaintiff is seeking punitive damages. As to the remaining allegations, Defendants lack the knowledge or information sufficient to form a belief of the truth of the remaining allegations contained in Paragraph 44, therefore the allegations are denied.

D. First, Fourth, and Fourteenth Amendments (City of Austin)

45. Defendants incorporate their previous responses from all preceding paragraphs.

46. Defendants acknowledge, on the face of the Complaint, that Plaintiff alleges and asserts a claim under 42 U.S.C. § 1983. Defendant deny all remaining allegations in Paragraph 46.

47. Defendants lack the knowledge or information sufficient to form a belief of the truth of the allegations contained in Paragraph 47, therefore the allegations are denied.

48. Paragraph 48 contains legal conclusions regarding the City of Austin and Brian Manley's state of mind for which no response is required. To the extent further response is required or the allegations are considered to be factual allegations, Defendants lack the knowledge or information sufficient to form a belief of the truth of the remaining allegations contained in Paragraph 48, therefore the allegations are denied.

49. Paragraph 49 contains legal conclusions regarding the City of Austin and Brian Manley's state of mind and ratification for which no response is required.. To the extent further response is required or the allegations are considered to be factual allegations, Defendants lack the knowledge or information sufficient to form a belief of the truth of the remaining allegations

contained in Paragraph 49, therefore the allegations are denied.

50. Defendants lack the knowledge or information sufficient to form a belief of the truth of the allegations contained in Paragraph 50, therefore the allegations are denied.

E. Negligence (City of Austin)

51. Defendants incorporate their previous responses from all preceding paragraphs.

52. Paragraph 52 contains legal conclusions regarding negligence for which no response is required. To the extent further response is required or the allegations are considered to be factual allegations, Defendants deny that the munitions became dangerous with age. Defendants lack the knowledge or information sufficient to form a belief about the truth of the remaining allegations, therefore the allegations are denied.

53. Paragraph 53 contains legal conclusions for which no response is required. To the extent further response is required or the allegations are considered to be factual allegations, Defendants deny that the munitions had hardened. Defendants further deny that the munitions caused Plaintiff's injuries to be "more serious." Defendants lack the knowledge or information sufficient to form a belief about the truth of the remaining allegations, therefore the allegations are denied.

F. Negligence (Safariland, LLC and Defense Technology, LLC)

54. Paragraph 54 contains legal conclusions regarding negligence for which no response is required. To the extent further response is required or the allegations are considered to be factual allegations, Defendants deny the allegations in Paragraph 54 as to Safariland, LLC and Defense Technology LLC, and lack knowledge or information sufficient to form a belief of the truth of the allegations as to CSI Combined Systems, Inc. ("**CSI**").

55. Paragraph 55 contains legal conclusions regarding negligence for which no

response is required. To the extent further response is required or the allegations are considered to be factual allegations, Defendants deny the allegations in Paragraph 55 as to Safariland, LLC and Defense Technology LLC, and lack knowledge or information sufficient to form a belief of the truth of the allegations as to CSI.

56. Paragraph 56 contains legal conclusions regarding negligence for which no response is required. To the extent further response is required or the allegations are considered to be factual allegations, Defendants deny the allegations in Paragraph 56 as to Safariland, LLC and Defense Technology LLC, and lack knowledge or information sufficient to form a belief of the truth of the allegations as to CSI.

57. Paragraph 57 contains legal conclusions regarding negligence for which no response is required. To the extent further response is required or the allegations are considered to be factual allegations, Defendants deny the allegations in Paragraph 57 as to Safariland, LLC and Defense Technology LLC, and lack knowledge or information sufficient to form a belief of the truth of the allegations as to CSI.

VII. DAMAGES

58. Defendants incorporate their previous responses from all preceding paragraphs.

59. Defendants acknowledge that, on the face of the Complaint, Plaintiff is seeking damages for past and future pain, past and future mental anguish, past and future disfigurement, past and future physical impairment, past and future loss of enjoyment of life, past and future medical expenses, past and future lost income, past and future loss of consortium, past and future loss of services, and unidentified miscellaneous other economic damages including out-of-pocket expenses, pre and post judgment interest, attorney's fees, expenses, and costs. Defendants lack knowledge or information sufficient to form a belief of the truth of the allegations that Plaintiff

incurred such damages, and deny that he is entitled to such damages from the Defendants. Defendants deny all remaining allegations.

VIII. REQUEST FOR JURY TRIAL

60. Paragraph 60 contains Plaintiff's request for a jury trial, which requires no response. To the extent a response is required, Defendants acknowledge that Plaintiff requests a jury trial, but deny that Plaintiff is entitled to recover the relief requested, or any relief whatsoever. Defendants deny all remaining allegations.

IX. PRAYER

61. The remainder of the Complaint consists of Plaintiff's prayer for relief, which requires no response. Defendants admit that Plaintiff seeks the identified relief. To the extent a response is required, Defendants deny that they are liable to Plaintiff for negligence or under strict liability, or under any other cause of action, and deny that Plaintiff is entitled to the requested relief, or to any relief whatsoever.

DEFENDANTS' AFFIRMATIVE DEFENSES

62. Subject to, and without waiving the foregoing, Defendants assert the following affirmative defenses and other defenses apply to Plaintiff's claims. By asserting these affirmative defenses, Defendants do not concede that they have the burden of proof as to any such defense. To the extent that any defense or legal theory asserted herein may be interpreted as being inconsistent, such defenses or legal theories are hereby pleaded in the alternative. Subject to, and without waiving the foregoing, and without waiving Plaintiff's burden to show otherwise, Defendants plead as follows:

63. Plaintiff's claims are barred by the applicable statute of limitations. Defendants are not liable to Plaintiff because any injuries and/or damages alleged by Plaintiff were

solely and proximately caused by the actions, omissions, and/or negligence of a person or entity, including but not limited to Plaintiff, other than Defendants, for whose actions, omissions, and/or negligence Defendants are in no way liable, and over which Defendants had no control, connection, or affiliation with, and/or that Plaintiff's claims are barred because his own actions and/or omissions contributed to his alleged damages. The Defendants maintain that they have no liability to Plaintiff, but in the unlikely event that Defendants are found liable, Defendants are entitled to have their liability to Plaintiff reduced by the percentage of causation of the injuries at issue found by the trier of fact to have resulted from the acts or omissions of Plaintiffs, and/or any other third parties pursuant to Chapters 32 and 33 of the Texas Civil Practice and Remedies Code. In the event that the Defendants are found liable, which liability is expressly denied, the Defendants will be entitled to a finding of comparative and/or contributory negligence or fault and, thereafter, indemnification, contribution, or apportionment pursuant to the applicable state law.

64. The injuries in question and Plaintiff's alleged resulting damages were caused as a result of intervening, superseding, new and independent causes, or another act that was the sole proximate cause, including but not limited to, the negligence or intentional acts of other persons over whom the Defendants had no control or affiliation.

65. Plaintiff's claims are barred, in whole or in part, by the doctrine of assumption of risk.

66. Plaintiffs' claim for attorneys' fees is barred pursuant to Texas Civil Practice & Remedies Code § 38.001.

67. The allegedly defective product's design and labeling complied with applicable mandatory safety standards or regulations adopted and promulgated by the federal government or an agency thereof. Thus, the presumption established in Section 82.008 of the Texas Civil Practice

& Remedies Code relieves the Defendants of any possible liability.

68. The Defendants are not liable, as a matter of law, for any unsoundness of the product that may have developed by reason of the misuse of the product by its purchaser, his/its employer, or his/its agents or employees, when such product was not under the control of, nor being used by, the Defendants.

69. Defendants performed any and all duties owed to Plaintiff, if there were any, and in any event, was under no duty to warn of inherent dangers resulting from any use, misuse, abuse, alteration, and/or lack of proper maintenance of the product at issue.

70. Plaintiff's claims and contention of liability are barred because there was no practical or technically feasible design or formulation that would have prevented the harm that allegedly occurred to Plaintiff without substantially impairing the utility or intended purpose of the product at issue.

71. All products and materials attributable to Defendants were supplied through sophisticated intermediaries or supplied to sophisticated users, therefore all of Plaintiff's claims are barred by the sophisticated user, knowledgeable user, learned intermediary, or knowledgeable intermediary doctrines.

72. In the event Plaintiff is awarded damages against Defendants in whole or in part, Defendants are entitled to a set-off or reduction for any damages awarded for economic loss, and for any such past or future costs or expenses which were or will, with reasonable certainty, be reimbursed or indemnified in whole or in part from any collateral source including, but not limited to, insurance proceeds.

73. Plaintiff's claim for exemplary damages is barred, in whole or in part, and/or is limited by the standards, requirements, and limitations of the law, including but not limited to, the

Constitution of the United States, the Texas Constitution, and Chapter 41 of the Texas Civil Practice & Remedies Code § 41.008(b) and the limitations on exemplary damages pursuant to the Due Process Clause of the U.S. Constitution, as well as the Due Course of Law provisions and Article 16, section 26 of the Texas Constitution.

74. Defendants further allege that Plaintiff's claims for pre-judgment interest and damages are limited by the damages and amounts set forth in:

a. Chapter 74 of the Texas Civil Practice & Remedies Code;

b. Chapter 304 of the Texas Finance Code;

c. Any and all other applicable rules, statutes, law, and regulations, as applicable to this case.

75. Defendants hereby adopt and incorporate by reference any and all defenses which are or may become available to them under Texas Civil Practice & Remedies Code Chapter 82, including but not limited to 82.003, 82.005, 82.006, and 82.008.

76. The Defendants reserve the right to assert other additional affirmative defenses as become apparent through the course of discovery or as otherwise permitted by the Federal Rules of Civil Procedure.

77. Plaintiffs' claims are barred by the Protection of Lawful Commerce in Arms Act (the "**PLCAA**"), which bars any qualified civil liability actions from being brought in court, including any claim against a manufacturer or seller of firearms or ammunition products based on harms resulting from the criminal or unlawful misuse of a firearm or ammunition products by a third party. 15 U.S.C. § 7901, *et seq*.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants pray that this Court enter judgment against Plaintiff on all of its claims and grant Defendants such other and further relief to which they may show themselves to be justly entitled.

Respectfully submitted,

/s/ Scott R. Wiehle
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ATTORNEYS FOR DEFENDANTS SAFARILAND, LLC AND DEFENSE TECHNOLOGY, LLC

CERTIFICATE OF SERVICE

This is to certify that on this 2nd day of October, 2024, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Scott R. Wiehle
Scott R. Wiehle

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

SAM KIRSCH	§	
Plaintiff	§	
	§	
V.	§	**CIVIL NO. 1:20-cv-1113-RP**
	§	
CITY OF AUSTIN, ROLAN RAST, SAFARILAND, LLC, DEFENSE TECHNOLOGY, AND COMBINED SYSTEMS, INC.	§	
Defendants	§	

DEFENDANT'S ANSWER TO PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendant Combined Systems, Inc. (hereinafter referred to as "CSI" or "Defendant") files its *Answer to Plaintiff's Second Amended Complaint* (the "Complaint"), and would respectfully show the Court the following:

I. INTRODUCTION

Defendant denies all factual allegations contained in Section I of the Complaint, including the introductory paragraphs and the Table of Contents.

Defendant further denies any and all factual allegations contained within the headings in the Complaint.

Relative to each of the specific allegations in the Complaint, Defendant hereby responds in the following numbered paragraphs, each of which corresponds to the same numbered paragraph in the Complaint unless stated otherwise.

II. PARTIES AND SERVICE

1. Admit.

2. Defendant admits the first sentence in Paragraph 2. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in the second sentence of Paragraph 2, therefore the allegations are denied.

3. Defendant admits that Officer Rolan Roman Rast was an Austin police officer. Defendant denies the remaining allegations in Paragraph 3.

4. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 4, therefore the allegations are denied.

5. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 5, therefore the allegations are denied.

6. Defendant admits that it is a foreign corporation located at 388 Kinsman Road, Jamestown, Pennsylvania. Defendant has received process and previously made appearance herein.

III. JURISDICTION

7. Paragraph 7 contains legal conclusions regarding subject matter jurisdiction for which no response is required. To the extent further response is required or the allegations are considered to be factual allegations, Defendant denies such allegations.

8. Paragraph 8 contains legal conclusions regarding personal jurisdiction for which no response is required. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in Paragraph 8.

9. Paragraph 9 contains legal conclusions regarding specific personal jurisdiction for which no response is required. Defendant admits that the protests underlying this lawsuit occurred

in Austin, Texas. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in Paragraph 9.

10. Defendant admits that the Defendant does business in the State of Texas.

IV. VENUE

11. Defendant admits that the protests underlying this lawsuit are alleged to have occurred in Austin, Texas and is not challenging venue.

V. FACTS

12. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 12, including the authenticity of the included photograph, and therefore the allegations are denied.

13. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 13, including the authenticity of the included photograph, and therefore the allegations are denied.

14. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 14, including the authenticity of the included photograph, and therefore the allegations are denied.

15. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 15, including the authenticity of the included photograph, and therefore the allegations are denied.

16. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 16, including the authenticity of the included photograph, and therefore the allegations are denied.

17. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 17, therefore the allegations are denied.

18. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 18, including the authenticity of the included photograph, and therefore the allegations are denied.

19. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 19, including the authenticity of the included photographs, and therefore the allegations are denied.

20. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 20, therefore the allegations are denied.

21. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 21, including the authenticity of the included photograph, and therefore the allegations are denied.

22. Defendant admits that the quoted statement appears in the linked City Council Special Called Meeting Transcript dated June 4, 2020. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in Paragraph 22, therefore the allegations are denied.

23. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 23, therefore the allegations are denied.

24. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegation that the City armed its police officers with expired munitions, therefore the allegations are denied. Defendant denies the remainder of the allegations contained in Paragraph 24.

25. Defendant admits that the quoted statement appears in the linked City Council Special Meeting Transcript dated June 4, 2020, except that the transcript does not contain identifiers of the speakers, such as "Sam:" and "Mayor Adler:" as inserted into the text in Paragraph 25, and Paragraph 25 omits the time stamps present within the transcript. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in Paragraph 25, therefore the allegations are denied.

26. Defendant admits that the transcript linked in Paragraphs 22 and 25 indicated that Chief Brian Manley attended the June 4 City Council meeting, where Plaintiff also spoke. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in Paragraph 26, therefore the allegations are denied.

27. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 27, therefore the allegations are denied.

28. Defendant admits that the quoted text appears in The New England Journal of Medicine article linked in Paragraph 28, and that the accompanying Table 1 in Paragraph 28 may be found at that link. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the remaining allegations contained in Paragraph 28, therefore the allegations are denied.

29. Defendant denies the allegations in Paragraph 29.

30. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 30.

31. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 31, therefore the allegations are denied.

32. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 32.

33. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 33.

34. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 34, therefore the allegations are denied.

35. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 35, therefore the allegations are denied.

VI. CLAIMS

A. First Amendment (Rolan Rast)

36. Defendant incorporates its previous responses to all preceding paragraphs.

37. Defendant acknowledges, on the face of the Complaint, that Plaintiff alleges and asserts a claim under 42 U.S.C. § 1983.

38. Defendant lacks the knowledge or sufficient information to form a belief about the truth of the allegations in Paragraph 38, therefore the allegations are denied.

39. Paragraph 39 contains legal conclusions regarding right to free speech and assembly for which no response is required. To the extent further response is required or the allegations are considered factual, this Defendant would be required to speculate and lacks the knowledge or information sufficient to form a belief about the truth of the remaining allegations, therefore the allegations are denied.

B. Fourth and Fourteenth Amendments (Rolan Rast)

40. Defendant incorporates its previous responses from all preceding paragraphs.

41. Defendant acknowledges, on the face of the Complaint, that Plaintiff alleges and asserts a claim under 42 U.S.C. § 1983.

42. Defendant lacks the knowledge or information sufficient to form a belief of the truth of the allegations contained in Paragraph 42, therefore the allegations are denied.

C. Exemplary Damages (Rolan Rast)

43. Defendant incorporates its previous responses to all preceding paragraphs.

44. Defendant acknowledges that, on the face of the Complaint, Plaintiff is seeking punitive damages. As to the remaining allegations, Defendant lacks the knowledge or information sufficient to form a belief of the truth of the remaining allegations contained in Paragraph 44, therefore the allegations are denied.

D. First, Fourth, and Fourteenth Amendments (City of Austin)

45. Defendant incorporates its previous responses from all preceding paragraphs.

46. Defendant acknowledges, on the face of the Complaint, that Plaintiff alleges and asserts a claim under 42 U.S.C. § 1983.

47. Defendant lacks the knowledge or information sufficient to form a belief of the truth of the allegations contained in Paragraph 47, therefore the allegations are denied.

48. Defendant lacks the knowledge or information sufficient to form a belief of the truth of the remaining allegations contained in Paragraph 48, therefore the allegations are denied.

49. Defendant lacks the knowledge or information sufficient to form a belief of the truth of the remaining allegations contained in Paragraph 49, therefore the allegations are denied.

50. Defendant lacks the knowledge or information sufficient to form a belief of the truth of the allegations contained in Paragraph 50, therefore the allegations are denied.

E. Negligence (City of Austin)

51. Defendant incorporates its previous responses from all preceding paragraphs.

52. Paragraph 52 contains legal conclusions regarding negligence for which no response is required. To the extent the allegations are considered factual, this Defendant would be required to speculate and generally denies that the munitions became dangerous with age. Defendant lacks the knowledge or information sufficient to form a belief about the truth of the remaining allegations, therefore the allegations are denied.

53. Defendant denies that it manufactured the munitions, or that its munitions were expired or had hardened. Defendant further denies that the munitions caused Plaintiff's injuries to be "more serious." Defendant lacks the knowledge or information sufficient to form a belief about the truth of the remaining allegations, therefore the allegations are denied.

F. Negligence (Safariland, LLC and Defense Technology, LLC)

54. Paragraph 54 contains legal conclusions regarding negligence for which no response is required and speculation as to other parties' conduct. Defendant denies the allegations in Paragraph 54 as to CSI and lacks knowledge or information sufficient to form a belief of the truth of the allegations as to Safariland, LLC and Defense Technology LLC.

55. Defendant denies the allegations in Paragraph 55 as to CSI, and lacks knowledge or information sufficient to form a belief of the truth of the allegations as to Safariland, LLC and Defense Technology LLC.

56. Defendant denies the allegations in Paragraph 56 as to CSI, and lacks knowledge or information sufficient to form a belief of the truth of the allegations as to Safariland, LLC and Defense Technology LLC.

57. Defendant denies that it manufactured or sold the munitions in question. Defendant denies the allegations in Paragraph 54 as to CSI, and lacks knowledge or information sufficient to form a belief of the truth of the allegations as to Safariland, LLC and Defense Technology LLC.

