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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SRI LOUISE COLES, et al. Plaintiffs, vs. CITY OF OAKLAND, a municipal entity, et al. Defendants.	**Case No.** C -03-2961 TEH (JL) **DEFENDANT CITY OF OAKLAND'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM PURSUANT TO FRCP 12(b)(6)**

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NOTICE OF MOTION

Please take notice that on Monday, March 7, 2005, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 12 of the above-entitled court, defendants City of Oakland, Police Chief Richard Word, Deputy Chief Patrick Haw, Captain Rod Yee, Lt. E. Poulson, Lt. Howard Jordan, Lt. Dave Kozicki, Sgt. T. Hogenmiller, E. Tracey, R. Gutierez, A. Oerleamns, R. Holmgren, P. Gonzales, S. Knight, Sgt. G. Tolleson, Police Officer M. Nichelini, and Police Officer Low, will move the court to dismiss the specified portion of Plaintiff's Second Amended Complaint for failure to state a claim upon which relief can be granted. The said Oakland police defendants bring this motion under Federal Rule of Civil Procedure, Rule 12(b)(6) as the Second Amended Complaint fails to state a viable cause of action against defendants as to all[1] plaintiffs under the Fourth Amendment

I. INTRODUCTION

On the morning of April 7, 2003, hundreds of people took part in a rally against the war in Iraq by gathering at the Port of Oakland to demonstrate. On several occasions during the course of the demonstration, after issuing dispersal orders to the crowd, officers from the Oakland Police Department (OPD) employed crowd dispersal tactics which included the use of "less than lethal" ammunition, a motorcycle "BUMP" technique and police batons to move protesters away from areas where they were blocking traffic. Plaintiffs in the instant action have asserted multiple claims against the City of Oakland and 16 individual Oakland police officers, including claims that OPD crowd dispersal tactics on the day of the April 7th protest constitute a violation of plaintiffs' constitutional right to be free from unreasonable seizure under the Fourth Amendment of the United States Constitution. Pursuant to Federal Rule of Civil Procedure, Rule 12(b)(6), defendants argue that the complaint fails to state a cause of action under the Fourth Amendment because the crowd dispersal tactics used by Oakland police do not constitute a seizure within the meaning of the Fourth Amendment.

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[1] Lindsey Parkinson, one of the six named plaintiffs, was arrested at the scene by OPD. By this motion, defendants do not challenge Ms. Parkinsons' right to assert a Fourth Amendment claim based on her arrest by OPD, conceding that an arrest is clearly a seizure within the meaning of the Fourth Amendment.

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II. STATEMENT OF FACTS

Defendants present the following statement of facts as alleged by plaintiffs in their Second Amended Complaint, (SAC). All paragraph references are to this pleading.

On April 7, 2003, a demonstration against the war in Iraq took place at the Port of Oakland. The demonstration was express opposition to the war in Iraq and against war profiteering by corporations doing business at the Port. (¶ 15).

Plaintiffs Coles, Hansen, Telles and Parkinson participated in the demonstration and plaintiff Bohning arrived in the area intending to participate. Plaintiff Smith attended the demonstration as in independent photo-journalist. (¶ 16).

During the course of the demonstration, members of the Oakland police employed less-lethal munitions for crowd control, including "concussion or "stinger" grenades, wooden dowels, "flexible batons," aka "bean bags" consisting of smallshot wrapped in a bag." Oakland police also used batons and police motorcycles to "BUMP" individuals for "crowd control." (¶¶ 18, 28).

Except for plaintiff Lindsey Parkinson, who alleges that she was injured while being arrested by defendant Officer Low and whose claims related to her arrest are not the subject of this motion, all of plaintiffs' alleged injuries stem from the use of OPD crowd control tactics. (¶ 19).

These facts demonstrate that, except with regard to the claim of plaintiff Parkinson, the Oakland police actions at issue constitute crowd dispersal efforts aimed at moving the demonstrators away from the police rather than into police control.

III. LEGAL ARGUMENT

Crowd Dispersal Tactics Do Not Constitute a Seizure Under The Fourth Amendment Therefore Plaintiffs' Claim For Violation of Their Right To Be Free Of Unreasonable Seizure Under The Fourth Amendment Must Be Dismissed

A motion to dismiss under Federal Rule 12(b)(6) tests the legal sufficiency of the claims stated in the compliant. *Levine v.Diamanthuset*, 950 F.2d 1278, 1483 (9th Cir. 1991). Dismissal of claims is proper where there is either a "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Ballistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). In determining the adequacy of a pleading, the court must determine whether

plaintiffs would be entitled to some form of relief if the facts alleged in the complaint were true. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1956); *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978).

