

(a) the City is entitled to sovereign immunity; (b) Plaintiffs' ante litem notice failed to place the City on proper notice of the nuisance claim set forth in the third amended complaint; (c) as an individual, Sue Starling cannot be held liable under a public nuisance theory as a matter of law and, to the extent she could be, she is otherwise entitled to qualified or official immunity from such claims in her individual capacity; (d) the City may not be held liable under O.C.G.A. § 36-33-2 for failing to perform an act it is not statutorily required to perform; (e) the City did not maintain, create, cause, or control any alleged nuisance at the University Plaza Establishments; (f) Plaintiffs have failed to establish that Rude Rudy's or the other University Plaza Establishments constituted a public or private nuisance; (g) Defendants had neither a duty nor an ability to revoke occupational tax certificates; and (h) no act or omission was the proximate cause of the Decedent's death.

3. Defendants are entitled to summary judgment on Plaintiffs' O.C.G.A. § 13-6-11 claim because: (a) such a claim is derivative and cannot survive to the extent the underlying tort claims are dismissed; (b) there is no evidence that the Defendants acted in bad faith, have been stubbornly litigious, or caused the Plaintiffs unnecessary trouble or expense; and (c) no Georgia case has ever found that a City may be held liable for allegedly creating or maintaining a nuisance on private property owned or leased by another.

4. Defendants are entitled to summary judgment on Plaintiffs' claim for damages associated with the Decedent's "conscious pain and suffering" because no evidence exists to support such a claim.

UNDISPUTED MATERIAL FACTS

The Parties

1. The Plaintiffs are Michael Gatto and Katherine Gatto, as the parents and Personal Representatives of Michael Joseph Gatto, and the Estate of Michael Joseph Gatto, by and through

Michael Scott Gatto, the duly appointed Administrator of the Estate. (Pl’s 3d Am. Compl., hereinafter, “TAC,” ¶ 1.)¹

2. The City is a Georgia municipal corporation. (TAC ¶ 2.)

3. The municipal government of the City consists of a Mayor and a five-member City Council. (Art. I, § 1-2 of the Charter and Related Laws of the City of Statesboro, Georgia (hereinafter, “Charter”)) (stating that the “municipal government of the City of Statesboro shall consist of a mayor and five members of the council who are constituted a body corporate under the name and style of the Mayor and City Council of Statesboro”).²

4. The City acts by and through the Mayor and City Council, who have, among other powers, the authority to contract and to be contracted with on behalf of the City. (Charter Art. I, § 1-2) (stating that the Mayor and City Council have “power and authority to contract and to be contracted with” on behalf of the City).

5. The City’s Charter provides that “three councilmembers shall constitute a quorum and shall be authorized to transact the business of the council,” and that “[t]he affirmative vote of a majority of the members present shall be required for the adoption of any ordinance, resolution, or motion, except as otherwise provided in this Charter.” (Charter Art. II, § 2-5(b)).

6. Article IV, Section 4-1(a) of the City’s Charter provides, in part, as follows: “The city council shall have the power and authority to enact such ordinances from time to time as it may deem necessary to enforce the provisions of this Charter...Except as otherwise provided in this Charter, the affirmative vote of three councilmembers shall be required for the adoption of any

¹ Plaintiffs’ TAC was filed with the Court on July 27, 2018.

² Relevant excerpts from the City’s Charter are attached hereto as exhibit 1. In addition, this Court may take judicial notice of the City Charter. See Collins v. State, 170 Ga. App. 753, 754 (1984).

ordinance, resolution, or motion.”

7. The City’s Charter provides that before entering upon the discharge of their respective offices, the Mayor and City Council shall each make and subscribe the following oath: “I do solemnly swear that I will faithfully discharge all duties devolving on me as mayor (or councilman as the case may be) of the City of Statesboro, during my continuance in office, according to the best of my ability and understanding, so help me God.” (Charter Art. II, § 2-1.)

8. Bill Hatcher (“Hatcher”) served as the City’s Mayor between January 2006 and December 31, 2009. (Chance Aff. ¶ 2³; Starling Aff. ¶ 4.)⁴

9. Joe Brannen (“Brannen”) served as the City’s Mayor between January 2010 and December 31, 2013. (Chance Aff. ¶ 2; Starling Aff. ¶ 4.)

10. Jan Moore (“Mayor Moore”) is the City’s most recent former Mayor, and served in that capacity at all times between the date of the first City Council meeting in January 2014 and August 28, 2014. (Moore Dep.⁵ at 11:3-11, 19:16-20:4; Chance Aff. ¶ 2; Starling Aff. ¶ 4.)

11. Between January 2009 and December 31, 2009, the City Council was comprised of Thomas N. Blich, Joe R. Brannen, Will Britt, Travis Chance, and Gary Lewis. (Chance Aff. ¶ 2; Starling Aff. ¶ 5.)

12. Will Britt, Travis Chance, John Riggs, and Gary Lewis also served on the City Council between January 2010 and since August 27, 2014. (W. Britt⁶ Dep. at 47:4-17; Chance⁷ Dep.

³ The Affidavit of Travis Lynn Chance is attached hereto as Exhibit 2.

⁴ The Affidavit of Martha Sue Starling, including its attachments A through J is attached hereto as Exhibit 3.

⁵ Excerpts from the May 16, 2017 deposition of Jan Johnston Moore are attached hereto as Exhibit 4. The full deposition transcript was previously filed with the Court on August 7, 2017.

⁶ Excerpts from the January 10, 2018 deposition of William Britt are attached hereto as Exhibit 5.

at 24:1-8; Riggs⁸ Dep. at 15:6-21, 16:18-24; Lewis⁹ Dep. at 17:1-17, 19:11-13, 23:14-22; Chance Aff. ¶ 2; Starling Aff. ¶ 5.)

13. Thomas Blitch also served on the City Council between January 2010 and August 28, 2012. (Chance Aff. ¶ 2; Starling Aff. ¶ 5.)

14. Phil Boyum is a member of the City Council, and served in that capacity at all times between January 2013 and August 28, 2014. (May 17, 2018 Rule 30(b)(6) Deposition of the City of Statesboro by Phillip A. Boyum (hereinafter, “Boyum 30(b)(6) Dep.”)¹⁰ at 9:3-10:10; Boyum Aff.¹¹ ¶ 2).

15. Article III, Section 3-2 of the Charter, entitled “Officers and employees,” was amended on May 18, 1999. (Charter Art. III, § 3-2.)

16. Subparagraph (a) of Article III, Section 3-2(a) of the Charter provides, in part, that the “mayor and city council shall have the power to appoint and, when necessary, to suspend a city clerk, city treasurer, city attorney, city engineer, city auditor, city manager, and such other officers and employees as are deemed necessary for the efficient administration and operation of the city government and the provision of services.” (Charter Art. III, § 3-2(a)).

17. Subparagraph (b) of Article III, Section 3-2 of the Charter provides, in part, as follows: “The mayor and city council may, in their discretion, create the administrative office of a

⁷ Excerpts from the May 16, 2017 deposition of Travis Chance are attached hereto as Exhibit 6.

⁸ Excerpts from the May 17, 2017 deposition of John Riggs are attached hereto as Exhibit 7. The full deposition transcript was previously filed on August 7, 2017.

⁹ Excerpts from the March 21, 2017 deposition of Gary Lewis are attached hereto as Exhibit 8. The full deposition transcript was previously filed on August 7, 2017.

¹⁰ Excerpts from the May 17, 2018 Rule 30(b)(6) Deposition of the City of Statesboro by Phillip A. Boyum are attached hereto as Exhibit 9.

¹¹ The Affidavit of Phillip Allan Boyum is attached hereto as Exhibit 10.

city manager. The city manager's duties shall be established by the policy set by the mayor and city council." (Charter Art. III, § 3-2(b)).

18. Article III, Section 3-4 of the Charter – entitled "City clerk" – provides, in part, as follows: "The clerk of the city council of the city shall be ex officio treasurer of the city and shall be ex officio a member of the board of tax assessors of the city, and the duties of the office shall be prescribed by the mayor and city council." (Charter Art. III, § 3-4).

19. Article III, Section 3-5 of the Charter – entitled "City manager; appointment; qualifications; compensation" – provides, in part, as follows: "The mayor and city council shall appoint a city manager for an indefinite term and shall fix his or her compensation...The manager...shall serve at the pleasure of the mayor and city council." (Charter Art. III, § 3-5).

20. Article III, Section 3-6 of the Charter – entitled "Administrative and service departments" – provides, in part, as follows: "Each department head or superintendent and other appointed officers of the city shall be appointed solely on the basis of their respective administrative and professional qualifications...Each department head or superintendent shall, subject to the direction and supervision of the city manager, be responsible for the administration and direction of the affairs and operations of his or her department or agency...All department heads and superintendents under the supervision of the city manager shall be appointed by the city manager. The city manager may suspend or remove any employee under his or her supervision in accordance with personnel policy or resolution." (Charter Art. III, § 3-6(b), (c), and (d)).

21. Shane Haynes served as the City Manager between July 2008 and September 2010. (Chance Dep. 49:22-50:16; Parker¹² Dep. 21:23-23:4; Starling Aff. ¶ 6.)

¹² Excerpts from the March 8, 2017 deposition of Frank C. Parker III are attached hereto as Exhibit 11.

22. Frank Parker served as the interim City Manager between October 6, 2010 and June 13, 2011, and as the full-time City Manager between June 14, 2011 and June 24, 2014. (Chance Dep. 50:17-51:3; Parker Dep. 21:23-23:4, 33:14-34:5, 123:13-124:1, 125:8-126:16, 128:2-16, Ex.'s D-6, D-7, D-8; Starling Aff. ¶ 6.)

23. Robert Cheshire served as the interim City Manager between June 25, 2014 and August 28, 2014. (April 19, 2018 Rule 30(b)(6) Deposition of the City of Statesboro by Robert L. Cheshire (hereinafter, "Cheshire 30(b)(6) Dep.")¹³ at 12:13-25; Starling Aff. ¶ 6.)

24. Judy McCorkle held the City Clerk position at all times between 1994 and August 2008. (McCorkle Dep. 13:8-10, 15:10-16, 187:22-24.)¹⁴

25. Defendant Starling is the current City Clerk and held that position at all times between mid-August 2008 and August 28, 2014. (TAC ¶ 3; Starling Dep.¹⁵ 12:20-13:1; Starling Aff. ¶ 2).

Relevant Provisions from Title III of the Official Code of Georgia

26. O.C.G.A. § 3-3-2(a) provides that "the manufacturing, distributing, and selling by wholesale or retail of alcoholic beverages shall not be conducted in any county or incorporated municipality of this state without a permit or license from the governing authority of the county or municipality. Each such local governing authority is given *discretionary* powers within the guidelines of due process set forth in this Code section as to the granting or refusal, suspension, or revocation of the permits or licenses..." (Emphasis added). See O.C.G.A. § 3-3-2(a).

¹³ Excerpts from the April 19, 2018 Rule 30(b)(6) Deposition of the City of Statesboro by Robert L. Cheshire are attached hereto as Exhibit 12.

¹⁴ Excerpts from the February 23, 2018 deposition of Judy McCorkle are attached hereto as Exhibit 13.

¹⁵ Excerpts from the May 15, 2017 deposition of Martha Sue Starling are attached hereto as Exhibit 14.

27. O.C.G.A. § 3-3-2(b) provides that:

“The *granting or refusal* and the *suspension or revocation* of the permits or licenses shall be in accordance with the following guidelines of due process: (1) The governing authority shall set forth ascertainable standards in the local licensing ordinance upon which all decisions pertaining to these permits or licenses shall be based; (2) All decisions approving, denying, suspending, or revoking the permits or licenses shall be in writing, with the reasons therefor stated, and shall be mailed or delivered to the applicant; and (3) Upon timely application, any applicant aggrieved by the decision of the governing authority regarding a permit or license shall be afforded a hearing with an opportunity to present evidence and cross-examine opposing witnesses.”

(Emphasis added.) See O.C.G.A. § 3-3-2(b).