VII. DAMAGES

58. Defendant incorporates its previous responses from all preceding paragraphs.

59. Defendant acknowledges that, on the face of the Complaint, Plaintiff is seeking damages for past and future pain, past and future mental anguish, past and future disfigurement, past and future physical impairment, past and future loss of enjoyment of life, past and future medical expenses, past and future lost income, past and future loss of consortium, past and future loss of services, and unidentified miscellaneous other economic damages including out-of-pocket expenses, pre and post judgment interest, attorney's fees, expenses, and costs. Defendant lacks knowledge or information sufficient to form a belief of the truth of the allegations that Plaintiff incurred such damages, and deny that he is entitled to such damages from the Defendant. Defendant denies all remaining allegations.

VIII. REQUEST FOR JURY TRIAL

60. Defendant acknowledges that Plaintiff requests a jury trial and herein proffers its own demand for a jury.

IX. PRAYER

61. The remainder of the Complaint consists of Plaintiff's prayer for relief, which requires no response. Defendant admits that Plaintiff seeks the identified relief. To the extent a response is required, Defendant denies that it is liable to Plaintiff for negligence or under strict liability, or under any other cause of action, and deny that Plaintiff is entitled to the requested relief, or to any relief whatsoever.

DEFENDANTS' AFFIRMATIVE DEFENSES

62. Subject to, and without waiving the foregoing, Defendant asserts the following affirmative defenses and other defenses apply to Plaintiff's claims. By asserting these affirmative defenses, Defendant does not concede that they have the burden of proof as to any such defense. To the extent that any defense or legal theory asserted herein may be interpreted as being inconsistent, such defenses or legal theories are hereby pleaded in the alternative. Subject to, and without waiving the foregoing, and without waiving Plaintiff's burden to show otherwise, Defendant pleads as follows:

63. Plaintiff's claims are barred by the applicable statute of limitations.

64. Defendant is not liable to Plaintiff because any injuries and/or damages alleged by Plaintiff were solely and proximately caused by the actions, omissions, and/or negligence of a person or entity, including but not limited to Plaintiff, other than Defendant, for whose actions, omissions, and/or negligence Defendant is in no way liable, and over which Defendant had no control, connection, or affiliation with, and/or that Plaintiff's claims are barred because his own actions and/or omissions contributed to his alleged damages. The Defendant maintains that it has no liability to Plaintiff, but in the unlikely event that Defendant is found liable, Defendant is entitled to have its liability to Plaintiff reduced by the percentage of causation of the injuries at issue found by the trier of fact to have resulted from the acts or omissions of Plaintiffs, and/or

any other third parties pursuant to Chapters 32 and 33 of the Texas Civil Practice and Remedies Code. In the event that the Defendant is found liable, which liability is expressly denied, the Defendant will be entitled to a finding of comparative and/or contributory negligence or fault and, thereafter, indemnification, contribution, or apportionment pursuant to the applicable state law.

65. The injuries in question and Plaintiff's alleged resulting damages were caused as a result of intervening, superseding, new and independent causes, or another act that was the sole proximate cause, including but not limited to, the negligence or intentional acts of other persons over whom the Defendant had no control or affiliation.

66. Plaintiff's claims are barred, in whole or in part, by the doctrine of assumption of risk.

67. Plaintiff's claim for attorneys' fees is barred pursuant to Texas Civil Practice & Remedies Code § 38.001.

68. The allegedly defective product's design and labeling complied with applicable mandatory safety standards or regulations adopted and promulgated by the federal government or an agency thereof. Thus, the presumption established in Section 82.008 of the Texas Civil Practice & Remedies Code relieves the Defendant of any possible liability.

69. The Defendant is not liable, as a matter of law, for any unsoundness of the product that may have developed by reason of the misuse of the product by its purchaser, his/its employer, or his/its agents or employees, when such product was not under the control of, nor being used by, the Defendant.

70. Defendant performed any and all duties owed to Plaintiff, if there were any, and in any event, was under no duty to warn of inherent dangers resulting from any use, misuse, abuse, alteration, and/or lack of proper maintenance of the product at issue.

71. Plaintiff's claims and contention of liability are barred because there was no practical or technically feasible design or formulation that would have prevented the harm that allegedly occurred to Plaintiff without substantially impairing the utility or intended purpose of the product at issue.

72. All products and materials attributable to Defendant were supplied through sophisticated intermediaries or supplied to sophisticated users, therefore all of Plaintiff's claims are barred by the sophisticated user, knowledgeable user, learned intermediary, or knowledgeable intermediary doctrines.

73. In the event Plaintiff is awarded damages against Defendant in whole or in part, Defendant is entitled to a set-off or reduction for any damages awarded for economic loss, and for any such past or future costs or expenses which were or will, with reasonable certainty, be reimbursed or indemnified in whole or in part from any collateral source including, but not limited to, insurance proceeds.

74. Plaintiff's claim for exemplary damages is barred, in whole or in part, and/or is limited by the standards, requirements, and limitations of the law, including but not limited to, the Constitution of the United States, the Texas Constitution, and Chapter 41 of the Texas Civil Practice & Remedies Code § 41.008(b) and the limitations on exemplary damages pursuant to the Due Process Clause of the U.S. Constitution, as well as the Due Course of Law provisions and Article 16, section 26 of the Texas Constitution.

75. Defendant further alleges that Plaintiff's claims for pre-judgment interest and damages are limited by the damages and amounts set forth in:

a. Chapter 74 of the Texas Civil Practice & Remedies Code;

b. Chapter 304 of the Texas Finance Code;

c. Any and all other applicable rules, statutes, law, and regulations, as applicable to this case.

76. Defendant hereby adopts and incorporates by reference any and all defenses which are or may become available to it under Texas Civil Practice & Remedies Code Chapter 82, including but not limited to 82.003, 82.005, 82.006, and 82.008.

77. The Defendant reserves the right to assert other additional affirmative defenses as become apparent through the course of discovery or as otherwise permitted by the Federal Rules of Civil Procedure.

78. Plaintiff's claims are barred by the Protection of Lawful Commerce in Arms Act (the "**PLCAA**"), which bars any qualified civil liability actions from being brought in court, including any claim against a manufacturer or seller of firearms or ammunition products based on harms resulting from the criminal or unlawful misuse of a firearm or ammunition products by a third party. 15 U.S.C. § 7901, *et seq*.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court enter judgment against Plaintiff on all of its claims and grant Defendant such other and further relief to which they may show themselves to be justly entitled.

Respectfully submitted,

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By: _____
P. Clark Aspy
State Bar Number 01394170

ATTORNEY FOR DEFENDANT COMBINED SYSTEMS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument was served on all counsel of record in accordance with the Texas Rules of Civil Procedure on this the 7th day of October, 2024.

_____
Clark Aspy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH,	§	
	§	
Plaintiff,	§	
	§	
	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-1113-RP**
	§	
CITY OF AUSTIN, ROLAN RAST SAFARILAND, LLC, DEFENSE TECHNOLOGY, AND CSI COMBINED SYSTEMS, INC.	§	
	§	
Defendant.	§	

DEFENDANTS SAFARILAND, LLC AND DEFENSE TECHNOLOGY, LLC'S MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants Safariland, LLC ("**Safariland**") and Defense Technology, LLC ("**Defense Technology**") (collectively, the "**Safariland Defendants**") move for a judgment on the pleadings under Federal Rule of Civil Procedure 12(c) (the "**Motion**").

I. INTRODUCTION

Plaintiff Sam Kirsch ("**Plaintiff**") alleges an Austin Police Department ("**APD**") police officer recklessly and intentionally shot him with a less-lethal round fired from a 12-gauge shotgun as retribution and punishment for exercising his First Amendment right to protest. Plaintiff further alleges that the less-lethal rounds were expired and became hardened, which caused serious bodily injuries. Plaintiff contends that the Safariland Defendants are culpable due to purported manufacturing and marketing defects.

This lawsuit has been pending for almost four years. Plaintiff has amended his petition twice. The most recent amendment was on April 9, 2024. [*See* ECF 118]. The parties submitted a Joint Report on July 31, 2024, setting forth the parties agreement as to "the causes of action…in

this case" and the "elements of the causes(s) of action." [ECF 146]. The Court issued an Amended Scheduling Order on September 17, 2024 that imposed a deadline to amend pleadings on October 3, 2024. [*See* ECF 153]. That deadline has since expired. [*Id.*].

In the six months since Plaintiff filed his Second Amended Complaint and the three months since the parties agreed on what elements constituted Plaintiff's causes of action, Plaintiff had ample opportunity to plead all of the elements of his claims. However, Plaintiff has not done so. Plaintiff has utterly failed to allege several elements of his multiple causes of action. For example, Plaintiff does not allege that the alleged manufacturing defect was a deviation from the planned output or that it existed at the time the munitions left the hands of the Safariland Defendants, as is required under Texas law. Similarly, Plaintiff does not allege that a marketing defect arises from the use of an otherwise adequate product or that any alleged failure to warn would have caused Defendant Officer Rolan Rast ("**Officer Rast**") to forego his retributive punishment of Plaintiff. In addition to these pleading defects, there are several legal deficiencies, such as the Safariland Defendant owing no duty to warn Plaintiff.

In addition to these fatal flaws, Plaintiff's claims are barred under the Protection of Lawful Commerce in Arms Act ("**PLCAA**"). For instance, the PLCAA categorically bars marketing defect/failure to warn claims. In addition, the criminal offense exception applies because Plaintiff had clearly and unequivocally alleged that Officer Rast engaged in illegal conduct. While the Court has already rendered an order on CSI's Rule 12(b)(6) motion based on the PLCAA, that order did not address the applicability of the PLCAA to marketing/failure to warn claims, nor did it address Plaintiff's clear allegations that Officer Rast engaged in a volitional, criminal act, focusing instead on the immaterial lack of a criminal indictment. [*See* ECF 154].

For all of these reasons, among other set forth below, the Safariland Defendants are entitled to judgment on the pleadings under Federal Rule of Civil Procedure 12(c).

II. FACTUAL BACKGROUND

Plaintiff participated in the May 2020 protests in Austin, Texas. [ECF 118 at ¶ 12].[1] Plaintiff alleges that, on May 31, 2020, an APD police officer shot him in the head with a less-lethal projectile. [*Id*. at ¶ 13-15; ECF 1 at ¶¶ 9-11]. Plaintiff alleges that, as a result of being shot by this projectile, he was injured. [ECF 1 at ¶¶ 9-16, 20, 29, 42-43; ECF 4 at ¶¶ 9-16, 20, 28, 41-42; ECF 118 at ¶¶ 13-20, 24, 34, 39, 52-53]. Plaintiff alleges that Officer Rast "shot Plaintiff [] in the face to punish him for participating in a peaceful protest against police brutality on Interstate 35." [ECF 118 at p. 1]. Plaintiff goes further by saying Officer Rast's actions were "retribution for Sam exercising his First Amendment rights." [ECF 118 at ¶ 39]. Plaintiff also claims that Officer Rast's actions were reckless. [ECF 118 at ¶ 44].

Plaintiff initially sued the City of Austin and a then unidentified APD police officer on November 9, 2020. [*See* ECF 1]. On January 21, 2021, Plaintiff amended his complaint to identify APD Officer Rast as the officer who shot him in May of 2020. [*See* ECF 4]. On April 9, 2024, Plaintiff filed his Second Amended Complaint to bring untimely claims against the Safariland Defendants for products liability. [*See* ECF 118; *id*. at ¶ 54-57]. The alleged defects are that a less-lethal round "may become hardened and unsuitable for its intended purpose past a certain date of its manufacture or under certain conditions" and become "a solid mass" which "can cause serious bodily injuries," which are either the result of a manufacturing defect and/or a marketing defect. [*Id*. at ¶¶ 24, 32-35, 51-53, 54-57]. To be clear, Plaintiff has not asserted a design defect claim. [*See* ECF 146 at p. 2 (Joint Report setting forth elements of Plaintiff's claims against the

[1] The Safariland Defendants request that the Court take judicial notice of the pleadings filed in the above-captioned litigation.

Safariland Defendants, and including only manufacturing and marketing defect claims under both negligence and strict liability)].

III. ARGUMENTS AND AUTHORITIES

A. Standard For Dismissal Under Federal Rule of Civil Procedure 12(c).

Rule 12(c) authorizes a motion for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial...." FED. R. CIV. P. 12(c). A Rule 12(c) motion can include the defense of failure to state a claim upon which relief can be granted. *Id*. at 12(h)(2)(B). "The Rule 12(c) standard is the same as that applied to Rule 12(b)(6)." *Vardeman v. City of Houston*, 55 F.4th 1045, 1049 (5th Cir. 2022). "The court accepts well-pled facts as true and view[s] them in the light most favorable to the plaintiff." *Id.* at 1050 (internal quotations omitted).

B. The Timing is Right for a Rule 12(c) Motion.

Pursuant to the Amended Scheduling Order, pleadings closed on October 3, 2024. [*See* ECF 153 at ¶ 3]. Plaintiff only added the Safariland Defendants on April 9, 2024. [*See* ECF 118]. The Safariland Defendants filed a Rule 12(b)(6) motion to dismiss, based on limitations, which the Court denied on September 18, 2024. [*See* ECF 154]. As of the date of this filing, the Safariland Defendants have not received any discovery requests, and have only just propounded discovery on Officer Rast. Trial is set for November 3, 2025. [ECF 153 at ¶ 8]. Therefore, the parties have not engaged in extensive discovery as to Plaintiff's product liability claims against the Safariland Defendants, and this Motion is filed early enough as to not delay trial.

C. Manufacturing Defect.

Plaintiff alleges that the Safariland Defendants' munitions contained a manufacturing defect, and brings claims for both strict liability and negligent manufacturing defect. However, the Safariland Defendants are entitled to judgement on the pleadings for several reasons.

With respect to strict liability, Plaintiff alleges that the munition can harden over time or in certain storage conditions. Plaintiff does not, however, allege that the munitions allegedly used against him deviated from the normal specification or planned output. Instead, Plaintiff alleges a propensity that could occur to any and all such munitions. Moreover, Plaintiff's allegations establish that the alleged defect did not exist at the time the munitions left the Safariland Defendants' hands, but manifests over time. As such, Plaintiff has not alleged, and cannot prove, two essential elements of a strict liability manufacturing defect claim.

With respect to negligence, Texas law is clear that a negligent manufacturing claim must fail if no defect is alleged. Because Plaintiff cannot maintain a strict liability claim, his negligence claim also fails. In addition, Plaintiff has failed to allege the existence of a safer alternative design, which is a required element of his negligent manufacturing claim.

1. Plaintiff's strict liability manufacturing defect claim fails because he did not allege, and therefore cannot prove, that the Safariland Defendant's product deviated from the specifications or planned output.

"'A manufacturing defect exists when a product deviates, in its construction or quality, from the specifications or planned output in a manner that renders it unreasonably dangerous.'" *Cofresi v. Medtronic, Inc.*, 450 F. Supp. 3d 759, 766-67 (W.D. Tex. 2020) (quoting *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W. 3d 797, 800 (Tex. 2006)); *see also* ECF 146 at p. 2. "'The deviation from design that caused the injury must be identified' in order to establish a defect." *Miller v. Bridgestone Americas Tire Operations, LLC*, No. 1:21-CV-437-RP, 2023 WL 2138182, at *3 (W.D. Tex. Feb. 21, 2023) (quoting *Casey v. Toyota Motor Eng'g & Mfg. N. Am., Inc.*, 770 F.3d 322, 326 (5th Cir. 2014)). This is because "Texas law does not generally recognize a product failure or malfunction, standing alone, as sufficient proof of a product defect." *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 42 (Tex. 2007).

Plaintiff's allegations with respect to the munitions are set forth in paragraphs 29-35 and 54-57 of his Second Amended Complaint. [ECF 118 at ¶¶ 29-35, 54-57]. "[N]owhere in the [Second Amended Complaint] does Plaintiff allege that a particular mishap occurred in the manufacturing process that rendered the [munitions] unreasonably dangerous…." *Cofresi*, 450 F. Supp. 3d at 767 (dismissing claim for failing to allege a necessary deviation). Courts routinely dismiss such claims for failing to allege a specific deviation from specifications or planned output. *See, e.g.*, *Miller*, 2023 WL 2138182, at *3 (dismissing claim for "fail[ing] to plead the requisite defect"); *Carpenter v. Boston Scientific Corp.*, No. 3:18-CV-02338-L, 2019 WL 3322091, at *7 (N.D. Tex. July 24, 2019) (dismissing claim that "makes no mention of the requisite element that a plaintiff show the device deviated from the specification or planned output"); *Saldana v. Rally Mfg., Inc.*, No. 1:18-CV-00126, 2019 WL 13438475, at *3 (S.D. Tex. Jan. 24, 2019) (dismissing claim because plaintiff "does not even suggest that the wiper blade deviated from its specification or planned output"); *Del Castillo v. PMI Holdings N. Am. Inc.*, No. 4:14-CV-03435, 2016 WL 3745953, at *15 (S.D. Tex. July 13, 2016) (dismissing claim where "[t]he Complaint fail[ed] to allege that the TPS system deviated in any way from its design specification.").

Moreover, when an allegation "appears to relate to the overall design of the [product] as it pertains to all devices manufactured—not the specific one that [Plaintiff] received," then Plaintiff cannot sustain a claim for a manufacturing defect. *Carpenter*, 2019 WL 3322091, at *7. This is because such an allegation relates to a *design defect*. *See, e.g.*, *Cofresi*, 450 F.Supp.3d at 767 ("It appears to the Court that Plaintiff argues instead that it is the entire design of the [product] that is defective. Consequently, Plaintiff has failed to plead a manufacturing defect, and this claim must be dismissed…."). Here, Plaintiff's allegations more closely resemble a design defect claim that the rounds were generally faulty. [ECF 118 at p.¶ 24 ("the City armed its police on May 30 and

May 31 with expired munitions which had hardened over time and thus caused more severe injuries than munitions used within the manufacturers' recommended time frames"), ¶ 32 ("The Model 3027 beanbag round comes with manufacturer's specifications and warnings, but none that warn end users (law enforcement officers) that the round may become hardened and unsuitable for its intended purpose past a certain date of its manufacture or under certain circumstances."), and ¶ 52 (the City owes a duty "not to arm its police with expired munitions that become more dangerous with age"). In other words, Plaintiff alleges that, generally and categorically, these munitions can harden over time and under certain conditions. However, Plaintiff did not bring a design defect claim. [ECF 146 at p. 2 (identifying only claims for manufacturing and marketing defect)].

Because Plaintiff has not alleged a mandatory element of his strict liability manufacturing defect claim, the Safariland Defendants are entitled to a judgment on the pleadings.

2. Plaintiff's claim also fails because he did not allege that the purported defect existed at the time the munitions left the Safariland Defendants' hands.

"To state a claim for manufacturing defect, a plaintiff must allege…(2) that the product was defective when it left the hands of the manufacturer." *Del Castillo*, 2016 WL 3745953, at *15 (internal quotations omitted); *see also* ECF 146 at p. 2. Failure to do so warrants dismissal. *Del Castillo*, 2016 WL 3745953, at *15 (absent an allegation that the "alleged defect was present at the time the [munition] left the manufacturer," "the claim [must] be dismissed").