One of the legal theories alleged by plaintiffs is that defendants' conduct deprived plaintiffs' of "The right to be free from excessive or unreasonable force as secured by the Fourth Amendment" and "The right to be free from unreasonable searches and seizures as secured by the Fourth Amendment." (SAC, ¶¶ 39, 54). The only facts alleged to support this theory arise from OPD's use of less-lethal ammunition, motorcycles and batons for crowd dispersal. Except for plaintiff Parkinson, there is no allegation that any plaintiff was arrested or otherwise detained by the police. Even if plaintiffs' allegations of OPD crowd dispersal tactics are true, such facts would not give rise to a Fourth Amendment violation because no search or seizure is involved. Not every claim of police excessive force is governed by the Fourth Amendment because, as in this case, not all police use of force occurs in the context of either a search or a seizure. A review of Fourth Amendment precedent reveals that crowd control dispersal tactics do not fit within any definition of Fourth Amendment seizure and policy considerations weigh against expanding the definition of Fourth Amendment seizure to include instances where police use force to disperse a crowd. Therefore plaintiffs' cause of action for violation of the 4th A should be dismissed.

A. Excessive Force Claims Which Do Not Involve Either Search or Seizure Do Not Fall Within The Ambit of the Fourth Amendment, Therefore, A Preliminary Question In This Case Is Whether Crowd Dispersal Tactics Constitute a Seizure

While most excessive force claims arise in the context of criminal investigations and can be clearly recognized as occurring during a search or seizure, it is not the case that all claims of police use of excessive force will fall within the ambit of the Fourth Amendment. In *Sacramento v. Lewis*, 523 U.S. 833 (1998), the Supreme Court examined the question of whether a police officer who participated in a high speed chase of two teenagers on a motorcycle, which resulted in the accidental death of the passenger Lewis, violated either Lewis' Fourth Amendment right to freedom from unreasonable seizure or his substantive due process rights under the Fourteenth Amendment. The Court notes first the rule announced in *Graham v. Conner*, 490 U.S. 386 (1989) that "''where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of

substantive due process, must be the guide for analyzing these claims." *Id* at 395. Because *Graham* also held that "[a]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard, rather than under a 'substantive due process' approach," *id* at 395 (emphasis added). Oral argument and several *amicus* briefs in the *Lewis* case argued that, by chasing the motorcycle, the officer was attempting to "seize" the suspects within the meaning of the Fourth Amendment, and in fact succeeded in "seizing" Lewis when the motorcycle crashed. We quote at length the Court's response to this argument as it provides a succinct review of the Fourth Amendment issues presented here.

> "The argument [that the *Graham* rule requires that the Fourth Amendment. standard apply in this case] is unsound. Just last Term, we explained that *Graham* "*does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." [Citations].
>
> Substantive due process analysis is therefore inappropriate in this case only if respondents' claim is "covered by " the Fourth Amendment. It is not.
>
> The Fourth Amendment covers only "searches and seizures," neither of which took place here. No one suggests that there was a search, and our cases foreclose finding a seizure. We held in *California v. Hodari D.,* 499 U.S. 621,626, that a police pursuit in attempting to seize a person does not amount to a "seizure" within the meaning of the Fourth Amendment. And in *Brower v. County of Inyo,* 489 U.S. 593, 596-597, we explained "that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied."* We illustrated the point by saying that no Fourth Amendment seizure would take place

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> where a "pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit," but accidentally stopped the suspect by crashing into him. That is exactly this case. . . . . *Graham's* more-specific provision rule is therefore no bar to respondents' suit [under the Fourteenth Amendment]. See, e.g., . . . *Evans v. Avery,* 100 F.3d at 1036 (noting that "outside the context of a seizure, . . . a person injured as a result of police misconduct may prosecute a substantive due process claim under section 1983") . . . *Lewis, supra,* at 843, 844."

The Court's analysis in *Lewis* applies to the instant case. Plaintiffs' Section 1983 claim regarding excessive force should be analyzed under the 14th Amendment's substantive due process standard unless it is "covered by" the Fourth Amendment. It is not.

