IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

LEONARD JOHNSON	§	
	§	
v.	§	**CASE NO. 4:23-cv-650**
	§	
THE TOWN OF PROSPER, TEXAS, et. al.	§	

DEFENDANT TOWN OF PROSPER'S MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW **TOWN OF PROSPER, TEXAS,** one of three Defendants,[1] pursuant to Federal Rule of Civil Procedure 12(b)(6), and files its MOTION TO DISMISS, and would show:

I.
INTRODUCTION AND OVERVIEW

Plaintiff has sued the Town of Prosper, Lieutenant Paul Boothe and Chief Doug Kowalski arising from the investigation, arrest, and indictment of the Plaintiff for the Felony criminal offense of Impersonating a Public Servant. The details of the investigation, arrest, and indictment of the Plaintiff and wholesale absence of any constitutionally problematic conduct is thoroughly described in LT. BOOTHE AND CHIEF KOWALSKI'S MOTION TO DISMISS [Dkt. 8], so this MOTION will focus on the Plaintiff sparse and wholly conclusory allegations against the Town of Prosper and the corresponding failure to allege any viable claims against it.

The sole claim against the Town is purportedly founded on *Monell*, and more specifically, on the flawed premise that the Town Council directed Chief Kowalski to begin an investigation into Plaintiff's identity. Not only is this factually incorrect, even if true, such allegation does nothing to remotely demonstrate *Monell* liability. Dismissal of the Town of Prosper should follow.

[1]Defendants Boothe and Kowalski have also filed their MOTION TO DISMISS [Dkt. 8].

II.
GROUNDS FOR RELIEF

Pursuant to Local Rule CV-7(a)(1), the Town of Prosper requests the Court decide the following issues:

1. Whether the Plaintiff has plead any plausible Fourth amendment illegal search or false arrest, First Amendment retaliation, or *Monell* claims; and

2. Whether Plaintiff has plead any plausible claims for Declaratory Judgment relief.

III.
PERTINENT FACTUAL BACKGROUND

For purposes of dismissal under FED. R. CIV. P. 12(b)(6), the following are pertinent facts gleaned from Plaintiff's lawsuit[2] along with exhibits 1-15which are being submitted in conjunction with Defendants LT. BOOTHE AND CHIEF KOWALSKI'S MOTION TO DISMISS [Dkt. 8], and all of which are incorporated by reference herein. Moreover, the events surrounding the investigation, indictment, and arrest of the Plaintiff - and his various allegations against Lt. Boothe and Chief Kowalski - are exhaustively detailed in Defendants LT. BOOTHE AND CHIEF KOWALSKI'S MOTION TO DISMISS [Dkt. 8], filed concurrently with the this MOTION, so the following discussion will focus on Plaintiff's allegations against the Town of Prosper, i.e., his putative claim for *Monell* liability.

Plaintiff correctly avers that Town of Prosper is a political subdivision of the State of Texas.[3] As part of its governmental functions to provide law enforcement, the Town of Prosper operates the

[2]Because this motion is brought pursuant to Fed. R. Civ. P. 12(b)(6), the factual allegations in Plaintiff's COMPLAINT [Dkt. 1] are taken as true but not necessarily the conclusory statements and bald assertions. However, nothing contained herein is intended to serve as a waiver of Defendant's right to challenge the veracity of same at trial or in the presentation of a further dispositive motions, if same even necessary. By filing this MOTION TO DISMISS, the Town of Prosper is not stipulating that the allegations of Plaintiff are true nor in any way acquiescing in the allegations contained in the Plaintiff's COMPLAINT. Rather, under the standards set forth above, the Town of Prosper contends that even if Plaintiff's sparse and specious allegations were factual, which they vehemently deny, the Town would still be entitled to dismissal as a matter of law.

