UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MAURA O'NEILL, as administrator of the Estate of Madelyn E. Linsenmeir, Plaintiff, v. CITY OF SPRINGFIELD, *et al.* Defendants.	C.A. No. 20-30036-MGM

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND TESTIMONY CONCERNING THE DISCIPLINARY AGREEMENT BETWEEN DEFENDANTS ZANAZANIAN AND CITY OF SPRINGFIELD

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INTRODUCTION

After Madelyn Linsenmeir died, the Springfield Police Department ("SPD") initiated three internal investigations concerning her time in the SPD's custody. The SPD did not, at the time, disclose the existence of these investigations to anyone outside of the SPD and City government, not even when Madelyn's family filed a lawsuit seeking all records concerning her custody.

Two of these investigations arose from a detention attendant's failure to record more than two thirds of her required cell checks while she was responsible for Madelyn. The SPD found that she had missed the checks through "negligence or sleeping." She was forced to resign within days thereafter.

The third investigation is the focus of this motion. That investigation was identified as Special Order ("SO") Number 18-261. One subject of that investigation was whether Sergeant Moises Zanazanian (a defendant in this action) committed misconduct when he failed to provide Madelyn with medical care. The investigation concluded with an agreement negotiated between the City, Sergeant Zanazanian, and the police supervisors union (the "Union"). The City acknowledges that it was adverse to Sergeant Zanazanian and the Union in this negotiation. The City has produced the final agreement, but is withholding documents and testimony concerning the negotiation and creation of the agreement, including:

- Multiple drafts of the agreement exchanged between representatives of the City, the Union, and Sergeant Zanazanian during the negotiation;
- Emails from the City's attorney William Mahoney to SPD Captain Phillip Tarpey, which contained messages for Captain Tarpey to pass on to representatives of the Union and/or Sergeant Zanazanian;
- Emails between the Union's representative and Sergeant Zanazanian's representative, which were evidently provided to the City during the course of the negotiation;
- Certain emails that attorney Mahoney reviewed to prepare to testify as the City's Rule 30(b)(6) representative on this topic; and

- Testimony concerning all of the above, because attorney Mahoney, testifying as the City's Rule 30(b)(6) designee, was instructed not to answer based on claims of privilege.

None of this information is privileged. Draft documents exchanged between adverse parties are not privileged. Attorney Mahoney's communications to and from adverse parties are not privileged, even if they were funneled through another employee of the City like Captain Tarpey. Communications among Zanazanian, the Union, and/or their counsel are not privileged, if the City also received them. And the fact that these communications concerned a potential resolution of disciplinary charges does not cause any privilege to attach, because—even assuming such a resolution would be a "settlement"—there is no privilege for settlement communications undertaken (as here) without a mediator. Moreover, even if a privilege had attached (which it did not), the emails reviewed by attorney Mahoney to educate himself as a Rule 30(b)(6) witness or otherwise refresh his memory for deposition are now discoverable, yet several are being withheld.

Accordingly, the Estate respectfully requests that the Court order the City to produce the following categories of records, to the extent not already produced:

(a) the correspondence exchanged between and among the City, the Union, and Zanazanian, and their respective representatives, while negotiating the agreement, including the emails and draft agreements they circulated;

(b) attorney Mahoney's email communications with Captain Tarpey concerning the negotiation and preparation of that agreement, with any attachments; and

(c) the emails that attorney Mahoney reviewed to educate himself as a 30(b)(6) witness and prepare for the deposition.

These records appear to include at least the emails listed as items 1, 2, 3, 4, 5, 7, 9, 55, 57, 58, 60, 61, and 63 on the City's privilege log, including any attachments.

The Estate also requests that, after production of these records, attorney Mahoney be required to give further 30(b)(6) deposition testimony about these subjects and the relevant records.

FACTUAL AND PROCEDURAL BACKGROUND

A. Madelyn died in custody after Sergeant Zanazanian and others ignored her complaints of chest pain and difficulty breathing.

Madelyn was arrested by the SPD on Saturday, September 29, 2018. The SPD held her in its own custody until Sunday, September 30. She was then transferred to the custody of the Hampden County Sheriff's Department ("HCSD"). On October 4, HCSD's staff found Madelyn "unresponsive" in her cell. *See* McFadden Decl. Ex. A (HCSD 764-65). HCSD transported Madelyn to the hospital, where she remained (still in custody) until her death on October 7.

The cause of Madelyn's death is not a mystery. While Madelyn was in SPD and HCSD custody, her body was gradually overwhelmed by a progressive infection arising in her heart, until she ultimately became septic and died. The autopsy identified her cause of death as "complications of methicillin-resistant *staphylococcus aureus* septicemia in the setting of tricuspid valve endocarditis." *See id.* Ex. B (Report of Autopsy). The infection had spread to tissues throughout her body: there were growths on her heart's tricuspid valve of "up to 3.5 centimeters in greatest dimension;" "septic emboli and cavitary lesions" throughout her lungs; "septic arthritis of the right knee;" and "septic emboli and infarctions of the kidneys." *See id*.

