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The Honorable Marsha J. Pechman

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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' MOTION FOR PARTIAL
SUMMARY JUDMGENT

Noted: October 31, 2003

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDMGENT
Case No. C00-1672 P
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20 341 F.3d 957 (9th Cir. 2003)10, 11

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1 Plaintiffs hereby move for an order granting partial summary judgment against Defendant
2 the City of Seattle ("the City") as to the City's liability for the wrongful arrest of Plaintiffs
3 Robert Hickey, Carroll Jackson, and the Class they represent, in violation of the Fourth and
4 Fourteenth Amendments to the United States Constitution.

5 I. INTRODUCTION

6 This motion rests on a basic principle – that when a party has a burden of production or
7 persuasion on a particular point, and cannot identify a single fact that would assist it in carrying
8 its burden of production or persuasion, the opposing party is entitled to summary judgment on
9 the issue in question. Plaintiffs Robert Hickey, Carroll Jackson, and the Class they represent¹
10 allege that the City wrongfully arrested them in violation of their rights to be free from
11 unreasonable searches and seizures. In defending against those allegations, because this is a
12 wrongful arrest case, the City bears the burden of producing evidence that demonstrates it had
13 probable cause to arrest each Class member. However, the City cannot carry its burden, because
14 it is undisputed that the City *has no such evidence*. A trial on the City's liability for wrongful
15 arrest is entirely unnecessary, since the City has no evidence to introduce that would help it to
16 carry its burden. Accordingly, there is no genuine issue of material fact regarding the City's
17 liability for the wrongful arrest of the Class. Plaintiffs Robert Hickey and Carroll Jackson, and
18 the Class they represent, are entitled to partial summary judgment on the issue of the City's
19 liability under their claims of wrongful arrest in violation of the Fourth and Fourteenth
20 Amendments to the United States Constitution. Plaintiffs do not seek summary judgment as to
21 their First Amendment claims and related state-law freedom-of-speech claims, nor as to issues of
22 damages.

23
24 ¹ Pursuant to this Court's order of November 5, 2002, final judgment was entered under Fed. R. Civ. P. 54(b)
25 against most of the other Plaintiffs named in this case – Kenneth Hankin, Jennifer Hudziec, Stephanie Lane, Jennifer
26 Hudziec, Denise Cooper, and Nicole Pearson, as the Court's previous rulings had extinguished their claims. See
Exhibit I to Declaration of Tyler S. Weaver in Support of Plaintiffs' Motion for Partial Summary Judgment. Those
Plaintiffs have appealed to the Ninth Circuit Court of Appeals and are not currently before this Court. Plaintiff
Emily Maloney is not a Class representative, nor a member of the certified Class, and the parties have reached
agreement as to the settlement of Mrs. Maloney's claims.

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II. FACTS

In broad summary, this case is about the arrest of a Class of approximately 150 people, many of whom were peaceful protesters that had been chased by Seattle police through the city streets for up to a mile before the police gassed them, shot them with "less lethal" munitions such as rubber pellets, prevented them from leaving, and arrested them. Other Class members were unfortunate passersby who followed police orders to join those who had been herded together, and were then arrested en masse and without any concern for probable cause. Indeed, the City and its officers failed to record or document a single fact that indicated that they had probable cause to arrest any Class member, instead treating them as a homogenous group subject to the same charges. The following is Plaintiffs' summary of the facts of this case.²

A. The City Erects a No-Protest Zone, Outside of Which the United Steelworkers of America and Associated Groups Conduct a Peaceful March

On the morning of December 1, 1999, the World Trade Organization, ("WTO"), was convened in downtown Seattle for a series of meetings that had commenced on November 30, 1999. That morning, in an attempt to keep the WTO meetings on track following a day of widespread protest on November 30, the City of Seattle had declared a large portion of downtown Seattle off-limits to all protest. This area, known as the "No-Protest Zone," had borders that ran from 4th Avenue eastward to Interstate 5, and from Seneca northward to Pine in one area, and Lenora in another. See Declaration of Tyler Weaver ("Weaver Decl."), Ex. 31 (mayoral order creating Zone). Those allowed into the Zone included WTO delegates, media, city employees, business owners, downtown residents, and downtown workers – in short, virtually every imaginable group other than protesters. See *id.*

² Plaintiffs recognize that there are likely to be disputes between the parties as to certain of these facts, and that the City will likely attempt to dispute many of these facts in its opposition to this motion. However, this statement of facts is necessary for the Court to understand the factual background to this case and this motion. Moreover, the fact that is central to this motion – that the City has no individualized evidence of probable cause for any Class member – is entirely undisputed. Therefore, there is no genuine issue of material fact that prevents the granting of Plaintiffs' motion.

1 The Zone was widely publicized and enforced by Seattle police, the National Guard, and
2 other police departments from around the State, including the Washington State Patrol. As Ed
3 Joiner of the Seattle Police Department declared that day to the national media, "Anyone who
4 goes into that area to protest will be arrested immediately." Ex. 32 to Weaver Decl., p. 2. This
5 was not an empty threat; hundreds of peaceful protesters were in fact arrested on December 1,
6 1999, for violating the boundaries of the No-Protest Zone.³

7 A reasonable assumption was that if protest was banned in the No-Protest Zone, it was
8 permitted elsewhere. In fact, the Court's prior order declaring the No-Protest Zone constitutional
9 was based in large part on the fact that the Court concluded that the City had not banned protest
10 throughout the entire City, and had left areas outside the Zone open to peaceful protest. *See*
11 October 29, 2001, Order, at pp. 16-17, Ex. 2 to Weaver Decl..