28. Actions against a state-issued license by the Georgia Department of Revenue’s Alcohol and Tobacco Division are also subject to due process requirements, including written notice of a hearing and of the allegations against a licensee, the right to present evidence, the right to cross-examine witnesses, and the right to appeal any such decision, with the burden of proof resting upon the state. (Huckaby Dep. 154:19-155:18, 155:23-157:25.)¹⁶

29. If a local alcohol license is revoked, a licensee’s state license automatically becomes invalid. Likewise, if a state license is revoked, a local alcohol license become invalid. (Huckaby Dep. 154:3-12; see also O.C.G.A. §§ 3-5-40, 3-6-40.)

Chapter 6 of the City’s Code of Ordinances as of March 18, 1997

30. On March 18, 1997, Chapter 6 of the City’s then-current version of its Code of Ordinances was “amended by striking” and replaced “in its entirety” by a new Chapter. (Starling Aff. ¶ 6, Ex. A, “March 18, 1997 Code of Ordinances”, CS000489).

31. Section 6-35(a) of the March 18, 1997 version of the City’s Code of Ordinances provided as follows: “Upon final disposition of a case by any court of competent jurisdiction, a

¹⁶ Excerpts from the March 13, 2018 deposition of Ronald C. Huckaby are attached hereto as Exhibit 14.

license may be suspended or revoked by the Mayor and City Council for any violation of this and/or other City Ordinances, for any violation of state or federal law, for any material misrepresentation or omission in the application for the license, or if the licensee or the licensed business ceases to meet the eligibility requirements for license.” (Id. at § 6-35(a), CS000503).

Chapter 6 of the City’s Code of Ordinances as of April 17, 2001

32. On April 17, 2001, Chapter 6 of the City’s then-current version of its Code of Ordinances was “amended by striking” and replaced “in its entirety” by a new Chapter. (Starling Aff. ¶ 7, Ex. B, “April 17, 2001 Code of Ordinances”, CS000528.)

33. Section 6-4 of the April 17, 2001 version of the City’s Code of Ordinances provided for the existence of an Alcohol Control Board consisting of three (3) city council members, two (2) citizens at large who hold licenses for the sale of alcoholic beverages, and two (2) citizens at large who do not hold a license, to be appointed by the Mayor and City Council. (Id. at § 6-4(a), CS000531-532).

34. Section 6-4(d) of the April 17, 2001 version of the City’s Code of Ordinances provided that the Alcohol Control Board was vested with duties and powers such as: (1) screening, verifying, and investigating all initial alcohol license applications; (2) the ability to recommend modifications to the alcohol ordinances; (3) the power to hear complaints, suggestions, and recommendations from officials such as the City Manager, the police department, the public, state officials, and alcoholic beverage dealers; (4) and granting or denying an applicant’s desired license, subject to an appeal to the Mayor and City Council. (Id. at § 6-4(d), CS000-532-533).

35. Section 6-4(e) of the April 17, 2001 version of the City’s Code of Ordinances provided that “All renewal decisions shall be made by the Alcohol Control Board employing the rules and regulations of this Ordinance.” (Id. at § 6-4(e), CS000532).

36. Section 6-35(a) of the April 17, 2001 version of the City's Code of Ordinances provided as follows: "Upon final disposition of a case by any court of competent jurisdiction, a license may be suspended or revoked by the Alcohol Control Board for any violation of this and/or other City Ordinances, for any violation of state or federal law, for any material misrepresentation or omission in the application for the license, or if the licensee or the licensed business ceases to meet the eligibility requirements for license. (Id. at § 6-35(a), CS000543).

37. Section 6-240(e) of the April 17, 2001 version of the City's Code of Ordinances provided as follows: "Any suspension or revocation of a license shall first require notice to the license holder of the grounds for potential suspension and revocation and shall entitle license holders to file an appeal which must be done within seventy-two (72) hours and shall be entitled to due process hearing before the Alcohol Control Board which appeal shall be heard within ten (10) working days. The decision of the Alcohol Control Board may be appealed to the Mayor and City Council whose decision shall be final." (Id. at § 6-240(e), CS000563-564).

Chapter 6 of the City's Code of Ordinances Between September 18, 2007 and December 6, 2011 (the "City's Pre-December 6, 2011 Ordinances")

38. Between September 17, 2007 and December 6, 2011, Section 6-3(b)(1)-(7) of the City's Code of Ordinances (which are hereinafter referred to as the "Pre-December 6, 2011 Ordinances") provided as follows:

(b) The violation of any of the provisions of this chapter, including the maximum occupant load, shall be *grounds* for suspension or revocation by the mayor and city council of any retail or wholesale license issued hereunder, as set out below:

- (1) For the first violation, there shall be a three-day suspension of the license.
- (2) For the second violation, the date of occurrence of which is within any 24-month period of the first violation, there shall be a ten-day suspension of the license.
- (3) For the third violation, the date of occurrence of which is within any 24-month period of the first violation, there shall be a 30-day suspension of the license.
- (4) For the fourth violation, the date of occurrence of which is within any 24-month period of the first violation, there shall be *either* a 90-day suspension of the

license, *or* revocation of the license.

(5) For any violation beyond the fourth, the date of occurrence of which is within any 24-month period of the first violation, the license shall be revoked.

(6) Any suspension or revocation shall begin on the seventh day after the suspension or revocation decision was made by the mayor and city council.

(7) Any suspension or revocation of a license *shall first require notice* to the license holder of a due process hearing as required by section 6-35 herein.

(Starling Aff. ¶¶ 8-9, Ex.'s C&D, § 6-3(b), at both CS000575 and CS000441) (Emphasis added).

39. Section 6-4 of the Pre-December 6, 2011 Ordinances provided for the existence of an Alcohol Control Board consisting of two city council members, two citizens at large who hold licenses for the sale of alcoholic beverages, and three citizens at large who do not hold a license, to be appointed by the Mayor and City Council. (Id. at § 6-4, at both CS000441-442 and 575-576).

40. Section 6-4(d)(1) and (5) of the Pre-December 6, 2011 Ordinances provided as follows: “The alcohol control board is hereby vested with the following duties and powers: (1) To take all applications, to screen, verify, investigate and review all initial applications for licenses for the sale of liquor, wine and male beverages, at wholesale and retail by the package and by the drink...(5) After screening, investigating and complying with all parts of this chapter, the alcohol control board shall grant the applicant’s desired license or shall deny said license, applying all requirements of this chapter.” (Id. at § 6-4, at both CS000442 and 576).

41. Section 6-4(e) of the Pre-December 6, 2011 Ordinances provided as follows: “All renewal decisions shall be made by the alcohol control board employing the rules and regulations of this chapter.” (Id.)

42. The Pre-December 6, 2011 Ordinances did not vest the City Clerk with the duty or power to either grant or deny an alcohol license application or to make decisions concerning the renewal of an alcohol license. (Id.)

43. Section 6-35(a) of the Pre-December 6, 2011 Ordinances contained the following sentence: “A license *may* be suspended or revoked by the mayor and city council for any violation of this chapter or other city ordinance, for any material misrepresentation or omission in the application for the license, or if the licensed business ceases to meet the eligibility requirements for license.” (Emphasis added.) Section 6-2 of the Pre-December 6, 2011 Ordinances, “Definitions,” expressly stated that “the term ‘may’ is permissive and the term ‘shall’ is mandatory.” (Starling Aff. ¶¶ 8-9, Ex.’s C-D, § 6-35(a), at both CS000448 and 583; § 6-2, at both CS000440 and 574.)

44. Section 6-35(a) of the Pre-December 6, 2011 Ordinances also provided, in part, as follows: “The city clerk shall schedule a due process hearing before the alcohol control board for any license holder *alleged to have violated* any provision of this chapter, by sending at least 14 days prior to the date of the due process hearing, a certified letter to the license holder containing the date, time, and location of the hearing, the date and *nature of the allegations*, and the license holder’s right to be represented by an attorney and to present evidence.” (Id. at § 6-35(a), at both CS000448 and 583-584) (Emphasis added.)

45. Section 6-35(a) of the Pre-December 6, 2011 Ordinances contains no directive as to *when* any such due process hearing must be heard relative to the licensee’s alleged violation. (Id.)

46. Section 6-35(b) of the Pre-December 6, 2011 Alcohol Ordinance provides as follows: “The alcohol control board shall conduct the hearing in accordance with the provisions of O.C.G.A. § 3-3-2 et seq., and forward its written recommendation on the matter to the mayor and city council.” (Emphasis added.) (Id. at § 6-35(b), at both CS000449 and 584).

47. Section 6-35(c) of the Pre-December 6, 2011 Ordinances provides, in part, as follows: “*Upon receipt of the written recommendations*, the city clerk shall schedule a due process hearing before the mayor and city council for any license holder *alleged to have violated* any provision of

this chapter, by sending at least 14 days prior to the date of the due process hearing, a certified letter to the license holder containing the date, time, and location of the hearing, the date and *nature of the allegations*, and the license holder's right to be represented by an attorney and to present evidence ...” (Emphasis added.) (Id. at § 6-35(c), at both CS000449 and 584).

48. Section 6-35(c) of the Pre-December 6, 2011 Ordinances contains no directive as to *when* any such due process hearing must be heard relative to either the licensee's alleged violation or upon the City Clerk's "receipt of the written recommendation" from the Alcohol Control Board. (Id.)

49. Section 6-35 of the City's Pre-December 6, 2011 Ordinances contains no directive as to the process by which the City Clerk is to receive notice that a license holder is "alleged to have violated any provision of this chapter." (Id.)

50. No provision set forth within Section 6-35 of the City's Pre-December 6, 2011 Ordinances required Starling, as the City Clerk, to schedule a due process hearing concerning an alleged violation of the City's Alcohol Ordinance of which she had neither written nor actual notice. (Id.)

51. Section 6-84(b)(3) of the City's Pre-December 6, 2011 Ordinances required all consumption-on-the-premises licensees to file with the city clerk quarterly reports for the preceding three-month period, including certified copies of the licensee's three monthly state sales tax reports as filed with the state department of revenue for the preceding three-month period, and "[a]ny other documents, reports, records, or books as shall be required *by the alcohol control board to confirm the accuracy of the reported information.*" (Emphasis added). (Starling Aff. ¶¶ 8-9, Ex.'s C-D, § 6-84(b)(3), at both CS000453 and CS000588).

52. These reports had to certified as true under penalty of perjury, and no provision set forth within the City's Pre-December 6, 2011 Ordinances directed the City Clerk to confirm the

accuracy of the information reported by licensees in an “on-premises consumption report” or to otherwise conduct audits of the information reported. (Leaphart Dep.¹⁷ 185:6-186:6; Moore Dep. 118:19-119:7; Riggs Dep. 38:15-24; Starkey Dep.¹⁸ 64:16-65:25, Ex. D-49 (“I (we) do solemnly swear subject to criminal penalties for false swearing, that the information contained herein is true, and no false or fraudulent information is made herein.”); Starling Dep. 101:7-9; Starling Aff. ¶ 11).

Chapter 6 of the City’s Code of Ordinances Between December 6, 2011 and August 28, 2014 (the “City’s December 6, 2011 Ordinances”)

53. On December 6, 2011, pursuant to Ordinance 2011-14 (hereinafter, the “City’s December 6, 2011 Ordinances”), the City Council amended and replaced Charter 6 of the City’s Code of Ordinances “in its entirety.” (TAC ¶ 60; Starling Aff. ¶ 10, Ex. E, at CS000409).

54. Between December 6, 2011 and August 28, 2014, Section 6-3(b) of the City’s December 6, 2011 Ordinances provided as follows:

(b) The violation of any of the provisions of this chapter *may* be grounds for suspension or revocation by the mayor and city council of any retail or wholesale license issued hereunder, as set out below:

(1) For the first violation, there *may* be a warning *or* a one-day suspension of the license.

(2) For the second violation, the date of occurrence of which is within any 12-month period of the first violation, there may be a three-day suspension of the license.

(3) For the third violation, the date of occurrence of which is within any 12-month period of the first violation, there may be a 10-day suspension of the license.

(4) For the fourth violation, the date of occurrence of which is within any 12-month period of the first violation, there may be a 30-day suspension of the license.

(5) For any violation beyond the fourth, the date of occurrence of which is within any 12-month period of the first violation, the license may be revoked.

(6) Any suspension or revocation shall begin after the suspension or revocation decision was made by the mayor and city council.