Here, Plaintiff does not allege that the munitions were defective at the time they left the Safariland Defendants' hands. Rather, Plaintiff alleges dangers arising from "the beanbags expiring or becoming hard or more dangerous in certain storage conditions or after a certain period of time." [ECF 118 at ¶ 55; *see also id.* at ¶ 32 ("the round may become hardened and unsuitable for its intended purpose past a certain date of its manufacture or under certain conditions")].

Plaintiff's allegations establish that the defect—a hardened round—may occur over time and did not exist at the time the munitions left the hands of the Safariland Defendants.

Indeed, Plaintiff's allegation that the "round ***may*** become hardened…past a certain date of its manufacture or under certain conditions" dooms his claim. [ECF 118 at ¶ 32 (emphasis added)]. In *Harrison*, the Fifth Circuit affirmed the dismissal of a manufacturing defect claim where the plaintiff alleged that the product "*may* have contained a manufacturing defect." *Harrison v. Medtronic, Inc.*, No. 22-10201, 2022 WL 17443711, at *2 (5th Cir. Dec. 6, 2022) (emphasis in original) (internal quotations omitted). A manufacturing defect either existed or did not exist at the time the munitions left the Safariland Defendants' hands. An allegation that a defect may (or may not) manifest at a later date under certain conditions is insufficient for a manufacturing defect claim.[2] As such, Plaintiff has not alleged, and cannot prove, a required element of his strict liability manufacturing defect claim, and judgment on the pleadings is warranted.

3. Plaintiff's claim for negligent manufacturing fails, as a matter of law, because Plaintiff has not adequately alleged a manufacturing defect.

"'[A] manufacturer logically cannot be held liable for failing to exercise ordinary care when producing a product that is not defective.'" *Miller*, 2023 WL 2138182, at *4 (quoting *Garrett v. Hamilton Standard Controls, Inc.*, 850 F.2d 253, 257 (5th Cir. 1988)). "Thus, because [Plaintiff] has failed to adequately plead a defect, his negligence claim fails on the same basis, and it should be dismissed." *Id.* (dismissing negligence claim because plaintiff failed to alleged a deviation from the design specifications or planned output for strict liability manufacturing claim).

[2] As set forth above, Plaintiff's allegations more closely resemble a design defect claim, but Plaintiff did not bring such a claim. [ECF 118 at ¶¶ 29-35, 54-57; ECF 146 at p. 2].

4. Plaintiff's claim for negligent manufacturing fails because he did not allege, and therefore cannot prove, the existence of a safer alternative design.

"Negligent design and manufacturing claims are predicated on the existence of a safer alternative design for the product." *Am. Tobacco Co., Inv. v. Grinnell*, 951 S.W.2d 420, 437 (Tex. 1997); *see also* ECF 146 at p. 2. Failure to identify the existence of a safer alternative design warrants dismissal. *See Castillo v. Boston Scientific Corp.*, No. 7:20-CV-123, 2020 WL 5608510, at *8 (S.D. Tex. Sept. 18, 2020) (granting motion to dismiss negligence claim because "Plaintiff has still failed to identify a safer alternative design"). Here, Plaintiff has not alleged the existence of a safer alternative design. [*See* ECF 118]. Therefore, Plaintiffs cannot prove a necessary element of his negligent manufacturing claim, and judgment on the pleadings should be rendered.

D. Marketing Defect.

Plaintiff alleges that the Safariland Defendants' munitions suffered from a marketing defect and that the Safariland Defendants either failed to warn or provided inadequate warnings to law enforcement officers. The defect and warnings are premised on Plaintiff's allegations that the munitions can harden over time or under certain storage conditions.

The Safariland Defendants are entitled to judgment on the pleadings as to the strict liability marketing defect claim because Plaintiff does not contend that the munitions were otherwise adequate. In other words, Plaintiff complains that the Safariland Defendants should have warned law enforcement officers about defective munitions, not how to use a properly functioning round. Texas law requires a marketing defect to arise from the use of an otherwise adequate product, so the Safariland Defendants are entitled to judgment on the pleadings as to this claim.

With respect to negligence, Plaintiff has not and cannot allege the existence of a duty owed to him by the Safariland Defendants. Indeed, Plaintiff alleges a duty owed to law enforcement

officers, not him. But, even if he had so alleged, Texas law would not impose such a duty in this circumstance, as recognized by a Dallas federal court in an almost identical situation. Moreover, the Safariland Defendants have no duty to warn of obvious risks, and the risk of serious injury resulting from 12-gauge projectiles fired from a shotgun is obvious, especially to police officers. Finally, Plaintiff has not plausibly alleged causation, such that Officer Rast, who is alleged to have shot Plaintiff as punishment, would have refrained from doing so had the Safariland Defendants warned him that the munitions may harden. For any of these reasons, the Safariland Defendants are entitled to judgment on the pleadings with respect to Plaintiff's negligent failure to warn claim.

1. The strict liability marketing claim fails because it is based on a faulty product.

"Liability will attach if the lack of adequate warning or instructions renders an otherwise adequate product unreasonably dangerous." *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 382 (Tex. 1995); *see also Emerson Electric Co. v. Johnson*, 601 S.W.3d 813, 825 (Tex. App.—Fort Worth 2018) ("Even a product which is safely designed and manufactured may be unreasonably dangerous as marketed because of a lack of adequate warnings or instructions."). "Thus, to prevail on a marketing defect claim, the product itself must have been adequately designed but rendered unreasonably dangerous by the lack of warning." *Timoschuk v. Daimler Trucks N. Am., LLC*, No. SA-12-CV-816-XR, 2014 WL 2592254, at *3 (W.D. Tex. June 10, 2014).

Here, Plaintiff has alleged only the existence of a defective product: that the rounds were defective because they can become hard. [ECF 118 at ¶¶ 24, 32, 53, 55]. The defect, in other words, is the alleged propensity of the munitions to harden over time and/or under certain circumstances. Yet, Plaintiff also alleges that the Safariland Defendants failed to warn "about the dangers of the beanbags expiring or becoming hard or more dangerous in certain storage conditions or after a certain period of time." [*Id.* at ¶ 55; *see also id.* at ¶ 32 ("The Model 3027 beanbag round

comes with manufacturer's specifications and warnings, but none that warn the end users (law enforcement officers) that the round may become hardened and unsuitable for its intended purpose past a certain date of its manufacture or under certain circumstances.")]. Doubling down, Plaintiff alleges elsewhere that the City of Austin was negligent by using "expired munitions that become more dangerous with age…." [*Id.* at ¶ 52]. In other words, Plaintiff alleges that the Safariland Defendants failed to warn about alleged defects in the product that renders them dangerous..

Courts routinely conclude that such allegations fail to state a claim for a strict liability marketing defect. In *Harrison*, the Fifth Circuit affirmed dismissal where the plaintiff claimed "Medtronic should have warned doctors that the device's lead connector could result in malfunction." *Harrison*, 2022 WL 17443711, at *3. The Fifth Circuit accurately recognized that the plaintiff alleged a failure to warn about a defect in the product itself that rendered it dangerous. *See id.* In *Barragan*, the court reached the same conclusion with respect to a marketing defect claim that GM failed to warn the users about the car's center of gravity, instability, and roof crush propensity, among other warnings. *Barragan v. Gen. Motors LLC*, No. 4:14-CV-93-DAE, 2015 WL 5734842, at *6 (W.D. Tex. Sept. 30, 2015). The plaintiffs in *Barragan* also alleged that all of these were design and manufacturing defects. *Id*. The court concluded that "Plaintiffs [] alleged only that GM failed to warn of unreasonable danger created by the vehicle's alleged manufacturing and design defects, and they have therefore failed to state a claim for marketing defect." *Id.*; *see also Timoschuk*, 2014 WL 2592254, at *3 (dismissing marketing defect claim because "danger was, according to Plaintiffs themselves, inherent to how the product was designed").

The same is true here. Plaintiff complains that the munitions were defective because they harden over time and under certain conditions. Plaintiff then complains that the Safariland Defendants did not warn the end users (law enforcement officers) that the munitions harden over

time and under certain conditions. Thus, Plaintiff has not alleged a marketing defect and the Safariland Defendants are entitled to judgment on the pleadings.

2. The Safariland Defendants do not owe a duty to warn Plaintiff.

"The existence of a duty to warn of dangers or instruct as to the proper use of a product is a question of law." *Grinnell*, 951 S.W.2d at 425. "Generally, a manufacturer has a duty to warn if it knows or should know of the potential harm to a user because of the nature of its product." *Id.* Moreover, "the law of products liability does not require a manufacturer or distributor to warn of obvious risks," which is an objective standard. *Caterpillar Inc.*, 911 S.W.2d at 382-83.

As an initial matter, Plaintiff has not alleged that the Safariland Defendants owe a duty to warn Plaintiff—only a duty to law enforcement officers. For example, Plaintiff alleges that "[t]he Model 3027 beanbag round comes with manufacturer's specifications and warnings, ***but none that warn the end users (law enforcement officers)*** that the round may become hardened and unsuitable for its intended purpose past a certain date of its manufacture or under certain circumstances." [ECF 118 at ¶ 32 (emphasis added)]. Plaintiff later alleges that the alleged duties include "a duty to provide adequate labeling and warnings to ***users*** of the rounds." [*Id.* at ¶ 54 (emphasis added)]. As such, Plaintiff has not even alleged that the Safariland Defendants owe *him* a duty. But, even if he had, no duty is owed to the general public. *See Doyle v. Combined Sys., Inc.*, No. 3:22-CV-01536-K, 2023 WL 5945857, at *13 (N.D. Tex. Sept. 11, 2023).

In *Doyle*, the plaintiffs alleged a duty to the general public, but conceded in their briefing that no such duty existed, shifting to the argument that Combined Systems, Inc. ("**CSI**") (a defendant also present here) "negligently breached a duty to warn the [Dallas Police Department] of the products' hazards." *Id.* The court stated that "[n]either the theory Plaintiffs pled nor the theory they now advance identifies a duty running from Defendants to Plaintiffs, so both are

insufficient to support Plaintiffs' claim." *Id.* The same holds true here, and a judgement on the pleadings is warranted with respect to Plaintiff's claim for negligent failure to warn.

Doyle is also consistent with the Texas Supreme Court. *See Praesel v. Johnson*, 967 S.W.2d 391 (Tex. 1998). There, the court determined that a physician did not owe a duty to third parties to warn epileptic patients not to drive in a lawsuit where the patient had a seizure that caused a fatal car accident. *Id.* at 392-93, 397-98. The Court noted that "among the considerations are whether one party would generally have…a right to control the actor who caused the harm." *Id*. at 397-98. There, the physician could not control whether the patient drove, *see id.* at 398, just like the Safariland Defendants cannot control whether and how Officer Rast employed munitions. Moreover, the Safariland Defendants cannot control the orders issued to Officer Rast by the APD. "The responsibility for safe operation of a [munition] should remain primarily with the [officer] who is capable of ascertaining whether it is lawful" to employ a particular munition. *Id.*

Finally, Plaintiff complains about an obvious risk. That is, Plaintiff complains about the munitions "becoming hard or more dangerous." [ECF 118 at ¶ 55]. However, Plaintiff clearly alleges that these munitions consist of a "12-gauge shell loaded with a 40-gram, tear-shaped bag [] made from a cotton and ballistic material and filled with #9 buckshot [sic]." [*Id.* at ¶ 32]. It is obvious that any projectile fired from a 12-gauge shotgun can cause serious injury or death. And, this risk would be very obvious to a trained officer. It is simply not plausible to allege, as Plaintiff does, that these munitions, loaded with #9 buckshot [sic], shot from a 12-gauge shotgun, would result only in "incapacitat[ion], but not serious[] injur[y]." [*Id.* at ¶ 33]. Whether or not the lead pellets somehow fuse together, firing material from a 12-gauge shotgun can obviously cause serious injury, particularly when fired at a person's head.

3. Plaintiff did not and cannot plausibly allege the element of causation.

Plaintiff alleges that "[t]he defective warnings and/or marketing rendered the beanbag rounds unreasonably dangerous for their intended and foreseeable uses, thereby proximately causing Plaintiff's injuries and damages." [ECF 118 at ¶ 57]. However, there is a fatal omission in Plaintiff's pleadings. That is, Plaintiff was not the user or consumer of the munitions; the APD and Officer Rast were. Therefore, Plaintiff must allege and then prove that a warning would have caused Officer Rast to not shoot Plaintiff with the munitions. However, Plaintiff failed to allege that Officer Rast would have showed such restraint. *See Doyle*, 2023 WL 7132955, at *13.

In *Doyle*, the court dismissed the plaintiffs' claim against CSI for the use of rubber bullets during the George Floyd protests in Dallas for the same reason. *Id*. at *1. There, the court stated, "Plaintiffs fail to plausibly allege that communicating the dangers posed by Defendants' launchers and rubber bullets to members of the general public who did not use the products would have prevented DPD officers from using the products to shoot Plaintiffs." *Id.* at *13. Indeed, Plaintiff's allegations are strident and resolute—Officer Rast was undertaking this action ***to punish*** Plaintiff for his protected First Amendment activity. [ECF 118 at p. 1]. Officer Rast was exacting ***retribution*** against Plaintiff. [*Id*. at ¶ 39]. As a result, any allegation that Officer Rast would have forgone his chance for retribution and punishment of Plaintiff due to an additional warning would be frivolous. After all, shooting Plaintiff in the head with a non-defective munition would have injured Plaintiff in any event. Thus, Plaintiff's claim for negligent failure to warn fails because Plaintiff did not, and cannot, adequately allege and prove causation.

4. Plaintiff cannot maintain a claim for a marketing defect or failure to warn because he did not allege, and therefore cannot prove, that the Safariland Defendants knew of the risk at the time the munitions were manufactured.

"The determination whether a manufacturer has a duty to warn is made at the time the product leaves the manufacturer." *Caterpillar Inc.*, 911 S.W.2d at 383; *see also Castillo*, 2020

WL 5608510, at *6 ("the product suppliers actually knew or should have reasonably foreseen the risk of harm at the time the product was marketed"); ECF 146 at p. 2. As set forth above in Section III.C.3, Plaintiff clearly alleges that the rounds "***may*** become hardened…past a certain date of its manufacture or under certain conditions." [ECF at ¶ 32 (emphasis added)]. Moreover, there is not a single allegation that the Safariland Defendants knew or should have known of this alleged propensity. As a result, Plaintiff cannot maintain an action for strict liability marketing defect or negligent failure to warn, and judgment on the pleadings should be rendered as to those claims.

E. Plaintiff's Claims are Barred by the Protection of Lawful Commerce in Arms Act.

The PLCAA was passed by Congress to bar claims like those brought by Plaintiff. The Safariland Defendants are entitled to judgment on the pleadings under the PLCAA for at least two reasons. First, Plaintiff previously argued that the products liability section saves his claims (for now), but the products liability section does not encompass marketing defect and failure to warn claims, such as those alleged by Plaintiff here. Multiple courts have so held, and this Court's prior order regarding the PLCAA only referenced Plaintiff's manufacturing defect claims. Second, the volitional, criminal offense exception to the PLCAA products liability exception bars Plaintiff's claims. Taken as true, Plaintiff has alleged a volitional, criminal offense as to Officer Rast. Specifically, Plaintiff's allegations would establish that Officer Rast committed assault, aggravated assault, and engaged in deadly conduct. Courts around the country have opined that a failure to charge or convict does not save a claim from the PLCAA. Indeed, the District of Rhode Island dismissed a claim against the Safariland Defendants arising out of identical facts under the volitional, criminal offense exception to the products liability exception. The Safariland Defendants are entitled to judgment on the pleadings for the same reason.

1. The PLCAA categorically bars marketing defect/failure to warn claims.

The Court has already (and correctly) determined that this lawsuit is a qualified civil liability action, and that the munitions at issue are qualified products. [*See* ECF 154 at pp. 8-9; *see also* 15 U.S.C. § 7903(4)-(5)(A)]. As the Court noted, there is a limited products liability exception. [*See* ECF 154 at pp. 8-9; *see also* 15 U.S.C. § 7903(5)(A)(v)]. However, the exception only applies to an "action…resulting directly from a defect in design or manufacture of the product." *See* 15 U.S.C. § 7903(5)(A)(v). The exception does ***not*** encompass an action resulting from a marketing defect or failure to warn. *See Doyle*, 2023 WL 5945857, at *8; *see also Santos v. City of Providence*, No. CV 23-221 WES, 2024 WL 1198275, at *4 (D.R.I. Mar. 20, 2024); *Travieso v. Glock Inc.*, 526 F.Supp.3d 533, 545 (D. Ariz. 2021).

The *Doyle* lawsuit involved the use of rubber bullets manufactured by CSI (a defendant here) during the George Floyd protests in Dallas, Texas. *Doyle*, 2023 WL 5945857, at * 1. The court summarized that "[t]he unifying theory behind Plaintiff's marketing defect, negligent failure to warn, implied warranty of fitness, and DTPA claims is that Defendants caused DPD officers to shoot and injure Plaintiffs during public protests by marketing and selling rubber bullets and launchers as appropriate tools for crowd control." *Id.* at *7. Plaintiffs in that matter "d[id] not contend that these claims are exempt by the PLCAA," so the court dismissed them. *Id.* at *8.

The *Travieso* and *Santos* plaintiffs did so contend, and those courts still dismissed the claims. The *Travieso* plaintiff was shot with a 9 mm Glock, as opposed to a less lethal munition. *Travieso*, 526 F.Supp.3d at 536. The *Travieso* court stated that "[p]roducts liability claims are almost uniformly brought on one of three theories: (1) defects in the design, (2) defects in the manufacturing process, or (3) defects based on inadequate instructions or warnings to reduce a

foreseeable risk of harm posed by the product."[3] *Id.* at 545. The court noted that "while the PLCAA specifically creates an exception for 'action[s] for…damage resulting directly from a *defect in design or manufacture* of the production,' 15 U.S.C. § 7903(5)(A)(v) [], it has no similar exclusion for actions resulting from defective instruction or inadequate warnings." *Id.* (emphasis in original). Under this rationale, the court concluded "that even if the 'product liability' exception allows Plaintiff's claim for design defect, it does not allow his claims of information defect or for inadequate warnings." *Id.*

In *Santos*, plaintiffs sued the City of Providence, a police officer, and one of the Safariland Defendants (Defense Technology) for the use of a similar munition during the George Floyd protests in Providence. *Santos*, 2024 WL 1198275, at *1. "Plaintiffs assert[ed] claims for failure to warn and for negligent marketing against Defense Technology." *Id.* at *2. Adopting the rationale of the *Travieso* court, the *Santos* court dismissed those claims because they are not included in the exception set forth in 15 U.S.C. § 7903(5)(A)(v). *See id.* at *4.

Plaintiff has brought claims for negligent failure to warn and marketing defects. [*See* ECF 118 at ¶¶ 54-57; ECF 146 at p. 2]. Because these claims are not included within the product liability exception, the PLCAA bars these claims and a judgment on the pleadings is warranted.[4]

[3] The same is true under Texas law: "In products liability cases, [the Texas Supreme Court has] recognized three types of defect: marketing, design, and manufacturing." *Cooper Tire*, 204 S.W.3d at 800.