[3]Plaintiff's COMPLAINT [Dkt. 1] paragraph II(6), p. 2

Prosper Police Department.[4] Paul Boothe, before his retirement, was a Lieutenant with the Town of Prosper Police Department.[5] He has been a Licensed Peace Officer since 1984.[6] Doug Kowalski is the Chief of the Town of Prosper Police Department.[7]

Regarding the Town of Prosper, the Plaintiff's sole "factual" allegation [couched upon the nebulous "on information and belief"] is as follows:

> On information and belief, around this same time, the full Prosper Town Council met to discuss the issue of the identity of the person behind the "prospercitycouncil@gmail.com" email and concurred as a full body to direct PPD to initiate an investigation into the matter. Accordingly, the Prosper Town Council, acting as the final policymaker for the Town of Prosper, officially directed PPD Chief Kowalski to begin an investigation into Plaintiff's identity.[8]

In actuality, Councilmember Jeff Hodges is the person who requested that the Police Department investigate this matter,[9] not the Prosper Town Council as the Plaintiff incorrectly avers. Lt. Boothe clearly explained in his COMPLAINT setting out probable cause for the arrest of the Plaintiff that:

> Further, Town of Prosper Councilman Hodges became concerned that someone could be using his identity to conduct nefarious acts that may include scams or misrepresentations that could potentially harm his reputation and/or the Town. At this time, **Town of Prosper Councilman Hodges requested that the Prosper Police Department conduct a full investigation** and expressed the desire to identify and prosecute the person representing himself as Town of Prosper Councilman Jeff Hodges to induce agents of the Town of Prosper and the Prosper Police Department to submit to the pretended authority of the requestor and cause the release of the requested information.[10]

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[4] https://www.prospertx.gov/172/Police-Department

[5] Plaintiff's COMPLAINT [Dkt. 1], paragraph II(7), p. 2

[6] Ex. 5, p. 1

[7] Plaintiff's COMPLAINT [Dkt. 1], paragraph II(8), p. 2

[8] Plaintiff's COMPLAINT [Dkt. 1], paragraph IV(C)(38), p. 8

[9] Ex. 5, p. 3

[10] Ex. 5, p. 3 (emphasis added)

Besides paragraph 38, there are no other "Factual Allegations" about or against the Town.[11] Although certainly not facts, Plaintiff's legal contentions against the Town of Prosper are set out in what he entitles COUNT V "Municipal Liability U.S. Const. Amends. I, IV, XIV, and 42 U.S.C. §1983 (Town of Prosper)."[12] In identifying the purported problematic policy of the Town, he avers:

> Specifically, the Town's unconstitutional policy was a decision to retaliate against and punish Plaintiff for (1) lawfully requesting public information under a pseudonym using the Town of Prosper's public records portals; and (2) corresponding with Town officials using an anonymous email about matters of public concern.[13]
>
> The Town's official policy is reflected in its collective decision to direct Defendant Kowalski, as head of the Prosper Police Department, to investigate and prosecute the person who used the name "Geoff Hodges" when making lawful public records requests through the Town of Prosper's public records portals. Though the Town of Prosper was aware as of at least November 2, 2020 that Plaintiff used the "Geoff Hodges" pseudonym in order to maintain his anonymity, the Town, on information and belief, continued to ratify the malicious investigation into Plaintiff's identity and, consequently, his unlawful arrest and detention in retaliation for exercising his First Amendment rights of free speech and petition.[14]

The remainder of the Plaintiff's *Monell* allegations against the Town[15] constitute a mere formulaic recitation of the elements of Plaintiff's purported *Monell* claim, and add nothing to the factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

IV.
STANDARD OF REVIEW

To survive a motion to dismiss under FED. R. CIV. P. 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Guidry v. American Public Life Ins. Co.*,

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[11]See, generally, Plaintiff's COMPLAINT [Dkt. 1], paragraph IV(A)-(D), p. 3-20