12 It was against this backdrop that a substantial number of anti-WTO demonstrations took
13 place on December 1 outside the Zone, in full compliance with the mayoral order that had set the
14 boundaries of the Zone. One of the largest that day was a march sponsored by the United
15 Steelworkers of America that began at the Labor Temple at the intersection of First Avenue and
16 Broad Street in Seattle, and ended with a rally on the Seattle waterfront. *See* Weaver Decl., Ex.
17 33 (permit for Steelworkers march). The Seattle waterfront, and hence the rally and the course
18 of the march, were outside the No-Protest Zone. *See* Weaver Decl., Ex. 31 (boundaries of Zone).
19 As that rally came to a close in the mid-afternoon of December 1, several hundred of those
20 present at the rally continued their protest by marching up the Pike Place Market hillclimb and
21 into the area near the Market – all of which was outside the Zone. *See, e.g.,* Declaration of
22 Michael Anderson, ¶¶ 3, 4; Declaration of Max Beagarie, ¶¶ 2, 3; Declaration of Nancy Egan,
23 ¶¶ 3, 4; Declaration of Nathaniel Eli Hastings, ¶¶ 3, 4; Declaration of Robert Hickey, ¶ 3

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26 ³ This included several of the Plaintiffs in this case other than Hickey and Jackson. Those Plaintiffs' claims are
now on appeal. *See* footnote 1.

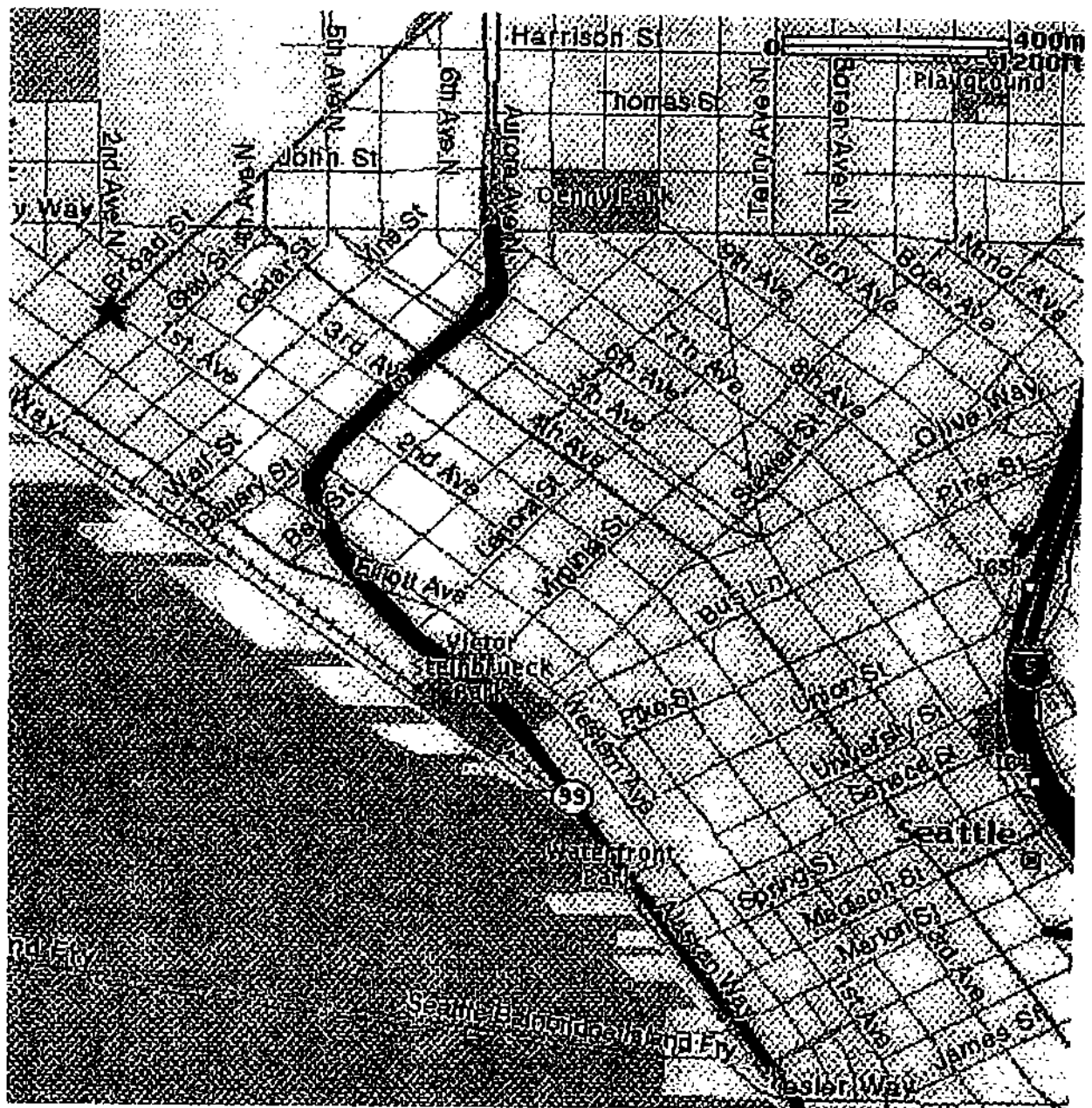
1 (attached as Ex. 3 to Weaver Decl.); Declaration of Jonathan Moore, ¶¶ 2, 3 (attached as Ex. 5 to
2 Weaver Decl.), Declaration of Jonathan Rosenblum, ¶ 3.