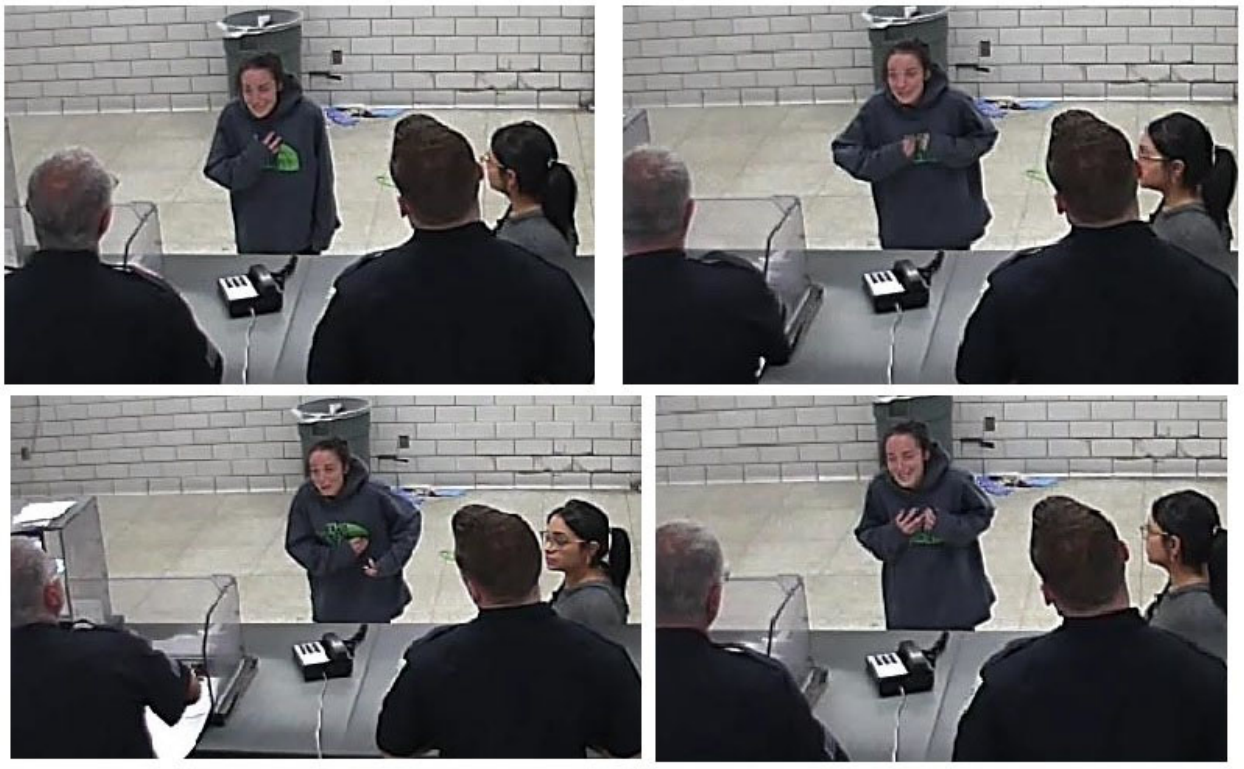
The SPD had ample notice of Madelyn's serious medical need while she was in their custody. When Madelyn was first arrested, her booking interview was audio and video recorded. On that recording, Madelyn tells the booking sergeant—defendant Zanazanian—and the other booking staff, among other things, that:

- "I'm very ill right now. I can't even think straight. I'm gonna like literally pass out from pain."
- "I have a really really really bad chest, like I don't know what happened to it, it feels like it's caving in, I can't even breathe."
- "I can't breathe, my chest really hurts."

- "I'm in so much pain right now."

See Complaint (D.E. 1) ¶¶37-45. After Madelyn was taken to her cell, she told the detention attendant—defendant Rodriguez—that she was in pain every 15 minutes for at least two hours. *See id.* Ex. C (Rodriguez Dep.) at 115:13-118:21. Ms. Rodriguez testified that she told Sergeant Zanazanian about Madelyn's complaints at least twice. *See id.*

Later that same day, Madelyn returned to the booking desk to call her mother. Sergeant Zanazanian did not activate the audio recording for that interaction, even though he believed that audio recording was required. *See id.* Ex. D (Zanazanian Tr. at 67:16-17). The silent video footage depicts Madelyn weeping and making repeated gestures towards her chest and rib cage:



Complaint Fig. 6: Madelyn in the booking area after her phone call

Despite receiving all of this information, Sergeant Zanazanian did not send Madelyn to the hospital. *See id.* Ex. D (Zanazanian Tr.) at 50:19-54-17. Sergeant Zanazanian did not give

Madelyn any medical treatment or evaluation of any kind. *See id.* While Madelyn was alive, Sergeant Zanazanian did not tell anyone that Madelyn had complained of chest pain and difficulty breathing. *See id.* at 96:13-20. His prisoner injury report concerning Madelyn omitted those symptoms. *See id.* Ex. E (Prisoner Injury Report).

Madelyn's endocarditis was a life-threatening infection, but it could have been successfully treated if the SPD or HCSD had provided her with appropriate medical attention. *See* Complaint (D.E. 1) ¶¶20, 76-78. But they did not, and she died as a result.