[4] The Court did not address Plaintiff's claims for marketing defect and failure to warn in its September 18, 2024 Order. [*See* ECF 154 at pp. 7-9]. The Court focused solely on Plaintiff's manufacturing defect claim. [*See id.*].

2. The criminal offense exception to the products liability exception applies because Plaintiff's claims against Officer Rast are premised on a volitional, criminal act.

As discussed above, there is a limited products liability exception to the PLCAA that applies to an "action…resulting directly from a defect in design or manufacture of the product." [*See* ECF 154 at pp. 8-9; *see also* 15 U.S.C. § 7903(5)(A)(v)]. However, there is an exception to the exception that applies "where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries, or property damage." 15 U.S.C. § 7903(5)(A)(v). "[T]he PLCAA's product liability preemption is triggered by the criminal nature of the act, not whether the actor is or can be charged with the crime."[5] *Traveiso*, 526 F. Supp. 3d at 547; *see also Santos*, 2024 WL 1198275, at *4 ("The inquiry centers on the criminal nature of the volitional act, rather than on whether the user of the firearm was charged or convicted of an offense."); *Johnson v. Bass Pro Outdoor World, LLC*, 64 Kan. App. 2d 217, 229-30 (Kan. Ct. of Appeals 2024) (opining that "[t]he prosecutor's discretionary decision not to charge him with the crime does not alter what happened" and concluding that the "product defect exception did not apply").

This matter is almost identical to *Santos*, where the court dismissed a similar claim against one of the Safariland Defendants for an identical injury caused by the same or similar munition during a George Floyd protest. There, Santos alleged that the officer "purposefully aimed and fired a KIP at Santos, who was an innocent bystander, without warning." *Santos*, 2024 WL 1198275, at *4. Here, Plaintiff alleges the same and then much worse. For example, Plaintiff alleges that "Officer Rast shot Sam in the head…after Sam had been peacefully exercising his

[5] While the Court did acknowledge that "the indictment against Officer Rast was dropped," [ECF 154 at p. 9], the Safariland Defendants respectfully posit that this fact is irrelevant so long as the allegations set forth a volitional act that constituted a criminal offense.

constitutional right to assemble…*while* Sam was following police commands to disburse and *after* Sam had stopped protesting and had left the highway." [ECF 118 at p. 1 (emphasis in original)]. Plaintiff goes on to allege that "Officer Rast shot Sam ***because Sam was protesting Austin police*** and other police departments around the country for their habitual use of excessive force." [*Id*. at ¶ 39 (emphasis added)]. In other words, Plaintiff is alleging that Officer Rast shot Plaintiff solely because Plaintiff was protesting police abuse. Putting to rest any doubt as to this interpretation, Plaintiff later alleges that Officer Rast "shot Sam ***as retribution*** for Sam exercising his First Amendment right." [*Id.* (emphasis added)]. This retributive act was undertaken, allegedly, "even though Sam did not pose a danger to anyone and *after* Sam had complied with police commands and left the highway." [*Id*. at ¶ 42 (emphasis in original)].

Santos also alleged a violation of § 1983 "based on theories of assault, battery, and mayhem, all of which are criminal offenses under Rhode Island law." *Santos*, 2024 WL 1198275, at *4. Here, Plaintiff brings a claim under § 1983 for "excessive and unjustified use of force [that] permanently disabled Sam." [ECF 118 at ¶ 20]. Plaintiff alleges that Officer Rast's actions "were egregious, reckless, and endangered numerous peaceful protestors and bystanders." [*Id*. at ¶ 44].

Plaintiff's allegations, which must be taken as true, certainly establish assault under the Penal Code. For example, simple assault is "intentionally, knowingly, or recklessly cause[ing] bodily injury to another." TEX. PENAL CODE § 22.01(a)(1). Plaintiff clearly alleges that Officer Rast caused him bodily injury and specifically alleges that his actions were "reckless." [ECF 118 at ¶ 44]. The Court can follow Plaintiff's allegations up the Texas Penal Code to more serious assaultive offenses. For example, aggravated assault requires "serious bodily injury" or the use of a "deadly weapon," which Plaintiff clearly alleges. [*Id*. at ¶¶ 23, 32-33, 39, 56-57; TEX. PENAL CODE § 22.02(a)(1)]. That offense is increased to a first degree felony if committed "by a public

servant acting under color of the servant's office of employment." TEX. PEN. CODE at § 22.02(b)(2)(A). Plaintiff alleges that "Officer Rast was acting under color of law when he shot Sam…." [ECF 118 at ¶¶ 39, 42]. Indeed, Plaintiff's allegations establish "Deadly Conduct," which requires "knowingly discharg[ing] a firearm at or in the direction of one or more individuals."[6] [*Id*. at 118 at pp. 1-2; *id*. at ¶¶ 12-15, 21, 23, 25, 39, 42, 44; TEX. PENAL CODE § 22.05(b)(1)].

Plaintiff has clearly and unmistakably alleged a "volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v). As such, Officer Rast's actions are deemed the sole proximate cause of Plaintiff's injuries, and the a judgment on the pleadings is proper. *Id.*

IV. CONCLUSION

For the foregoing reasons, the Safariland Defendants respectfully pray the Court grant their Motion, render a judgment on the pleadings in favor of the Safariland Defendants, and grant the Safariland Defendants such other or further relief, in law or in equity, which the Court deems just and proper.

[6] The Court stated in its Order that "a key part of Kirsch's [complaint] is his contention that a defect in the less lethal munitions may have caused a greater injury than otherwise expected from Officer Rast's actions." [ECF 154 at p. 9] Respectfully, this does not impact the analysis. Regardless of the expected scale of injury, the allegations still satisfy all of the elements of assault, aggravated assault, and deadly conduct. Severity of the expected injury is immaterial. However, the injury is alleged to be a permanent disability, and the conduct reckless and intentional. [ECF 118 at ¶¶ 20, 44, 50]. Taken as true, that is more than sufficient to allege assault, which preempts the products liability exception.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS SAFARILAND, LLC AND DEFENSE TECHNOLOGY, LLC

CERTIFICATE OF SERVICE

This is to certify that on October 28, 2024, I served all counsel of record electronically or by another manner authorized under Federal Rule of Civil Procedure 5(b)(2).

/s/ Mallory B. Williams
Mallory B. Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH,	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-01113-RP**
	§	
CITY OF AUSTIN, ROLAN RAST,	§	
SAFARILAND LLC, DEFENSE TECHNOLOGY,	§	
AND CSI COMBINED SYSTEMS INC.,	§	
Defendants.	§	
	§	

PLAINTIFF'S RESPONSE TO SAFARILAND LLC AND DEFENSE TECHNOLOGY LLC'S MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff Sam Kirsch respectfully files this response in opposition to Defendants Safariland LLC and Defense Technology LLC's Motion for Judgment on the Pleadings, (Dkt. 161).

I. Introduction

This Court recently denied these same two Defendants' Motion to Dismiss under Federal Rule of Civil Procedure 12(b), (Dkt. 154). The Court should deny this Motion for Judgment on the Pleadings under Federal Rule of Civil Procedure 12(c), (Dkt. 161), for the same reasons given in the Court's prior order and because the standard for analyzing a motion under Federal Rule of Civil Procedure 12(b) and a motion Federal Rule of Civil Procedure 12(c) is the same.

A third products liability Defendant (Combined Systems Incorporated) also filed a Motion to Dismiss under Federal Rule of Civil Procedure 12(b), (Dkt. 142). The Court denied that motion in the same Order denying these Defendants' Motion to Dismiss, (Dkt. 154). Between the two Federal Rule of Civil Procedure 12(b) motions, the Court has already considered and analyzed all of the arguments in the pending Motion for Judgment on the Pleadings. The Court should deny

this Motion for the same reasons that the Court already denied Combined Systems Incorporated's Motion to Dismiss.

II. This Court recently denied Defendants' motions to dismiss based in the same arguments here.

Defendants Safariland LLC and Defense Technology LLC filed their Motion to Dismiss under Federal Rule of Civil Procedure 12(b) for failure to state a claim on June 10, 2024, (Dkt. 139). These two Defendants' original Motion to Dismiss focused primarily on challenging Plaintiff's invocation of the Discovery Rule, (Dkt. 139) because Plaintiff alleged in his Second Amended Complaint that he learned about Safariland LLC, Defense Technology LLC, and Combined Systems Incorporated's ("Beanbag Defendants") liability in March 2024 from an investigative report by the Austin American-Statesman, (Dkt. 118, at ¶ 29).

The third Beanbag Defendant, Combined Systems Incorporated, filed its Motion to Dismiss under Federal Rule of Civil Procedure 12(b) for failure to state a claim on June 27, 2024, (Dkt. 142). This Defendant's Motion to Dismiss argued—similar to Defendants Safariland LLC and Defense Technology LLC's Motion to Dismiss—that Plaintiff's products liability claims were time-barred, (Dkt. 142, at pp. 6-10). In addition, Defendant Combined Systems Incorporated's Motion argued that Plaintiff had not met the federal pleading standard in alleging his claims against that Defendant, (Dkt. 142, at pp. 10-12). Finally, Defendant Combined Systems Incorporated also invoked immunity under the Protection of Lawful Commerce in Arms Act, (Dkt. 142, at pp. 12-20).

Plaintiff responded to both Federal Rule of Civil Procedure 12(b) motions in a single, combined response in opposition, (Dkt. 143). In his response, Plaintiff addressed the Discovery Rule argument invoked by all three Defendants, the federal pleading standard, and Protection of

Lawful Commerce in Arms Act arguments invoked by Defendant Combined Systems Incorporated, (Dkt. 143).

This Court analyzed all three arguments—Discovery Rule, federal pleading standard, and Protection of Lawful Commerce in Arms Act—and denied the three Beanbag Defendants' two motions to dismiss in one, combined Order on September 18, 2024, (Dkt. 154).

Defendants Safariland LLC and Defense Technology LLC now renew the same motion to dismiss arguments as their currently pending Motion for Judgment on the Pleadings. The pending motion is based on the two arguments that Defendant Combined Systems Incorporated included in its Motion to Dismiss, and the Court denied, (Dkt. 142, at pp. 10-20), but that Defendants Safariland LLC and Defense Technology LLC did not include in their Motion to Dismiss, (Dkt. 139).

In other words, this pending motion is the first time that Defendants Safariland LLC and Defense Technology LLC made arguments based on the federal pleading standard and the Protection of Lawful Commerce in Arms Act however, even though the Court has already considered and denied these arguments for another similarly situated Defendant.

III. The standard for analyzing Motions to Dismiss under Rule 12(b) and Motions for Judgment on the Pleadings under Rule 12(c) is the same.

In Jones v. Greninger, 188 F. 3d 322, 324, 327, n.4 (5th Cir. 1999), the Fifth Circuit allowed an untimely Motion to Dismiss brought pursuant to Federal Rule of Civil Procedure 12(b) to be converted to a Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c). The Court reviewed the Motion for Judgment on the Pleadings (née Motion to Dismiss) based on the same standard for motions to dismiss under Rule 12(b): whether the plaintiff had failed to state a claim for which relief could be granted. Jones, 188 F. 3d, at 324

("Such motions will be treated as a motion for judgment on the pleadings based on a failure to state a claim on which relief may be granted.").

In 2011, Judge Sparks expressed some skepticism of the appellate Court's forbearance regarding the untimely Federal Rule of Civil Procedure 12(b) motion in Jones, but he followed the Fifth Circuit's primary ruling because the untimely Federal Rule of Civil Procedure 12(b) before him dealt with personal jurisdiction which cannot be waived. Dell Marketing LP v. InCompass IT Inc., 771 F.Supp.2d 648, 654, n.4 (WDTX 2011). "Because the standards for deciding a 12(c) motion are the same as for deciding a 12(b) motion, there seems little practical effect to this distinction; nor would this Court's analysis be different under Rule 12(c)." Id.

This Court has more recently reiterated that the same standard applies to both types of motions. See, e.g., Portee v. Morath, case no. 1:23-CV-551-RP (WDTX Nov. 20, 2023). "The Fifth Circuit applies the same standard to a motion under Rule 12(c) as it does for a motion under Rule 12(b)(6)." Id.

Thus this Court should apply the same standard here that it has already applied to these same issues in ruling on the three Beanbag Defendants two Motions to Dismiss pursuant to Federal Rule of Civil Procedure 12(b):

> Pursuant to Rule 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a 12(b)(6) motion, a "court accepts 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'" In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007) (quoting Martin K. Eby Constr. Co. v. Dall. Area Case Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004)). "To survive a Rule 12(b)(6) motion to dismiss, a complaint 'does not need detailed factual allegations,' but must provide the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true 'raise a right to relief above the speculative level.'" Cuvillier v. Taylor, 503 F.3d 397, 401 (5th Cir. 2007) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). That is, "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 Twombly, 550 U.S. at 570).
>
> A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. A court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Dorsey v. Portfolio Equities, Inc., 540 F.3d 333, 338 (5th Cir. 2008) (citations and internal quotation marks omitted). A court may also consider documents that a defendant attaches to a motion to dismiss "if they are referred to in the plaintiff's complaint and are central to her claim." Causey v. Sewell Cadillac-Chevrolet, Inc., 394 F.3d 285, 288 (5th Cir. 2004). But because the court reviews only the well-pleaded facts in the complaint, it may not consider new factual allegations made outside the complaint. Dorsey, 540 F.3d at 338. "[A] motion to dismiss under 12(b)(6) 'is viewed with disfavor and is rarely granted.'" Turner v. Pleasant, 663 F.3d 770, 775 (5th Cir. 2011) (quoting Harrington v. State Farm Fire & Cas. Co., 563 F.3d 141, 147 (5th Cir. 2009)).

(Dkt. 154, at pp. 3-4).

IV. Plaintiff has stated products liability claims upon which relief can be granted.

Defendants' Motion for Judgment on the Pleadings claims that Plaintiff has not stated claims for manufacturing defects or marketing defects. On the contrary and as this Court has already ruled, Plaintiff adequately pled these claims on page 17 of the Second Amended Complaint, (Dkt. 118). The Court's prior analysis addressed Plaintiff's manufacturing defect and marketing defect claims against Combined Systems Incorporated however, the analysis is the same because everything that Plaintiff alleged against Combined Systems Incorporated has also been alleged against Defendants Safariland LLC and Defense Technology LLC, (2d Am. Compl., Dkt. 118, at p. 17). As the Court already ruled:

> While Kirsch's second amended complaint is relatively sparse on detail when it comes to CSI, the Court finds that Kirsch has adequately alleged enough

> information about CSI's alleged liability. Kirsch alleges that CSI, alongside Safariland and DT, "sold the beanbag rounds at issue to the City of Austin." (2d Am. Compl., Dkt. 118, at 13). Kirsch also alleges that CSI, alongside Safariland and DT, "were negligent when they manufactured and distributed faulty rounds, failed to adequately label the rounds themselves and the packaging of the rounds, and/or failed to provide adequate warnings about the dangers of the beanbags expiring or becoming hard or more dangerous in certain storage conditions or after a certain period of time." (Id. at 17). Kirsch also alleges that the three new "Defendants are strictly liable as manufacturers and/or sellers of defective beanbag rounds, including for inadequate warnings or instructions." (Id.). Thus, while Kirsch has not laid out CSI's individual liability in great detail, he has adequately alleged that CSI was involved in the manufacture or distribution of the munitions at issue in the case. CSI is appropriately on notice as to Kirsch's claims against it.

(Dkt. 154, at pp. 7-8).

For the same reasons that the Court already denied Combined Systems Incorporated's motion pursuant to Federal Rule of Civil Procedure 12(b) (arguing that Plaintiff's pleading is inadequate), the Court should deny Defendants Safariland LLC and Defense Technology LLC's arguments that Plaintiff's pleading is inadequate pursuant to Federal Rule of Civil Procedure 12(c).

V. Defendants are not entitled to dismissal under the Protection of Lawful Commerce in Arms Act.

Just as this Court should adopt its earlier analysis of the federal pleading standard, the Court should rely on its prior ruling regarding Defendants' claims of immunity under the Protection of Lawful Commerce in Arms Act (PLCAA). The Court has already determined that the PLCAA applies to this case and that an exception to PLCAA also applies, (Dkt. 154, at pp. 8-9).

> Because the indictment against Officer Rast was dropped, there are no current criminal proceedings relating to the events at issue—and a key part of Kirsch's second amended complaint is his contention that a defect in the less lethal munitions may have caused a greater injury than otherwise expected from Officer Rast's actions. (2d Am. Compl., Dkt. 118, at 13–14). Accordingly, the Court finds that the design or manufacturing defect exception to the PLCAA applies.

> Therefore, the Court will deny CSI's motion to dismiss the second amended complaint on the basis of PLCAA preemption.

(Dkt. 154, at p. 9).

For the same reasons that the Court already denied Combined Systems Incorporated's motion pursuant to Federal Rule of Civil Procedure 12(b) (arguing that PLCAA immunity applies), the Court should deny Defendants Safariland LLC and Defense Technology LLC's Federal Rule of Civil Procedure 12(c) motion based on Protection of Lawful Commerce in Arms Act immunity.

VI. Conclusion

For all these reasons, Plaintiff Sam Kirsch respectfully requests that the Court deny Defendants Safariland LLC and Defense Technology LLC's Motion for Judgment on the Pleadings under Federal Rule of Civil Procedure 12(c).

Dated: November 25, 2024

Respectfully submitted,
/s/ Rebecca Webber

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Certificate of Service

I certify that I filed Plaintiff's Response via the Court's CM/ECF system on November 25, 2024, which will serve all counsel of record.

/s/ Rebecca Webber
Rebecca Webber

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH,	§	
	§	
Plaintiff,	§	
	§	
	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-1113-RP**
	§	
CITY OF AUSTIN, ROLAN RAST SAFARILAND, LLC, DEFENSE TECHNOLOGY, AND CSI COMBINED SYSTEMS, INC.	§	
	§	
Defendant.	§	

DEFENDANTS SAFARILAND, LLC AND DEFENSE TECHNOLOGY, LLC'S REPLY IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS

Defendants Safariland, LLC ("**Safariland**") and Defense Technology, LLC ("**Defense Technology**") (collectively, the "**Safariland Defendants**") file this *Reply in Support of Their Motion for Judgment on the Pleadings* (the "**Motion**") and would show as follows:

I. INTRODUCTION

Plaintiff Sam Kirsch ("**Plaintiff**") contends that the Safariland Defendants are culpable for his injuries caused by being shot (allegedly without justification) with a less lethal munition with purported manufacturing and marketing defects. However, Plaintiff has failed to state a claim for a manufacturing defect because his Second Amended Complaint is missing several essential elements of those claims. Likewise, there are several fatal legal deficiencies as to the remaining claims in Plaintiff's Second Amended Complaint, which entitle the Safariland Defendants to judgment on the pleadings.

Plaintiff offers nothing to the Court in his Response to the Safariland Defendants' Motion for Judgment on the Pleadings (the "**Response**"). [ECF 166]. Plaintiff does not cite a single

allegation in his Second Amended Complaint that purports to provide the missing elements of his products liability claims. Plaintiff presents no argument in response to the multiple legal arguments raised in the Motion, such as the Safariland Defendant's argument that no duty to warn exists or that Plaintiff's own allegations disprove causation. Nothing.