3 **B. The City's Officers Confront Protesters With Teargas and Munitions and Proceed**
4 **to Herd Them to the Intersection of First and Broad, Where They Are Surrounded**
5 **and Prevented From Leaving**

6 The Seattle Police responded to calls that there were protesters in the area near the
7 Market, and the result was a group of confrontations at various locations in the area,
8 confrontations that all had a common theme. At the intersections of Third and Pine, Second and
9 Pike, and First and Pike, protesters and others encountered police lines and large groups of police
10 who teargassed the crowd – without any prior warning or order to disperse – and shot various
11 projectiles into the crowd, including rubber bullets and concussion grenades. *See, e.g.*, Beagarie
12 Decl., ¶ 3 (Third/Pine); Declaration of Estelle Davis, ¶¶ 6, 7 (First/Pike); Egan Decl., ¶ 4
13 (approx. Third/Pine); Hastings Decl., ¶ 6 (Third/Pine); Hickey Decl., ¶ 3 (Second or Third and
14 Pike) (attached as Ex. 3 to Weaver Decl.); Moore Decl., ¶ 3 (attached as Ex. 5 to Weaver Decl.)
15 (Second/Pike); Rosenblum Decl., ¶¶ 3-6 (Second/Pike).

16 To assist the Court in orienting itself to these points of initial conflict, and the ensuing
17 events discussed, below the following is a partial map of downtown Seattle depicting the streets
18 and intersections discussed in this brief and the related exhibits:
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1428 10 0128 NITN DOC

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1 It is undisputed that at each location where the groups of protesters initially confronted
2 police, the groups left the area upon being shot at and gassed. *See, e.g.*, Deposition of Lt. Dan
3 Whelan, at 18:25 – 19:20, Ex. 27 to Weaver Decl.; Deposition of Sgt. Fred Ibuki, at 17:12 – 19,
4 Ex. 26 to Weaver Decl.. The crowd remained peaceful, despite being attacked. *See, e.g.*, Ibuki
5 Dep. at 27:12 – 24, 39:19 – 25. *See also* Anderson Decl., ¶¶ 5, 7; Beagarie Decl., ¶ 9; Davis
6 Decl., ¶ 23; Hastings Decl., ¶ 12; Declaration of Sarah Kerr, ¶ 4; Moore Decl., ¶¶ 3, 4 (attached
7 as Ex. 5 to Weaver Decl.); Rosenblum Decl, ¶ 7. However, the protesters were unable to get
8 away from the police, who continued to pursue them as they left the area. *See, e.g.*, Anderson
9 Decl., ¶¶ 6-8; Beagarie Decl., ¶¶ 4, 5; Egan Decl., ¶ 4; Hastings Decl., ¶¶ 7-11; Kerr Decl., ¶¶ 3-
10 6. As the only police report ever generated with regard to this incident confirms, the intent of the
11 police was to drive the protesters to the north, trap them, and arrest them:

12 A MOVING CONFLICT ENSUED WITH THE CROWD
13 ATTEMPTING TO CONTINUE SOUTH, OUT OF CONCERN
14 FOR THE SECURITY OF THE WTO AND THE DOWNTOWN
15 AREA THAT WAS DEVASTATED THE DAY BEFORE BY
16 ANTI-WTO RIOTERS, IT WAS DECIDED TO MOVE THE
CROWD NORTH AND ATTEMPT TO FIND AN AREA
WHERE THE CROWD COULD BE CONTAINED AND
ARRESTED.

17 Ex. 22 to Weaver Decl., at p. 2. According to Captain Jim Pugel, who was directing this action,
18 the officers' goal was to "corner" the protesters. Deposition of Capt. Pugel, at 261:25 – 262:2,
19 Ex. 23 to Weaver Decl. That is precisely what the police did.

20 The incident report once again provides a succinct description of what the police did:

21 THE CROWD WAS FOLLOWED AND MANAGED TO THE
22 AREA OF 1ST AND CLAY. AGAIN CHEMICAL AGENTS
23 AND LESS LETHAL WEAPONS WERE DEPLOYED. THE
CROWD WAS STOPPED, SURROUNDED BY OFFICERS,
AND TAKEN INTO CUSTODY.

24 Ex. 22 to Weaver Decl., at p. 3. More precisely, from approximately the intersection of First
25 Avenue and Pike Street, the police pursued multiple groups of people northward on Western and
26 First Avenues, ultimately pushing them all onto First Avenue. *See, e.g.*, Deposition of Lt. Landy

1 Black, at 40:8 – 41:9, Ex. 24 to Weaver Decl. (multiple groups herded simultaneously); Ibuki
2 Dep., at 26:3 – 14, Ex. 26 to Weaver Decl. (distinct groups on Western). *See also, e.g.,*
3 Anderson Decl., ¶ 7; Beagarie Decl., ¶¶ 7, 9; Egan Decl., ¶ 4; Hastings Decl., ¶¶ 9, 10; Kerr
4 Decl., ¶¶ 4, 5; Moore Decl., ¶¶ 4, 6 (attached as Ex. 5 to Weaver Decl.). This was a coordinated
5 effort that Capt. Pugel choreographed over police channels. Those communications confirm that
6 officers were told to the groups moving them north, and to use various munitions to direct the
7 crowd to the desired location. *See, e.g.,* Ex. 3 to Declaration of Tricia Sexton (attached as Ex. 6
8 to Weaver Decl.), at pp. 8 (“use the pepper and the stingballs to drive them west”); 10 (seeking
9 “as many available CART units north on Third and Fourth and try to block any street up to
10 [Denny] to prevent them from going eastbound”); 11 (directing units to come westbound to First
11 Avenue from Second).