B. Madelyn's family sought information about her death through a public records request and public records litigation.

About a week after after Madelyn died, her family (through counsel) filed a public records request with the City of Springfield (the "City") seeking, among other things, "[a]ll documents relating to Madelyn Linsenmeir's arrest, booking, and detention, including without limitation any . . . notes, correspondence, and reports relating to the arrest, booking, and any related investigation."[1] *See* McFadden Decl. Ex. F (Oct. 15, 2018 letter) at ¶¶1, 10, 12. The SPD provided no substantive response for over a month, and so Madelyn's family filed a public records lawsuit on November 26, 2018. *See id.* Ex. G (public records complaint).

On December 13, 2018, facing pressure from the lawsuit, the City finally provided its substantive response in a letter. *See id.* Ex. H (response letter). That letter denied the existence of any records of any investigation into Madelyn's death. *See id.* (response #10). The letter did,

[1] Under the Public Records Law, a municipality's written response to a request is typically due within 10 business days. *See* G.L. c. 66, § 10(a)-(b). The response must identify any records that are being withheld, identify the applicable exemption(s), and explain the reason for the withholding. *Id.* § 10(b)(iv). If the agency fails to respond or unlawfully withholds records, the requestor may file a lawsuit. *Id.* § 10A(c). The Superior Court may inspect any withheld records and make a *de novo* determination of whether the records may be withheld. *Id.* § 10A(d).

however, disclose certain records created during Madelyn's custody (*e.g.*, arrest report and booking videos).[2] *See id.* It also disclosed a November 2 report created by Sergeant Albert Witkowski, in which he described how he collected the identified records. *See id.* (response #12); *see also id.* Ex. I (Witkowski Nov. 2, 2018 report re: documents).

The City produced the records identified in the letter over the next two months, with certain redactions for third-party privacy. Having received all the records that the City claimed to have, Madelyn's family voluntarily dismissed the public records lawsuit on February 22, 2019. *See id.* Ex. J (Feb. 22, 2019 Notice of Dismissal).

C. While the public records lawsuit was pending, the SPD secretly investigated Sergeant Zanazanian for his failure to provide Madelyn with medical attention.

What Madelyn's family did not know at the time they dismissed the public records lawsuit—because the City had kept it secret—was this: By the time the City had sent its public records response on December 13, Sergeant Witkowski had already authored *two additional reports* concerning Madelyn's time in custody, and those reports had become the basis for *three separate internal investigations*.

Sergeant Witkowski's second report was dated November 2 (the same date as his first report on document collection that the City produced to the family). *See* McFadden Decl. Ex. K (Witkowski Nov. 2, 2018 report re: cell checks). It contained Sergeant Witkowski's findings that one of the three detention attendants during Madelyn's custody had failed to record more than two thirds of her required cell checks during that shift. *See id.* This report spawned two separate internal investigations: Special Order ("SO") 18-247 assigned to the SPD's Internal Investigation

[2] The City initially demanded that Madelyn's family sign an NDA to view the booking videos. *See* McFadden Decl. Ex. H (response letter). Madelyn's family refused. The City ultimately provided the videos without an NDA.

Unit ("IIU") on November 8, and Preliminary Investigation of Employee ("PIE") 18-053 assigned to then-Deputy Chief Cheryl Clapprood on November 9. *See id.* Ex. K (SO 18-247) & L (PIE 18-053). On January 28, 2019—during the pendency of the public records lawsuit—Deputy Chief Clapprood found as fact that the detention attendant had missed the checks "through negligence or sleeping." *See id.* Ex. M (SO 18-247 findings). Commissioner Barbieri found that allegation "SUSTAINED" the next day. *See id.* The attendant—who was a uniformed police officer—was forced to resign from the SPD just two days later.[3] Yet nobody told Madelyn's family or counsel about Sergeant Witkowski's cell check report, or about SO 18-247, or about PIE 18-053, or about Clapprood and Barbieri's findings *until May 2022*, almost four years after Madelyn died, and more than two years into this lawsuit.

Sergeant Witkowski's third report was dated November 27, 2018 (the day after the public records suit was filed) and is entitled "Re: Linsenmeir, Madelyn Civil Suit." *See id.* Ex. N (Nov. 27 Witkowski report). This report triggered investigation SO 18-261, assigned to the IIU. *See id.*; *id.* Ex. O (SO 18-261). SO 18-261 included inquiry into whether Sergeant Zanazanian committed misconduct by failing to provide Madelyn with medical care, and the reasons for her death. *See id.* Ex. P (McCoy Dep.) at 86:5-90:8. The IIU conducted interviews between November 29 and December 5, but did not attempt to speak with Madelyn's mother, nor any other person who was not an active employee of the SPD.[4] *See id.* at 244:1-247:9.

[3] https://www.mass.gov/doc/sanchez-maria-v-springfield-police-department-101019/download

[4] One of the three detention attendants on duty during Madelyn's custody had resigned in early November for apparently unrelated reasons. The City had her contact information, but the IIU did not attempt to interview her during SO 18-261.