¹⁷ Excerpts from the April 10, 2018 deposition of J. Alvin Leaphart IV are attached hereto as Exhibit 16.

¹⁸ Excerpts from the February 7, 2018 deposition of Jonathan Earl Starkey are attached hereto as Exhibit 17.

(7) Any suspension or revocation of a license *shall first require notice* to the license holder of a due process hearing as required by section 6-35 herein.

(Emphasis added). (Starling Aff. ¶ 10, Ex. E, § 6-3(b), at CS000412).

55. The City’s Alcohol Control Board was officially abolished with the adoption of the December 6, 2011 Ordinances, which removed all reference to the Alcohol Control Board. (Id.; see also TAC ¶ 67.)

56. Section 6-30(h) of the December 6, 2011 Ordinances authorized the City Clerk to investigate and either “grant or deny” an alcohol license application. (Starling Aff. ¶ 10, Ex. E, § 6-30(h), at CS000416).

57. Section 6-31 of the December 6, 2011 Ordinances provided as follows: “All alcoholic beverage licensees shall be required to apply for renewal of their licenses annually on forms prescribed by the city clerk and must comply with all provisions of this article, with the exception that publication of notice, fingerprinting, and background checks, shall not be required for renewal of a license unless there has been a change of ownership of the business. On renewal, the applicant shall take the oath specially contained on the application form.” (Id. at § 6-31, at CS00416.)

58. Section 6-35(a) of the December 6, 2011 Ordinances contained the following sentence: “A license *may* be suspended or revoked by the mayor and city council for any *major* violation of this chapter or other city ordinances, for any material misrepresentation or omission in the application for the license, or if the licensee or the licensed business ceases to meet the eligibility requirements for license.” (Emphasis added.) (Id. at § 6-35(a), at CS00417.)

59. Section 6-35(a) of the December 6, 2011 Ordinances also provided, in part, as follows: “The city clerk shall schedule a due process hearing before mayor and city council for any license holder *alleged to have violated* any provision of this chapter, by sending at least 14 days

prior to the date of the due process hearing, a certified letter to the license holder containing the date, time, and location of the hearing, the date and *nature of the allegations*, and the license holder's right to be represented by an attorney and to present evidence." (Emphasis added.) (Id.)

60. Section 6-35(a) of the December 6, 2011 Ordinances contains no directive as to *when* any such due process hearing must be heard relative to the licensee's alleged violation. (Id.)

61. Section 6-35(b) of the December 6, 2011 Ordinances provides as follows: "The mayor and city council shall conduct the hearing in accordance with the provisions of O.C.G.A. § 3-3-2 et seq., and shall make written findings of fact and reason(s) for its decision." (Id. at § 6-35(b), at CS000417).

62. Section 6-35 of the City's December 6, 2011 Ordinances contains no directive as to the process by which the City Clerk is to receive notice that a license holder is "alleged to have violated any provision of this chapter." (Id.)¹⁹

63. No provision set forth within Section 6-35 of the City's December 6, 2011 Ordinances required Starling, as the City Clerk, to schedule a due process hearing concerning an alleged violation of the City's Alcohol Ordinance of which she had neither written nor actual notice. (Id.) (See also Skinner Dep.²⁰ 117:3-8) (Q. "Y]all can only address violations of the alcohol ordinance that are brought to your attention; is that right?" A. "That's right."); Starling Dep. 135:20-24; McCorkle Dep. 189:24-190:4).

64. Section 6-84(b) of the City's December 6, 2011 Ordinances required all consumption-

¹⁹ See also Leaphart Dep. 195:12-20 (Q. "Based upon your review of the modified 2011 ordinance, did it clearly detail the process for transmitting the alcohol-related citations from the issuing authority to the city clerk's office?" A. "No, it did not." Q. All right. Did it speak to it at all?" A. "No, it did not.").

²⁰ Excerpts from the May 15, 2017 deposition of Nancy Teresa Skinner are attached hereto as Exhibit 18.

on-the-premises licensees to file with the city clerk quarterly reports for the preceding three-month period, including certified copies of the licensee's three monthly state sales tax reports as filed with the state department of revenue for the preceding three-month period, and "[a]ny other reasonable documents, reports, records, or books as shall be required *by the mayor and city council to confirm the accuracy of the reported information.*" (Emphasis added). (*Id.* at § 6-84(b), at CS000420).

65. No provision set forth within the City's December 6, 2011 Ordinances directed the City Clerk to confirm the accuracy of the information reported by licensees in an "on-premises consumption report" or to otherwise conduct audits of the information reported. (*Id.*) See also SMF 52, above.

66. All of the on-premises-consumption reports prepared between 2009 and 2014 regarding Rude Rudy's were sworn to their accuracy under penalty of perjury by Jon Starkey, and none of the reports disclosed violations. (Starkey Dep. 64:16-65:25, 68:16-69:1, Ex. D-49 ("I (we) do solemnly swear subject to criminal penalties for false swearing, that the information contained herein is true, and no false or fraudulent information is made herein.")²¹; Leaphart Dep. 186:13-19; Starling Aff. ¶ 11, Ex. F; Chance Aff. ¶ 3; Riggs Aff. ¶ 3; Boyum Aff. ¶ 3).

The City's Longstanding Internal Procedure for Providing Notice to the City Clerk of Alleged Violations of the Alcohol Ordinances

67. Lyn Dedge, Judy McCorkle, Teresa Skinner, and Sue Starling, as well as the City's 30(b)(6) designee, consistently testified their standard practice of receiving notice of an alleged violation of the City's alcohol ordinances, and the need to schedule a due process hearing, was precipitated by receiving a citation from either the Statesboro Police Department or

²¹ See Starkey Dep. at 68:16-68:20 (Q. "Was there ever a time that you submitted a form such as the on-premises consumption reports that you can recall that showed the sale of food and nonalcoholic beverages below 50 percent?" A. "No. Not that I recall.")

the Georgia Department of Revenue. (Dedge Dep.²² 13:14-16:3, 16:4-19:9, 19:10-20:17, 32:6-34:2, 46:7-48:12; Cheshire 30(b)(6) Dep. at 39:7-40:19, 42:9-25; Starling Dep. 62:15-63:12, 63:13-64:21, 82:14-21, 91:19-92:24; Skinner Dep. 76:3-77:2, 78:16-79:21, 117:3-8; McCorkle Dep. 84:19-85:8.)

68. If the City Clerk's office did not receive an actual citation alleging an alcohol violation, there was nothing to schedule a due process hearing on, and the City Clerk's practice was to await receipt of citations from the Statesboro Police Department. (Cheshire 30(b)(6) Dep. 43:1-44:4; Starling Dep. 63:13-65:5, 89:6-24, 90:22-91:15; McCorkle Dep. 189:24-190:4.)

The City Clerk's Longstanding Internal Procedure for Awaiting Municipal Court Adjudication Prior to Scheduling a Due Process Hearing

69. Sam L. Brannen was the City Attorney for the City between 1966 and his death on January 6, 2011. (Starling Aff. ¶ 12).

70. Judy McCorkle held the City Clerk position at all times between 1994 and August 2008. (McCorkle Dep. 13:8-10, 15:10-16, 187:22-24.)

71. Sue Starling replaced Judy McCorkle in the City Clerk position and served in that role at all times between September 2008 and August 28, 2014. (Starling Dep. 12:1-13:1, 42:6-12; Starling Aff. ¶ 2).

72. Lyn Dedge held the Tax Clerk position at all times between late 1991 or early 1992 and April 20, 2009. (Dedge Dep. 10:9-11:24.)

73. Teresa Skinner replaced Lyn Dedge in the Tax Clerk position and served in that role at all times between May 2009 and August 28, 2014. (Skinner Dep. at 26:14-23, 110:5-9.)

74. During her time as the City Clerk, Sam Brannen advised Ms. McCorkle to wait and

²² Excerpts from the December 13, 2017 deposition of Lynette M. Dedge are attached hereto as Exhibit 19.

determine whether an individual accused of an alcohol-related violation that could be imputed to an alcohol licensee “had been adjudicated guilty on the municipal court side before [she] could bring an administrative hearing” against the licensee. (McCorkle Dep. 89:4-11).

75. Both Judy McCorkle and Lyn Dedge testified that during Ms. McCorkle’s tenure as the City Clerk, their practice was to wait to schedule a due process hearing until after there was an adjudication of guilt at the municipal court level against the underlying criminal offender who had been cited by the Statesboro Police Department or Georgia Department of Revenue agent. (McCorkle Dep. 186:11-187:6; Dedge Dep. 28:8-30:5, 30:12-31:12, Dedge Dep. 32:6-34:2; Bryan Dep.²³ 121:5-122:18).

76. The previous practice implemented by Lyn Dedge and Judy McCorkle at the direction of Sam Brannen continued when Teresa Skinner and Sue Starling replaced them in their respective positions, and neither Skinner nor Starling ever worked for the SPD or otherwise had the ability to issue citations to individuals or businesses for alleged violations of law. (April 19, 2018 Rule 30(b)(6) Deposition of the City of Statesboro, Robert Cheshire as Designee (hereinafter, “Cheshire 30(b)(6) Dep.”) at 40:20-41:17; Starling Dep. 91:19-92:24, 132:7-133:14; Starling Aff. ¶ 12.)

77. Michael Graves served as the City’s “Staff Attorney” from April or May of 2010 until on or about August 15, 2011. (Graves Dep.²⁴ 13:22-14:11, 58:4-15; Starling Aff. ¶ 12).

78. There is no record evidence that Mr. Graves ever met with Ms. Starling to explain how the City’s alcohol ordinances functioned in regards to administrative hearings, and also never instructed or informed Ms. Starling that the prior procedure for waiting for an adjudication to occur

²³ Excerpts from the January 10, 2018 deposition of Robert W. Bryan, Jr. are attached hereto as Exhibit 20.

²⁴ Excerpts from the March 13, 2018 deposition of Michael Graves are attached hereto as Exhibit 21.

had changed in any manner. (Starling Aff. ¶ 12).

79. Alvin Leaphart became the City Attorney and City Solicitor on or about December 11, 2011 and remained so through August 28, 2014. (Leaphart Dep. 12:13-19, 16:15-17:20; Leaphart Aff.²⁵ ¶ 3; Starling Aff. ¶ 12).

80. Between December 2011 and August 28, 2014, Mr. Leaphart never met with Ms. Starling to explain how the City's alcohol ordinances functioned in regards to administrative hearings, and also never instructed or informed Ms. Starling that the prior procedure for waiting for an adjudication to occur had changed in any manner. (Leaphart Dep. 177:7-23.)

University Plaza, Inc.

81. Between at least 1990 and August 28, 2014, Holmes Ramsey was the sole owner and shareholder of University Plaza, Inc., and there were never any employees of University Plaza, Inc. (Ramsey Dep.²⁶ 7:17-12:9.)

82. There is no record evidence that the City of Statesboro, its current or former City Clerk, its current or former City Manager, any current or former employee of the Statesboro Police Department, its current or former Mayor, Travis Chance, John Riggs, Gary Lewis, or Phil Boyum have any ownership interest in University Plaza, Inc. (Leaphart Aff. ¶ 4; Starling Aff. ¶ 23; Boyum Aff. ¶ 4; Chance Aff. ¶ 5; Riggs²⁷ Aff. ¶ 5).

83. University Plaza's tenants had control over the space within the properties they leased from University Plaza; had control over how employees working in those spaces were trained and supervised; had control over how employees working in those spaces were trained; had control over

²⁵ The Affidavit of J. Alvin Leaphart IV is attached hereto as Exhibit 22.

²⁶ Excerpts from the December 13, 2017 deposition of T. Holmes Ramsey are attached hereto as Exhibit 23.

²⁷ The Affidavit of John Conner Riggs is attached hereto as Exhibit 24.

how their employees were supervised; and had control over which of their employees were serving alcohol, who was served, and how much alcohol was being served. (Ramsey Dep. 60:3-62:10, Ex. P-1 at ¶ 11) (“Landlord gives to Tenant exclusive control of the Demised Premises and shall be under no obligation to inspect same.”); Starkey Dep. at 42:19-43:8).

84. Between 2010 and 2014, neither Rude Rudy’s nor any other tenants at University Plaza owned or controlled any portion of the parking lot at university Plaza. (Ramsey Dep. 51:20-52:8; Starkey Dep. 138:23-139:2; York Dep.²⁸ 104:13-23.)