12 As they moved northward followed by police, several members of the various groups
13 attempted to leave First Avenue via cross streets but officers who were lining or filling those
14 cross streets prevented them from doing so. *See, e.g.,* Anderson Decl., ¶8; Davis Decl., ¶ 13-16,
15 20; Egan Decl., ¶ 4; Hastings Decl., ¶ 10; Kerr Decl., ¶ 6; Moore Decl., ¶ 4 (attached as Ex. 5 to
16 Weaver Decl.). This went on for many, many blocks. Although several members of the crowd
17 had initially encountered police at Third and Pine and had attempted to evade them via a path
18 that took them through the area around Pike’s Place Market, officers pursued them for
19 approximately 14 or 15 blocks (away from downtown and the No-Protest Zone) until the crowd
20 neared the Labor Temple, where the Steelworkers’ march had commenced earlier that day.

21 At the intersection of First Avenue and Broad Street (where the Labor Temple is located),
22 the police hemmed the crowd in, blocking them from their attempts of continuing to leave the
23 area by bringing in a squadron of officers from the north, thereby trapping them between two
24 police lines. *See, e.g.,* Capt. Pugel Dep., 278:16 – 279:4, Ex. 23 to Weaver Decl.; Ex. 6 to
25 Weaver Decl., at p. 12 (police communications documenting desire to “keep them from going
26 north on First from Broad”). *See also* Egan Decl., ¶¶ 5, 9; Hastings Decl., ¶ 14; Moore Decl., ¶ 4

1 Black, at 40:8 – 41:9, Ex. 24 to Weaver Decl. (multiple groups herded simultaneously); Ibuki
2 Dep., at 26:3 – 30, Ex. 26 to Weaver Decl. (distinct groups on Western). *See also, e.g.,*
3 Anderson Decl., ¶ 7; Beagarie Decl., ¶¶ 7, 9; Egan Decl., ¶ 4; Hastings Decl., ¶¶ 9, 10; Kerr
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13 attempted to leave First Avenue via cross streets but officers who were lining or filling those
14 cross streets prevented them from doing so. *See, e.g.,* Anderson Decl., ¶8; Davis Decl., ¶ 13-16,
15 20; Egan Decl., ¶ 4; Hastings Decl., ¶ 10; Kerr Decl., ¶ 6; Moore Decl., ¶ 4 (attached as Ex. 5 to
16 Weaver Decl.). This went on for many, many blocks. Although several members of the crowd
17 had initially encountered police at Third and Pine and had attempted to evade them via a path
18 that took them through the area around Pike’s Place Market, officers pursued them for
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22 the police hemmed the crowd in, blocking them from their attempts of continuing to leave the
23 area by bringing in a squadron of officers from the north, thereby trapping them between two
24 police lines. *See, e.g.,* Capt. Pugel Dep., 278:16 – 279:4, Ex. 23 to Weaver Decl.; Ex. 6 to
25 Weaver Decl., at p. 12 (police communications documenting desire to “keep them from going
26 north on First from Broad”). *See also* Egan Decl., ¶¶ 5, 9; Hastings Decl., ¶ 14; Moore Decl., ¶ 4

1 (attached as Ex. 5 to Weaver Decl.); Rosenblum Decl., ¶ 10. The crowd was blocked from
2 continuing northward, in part by the use of an armored vehicle that came southward from Denny,
3 from which several officers launched “stinger grenades” toward the crowd. *See, e.g.*, Deposition
4 of Officer Thomas Burns, 90:2 – 91:13, Ex. 25 to Weaver Decl.

5 At some point in the area of First and Broad, an officer indicated the crowd could leave
6 the area, but as soon as they attempted to go the direction that officer had indicated, another
7 group of officers fired “less lethal” munitions at them and did not allow them to leave. *See, e.g.*,
8 Anderson Decl., ¶ 9; Egan Decl., ¶¶ 5, 6, 9; Hastings Decl., ¶¶ 16-18; Declaration of Carroll
9 Jackson, ¶ 4 at pp. 3-4 (attached as Ex. 4 to Weaver Decl.); Kerr Decl., ¶ 7. Those surrounded
10 were ordered to sit down, and did so. They were not allowed to leave the area again before being
11 arrested – even if they asked to do so. *See, e.g.*, Black Dep. at 36:16 – 37:2, Ex. 24 to Weaver
12 Decl.; Beagarie Decl., ¶ 10; Egan Decl., ¶ 5; Hastings Decl., ¶ 15; Hickey Decl., ¶ 4 (attached as
13 Ex. 3 to Weaver Decl.); Jackson Decl., ¶ 4, p. 4 (attached as Ex. 4 to Weaver Decl.); Kerr Decl.,
14 ¶ 7.