Instead, Plaintiff claims that the Court already resolved these issues in a September 18, 2024 Order denying motions to dismiss. However, Plaintiff's argument is premised on a tendentious, incorrect recitation of the contents of both those motions and the order. In truth, none of the pleading failures raised in the Motion were previously addressed. Likewise, the legal deficiencies related to Plaintiff's products liability claims are also absent from the Court's prior order. The only overlap is one of the two arguments related to the Protection of Lawful Commerce in Arms Act (the "**PLCAA**"), and even that issue was not resolved in the same posture as it is being presented here.

As a result, the Safariland Defendants are entitled to judgment on the pleadings under Federal Rule of Civil Procedure 12(c).

II. ARGUMENTS AND AUTHORITIES

A. Manufacturing Defect.

Plaintiff does not contest that the following elements are necessary to bring strict liability and/or negligent manufacturing claims:

- To bring a strict liability manufacturing defect claim, Plaintiff must allege that "a product deviates, in its construction or quality, from the specifications or planned output in a manner that renders it unreasonably dangerous.'" *Cofresi v. Medtronic, Inc.*, 450 F. Supp. 3d 759, 766-67 (W.D. Tex. 2020) (quoting *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W. 3d 797, 800 (Tex. 2006)). [ECF 161 at p. 5];

- To bring a strict liability manufacturing defect claim, Plaintiff must allege "that the product was defective when it left the hands of the manufacturer." *Del Castillo v. PMI Holdings N. Am. Inc.*, No. 4:14-CV-03435, 2016 WL 3745953, at *15 (S.D. Tex. July 13, 2016) (internal quotations omitted). [ECF 161 at p. 7]; and

- Plaintiff must allege the existence of a safer alternative design to bring a negligent manufacturing claim. *See Castillo v. Boston Scientific Corp.*, No. 7:20-CV-123, 2020 WL 5608510, at *8 (S.D. Tex. Sept. 18, 2020) (granting motion to dismiss negligence claim because "Plaintiff has still failed to identify a safer alternative design"). [ECF 161 at p. 7].

As forth in the Motion, Plaintiff has failed to allege these necessary elements of these two causes of action. [ECF 161 at pp. 4-9]. In his Response, Plaintiff does not direct the Court to even a single paragraph of his Second Amended Petition to rebut the Safariland Defendants' argument that these allegations are wholly absent from the operative pleading. [ECF 166 at pp 5-6]. Pointing to an actual allegation is simple and straight-forward, and it is the most obvious approach to responding to a motion arguing failure to state a claim. Plaintiff did not do that because no such allegations exist. Instead, Plaintiff relies on the Court's September 18, 2024 Order (the "**Order**") and argues that the Court has already resolved these arguments by obfuscating what that Order actually addressed. [*Id*. at pp. 5-6]. As set forth below in Section II.C., Plaintiff is entirely wrong.

Finally, with respect to the manufacturing defect claims, Plaintiff does not contest that a failure to allege a strict liability manufacturing defect is fatal to a negligent manufacturing claim. *See Miller v. Bridgestone Americas Tire Operations, LLC*, No. 1:21-CV-437-RP, 2023 WL 2138182, at *4 (W.D. Tex. Feb. 21, 2023) ("'[A] manufacturer logically cannot be held liable for failing to exercise ordinary care when producing a product that is not defective.'") (quoting *Garrett v. Hamilton Standard Controls, Inc.*, 850 F.2d 253, 257 (5th Cir. 1988)). Because Plaintiff has failed to allege each element of a strict liability manufacturing defect claim, his negligent manufacturing defect claim also fails. [ECF 161 at pp. 8-9].

Due to these failures, the Safariland Defendants are entitled to judgment on the pleadings as to these claims.

B. Marketing Defect.

Plaintiff does not contest the following grounds for dismissal of his strict liability marketing and/or negligent failure to warn claims:

- "[T]o prevail on a marketing defect claim, the product itself must have been adequately designed but rendered unreasonably dangerous by the lack of warning." *Timoschuk v. Daimler Trucks N. Am., LLC*, No. SA-12-CV-816-XR, 2014 WL 2592254, at *3 (W.D. Tex. June 10, 2014). Here, Plaintiff has alleged only the existence of a defective product. [ECF 161 at pp. 10-11];

- Plaintiff has not alleged that the Safariland Defendants owe a duty to warn Plaintiff, which is a question of law, only a duty to law enforcement officers, and no duty is owed to the general public. *See Doyle v. Combined Sys., Inc.*, No. 3:22-CV-01536-K, 2023 WL 5945857, at *13 (N.D. Tex. Sept. 11, 2023). [ECF 161 at pp. 12-13];

- Plaintiff complains about an obvious risk—that a projectile fired from a 12-gauge shotgun can cause serious injury or death. [ECF 161 at pp. 12-13]; and

- Plaintiff's allegations disprove causation because Officer Rast was undertaking this action to punish Plaintiff and exact retribution; therefore, any allegation that Officer Rast would have forgone his chance for retribution and punishment of Plaintiff due to an additional warning would be frivolous. [ECF 161 at pp. 14].

Again, Plaintiff's Response does not direct the Court to a single paragraph of his Second Amended Petition to rebut the Safariland Defendants' arguments, relying instead on the Order, which is addressed below. [ECF 166 at 5-6]. Moreover, Plaintiff does not even offer a responsive argument, which is important because the Safariland Defendants' grounds, as to these claims, are either legal arguments or assume the truth of Plaintiff's allegations. By failing to provide even a perfunctory response, Plaintiff has conceded the Motion and judgment should be rendered in favor of the Safariland Defendants.

C. The Order Did Not Address the Safariland Defendants' Arguments.

Instead of directly addressing the Safariland Defendants' grounds for judgment on the pleadings, Plaintiff responds that "[t]his court recently denied Defendants' motions to dismiss based in [sic] the same arguments here." [ECF 166 at p. 2]. Plaintiff contends that "[t]his Court

analyzed all three arguments—Discovery Rule, federal pleadings standard, and Protection of Lawful Commerce in Arms Act—and denied the three Beanbag Defendants' two motions to dismiss in one, combined Order on September 18, 2024, (Dkt. 154)." [*Id*. at p. 3]. The Motion does not discuss the discovery rule, so that portion of the Order is entirely immaterial to this discussion. The Motion does make two arguments under the PLCAA. However, the Order was silent with respect to one and, respectfully, incomplete as to the other. The PLCAA is discussed in Section II.D. below. As to the "federal pleadings standard," Plaintiff is simply wrong.

Defendant Combined Systems, Inc. ("**CSI**"), moved to dismiss Plaintiff's complaint on the grounds that it was unclear how CSI was liable when "Plaintiff's Second Amended Complaint readily concedes that the product at issue was made by an entirely separate company" and "there is no discussion of CSI as a company, or how it is involved in this case." [ECF 142 at p. 16; *see also* ECF 144 at pp. 6-7]. In its Order, the Court determined that Plaintiff had adequately alleged that CSI "'sold the beanbag rounds at issue to the City of Austin'" and "that CSI was involved in the manufacture or distribution of the munitions at issue in the case." [ECF 154 at p. 7 (quoting ECF 118 at p. 13)].

Neither CSI nor the Court analyzed whether Plaintiff had adequately alleged each and every element of a strict liability or negligent manufacturing defect claim. None of the magic language of the elements identified by the Safariland Defendants is found in any of those papers, *i.e.*, "deviates, in its construction or quality," "left the hands," "safer alternative design." CSI did not raise, and the Court did not resolve, the legal issues pertaining to the products liability claims raised by the Safariland Defendants in the Motion. For example, there is no discussion as to whether or not a negligent marketing claim can be premised on a defective product. Nor is there any mention of whether a duty to warn exists or whether the allegations disprove causation.

Simply put, Plaintiff made no attempt whatsoever to join issue as to the grounds set forth in the Motion. The simplest way to rebut an argument that an element is missing from a pleading is to point to a specific allegation in the complaint. This Plaintiff abjectly failed to do. The reason for this failure is simple: Plaintiff's Second Amended Complaint is deficient and fails to state a claim. Plaintiff compounded this failure by ignoring the Safariland Defendants' legal arguments that are either independent of Plaintiff's pleading or assume their truth. Plaintiff's response is mortally deficient and effectively concedes the Motion, which should be granted.

D. The Protection of Lawful Commerce in Arms Act Mandates Dismissal.

The PLCAA precludes Plaintiff's claims against the Safariland Defendants for two reasons. First, the products liability section does not encompass marketing defect and failure to warn claims, such as those alleged by Plaintiff here. Second, the volitional, criminal offense exception to the PLCAA products liability exception bars Plaintiff's claims. While the Court's prior Order addresses the PLCAA, the Order did not resolve the legal issue of whether the products liability exception applies to strict liability marketing and negligent failure to warn claims. While the Order did reference the dropped indictment, the Court did not have the opportunity to address the case law that holds an indictment (or any other criminal consequence) is immaterial, or the argument that the allegations, taken as true, clearly establish the exception to the products liability exception.

1. Plaintiff does not contest that the PLCAA precludes marketing defect/failure to warn claims.

The products liability exception of the PLCAA only applies to an "action…resulting directly from a defect in ***design or manufacture*** of the product." *See* 15 U.S.C. § 7903(5)(A)(v) (emphasis added). The exception does ***not*** encompass an action resulting from a marketing defect or failure to warn. *See Doyle*, 2023 WL 5945857, at *8; *see also Santos v. City of Providence*, No.

CV 23-221 WES, 2024 WL 1198275, at *4 (D.R.I. Mar. 20, 2024); *Travieso v. Glock Inc.*, 526 F.Supp.3d 533, 545 (D. Ariz. 2021). Because these claims are not included within the product liability exception, the PLCAA bars Plaintiff from asserting such claims and a judgment on the pleadings is warranted as to these claims. [ECF 161 at pp. 16-17].

Plaintiff does not contest that the PLCAA applies to his claims against the Safariland Defendants. Plaintiff makes no attempt whatsoever to address the Safariland Defendants' specific argument, supported by case law, that the PLCAA products liability exception does not apply to marketing defect/failure to warn claim. Instead, Plaintiff simply refers to the Order. [ECF 166 at p. 6 (citing ECF 154 at 9]. The Court, however, did not address this legal issue[1] in the Order. [*See generally* ECF 154]. Instead, the Court focused entirely on Plaintiff's manufacturing defect claim and whether Plaintiff had alleged sufficient facts to invoke the exception. [*Id.* at pp. 7-9]. The applicability of the products liability exception to a marketing defect/failure to warn claim has not yet been decided in this litigation.

As set forth in the Motion and herein, the PLCAA product liability exception does not apply to these claims. Plaintiff makes no attempt to argue to the contrary, and the applicable case law, supports the Safariland Defendants' argument. As a result, the Court should render judgment on these claims in favor of the Safariland Defendants.

[1] This particular issue has nothing to do with the inadequacy of Plaintiff's allegations. Plaintiff has (unsuccessfully) attempted to allege claims for strict liability marketing defect and negligent failure to warn. Even if those claims were properly pled, however, the PLCAA products liability exception does not encompass them, as a matter of law.

2. Plaintiff has alleged a volitional, criminal act, which precludes the application of the PLCAA products liability exception.

The exception to the product liability exception applies "where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries, or property damage." 15 U.S.C. § 7903(5)(A)(v). The parties agree that for purposes of this Motion, Plaintiff's allegations must be taken as true. [ECF 166 at p. 4 (citing ECF 154 at pp. 3-4)]. Plaintiff alleges, among other things, that Officer Rast shot Plaintiff solely because of, and in retribution for, Plaintiff protesting police abuse and while Plaintiff posed no safety threat. Taken as true, these allegations establish one or more assaultive offenses under the Texas Penal Code. Plaintiff has clearly and unmistakably alleged a "volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v). As such, Officer Rast's actions are deemed the sole proximate cause of Plaintiff's injuries, and a judgment on the pleadings is proper. [ECF 161 at pp. 18-20].

In response, Plaintiff makes no real effort to address this argument, relying instead on a citation to and block quote of the Court's Order. [ECF 166 at pp. at 6-7 (quoting ECF 154 at pp. 8-9]. Therein, the Court noted that "the indictment against Officer Rast was dropped" and that Plaintiff contends "that a defect in the less lethal munitions may have caused a greater injury than otherwise expected from Officer Rast's actions." [ECF 154 at pp. 8-9]. Respectfully, the Court's reference to Officer Rast's indictment is immaterial. "[T]he PLCAA's product liability preemption is triggered by the criminal nature of the act, not whether the actor is or can be charged with the crime." *Travieso*, 526 F.Supp.3d at 547. So, too, is the Court's reliance on the allegation that an alleged defect may have caused greater injury. Instead, "[t]he inquiry centers on the criminal nature of the volitional act, rather than on whether the user of the firearm was charged or

convicted of an offense." *Santos*, 2024 WL 1198275, at *4. If the volitional act was criminal in nature, it "shall be considered the sole proximate cause of any resulting death, personal injuries, or property damage." 15 U.S.C. § 7903(5)(A)(v).

What is undisputable is that Plaintiff has set forth allegations, which must be taken as true, that Officer Rast engaged in a volitional act that constitutes a criminal offense. [ECF 118 at p. 1 (Officer Rast "shot Plaintiff [] in the face to punish him for participating in a peaceful protest against police brutality on Interstate 35"); *Id*. at ¶¶ 39 (Officer Rast's actions were "retribution for Sam exercising his First Amendment rights"), 44 (Officer Rast's actions were reckless)]. Plaintiff offers no argument to the contrary and makes no effort to explain why these allegations do not establish assault under the Texas Penal Code. Whether Officer Rast is ever held to account by the criminal justice system does not impact the analysis. Moreover, even if a defect does exist that caused a greater injury than otherwise expected, the PLCAA mandates that Officer Rast's actions act "shall be considered the sole proximate cause of any resulting death, personal injuries, or property damage." 15 U.S.C. § 7903(5)(A)(v). For these reasons, the Safariland Defendants are entitled to a complete judgment on the pleadings.

III. CONCLUSION

For the foregoing reasons, the Safariland Defendants respectfully pray the Court grant their Motion, render a judgment on the pleadings in favor of the Safariland Defendants, and grant the Safariland Defendants such other or further relief, in law or in equity, which the Court deems just and proper.

Respectfully submitted,

/s/ Scott R. Wiehle
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ATTORNEYS FOR DEFENDANTS SAFARILAND, LLC AND DEFENSE TECHNOLOGY, LLC

CERTIFICATE OF SERVICE

This is to certify that December 2, 2024, I served all counsel of record electronically or by another manner authorized under Federal Rule of Civil Procedure 5(b)(2).

/s/ Mallory B. Williams
Mallory B. Williams

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH,	§	
	§	
Plaintiff,	§	
	§	
	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-1113-RP**
	§	
CITY OF AUSTIN, ROLAN RAST SAFARILAND, LLC, DEFENSE TECHNOLOGY, AND CSI COMBINED SYSTEMS, INC.	§	
	§	
	§	
Defendant.	§	

PLAINTIFFS' RULE 26(a)(2) EXPERT DISCLOSURE

COMES NOW Sam Kirsch ("Plaintiff"), pursuant to Fed. R. Civ. P. 26(a)(2) and hereby submits his Expert Disclosure.

I.

RULE 26(a)(2)(B) DISCLOSURE

Plaintiffs may use the following persons at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

1) **Jeffrey J. Noble**
24 Calle Katrina
Rancho Santa Margarita, CA 92688
(949) 279-4678

Mr. Jeffrey Noble is an expert in a wide range of law enforcement and policing procedures including but not limited to misconduct, corruption, use of force, pursuits, police administration, training, police operations, criminal and administrative investigations, interviews and interrogations, civil rights violations, and crowd control. His qualifications are set out more fully in his expert report and curriculum vitae. By way of example and not limitation, Mr. Noble will testify as to his opinion that a reasonable police officer would not have used any force against Plaintiff and further that the use of force in this case was inconsistent with generally accepted police practices and so inappropriate and contrary to accepted police practices that it is outrageous and shocking to the conscience. Mr. Noble will also testify that the Austin Police Department policies in place regarding the use of less lethal kinetic projectile weapons and use of force during the events at issue were highly dangerous.

A report containing Mr. Noble's opinions, along with his curriculum vitae, publications, and prior testimony list, has been served on defense counsel along with these disclosures in accordance with Fed. R. Civ. P. 26(a)(2)(B) at Kirsch - PL Expert 0103 – 0178.

2) **Michael S. Maloney, MFS**
1107 West College Street
Independence Missouri 64050
(816) 908-2080

Mr. Michael Maloney is an independent forensic consultant and trainer. He is an expert in a variety of forensic disciplines including death investigations, death/crime scene reconstruction, death/crime scene processing, wound dynamics/evidence of injury, bloodstain pattern analysis, firearms/trajectory analysis and post-blast investigations. Mr. Maloney will testify, among other things, to his opinions regarding the officer who shot Plaintiff, the type of munition used, and the appropriate decision process for deciding whether to shoot. His qualifications are set out more fully in his expert report and curriculum vitae.

A report containing Mr. Maloney's opinions, along with his curriculum vitae, publications, fee schedule, and prior testimony list, has been served on defense counsel along with these disclosures in accordance with Fed. R. Civ. P. 26(a)(2)(B) at Kirsch - PL Expert 0191 – 0216.

3) **Angelos Leiloglou**
24511 Bliss Canyon
San Antonio, TX 78260
(210) 660-8701

Mr. Angelos Leiloglou is an independent forensic analyst with over 20 years of experience. As the founder of Forensic Viz, LLC, he is an expert in forensic visualization incident reconstruction, including site inspections, video analysis, 3D modeling, digital enhancement, measurements, and event timing.

Mr. Leiloglou's opinions are set forth in his report served in accordance with Fed. R. Civ. P. 26(a)(2)(B) at Kirsch - PL Expert 0001 – 0042.

4) **Eytan A. David, B.Sc., M.D., F.R.C.S.(C)**
101B – 1221 Lonsdale Avenue
North Vancouver, BC V7M 2H5
(604) 988-0598

Dr. David Eytan is an independent Otolaryngologist who specializes in inner ear disorders causing dizziness, hearing loss, and tinnitus. His expertise includes the fields of Otology, Neurotology, Skull Base Surgery Hearing, Balance and Facial Nerve Disorders. He will testify as to his opinion that Mr. Kirsch demonstrates a clinically significant balance deficit and injury to Mr. Kirsch's left inner ear and the resulting dizziness, imbalance, vertigo, and tinnitus Mr. Kirsch now endures as well as the implications of these conditions and recommended future treatment.

Dr. David's opinions are more fully set forth in his report served in accordance with Fed. R. Civ. P. 26(a)(2)(B) at Kirsch - PL Expert 0043 – 0102.