85. Holmes Ramsey admitted that University Plaza, Inc. at all times maintained control over the parking lot, and by leasing property to Jonathan Starkey or others, he didn’t relinquish any right of control or responsibility over the parking lots. (Ramsey Dep. 51:20-52:8.)

86. Holmes Ramsey also admitted that with respect to businesses that were selling alcohol, he as the person who leased the property and controlled the parking lot did not take any steps to try to protect the safety of people who came onto that property. (Ramsey Dep. 52:18-53:3.)

87. There is no record evidence that the City ever issued an alcohol license to University Plaza, Inc. (Starling Aff. ¶ 13).

88. There is no record evidence that the Plaintiffs had any ownership interest in or financial interest in any of the establishments located at University Plaza or in University Plaza, Inc.

The University Plaza Establishments

89. On or about April 2, 2001, the City approved an alcohol license application for Retrievers, Inc. (hereinafter, “Retriever’s”), which was located at University Plaza. (Starling Aff. ¶ 14.)

²⁸ Excerpts from the February 7, 2018 deposition of Stanley York are attached hereto as Exhibit 25.

90. Sometime prior to January 1, 2009, Retrievers applied for and the City issued an Occupational Tax Certificate to Retrievers, which it also held on the evening of August 27-28, 2014. (TAC ¶¶ 27-29.)

91. The City Clerk's records pertaining to Retriever's have always indicated that owner and licensee of the business was Jason Franklin. (Cheshire 30(b)(6) Dep. at 28:22-29:20; Starling Aff. ¶ 14).

92. On or about July 16, 2002, the City's then-existing Alcohol Control Board approved an alcohol license application for Chrysha, Inc. d/b/a Rum Runners, which was located at University Plaza. (Starling Aff. ¶ 15).

93. Sometime prior to January 1, 2009, Rum Runners applied for and the City issued an Occupational Tax Certificate to Rum Runners, which it also held on the evening of August 27-28, 2014. (TAC ¶¶ 30-32.)

94. The City Clerk's records pertaining to Rum Runners have always indicated that Jim Stafford was the owner/operator of Chrysha, Inc. d/b/a Rum Runners. (Cheshire 30(b)(6) Dep. at 28:22-29:20; Starling Aff. ¶ 15).

95. Will Britt and Trey Britt denied having a financial interest in Rum Runners, and also denied having provided any financial backing to either Rum Runners or Jim Stafford. (W. Britt dep. 30:15-31:16; T. Britt Dep.²⁹ 17:23-18:11.)

96. On or about October 19, 2005, the City's then-existing Alcohol Control Board approved an alcohol license for Jonathan Earl Starkey d/b/a Rude Rudy's With Feisty Goat to serve beer and wine. (McCorkle Dep. 28:21-31:22, Ex. P-55 at CS004910; Huckaby Dep. Ex. D-66 at

²⁹ Excerpts from the June 19, 2018 deposition of Eugene ("Trey") Britt are attached hereto as Exhibit 26.

Gatto_Pltf_00021; Starling Aff. ¶ 16).

97. On or about December 2, 2005, the Georgia Department of Revenue issued a license to sell beer and wine to Jonathan E. Starkey d/b/a Rude Rudy's With Fiesty Goat, which was located at University Plaza. (McCorkle Dep. 25:21-26:3, Ex. P-54.)

98. On or about August 28, 2006, the City's then-existing Alcohol Control Board approved an alcohol license application for Rude Rudy's to serve beer, wine, and liquor, which decision was upheld on appeal by the City Council on or about September 21, 2006. (McCorkle Dep. 106:1-107:4, 117:22-118:20, Ex. P-62, P-65; Starling Aff. ¶ 16.)

99. Sometime prior to January 1, 2009, Rude Rudy's applied for and the City issued an Occupational Tax Certificate to Rude Rudy's, which it also held on the evening of August 27-28, 2014. (TAC ¶¶ 24-27.)

100. The City Clerk's records pertaining to Rude Rudy's have always indicated that Jonathan Starkey was the owner/operator of Rude Rudy's. (Cheshire 30(b)(6) Dep. at 28:22-29:20; Dedge Dep. 25:6-11; Starling Dep. 111:19-23; Parker Dep. 108:24-109:23; Starling Aff. ¶ 16.)

101. Mr. Starkey testified that he was the sole owner of Rude Rudy's until it closed, and that no one other than himself had a financial interest in the establishment. (Starkey Dep. 16:1-9, 59:1-10, 73:9-16.)

102. Holmes Ramsey also testified that Mr. Starkey was the only owner of Rude Rudy's to his knowledge. (Ramsey Dep. 18:3-10.)

103. It is also undisputed that Mr. Starkey told Derek Todd, the General Manager of Rude Rudy's, that he was the sole owner of Rude Rudy's, and that Mr. Starkey signed the lease agreement

on behalf of Rude Rudy's with University Plaza, Inc. (Todd Dep³⁰. at 28:19-29:2, 44:13-44:7; Ramsey Dep. Ex. P-1.)

104. Both Will Britt and Trey Britt denied that they had any ownership or financial interest in Rude Rudy's. (W. Britt Dep. 26:22-27:24; T. Britt Dep. 18:12-19:11.)

105. On or about December 18, 2007, the City's then-existing Alcohol Control Board approved an alcohol license application for Rusty's Tavern. (Starling Aff. ¶ 17).

106. Sometime prior to January 1, 2009, Rusty's Tavern applied for and the City issued an Occupational Tax Certificate to Rusty's Tavern, which it also held on the evening of August 27-28, 2014. (TAC ¶¶ 33-35.)

107. The City Clerk's records pertaining to Rusty's Tavern have always indicated that Joshua "Rusty" Ledford was the owner/operator of Rusty's Tavern. (Cheshire 30(b)(6) Dep. at 28:22-29:20; Starling Aff. ¶ 17).

108. At his deposition, Will Britt invoked 5th Amendment privilege against self-incrimination in response to the question: "Isn't it true that documents or other records obtained by the FBI in that search show indications of your having a financial interest in one or more businesses at University Plaza during the year 2014." (W. Britt Dep. 102:10-104:5.)

109. At his deposition, Trey Britt also invoked the 5th Amendment privilege against self-incrimination in response to the question: "Did any of the documents seized from your apartment in Milledgeville indicate that you had a financial interest in any businesses at University Plaza?" (T. Britt Dep. at 22:9-15.)

110. At his deposition, Will Britt denied (1) that he did not want violations of the alcohol ordinance against Rude Rudy's to be heard by the City Council, (2) that he did not want violations to

³⁰ Excerpts from the April 17, 2018 deposition of Derek Todd are attached hereto as Exhibit 27.

be brought up before City Council by the Statesboro Police Department or Georgia Department of Revenue agents against Rude Rudy's, and also denied that he did not want any violations against other businesses at University Plaza to be brought before the City Council for a hearing. (W. Britt Dep. 104:6-21.)

111. There is no record evidence that the City of Statesboro, its current or former City Clerks, its current or former City Managers, any current or former employees of the Statesboro Police Department, its current or former Mayors, Travis Chance, John Riggs, Gary Lewis, or Phil Boyum have any ownership interest in Retriever's, Rusty's Tavern, Rum Runners, or Rude Rudy's. (Lewis Dep. 83:7-23; Parker Dep. 147:2-5; Ramsey Dep. 11:4-12:9; Skinner Dep. 115:18-116:16; Leaphart Aff. ¶ 4; Starling Aff. ¶ 23; Boyum Aff. ¶ 4; Chance Aff. ¶ 5; Riggs Aff. ¶ 5).

112. The City and Ms. Starling do not hire, train, or supervise employees of establishments that are licensed within the City. (Moore Dep. 158:3-12; Starling Aff. ¶ 18).

113. While Section 6-88(c) of the City's Pre-December 6, 2011 Ordinances and the December 6, 2011 Ordinances provided that "No licensee shall permit on the licensed premises any disorderly conduct, breach of peace, or noise or activity which is disturbing to the surrounding neighborhood," no provision set forth in the City's ordinance prohibited: (1) fights or other criminal activity which were not disturbing to the surrounding neighborhood; or (2) fights or criminal activity in parking lots or other spaces that are not "on the premises." (Leaphart Dep. 55:2-18; McCorkle Dep. 183:23-184:12; Starling Aff. ¶¶ 8-9, Ex.'s C-D, at § 6-88(c), at CS000421 and CS000454).

**Citations Alleging Alcohol Ordinance Violations Involving the University Plaza
Establishment Between 2009 and August 2014**

114. In or around May 2009, the City Clerk's office was notified that on March 28, 2009,

patrons of the Rusty's Tavern had been cited by the Georgia Department of Revenue Alcohol and Tobacco Law Enforcement Division for possession of alcohol by an underage person. (Starling Aff. ¶ 19, Ex. G at CS000705).

115. On May 8, 2009, Defendant Starling notified Rusty Ledford of Rusty's Tavern via letter that a due process hearing would be held on May 19, 2009 before the City's Alcohol Control Board with respect to whether Rusty's Tavern had violated Section 6-86 of the City's ordinances. (Id.)

116. On May 26, 2009, Defendant Starling notified Rusty Ledford of Rusty's Tavern that the City's Alcohol Control Board found the establishment to be in violation of Section 6-86 of the City's ordinances and had voted to recommend this count as a first violation with a 3-day suspension of his alcohol license. (Id. at CS000702).

117. Defendant Starling's May 26, 2009 letter also notified Mr. Ledford pursuant to Section 6-35(c) that an additional due process hearing would be held before the City's Mayor and City Council on June 16, 2009. (Id. at CS000702).

118. On June 16, 2009, a due process hearing concerning Rusty Tavern's alleged violation of Section 6-86 of the City's ordinances was held before the City Council, which voted to impose a 3-day suspension of Mr. Ledford's alcoholic beverage license to begin on July 13, 2009. (Id. at CS000700).

119. The City's former Alcohol Control Board held its last meeting on or about December 14, 2009 and thereafter did not function until it was formally abolished on December 6, 2011. (TAC ¶ 67; Leaphart Dep. 126:16-127:7; Barber Dep.³¹ 21:1-19, 24:9-23; Parker Dep. 80:25-82:20.)

³¹ Excerpts from the February 23, 2018 deposition of W. Keith Barber, Esq. are attached hereto as Exhibit 28.

120. In or around March 2010, after being advised in or around January 2010 not to worry about coming to the next Alcohol Control Board meeting, Keith Barber resigned his position as the City's City Solicitor and accepted the newly-appointed position of Municipal Court Judge. (Barber Dep. 21:1-19, 24:9-23.)

121. On or about June 21, 2010, the positions of the Statesboro employees Stan York (Chief of Police), Frank Roach (Lieutenant in the Statesboro Police Department), Dennis Merrifield (Fire Chief), Emerson Melton (Captain in the Fire Department), and Mike Smith (Captain in the Fire Department) were eliminated as a result of a reorganization and restructuring of the City's police and fire departments. (York Dep. 68:20-69:23, Parker Dep. 46:1-6, 50:3-15, Graves Dep. 34:24-36:14, Bryan Dep. 176:7-177:16; Turner Dep.³² at 22:13-23:17).

122. The then-current City Manager Shane Haynes made the recommendation to eliminate these positions and to reorganize the City's separate police and fire departments into a new Public Safety Department, and the City Council then voted to approve his recommendation, resulting in savings in excess of \$400,000. (York Dep. 70:10-71:12, Lewis Dep. 105:17-24.)

123. Wendell Turner was subsequently promoted to the position of Public Safety Director. (Turner Dep. 23:1-20, 26:8-19, Bryan Dep. 16:1-24.)

124. On or about September 29, 2010, the City's then-current City Manager Shane Haynes was terminated by the City Council. (York Dep. 72:23-73:2; Graves Dep. 60:23-61:12, 62:25-63:6; Starling Aff. ¶ 6.)

125. On or about January 6, 2011, the City's then-current City Attorney Sam Brannen passed away. (Starling Aff. ¶ 12).

³² Excerpts from the March 22, 2018 deposition of Wendell Turner are attached hereto as Exhibit 29.