15 **C. The City’s Officers Refuse to Let Anyone in the Surrounded Area Leave and**
16 **Indiscriminately Arrest Anyone In the Area**

17 However, the officers did not limit themselves to arresting only the people they had
18 herded toward First and Broad. Instead, it is undisputed that there were several individuals who
19 had no association with the group that were ordered to join the crowd and indiscriminately
20 arrested along with the others. *See, e.g.*, Egan Decl., ¶ 6; Hastings Decl., ¶ 15; Hickey Decl.,
21 ¶¶ 4, 6 (attached as Ex. 3 to Weaver Decl.); Jackson Decl., ¶ 4, p. 4 (attached as Ex. 4 to Weaver
22 Decl.). Footage taken at the scene of the mass arrest dramatically documents the police’s refusal
23 to let even those sitting apart from the group leave the area upon their requests to do so. *See*
24 Declaration of Robert Hickey in Support of Plaintiffs’ Motion for Partial Summary Judgment,
25 Ex. 1. There was no attempt made to distinguish between those herded and those who were
26 unfortunate enough to find themselves in the area when police surrounded it.

1 **D. Class Members Are Held For Three Days and All Charges Are Subsequently**
2 **Dropped**

3 The surrounded group was eventually arrested and carted off on transit buses for booking
4 at the Sandpoint Naval Facility, which was being used to process arrestees during the WTO
5 meetings, and then jailed. The vast majority of the Class members were jailed for three days.
6 *See, e.g.*, Egan Decl., ¶ 7; Hastings Decl., ¶ 27; Hickey Decl., ¶ 6 (attached as Ex. 3 to Weaver
7 Decl.); Jackson Decl., ¶ 7 (attached as Ex. 4 to Weaver Decl.); Kerr Decl., ¶¶ 11-13. *Cf.*
8 Anderson Decl., ¶¶ 16-17 (kept only one day due to medical condition). However, to Plaintiffs'
9 knowledge, not a single member of the Class ever faced prosecution on any charges arising out
10 of this arrest, and the City dropped all charges against the Class members. *See, e.g.*, Anderson
11 Decl., ¶ 18 Egan Decl., ¶ 8; Hastings Decl., ¶ 28; Hickey Decl., ¶ 7 (attached as Ex. 3 to Weaver
12 Decl.); Jackson Decl., ¶ 8 (attached as Ex. 4 to Weaver Decl.). Approximately 150 people were
13 held for as long as three days (roughly until the WTO meetings stopped and the delegates left
14 town) without ever facing charges.

15 **E. All of the Class Members Are Arrested and Booked Using Identical Arrest Records**
16 **and Without Any Documentation as to What Any Class Member Specifically Did or**
17 **Did Not Do to Warrant Arrest**

18 Even though the City had arrested roughly 150 people, and kept them in jail for as long as
19 3 days, the City's documentation of the arrests is sparse at best. As described in greater detail in
20 section III.3 of this motion, the City treated every single one of its 150 arrestees in exactly the
21 same fashion, using photocopied arrest records and explanations for arrest. As this Court
22 observed when certifying the Class, "the ... class members were arrested together at the same
23 general location, for the same alleged violation, and they were booked on the same charge." Ex.
24 1 to Weaver Decl., at pp. 9-10: The City did not record in any Class member's arrest record any
25 individual-specific information about what any arrestee had done, not done, seen, or heard, that
26 might have justified arrest. The City did not even record which officer had arrested which
person. *See* Weaver Decl., ¶¶ 9 – 17 (describing arrest records) and Exs. 7 to 21 (illustrative

1 arrest records and table summarizing all 140+ arrest records). As described below, even the
2 photocopied arrest records that the City did use are undisputedly false in several respects.

3 Moreover, even though this arrest involved approximately 150 civilians and dozens of
4 police officers, the City prepared only one report summarizing the incidents resulting in the mass
5 arrest. That three-page report, attached as Exhibit 22 to Weaver Decl., does not discuss any
6 particular arrestee, much less what any person did to justify being arrested and detained for three
7 days.

8 To this day, the City cannot identify any fact that would support a finding that the City
9 had probable cause to arrest any individual, beyond discussing in broad terms what the Class
10 members allegedly did "as a group." In its initial answer to Plaintiffs' Interrogatory No. 11, in
11 which Plaintiffs sought all facts constituting probable cause to arrest any Class member, the City
12 refused to answer for individuals but gave a description as to what the arrestees had done "as a
13 group." See Ex. 28 to Weaver Decl., at p. 6. More recently, in its opposition to Plaintiffs'
14 motion to compel an answer to that interrogatory as to individuals, the City indicated it should
15 not be required to respond further because it had no additional information, and "all of the
16 information [the City has] relevant to Interrogatory No. 11 was contained in the individual arrest
17 records." Weaver Decl., Ex. 29, p. 9.⁴ Yet, as described in detail in section III.B.2.b of this
18 motion, those arrest records contain no individualized evidence of probable cause, and are
19 identical for each Class member. The City has no individualized evidence of probable cause.

20 III. ARGUMENT

21 A. Standard of Review

22 On summary judgment, this Court's role is determine whether there is any genuine issue
23 of material fact such that trial would be necessary to resolve that issue of fact. See, e.g., *Taybron*
24 *v. City and County of San Francisco*, 341 F.3d 957, 957 (9th Cir. 2003). In this case, the issue is
25

26 ⁴ The Court has since compelled a further, complete answer to Interrogatory No. 11 as to individuals. As of the
filing of this motion, the City has not yet provided that additional answer.