The IIU issued its report for SO 18-261 on December 12—the day before the City denied the existence of such records.[5] *See id.* Ex. Q (Dec. 12, 2018 IIU report). The next day, the City's Community Police Hearing Board screened the case and recommended that charges issue. *See id.* Ex. S (18-261 review documents). Within a week, Commissioner Barbieri had ordered a disciplinary hearing for Sergeant Zanazanian. *See id.* And on December 26, 2018, a formal charge letter issued to Sergeant Zanazanian, alleging five separate violations of the SPD's rules and regulations. *See id.* Ex. T (charge letter). Nobody told Madelyn's family about any of this while their public records lawsuit was pending.[6]

D. After the public records lawsuit was dismissed, the SPD secretly negotiated an agreement with Sergeant Zanazanian and the police union to resolve the pending charges against him.

Within a week after Madelyn's family dismissed the public records lawsuit, the IIU conveyed a message from the Union to attorney William Mahoney, the City's Director of Human Resources and Labor Relations. *See* McFadden Decl. Ex. U (Feb. 27, 2019 email) & Ex. V (Mahoney Dep.) at 6:17-7:3. The Union was "looking to come to an agreement on [SO 18-261]," *i.e.*, the charges against Sergeant Zanazanian. *See id.* Ex. U (Feb. 27, 2019 email).

By early March, representatives for the City, the Union, and Zanazanian were exchanging drafts of the proposed agreement. *See, e.g.*, *id.* Ex. W (Final Privilege Log) at lines 1, 2, 3, 4, 55,

[5] The IIU also issued a supplemental report for SO 18-261 in January 2019. That supplement reported the cause of death listed on Madelyn's death certificate, which had recently become available. *See* McFadden Decl. Ex. R (18-261 supplemental).

[6] The City never volunteered the substance of SO 18-261 to Madelyn's family. At some point in 2019, the CPHB posted a quarterly report that indicated that 18-261 related to an unidentified event at the police station on September 29, 2018 (the same day as Madelyn's arrest). Her family (through counsel) submitted a new public records request specifically for the records of SO 18-261 on April 11, 2019. When the City began producing certain of the records later that month, Madelyn's family learned for the first time that the investigation did, in fact, concern Madelyn.

57, 58, 60, 61, and 63. Zanazanian was represented in the negotiation by attorney John Vigliotti, and the Union by its President, SPD Captain Brian Keenan. *See id.* Ex. V (Mahoney Dep.) at 14:6-15:4. The City was represented by attorney Mahoney, but he did not speak directly to Vigliotti or Keenan. *See id.* Rather, Mahoney's correspondence to them was relayed by email through SPD Captain Philip Tarpey.[7] *See id.* at 13:3-16:9. That correspondence included at least three separate drafts of the potential agreement. *See id.* Ex. V (Mahoney Dep.) at 18:10-19:8. In sending these materials, the City understood that it was adverse to both the Union and to Sergeant Zanazanian in the negotiation. *See id.* at 17:20-18:9. Throughout this process, nobody told Madelyn's family that there was a pending disciplinary matter relating to her treatment, or that an agreement was being negotiated to resolve that matter. *See id.* 31:17-34:15.

On March 13, 2018, the City, the Union, and Sergeant Zanazanian executed the agreement, now titled "Memorandum of Agreement Between and Among the City of Springfield and the Springfield Police Suprervisors [sic] Associations and Moises Zanazanian." *See id.* Ex. X (agreement). The City agreed to cancel Sergeant Zanazanian's scheduled disciplinary hearing, and to drop most of the pending charges against him. *See id.*; *id.* Ex. V (Mahoney Dep.) at 28:16-29:9. Sergeant Zanazanian admitted the charge that he violated the SPD's Rule 29. *See id.* Ex. X (agreement). Rule 29 includes the general prohibition against conduct unbecoming and disobeying orders. *See id.* Ex. T (charge letter), & Ex. Y (Clapprood Dep.) at 136:3-137:13. Zanazanian agreed to receive a two-day suspension plus additional training. *See id.* Ex. X (agreement).

[7] Captain Tarpey evidently relayed messages during the negotiation of the agreement, but he has no memory of playing any substantive role in its creation. *See* McFadden Decl. Ex. Z (Tarpey Tr.) at 227:18-231:9. He testified that he discussed with then-Commisioner Clapprood the bare fact that an agreement would be created, but not its contents. *See id.* He also testified that he did not recall discussing the agreement with anyone else or having seen the agreement, did not know who drafted the agreement, and did not know who in City government decided to enter into the agreement. *See id.*

The agreement does not specify how Zanazanian violated Rule 29, and he gave no clear answer in his deposition. *See id.* Ex. D (Zanazanian Dep.) 169:7-176:3. Then-Commissioner Clapprood, who signed the agreement for the City, testified that Sergeant Zanazanian did not violate Rule 29. *See id.* Ex. Y (Clapprood Dep.) at 136:3-137:13. In contrast, attorney Mahoney testified that Zanazanian did violate Rule 29 by not calling for medical attention. *See id.* Ex. V (Mahoney Dep.) at 26:4-11. The IIU took a similar position in the notice of suspension that it drafted (and that then-Commissioner Clapprood signed) after the agreement was executed. *See id.* Ex. P (McCoy Dep.) at 234:2-239:13 & Ex. AA (Notice). The parties' communications while negotiating this agreement might shed some light on, among other things, what exactly was agreed. But, as described below, that is exactly the evidence that the City is refusing to produce.

E. The City has refused to produce documents and testimony concerning the negotiation of the agreement.

When fact discovery commenced in this litigation, the City produced the agreement with Zanazanian and the Union for the first time with its initial disclosures in September 2021. Later that month, the Estate served the City with document requests. *See* McFadden Decl. Ex. BB (Estate RPDs to City). Several of the requests sought the City's communications with Zanazanian and/or the Union concerning the negotiation of the agreement, including:

> **REQUEST FOR PRODUCTION NO. 6:** All documents that are communications between or among Springfield, any current or former SPD officer or employee, any police union, and/or their respective attorneys, concerning Madelyn Linsenmeir or any matter concerning her (including Special Order 18-261 and CPHB Complaint SO-18-261).
>
> **REQUEST FOR PRODUCTION NO. 7:** All documents concerning the negotiation, drafting, and execution of the "MEMORANDUM OF AGREEMENT BETWEEN AND AMONG THE CITY OF SPRINGFIELD AND THE SPRINGFIELD POLICE SUPERVISORS ASSOCIATION AND MOISES ZANAZANIAN" dated March 13, 2019, including without limitation all drafts of that agreement and all communications between and among Springfield, Zanazanian, any police union, and/or their respective attorneys concerning that agreement.

See id. at 4-5. The City objected to Request 7, at least in part, on the grounds that the requested documents were "protected settlement communications," "work product documents," and "attorney/client communications." *See id.* Ex. CC (City's Nov. 29, 2021 RPD responses).

The City served a privilege log in early 2022. *See id.* Ex. W (City's final privilege log). That log discloses that the City is withholding multiple communications concerning the negotiation of the agreement. Some of these appear to be drafts relayed back and forth between attorney Mahoney and his messenger Captain Tarpey. *See id.* at entries 1, 2, 3, 4, 61, & 63.[8] Others appear to be communications between the City and the adverse parties, or communications between the adverse parties that were forwarded or otherwise provided to the City. *See id.* at entries 55, 57, 58, 60, & 61. The City asserted the attorney-client privilege over these materials, and in some cases also the work product doctrine. *See id.*

Additionally, attorney Vigliotti has asserted attorney-client privilege over emails between himself and Captain Keenan (who he also identifies as his client) about Sergeant Zanazanian's draft agreement that are in the possession of the City. The City evidently has three of these (at least two of them appear to have been forwarded to Captain Tarpey) and listed them on the City's own privilege log. *See id.* at entries 55, 58, & 60.

The City is also withholding testimony concerning the negotiation. In October 2022, the Estate noticed the deposition of the City of Springfield under Rule 30(b)(6), along with a list of topics. *See* McFadden Decl. Ex. FF (30(b)(6) notice). Topic 6 required testimony on:

> The investigation and discipline of Moises Zanazanian for his conduct, acts, and/or omissions concerning Madelyn Linsenmeir, including without limitation the negotiation and drafting of the "Memorandum Of Agreement Between And Among

[8] Entry 4 appears to be a draft agreement that was intended to be sent to Sergeant Zanazanian. The City asserts that it was not sent for unspecified reasons. Given that the document was intended to be shared with an adverse party, the fact that the transmittal was unsuccessful would not change the privilege analysis.

> The City Of Springfield And The Springfield Police Supervisors Association And Moises Zanazanian" dated March 13, 2019. This topic includes without limitation all communications between and among the City, Zanazanian, any police union, and their respective attorneys concerning the investigation, discipline, and agreement.

See id. The City designated attorney Mahoney to testify for the City on this topic, *see id.* Ex. DD (30(b)(6) designations), and produced him to testify on December 9, 2022. *See id.* Ex. V (Mahoney Tr.). At the deposition, attorney Mahoney confirmed he was testifying on behalf of the City on this topic.[9] *See id.* at 7:16-9:21.

At the deposition, the City took the position that it would instruct Mahoney not to answer questions regarding the drafts of the agreement exchanged between the City, the Union, and Zanazanian, on the grounds that the City contends those draft are protected settlement communications. *See id.* at 17:1-22:3. The City also took the position that it would instruct Mahoney not to answer questions about the messages he relayed through Captain Tarpey during the negotiation. *See id.* at 22:4-24:9. Mahoney testified, however, that he reviewed emails to prepare for the deposition. *See id.* at 41:9-16. Those emails included privilege log items 1, 5, 7, 9, 57, and 61, and their attachments. *See id.* Ex. EE (Jan. 4, 2023 email).

The parties have agreed that the issue is now ripe for a motion to compel. *See id.* Ex. V (Mahoney Tr.). at 17:1-24:9. Attorney DeSousa (for the City) and attorney McFadden (for the Estate) conducted a further Rule 7.1 and 37.1 conference on the issue by telephone for about 15 minutes on December 27, 2022. After further correspondence by email, the City provided its final position on January 7, 2023. The City opposes this motion.

[9] At the deposition, the City's counsel clarified that, to the extent this topic sought information from the IIU (*e.g.*, about the underlying investigation), that would be encompassed by a separate witness's testimony on topic 7. *See* McFadden Decl. Ex. V (Mahoney transcript) at 8:16-9:16. There was no dispute that attorney Mahoney was designated to testify as to so much of this topic that relates to the creation of the agreement. *See id.*

ARGUMENT

A. Legal Standards.

The Federal Rules of Civil Procedure permit discovery of "any nonprivileged matter that is relevant to a party's claim or defense and proportional to the needs of the case . . . ." *See* Fed. R. Civ. P. 26(b)(1). "Information within this scope of discovery need not be admissible in evidence to be discoverable." *Id.* When a party withholds relevant information from discovery based on claims of privilege, it is well established that "[t]he burden is on the party asserting a privilege . . . to establish the existence and applicability of the privilege." *See Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8, 12 (1st Cir. 1991). "[T]he assertion of privilege . . . must also be accompanied by sufficient information to allow the court to rule intelligently on the privilege claim." *Id.* Finally, "[i]n federal civil rights cases, an assertion of privilege must 'overcome the fundamental importance of a law meant to insure each citizen from unconstitutional state action." *Williams v. City of Bos.*, 213 F.R.D. 99, 102 (D. Mass. 2003) (citation and internal quotation marks omitted).

B. The requested records are relevant, and there is no privilege for settlement communications made without a mediator.

The requested records are relevant. The information at issue is direct evidence of the City's internal review of Sergeant Zanazanian's interactions with Madelyn, and of the resolution of that proceeding. This case includes not only an individual claim against Sergeant Zanazanian, but also a municipal liability claim against the City arising from these facts. *See* Cmplt. (D.E. 1) ¶¶87-94, 112-115. The Complaint specifically pleads the City's mishandling and concealment of the investigation and disciplinary process as facts supporting the City's municipal liability. *See* Cmplt. (D.E. 1) ¶82. Such facts are, in fact, relevant to the City's policies, customs, and practices as a matter of controlling law. *See Bordanaro v. McLeod*, 871 F.2d 1151, 1166-67 (1st Cir. 1989) (affirming admission of "post-event evidence of the lack of proper internal investigation of the

attack and the failure to take strong disciplinary action against the officers involved" as probative of "what policies existed in the city on the date of an alleged deprivation of constitutional right").

The information is relevant in other ways, as well. Although the agreement admitted a violation of the SPD's Rule 29, neither Sergeant Zanazanian nor Superindendent Clapprood are able to articulate how that rule was violated. *See* McFadden Decl. Ex. D (Zanazanian Dep.) at 169:7-176:3 & Ex. Y (Clapprood Dep.) at 136:3-137:13. The parties' negotiation would likely shed light on this ambiguity. *See, e.g., Starr v. Fordham*, 420 Mass. 178, 190 n.11 (1995) ("[a]ny determination of meaning or ambiguity should only be made in the light of," among other things, "preliminary negotiations and statements made therein"). The parties' statements could also reveal whether the agreement was made in whole or in part for reasons other than a genuine disciplinary assessment, such as to protect the parties by preserving secrecy or avoiding the creation of a further evidentiary and documentary record of Madelyn's mistreatment at a formal CPHB hearing. *See Bordanaro*, 871 F.2d at 1166-67. Similarly, any statements or positions taken by Sergeant Zanazanian during the negotiation—or promises, inducements, or threats communicated to him—could bear on many things, including his state of mind then and now. *See, e.g.,* Fed. R. Evid. 408(b) (compromise negotiations admissible to prove, among other things, "a witness's bias or prejudice"). And, regardless of whether the information ultimately proves independently admissible (a judgment the Estate cannot make without first seeing the information), the Estate's policing expert may rely on the City's communications with Zanazanian and the Union to form opinions about the City's conduct, practices, and actions in this case. *See* Fed. R. Evid. 703 (facts or data relied on by expert "need not be admissible for the opinion to be admitted").

Despite the relevance of the information, the City is refusing to produce it based on a supposed privilege for "protected settlement communications." *See* McFadden Decl. Ex. V

(Mahoney Tr.) at 19:14-20. However, even assuming the City could establish that the resolution of internal police disciplinary charges was a "settlement," there is no privilege that protects the negotiation of settlement agreements, at least when (as here) the negotiation did not involve a mediator. *See Ark. Teacher Ret. Sys. v. State St. Bank and Trust Co.*, 523 F. Supp. 3d 181, 194 (D. Mass. 2018); *ACQIS, LLC v. EMC Corp.*, C.A. No. 14-12560, 2017 WL 2818984, at *2 (D. Mass. Jun. 29, 2017); *Bingham v. Supervalu Inc.*, C.A. No. 13-11690, 2014 WL 12792989, at *6 (D. Mass. Jul. 11, 2014). Courts in this circuit have required the production of settlement information when the information meets the usual Rule 26 relevance standards. *See Barclay v. Gressit*, No. 12-156, 2013 WL 3819937, at *1-2 (D. Me. Jul. 24, 2013) (citing *Bennett v. La Pere*, 112 F.R.D. 136, 138-39 (D.R.I. 1986)); *Cook v. CTC Comms. Corp.*, No. 06-058, 2006 WL 3313838, at *2 (D.N.H. Nov. 13, 2006). There is no privilege shielding such information, nor any requirement to show a particularized need for the information or to demonstrate its future admissibility. *See Barclay,* 2013 WL 3819937, at *1-2; *Cook,* 2006 WL 3313838, at *2-3.

Accordingly, the City cannot withhold the requested records based on the mere fact that they arose during the creation of the agreement to resolve the investigation of Sergeant Zanazanian's failure to provide Madelyn with medical attention. To the extent the City wishes to limit the admissibility of such information to certain purposes under Rule 408, it may argue that at trial. *Cf.* Fed. R. Evid. 408(b) (evidence of compromise negotiations may be admitted for various purposes). But potential objections to admissibility do not, without more, preclude discovery. *See* Fed. R. Civ. P. 26(b)(1).

C. The attorney-client privilege and work product protection do not apply to communications with adverse parties in a negotiation, even if funneled through an employee of the attorney's client.

The City also appears to claim that the correspondence and draft agreements it sent to or received from Zanazanian or the Union during the negotiation are attorney-client privileged and work product. *See, e.g.*, McFadden Decl. Ex. W (Privilege Log) at lines 1, 2, 3, 4, 55, 57, 58, 60, 61, and 63. The City has not met its burden to establish either. The City was adverse to both the Union and to Sergeant Zanazanian in the negotiation. *See id.* Ex. V (Mahoney Dep.) at 17:20-18:9. The attorney-client privilege does not apply to communications prepared for or sent to adverse parties, including because such communications are not confidential between the attorney and client, and because any privilege is waived by disclosure. *See, e.g.*, *Blattman v. Scaramellino*, 891 F.3d 1, 4 (1st Cir. 2018); *In re Keeper of Records*, 348 F.3d 16, 23 (1st Cir. 2003); *Cavallaro v. United States*, 284 F.3d 236, 245-51 (1st Cir. 2002). The work product doctrine also does not shield communications sent to an adversary. *See, e.g.*, *United States v. MIT*, 129 F.3d 681, 688 (1st Cir. 1997) (no work product protection for documents disclosed to potential adversary).

The City points also to the fact that some of these communications passed between attorney Mahoney and Captain Tarpey. However, these communications were intended for third parties and were being relayed through Captain Tarpey. *See* McFadden Decl. Ex. V (Mahoney Dep.) at 13:3-16:9. Although Captain Tarpey relayed messages, he has no memory of playing any substantive role in the negotiation. *See* McFadden Decl. Ex. Z (Tarpey Tr.) at 227:18-231:9. Where a corporate attorney uses a corporate employee as a conduit to funnel communications to adversarial parties, those communications are neither intended to be confidential nor made for the purpose of giving or receiving advice, and are therefore not privileged. *See* JOHN W. GERGACZ, Attorney-Corporate Client Privilege § 3:60, Westlaw ("For example, a business proposal may be

communicated to corporate counsel with the direction to disclose it to a third-party customer. . . . [T]herefore no privilege will attach."); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 377, 390 (D.D.C. 1978) ("if [the client] intends to, or permits his attorney to, disclose the communication to others, there can be no confidentiality"); *Entrata, Inc. v. Yardi Sys., Inc.*, No. 2:15-CV-00102, 2018 WL 5438129, at *1-2 (D. Utah Oct. 29, 2018) (documents prepared for third parties not privileged).

Lastly, attorney Vigliotti has asserted that his communications to Captain Keenan about Sergeant Zanazanian's investigation and the potential agreement are attorney-client privileged, with Captain Keenan (presumably in his capacity as Union president) in the position of the client. However, the City has at least three such communications, and listed them on its own privilege log. *See* McFadden Decl. Ex. W (City's final privilege log) at 55, 58, & 60. The City was an adversary to Zanazanian and the Union in that negotiation. *See* McFadden Decl. Ex. V (Mahoney Dep.) at 17:20-18:9. To the extent those three communications between attorney Vigliotti and Captain Keenan were privileged, they ceased to be privileged when they were provided to the City. *See Cavallaro,* 284 F.3d at 246-47; *U.S. v. Morrell-Corrada*, 343 F. Supp. 2d 80, 86 (D.P.R. 2004).

D. Record reviewed by a Rule 30(b)(6) designee to educate himself and prepare to testify are discoverable, even if formerly privileged.

Lastly, even to the extent that the City has established a privilege over certain records, the records are discoverable if used by the City's 30(b)(6) designee to educate himself or herself for the deposition or otherwise to prepare to testify. Here, Mahoney testified that he reviewed emails to prepare for his deposition as the City's 30(b)(6) designee, *see* McFadden Decl. Ex. V (Mahoney Tr.) at 41:9-16. The City later identified those emails as including privilege log items 1, 5, 7, 9, 57, and 61, and their attachments, which are being withheld. *See id.* Ex. EE (Jan. 4, 2023 email).

"Some courts . . . have applied an 'automatic' waiver" rule for purportedly privileged documents used to prepare for a Rule 30(b)(6) deposition. *See Adidas America, Inc. v. TRB*

Acquisitions LLC, 324 F.R.D. 389, 397 (D. Or. 2017) (collecting cases and summarizing prevailing standards). Among other reasons, if the rule were otherwise, "[a] corporate designee could testify only as to information and communications that are advantageous." *See id.* at 398. "Other information that would contradict the testimony or undermine the corporation's position and was contained in the documents could be ignored, and the opposing party would have no way of knowing how to test or challenge the corporate designee's testimony." *See id.*

Other courts presented with this question "exercise discretion by applying a case-by-case balancing test." *See id.* (collecting cases and citing, among others, *Heron Interact, Inc. v. Guidelines, Inc.*, 244 F.R.D. 75, 77 (D. Mass. 2007)). Under the balancing approach, "the court must balance [the examining party's] need to see the documents—so as to have a complete record of its examination as well as to test [the witness's] credibility—with [the defending party's] interest in protecting privileged information which might reveal its counsel's trial strategy or theory of the case." *See Heron*, 244 F.R.D. at 77.

Yet other courts—including in *Adidas*—have ultimately selected a "middle-ground approach between the automatic waiver rule and the balancing test, in which a balancing test is applied but certain elements of the test are considered met with a rebuttable presumption in the context of a witness designated under [Rule 30(b)(6)]." *See Adidas*, 324 F.R.D. at 399. In *Adidas*, the court examined: "(1) the witness must use the writing to refresh his memory; (2) the witness must use the writing for the purpose of testifying; and (3) the court must determine that production is necessary in the interests of justice." *See id.* at 396-97, 399 (quoting *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir. 1985)) (internal quotation marks omitted). The *Adidas* court modified this test for the 30(b)(6) context by imposing a rebuttable presumption that the first element is met, because, regardless of the individual's memory, "it is the corporation's knowledge that is being 'refreshed'

under" Federal Rule of Evidence 612. *See id.* at 399. The *Adidas* court also imposed a rebuttable presumption that the second element is met, because the concerns animating the use of this element—"that parties do not go on 'fishing expeditions' or are not given 'wholesale' access to the opposing party's files"—"are not present in ordering production of only specific documents that were shown to a designated corporate representative to prepare that witness" for a Rule 30(b)(6) deposition. *See id.* (quoting *Sporck*, 759 F.2d at 317-18). The third element balances "the policies underlying the attorney-client privilege and the work product protection against the need for disclosure for effective cross-examination and impeachment," taking into account that "there is a heightened need for robust disclosure in this context." *See id.* at 401.

Here, the Court need not resolve which test applies, because the documents reviewed by attorney Mahoney should be disclosed under any of them. Under the "automatic waiver" approach, attorney Mahoney's use of the documents to prepare his testimony as a 30(b)(6) designee is sufficient, without more, to require disclosure. *See Adidas*, 324 F.R.D. at 397.

Similarly, under the case-by-case balancing test used in *Heron*, the documents should also be disclosed. *See* 244 F.R.D. at 76-78. As described above, the process by which the City investigated Zanazanian and resolved the charges against him is highly relevant to this case for multiple reasons, including as evidence of the City's practices, the meaning of the agreement, the intentions, motives, and biases of the parties, and for the foundation of expert opinion. The production of these documents will allow the Estate to better understand that process, and to test the City's testimony. And because these records were not created for this case—indeed, were created roughly a year before this case was filed—the City does not have an interest in protecting this information to guard its theory of the case or trial strategy. *See id.* at 77.

Finally, the middle-ground approach also requires disclosure. *See Adidas*, 324 F.R.D. at 399-402. The first element is presumed satisfied, *see id.*, and in all events the witness did use the materials to prepare his testimony. *See* McFadden Decl. Ex. V (Mahoney Tr. At 41:9-16). The second element is also presumptively satisfied, and in any event is demonstrated because the documents shown to the designee during deposition preparation have been requested for production. *See Adidas*, 324 F.R.D. at 399-402. Lastly, the third element is satisfied because the interests of justice support disclosure of the documents. The City secretly conducted three internal investigations arising from Madelyn's custody, secretly dismissed most of the resulting charges to avoid a hearing, and cannot consistently articulate what conduct, if any, it believed violated its own rules. The City's failure to establish and enforce clear rules for its officers is an important part of the Estate's municipal liablity claim. "[T]he need for disclosure for effective cross-examination and impeachment" is particularly strong in this case. *See Adidas* at 401.

CONCLUSION

For all the foregoing reasons, the Estate respectfully requests that the Court order the City to produce the following categories of records, to the extent not already produced:

(a) the drafts of the agreement exchanged between and among the City, the Union, and Zanazanian, and their respective representatives, and associated correspondence;

(b) attorney Mahoney's email communications with Captain Tarpey concerning the negotiation and preparation of that agreement; and

(c) the emails that attorney Mahoney reviewed to educate himself as a 30(b)(6) witness and prepare for the deposition.

The Estate respectfully asserts that the production should include at least the emails listed as items 1, 2, 3, 4, 5, 7, 9, 55, 57, 58, 60, 61, and 63 on the City's privilege log, including any attachments, and that *in camera* review of those items would potentially be useful to resolving this motion. The Estate also requests that, after production of these records, attorney Mahoney be required to give further 30(b)(6) deposition testimony about these subjects and the relevant records.

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Respectfully submitted,

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