[12]Plaintiff's COMPLAINT [Dkt. 1] paragraphs V(137)-(145), p. 27-29

[13]Plaintiff's COMPLAINT [Dkt. 1] paragraph V(139), p. 28

[14]Plaintiff's COMPLAINT [Dkt. 1] paragraph V(140), p. 28

[15]Plaintiff's COMPLAINT [Dkt. 1] paragraphs V(137)-(145), p. 27-29

512 F.3d 177, 180 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plausibility standard "asks for more than a sheer possibility that the defendant has acted unlawfully." *Id.* at 679. The Supreme Court's decision in *Twombly* "retire[d]" the standard espoused in *Conley v. Gibson* which spoke of the "accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," in favor of its current standard requiring plausibility. *Id.* at1968-70 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Under FED. R. CIV. P. 8, "the complaint must contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn" under a relevant legal theory. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) (*quoting* 3 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d §1216 at 156-159).When reviewing a complaint to determine whether it contains all of the essential elements of a plaintiff's theory of recovery, "[t]he court is not required to 'conjure up unplead allegations or construe elaborately arcane scripts' to save [the] complaint." *Id*. (*quoting Gooley v. Mobile Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988)). If the complaint "lacks an allegation regarding a required element necessary to obtain relief," dismissal is proper. *Id*. (*quoting* 2A MOORE'S FEDERAL PRACTICE ¶12.07 [2.-5] at 12-91). . "Generally, 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." *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011)(cleaned up).

The pleading standard under Rule 8 "does not require 'detailed factual allegations,' but it

demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft*, 556 U.S. at 679. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id*. When considering a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6), courts must accept all well pleaded facts in the complaint as true; however, legal conclusions "are not entitled to the [same] assumption of truth" nor are courts bound to "accept as true a legal conclusion couched as a factual allegation." *Id.* If, after removing legal conclusions, a complaint merely "tenders naked assertions devoid of further factual enhancement," dismissal under Rule 12(b)(6) is proper. *Id.* at 678.

V.
PLAINTIFFS' CLAIMS AGAINST TOWN OF PROSPER FAIL AS MATTER OF LAW

Plaintiff headnotes that this is an action for damages pursuant to 42 U.S.C. §1983 based on alleged violations of First, Fourth and Fourteenth Amendments to the United States Constitution.[16] The resulting discussion, however, is nothing more than conclusory assertions without meaningful analysis or substantive discussion of relevant facts demonstrating any liability on the City's part.[17] Put bluntly, even if properly plead, there are myriad reasons why the Plaintiff cannot prevail herein. First and most importantly, there simply was no constitutional violation of any of his secured rights. The fact that Plaintiff was not ultimately convicted of the Felony for which he was charged does not rise to the level of a constitutional violation. Second, Plaintiff's pleadings are also deficient, for a variety of reasons, regarding a viable *Monell* claim. Third, and finally, Plaintiff is not entitled to Declaratory relief against the Town.

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[16]Plaintiff's COMPLAINT [Dkt. 1] paragraph V, p. 27 ("COUNT V "Municipal Liability U.S. Const. Amends. I, IV, XIV, and 42 U.S.C. §1983 (Town of Prosper))."

[17]Plaintiff's COMPLAINT [Dkt. 1] paragraphs V(137)-(145), p. 27-29

A. No violation of any constitutional rights

Generally, to state a viable Section 1983 claim, a plaintiff must (1) allege a violation of a right secured by the Constitution (2) that was clearly established at the time of their conduct. *See, Price v. Roark*, 256 F.3d 364, 369 (5th Cir. 2001)(citing *Saucier v. Katz*, 533 U.S. 194 (2001)). As a logical corollary, where there is no underlying constitutional violation, there can be no *Monell* liability, regardless of the government entity's policies or customs. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point."). *See also, Olabisiomotosho v. City of Houston*, 185 F.3d 521, 529 (5th Cir. 1999); *Bodzin v. City of Dallas,* 768 F.2d 722, 726 (5th Cir. 1985)("The arrest of Bodzin was lawful as a matter of law, and he cannot recover under §1983 from any Defendant. We need not discuss good faith, municipal liability, or conspiracy."). The Fifth Circuit has expressly restated *Heller* while distinguishing it from a case in which the officers were found to have qualified immunity, which would protect only the individual officers, not the municipality. *Brown v. Lyford,* 243 F.3d 185, 191 (5TH Cir. 2001). In reciting the holding of *Heller*, the *Brown* court stated that "if the plaintiff does not show any violation of his constitutional rights--then there exists no liability to pass through to the county." *Id.*

The issue of whether a governmental entity was entitled to dismissal [albeit in the context of a summary judgment] when a police officer arrested a suspect based on probable cause that the suspect had impersonated a public servant in violation of Texas Penal Code §37.11 was addressed by the Fifth Circuit in *Luera v. Kleberg County, Tex*, 460 Fed. Appx. 447 (5th Cir 2012). In *Luera* the Fifth Circuit discussed the elements of Texas Penal Code §37.11, the facts underlying the Plaintiff's arrest and existence of probable cause, then succinctlyconcluded: "Thus, given that

[Officer] had probable cause to arrest [Plaintiff], there was no constitutional violation in this case; and [Officer] and Kleberg County were therefore entitled to summary judgment". *Id* at 450.