1 whether the City can produce evidence that it had probable cause to arrest any Class member.
2 On that issue, it is the defendant – the City – that bears the burden of production. As described
3 below in Section III.B.1, this unusual assignment of the burden of production is the result of the
4 fact that Plaintiffs claim they were wrongfully arrested. Therefore, Plaintiffs’ burden on this
5 motion is to demonstrate that the City “does not have enough evidence to carry its burden at
6 trial.” *Block v. City of Los Angeles*, 253 F.3d 410, 416 (9th Cir. 2001), citing *Nissan Fire &*
7 *Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once Plaintiffs
8 make such a showing, the City has the burden of providing “specific facts showing that there is a
9 genuine issue for trial” as to whether the City had individualized probable cause to arrest any
10 Class member. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986).

11 **B. The City Bears the Burden of Coming Forth With Evidence of Individualized**
12 **Probable Cause, Which It Cannot Do**

13 The law is clear that the City, like any defendant in a wrongful arrest case, has the burden
14 of producing evidence that at the time it arrested the Class members, it had individualized
15 probable cause to do so. The law is so clear, in fact, that the City’s own guidelines for
16 documenting mass arrests confirm that it is not enough to arrest a group of people and then claim
17 that they all did or did not do the same thing. *See infra*, Section III.B.2. However, in this case,
18 the City failed to follow its own guidelines, and as a result has absolutely no evidence of
19 individualized probable cause that it could introduce at trial. As a matter of law, the City cannot
20 carry its burden of production and therefore Plaintiffs are entitled to summary judgment as to the
21 City’s liability under the Fourth Amendment.

22 **1. The City bears the burden of providing individualized evidence that it had**
23 **probable cause to arrest each Class member at the time of the arrest**

24 At trial, the City would bear the burden of producing evidence that, at the time of the
25 arrest, its officers had probable cause to arrest each Class member. This is a burden to produce
26 evidence specific to each Class member that demonstrates the City had probable cause to arrest
that Class member.

1 The nature of the City's burden, and the consequences of failing to carry that burden,
2 were most recently outlined by the Ninth Circuit in *Dubner v. City and County of San Francisco*,
3 266 F.3d 959 (9th Cir. 2001). In *Dubner*, the plaintiff was arrested while acting as a legal
4 observer at a demonstration in downtown San Francisco. *See id.* at 961. At some point, the
5 demonstrators were determined to be trespassing or in violation of police orders and were
6 arrested as a group that included Dubner. *See id.* at 963. At trial it became clear that the person
7 listed as the arresting officer did not know Dubner and had not arrested her, that there was no
8 record of who had arrested Dubner, and that the defendants could not produce any evidence that
9 they had probable cause to arrest Dubner. *See id.* at 964. The trial court ruled in favor of the
10 defense, on the erroneous ground that Dubner bore the burden of proving that the officers did not
11 have probable cause to arrest her. The Ninth Circuit reversed, holding that a defendant in a
12 wrongful arrest case must – at a minimum – “provide some evidence that the arresting officers
13 had probable cause for a warrantless arrest” because “the police department ... is in the better
14 position to gather information about the arrest.” *Id.* at 965. As the court elaborated:

15 [D]efendants had the burden of producing some evidence that the
16 arresting officers had probable cause. None of the officers testified
17 to having seen Dubner during the demonstration, much less to
18 having seen her break the law. ... [T]here is no indication that
19 any of the police officers at the [scene of arrest] witnessed Dubner
20 violate any laws or communicated any information regarding
21 Dubner to the arresting officers. *Based on the total lack of
22 evidence as to who arrested Dubner or what they knew at the
23 time, it follows that the defendants failed to satisfy their burden
24 of production and that Dubner has made out a claim of unlawful
25 arrest.*

26 *Id.* at 966 (emphasis added). Thus, in this case, the City at a minimum bears the burden of
coming forth with evidence that it had probable cause to arrest each Class member. Mere
evidence as to what a group of people might or might not have done is insufficient; “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 (2000).

1 To put this burden in further perspective, as one court has stated, when a mass arrest is so
2 poorly documented that even not even the arresting officer is properly stated on an arrest record,
3 the arrests made are "*presumptively invalid.*" *Sullivan v. Murphy*, 478 F.2d 938, 967 (D.C. Cir.
4 1973) (emphasis added). In *Sullivan*, police arrested hundreds of protesters in the nation's
5 capitol without recording any individualized basis for arresting many of those protesters and
6 without recording the name of the arresting officer. In the resulting class action brought on
7 behalf of those individuals, the District of Columbia Circuit declared that the Fourth Amendment

8 holds presumptively invalid any arrest that was not accompanied
9 by a contemporaneous Polaroid [of the officer and arrestee
10 together] and field arrest form executed by the one who was in fact
11 the arresting officer, this presumption of being course open to
12 rebuttal upon an affirmative showing by Defendants that any
13 particular arrest was based upon probable cause.

14 *Id.* There, as here (and demonstrated below), where the arrest records are so entirely void of
15 individualized probable cause, the entire arrest must be assumed improper unless the City can
16 produce evidence of probable cause.