The Fourth Amendment covers only "searches and seizures," U.S. Const., Amdt. 4[2]. No one suggests that the plaintiffs in this case were searched, therefore, plaintiffs must demonstrate that they were seized. No one suggests that plaintiffs were arrested or subject to an investigatory stop, therefore, plaintiffs must demonstrate that being subjected to the crowd dispersal tactics used by OPD comes within the "other seizure" category described by *Graham*, but case law and common understanding preclude such a finding.

B. Case Law Demonstrates That Fourth Amendment Seizures Require Restraint of Liberty And Intent to Seize

The *Graham* court's holding that claims of police excessive force in the course of an arrest, investigatory stop, or other 'seizure' are "to be analyzed under the Fourth Amendment" derives directly from the language of the Amendment which clearly limits its application to "unreasonable searches and seizures." It is not surprising then that most case law which specifically addresses the definition of seizure under the Fourth Amendment concerns fact situations where citizens interact with police in the context of police investigations of criminal activity. A brief review of the seminal cases which address seizures in the context of arrests and investigatory stops will assist in the

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[2] The text of the Fourth Amendment reads: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable

1 analysis of whether policy crowd dispersal tactics should be included in the category of "other
2 seizures" referred to in *Graham.*
3 Twenty years prior to *Graham,* the Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968)
4 addressed whether a police officer has the right to 'stop and frisk' a citizen based only on reasonable
5 suspicion, rather than probable cause. The Court's analysis focuses first on when the suspects were
6 "seized" by the officer, finding that "whenever an officer accosts an individual and restrains his
7 freedom to walk away, he has "seized" that person," and "[o]nly when the officer, by means of
8 physical force or show of authority, has in some way restrained the liberty of a citizen may we
9 conclude that a "seizure" has occurred." *Id* at 16 and 19, n.16. Under *Terry,* restraint of liberty or
10 freedom is an essential element of a Fourth Amendment seizure.
11 In *United States v. Mendenhall*, 446 U.S. 544 (1980), DEA agents stopped a young traveler at
12 an airport based on their belief that she fit a "drug courier profile." In reviewing whether
13 Mendenhall's Fourth Amendment rights were honored, the Court indicated its "adherence to the view
14 that a person is "seized" only when, by means of physical force or a show of authority, his freedom of
15 movement is restrained," and articulated a test for determining when a "seizure" within the meaning
16 of the Fourth Amendment occurs: "a person has been "seized" within the meaning of the Fourth
17 Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person
18 would have believed that he was not free to leave." *Id* at 554. Again, the Court indicates that
19 restraint of liberty or freedom is an essential element of Fourth Amendment seizure.
20 What constitutes a seizure was more recently addressed by the Supreme Court in *California v.*
21 *Hodari D.* 499 U.S. 621 (1991). A police officer acting without probable cause was in pursuit of
22 Hodari when he tossed away a small rock of cocaine. The officer then tackled Hodari and placed him
23 under arrest. The question before the court was whether Hodari had be seized at the time he dropped
24 the drugs. The court notes that "from the time of the founding fathers to the present, the word
25 "seizure" has meant a "taking of possession." [Citations]. For most purposes at common law, the
26 word connoted <u>not merely</u> grasping, or <u>applying physical force to</u>, the animate or inanimate object in
27 question, <u>but actually bringing it within physical control</u>." *Id.* at 624. (Emphasis added). The Court
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cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to

1 goes on to examine the meaning of seizure within the context of making an arrest[3], and distinguishes
2 between arrests based on a show of authority and those based on the application of physical force. In
3 the former instance, *Hodari* holds that there is no Fourth Amendment seizure if the suspect does not
4 yield to the show of authority. In the latter instance, even a minimal touching for the purpose of
5 arresting a suspect will constitute a seizure, with the caveat that, if the suspect escapes, there is no
6 "continuing seizure." *Id* at 625. In other words, a seizure occurs by application of force to arrest so
7 long as the force applied continues to restrain the liberty of the suspect. *Hodari* makes it clear that a
8 partial restraint of freedom is insufficient to constitute a seizure by holding that "an attempted seizure
9 is not a seizure." *Id* at 626.