5) **Edmond A. Provder**
6538 Collins Avenue, #231,
Miami Beach, FL 33141
(201) 406-5906

Dr. Edmond Provder is a Vocational Expert/Life Care Planner at Occupational Assessment Services Inc. Dr. Provder will testify to the potential employability of Plaintiff having conducted a vocational appraisal regarding his ability to work.

Dr. Provder's opinions are more fully set forth in his report served in accordance with Fed. R. Civ. P. 26(a)(2)(B) at Kirsch - PL Expert 0305 – 0392.

6) **John C. Meyer**
1536 Story Avenue
Louisville, KY 40206
(502) 589-1500

Dr. John Meyer is a board-certified ophthalmologist with over 35 years in the medical field. He has expertise in areas including, but not limited to, cataract, glaucoma, and retinal detachment. Dr. Meyer has reviewed extensive medical records of Mr. Kirsch related to the incident at issue and will issue opinions about the injury to Mr. Kirsch's eye, the treatment provided, Mr. Kirsch's response, and the need for future care.

Dr. Meyer's opinions are set forth in his report served in accordance with Fed. R. Civ. P. 26(a)(2)(B) at Kirsch - PL Expert 0179 – 0190.

7) **Nancy J. Bond, M.Ed., CLCP, CCM**
8531 Veterans Hwy, Third Floor
Millersville, MD
(410) 987-1048

Ms. Nancy Bond is certified life care planner. She specializes in the provision of multidisciplinary life care plans for adults with catastrophic health care issues resulting from medical malpractice, product liability, and personal injury. Ms. Bond also provides care coordination services related to life care planning and long-term care coordination. Ms. Bond will testify as to her opinions related to the life care plan she developed for Mr. Kirsch.

Ms. Bond's opinions are more fully set forth in her report served in accordance with Fed. R. Civ. P. 26(a)(2)(B) at Kirsch - PL Expert 0217 – 0279**.**

8) **Roberto J. Cavazos, Ph.D.**
(202) 702-4031
rcavazos@employstats.com

Dr. Cavazos is an independent economist, with emphasis on data analysis. He has reviewed Plaintiff's income and developed opinions and performed calculations as to his past lost earnings and future earning capacity.

Dr. Cavazos's opinions are more fully set forth in his report served in accordance with Fed. R. Civ. P. 26(a)(2)(B) at Kirsch - PL Expert 0280 – 0304.

9) **Rick T. Wyant, M.S.**
P.O. Box 84536
Seattle, WA 98124
(425) 238-9662

Mr. Rick Wyant is an independent forensic munitions and firearm analyst. He has experience in bullet/bullet cartridge comparison, less-lethal munitions, review of less-lethal weapon evidence (specifically officer involved shootings), trajectory reconstruction, firearm operability and wound interpretation.

Mr. Wyant's opinions are set forth in his forthcoming report that will be served in accordance with Fed. R. Civ. P. 26(a)(2)(B) and pursuant to Text Order GRANTING [170] Plaintiff's Unopposed Motion to Extend Scheduling Order Deadlines.

10) **Mike McCord, M.S., CRC, CCM, D/ABVE, CLCP**
1270 Caroline Street, Suite D120-467
Atlanta, Georgia 30307
(470) 421-7266

Mr. Mike McCord specializes in rehabilitation services. He has over 30 years' experience in evaluating individuals' rehabilitation needs and developing rehabilitation plans and vocational options compatible with physical and psychological abilities. Mr. McCord will testify as to his opinions regarding Mr. Kirsch's ability to return to the workforce, what factors to consider in a determination of whether that is possible, and a timeline for doing so.

Mr. McCord's opinions are more fully set forth in his forthcoming report that will be served in accordance with Fed. R. Civ. P. 26(a)(2)(B) and pursuant to Text Order GRANTING [170] Plaintiff's Unopposed Motion to Extend Scheduling Order Deadlines.

RULE 26(a)(2)(C) DISCLOSURE

A. MEDICAL PROVIDERS

The following persons are medical providers and mental health providers, including physicians, technicians, nurses, physicians' assistants, healthcare providers, licensed counselors, records custodians, clinics, hospitals and their agents, representatives and employees, where, or by whom, Plaintiff received medical care and treatment including mental health care. Plaintiff identifies the following healthcare providers as persons who may give expert testimony at the trial of this cause. To the extent it is necessary to call live at the trial of or deposition in this cause any custodian of records for any of the following health care providers, Plaintiff identifies any such custodian as a person who may have expert knowledge regarding issues related to the incident in question, including the costs of care provided to Plaintiff and the reasonable certainty of future medical care. The health care providers listed below are not within the control of Plaintiff and have not been retained by Plaintiff as expert witnesses (and therefore have not provided to Plaintiff any specific written report other than their respective medical records and in some cases, medical

summaries); therefore, for the mental impressions held by and the opinions of and facts known by any of the following witnesses, please refer to their medical records of Plaintiff and in some cases, the depositions that have occurred. Other than the medical animation shown to Dr. Harshbarger at his deposition, Plaintiff has furnished no documents, tangible things, reports, models or data compilations to any of Plaintiff's medical providers for their review. Nor has Plaintiff prepared any such information for any medical provider in anticipation of their testimony. Plaintiff does not have possession of the curriculum vitae of any relevant medical provider and has not retained any such medical provider to testify live at the trial of this cause.

Plaintiffs may use the following persons at trial to present evidence under Federal Rule of Evidence 702, 703, or 705. Please note that each below listed person is also designated as a Fact Witness.

1) **Raymond J. Harshbarger, III, MD**
Adam Weinfeld
Dell Seton Medical Center
1601 Trinity St., 704 D
Austin, TX 78701
(512) 324-8320

Dr. Harshbarger is a craniomaxillofacial surgeon who has treated Plaintiff Sam Kirsch on multiple occasions following the incident giving rise to this lawsuit. Dr. Harshbarger performed open reduction internal fixation, bone graft, orbital floor implant, and completed a closed nasal reduction on June 9, 2020. He later performed exploration and decompression of Mr. Kirsch's left infraorbital nerve and excision of neuroma at the nerve graft to infraorbital nerve on August 17, 2022. He may render opinions as to the treatment he and his colleagues provided to Mr. Kirsch, his observations of Mr. Kirsch's condition, Mr. Kirsch's reaction to the treatment, the risk of developing future problems, and the need for future treatment, as well as the treatment Mr. Kirsch received immediately following the injury, including the surgery performed by Dr. Weinfeld on May 31, 2020. He has given sworn testimony in this lawsuit.

2) **Aaron B. Roller, MD**
Valla Djafari
Texas Retina Institute
4010 Sandy Brook Dr # 105
Round Rock, TX 78665
(512) 651-2201

Dr. Roller is a board-certified ophthalmologist who has treated Plaintiff Sam Kirsch on multiple occasions following the incident giving rise to this lawsuit. Dr. Roller performed a laser procedure to stabilize Mr. Kirsch's retina and observed that Mr. Kirsch's left eye met the definition for "legal blindness." He later performed a vitrectomy. He may render opinions as to the treatment he and his colleagues provided to Mr. Kirsch, his observations of Mr. Kirsch's condition, Mr. Kirsch's reaction to the treatment, and the risk of developing future problems including glaucoma and choroidal neovascularization, the need for future treatment. He has given sworn testimony in this lawsuit.

3) **Deborah A. Bergfeld, MD**
Seton Brain and Spine Pain Center/Rehabilitation
1600 W 38th St #312
Austin, TX 78731
(512) 324-7131

Dr. Bergfeld is a physical medicine and rehabilitation specialist who has treated Plaintiff Sam Kirsch on multiple occasions following the incident giving rise to this lawsuit and concluded that he suffered a mild traumatic brain injury from the incident at issue. She may render opinions as to the treatment she and her colleagues provided to Mr. Kirsch, her observations of Mr. Kirsch's condition, Mr. Kirsch's reaction to the treatment, the risk of developing future problems, and the need for future treatment. She has given sworn testimony in this lawsuit.

4) **Jonathan A. Church, MD**
Capitol Pain Institute South Austin
8015 Shoal Creek Blvd #103
Austin, TX 78757
(512) 467-7246

Dr. Church is a dual board-certified anesthesiologist and pain management physician who has treated Plaintiff Sam Kirsch on multiple occasions following the incident giving rise to this lawsuit. He may render opinions as to the treatment provided to Mr. Kirsch by Capital Pain Institute to address his ongoing issues with pain, including depression, his observations of Mr. Kirsch's condition, Mr. Kirsch's reaction to the treatment, and the need for future treatment. He has given sworn testimony in this lawsuit.

5) **Vikram D. Durairaj, M.D.**
Texas Oculoplastics Consultants (TOC) Eye and Face
3705 Medical Pkwy, Ste 120
Austin TX 78705
(512) 458-2141

Dr. Durairaj is an ophthalmologist who has treated Plaintiff Sam Kirsch on multiple occasions following the incident giving rise to this lawsuit related to retraction of his eyelid. On April 3, 2023, he performed surgery to correct Mr. Kirsch's left lagophthalmos and placement of a gold weight implant into his upper lid along with canthoplasty. He may render opinions as to the treatment provided to Mr. Kirsch by TOC Eye and Face, his observations of Mr. Kirsch's condition, Mr. Kirsch's reaction to the treatment, and the need for future treatment, including removal of the gold weight. He has given sworn testimony in this lawsuit.

6) **Additional providers**

The following mental health and medical healthcare facilities and professionals have also provided care to Plaintiff Sam Kirsch related to the injuries at issue in this lawsuit and may be called upon to discuss the care provided and their expertise.

Erin Snyder, LPC
8700 Menchaca Road, Bldg. 7, STE 706
Austin, Texas 78748
(361) 201-0142

Kristen Hawthorne
Howerton Eye Clinic
2610 South IH 35
Austin, Texas 78704
(512) 443-9715

Gene Kim, MD
Aman Mittal, MD
UT Health Austin
1601 Trinity Street, Bldg A
Austin, TX 78712
(833) 882-2737

Todd Shepler, MD
Hill Country Eye Center
111901 W. Parmer Lane, STE 400
Cedar Park, Texas 78613
(512) 528-1144

Malena M. Amato, MD
Eyelid & Facial Plastic Surgery Associates
12202 Renfert Way, STE 100
Austin, Texas 78758
(512) 501-1010

Megan Schutte, OD
10000 Research Blvd Ste 150
Austin, TX 78759
(512) 345-5642

Kristen M. Hawthorne, MD
2610 S I-35 Frontage Rd
Austin, TX 78704
(512) 443-9715

Roxana Hemmati, OD
4211 S. Lamar Blvd #E3
Austin, TX 78704
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B. LAW ENFORCEMENT OFFICERS AND INVESTIGATORS

Plaintiff reserves the right to elicit expert opinions from qualified Austin Police Department police officers and/or investigators and corporate representatives who testify in depositions or at trial in this case. Plaintiff reserves the right to elicit expert opinions from such witnesses that are related to each witness's personal knowledge of facts relevant to this case. Plaintiff also reserves the right to elicit expert testimony from such witnesses by showing them evidence produced in this case, including (without limitation) video recordings, audio recordings, still photographs, witness statements, investigative materials, or other evidence related to the incident giving rise to this lawsuit. Plaintiff reserves the right elicit such non-retained expert opinions from any law enforcement officer or investigator called as a witness by Defendants, and Plaintiff specifically identifies the following individuals as potentially providing non-retained expert testimony:

- Detective Benjamin Hart. Detective Hart will testify as to the opinions and conclusions of his investigation into the city's knowledge of issues with the kinetic impact munitions. The substance of his opinions and conclusions may be found within his deposition testimony and investigative report.
- William Mercado. Mr. Mercado may offer opinions based on his knowledge, experience, and training in the use of kinetic energy weapons. The substance of his opinions may be found within his deposition testimony.

Plaintiff cannot provide additional detail regarding the substance of the non-retained expert testimony that each of these witnesses may offer because these witnesses are not under Plaintiff's control.

C. ATTORNEYS' FEES

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Plaintiff's counsel has knowledge of the hours worked and reasonable hourly rates for Plaintiff's claims for attorneys' fees pursuant to 42 USC §1988. They will testify that the hours were worked on this case and were necessarily incurred to reach the ultimate result. Plaintiff further reserves the right to supplement with expert testimony by other attorneys in the relevant market(s).

II.

Plaintiff reserves the right to supplement these disclosures as permitted by the Federal Rules of Civil Procedure.

Plaintiff reserves the right to offer expert testimony at trial from any retained or non-retained expert identified by any of the Defendants in this case.

Plaintiff reserves the right to call undesignated rebuttal expert witnesses, whose testimony cannot reasonably be foreseen until the presentation of the evidence against the Plaintiff.

Plaintiff reserves the right to withdraw the designation of any expert and to aver positively that any such previously designated expert will not be called as a witness at trial, and to re-designate same as a consulting expert, who cannot be called by opposing counsel.

Plaintiff reserves the right to elicit any lay opinion testimony at the time of trial which would be truthful, which would be of benefit to the jury to determine material issues of fact, and which would not violate any existing Federal Rule of Civil Procedure or Federal Rule of Evidence. Specifically, Plaintiff reserves the right to elicit such testimony from persons with knowledge of relevant facts who have been identified in response to discovery propounded to Plaintiff.

Plaintiff reserves all additional rights he has with regard to experts pursuant to the Federal of Civil Procedure, the Federal Rules of Evidence, the case law construing same, and the rulings of the trial court.

Dated: March 5, 2025

Respectfully submitted,
HENDLER FLORES LAW, PLLC

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served to all know counsel of record via the Court's CM/ECF e-filing system on March 5, 2025.

/s/ Leigh A. Joseph
Leigh A. Joseph

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAMUEL KIRSCH,	§	
Plaintiff,	§	
	§	
V.	§	**CASE NO. 1:20-CV-1113-RP**
	§	
CITY OF AUSTIN, et al.,	§	
***Defendants*,**	§	

NON-PARTY TRAVIS COUNTY DISTRICT ATTORNEY JOSÉ GARZA'S ADVISORY TO THE COURT REGARDING JOINT MOTION TO COMPEL DESTRUCTIVE TESTING OF STATE'S EVIDENCE IN ONGOING CRIMINAL PROSECUTIONS

The Travis County District Attorney José Graza ("TCDA") files this advisory to inform the Court of a significant issue in this case, specifically, the proposed testing of evidence by parties to this case which poses the risk of destroying evidence needed for testing in pending criminal cases arising out of the same facts and circumstances as this case.

1. Procedural History. On March 4, 2025, certain parties ("Movants") in the above referenced case filed a Joint Motion to Compel Testing of Less Lethal Shotgun and Production of Less Lethal Munitions For Testing From Defendant City of Austin (Dkt. 169). On March 5, 2025, one of the Movants filed a Notice of Service of that Joint Motion (Dkt. 177) reflecting that copies of the Joint Motion were sent via email to the Assistant District Attorney assigned by the TCDA as the State's lead prosecuting attorney, and to three attorneys representing certain defendants, in the following ongoing criminal prosecutions:

1. *State of Texas v. John Siegel*, Cause No. D-1-DC-20-900072 in the 147th Judicial District Court, Travis County, Texas;
2. *State of Texas v. Jeffrey Teng*, Cause No. D-1-DC-23-900065 in the 299th Judicial District Court, Travis County, Texas;
3. *State of Texas v. Kyle Felton*, Cause No. D-1-DC-23-900066 in the 299th Judicial District Court, Travis County, Texas;

4. *State of Texas v. Chance Bretches*, Cause No. D-1-DC-24-904031 in the 299th Judicial District Court, Travis County, Texas;[1]
5. *State of Texas v. Kyle Felton*, Cause No. D-1-DC-20-900054 in the 299th Judicial District Court, Travis County, Texas; and
6. *State of Texas v. Chance Bretches*, Cause No. D-1-DC-20-900056 in the 299th Judicial District Court, Travis County, Texas.

(collectively, the "Pending Criminal Prosecutions"). That Joint Motion remains pending. (Dkt. 169).

2. The Pending Criminal Prosecutions Arise from the Same Set of Facts and Circumstances as This Lawsuit. Each of the Pending Criminal Prosecutions arise from the same events made the basis of this civil lawsuit, and each of the defendants in the Pending Criminal Prosecutions was employed at that time as a law enforcement officer by the City of Austin's Police Department.

3. Destructive Testing of the State's Evidence Should Not Be Ordered Without Adequate Protection for the Rights of the State and the Criminal Defendants in the Pending Criminal Prosecutions. The munitions in question are part of the State's evidence in the Pending Criminal Prosecutions being prosecuted by the TCDA and are held in the *custodia legis* of the Austin Police Department pursuant to Texas law. Although the movants in this civil case may agree on issues seeking destructive testing of such State's evidence, the TCDA has a substantial and compelling interest to ensure that sufficient quantities of the State's evidence remain in order to ensure a fair, just, and orderly trial that will preserve the respective rights of both the State and the defendants in the Pending Criminal Prosecutions.

4. TCDA and the Austin Police Department conducted a count of the remaining munitions on March 13, 2025, which are being held in evidence at the Austin Police Department; the following amounts of the munitions are currently in the custody of the Austin Police Department:

Total Count by Year

2007: 4 full boxes of 25, and 1 box with 23 = 123 rounds

2012: 3 boxes of 5 each = 15 rounds

2015: 16 boxes of 5 each = 80 rounds

2017: 2 boxes of 5 each = 10 rounds

[1] This matter is set for trial beginning July 7, 2025.

2018: 2 boxes of 5 rounds = 10 rounds

2019: 188 boxes of 5 each = 940 rounds

2020: 107 boxes of 5 each = 535 rounds + 1 box of 3 rounds = 538 rounds

Undated ("Loose") Rounds: Hundreds

The Movants have proposed the destructive testing of 50 of the "loose" and undated rounds, and 20 rounds for each year of the "dated" rounds, and would address fewer quantities as follows:

> the parties would agree to take all but two (2) of such rounds, and split the rounds equally between the Safariland Defendants and Plaintiff. Any reduction in total rounds for testing would be offset by an increase in the number of loose rounds provided to the movants. The need may arise for testing of additional rounds beyond the number requested herein.

Joint Motion (Dkt. 169) at footnote 7. Leaving only <u>two rounds</u> available for purposes of the six Pending Criminal Prosecutions, which involve four different defendants (none of whom are parties to this lawsuit), will not adequately protect the rights of those defendants and the State.

5. In addition to the criminal case defendants' interests in preserving these munitions for testing, the State (TCDA) also has an obligation to protect the interest of each defendant in the criminal prosecutions and to ensure there are adequate munitions for defense experts to test in order to advance relevant defenses. The State also has an independent interest in preserving munitions to be able to rebut any relevant defenses regarding munitions. To that end, in an attempt to protect against the possibility that evidence in ongoing criminal cases would be destroyed or adversely affected, the TCDA filed motions in all six pending criminal cases to preserve the evidence thus helping to ensure that no party has access to munitions at APD for destructive testing without an order by the criminal courts overseeing the criminal cases. Judges Karen Sage of the 299th District Court and Clifford Brown of the 147th District Court of Travis County, Texas, granted all six motions and ordered that APD not release any munitions to any party unless by order of one of those two courts. Those orders are collectively attached hereto as **Exhibit A**.