17 Furthermore, the City's burden is not to show that it might be able to construct
18 individualized probable cause now, almost 4 years later, but rather to show that its officers had
19 probable cause to arrest each Class member at the time the arrests were made. As the Supreme
20 Court stated nearly 40 years ago:

21 Whether [an] arrest was constitutionally valid depends ... upon
22 whether, at the moment the arrest was made, the officers had
23 probable cause to make it -- whether *at that moment* the facts and
24 circumstances within their knowledge and of which they had
25 reasonably trustworthy information [gave rise to probable cause].

26 *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964) (emphasis added), *citing*
Brinegar v. United States, 338 U.S. 160, 175-76 (1949). *See also, e.g., Saucier v. Katz*, 533 U.S.
194, 207, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (claims of violation of the Fourth
Amendment turn "upon the information the officers had when the conduct occurred."); *Franklin*

1 v. *Fox*, 312 F.3d 423, 439 (9th Cir. 2002) (claim of wrongful arrest turns on “what information
2 the officers possessed at the time of ... arrest”).

3 Thus, the City’s burden is produce evidence that its officers had *individualized* probable
4 cause to arrest each Class member *at the time of the arrests*. Yet as demonstrated below, the
5 City has always treated the Class members as a homogenous group and cannot produce any
6 evidence specific to any Class member.

7 **2. The City’s own procedures confirm the City’s burden and the City’s failure**
8 **to carry that burden**

9 If the law leaves any doubt as to what the City’s burden is in demonstrating probable
10 cause, or as to what sort of documentation of probable cause is necessary to justify an arrest, the
11 City itself has resolved that doubt. In the City’s *Procedures for Use in Selected Offenses Against*
12 *Public Order*, the City has adopted guidelines for documenting probable cause to arrest large
13 groups of people that the City contends have committed certain offenses. Weaver Decl., Ex. 30,
14 p. 1, § I. As those guidelines make clear, the City cannot satisfy its burden of justifying an arrest
15 by lumping a large group of arrestees (in this case approximately 150 people) together and not
16 noting or recording any basis for arresting each person:

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

19 This requires not only that the officer-witness be able to identify
20 the defendant in court, but that the officer be able to document and
21 testify as to specific acts committed as to a specific individual,
22 which meet all the elements necessary to prove the crime. *Thus,*
23 *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.
24 *Each individual’s specific involvement and actions must be*
documented. A “generic” report concerning an incident will not
be sufficient.

25 Weaver Decl., Ex. 30, pp. 6-7, § II.B.3 (emphasis added). See also *id.*, p. 11, § III.B.9 (“Officers
26 should remember that it must be established that each suspect committed the crime(s) in

1 question. Thus, reports should document facts to establish elements of the crime as they relate to
2 that suspect.”).

3 In order to ensure accuracy, the City also strongly encourages that the officers work
4 together to prepare a complete report and document probable cause. As the procedures indicate,
5 “[t]he Field Commander or his/her designee on the scene should prepare the master report.
6 Before doing so, he/she should speak with each of the officers on the scene, so that no important
7 details are left out. Each arresting officer should prepare his/her supplemental report.” *Id.*, p. 12,
8 § IV.B. However, as demonstrated below, the City failed to follow even its own guidelines. The
9 City’s officers made absolutely no record of what any Class member did or heard or even who
10 arrested the Class members. Furthermore, the only documentation of the arrest is a “generic” 3-
11 page report regarding what the Class did as a group – a report that was prepared without input
12 from the arresting officers and is not supplemented by reports of the actual arresting officers.

13 **3. The City has no evidence with which to carry its burden of producing**
14 **individualized evidence of probable cause**

15 The City has no evidence at its disposal that it could use to carry its burden of producing
16 individualized evidence of probable cause. The City has admitted in discovery that it cannot
17 specify any facts constituting probable cause to arrest any Class member. The only
18 documentation of probable cause that the City can point to is the arrest records of the Class
19 members – which are virtually identical for each Class member – and an incident report prepared
20 to describe the arrest, which provides only cursory general information as to the events leading to
21 this mass arrest.

22 **a. The City has admitted that it has no evidence of individualized**
23 **probable cause as to any Class member**

24 It is evident from the City’s responses to Plaintiffs’ discovery requests that the City has
25 no individualized evidence of probable cause. For example, in response to Plaintiffs’
26 Interrogatory No. 11, which requested that the City, “[f]or each member of the Class, list all facts
that could support a finding that any officer had probable cause to arrest that Class member on

1 the afternoon of December 1, 1999, for the commission of a crime.” Weaver Decl., Ex. 28, p. 6.
2 The City’s answer was that the officers had probable cause to arrest them as “a group” but that
3 the City was “unable to discuss specific members of the Class” for alleged privacy reasons. *Id.*
4 In opposition to Plaintiffs’ second motion to compel an answer as to individuals for this
5 interrogatory (a motion this Court granted on October 3, 2003), the City further stated that “all of
6 the information [the City has] relevant to Interrogatory No. 11 was contained in the individual
7 arrest records.” Weaver Decl., Ex. 29, p. 9. However, those arrest records – as discussed in the
8 following section – are inaccurate and do not contain individualized evidence of probable cause.
9 While the City has yet to provide an additional response pursuant to the Court’s October 3, 2003,
10 order, the City’s prior answers to discovery and its representations to this Court in opposition to
11 Plaintiffs’ motion to compel indicate that the City has no such evidence, and a review of the
12 documents it has identified and produced confirms that fact.

13 **b. The arrest records are undisputedly at least partially false and do not**
14 **contain individualized evidence**

15 The City has indicated that to the extent its answer to Interrogatory No. 11 provides any
16 evidence of probable cause to arrest any Class member, it is “premised primarily upon the arrest
17 reports of the potential class members previously discussed. Defendants are unaware of any
18 other specific documents which provide evidence which could constitute cause to arrest the
19 plaintiffs on the various charges.” Weaver Decl., Ex. 28, p. 7 (answer to Interrogatory No. 12,
20 requesting identification of documentation of probable cause). However, those arrest records are
21 not only literally photocopies of each other, it is undisputed that they are false, at least in part.

22 As the arrest records demonstrate, all of the Class members were processed without any
23 concern for what they might have specifically done, or not done, or even who actually arrested
24 them. Each Class member was processed using photocopied forms, that, among other things, list
25 “Lt. Black” as the “arresting officer,” charge the Class members with the crime of violating a
26 SMC 12A.26.040 (for violation of a mayoral emergency order), and contain a one-page

1 photocopied basis for the arrest. *See* Weaver Decl., ¶¶ 9 to 17 (discussing arrest records) and
2 Exs. 7 to 21 (representative arrest records and table summarizing arrest records). The
3 photocopied basis for arrest indicates, in part, that every Class member “failed to clear the street
4 ... in accordance with mayor order” and that there was “an arrest warning giving by Lt. Black.”
5 *See* Exs 8 to 21, Weaver Decl. (sample arrest records). None of the arrest records for the Class
6 members contain any record of individualized probable cause, nor provide any explanation of
7 any individual basis for arrest. *See* Weaver Decl., ¶¶ 9, 14 to 16.

8 Even this cursory, Class-wide description of the reason for arrest is at least partially false.
9 As Lt. Landy Black testified, contrary to what the arrest records indicate, he was not the arresting
10 officer for any Class members, nor did he give any arrest warning. *See* Black Deposition, at
11 25:25 – 30:11; 35:13 – 36:11, Ex. 24 to Weaver Decl.. In addition, it is undisputed that no Class
12 member violated the mayoral order that created the No-Protest Zone because they never entered
13 that Zone. As Capt. Jim Pugel, who was in charge of the arrest testified, the reference in the
14 arrest records to violation of a “mayoral order” was “clearly a misstatement by the person who
15 wrote this report.” Pugel Dep., at 282:15-16, Ex. 23 to Weaver Decl.. *See also id.* at 266:10 - 16
16 (Class did not enter Zone); Whelan Dep. at 30:12 – 32:3, Ex. 27 to Weaver Decl. (same).

17 The arrest records of the Class members do not contain any evidence that the City can use
18 to carry its burden of producing evidence indicating that its officers had individualized probable
19 cause to arrest any Class members. Aside from being inaccurate, they are uniform and contain
20 no individualized evidence or information as to any Class member.

21 **c. The Whelan Report does not contain individualized evidence of**
22 **probable cause**

23 The only other documentation the City has produced that records any reason why the
24 Class was arrested is a 3-page “incident report” prepared by Lt. Dan Whelan on the night of the
25 arrest. In that report, Lt. Whelan discussed his general observations concerning the events of that
26 day and evening, but did not record any fact concerning what any individual person had done to

1 warrant arrest, much less elaborate on the facts giving rise to probable cause to arrest any
2 particular Class member. *See* Ex. 22 to Weaver Decl. The report contains nothing constituting
3 individualized probable cause.

4 Furthermore, this cursory 3-page report is apparently the *only* report ever prepared to
5 document the arrest of the roughly 150 members of the Class. Although Plaintiffs have
6 requested all such reports, this is the only report that has been produced. Furthermore, Lt.
7 Whelan testified at his deposition that while he authored this report (after speaking to Capt.
8 Pugel and an unnamed City attorney), he did not consult with any other officers about the events
9 leading up to the report, did not take any other notes, did not direct other officers to prepare
10 reports, and is unaware of any such report. *See* Whelan Dep., at 23:13 – 26:18, 27:18 – 28:22,
11 32:4 – 13, 45:24 – 46:13, Ex. 22 to Weaver Decl.. Furthermore, although he was delegated
12 responsibility for documenting the arrest, he was not even present when the Class members were
13 taken into custody, he took no role in preparing any arrest records, and he did not review the
14 arrest records once they were completed. *Id.* at 22:19 – 23:12.

15 Lt. Black, who was second in command at this arrest under Capt. Pugel, and was listed
16 (erroneously) as the “arresting officer,” testified that although he was involved in the arrest, he
17 did not prepare any reports or otherwise document probable cause to arrest any person, and was
18 unaware of anything other than the arrest records that might constitute grounds for probable
19 cause. Black Dep., at 42:8 – 43:3, Ex. 24 to Weaver Decl.

20 The City has no evidence of individualized probable cause. The Class is therefore
21 entitled to partial summary judgment as to the City’s liability under their claims of wrongful
22 arrest in violation of the Constitution.

23 IV. CONCLUSION

24 For the reasons stated above, the Court should grant Plaintiffs’ motion for partial
25 summary judgment as to the City’s liability for wrongful arrest under the Fourth and Fourteenth
26 Amendments to the United States Constitution.

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