126. In or around January 2011, the City Clerk's office was notified that on November 19, 2010, an employee of Rusty's Tavern had been cited by the Georgia Department of Revenue Alcohol and Tobacco Law Enforcement Division for sale of alcohol to an underage person. (Starling Aff. ¶ 20, Ex. H, at CS000646).

127. On January 20, 2011, Defendant Starling notified Rusty Ledford of Rusty's Tavern that a due process hearing would be held on February 15, 2011 before the City Council with respect to whether Rusty's Tavern had violated Section 6-86 of the City's ordinances on November 19, 2010. (Id.).

128. On February 15, 2011, the City Council held a due process hearing involving Rusty's Tavern's alleged violation of Section 6-86 of the City's ordinances on November 19, 2010, and by a vote of 4-0 following a motion by Councilman Lewis, seconded by Councilman Riggs, suspended the alcohol license of Rusty's Tavern for 10 days pursuant to Section 6-35(c) of the ordinance. (Id. at CS000647).

129. Also on February 15, 2011, the City Council held due process hearings for alleged "first offense" violations of the City's alcohol ordinance involving Kevin's Food Mart, Sunny Food Mart, Buffalo's, Christopher's, and Holiday Pizza, and voted unanimously following a motion by Councilman Chance, seconded by Councilman Lewis, to consider these first offenses as a "warning" for each business. (Id. at CS000647).

130. On April 12, 2011, Defendant Starling notified Thomas C. Jones of Statesboro Millhouse that a due process hearing concerning that establishment's alcohol license would be held before the City Council on May 3, 2011 in connection with a citation issued by the Georgia Department of Revenue Alcohol and Tobacco Law Enforcement Division on November 18, 2010. (Id. at CS000650).

131. On May 3, 2011, a due process hearing was held by the City Council with respect to Statesboro Millhouse, and the City Council voted unanimously, following a motion by Councilman Lewis, seconded by Councilman Riggs, to consider this first offense as a “warning.” (Id. at CS000653).

132. Riggs and Chance voted to consider first offenses against Millhouse, involving Kevin’s Food Mart, Sunny Food Mart, Buffalo’s, Christopher’s, and Holiday Pizza as warnings based on the language of Section 6-35(a) of the City’s Pre-December 6, 2011 Ordinances, which stated “A license *may* be suspended or revoked by the mayor and city council for any violation of this chapter or other city ordinance...” (Chance Aff. ¶ 4; Riggs Aff. ¶ 4).

133. In July 2011, forty-two uniform traffic citations were issued within the City by the Statesboro Police Department related to alleged violations of the City’s then-current alcohol ordinances, including six to individuals employed by the Rude Rudy’s establishment for alleged violations of the “hours of sale” provisions set forth within the pre-December 6, 2011 alcohol ordinances and one for allegedly “Charging Cover Charge Which Discriminates [Against] Gender.” (Bryan Aff.³³ ¶ 3, Ex. A; TAC ¶¶ 72, 86).

134. With respect to the seven (7) citations issued in July 2011 against Rude Rudy’s: (1) each of the citations were issued by Statesboro Police Officer Dustin Cross; (2) four of the citations were written on July 22, 2011 at 11:35 a.m. and alleged the offense of “Hours of Sale” under Section 6-162 of the City’s Pre-December 6, 2011 Ordinances against four different individuals (Cameron Hudson, David New, Derek Todd, and Jonathan Starkey); (4) one of the citations was issued on July 22, 2011 at 11:33 a.m., once again alleging the offense of “Hours of Sale” under Section 6-162, and written against yet another individual (Gabriel Gunn); (5) one of the citations was issued on July 22,

³³ The Affidavit of Robert W. Bryan is attached hereto as Exhibit 30.

2011 against Jonathan Starkey, alleging a violation of “Charging Cover Charge Which Discriminates Gender” under Section 6-165(15) of the City’s Pre-December 6, 2011 Ordinances; and (6) one of the citations was issued on July 23, 2011 at 11:35 a.m. against Kyle Weber, alleging the offense of “Hours of Sale” under Section 6-162. (Bryan Aff. ¶ A at CS005124, CS005126, CS005128, CS005130, CS005132, CS005134, and CS005136.)

135. Each of the seven citations issued against Rude Rudy’s on July 22, 2011 ordered the individual alleged offenders to appear at the Statesboro Municipal Court on January 10, 2012. (Id.)

136. Neither Rusty’s Tavern, Chrysha Inc. d/b/a Rum Runners, nor Retriever’s were cited in connection with the July 2011 operation conducted by the Statesboro Police Department. (Bryan Aff. ¶ 4).

137. On August 3, 2011, Michael Graves emailed Rob Bryan and Scott Brunson of the Statesboro Police Department, stating “Council is holding all alcohol violations until a later time. I wanted to give you a heads up.” (Graves Dep. 32:20-34:6, 57:13-58:6; Bryan Dep. 55:1-25, 59:25-63:6, Ex. P-1.)

138. Graves testified he believes he sent the 8/3/2011 email because he was leaving his employment with the City on or about the next week to take a position with the Army Corps of Engineers, leaving the City without either an in-house attorney or a city solicitor to assist with the prosecution of the citations issued by the Statesboro Police Department in July 2011. (Graves Dep. 32:20-34:6, 57:13-58:6, 59:9-22.)

139. When Graves sent the email to Brunson and Bryan, what he expected them to do was to “hold [the previously-issued citations] until another city attorney was in place,” and was simply communicating that they shouldn’t expect the citations to be heard by the City Council until there was a new city attorney in place. (Graves Dep. 63:21-64:10.)

140. When Bryan received the email, his interpretation was that the City Council did not intend to hear the July 2011 alleged violations at the time, and his assumption was that Graves was letting him know that the Statesboro Police Department would be contacted in the future if the violations were ever going to be presented to the City Council. (Bryan Dep. 59:25-63:6.)

141. It is undisputed that or about August 15, 2011, the City's then-current staff attorney, Michael Graves, resigned from his employment with the City and began working for the Army Corps of Engineers. (Graves Dep. 58:4-15; Starling Aff. ¶ 12.)

142. It is also undisputed City did not have an in-house attorney (i.e., neither a City Attorney nor a "Staff Attorney") or a city solicitor between the date of Mr. Graves' resignation and Mr. Leaphart's hire in December 2011, as Graves had resigned and Sam Brannen had passed away. (Leaphart Dep. 192:10-17; Graves Dep. 68:17-24, 72:16-73:4; Leaphart Aff. ¶ 3; Starling Aff. ¶ 12.)

143. The July 2011 citations were still pending in municipal court when Leaphart was hired as the City Attorney and City Solicitor in December 2011, and he shortly thereafter became aware of the citations. (Leaphart Dep. 88:6-89:12, 89:18-90:10.)

144. By the time Leaphart had been hired, the December 6, 2011 Ordinance had been enacted, the non-functioning Alcohol Control Board had been abolished, and the Pre-December 6, 2011 Ordinance under which the July 2011 citations were issued had been re-written "in its entirety." (See SMF ¶¶ 53, 55, 119).

145. It was Leaphart's misunderstanding that a decision had been made that administrative due process hearing against the licensees associated with the July 2011 citations were not going to be heard by the City Council, which caused Leaphart to question whether it would be appropriate to go forward with the prosecution of the individuals who had been cited in municipal court. (Leaphart Dep., 92:10-93:5, 95:20-96:6; Leaphart Aff. ¶ 7).

146. While there is a factual dispute as to whether or not former City Manager Frank Parker told, recommended, or advised Mr. Leaphart to dismiss the citations pending in municipal court, what is materially undisputed is that Mr. Leaphart, acting as the City Solicitor, is the person who made the final decision to dismiss the charges, actually, dismissed the charges, and exercised his prosecutorial discretion when electing to do so. (Leaphart Dep. 97:13-25, 131:25-134:11, 199:10-200:1; Leaphart Aff. ¶ 5.)

147. There is no record evidence which demonstrates that Starling ever received written notice of the nature of the alleged violations concerning Rude Rudy's issued by the Statesboro Police Department in July 2011 prior to August 28, 2014. (Leaphart Dep. 198:25-199:4, 200:2-6; Turner Dep. 148:23-149:7; Starling Dep. 85:1-4, 86:14-87:2; Leaphart Aff. ¶ 5; Starling Aff. ¶ 21),

148. There is no record evidence which demonstrates that Starling ever received actual notice of nature of the alleged violations concerning Rude Rudy's issued by the Statesboro Police Department in July 2011 prior to August 28, 2014. (Leaphart Dep. 99:7-19, 136:1-21; Starling Dep. 85:1-4, 86:14-87:2; Leaphart Aff. ¶ 5; Starling Aff. ¶ 21).

149. There is no record evidence which demonstrates that Starling ever received copies of any of the citations issued by the Statesboro Police Department to Rude Rudy's in July 2011 prior to August 28, 2014. (Parker Dep. 140:20-141:1; Leaphart Aff. ¶ 5; Starling Aff. ¶ 21).

150. There is no record evidence which demonstrates that Starling ever received copies notice of any information from the City's municipal court regarding the dismissal by Leaphart of the alleged violations concerning Rude Rudy's issued by the Statesboro Police Department in July 2011 prior to August 28, 2014 else. (Leaphart Aff. ¶ 5; Starling Aff. ¶ 21).

151. There is no record evidence that any citations involving alleged violations of the City's December 6, 2011 Ordinances or otherwise alleging violations of state alcohol laws, such as

the unlawful sale of alcohol to an underage person, were issued to the licensees or employees of Rude Rudy's, Rusty's Tavern, Retriever's, or Rum Runners between July 24, 2011 and March 27, 2013. (Huckaby Dep. 117:6-119:19, 123:8-124:3, 130:1-10, 138:23-140:13, Ex.'s D-66, D-67).³⁴

152. There is no record evidence that any citations involved alleged violations of the City's December 6, 2011 Ordinances or otherwise alleging violations of state alcohol laws, such as the unlawful sale of alcohol to an underage person, were issued to the licensee or employees of Rum Runners between March 28, 2013 and August 28, 2014. (Id.)

153. The Honorable W. Keith Barber, who was the City's Municipal Court judge when the above-referenced citations were dismissed, testified that it is not possible, without having to speculate, for him to know how he would have ruled on any evidence that may have come before him or how he would have ruled had a hearing on any of those citations occurred. (Barber Dep. 66:5-67:2) Also, O.C.G.A. § 33-3-33 provides there is a First Offender availability to those persons involved with an alcohol-related offense such that no adjudication of guilt may have occurred. See O.C.G.A. § 3-3-23.1.

154. On or about March 28, 2013, the Statesboro Police Department issued a uniform traffic citation to Shelbi Sims alleging that she violated O.C.G.A. § 3-3-23, Sale of Alcohol to Person Under 21, at the Rude Rudy's establishment on March 28, 2013. (Defendants' First Requests for Admissions to Plaintiffs³⁵; Plaintiffs First Amended Responses to Defendants' Requests for

³⁴ See Huckaby Dep. at 140:5-13 (Q. "So, even though there was a period where you – your agency wasn't prosecuting matters in the Statesboro municipal court, it's not like there were all these incident reports involving businesses at University Plaza that weren't making their way into the City, right?" ... A. "No. What you have is actually what we - - what we done.").

³⁵ Defendants' First Requests for Admissions are attached hereto as Exhibit 31.

Admissions,³⁶ Response Nos. (hereinafter, “Pl’s 1st Am. RFA Resp. No.”) 74-75; TAC ¶ 113; Starling Dep. 132:5-133:22, Ex. D-13.)

155. The March 28, 2013 citation against Shelbi Sims was “dismissed without adjudication of guilt” by the municipal court on May 14, 2013. (Pl’s 1st Am. RFA Resp. No.74; Starling Dep. Ex. D-13).

156. There is no record evidence that any citations involved alleged violations of the City’s December 6, 2011 Ordinances or otherwise alleging violations of state alcohol laws, such as the unlawful sale of alcohol to an underage person, were issued to the licensee or employees of Rude Rudy’s between March 29, 2013 and March 7, 2014. (Huckaby Dep. 117:6-119:19, 123:8-124:3, 130:1-10, 138:23-140:13, Ex.’s D-66, D-67).