10 *Terry, Mendenhall* and *Hodari D.* all involve police interactions with suspects prior to their
11 arrest where the 'seizure' issue involved a show of police authority. Cases which involve police use
12 of physical force which give rise to a seizure question also demonstrate that a Fourth Amendment
13 seizure requires a complete and intentional restraint of liberty. In *Brower v. County of Inyo, supra,* a
14 suspected car thief was killed when he crashed into a police roadblock after evading police on a
15 lengthy high speed chase. Because the roadblock was designed to cause the suspect vehicle to stop
16 by physical impact if voluntary compliance did not occur, and because Brower was stopped and
17 killed when he crashed into the roadblock, the Court held that a Fourth Amendment seizure did
18 occur. Brower was seized because he was stopped by police conduct specifically implemented for
19 the purpose of stopping him.[4] *Id,*. 489 U.S. 593, 598-599. By comparison, the Court in *Lewis v.*
20 *Sacramento, supra,* found no seizure occurred when Lewis was killed in a motorcycle crash while
21 being pursued by police: "Because the officer did not intend to seize Lewis by striking him with his
22 vehicle, Lewis was not seized even though his freedom of movement was undoubtedly terminated."
23 *Id,* 490 U.S. 833, 844.

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27 be seized.

28 [3] The *Hodari* Court also notes that a mere touching, however slight, can constitute an arrest of the person, and thus a seizure, if the touching is for the purpose of arresting, which is not true of crowd dispersal efforts.

[4] Deadly force permanently restrains one's liberty. Justice Steven's concurring opinion notes that in *Tennessee v. Garner,* 471 U.S. 1 (1985), the Court recognized that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." 471 U.S. at 7

1 In *Fuller v. Vines,* 36 F3d 65 (1994)[5], the Ninth Circuit examined the definition of seizure
2 under the following facts: police officers investigating another matter walked past Fuller's yard
3 where James Jr. was standing with his dog. Police claim the dog attacked them and for that reason
4 they shot and killed the dog. James Jr. became angry and was wrestled to the ground by friends to
5 prevent a confrontation. Nevertheless, an officer drew his weapon and pointed a gun at James Jr.'s
6 head, allegedly in self defense. In examining Fullers' Fourth Amendment claims, the court finds that
7 while the killing of the dog was clearly a seizure of property, the claim that the police "seized"
8 James Jr. by pointing the gun at him, could not be recognized. The court reasoned that

9 There is no contention that he was arrested or that his liberty was restrained,
10 other than that he was not free to attack the officers. The officers contend that this action with the gun was necessary in order to keep James Jr. from attacking them.
11 Although the Fullers argue that this was unnecessary, there is no contention that the officers indicated James Jr. was not free to leave. In order to constitute a seizure of
12 the person, the action of the officers must be a restraint of liberty such that the person reasonably believes he is not free to leave. *United States v. Mendenhall*, 446 U.S. 544,
13 554 (1980). It is not sufficient to constitute a seizure when the restraint is only that the
14 person is not free to attack the officers.

15 *Id* at 68.

16 In *Schaefer v. Goch*, 153 F.3d 793, (1998), police encountered a hostage situation and
17 unintentionally killed the suspect's wife during his standoff with police. Her parents made a Fourth
18 Amendment excessive force claim, arguing that when police told their daughter to drop to her hands
19 and knees and she complied with this instruction, she was seized under *Brower*'s definition of "a
20 governmental termination of freedom of movement through means intentionally applied." *Brower,*
21 *supra,* 489 U.S. at 597. However, the court held that because the daughter was temporarily
22 immobile, it did not follow that her freedom of movement was terminated. Because she could still
23 choose to move away from where the officer had directed her, and in fact was pulled away by her
24 husband, the court found an insufficient restraint on her liberty to constitute a seizure. (See, also,
25 *Gause v. Philidelphia*, 2001 U.S. Dist. LEXIS 17428 (2001), wherein Gause brought a claim for
26 excessive force under the Fourth Amendment when she was struck by a police officer during his
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[5] Overruled on other grounds in *Robinson v. Solano County*, 278 F.3d 1007, 1013 (2002): " To the extent that Fuller may be read as suggesting that the conduct of officers in pointing a gun at a suspect during an actual seizure can never be excessive force, it is overruled." (Emphasis added).

1 efforts to arrest her son. Evidence showed that she was not arrested and had been instructed to leave
2 the area. Applying the *Mendenhall* test, the court found that a reasonable person in *Gause'* position
3 would have known she was free to leave, and thus, not "seized.")
4 As demonstrated by these cases, it is difficult to draw a general rule of what constitutes a
5 Fourth Amendment seizure because the analysis is so heavily fact specific. Yet some parameters
6 may be gleaned: in the context of arrests and investigatory stops, as demonstrated in *Terry,*
7 *Mendenhall, Hodari* and *Brower*, a successful, complete and purposeful restraint of liberty are the
8 common elements defining Fourth Amendment seizure; the officer's lack of intent to arrest by a
9 particular means may support a finding of no seizure under *Lewis*; and where there is a use of force
10 without the intent to arrest, and the subject is free to leave, as in *Fuller, Schaefer* and *Gause,* there is
11 no seizure.

12 C. Cases Addressing Crowd Dispersal Use of Force Issues Show
13 Inconsistencies in Applying Fourth Amendment Precedent

14 One United States Courts of Appeal decision and several District Court decisions which
15 address the issue of police use of force during demonstrations show that courts have not analyzed this
16 issue in a consistent fashion. In *Darrah v. Oak Park,* 255 F.3d 301 (6th Cir. 2001), union protester
17 Darrah was struck in the face by Officer Bragg when she attempted to interfere with Bragg's efforts
18 to arrest another protester by pulling at the officer's ankle. In reviewing Darah's Fourth Amendment
19 claim of excessive force, the court notes that the "Supreme Court has cautioned that not 'all
20 constitutional claims relating to physically abusive government conduct must arise under either the
21 Fourth or Eighth Amendments.' [Citations]" and "[t]he first question in this case, then, is whether
22 Officer Bragg's conduct in striking plaintiff in the face while plaintiff was attempting to prevent
23 Bragg from executing an arrest constitutes a seizure." *Id.* at 305-306. Thus, the *Darrah* court
24 properly frames the question. Unfortunately, the court provides no further helpful analysis, because it
25 concludes that "regardless of which test is applied ['objective reasonableness' under the Fourth
26 Amendment or 'shocks the conscience' under the Fourteenth Amendment], Darrah is unable to create
a genuine issue of material fact with respect to her excessive force claim. Therefore, we need not and
do not decide whether Bragg's conduct constitutes a seizure."
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Defendants have found no other Court of Appeals opinion on point[6], however, several District Court opinions are available for review[7]. In *Russ v. Jordan,* 1992 U.S. Dist. LEXIS 19484, (1992), Judge Patel held that a non-participant observer who was jabbed by a police baton at a demonstration following the Rodney King verdict does not have a First Amendment claim. However, the court applied the Fourth Amendment reasonableness standard to Russ' excessive force claim without undertaking any inquiry into whether a baton strike to an observer at a demonstration whom officers had no intent to arrest and who was free to leave throughout the incident constituted a seizure under the Fourth Amendment. Similarly, no such inquiry is undertaken in *Lamb v. City of Decatur,*947 F. Supp. 1261 (1996), when the court, in reviewing the class action claim of protestors who were pepper-sprayed at a civil rights demonstration, states that although there are "no cases specifically stating that pepper spraying demonstrators violates the Fourth Amendment, there is enough of a widespread Constitutional and judicial protection of First Amendment demonstrators to put the police on notice that unnecessary force is prohibited." *Id* at 1264. And in *Secot v. City of Sterling Heights,* 985 F. Supp. 715 (1997), a union member protesting at a newspaper plant where strikers were blocking the driveway was struck by a police baton during a confrontation with police, with no indication that the claimant was arrested. Application of the Fourth Amendment standard to Secot's excessive force claim is assumed appropriate without any analysis of whether the baton strike constituted a seizure

Finally, a recent District Court opinion from Oregon does undertake some analysis of whether dispersal tactics constitute a seizure. In *Marbet v. City of Portland*, 2003 U.S. Dist. LEXIS 25685 (2003), demonstrators protesting against President Bush' policies were blocking the entrance to a Bush fundraiser. After allegedly directing the crowd to move from the entrance, police used pepper spray and less lethal munitions to move the crowd. In reviewing the defendants' Rule 12(b)(6) motion to strike excessive force claims under the Fourth Amendment based on there being no allegation of seizure, the court notes the *Brower* definition that a seizure occurs from "the governmental termination of freedom of movement through means intentionally applied," *Brower, supra,* 489 U.S. at 596-597, and concludes that when police intentionally restrained the protestors' freedom of movement by applying pepper spray and using less lethal ammunition and by physically

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[6] Two Ninth Circuit Court of Appeal cases involving excessive force claims by protesters clearly arise in the context of arrests, and therefore do not examine whether dispersal efforts can equate to a seizure: *Forrester v. San Diego,* 25 F3d 804 (9th Cir. 1994) and *Headwaters Forest Defense v. Humboldt,* 240 F3d 1185 (9th Cir. 2001).

[7] Defendants offer these District Court opinions for illustration only and not as controlling precedent.

moving the protestors back from their peaceful positions, the effect was to control plaintiffs' movements. The court concludes that police acts to move the crowd constitute a "seizure" under the Fourth Amendment.

It is clear that not all courts acknowledge, as did the *Darrah* court, that the preliminary question in excessive force claims is whether the force complained of was used in the context of a search or seizure. The District Court opinions do not consider the fact that their claimants are not being searched, arrested or subject to an investigatory stop – the usual prerequisites to claims under the Fourth Amendment. The *Russ* and *Secot* decisions simply *assume* application of the Fourth Amendment, and *Lamb* notes that police should know that excessive force is prohibited without attempting to determine the appropriate constitutional standard for review of that particular claim of excessive force. The court in *Marbet* fails to acknowledge that under *Brower,* a seizure requires a termination of movement and does not include the "governmentally caused termination of an individual's freedom of movement (the innocent passerby)" and the "governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon)" because the individual is free to move away from police custody. *Brower, supra,* 489 U.S. at 596-597. Cases like *Fuller v. Vines, Schaefer v. Goch,* and *Hodari D., supra,* demonstrate that, contrary to the *Marbet* court's conclusion, a partial restriction of an individual's freedom of movement by police does NOT constitute a seizure. And *Marbet*'s citation of *Hodari D, supra,* for the proposition that seizure can mean touching or application of physical force even when ultimately unsuccessful is correct only to the extent that such touching or application of force is made with the intent to arrest. (See, *Hodari D., supra,* and section III A 2 and footnote 3 above). *Hodari* gives no guidance where the application of force by police is to disperse rather than to arrest.

D. Crowd Dispersal Tactics Involve Neither Restraint of Liberty Nor Intent To Seize And Therefore Do Not Come Within Any Definition Of Fourth Amendment Seizure

Defendants have found no case definitively stating that crowd dispersal tactics constitute a seizure thereby requiring that claims of excessive force used to disperse a crowd be analyzed under the Fourth Amendment. Defendants argue that a careful reading of Fourth Amendment precedent weighs against finding that dispersal techniques constitute a seizure because the two main elements defining seizure – termination of freedom of movement and intent to seize – are clearly not present in

crowd dispersal situations. Police dispersal techniques are not intended to terminate an individual's freedom of movement. Plaintiffs do not allege that they reasonably believed they were not free to leave. On the contrary, plaintiffs' allegations demonstrate that they were free to move away from police throughout the incident. There was certainly no 'successful, complete and purposeful restraint of liberty' with regard to these plaintiffs. Crowd dispersal tactics do not fit within any recognized definition of Fourth Amendment seizure. And, it is contrary to common understanding that being dispersed is in fact being seized. In fact, police action to *disperse* a crowd is the conceptual opposite of police action to arrest or seize an individual. Because police dispersal tactics do not constitute a seizure, plaintiffs' excessive force claims must be analyzed under the Fourteenth Amendment's Due Process Clause and their Fourth Amendment claims should be dismissed.

E. <u>Policy Considerations Weigh Against Equating Crowd Dispersal Tactics With Fourth Amendment Seizure</u>

Under *Graham v. Conner,* "where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Id* at 395. Here, the plaintiffs argue that protection from police use of excessive force to disperse a crowd finds its explicit textual source in the Fourth Amendment's prohibition of unreasonable seizures. However, Justice Scalia has cautioned that "[w]e do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest . . . ." *California v. Hodari D. supra*, at 697-698. There is no question that including crowd dispersal tactics within the meaning of seizure would significantly stretch the meaning of seizure, both as the term is commonly understood, and as it has been understood in the context of the Fourth Amendment.

Plaintiffs have a more appropriate potential remedy under the Fourteenth Amendment. Substantive due process protects against government power arbitrarily or oppressively exercised. *Daniels v. Williams,* 474 U.S. 327, 331. "The Due Process Clause was intended to prevent government officials "'from abusing [their] power, or employing it as an instrument of oppression.'" [Citations]." *Sacramento v. Lewis, supra,* 523 U.S. at 846. As the Fourteenth Amendment Due Process Clause provides for constitutional review of police activities which are outside the scope of

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searches and seizures, there is no reason to stretch the Fourth Amendment beyond the plain meaning of its language.

IV. CONCLUSION

For the reasons set forth above, defendants respectfully submit that its motion to dismiss should be granted without leave to amend.

Dated: January 28, 2005

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