The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT HICKEY, KENNETH HANKIN, JENNIFER HUDZIEC, STEPHANIE LANE, CARROLL JACKSON, DENISE COOPER, NICOLE PEARSON, and EMILY MALONEY, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THE CITY OF SEATTLE, a municipality; PAUL SCHELL, Mayor of the City of Seattle; and NORMAN STAMPER, Chief of Police of the City of Seattle,

Defendants.

No. C00-1672 P

PLAINTIFFS' REPLY REGARDING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

NOTED: October 31, 2003

1301 FIFTH AVENUE, SUITE 2900 • SEATTLE, WA 98101
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Plaintiffs hereby submit their reply memorandum in support of Plaintiffs' Motion for Partial Summary Judgment. This brief does not constitute Plaintiffs' reply to the City's motion to strike contained in the City's brief, which was not noted separately under CR 7(d) but which Plaintiffs understand should have been noted under CR 7(d)(3) for November 14, 2003. Plaintiffs will submit their reply to that motion in accordance with CR 7(d)(3) on or before November 10, 2003.

I. INTRODUCTION

Plaintiffs moved for partial summary judgment on the basis that the City has a burden of producing evidence of individualized probable cause and that it cannot carry that burden. The City's opposition does not dispute that the City has a burden of production, and that the City has no individualized evidence of probable cause. Instead, in the face of contradictory law from the Supreme Court and the Ninth Circuit, the City argues that it does not have to produce individualized evidence of probable cause. The City is not correct about the applicable standard.

Nor is the City correct that it cannot be held liable under 42 U.S.C. § 1983. As discussed at length in Plaintiffs' opposition to the City's motion for summary judgment, at pp. 4-14, Plaintiffs have proven as a matter of law that the City can be held liable for this arrest because it as conducted by Captain James Pugel, a policymaker with authority to manage all demonstrations and make mass arrests during the WTO. The City's arguments concerning municipal liability do not preclude the entry of partial summary judgment in favor of Plaintiffs. Similarly, the City's motion to strike portions of Plaintiffs' evidence, even if it proves successful, would not create genuine issues of material fact such that Plaintiffs' motion for partial summary judgment should be denied.

II. STATEMENT OF FACTS

Plaintiffs incorporate and refer the Court to the statements of facts provided in Plaintiffs' motion for partial summary judgment, at pp. 2-10, and also in Plaintiffs' opposition to the City's motion for summary judgment, at pp. 2-3 and 7-10.

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III. ARGUMENT

A. Plaintiffs Have Proven as a Matter of Law That the City Can Be Held Liable in This Case

The City has opposed Plaintiffs' motion on the same ground that it moved for summary judgment – that the City cannot be held liable under 42 U.S.C. § 1983 because the Class was not arrested pursuant to a City policy, custom, or practice. However, as explained in Plaintiffs' opposition to the City's motion, municipal liability can actually be proven three ways: (1) by showing that the action was pursuant to a policy, (2) by showing that the action was undertaken by a policymaker, or (3) by showing it was ratified by a policymaker. *See*, *e.g.*, Plaintiffs' Opposition, at p. 4. Plaintiffs can prove, and have proven, as a matter of law that the herding, trapping, and arrest of the Class was directed and ordered by Captain James Pugel, who had been delegated exclusive and complete policymaking authority with regard to demonstration management and mass arrests during the WTO. *See* Plaintiffs' Opposition to City's SJ Motion, at pp. 6-11. His decision to arrest the Class therefore subjected the City to potential liability under § 1983. *See id*. *See also*, *e.g.*, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) (discussing delegation of policymaking authority); *St. Louis v. Praprotnik*, 485 U.S. 112, 126, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988) (same); *Trevino v. Gates*, 99 F.3d 911, 918 n.2 (9th Cir. 1998) (single act of delegated policymaker is enough to bind City). In any case, even if the Court concludes that there are genuine issues of material fact as to whether the City may be subject to liability under § 1983, such a finding would not prevent the Court from granting partial summary judgment on the ground that the City did not and cannot sustain its burden to produce individualized evidence of probable cause.

B. The City Apparently Admits That It Carries a Heavy Burden of Production on Questions of Probable Cause

The City does not dispute that it carries a heavy burden of producing evidence of probable cause in this case, as it would in any wrongful arrest case. *See*, *e.g.*, *Dubner v. City of San Francisco*, 266 F.3d 959, 965 (9th Cir. 2001). While the City does not expressly

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acknowledge this burden, it also does not deny that it exists, nor could it. To the extent the City's discussion of *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107 (D.C. Cir. 1977), is an attempt to deny the existence of its burden, the City is incorrect. *Cullinane* does not even discuss the City's burden, much less hold that it does not exist. Even in the *Cullinane* court the defendant in a wrongful arrest suit bears "the burden of justifying the arrest." *See Dellums v. Powell*, 566 F.2d 167, 175-76 (D.C. Cir. 1977). The City bears that burden, and as explained in Plaintiffs' opening brief, and again below, the burden is to produce evidence of ***individualized*** probable cause.

C. The City Cannot Avoid the Requirement of Individualized Probable Cause

1. The law is clear – the Fourth Amendment requires individualized probable cause

The City, unable to dispute that it bears a burden of production in this case, and also unable to provide ***any*** evidence of individualized probable cause, instead attempts to argue that its not required to provide individualized evidence in order to satisfy its burden. The City is wrong.

As Plaintiffs pointed out in their motion, "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000).[1] That general rule is subject to limited exceptions that apply only to "regimes of suspicionless searches … designed to serve 'special needs, beyond the normal need for law enforcement.'" *Id.* (citations omitted). The Supreme Court has strictly limited exceptions to the general requirement of individualized probable cause to broad searches that have a special purpose other than basic law enforcement, such as drug tests of student-athletes, inspections of homes for compliance with housing codes, and seizures of motorists at Border Patrol or sobriety checkpoints. *See id.* at 37-38. The requirement of individualized suspicion is never relaxed and remains intact "where governmental authorities

[1] It should be noted that although Plaintiffs cited *Edmond* in their opening brief, the City did not discuss the case or its holding anywhere in its response brief.

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primarily pursue their general crime control ends." *Id.* at 43. *See also*, *e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67, 83-84, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001) (individualized suspicion required where purpose of search or seizure is "for law enforcement purposes"), *cert. denied*, 156 L. Ed. 2d 605 (2003); *United States v. Kincade*, ___ F.3d ___ , 2003 U.S. App. Lexis 20123, *29 (9th Cir. 2003) (individualized suspicion required for search or seizure where purpose is for "the solving and punishing of crime") (attached as Ex. 1 to Declaration of Tyler Weaver in Support of Reply Regarding Plaintiffs Motion for Partial Summary Judgment ("Weaver Reply Decl.")).

To that end, the Ninth Circuit has held in at least two recent cases concerning arrests during demonstrations that the defendant in a wrongful arrest case cannot prevail without producing evidence of individualized probable cause. In *Dubner v. City of San Francisco*, 266 F.3d 959 (9th Cir. 2001), already discussed extensively in prior briefs, the Ninth Circuit held that "the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest." *Id*. at 965. In applying that burden, the Court held that Dubner had – as a matter of law – "made out a valid claim of lawful arrest" because the defendant had failed to come forth with any evidence "as to who arrested Dubner or what they knew at the time." *Id*. at 966.[2]

The City claims that *Dubner* has no bearing on this case because it concerned "a single plaintiff's arrest." City's Response, at p. 10. However, *Dubner* does not limit its holding to such cases. The City also claims that the somehow the facts of this case differ substantially from *Dubner* because the City can produce more evidence of probable cause, but that is simply not the case. If anything, the *Dubner* defendants provided far more individualized evidence than the City has produced.

[2] The City suggests that Plaintiffs believe that *Dubner* requires that the police officer know the identity of a person before they arrest that person. *See* City's Response at p. 9. That is not Plaintiffs' argument. Nor is it Plaintiffs' argument that "because the City may have had difficulty convicting the plaintiffs of the crimes they committed, the arrests were necessarily unlawful." *Id.* at 7. *Dubner* speaks for itself – what is required is that a defendant in a wrongful arrest case be able to produce evidence of who arrested a particular person, and what specifically that person did to warrant arrest. *Dubner*, 266 F.3d at 966.

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In *Dubner*, a citizen directed the police to arrest protesters in front of a convention center – by directing them to arrest any person who did not appear to be a convention attendee (and the plaintiff did not). *See Dubner v. City & County of San Francisco*, 1999 U.S. Dist. Lexis 15808, *34 (N.D. Cal. 1999) (attached as Ex. 1 to Weaver Reply Decl.). Furthermore, there was video evidence that placed the plaintiff near the convention doors near the time an order to disperse was given, and there was a defense witness who testified that he had seen the plaintiff "congregating" with the protesters that were arrested for failure to disperse. *See id.* at *39 - *40. However, not even such evidence was sufficient to carry the defense's burden of production on probable cause because no officer could testify to having seen her at the scene of arrest and could not testify as to why they had probable cause to arrest Dubner. *See Dubner*, 266 F.3d at 966. In comparison, in this case the City has not even produced video evidence of any arrestee, nor any officer who could identify a particular Class member, much less indicate what that person did to warrant arrest. In fact, officers who oversaw this arrest – including Capt. Pugel's primary deputy and the officer who wrote the solitary arrest report for this arrest – have testified that they could not identify a single Class member. *See* Deposition of Dan Whelan, 22:22-25, 32:14 - 33:3, Ex. 2 to Weaver Reply Decl.; Deposition of Fred Ibuki, 46:19 - 47:2, Ex. 3 to Weaver Reply Decl.; Deposition of Landy Black, 44:11 - 45:3, Ex. 4 to Weaver Reply Decl. If the *Dubner* plaintiff had established wrongful arrest as a matter of law due to the *Dubner* defendant's lack of evidence as to probable cause, then clearly the same is true for Plaintiffs and the Class.

Dubner's guidance as to the City's burden was recently affirmed and elaborated upon in *Graves v. City of Couer d'Alene*, 339 F.3d 828 (9th Cir. 2003). *Graves* was a wrongful arrest case in which the defendant did in fact produce evidence of who arrested the plaintiff, and what that officer had considered to be probable cause to arrest the plaintiff. However, the officer had his probable cause analysis largely on the circumstances in which he encountered the plaintiff – a large, potentially violent, possibly militant demonstration against a neo-Nazi parade. *See id.* at 842-44. The court held that even in such "hostile circumstances," and even given the officer's

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good intentions, there was "insufficient individualized suspicion" to support a finding of probable cause – and therefore the plaintiff had been wrongfully arrested as a matter of law. *Id*. at 844. The Ninth Circuit could not have been clearer about the requirement of individualized probable cause:

> ***[The officer] did not give adequate weight to what the Fourth Amendment requires us to place at the heart of our probable cause assessment – consideration of evidence supporting individualized suspicion.***

Id. at 844 (emphasis added). Again, if the showing in *Graves* was insufficient, it is clearly so here, where the City cannot and will not be able to produce ***any*** individualized evidence of probable cause as to any Class member.

Graves and *Dubner* are directly contrary to the City's argument that it need not produce evidence of individualized probable cause. If the City were correct, and it was enough for the City to simply produce evidence that its officers had a variety of "group" or "generalized" probable cause to arrest the Class, then the burden of production would be on Plaintiffs and the Class to come forth with evidence that the City's officers did not have individualized evidence of probable cause to arrest them. Such a shift in the burden would directly contradict *Dubner*, which clearly places that burden on the City, and also run counter to *Graves*, which unequivocally states that unless the fact finder can find ***individualized*** probable cause, the plaintiff has established wrongful arrest as a matter of law. The City has provided ***nothing*** for a finder of fact to consider in its analysis of probable cause, and therefore partial summary judgment is appropriate because there is no issue for trial.

The City nonetheless contends that because it arrested such a large group of people in this case, the requirement of probable cause should be relaxed. For that proposition, the City relies exclusively on *Cullinane* – which is not binding on this Court, as are *Dubner*, *Graves*, *Edmond, Kincade*, and *Ferguson*. In any case, *Cullinane* does not stretch as far as the City would like it to. The primary issue in *Cullinane* was whether the district court had properly issued an

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injunction mandating that the police in the future would have to complete a "field arrest form" for each person in a mass arrest. *See id*. at 120-21. The circuit court held the injunction was improper because a prosecutor could theoretically build a case against each arrestee based on witness testimony, even where no documentation of probable cause was made in the field. *See id.* at 121.

The court was ***not*** considering the considerably different question of whether an arrest that had already taken place was supported by probable cause, and hence did not even suggest that proof individualized probable cause is unnecessary either in prosecuting a criminal case, or in defending against a claim of wrongful arrest. If anything, the *Cullinane* court confirmed that merely standing next to somebody who may have broken the law is not a sufficient basis for arrest: "We do not suggest of course that one who has violated no law may be arrested for the offenses of those who have been violent or obstructive." *See id.* at 120. As the court noted, only individuals who actually heard an order to disperse and failed to capitalize on an opportunity to leave that could be arrested. *See id.* For that reason, the court was given "pause" by evidence that many of those arrested did not hear any order to leave the area. *See id.* at 120 n.4. However, because it was not deciding a wrongful arrest claim, but rather was ordering an injunction regarding documentation of probable cause, the court did not have to reach the issues of whether those individuals would have a claim of wrongful arrest. Furthermore, the court specifically approved of cases finding wrongful arrest due to lack of evidence of probable cause – ***including*** *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir. 1973). *See Cullinane*, 566 F.2d at 121 n.5 (approving of *Sullivan*). *See also Dellums*, 566 F.2d at 181 n.31 (discussing limitations of *Cullinane*'s holding). As indicated in Plaintiffs' opening brief, *Sullivan* held that if individualized probable cause is not recorded at the scene of arrest, the entire mass arrest is "presumptively invalid." *Sullivan*, 478 F.2d at 967.

Cullinane thus does not hold that law enforcement can defeat a wrongful arrest claim without providing individualized evidence of probable cause. Moreover, even if *Cullinane* had

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so held, that holding would have been invalid under *Edmond* and *Ferguson*, and would also have contradicted the law of the Ninth Circuit. Nor is the City's argument correct as a matter of principle. The City essentially claims that because it arrested more than 140 Class members, it is not bound to any requirement of producing evidence of individualized probable cause. In effect, the City's position is that the more massively it has curtailed the rights of personal liberty and free speech, the less it must do to justify its actions. Such a rule would only create a preserve incentive to conduct mass arrests and document them as poorly as the City documented the arrest of this Class. This cannot be correct, and there is no case so holding. As a matter of law, and of public policy, the City must come forward with individualized evidence of probable cause supporting this arrest – which it cannot do and has not done.

2. The City has not even attempted to characterize its actions as conforming to its own policies on this matter

In its response to Plaintiffs' motion, the City has barely even mentioned its own policy on documentation of mass arrests. The City's only mention of that policy in its opposition is a virtual admission that the documentation of this arrest violated its policy of recording individualized probable cause in cases of mass arrest arising from large demonstrations. *See* City's Response, at p. 4. The City cannot escape the fact that its own policies have codified the legal requirement of individualized evidence of probable cause, and that those policies were not followed in this case. *See* Ex. 30 to Declaration of Tyler Weaver in Support of Motion for Partial Summary Judgment, at pp. 6-7 (one portion of City policy confirming need for individualized evidence). This failure to follow its own policies simply confirms that the City cannot carry its burden.

In addition, to the extent the City is attempting to convince the Court that it would be unrealistic to expect officers to document individualized probable cause in a mass arrest, the City's policy completely belies that argument. To quote that policy:

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> To convict a suspect of Pedestrian Interference or Failure to Disperse requires, as with other crimes, that the prosecution prove the individual suspect committed the acts in question.
>
> This requires not only that the officer-witness be able identify the defendant in court, but that the officer be able to document and testify ***to specific acts committed by a specific individual***, which meet all the elements necessary to prove the crime. Thus, documentation of acts committed by the crowd in general, while relevant and helpful, are by themselves not sufficient for the charging and conviction of individual members of the crowd. ***Each individual's specific involvement and actions must be documented***. A "generic" report concerning an incident will not be sufficient.

Id. (emphasis added). The City not only contemplated that officers would be able to document individualized probable cause, it mandated them to do so. The City's argument that it should not should not now be held to that standard rings hollow.

3. The City's response confirms that it lacks individualized probable cause

The City's response to Plaintiff's motion confirms that the City has no individualized evidence of probable cause. The City has not even attempted to produce such evidence, nor even attempt to rebut Plaintiffs' showing that those arrested included people who were merely bystanders or people who had happened upon the scene. The only mention of what any specific Class member did is a reference to the declaration of Class representative Carroll Jackson, in which the City apparently claims Mrs. Jackson admitted blocking traffic. *See* City's Opposition at p. 8. However, any honest reading of that declaration reveals that Ms. Jackson was never blocking traffic that was not already blocked by others (including the police) and that her only intent was to obey police orders, not to block traffic. *See* Declaration of Carroll Jackson, ¶ 4, Ex. 4 to Declaration of Tyler Weaver in Support of Motion for Partial Summary Judgment. In fact, Ms. Jackson unequivocally stated in her declaration, "I never blocked traffic." *See id.* at ¶ 5. This declaration does not satisfy the City's burden of production on any point.

The only witness declaration that the City has submitted in opposition to Plaintiffs' motion is that of Lt. Dan Whelan, who offers nothing more than his generalized view of what the

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Class did to justify arrest. This is not surprising given that Lt. Whelan (despite being the author of the only arrest report in this case) was not present for the actual arrest and cannot identify a single Class member. *See* Deposition of Dan Whelan, 27:24 - 28:3, 32:14 - 33:3 and 45:16-21, Ex. 2 to Declaration of Tyler Weaver in Support of Reply Regarding Plaintiffs Motion for Partial Summary Judgment ("Weaver Reply Decl."). The testimony of other officers is essentially the same – that none of them can identify a single Class member. *See*, *e.g.*, Deposition of Fred Ibuki, 46:19 - 47:2, Ex. 3 to Weaver Reply Decl.; Deposition of Landy Black, 44:11 - 45:3, Ex. 4 to Weaver Reply Decl.

In addition, shortly after Plaintiffs filed their motion in this Court, they received the City's answer to Interrogatory No. 11, as compelled by this Court on October 10, 2003. In answering that interrogatory, which sought a recitation of all facts supporting probable cause to arrest the Class members, the City provided a revised and updated version of its view of the facts, but did not discuss any Class member, much less provide anything to support individualized probable cause. *See* Ex. 5 to Weaver Reply Decl. The City cannot carry its burden of production, and Plaintiffs are entitled to partial summary judgment.

D. Because the City Has Failed to Carry Its Burden of Producing Individualized Evidence, Its Arguments On Probable Cause Are Irrelevant

Even if the City had carried its burden, Plaintiffs have already rebutted the City's arguments concerning probable cause to arrest the Class for pedestrian interference, in Plaintiffs' opposition to the City's summary judgment motion. However, because the City has failed to carry its burden of production, its arguments regarding probable cause in response to this motion are irrelevant.[3]

[3] Even if the Court denies Plaintiffs' motion for partial summary judgment that does not mean the City is entitled to summary judgment. Plaintiffs have opposed that motion, and in particular the City's arguments regarding probable cause, in their opposition to that motion and refer to that opposition for a discussion of the numerous genuine issues of material fact with regard to the crimes for which the City contends it had probable cause to arrest the Class.

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E. The City's Groundless Motion to Strike Would Not Affect the Outcome of This Motion Even If It Was Granted

The City has also moved to strike several of the declarations of several Class members and other witnesses, as well as two exhibits. Plaintiffs will respond to this motion on or before November 10, 2003, as provided in CR 7(d)(3). For present purposes, it is enough to note that Plaintiffs will argue that the City's motion is groundless and that the motion should be denied.

However, even if the City was entirely successful in striking the evidence it seeks to strike, the Court should still grant Plaintiffs' motion, and need not wait until the briefing on the motion to strike is complete to grant partial summary judgment to Plaintiffs. Even without the evidence the City claims was improperly submitted, it remains undisputed that the City cannot produce any evidence of individualized probable cause, as admitted by the City in its discovery responses and as confirmed by the testimony of its own officers. The City has failed to carry its burden under *Dubner* and related cases, and therefore partial summary judgment in favor of Plaintiffs is appropriate – even if the City were to successfully strike the evidence it seeks to exclude.

IV. CONCLUSION

For the reasons given above and in Plaintiffs' opening brief, the Court should grant Plaintiffs' motion for partial summary judgment.

Dated: October 30, 2003.

HAGENS BERMAN LLP

By_____
Steve W. Berman, WSBA #12536
Tyler Weaver, WSBA #29413
1301 Fifth Avenue, Suite 2900
Seattle, WA 98101
(206) 623-7292

1301 FIFTH AVENUE, SUITE 2900 • SEATTLE, WA 98101
TELEPHONE (206) 623-7292 • FACSIMILE (206) 623-0594

Arthur Bryant
Victoria Ni
TRIAL LAWYERS FOR PUBLIC JUSTICE
One Kaiser Plaza, Suite 275
Oakland, CA 94612-3684
(510) 622-8150

Michael E. Withey
STRITMATTER KESSLER WHELAN WITHEY COLUCCIO
200 Second Avenue West
Seattle, WA 98119-4204
(206) 448-1777

FRED DIAMONDSTONE
Attorney at Law
700 Dexter Horton Bldg
710 Second Ave
Seattle, WA 98104
(206) 568-0082

YVONNE KINOSHITA WARD
Attorney at Law
128 14th St. S.E.
Auburn, WA 98002
(253) 887-8686

John Muenster
MUENSTER & KOENIG
Wells Fargo Center
999 Third Ave., Suite 4100
Seattle, WA 98104

Benjamin Schwartzman
LOVELL STEWART HALEBIAN & BARTH, LLP
1420 Fifth Ave., Suite 2200
Seattle, WA 98101

ERWIN CHEMERINSKY
Professor of Law
Univ. of So. Calif. Law School
University Park
Los Angeles, CA 90089-0071

Counsel for Plaintiffs

1301 FIFTH AVENUE, SUITE 2900 • SEATTLE, WA 98101
TELEPHONE (206) 623-7292 • FACSIMILE (206) 623-0594