6. Before any ruling or agreed order is entered in this case concerning the Joint Motion, the TCDA requires time to engage in discussions with the parties in this case to attempt to reach an

agreement about conducting joint testing and/or coordinate any destructive testing of the subject munitions to avoid compromising the Pending Criminal Prosecutions and focus on only those years where there are adequate quantities available for destructive testing purposes. Attorneys for the TCDA have begun such discussions with one of the Movants.

7. However, time is of the essence due to the possibility of the Court ruling on the Joint Motion before these discissions can be had and agreements can be made. If the District Attorney can reach an agreed resolution with the parties, he can join in any agreed order as a party in interest *on this specific issue*. If an agreement cannot be made, the District Attorney may seek intervention in this case for the purposes of being heard on the issue of the proposed destruction of the State's evidence being held *in custodia legis* by the City of Austin.

Respectfully submitted,

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ATTORNEYS FOR INTERESTED THIRD PARTY TRAVIS COUNTY DISTRICT ATTORNEY JOSÉ GARZA

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of March 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all parties and attorneys in this case, as well as to the following:

Elaine A. Casas
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Attorneys for Interested Third Party,
Travis County District Attorney
José Garza

By: */s/ Cynthia W. Veidt*
ELAINE CASAS
CYNTHIA W. VEIDT
Assistant County Attorneys

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH,	§	
***Plaintiff*,**	§	
	§	
v.	§	
	§	**CIVIL ACTION NO. 1:20-CV-01113-RP**
CITY OF AUSTIN, ROLAN RAST,	§	
SAFARILAND, LLC, DEFENSE	§	
TECHNOLOGY, and CSI	§	
COMBINED SYSTEMS, INC.	§	
***Defendants*.**	§	

DEFENDANT COMBINED SYSTEMS INC.'s NO-EVIDENCE AND TRADITIONAL MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

TO THE HONORABLE ROBERT PITMAN:

COMES NOW, Defendant, Combined Systems Inc. ("CSI"), and files this its No Evidence and Traditional Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, and would respectfully show the Court the following:

I. NATURE AND STAGE OF PROCEEDINGS

1. Plaintiff was a protester and sustained injuries during the riots on May 31, 2020. *See* ECF 118, at pp. 4-6. He sued the City of Austin and an Austin Police officer on November 9, 2020, alleging that the Austin Police officer utilized "excessive and unjustified use of force" in violating his civil rights. ECF 1 at pars. 10-11, 16, 32, 39, 34, 37. Further, Plaintiff alleged that the City of Austin was negligent when it used "expired munitions that [became] more dangerous with age." *Id*. at par. 42. Plaintiff alleged that his injuries were "more serious" because "the projectile [that he was struck with] was expired and had hardened" and was not used "within the manufacturers' recommended time frames," directly and proximately causing his injuries. *Id*. at pars. 20, 42.

2. On January 21, 2021, Plaintiff amended his complaint to identify Austin Police officer Rolan Rast ("Detective Rast") as the officer who shot him on May 31, 2020. *See* ECF 4.

3. On April 9, 2024, Plaintiff filed a Second Amended Complaint adding new claims against CSI and co-defendant Defense Technology, LLC/Safariland, LLC ("Defense Technology") for negligence and strict products liability. ECF 118.

4. The Second Amended Complaint alleges the beanbag round that Officer Rast used to shoot Plaintiff was a 12-Gauge Drag Stabilized Round, Model 3027 manufactured by Defense Technology and sold to Austin Police Department. ECF 118 at par. 30-32. With respect to CSI, the body of the Second Amended Complaint itself contains only four paragraphs referencing CSI as a standalone entity, two of which address jurisdiction and one of which is located in the prayer for relief. *Id*. at pars. 6, 10, 29, 61. The remaining paragraph merely states "[o]n March 15, 2024, Plaintiff obtained new information that enabled him to discover his newly alleged claims against Defense Technology, LLC, Safariland, LLC, and/or CSI Combined Systems, Incorporated (collectively 'the Beanbag Defendants')." *Id*. at par. 29. The Second Amended Complaint then alleges the Safariland co-defendants manufactured "the beanbag rounds used by Defendant Rast when shooting at Plaintiff." *Id*. at par. 30. Thereafter the Second Amended Complaint vaguely alleges "The Beanbag Defendants sold the beanbag rounds at issue to the City of Austin." *Id*. at par. 31.

5. CSI moved to dismiss the Second Amended Complaint, in part, on the basis that the Second Amended Complaint lacked factual allegations that would support a viable claim against CSI or otherwise put it on notice of its alleged individual involvement in the case. ECF 142, 144. The Court denied CSI's motion to dismiss noting "[t]he Court expects that fact discovery will provide the parties with further information." ECF 154 at p. 7-8.

6. Since that time, voluminous discovery has been exchanged amongst the parties and multiple depositions have been completed, including depositions of Plaintiff's treating physicians, and several current or former members of Austin Police Department: Detective Rolan Rast, Detective Andrew Bryan Pietrowski, former Sergeant Steven Willis, former Corporal William Mercado, and former Commander Mark Spangler. Such deposition testimony establishes that Plaintiff was not struck by a CSI munition and that no CSI munition is alleged to have been defective or to have performed improperly. *See generally*, Exhibits D-G. There are no further deposition requests outstanding nor outstanding discovery requests directed towards CSI at the time of the filing of this motion.

7. Plaintiff's counsel recently served Plaintiff's Expert Disclosure and accompanying expert reports, including the reports of forensic consultant Michael Maloney and Angelos Leiloglou. *See* Exhibits H and I. These expert reports conclude that Plaintiff was not struck by a CSI product, and they contain no assertion of any problem or defect with any CSI munition. *Id.*

8. There is a complete lack of evidence to demonstrate that Plaintiff was impacted by a CSI round, and, in fact, the evidence affirmatively demonstrates that Plaintiff was not impacted by a CSI round. Further, there is no evidence that any CSI round was defective or did not perform as intended. This case is therefore ripe for summary judgment in favor of CSI.

II. FACTUAL BACKGROUND

a. Plaintiff's Second Amended Complaint

9. Plaintiff alleges that on May 31, 2020, he was sitting in the northbound lane of Interstate 35 adjacent to Austin police headquarters with a large crowd of peaceful protesters when Austin Police Department officer Rolan Rast shot him in the head with a less lethal projectile. ECF 118, pars. 12-18, 32. Plaintiff contends that Officer Rast acted with "excessive and unjustified use of

force" in violating his civil rights by shooting Plaintiff in the head while peacefully demonstrating and only after he had left the highway. *Id*. at p. 1; *see also* pars. 20, 32, 39, 42, 44, 47. Plaintiff also alleges that the City "caused severe injuries by allowing its stockpile of 'less-lethal' munitions to expire, and thus harden, and then arming its police with the expired munitions for crowd control during peaceful demonstrations." *Id*. at p. 2, par. 24.

10. The Second Amended Complaint provides conflicting allegations regarding the specific less lethal round that is alleged to have impacted Plaintiff. On one occasion it states that "[u]pon information and belief, Officer Rast shot Sam with a 40mm 'foam baton' round or a 12-gauge round filled with lead pellets" yet it later specifies that "[t]he specific beanbag round used against Plaintiff is the 12-Gauge Drag Stabilized Round, Model 3027 . . ." *Id*. at pars. 23, 32. The Second Amended Complaint went on to allege generally that "[t]he Beanbag Defendants sold the beanbag rounds at issue to the City of Austin". *Id*. at par. 30-32. Plaintiff ultimately alleges that "the Beanbag Defendants" acted negligently "when they manufactured and distributed faulty rounds, failed to adequately label the rounds themselves and the packaging of the rounds, and/or failed to provide adequate warnings about the dangers of the beanbags expiring or becoming hard or more dangerous in certain storage conditions or after a certain period of time." *Id*. at par. 55.

11. Contrary to the Plaintiff's allegations, there has been no evidence adduced that supports any claim against CSI. In fact, all evidence, testimony, and Plaintiff's own expert, agree that Plaintiff was not struck by a CSI munition, there is no claim of any problem or "defect" with any CSI munition, and CSI was, actually, identified as the proposed solution to problems APD was experiencing with its less lethal munitions.

b. Discovery

i. Detective Rolan Rast

12. Detective Rolan Rast provided deposition testimony on February 28, 2024 and again on December 9, 2024. Detective Rast was assigned to both APD patrol and APD's Special Response Team as of May 2020. *See* Exhibit D at p. 36. On May 31, 2020, Detective Rast fired five shots from his Remington 12 gauge less lethal shotgun at five separate targets at the time of the incident in question on May 31, 2020. *Id*. at pp. 19, 24-25, 36, 101-102, 106; *see also* Exhibit D at Exhs. 6-10; Exhibit I. He was unable to identify any of the five targets that he fired at upon reviewing his body cam footage. *Id.* at pp. 38, 47-48, 50. Detective Rast fired 12 gauge beanbag rounds manufactured by Defense Technology. *See* Exhibit D at p. 126, Exhs. 6-10; *see also* Exhibit I.

ii. Will Mercado

13. Will Mercado was a long-time member of the Austin Police Department. *See* Exhibit E, pp. 11, 16, 84. He started with the Learned Skills Unit, the division of APD responsible for training cadets at the Austin Police Academy, in 2017 and was a Corporal with the Learned Skills Unit as of the May 2020 riots. *Id.* at pp. 16, 21, 84.

14. Corporal Mercado testified that APD patrol was using Defense Technology 12 gauge less lethal beanbag rounds when he started with the Learned Skills Unit in 2017. *See* Exhibit E at p. 84. Shortly after starting with the Learned Skills Unit, Corporal Mercado began advocating that APD switch from Defense Technology 12 gauge beanbag rounds to 12 gauge less lethal beanbag rounds manufactured by CSI. *Id.* Both Corporal Mercado and Sergeant Steven Willis together pushed for a change to CSI rounds. *Id*. at p. 85. They were exploring a switch to either CSI 12 gauge less lethal beanbag rounds or CSI 40mm foam baton rounds. *Id*. at p. 84. Corporal Mercado testified that he believed the CSI round was a better round. *Id*. at pp. 85-86. He also believed that the 40mm launcher and foam baton round were a better weapons system for crowd control than

the less lethal shotgun because they have a rifled bore that allows them to be fired more accurately. *Id*. at pp. 85-86, 190-191.

15. In 2019, as part of the effort to effectuate a switch to 40mm launchers and foam baton rounds, Corporal Mercado brought a representative from CSI out to the APD Training Academy to put on a demonstration for the higher-ups in Corporal Mercado's chain of command on the use of the 12 gauge less lethal shotgun as compared to the 40mm launcher. *Id*. at pp. 88-90. He testified that the demonstration was "positive" and left everyone with the impression that it was a good idea to make the switch to the 40mm launcher. *Id*. A 40mm pilot program was developed, but the switch was never made. *Id*. at p. 94.

16. Later that year, in September 2019, Corporal Mercado organized a side by side comparison of Defense Technology 12 gauge beanbag rounds and CSI 12 gauge beanbag rounds. *Id*. at pp. 42-44, 90-91. Corporal Mercado testified that the results from this testing showed that the CSI rounds were more accurate than the Defense Technology rounds as the shooter got further away. *Id.* at pp. 41, 90-91, 171.

17. Notwithstanding Corporal Mercado's efforts, a change to CSI products was never effectuated prior to the May 2020 riots. *Id*. at p. 94. Corporal Mercado testified that after May 30, 2020, APD was running low on less lethal rounds and he was asked to order rounds from CSI. *Id*. at pp. 94-95. An order was placed for 5,000 CSI 12 gauge beanbag rounds along with 500 CSI foam baton rounds on May 31, 2020 – the day Plaintiff was injured – and delivery of that order was not received by APD until June 1, 2020 – after Plaintiff was injured. *Id*. at pp. 96-99.

iii. Steven Willis

18. Steven Willis served as the Sergeant in charge of the Learned Skills Unit from approximately 2018 until February/March 2020. *See* Exhibit F at pp. 11-12. During this time he

was in charge of the APD Training Academy range. In this capacity, Sergeant Willis performed munitions orders for APD (but not SWAT) and testified that he did not purchase any CSI beanbag rounds. *Id*. at p. 24.

19. Willis testified that during his time with the Learned Skills Unit he too was involved in the effort to transition to CSI rounds. *Id*. at pp. 24-26. Sergeant Willis was not aware of any issues whatsoever with the CSI rounds; in fact he testified that a switch to CSI rounds was the proposed solution to any issues APD was having with its existing rounds. *Id*. at pp. 24, 26, 32, 281. Sergeant Willis testified that the change to CSI rounds never occurred prior to the May 2020 riots. *Id*. at p. 48. In fact, he testified that he never dealt with any CSI munitions while at the APD training academy. *Id*. at p. 24.

iv. Mark Spangler

20. Mark Spangler was a Commander with APD in 2020. *See* Exhibit G at p. 8. Commander Spangler was aware of an overpenetration incident at APD in January 2020 and confirmed that this incident did not involve a CSI round. *Id*. at pp. 78-79. He was not aware of any similar instances of overpenetration involving a CSI round. *Id*. at p. 79.

21. Generally, Commander Spangler testified that following the May 2020 protests an audit was performed of the less lethal munitions at which time they located boxes of 12 gauge beanbag rounds that had old dates of manufacture printed on the box that was not within the manufacturer's 5 year warranty. *Id*. at pp. 9-10. Commander Spangler identified these as being boxes of Defense Technology rounds. *Id*. at p. 11. Spangler was not aware of any expired CSI rounds in APD's inventory, nor was he aware of any issues with the accuracy or performance of CSI rounds. *Id*. at pp. 79-81.

22. Commander Spangler confirmed that the switch to CSI 12 gauge beanbag rounds occurred after the May 2020 riots. *Id*. at p. 78. In this regard, a bulletin was issued on June 4, 2020 advising that APD Patrol was switching from Defense Technology 12 gauge beanbag rounds to CSI 12 gauge beanbag rounds. *Id*.

v. Plaintiff's Expert Disclosure

23. Shortly after the completion of depositions, Plaintiff served expert disclosure in this matter along with accompanying expert reports. Among the reports disclosed include *inter alia* the reports of Angelos Leiloglou and forensic consultant Michael Maloney. *See* Exhibits H and I. Plaintiff's expert disclosure and accompanying expert reports make no allegation that Plaintiff was struck by a CSI product. *Id*. Instead, Plaintiff's expert reports opine that Detective Rolan Rast shot Plaintiff with a Defense Technology 12 gauge beanbag round. *See* Exhibit I. Notably, the report of Mr. Maloney actually opines that the diameter of Plaintiff's eye injury is not consistent with either a CSI 12 gauge beanbag round nor a CSI 40 mm foam baton round. *Id*. at p. 4.

III. NO EVIDENCE SUMMARY JUDGMENT ARGUMENT AND AUTHORITIES

A. Summary Judgment Standard

24. The initial burden to demonstrate the absence of a genuine issue of material fact is on the movant. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The movant may satisfy its initial burden by "merely pointing to the absence of evidence in the record supporting the issue." *Rushing v. Kan. City. S. Ry. Co.*, 185 F.3d 496, 505 (5th Cir. 1999). In doing so, the movant shifts the burden to the nonmovant to present specific facts showing a genuine issue for trial. *Celotex*, 477 U.S. at 324. A no evidence motion puts the nonmovant on notice that he must come forward with all of his evidence and specifically demonstrate how the evidence proves there is a genuine issue of material fact as to each element of his causes of action. *Malacara v. Garber*, 353 F.3d 393, 404

(5th Cir. 2003). A plaintiff "may not rest upon the mere allegations or denials of his pleading," to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

25. Under Rule 166a(i) of the Texas Rules of Civil Procedure, a party may move for summary judgment after an adequate time for discovery if there is no evidence to support one or more essential elements of a claim or defense on which the nonmovant would have the burden of proof at trial. Tex. R. Civ. P. 166a(i). To shift the burden of production to the nonmovant, the motion need only state the elements as to which there is no evidence. *Id.* "To defeat a Rule 166a(i) summary judgment motion, the nonmovant must produce summary judgment evidence raising a genuine issue of material fact." *Ford Motor Co. v. Ridgway*, 135 S.W.3d. 598, 601 (Tex. 2004). "[W]hen the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." *Id.*; *see also Selz v. Friendly Chevrolet, Ltd.*, 152 S.W.3d 833, 837 (Tex. App.—Dallas 2005, no pet.) ("When summary judgment evidence raises only a mere suspicion or surmise of a fact in issue, no genuine issue of material fact exists to defeat summary judgment.").

B. An Adequate Time for Discovery Has Passed

26. Plaintiff initially filed this case on over four years ago, on November 9, 2020. *See* ECF 1. CSI was added by way of Second Amended Complaint on April 9, 2024. *See* ECF 118. Since that time, the parties have exchanged disclosures, interrogatories, requests for production, and completed all outstanding noticed depositions. An adequate time for discovery has passed and this motion is filed pursuant to the dispositive motion deadline of June 2, 2025. *See* ECF 153 at par. 7.

C. CSI Has Demonstrated There is No Evidence To Support One or More Essential Elements of Plaintiff's Claims

a. There is no evidence to support Plaintiff's negligence claim against CSI

27. The elements of a negligence cause of action are: (1) the existence of a legal duty; (2) a breach of that duty; and (3) damages (4) proximately caused by the breach. *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004).

28. As set forth above, plaintiff is alleging "[t]he Beanbag Defendants owe a duty of care to those who will eventually be impacted by the beanbags they manufacture and distribute. This includes a duty to manufacture rounds that work properly as well as a duty to provide adequate labeling and warnings to users of the rounds." ECF 118 at par. 54. Plaintiff is further alleging "[t]he Beanbag Defendants breached this duty and were negligent when they manufactured and distributed faulty rounds, failed to adequately label the rounds themselves and the packaging of the rounds, and/or failed to provide adequate warnings about the dangers of the beanbags expiring or becoming hard or more dangerous in certain storage conditions or after a certain period of time." *Id*. at par. 55. Finally, Plaintiff alleges "[t]he Beanbag Defendants" proximately caused Plaintiff's damages "when Plaintiff was shot with one of these beanbag rounds by Defendant Rast." *Id.* at par. 56.

29. Discovery has confirmed the lack of any basis for a claim against CSI in this case given that there is no evidence Plaintiff was ever impacted by a CSI product. In particular, APD Patrol was using Defense Technology 12 gauge beanbag rounds prior to the May 2020 riots. *See* Exhibit E at pp. 84-94; Exhibit F at pp. 24, 26, 32, 48; Exhibit G at p. 78. Although there were efforts amongst members of APD's Learned Skills Unit to transition the department from Defense Technology rounds to CSI rounds, this switch did not occur until after the May 2020 riots. *Id*. Moreover, the evidence in this case specifically demonstrates that Detective Rolan Rast fired five 12 gauge beanbag rounds manufactured by Defense Technology. *See* Exhibit D at Exhs. 6-10; *see*

also Exhibit I. Insofar as there is no evidence that Plaintiff was impacted by a CSI munition, Plaintiff cannot prevail on any of the elements of his negligence claim as it pertains to CSI.