As detailed LT. BOOTHE AND CHIEF KOWALSKI'S MOTION TO DISMISS [Dkt. 8], Plaintiff's constitutional rights were not violated - and such arguments are incorporated as if fully set forth. Like the Plaintiff in *Luera*, Plaintiff herein cannot prevail against the Town of Prosper because probable cause existed for the Plaintiff's arrest for violation of Texas Penal Code §37.11, i.e. there was no constitutional deprivations of any kind, and thus there is no Section 1983 nor *Monell* liability.

B. Plaintiff has not adequately plead nor could he establish under these facts any Section 1983 and *Monell* liability

A governmental entity such as the Town of Prosper can be sued and subjected to monetary damages and injunctive relief under 42 U.S.C. §1983 only if its official policy or custom causes a person to be deprived of a federally protected right. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). An isolated incident cannot be the basis for holding a City/Town liable. In any event, the Plaintiff must identify the policy, connect the policy to the City/Town itself and show that her injury and damage was incurred because of the application of that specific policy. *Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir. 1984) cert. denied, 472 U.S. 1016 (1985). Official policy is defined as:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy making authority; or

2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy making authority.

Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984); *Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984).

The existence of a constitutionally deficient policy cannot be inferred from a single wrongful act. *O'Quinn v. Manuel*, 773 F. 2d 605, 610 (5th Cir. 1985) (citing *City of Oklahoma v. Tuttle,* 471 U.S. 808, 105 S. Ct. 2427, 85 L.Ed. 2d 791 (1985); see also, *Tuttle*, 105 S. Ct. at 2436 (plurality opinion) "[W]here the policy relied upon is not itself unconstitutional, considerably more proof than the single incident [of unconstitutional conduct forming the basis of the section 1983 action] will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation."

In order to defeat the Town's entitlement to dismissal, the Plaintiff must come forward with more than mere allegations establishing that his purported constitutional deprivations were caused by the application of an official policy, custom or practice of the Town of Prosper. Plaintiff's COMPLAINT fails woefully in this regard.[18]

1. Official Policy

A "policy" for *Monell* purposes, can be a "policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by [a municipality's] lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority. *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 436 (5th Cir. 2008). For purposes of *Monell* liability, an "'[o]fficial policy' includes unwritten practices that are 'so common and well settled as to constitute a custom that fairly represents municipal policy.'" *Jackson v. City of Hearne*, 959 F.3d 194, 204 (5th Cir. 2020).

[18]Plaintiff's COMPLAINT [Dkt. 1] paragraphs V(137)-(145), p. 27-29

Plaintiff does not point to any formally adopted policy of the Town of Prosper, written or unwritten, but merely uses the *Monell* buzzwords in his pleadings. Considering that a constitutionally deficient policy is the cornerstone of a plausible *Monell* claim, the failure to make more than a conclusory assertion of buzzwords shows merits dismissal.

2. Persistent widespread practice rising to level of Official Custom

A "custom" for *Monell* purposes, is a "persistent, widespread practice of [municipal] officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to . . . fairly represent[] government policy." *Gates*, 537 F.3d at 436. Critically, "[i]solated violations are not the persistent, often repeated constant violations that constitute custom and policy as required for municipal section 1983 liability." *Id.* at 437 (quoting *Campbell v. City of San Antonio*, 43 F.3d 973, 977 (5th Cir. 1995)); *see also O'Quinn v. Manuel*, 773 F.2d 605, 610 (5th Cir. 1985); *City of Oklahoma v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 2436 (1985)(plurality opinion)(noting that, when a plaintiff cannot point to a policy that is unconstitutional on its face, "considerably more proof than [a] single incident" is necessary to establish municipal §1983 liability"). "A successful showing of such a pattern 'requires similarity and specificity; [p]rior indications cannot simply be for any and all 'bad' or unwise acts, but rather must point to the specific violation in question." *Id.* (quoting *Peterson v. City of Fort Worth*, 558 F.3d 838, 850 (5th Cir. 2009)). Importantly, a pattern requires "sufficiently numerous prior incidents, as opposed to isolated instances." *Peterson*, 558 F.3d at 852. Thus, to properly plead *Monell* liability, Plaintiff must establish the Town maintained an unconstitutional custom by alleging more than an isolated violation of his rights, which were not violated as examined supra. *See id.* Like his failure to note any official policy, there are no allegations about purportedly problematic customs of the Town.