157. On March 29, 2013 and August 22, 2013, the Statesboro Police Department issued uniform traffic citations to employees of the Rusty’s Tavern, alleging violations of O.C.G.A. § 3-3-23, Sale of Alcohol to Person Under 21, the first of which was dismissed without adjudication of guilt on May 14, 2013, and the second of which resulted via pre-trial consent for the offender to complete 100 hours of community service and dismissed on September 11, 2014. (TAC ¶ 114; Moore Dep. Ex. 1 at Gatto_Pltf_0004750-4755; Turner Dep. 179:11-182:18; see also March 29, 2013 and August 22, 2013 citations to Rusty’s Tavern,³⁷ at CS004758 and CS004761.)

158. There is no record evidence that any citations involving alleged violations of the City’s December 6, 2011 Ordinances or otherwise alleging violations of state alcohol laws, such as the unlawful sale of alcohol to an underage person, were issued to the licensee or employees of

³⁶ Plaintiffs’ First Amended Responses to Defendants’ Requests for Admissions are attached hereto as Exhibit 32.

³⁷ The March 29, 2013 and August 22, 2013 citations to Rusty’s Tavern are attached hereto as Exhibit 33.

Rusty's Tavern between August 23, 2013 and August 28, 2014.

159. On August 22, 2013, the Statesboro Police Department issued a uniform traffic citation to an employee of Retriever's, alleging violations of O.C.G.A. § 3-3-23, Sale of Alcohol to Person Under 21, which was dismissed without adjudication of guilt by the municipal court on September 12, 2013. (Moore Dep. Ex. 1 at Gatto_Pltf_0004750-4755; Turner Dep. 179:11-182:18; see also August 22, 2013 citation to Retrievers,³⁸ at CS004750.)

160. There is no record evidence that any citations involved alleged violations of the City's December 6, 2011 Ordinances or otherwise alleging violations of state alcohol laws, such as the unlawful sale of alcohol to an underage person, were issued to the licensee or employees of Retriever's between August 23, 2013 and August 28, 2014. (Huckaby Dep. 117:6-119:19, 123:8-124:3, 130:1-10, 138:23-140:13, Ex.'s D-66, D-67).

161. On August 23, 2013, Public Safety Director Wendell Turner sent an email addressed to City Attorney Alvin Leaphart, with a "Cc:" to City Manager Frank Parker, Sue Starling, and Rob Bryan, in which he wrote:

Alvin,

FYI...attached is the list documenting violations for alcohol establishments during recent PD operations. Call Sgt. Patrick Harrelson if you have any questions. All were cited with a UTC.

Thanks,
Wendell

(Turner Dep. at 156:12-159:24, Ex. P-3; see also August 23, 2013 email from Wendell Turner,³⁹ at CS016394-CS016402.)

³⁸ The August 22, 2013 citation to Retrievers is attached hereto as Exhibit 34.

³⁹ The August 23, 2013 email from Wendell Turner is attached hereto as Exhibit 35.

162. Mr. Turner's 8/23/2013 email forwarded an email from Rob Bryan to Turner, Brunson, Tom Woodrum, and Kaleb Moore, each of whom were employees of the Statesboro Police Department, in which Mr. Bryan wrote, in part, as follows:

The business [sic] listed below sold to Underage sources last night during the Alcohol Compliance Check, the business [sic] checked last night were licensed for on premises consumption. Attached is a copy of all business [sic] that were checked during the month of August. A total of 14 businesses were found to be in violation of State Law during the month of August. 21 were found to be in violation in March when the first round of compliance checks were conducted.

(Id.)

163. The attachment to Bryan's email, which was forwarded by Turner to Mr. Leaphart with a copy to Mr. Parker, Ms. Starling, and Mr. Bryan, contained an excel spreadsheet that had been prepared by Sgt. Patrick Harrelson which reflected City-wide compliance checks conducted by the Statesboro Police Department in March and August of 2013, containing the name of each licensee at whom the department attempted through an undercover and underage operative to obtain a sale of alcohol, the date of the attempted sale, the address of the licensee, and whether there was or was not a sale. (Turner Dep. 178:20-182:9.)

164. The excel spreadsheet attached to the 8/23/2013 email indicated that a "sale" was achieved during compliance checks at Rude Rudy's and Rusty's Tavern on March 28, 2018, and at Retriever's and Rusty's Tavern on August 22, 2013. (Turner Dep. 178:20-182:9; Moore Dep. Ex. 1 at Gatto_Pltf_0004750-4755).

165. The actual uniform traffic citations ("UTC's") that were referenced in Mr. Turner's 8/23/2013 email were not attached to his email, and the spreadsheets attached to his email contain no information about the specific code sections or violations of law cited in each case, nor the name of any individual who was cited. (Turner Dep. 178:20-182:9, 182:10-183:2; Starling Dep. 70:20-72:21;

Dedge Dep. 65:17-66:24.)

166. There is no record evidence that Starling ever received either the actual citations issued against Rude Rudy's, Rusty's Tavern, or Rum Runners referenced in Turner's 8/23/2013 email to Mr. Leaphart or any subsequent information from the municipal court following the adjudication of those alleged violations. (Starling Dep. 70:20-72:21, 72:22-73:12; Bryan Dep. 93:19-94:20.)

167. On February 23, March 8, 2014, March 9, 2014, and May 4, 2014, officers from the Statesboro Police Department issued Derek Todd – the former general manager of Rude Rudy's – uniform traffic citations alleging violations of Section 6-88(c) the December 6, 2011 Ordinance, prohibiting noise or activity which is disturbing to the surrounding neighborhood. (Leaphart Aff. ¶ 6, Ex. A).

168. Former Statesboro Police Department Major Scott Brunson became aware of the noise ordinance citations issued to Rude Rudy's on March 8, 2014, March 9, 2014, and May 4, 2014, and recommended to Alvin Leaphart that the citations be dismissed or reduced to a warning. (Brunson Dep.⁴⁰ 71:16-72:6, 72:8-73:2, 74:23-75:22; Starkey Dep. 104:21-105:20; Leaphart Aff. ¶ 6, Ex. A.)

169. Mr. Leaphart exercised his prosecutorial discretion and dismissed the three noise ordinance citations, which were subsequently marked with a "warning" label. (Leaphart Aff. ¶ 6).

170. There is no evidence that before Mr. Leaphart exercised his prosecutorial discretion and dismissed the three noise citations, he was aware of any gifts, gratuities, and/or favors that Mr.

⁴⁰ Excerpts from the February 6, 2018 deposition of Scott Brunson are attached hereto as Exhibit 36.

Brunson had received from Mr. Starkey. (Leaphart Aff. ¶ 6; Winskey Dep.⁴¹ 86:1-87:1.)

171. There is no record evidence which demonstrates that Starling ever received written notice of the nature of the alleged violations concerning Derek Todd or Rude Rudy's issued by the Statesboro Police Department on February 23, 2014, March 8, 2014, March 9, 2014, and May 5, 2014 prior to August 28, 2014. (Leaphart Aff. ¶ 6; Starling Aff. ¶ 22).

172. There is no record evidence which demonstrates that Starling ever received actual notice of nature of the alleged violations concerning Derek Todd or Rude Rudy's issued by the Statesboro Police Department on February 23, 2014, March 8, 2014, March 9, 2014, and May 5, 2014 2011 prior to August 28, 2014. (Leaphart Aff. ¶ 6; Starling Aff. ¶ 22).

173. There is no record evidence which demonstrates that Starling ever received copies of any of the citations issued by the Statesboro Police Department concerning Derek Todd or Rude Rudy's on March 8, 2014, March 9, 2014, and May 5, 2014 prior to August 28, 2014. (Leaphart Aff. ¶ 6; Starling Aff. ¶ 22).

174. There is no record evidence which demonstrates that Starling ever received copies notice of any information from the City's municipal court regarding the dismissal by Leaphart of the alleged violations concerning Derek Todd or Rude Rudy's issued by the Statesboro Police Department in March and May 2014 prior to August 28, 2014. (Leaphart Aff. ¶ 6; Starling Aff. ¶ 22).

175. There is no record evidence that any citations involved alleged violations of the City's December 6, 2011 Ordinances or otherwise alleging violations of state alcohol laws, such as the unlawful sale of alcohol to an underage person, were issued to the licensee or employees of Rude

⁴¹ Excerpts from the May 16, 2018 deposition of James Winskey are attached hereto as Exhibit 37.

Rudy's between May 6, 2014 and August 28, 2014. (Huckaby Dep. 117:6-119:19, 123:8-124:3, 130:1-10, 138:23-140:13, Ex.'s D-66, D-67)

176. The Georgia Department of Revenue is a state agency, and neither it nor Ron Huckaby, the special agent in charge of the district which Statesboro lies, is subject to the control of any employees or officials of the City of Statesboro, and have an independent investigative capability separate from the Statesboro Police Department. (M. Gatto Dep.⁴² 78:6-13; York Dep. 90:21-91:4; Huckaby Dep. 6:17-7:5, 14:13-15:2, 143:11-22.)

177. There is no evidence that the Georgia Department of Revenue's Alcohol and Tobacco Division ever issued a citation involving alleged alcohol violations against Rude Rudy's or its employees between August 1, 2009 and August 28, 2014. (Huckaby Dep. 117:6-119:19, Ex. D-66; Huckaby Dep. 132:9-24, 138:23-140:4, Ex. D-67.)

178. During the 12-month period preceding October 17, 2014, the Georgia Department of Revenue's Alcohol and Tobacco Division did not issue a citation that alleged alcohol violations involving any of the businesses at University Plaza. (Huckaby Dep. 130:1-10.)

179. When asked at his deposition, "So, even though there was a period where you – your agency wasn't prosecuting matters in the Statesboro municipal court, it's not like there were all these incident reports involving businesses at University Plaza that weren't making their way into the City, right?", Special Agent Ron Huckaby responded, "No. What you have is actually what we - - what we done." (Huckaby Dep. 140:5-13.)

180. There is also no evidence that either the City Clerk or its Tax Clerk were aware of any Department of Revenue operations plans within the City that involved any business at University

⁴² Excerpts from the March 20, 2018 deposition of Michael Scott Gatto are attached hereto as Exhibit 37.

Plaza between 2011 and 2014. (Huckaby Dep. 152:5-23.)

The Decedent's Arrest and Violation of His Pre-Trial Agreement

181. On July 4, 2014, the Decedent was arrested by the Athens-Clarke County Police Department and charged with Theft of Services pursuant to O.C.G.A. § 16-8-5 and Underage Furnishing, Possession, or Consumption of Alcohol pursuant to O.C.G.A. § 3-3-23. (Defendants' First RFA's; Pl's 1st Am. Resp. to RFA No. 2.)

182. On or about July 28, 2014, the Decedent was charged and accused with the offense of Theft of Services in violation of O.C.G.A. § 16-8-5 and the offense of Underage Possession of Alcohol pursuant to O.C.G.A. § 3-3-23 in the matter of *State of Georgia vs. Michael Gatto*, Case No. ST14CR1837, In the State Court of Clarke County, State of Georgia (hereinafter, the "Gatto Criminal Action"). (Defendants' First RFA's; Pl's 1st Am. Resp. to RFA No. 23.)

183. On or about August 5, 2014, the Decedent entered into a Pretrial Intervention Program Agreement in connection with the Gatto Criminal Action whereby he agreed to, among other things: (a) not violate any criminal laws, whether federal, state, or local; (b) "not drink or consume any alcoholic beverage or have any alcoholic beverages in your possession"; and (c) "not visit, enter, or contact any bar, liquor store, night club or other location whose primary purpose is the sale or distribution of alcoholic beverages." (Defendants' First RFA's; Pl's 1st Am. Resp. to RFA No. 26, No. 27; K. Gatto⁴³ 56:4-12, Dep. Ex. 69; Pretrial Intervention Program Agreement.)⁴⁴

184. It is undisputed that Rude Rudy's primary source of revenue came through the sale of

⁴³ Excerpts from the March 19, 2018 deposition of Katherine Gatto are attached hereto as Exhibit 38.

⁴⁴ The Pretrial Intervention Program Agreement is attached hereto as Exhibit 39.

alcoholic beverages. (Burroughs⁴⁵ Dep. 28:14-19; Cowart⁴⁶ Dep. 28:8-16; K. Gatto Dep. 58:16-22; McDaniels⁴⁷ Dep. 50:17-20; Ramsey Dep. 53:19-22; Spencer Dep.⁴⁸ 48:25-49:4; Spieth⁴⁹ Dep. 58:13-23; Starkey Dep. 81:12-20.)

185. The Decedent admitted to Tore Christiansen, his former girlfriend, that he had gone to “bars” during the week or two period prior to August 21-22, 2014:

Q. Well, let’s just start from July 5th. Let’s just pick that as a day.

A. Okay.

Q. Until – when did you go – when did you leave coming to go to Oxford?

A. August – he left before me. August 15th. So I started school on the 21st, 22nd of August.

Q. Okay.

A. So he left two weeks before me or a week before me.

Q. Okay. Did you talk to him at all while he was down in Statesboro during that time period?

A. Yes, sir.

Q. Alright. Did he tell you that he had gone to any bars at any point during that time period?

A. Yes, sir.

Q. He didn’t?

A. He did.

(Christiansen⁵⁰ Dep. 69:12-70:5.)

186. Colton Spieth, Matt Cira, and Sami McDaniels also admitted they had previously

⁴⁵ Excerpts from the June 7, 2017 deposition of Taylor Burroughs are attached hereto as Exhibit 40.

⁴⁶ Excerpts from the June 7, 2017 deposition of Julian Buchanan Cowart are attached hereto as Exhibit 41.

⁴⁷ Excerpts from the June 4, 2018 deposition of Samantha L. McDaniels are attached hereto as Exhibit 42.

⁴⁸ Excerpts from the March 7, 2017 deposition of Grant James Spencer are attached hereto as Exhibit 43. The full transcript from the deposition of Mr. Spencer was filed with the Court on July 5, 2017.

⁴⁹ Excerpts from the June 6, 2017 deposition of Colton Burgess Spieth are attached hereto as Exhibit 44.

⁵⁰ Excerpts from the June 8, 2017 deposition of Tore Christiansen are attached hereto as Exhibit 45.

been to Rude Rudy's and Rum Runners with the Decedent prior to August 28, 2014. (Cira⁵¹ Dep. 51:6-17, 51:20-23, Ex. D-21, Wells Fargo Bank Statement; Spieth Dep. 28:10-15; McDaniels Dep. 34:8-18).

187. It is also undisputed that Michael Joseph Gatto purchased and/or consumed alcohol between August 5, 2014 and August 28, 2014. (Spieth Dep. 20:15-23:4, 34:21-36:11, 39:1-18, Ex. D-25, D-27; McDaniels Dep. 31:21-32:21, 34:21-35:9; K. Gatto Dep. 63:4-17, Ex. D-21.)

188. It is undisputed that the Decedent was present and on the premises of Rude Rudy's on the evening of August 27-28, 2014. (TAC ¶ 16.)

189. It is also undisputed that the decedent purchased alcohol for other minors while he was present at Rude Rudy's on August 27-28, 2014. (Cira Dep. 66:5-21, 71:1-73:9, 79:15-80:9, 83:2-86:10, Ex. D-23; Spieth Dep. 34:21-36:11.)

190. The Decedent was attacked and beaten by Grant James Spencer while he was present at Rude Rudy's on the evening of August 27-28, 2014. (TAC ¶ 21).

191. Prior to the attack, the Decedent was standing at the bar of Rude Rudy's, where he had been accused of attempting to steal tip money while attempting to purchase alcoholic beverages. (Cira Dep. 80:11-82:15, 83:14-84:6, 89:25-92:3, Ex. D-24; Spieth Dep. at 38:24-43:6, Ex. D-27; Ryan⁵² Dep. 27:7-35:11, Ex. D-44; Clark⁵³ Dep. 21:20-22:25, 26:20-31:8, 32:6-34:21, 35:2-36:1, Ex. D-47).

192. On or about August 28, 2014, Officer Amanda M. Lane of the Statesboro Police

⁵¹ Excerpts from the June 6, 2017 deposition of Matthew Vincent Cira are attached hereto as Exhibit 46.

⁵² Excerpts from the June 8, 2017 deposition of Ailish F. Ryan are attached hereto as Exhibit 47.

⁵³ Excerpts from the February 1, 2018 deposition of Andrew McGinnis Clark are attached hereto as Exhibit 48.

Department (hereinafter, as provided for in the Definitions above, "Police Department"), responded to an incident report in reference to a person that had been involved in an altercation at Rude Rudy's and arrived at Rude Rudy's on or about 12:45 a.m.). (K. Gatto Dep. Ex. D-70, Pl's 1st Am. Resp. to RFA No. 45-46; Defendants' First RFA's, Ex. 7.)

193. A true and correct copy of the incident report prepared by Officer Amanda M. Lane of the Police Department (hereinafter, the "Incident Report") in reference to the August 27 or 28, 2014 beating of Michael Joseph Gatto while he was upon the premises of Rude Rudy's is attached hereto. (K. Gatto Dep. Ex. D-70, Pl's 1st Am. Resp. to RFA No. 45-46; Defendants' First RFA's, Ex. 7.)

194. While responding to the incident at Rude Rudy's on August 28, 2014, Officer Lane recovered a paper copy of a Georgia driver's license belonging to an individual named Zachery Scott Childress, which was found in the Decedent's wallet. (Cira Dep. 25:1-23; Incident Report, Defendants' First RFA's, Ex. 7).

195. It is undisputed that the Decedent obtained an "over-21" wristband at Rude Rudy's on August 27-28, 2014 using a fake i.d.:

11. . . . Q. . . . (By Mr. Bennett). When you came to Rude
12. Rudy's that night, was there a bouncer at the front
13. entrance?
14. . . . A. . . . There was.
15. . . . Q. . . . And did the bouncer check your ID?
16. . . . A. . . . Uh-huh (affirmative). That was the way we
17. had to get in the bar.
18. . . . Q. . . . Did you show the bouncer your real ID?
19. . . . A. . . . At the time, I'm pretty sure that you
20. were -- you could be 18 to get into the bar, so I
21. showed my 18 ID.
22. . . . Q. . . . Right. Okay. And so did you get any type
23. of a wristband that signifies that you were 18 or less
24. than 21?
25. . . . A. . . . I think they would put, like, a -- let me

Page 65

- 1· ·think· I'm trying to remember· It's been a while.
- 2· ·To be honest with you, I don't know.
- 3· · · ·Q· · ·Okay· Did Michael Gatto receive a
- 4· ·wristband that signified he was over 21 years of age
- 5· ·that night?
- 6· · · ·A· · ·He did.
- 7· · · ·Q· · ·Do you recall how he did that?
- 8· · · ·A· · ·With using a fake ID.

(Cira Dep. 64:11-65:8)

196. By being present at Rude Rudy's, possessing a fake identification card, consuming alcoholic beverage, and purchasing alcoholic beverages for minors, the Decedent engaged in one or more criminal acts on the evening of August 27-28, 2014 and in turn violated the terms of his Pretrial Intervention Program Agreement dated August 5, 2014. (K. Gatto Dep. 59:18-61:23, Ex. D-69; Pretrial Intervention Program Agreement).

197. On October 11, 2016, Spencer pled guilty for the August 28, 2014 voluntary manslaughter of the Decedent and was sentenced to 20 years in prison. (TAC ¶ 23).

198. The City's Police Department is, and was at all times between 2009 and August 28, 2014, responsible for enforcing all ordinances set forth in the City's Code of Ordinances, including but not limited to the Pre-December 6, 2011 Alcohol Ordinance and the December 6, 2011 Alcohol Ordinance. (Bryan Aff. ¶ 6; Harrelson⁵⁴ Dep. 19:24-20:13; Woodrum⁵⁵ Dep. 45:10-46:20).

199. Between 2009 and 2014, when alcohol licenses issued by the City were suspended or revoked, personnel from the Statesboro Police Department are responsible for physically confiscating the licenses. (Bryan Aff. ¶ 6).

⁵⁴ Excerpts from the May 16, 2018 deposition of Warren Patrick Harrelson are attached hereto as Exhibit 48.

⁵⁵ Excerpts from the May 16, 2018 deposition of Thomas Arthur Woodrum are attached hereto as Exhibit 49.

200. No employee of the City of Statesboro, including but not limited to appointed and/or elected officials, with the exception of P.O.S.T.-certified employees of the Statesboro Police Department, had the ability to issue citations for alleged violations of the Pre-December 6, 2011 Ordinances or the December 6, 2011 Ordinances. (Leaphart Dep. 156:3-16; Starling Dep. 122:9-21; Bryan Aff. ¶ 6; Starling Aff. ¶ 18).

201. Plaintiffs are aware of no evidence that any current or former employee (of any rank) of the City's Police Department had spoken with Michael Joseph Gatto at any time prior to August 28, 2014. (K. Gatto Dep. 75:16-20, Ex. D-70, Pl's 1st Am. Resp. to RFA No. 54; M. Gatto Dep. 52:22-53:1).

202. There is no record evidence that any current or former employee (of any rank) of the City's Police Department represented, promised, and/or assured that they and/or the Police Department would act on behalf of Michael Joseph Gatto to prevent, assist, or respond to any actions or omissions of any current or former employee, manager, owner, or patron of Rude Rudy's, Grant Spencer, or any other person or entity, or to prevent, assist, or respond to any other crime or criminal act or omission.

203. There is no record evidence that any current or former employee or official of the City, Starling, the John Does, or any current or former member of the City Council represented, promised, and/or assured that they and/or the City's Police Department would act on behalf of Michael Joseph Gatto to prevent, assist, or respond to any actions or omissions of any current or former employee, manager, owner, or patron of Rude Rudy's, Grant Spencer, or any other person or entity, or to prevent, assist, or respond to any other crime or criminal act or omission.

204. There is no evidence that any current or former employee or official of the City, Starling, the John Does, or any current or former member of the City Council had spoken with

Michael Joseph Gatto at any time prior to August 28, 2014. (K. Gatto Dep. Ex. D-70, Pl's 1st Am. Resp. to RFA No. 56.)

No Public Nuisance

205. There is no record evidence that every single person who entered the University Plaza Establishments was harmed. (McDaniels Dep. 47:24-48:1, Chance Dep. 93:18-25, Cowart Dep. 110:25-112:4).

206. There is no evidence that any person other than the Decedent was attacked and beaten unconscious by an on or off-duty bouncer of a University Plaza Establishment. (Clark Dep. 19:24-20:5; Ryan Dep. 58:12-59:3; Cira Dep. 96:16-26; Burroughs Dep. 47:24-48:13, 133:16-19; Cowart Dep. 58:16-59:12).

207. Multiple witnesses in this case testified that they had never been beaten or assaulted at Rude Rudy's and had never witnessed or heard about any altercation similar to the one that injured the Decedent. (Id.)

No Private Nuisance

208. There is no record evidence that either the Plaintiffs or the Decedent owned or resided at any of the University Plaza Establishments.

The City's Discretionary Nuisance Abatement Process

209. O.C.G.A. § 41-2-2 provides that the "district attorney, solicitor-general, city attorney, or county attorney on behalf of the public" may pursue a public nuisance action, but does not mandate that such officials actually pursue a public nuisance action. See O.C.G.A. § 41-2-2

210. Article IV, Section 4-6 of the City's Charter, adopted on or about March 29, 2012, provides, in part, as follows: "The mayor and city council are empowered to declare what shall constitute a nuisance within the limits of the City of Statesboro and to pass such ordinances as are

necessary to prevent the same, and by ordinance they may empower the municipal court of the city to abate same and authorize the removal of such nuisance within the city limits of the City of Statesboro and to punish the person, persons, firms, or corporations causing or allowing such nuisance to exist, and they may provide for the assessment of the expense of the removal of such nuisance against such persons, firms, or corporations causing or continuing same and may provide for the collection of such expense by execution, the execution to have the same force and effect as city tax executions.” (Emphasis added.) (Charter Art. IV, § 4-6.)

211. Section 38-27 of the City’s Code of Ordinances was adopted on or about April 3, 2012, and provides as follows: “The municipal court shall have jurisdiction to try issues concerning the existence and abatement of public nuisances within the geographical limits of the city in accordance with the provisions of O.C.G.A. § 41-2-5.” (Starling Aff. ¶ 24, Ex. J, Code of Ordinances § 38-27.)

212. Section 38-29(a) of the City’s Code of Ordinances provides that “[a] proceeding to abate a public nuisance *may* be commenced under this chapter by filing a complaint in the name of the city against the respondent in the municipal court, specifically setting forth therein the facts of the alleged nuisance.” (Emphasis added). (Id. at § 38-29(a).)

213. Section 38-29(c) of the City’s Code of Ordinances provides that “[t]he summons shall notify the interested parties that a hearing will be held before the Municipal Court of the City of Statesboro at a date and time certain. Such hearing shall be held not less than 15 calendar days nor more than 45 calendar days after the filing of said complaint in the proper court.” Code of Ordinances § 38-29(c). (Id. at § 38-29(c).)

214. Section 38-30 of the City’s Code of Ordinances provides that, “[a]t the hearing, the burden shall be upon the city to prove its complaint by competent evidence. The responding party(s)

shall have the right to file an answer to the complaint and to appear in person or by counsel, to present evidence and to cross-examine the city's witnesses.” (Id. at § 38-30.)

215. Section 38-32 of the City’s Code of Ordinances provides that “[w]here the abatement action does not commence in the superior court, review of a court order requiring the repair, alteration, improvement, or demolition of a dwelling, building, or structure shall be by direct appeal to the superior court under O.C.G.A. § 5-3-29.” (Id. at § 38-32.)

216. Any direct appeal to the superior court under O.C.G.A. § 5-3-29 is subject to de novo review, and any further order from the superior court would be subject to a discretionary appeal pursuant to O.C.G.A. § 5-6-35. (“An appeal to the superior court in any case where not otherwise provided by law is a de novo investigation. It brings up the whole record from the court below; and all competent evidence shall be admissible on the trial thereof, whether adduced on a former trial or not. Either party is entitled to be heard on the whole merits of the case.”).

The City’s Occupational Tax Certificates

217. The City’s administrative fee, regulatory, tax and business ordinance is set forth in Chapter 18, Article 5 of the City’s ordinances. (Starling Aff. ¶ 24, Ex. I, Code of Ordinances § 18, Art. V.)

218. Section 18-101 of the City’s Code of Ordinances defines the term “Administrative fee” to mean “the component of an occupation tax, which approximates the reasonable cost of handling and processing the registration of the business from whom the occupation tax is collected.” (Id. at § 18-101.)

219. Section 18-101 of the City’s Code of Ordinances defines the term “Occupation tax” to mean “a tax levied on persons, partnerships, corporations, or other entities for engaging in an occupation, profession or business and enacted by the City of Statesboro for the purpose of raising

revenue.” (Id. at § 18-101.)

220. Section 18-101 of the City’s Code of Ordinances defines the term “Occupation tax certificate” to mean “a document issued by the City of Statesboro acknowledging payment of the occupation tax and administrative fee.” (Id. at § 18-101.)

221. Section 18-101 of the City’s Code of Ordinances defines the term “Regulatory fee” to mean “the payment required by the city as an exercise of its police power as part of or as an aid to regulation of an occupation, profession, or business...” (Id. at § 18-101.)

222. Section 18-101 of the City’s Code of Ordinances defines the term “regulatory fee certificate” to mean “a document issued by the City of Statesboro acknowledging payment of a regulatory fee.” (Id. at § 18-101.)

223. Regulatory fees generally “must be paid before commencing business as a condition precedent for transacting business or practicing a profession.” (Id. at § 18-103(b).)

224. The City’s occupation tax is levied based on the number of employees of the business or practitioner as computed on a full-time basis or full-time position equivalent basis. (Id. at §104(b).)

225. Neither the City Charter nor the City’s Code of Ordinances, or any other statutory authority, grant the City any authority to revoke occupational tax certificates, which are also not a prerequisite to commencing business in the City. (Id. at § 18-113; Leaphart Dep. 59:25-61:9, 61:23-62:7; 30b6 Cheshire Dep. at 37:4-38:6.)

226. Section 18-114 reflects the “Enforcement Provision” of the City’s administrative fee, regulatory, tax and business ordinance, and provides that “the city clerk may issue executions against individuals, businesses and practitioners for taxes or fees which are due and owing; any penalty imposed by section 18-113; and any interest imposed by section 18-113.” (Id. at § 18-114.)

227. Section 18-114(d) of the City's Code of Ordinances provides that "Individuals, businesses and practitioners who fail or refuse to pay any occupation tax charged pursuant to this ordinance shall be subject to a maximum \$500.00 civil fine to be imposed by city's municipal court and enforceable by the contempt power of the court." (Id.)

228. There is no evidence that either Rude Rudy's or any of the other University Plaza Establishments identified in the Plaintiffs' Third Amended Complaint were subject to regulatory fees (as distinguished from an "occupational tax") by the City, whether designated as a license or permit fee or any other name, as a requirement to conduct business within the City.

No Evidence of Conscious Pain and Suffering

229. When Officer Lane arrived at Rude Rudy's on August 28, 2014 at around 12:45 a.m., Michael Joseph Gatto was found unconscious, bleeding from the ears, and laying on his left side in front of the doors of Rude Rudy's. (K. Gatto Dep. Ex. D-70, Pl's 1st Am. Resp. to RFA No. 45-46; Defendants' First RFA's, Ex. 7.)

230. When Officer Lane arrived at Rude Rudy's on August 28, 2014, Michael Joseph Gatto appeared "unconscious, and unable to respond to any comments given by me or others." (K. Gatto Dep. Ex. D-70, Pl's 1st Am. Resp. to RFA No. 45-46; Defendants' First RFA's, Ex. 7.)

231. McGinnis Clark (bar patron), Ailish Ryan (bar patron), Matt Cira (bar patron and friend of the Decedent), Colton Spieth (bar patron and friend of the Decedent), Taylor Burroughs (bartender), Grant Spencer (the assailant), Sami McDaniels (bar patron and friend of the Decedent), and former Statesboro Police Officer Thomas Woodrum each testified that the Decedent appeared unconscious following the initial punch by Spencer. (Clark Dep. 35:12-36:1; Rayn Dep. 56:8-18; Cira Dep. 93:7-20; Burroughs Dep. 76:14-23; Spieth Dep. 55:11-17, 57:24-58:6, Spencer Dep. 87:16-23, McDaniels Dep. 44:23-45:22, Woodrum Dep. 78:24-79:5.)

232. Plaintiff Katherine Gatto also admitted that when she saw the Decedent in the hospital, at no time did he ever exhibit any consciousness, and that none of the doctors told her he had regained consciousness after being struck in the head. (K. Gatto Dep. 85:18-86:22.)

233. There is no record evidence establishing that the Decedent was consciously suffering prior to his demise.

Plaintiffs' Deficient Ante Litem Notice

234. On February 18, 2015 Plaintiffs' counsel issued a written notice of claim to the City, a copy of which is attached to the original Complaint. (TAC Ex. 2)

235. The letter in question mentions the fact that the Decedent was killed at or near the premises of Rude Rudy's, and alleges that the City's negligence, gross negligence, recklessness, or intentional conduct caused his death in a variety of ways, including by failing to enforce municipal liquor laws and failing to abate a known nuisance. (TAC Ex. 2)

236. However, while the notice states that the "beating death of Michael Joseph Gatto . . . occurred within the limits of the City of Statesboro at or near the premises of Rude Rudy's, LLC," it contains absolutely no mention of any of the other "University Plaza Establishments" that are central to the claim (i.e., Retrievers, Rum Runners, and Rusty's Tavern), let alone the fact that the City licensed any of those establishments and thereby created a nuisance at each of the four establishments. (TAC Ex. 2)

237. The ante litem notice also does not contain any mention of the FAC's allegation that "[b]ut for the failure of Defendants' Statesboro and Starling to abate the nuisance by revoking the alcohol licenses and business licenses" of Retrievers, Rum Runners, Rusty's Tavern and Rude Rudy's, "Michael Joseph Gatto would not have been beaten and killed on August 28, 2014." (TAC Ex. 2)

Sovereign Immunity

238. Atlantic Specialty Insurance Company (“Atlantic”) issued policy number 791-00-07-64-0000 to the City with a policy period of May 1, 2014 to May 1, 2015 (the “Policy”). (Prather 30(b)(6) Dep. at 10:19-14:25;⁵⁶ Atlantic Special Insurance Policy⁵⁷ Number 791-00-07-64-0000, CS00001-CS0000398.)

239. The Policy contains several coverage parts, including a Commercial General Liability (“CGL”) part, Public Officials Errors & Omissions (“E&O”) part, Law Enforcement Liability (“LEL”) part, and Excess Liability part. (*Id.*)

240. The CGL section of the Policy contains an endorsement, which provides in part as follows:

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE
READ IT CAREFULLY.
GEORGIA CHANGES PROTECTION OF IMMUNITY**

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART (CLAIMS-
MADE)

The following is added to **SECTION I — COVERAGES**
COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY
COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY
COVERAGE C HEALTH CARE AND SOCIAL SERVICES LIABILITY

We have no duty to pay damages on your behalf under this policy unless the defenses of sovereign and governmental immunity are inapplicable to you.

The following is added to **SECTION IV — CONDITIONS**

This policy and any coverages associated therewith does not constitute, nor reflect an

⁵⁶ Excerpts from the April 19, 2018 Rule 30(b)(6) Deposition of the City of Statesboro by Darren Prather are attached hereto as Exhibit 48.

⁵⁷ The Atlantic Specialty Insurance Company Policy is attached hereto as Exhibit 49.

intent by you, to waive or forego any defenses of sovereign and governmental immunity available to any Insured, whether based upon statute(s), common law or otherwise, including Georgia Code Section 36-33-1, or any amendments.

(Id. at CS000258).

241. The E&O, LEL, and Excess Liability parts of the policy also each contain an identical endorsement. (Id. at CS000283, CS000286, 314)

242. There is no record evidence that the City has a policy of liability insurance which covers an occurrence for which the City's sovereign immunity defenses are available in this action.

Miscellaneous

243. There is also no evidence that the City Council ever actually "voted" or otherwise decided that due process hearings should be put on hold, and there is no evidence that the City Council ever issued a directive to the City Clerk, the SPD, or anyone else that they should not enforce the ordinances at any time between 2011 and August 28, 2014. (Starling Aff. ¶ 23; Chance Aff. ¶ 5; Boyum Aff. ¶ 4; Riggs Aff. ¶ 5; Leaphart Aff. ¶ 7).

244. Starling, Boyum, Chance, Leaphart, Riggs and Will Britt also affirmatively testified that they never took or recommended any action with respect to Rude Rudy's or any of the University Plaza Establishments that was purposely or maliciously intended benefit those establishments or to injure anyone, and did not understand any of their actions to be wrongful or without privilege. (Id.)

245. Ms. Starling has never been to any of the University Plaza Establishments and there is no evidence that she cites, issues, or receives incident reports, citations, or dispatch summary reports pertaining to incidents of fighting or violence in the parking lots outside of establishments. (Starling Dep. 101:19-22, 113:9-10; Starling Aff. ¶ 18),

246. Between 2009 and August 2014, there is no evidence that Rum Runners was never

actually cited with an alcohol ordinance violation; Retrievers was cited a single time; Rusty's Tavern was cited four time; and Rude Rudy's 12 times, yet 11 of those were dismissed and not criminally prosecuted at the municipal court level. (See SMF Nos. 114, 126, 134-136, 146, 154-155, 157, 159).

247. The City does not dispute that occupational tax certificates contain small print which refer to them as a "business license."

Respectfully submitted, this 30th day of August, 2018.

/s/ John D. Bennett
John C. Stivarius, Jr.
Georgia Bar No. 682599
R. Read Gignilliat
Georgia Bar No. 293390
John D. Bennett
Georgia Bar No. 059212

ELARBEE, THOMPSON, SAPP & WILSON, LLP
800 International Tower
229 Peachtree Street, N.E.
Atlanta, Georgia 30303
Telephone: (404) 659-6700
Facsimile: (404) 222-9718
stivarius@elarbeethompson.com
Gignilliat@elarbeethompson.com
Bennett@elarbeethompson.com

Attorneys for Defendants:
City of Statesboro and Sue Starling,
Individually and in her Official Capacity