30. Even if there were evidence to suggest Plaintiff was impacted by a CSI munition, which there is none, CSI would still be entitled to summary judgment on Plaintiff's negligence claim because there is no evidence that any CSI product was defective.

31. Plaintiff's Second Amended Complaint alleges that, at times, the specific round used against Plaintiff, the 12-Gauge Drag Stabilized Round, Model 3027 (not manufactured/sold by CTS/CSI), does not work as intended when the buckshot inside the beanbag becomes a solid mass whose kinetic energy is not disseminated and can cause serious bodily injuries including the penetration of the skin. *See* ECF 118 at par. 33. Plaintiff alleges that the round that hit him did not work properly, or alternatively, was not used properly as a result of marketing and packaging defects that failed to warn end users (law enforcement officers) that the round may become hardened and unsuitable for its intended purpose past a certain date of its manufacture or under certain conditions. *Id.* at pars. 32-35.

32. Here, not only is there no evidence that Plaintiff was struck with a CSI round, but there is no evidence that any CSI round became hardened and unsuitable for its intended purpose or otherwise did not work as intended. To the contrary, the evidence in this case suggests that members of APD identified certain concerns with the existing inventory of less lethal munitions prior to May 2020, and that a switch to CSI rounds was the proposed fix. *See e.g.*, Exhibit F at p. 24, 26, 32, 281. This transition to CSI products by APD Patrol did not occur until after the occurrence of the May 2020 riots. Exhibit E at p. 94; Exhibit F at p. 48; Exhibit G at p. 78.

33. In sum, there is no evidence that would support a claim for negligence against CSI.

b. There is no evidence to support Plaintiff's strict liability claim for inadequate warnings or instructions

34. The elements of a strict products liability cause of action are: (1) defendant placed a product into the stream of commerce; (2) the product was in a defective or unreasonably dangerous condition; and, (3) there was a causal connection between such condition and the plaintiff's injuries or damages. *See Hampl v Bell-Helicopter Textron, Inc*., 2018 U.S. Dist. LEXIS 160738 (N.D.Tx. 2018), citing *Houston Lighting & Power Co. v. Reynolds*, 765 S.W.2d 784, 785 (Tex. 1988). The causation standard is producing cause, meaning that the defect was a substantial factor in bringing about an injury and without which the injury would not have occurred. *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007); *Davis v. Conveyor-Matic, Inc*., 139 S.W.3d 423, 429 (Tex. App.--Fort Worth 2004, no pet.).).

35. A defendant's failure to warn of a product's potential dangers when warnings are required is a type of marketing defect. *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 382 (Tex. 1995). Liability will attach if the lack of adequate warnings or instructions renders an otherwise adequate product unreasonably dangerous. *Id.* The elements of a marketing defect cause of action are: (1) a risk of harm that is inherent in the product or that may arise from the intended or reasonably anticipated use of the product must exist; (2) the product supplier must actually know or reasonably foresee the risk of harm at the time the product is marketed; (3) the product must possess a marketing defect in the sense that the manufacturer failed to warn of the risk; (4) the absence of the warning and/or instructions must render the product unreasonably dangerous to the ultimate user or consumer of the product; and (5) the failure to warn and/or instruct must constitute a causative nexus in the product user's injury. *Hampl*, 2018 U.S. Dist. LEXIS 160738 at *6, citing *Jaimes v. Fiesta Mart, Inc*., 21 S.W.3d 301, 305-06 (Tex. App.--Houston [1st Dist.] 1999, pet. denied). The causation standard is producing cause. *Rolen v. Burroughs Wellcome Co*., 856 S.W.2d 607, 609 (Tex. App.--Waco 1993, writ denied).

36. As noted above, Plaintiff alleges that pursuant to Chapter 82 of the Texas Civil Practice and Remedies Code, "the Beanbag Defendants" are strictly liable as manufacturers and/or sellers of defective beanbag rounds, including for inadequate warnings or instructions. ECF 118 at par. 57. Plaintiff further alleges that the defective warnings and/or marketing rendered the beanbag rounds unreasonably dangerous for their intended and foreseeable uses, thereby proximately causing Plaintiff's injuries and damages. *Id*.

37. Plaintiff's strict liability claim against CSI fails for the same reason as does the negligence claim. There is no evidence that Plaintiff was ever impacted by a CSI round. To the contrary, Plaintiff's Expert Disclosure confirms Plaintiff is alleging he was impacted by another manufacturer's product. *See* Exhibit I. Therefore, CSI cannot be strictly liable to Plaintiff as there can be no inadequate warning or instruction when no CSI product is involved with this incident.

38. Further, CSI also cannot be held strictly liable for Plaintiff's injuries because there is no evidence that any CSI rounds were defective such that they contained inadequate warnings or instructions. As discussed above, there is no evidence that any CSI rounds were expired, had hardened, or become unsuitable for its intended purpose. *See generally,* Exhibits E, F, G. Therefore, there is no basis for a claim that CSI failed to warn of any such propensity or otherwise provided inadequate instructions for the use of a CSI product that proximately caused Plaintiff's alleged injuries.

39. For the above reasons, CSI cannot be held liable for a strict liability failure to warn claim.

IV. TRADITIONAL MOTION FOR SUMMARY JUDGMENT

40. Defendant incorporates by reference the above, No Evidence, arguments and respectfully contends that the overwhelming evidence existing herein establishes as a matter of law that there is no genuine issue of material fact as to the involvement of CSI's products. First, there is no

evidence Plaintiff was struck by a CSI product. Secondly, there is no evidence supporting any contention of a problem or "defect" with any CSI munition.

A. Alternatively, CSI is Entitled to Immunity and Dismissal of Plaintiff's Claims Against CSI Pursuant to the Protection of Lawful Commerce in Arms Act

41. Even if there were evidence implicating a CSI product, because there is no evidence that any CSI product was defective, CSI would, alternatively, still be entitled to summary judgment dismissing Plaintiff's claims against it because such claims are barred by the Protection of Lawful Commerce in Arms Act ("PLCAA").

42. As the Court may recall, when CSI moved to dismiss the Second Amended Complaint as against it, it did so on several grounds, including that the products liability exception to the PLCAA could not apply in this case because Plaintiff was alleging an information defect or failure to warn, which is not among the claims included within the scope of the limited products liability exception. *Id*. at pp. 16-18. Ultimately, because the Complaint alleged there was a defect in the less lethal munitions and that CSI was a manufacturer of the munitions, the Court held that an exception to the PLCAA could exist, depending on the evidence, and it denied CSI's motion to dismiss. *See* ECF 154 at p. 9. The Court did not rule on CSI's argument that the design defect exception does not encompass information defect or inadequate warning theories of liability as a matter of law. *See generally* ECF 154; *see also* ECF 161 at FN4. That specific question still need not be decided to grant CSI's present Motion.

43. CSI hereby readopts and reincorporates the arguments set forth in its motion to dismiss relative to the applicability of the PLCAA as against CSI. CSI further submits that it is entitled to immunity under the PLCAA because, discovery has confirmed that Plaintiff is not alleging he was impacted by a munition manufactured or designed by CSI, therefore, there is no legal question as to the adequacy of CSI's warnings. On this first point, CSI refers the Court to it's no-evidence

summary judgment motion in Part III(c). In particular, not only has CSI affirmatively demonstrated the lack of evidence that Plaintiff was impacted by a product manufactured or designed by CSI, there is also no evidence that any CSI product was defective, had hardened, or otherwise did not perform as intended.

44. The Court has already (and correctly) determined that this lawsuit is a qualified civil liability action, and that the munitions at issue are qualified products. *See* ECF 154 at pp. 8-9; *see also* 15 U.S.C. § 7903(4)-(5)(A)]. As the Court noted, there is a limited products liability exception. *See* ECF 154 at pp. 8-9; *see also* 15 U.S.C. § 7903(5)(A)(v). However, the exception only applies to an "action…resulting directly from a defect in design or manufacture of the product." *See* 15 U.S.C. § 7903(5)(A)(v). The exception does not encompass an action resulting from a marketing defect or failure to warn if the subject product is not even involved in the complained of activity. *See Doyle v. Combined Sys., Inc*., No. 3:22-CV-01536-K, 2023 WL 5945857, at *8 (N.D. Tex. Sept. 11, 2023); *see also Santos v. City of Providence*, No. CV 23-221 WES, 2024 WL 1198275, at *4 (D.R.I. Mar. 20, 2024); *Travieso v. Glock Inc*., 526 F.Supp.3d 533, 545 (D. Ariz. 2021).

45. Plaintiff has brought claims for negligent failure to warn and marketing defects. *See* ECF 118 at ¶¶ 54-57; ECF 146 at p. 2. Because there is no evidence of a defect with a CSI product, there is no basis for a failure to warn as against CSI. The PLCAA bars these claims against CSI, and summary judgment in favor of CSI is warranted.

WHEREFORE, PREMISES CONSIDERED, CSI respectfully prays that the Court, after considering the above Motion, grant Defendants requested summary judgement and enter an order awarding judgement in favor of CSI and against Plaintiff as to all claims and causes of action asserted herein and for such other and further relief to which Defendant may be justly entitled.

Dated: April 8, 2025

Respectfully Submitted,

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By: 
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ATTORNEY FOR DEFENDANT COMBINED SYSTEMS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served to all known counsel of record via the Court's CM/ECF e-filing system on April 8, 2025.

P. Clark Aspy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, *Plaintiff,*	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-01113-RP**
CITY OF AUSTIN, et al, *Defendants.*	§	

PLAINTIFF'S RESPONSE TO DEFENDANT COMBINED SYSTEMS INC.'S NO-EVIDENCE AND TRADITIONAL MOTION FOR SUMMARY JUDGMENT

Plaintiff Sam Kirsch respectfully files his response to Defendant Combined Systems Inc.'s No-evidence and Traditional Motion for Summary Judgment (Dkt. 184) and would show the Court the following:

The Court should grant Defendant Combined Systems Inc.'s Motion for Summary Judgment because there is no evidence that this Defendant was a proximate cause of Plaintiff Sam Kirsch's injury. In granting the Motion, the Court should enter an Order that forestalls this movant Defendant from being designated as a responsible third party by any other Defendant.

This Court (via an adopted Report and Recommendation by Judge Hightower) recently laid out the purpose of and procedure for designating responsible third parties:

> Section 33.004(a) of the Texas Civil Practice and Remedies Code allows a defendant sued in tort to designate an entity or individual who is not a party to the suit but who the defendant contends is at least partially responsible for the plaintiff's injury so their fault can be considered by the jury in apportioning responsibility. When a responsible third party is designated, the designation enables the defendant "to introduce evidence regarding a responsible third party's fault and to have the jury apportion responsibility to the third party even if that person has not been joined as a party to the lawsuit." *Withers v. Schneider Nat'l Carriers, Inc.*, 13 F. Supp. 3d 686, 688 (E.D. Tex. 2014). If the responsible third party is allocated a percentage of responsibility by the jury, this allocation does not impose any liability, as the responsible third party is designated but not formally joined in the case. Id.; TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.003(a) and 33.004(i). The defendant's liability, however, is reduced by the percentage of responsibility

> attributed to the third party. TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.002 and 33.004.

Al-Khawaldeh v. Tackett, case no. 1:20-CV-1079-RP (WDTX Dec. 16, 2021). Plaintiff respectfully asserts that no Defendant should be allowed to designate the movant Defendant as a responsible third party and that no Defendant should have its liability reduced by any percentage of responsibility attributed to the moving Defendant.

As stated in the Motion, there is no evidence that Plaintiff was struck with the movant Defendant's product and therefore there is no duty of care owed by the movant Defendant to Plaintiff. If Defendant had no legal duty to Plaintiff, it cannot be an entity that is "responsible for any portion of the claimant's alleged injury or damages." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(l)("After adequate time for discovery, a party may move to strike the designation of a responsible third party on the ground that there is no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage. The court shall grant the motion to strike unless a defendant produces sufficient evidence to raise a genuine issue of fact regarding the designated person's responsibility for the claimant's injury or damage.").

For these reasons, Plaintiff requests that the Court grant the motion and enter an order forestalling Defendants from designating the movant Defendant as a responsible third party.

Dated: April 29, 2025

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed on April 29, 2025 via the Court's CM/ECF which will serve to all counsel of record via electronic mail.

/s/ Rebecca R. Webber
Rebecca R. Webber

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, *Plaintiff,*	§	
v.	§	**CIVIL ACTION NO. 1:20-cv-01113-RP**
CITY OF AUSTIN, et al, *Defendants.*	§	

ORDER GRANTING DEFENDANT COMBINED SYSTEMS INC.'S NO-EVIDENCE AND TRADITIONAL MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant, Combined Systems Inc.'s ("CSI"), *No-Evidence and Traditional Motion for Summary Judgment.* Having considered said Motion, the summary judgment evidenced submitted therewith, the response of Plaintiff and the applicable law, the Court is of the opinion that Defendant's Summary Judgment should be granted as there is no genuine issue as to any material fact with respect to Plaintiff's claims against Defendant CSI and CSI is, therefore, entitled to Judgment as a matter of law as to all claims asserted by Plaintiff Sam Kirsch against said Defendant.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that Judgment is hereby entered in favor of Defendant Combined Systems, Inc., and against Plaintiff Sam Kirsch as to any and all claims and causes of action alleged or available in the above captioned and numbered Lawsuit and no Defendant may designate Defendant Combined Systems Inc. as a responsible third party under Section 33.004(a) of the Texas Civil Practice and Remedies Code.

IT IS FURTHER ORDERED that all costs as to these parties are taxed against the party incurring same and that the Court intends this Judgment in favor of Defendant CSI is final and disposes of all claims and disputes between these parties.

All relief not specifically granted herein is DENIED.

SIGNED AND ENTERED THIS ____ day of _____ 2025.

_____
HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, Plaintiff, v. CITY OF AUSTIN, et al., Defendants.	§ § § § § § § § §	1:20-CV-1113-RP

ORDER

Before the Court is Defendant Combined System Inc.'s ("CSI") Motion for Summary Judgment. (Dkt. 184). Plaintiff Sam Kirsch ("Plaintiff") filed a response, indicating that he does not oppose the motion: "The Court should grant Defendant Combined Systems Inc.'s Motion for Summary Judgment because there is no evidence that this Defendant was a proximate cause of Plaintiff Sam Kirsch's injury." (Dkt. 186, at 1). In light of the lack of opposition, the Court finds CSI's motion should be granted.

Accordingly, **IT IS ORDERED** that CSI's Motion for Summary Judgment, (Dkt. 184), is **GRANTED**.

IT IS FURTHER ORDERED that CSI is **TERMINATED** as a party in this case.

SIGNED on May 8, 2025.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

United States District Court for the Western District of Texas
Austin Division

Sam Kirsch,	§	
Plaintiff,	§	
	§	Case no. 1:20-cv-11133-RP
v.	§	
	§	
City of Austin, et al,	§	
Defendants.	§	

Notice of Settlement

Plaintiff Sam Kirsch respectfully notifies the Court that Defendant City of Austin and Plaintiff have agreed to settle all claims brought against the City and Defendant Rolan Rast in this matter. The settling parties are preparing and finalizing a settlement agreement and notice of dismissal of claims with prejudice regarding the City of Austin and Rolan Rast. The parties anticipate filing the notice of dismissal with prejudice within the next thirty (30) days.

Dated: May 27, 2025

Respectfully Submitted
By: */s/ Rebecca Webber*

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Attorneys for Plaintiff Sam Kirsch

Certificate of Conference

I certify that I conferred with counsel for the City of Austin and Rolan Rast via email on May 23 and May 27, 2025 and they are in agreement with the filing of this notice.

/s/ Rebecca Webber
Rebecca Webber

Certificate of Service

I certify that I filed this Notice on May 27, 2025, via the Court's CM/ECF which will serve all counsel of record.

/s/ Rebecca Webber
Rebecca Webber

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, *Plaintiff,*	§	
v.	§	
CITY OF AUSTIN, ROLAN RAST, SAFARILAND, LLC, DEFENSE TECHNOLOGY, and CSI COMBINED SYSTEMS, INC. *Defendants.*	§	**CIVIL ACTION NO. 1:20-cv-01113-RP**

PLAINTIFF SAM KIRSCH AND DEFENDANTS' CITY OF AUSTIN'S AND ROLAN RAST'S JOINT MOTION TO DISMISS CLAIMS AGAINST CITY OF AUSTIN AND ROLAN RAST ONLY

The City of Austin agreed to pay Plaintiff Sam Kirsch a sum certain to resolve his claims in a manner that would result in the dismissal of all claims he has made against the City and Austin Police Department Detective Rolan Rast in this matter, with no admission of liability or fault on behalf of the City or Detective Rast. As the City has now delivered the agreed-upon payment to Plaintiff Sam Kirsch's counsel, the case with respect to Plaintiff Sam Kirsch's claims against the City and Rast has been fully resolved by settlement. The claims by Plaintiff Sam Kirsch against Safariland, LLC, Defense Technology and CSI Combined Systems, Inc. remain live, pending and unaffected by this settlement. Accordingly, the Court should dismiss Plaintiff Sam Kirsch's claims against the City of Austin and Rolan Rast with prejudice, with the parties to bear their own costs as to these claims.

Dated: August 5, 2025.

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Rules of Federal Procedure, this 5th day of August, 2025.

Via CM/ECF:

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COMBINED SYSTEMS, INC.

/s/ H. Gray Laird III
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, Plaintiff, v. CITY OF AUSTIN, et al., Defendants.	§ § § § § § § § §	1:20-CV-1113-RP

ORDER

On August 5, 2025, Plaintiff Sam Kirsch ("Plaintiff"), Defendant City of Austin ('the City"), and Defendant Rolan Rast ("Rast") filed a joint motion to dismiss stating these parties have resolved their dispute and agree to dismiss Plaintiff's claims against the City and Rast with prejudice. (Dkt. 209). The Court construes the parties' motion as a joint stipulation of dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). "Stipulated dismissals under Rule 41(a)(1)(A)(ii) . . . require no judicial action or approval and are effective automatically upon filing." *Yesh Music v. Lakewood Church*, 727 F.3d 356, 362 (5th Cir. 2013).

Accordingly, **IT IS ORDERED** that the City and Rast are **TERMINATED** as parties in this case.

SIGNED on August 6, 2025.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SAM KIRSCH, Plaintiff, v. CITY OF AUSTIN, et al., Defendants.	§ § § § § § § § §	1:20-CV-1113-RP

ORDER

On August 6, 2025, Plaintiff Sam Kirsch and Defendants Safariland, LLC, and Defense Technology, LLC, dismissed the remaining claims in this case with prejudice by joint stipulation of dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). (Dkt. 211). "Stipulated dismissals under Rule 41(a)(1)(A)(ii) . . . require no judicial action or approval and are effective automatically upon filing." *Yesh Music v. Lakewood Church*, 727 F.3d 356, 362 (5th Cir. 2013).

As nothing remains to resolve, **IT IS ORDERED** that the case is **CLOSED**.

SIGNED on August 6, 2025.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE