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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



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1 **TABLE OF AUTHORITIES**

2 **CASES**

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6 566 F.2d 167 (D.C. Cir. 1977).....3, 7

7 *Dubner v. City & County of San Francisco*,
8 1999 U.S. Dist. Lexis 15808 (N.D. Cal. 1999).....5, 6, 11

9 *Dubner v. City of San Francisco*,
10 266 F.3d 959 (9th Cir. 2001)2, 4, 5

11 *Ferguson v. City of Charleston*,
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13 *cert. denied*, 156 L. Ed. 2d 605 (2003).....4, 6, 8

14 *Graves v. City of Couer d'Alene*,
15 339 F.3d 828 (9th Cir. 2003)5, 6, 7

16 *Pembaur v. City of Cincinnati*,
17 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986).....2

18 *St. Louis v. Praprotnik*,
19 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988).....2

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24 *United States v. Kincade*,
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26 *Washington Mobilization Comm. v. Cullinane*,
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29 C.F.R. § 2509.75-5FR-103

29 C.F.R. § 2550.404a-1(b)4

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

7 I. INTRODUCTION

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

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

23 II. STATEMENT OF FACTS

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



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III. ARGUMENT

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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.

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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



1 acknowledge this burden, it also does not deny that it exists, nor could it. To the extent the
2 City’s discussion of *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107 (D.C. Cir.
3 1977), is an attempt to deny the existence of its burden, the City is incorrect. *Cullinane* does not
4 even discuss the City’s burden, much less hold that it does not exist. Even in the *Cullinane* court
5 the defendant in a wrongful arrest suit bears “the burden of justifying the arrest.” *See Dellums v.*
6 *Powell*, 566 F.2d 167, 175-76 (D.C. Cir. 1977). The City bears that burden, and as explained in
7 Plaintiffs’ opening brief, and again below, the burden is to produce evidence of *individualized*
8 probable cause.

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

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

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

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

26 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.



1 primarily pursue their general crime control ends.” *Id.* at 43. *See also, e.g., Ferguson v. City of*
2 *Charleston*, 532 U.S. 67, 83-84, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001) (individualized
3 suspicion required where purpose of search or seizure is “for law enforcement purposes”), *cert.*
4 *denied*, 156 L. Ed. 2d 605 (2003); *United States v. Kincade*, ___ F.3d ___, 2003 U.S. App. Lexis
5 20123, *29 (9th Cir. 2003) (individualized suspicion required for search or seizure where
6 purpose is for “the solving and punishing of crime”) (attached as Ex. 1 to Declaration of Tyler
7 Weaver in Support of Reply Regarding Plaintiffs Motion for Partial Summary Judgment
8 (“Weaver Reply Decl.”)).

9 To that end, the Ninth Circuit has held in at least two recent cases concerning arrests
10 during demonstrations that the defendant in a wrongful arrest case cannot prevail without
11 producing evidence of individualized probable cause. In *Dubner v. City of San Francisco*, 266
12 F.3d 959 (9th Cir. 2001), already discussed extensively in prior briefs, the Ninth Circuit held that
13 “the burden shifts to the defendant to provide some evidence that the arresting officers had
14 probable cause for a warrantless arrest.” *Id.* at 965. In applying that burden, the Court held that
15 Dubner had – as a matter of law – “made out a valid claim of lawful arrest” because the
16 defendant had failed to come forth with any evidence “as to who arrested Dubner or what they
17 knew at the time.” *Id.* at 966.²

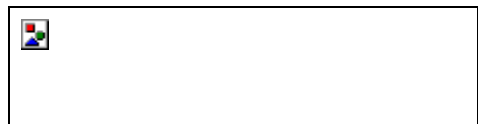
18 The City claims that *Dubner* has no bearing on this case because it concerned “a single
19 plaintiff’s arrest.” City’s Response, at p. 10. However, *Dubner* does not limit its holding to such
20 cases. The City also claims that the somehow the facts of this case differ substantially from
21 *Dubner*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

24 ² The City suggests that Plaintiffs believe that *Dubner* requires that the police officer know the identity of a
25 person before they arrest that person. *See* City’s Response at p. 9. That is not Plaintiffs’ argument. Nor is it
26 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.



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

20 *Dubner*’s guidance as to the City’s burden was recently affirmed and elaborated upon in
21 *Graves v. City of Couer d’Alene*, 339 F.3d 828 (9th Cir. 2003). *Graves* was a wrongful arrest
22 case in which the defendant did in fact produce evidence of who arrested the plaintiff, and what
23 that officer had considered to be probable cause to arrest the plaintiff. However, the officer had
24 his probable cause analysis largely on the circumstances in which he encountered the plaintiff – a
25 large, potentially violent, possibly militant demonstration against a neo-Nazi parade. See *id.* at
26 842-44. The court held that even in such “hostile circumstances,” and even given the officer’s



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

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

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

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

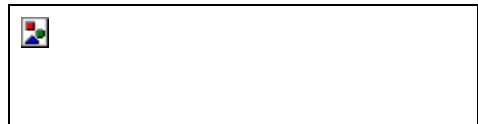
23 The City nonetheless contends that because it arrested such a large group of people in this
24 case, the requirement of probable cause should be relaxed. For that proposition, the City relies
25 exclusively on *Cullinane* – which is not binding on this Court, as are *Dubner*, *Graves*, *Edmond*,
26 *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



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

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

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



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

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

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

23 In addition, to the extent the City is attempting to convince the Court that it would be
24 unrealistic to expect officers to document individualized probable cause in a mass arrest, the
25 City’s policy completely belies that argument. To quote that policy:
26



1 To convict a suspect of Pedestrian Interference or Failure to
2 Disperse requires, as with other crimes, that the prosecution prove
the individual suspect committed the acts in question.

3 This requires not only that the officer-witness be able identify the
4 defendant in court, but that the officer be able to document and
5 testify *to specific acts committed by a specific individual*, which
6 meet all the elements necessary to prove the crime. Thus,
7 documentation of acts committed by the crowd in general, while
8 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.

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

12 **3. The City’s response confirms that it lacks individualized probable cause**

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

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



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

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

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

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

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25 ³ Even if the Court denies Plaintiffs’ motion for partial summary judgment that does not mean the City is
26 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.



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

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

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

16 **IV. CONCLUSION**

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

19 Dated: October 30, 2003.

20 HAGENS BERMAN LLP

21
22 By _____
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25 1301 Fifth Avenue, Suite 2900
26 Seattle, WA 98101
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