Regarding specificity of allegations required, this Court has held that generic assertions of liability, like those in the Plaintiff's pleadings herein, will not suffice. *See Wright v. Denison Indep. Sch. Dist*., 2017 WL 2262778, at *4 (E.D. Tex. 2017). A plaintiff suing a government entity and claiming some policy of the entity harmed them "should be able to muster allegations of 'past incidents of misconduct to others, multiple harms that occurred to the plaintiffs themselves, misconduct that occurred in the open, the involvement of multiple officials in the misconduct, or the specific topic of the challenged policy or training inadequacy ....' " *Id.* at *4 (*citing Thomas v. City of Galveston, Texas*, 800 F. Supp. 2d 826, 842 (S.D. Tex. 2011)); *Williams v. City of Denton, Texas*, No. 4:17-CV-00811, 2019 WL 438403, at *7-8 (E.D. Tex. Jan. 10, 2019), report and recommendation adopted, No. 4:17-CV-00811, 2019 WL 430913 (E.D. Tex. Feb. 4, 2019).

3. Plaintiff fails to sufficiently plead an official policy, practice or custom of the Town of Prosper

Plaintiff's apparent hope is that by identifying the particular involved investigating officer - Lieutenant Boothe and also naming the Chief of Police Kowalski, in and of itself, is somehow sufficient to foist *Monell* liability onto the Town. But it does not.

Plaintiff must do far more than just suggest that the Town of Prosper violated his rights - it must stem from a deliberate systemic Town practice which is constitutionally unsound. Plaintiff clearly fails here. His COMPLAINT does not even allege more than an isolated violation of his constitutional rights,[19] assuming arguendo that they were even violated[20]; this is insufficient to establish a custom or policy of the Town of Prosper. *See, e.g., Gates*, 537 F.3d at 437; *O'Quinn*, 773

[19]Plaintiff's COMPLAINT [Dkt. 1] paragraphs V(137)-(145), p. 27-29

[20]The Town does not concede and has shown above and through Lt. Boothe and Chief Kowalski's MOTION TO DISMISS that Plaintiff's constitutional rights were not violated.

F.2d at 610; *see also Tuttle*, 471 U.S. 808. Accordingly, because the Plaintiff fails to sufficiently allege that Town of Prosper maintained an unconstitutional policy, custom, or practice necessary to establish *Monell* liability, he has failed to properly state a claim which is capable of surviving Rule 12(b)(6) dismissal.

5. Town of Prosper's Policies were not the "moving force" of Plaintiff's alleged constitutional deprivation

While the Town certainly does not concede that Plaintiff has adequately plead the first two *Monell* prongs, it is the third prong where Plaintiff's claims are most obviously implausible. It is evident that a meaningful discussion of the concept of "moving force" is completely absent from the Plaintiff's lawsuit.[21] The word "moving force" literally appears just once in Plaintiff's entire COMPLAINT, and even then, in the most conclusory of manner:

> The Town of Prosper's policy was the moving force behind the deprivation of Plaintiff's constitutional rights because it contributed to and caused Plaintiff's wrongful arrest done without probable cause and in retaliation for his exercise of his First Amendment rights.[22]

Missing, too, is any cogent discussion by Plaintiff of how any Town policies were in any way constitutionally deficient. Plaintiff's suggestion [though really not even made at all] that the Town's policies were the moving force behind the alleged nonexistent constitutional harm falls far short of the "high threshold" of causation, *Piotrowski*, 237 F.3d at 580, required to avoid "municipal liability collaps[ing] into respondeat superior liability" *Snyder*, 142 F.3d at 796 (quoting *Brown*, 520 U.S., at 415). In other words, Plaintiff's pleadings simply do not allow an inference that any purportedly problematic policy was the moving force the led to his arrest on a warrant based on probable cause

[21]Plaintiff's COMPLAINT [Dkt. 1] paragraphs V(137)-(145), p. 27-29

[22]Plaintiff's COMPLAINT [Dkt. 1] paragraphs V(143), p. 28-29

determined after careful review by a State District Court Judge then confirm by independent review by a Grand Jury and resulting Indictment of the Plaintiff. Accordingly, Plaintiff has not plausibly alleged that a Town of Prosper policy nor an action by any Town employee led to the independent finding of probable cause and warrant which was the "actual cause of the constitutional violation" *Valle*, 613 F.3d at 546 (citing *Thompson*, 578 F.3d at 300).

Plaintiff's claims fall flat, to the point of causation being non-existent as a matter of law. Even given its best spin, Plaintiff's allegations are nothing more than conclusive statements and do not point to a specific policy that allegedly gave rise to the Plaintiff's arrest nor that the policy was the moving force in lieu of an independent finding of probable cause. What emerges from even a cursory review of Plaintiff's sparse allegations against the Town, without specific factual allegations to support them, is that he fails to meet the his pleading burden. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007). Plaintiff does not and cannot allege the Town of Prosper adopted "written policy statements, ordinances, or regulations" evidencing a policy of retaliation against persons who submit Public Information Act requests, nor do they allege the Town adopted a widespread practice "so common and well-settled as to constitute a custom that fairly represents" the Town's policy. *Webb v. Town of Saint Joseph*, 925 F.3d 209, 214 (5th Cir. 2019). Lt. Boothe's investigation of a person suspected of impersonating a Town Council member, without more, does not rise to the level of a town-wide policy or custom, particularly since Lt. Boothe is not the official policy maker for the Town. Furthermore, merely referring to Chief Kowalski as a "policymaker" is insufficient to establish the "rare" case where a single act by an official with "final policymaking authority" becomes municipal policy. *Webb v. Town of Saint Joseph,* 925 F.3d at 214. Overcoming the Town of Prosper's challenge requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007).

6. Town of Prosper cannot be held vicariously liable herein as matter of law

A governmental entity cannot be held vicariously liable under 42 U.S.C.§1983 for purported unconstitutional acts committed by its employees. *Pembaur vs. City of Cincinnati*, 106 S.Ct. 1292, 1298 (1986); *Monell vs. Dep't of Social Servs.,* 98 S.Ct. 2018, 2037 (1978); *Brown vs. Bryan County*, 53 F.3d 1410 (5th Cir. 1985); *Piotrowski*, 51 F.3d 512; *Harris vs. City of Pagedale*, 821 F.2d 499, 504 (8th Cir. 1987). Thus, to the extent Plaintiff seeks to foist liability onto the Town of Prosper for the actions of its employees, he cannot do so.

D. Plaintiff is not entitled to any Declaratory Judgment relief against the Town

Dismissing the underlying substantive claim against Defendants effectively resolves any dispute as to Plaintiff's request for Declaratory Judgment against them. Declaratory relief is simply unavailable in the absence of some "judicially remediable right." *Schilling v. Rogers*, 363 U.S. 666, 677, 80 S. Ct. 1288, 4 L. Ed. 2d 1478 (1960). Simply put, unless Plaintiff has a valid First or Fourth Amendment claim, he has no basis for the Court to issue any declaratory judgment against the Town of Prosper, Lt. Boothe, or Chief Kowalski. See, i.e., *Reitz v. City of Abilene*, No. 1:16-CV-0181-BL, 2017 WL 3046881, 2017 U.S. Dist. LEXIS 110673, at* n. 9 (N.D. Tex. May 25, 2017).

VI.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant the **TOWN OF PROSPER,** prays that the Court grant its MOTION TO DISMISS; that it dismiss the Plaintiff's claims and pleas for damages, and that the Town have such other relief, at law or in equity, to which it may show itself justly entitled.

Respectfully submitted,

By: /s/ *Robert J. Davis*

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2023, I electronically filed the foregoing document with the clerk of the Court for the Eastern District, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means: Thomas S. Leatherbury and Peter B. Steffensen.

/s/ *Robert J. Davis*
ROBERT J. DAVIS