

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

BROOK BERNINI, et. al.,

CASE FILE 09 CV 2312 PAM/JJG

Plaintiffs,

vs.

CITY OF ST. PAUL, STEVEN FRAZER,
BILL SNYDER, JOE NEUBERGER, AXEL HENRY,
PATRICIA ENGLUND AND MATTHEW CLARK,
in their individual capacity,

Defendants.

**DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

This case stems from a chaotic attack on officers in St. Paul, Minnesota on September 1, 2008 during the Republican National Convention which led to multiple arrests. Plaintiffs allege officers arrested them without probable cause, used excessive force and violated their First Amendment Rights. Plaintiffs also allege the City of St. Paul had an unconstitutional policy. Defendants are entitled to qualified immunity and there is no basis for a claim against the City of St. Paul and all claims should be dismissed.¹²

¹ Plaintiffs have alleged, but not brought, a Rule 23 motion. Defendants dispute Plaintiffs' claims meet the criteria in Federal Rule 23.

² Plaintiffs dismissed the claims against Commander Snyder.

STATEMENT OF UNDISPUTED FACTS

A. Background

From September 1 through September 4, 2008, the City of St. Paul, Minnesota hosted the Republican National Convention (“RNC”). *Aff. Frazer* ¶ 2. On September 1, 2008, there were multiple instances of property damage, cars with rocks thrown at them, cars tipped over, squad car tires slashed and windows broken and several reports of citizens being assaulted. *Neuberger Dep. pp. 28-29; Frazer Dep. p. 82; Aff. Frazer Ex. B (5:57); Englund Dep. p. 23; Hagy Dep. p. 26.*³ Delegate buses were stopped and rocks were thrown at them and tires slashed. *Neuberger Dep. p. 29.* Groups threw sandbags and street signs at delegate buses. *Neuberger Dep. p. 29.* Dumpsters were lit on fire. *Neuberger Dep. p. 29; Henry Dep. p. 54.* Squad cars were encircled and officers were gravely concerned their cars would be tipped over with them inside. *Neuberger Dep. p. 29.* Multiple individuals were arrested for various activities throughout day one of the RNC.

By 3:00 p.m., permitted marches for day one had ended. *Neuberger Dep. p. 158.* Around 3:00 p.m., a large group of about 100 people on Walnut and 7th were trying to make their way to Chestnut to access the Xcel Energy Center where the RNC was held. *Neuberger Dep. p. 37.* This group lit a dumpster on fire and pushed past officers. *Henry Dep. pp. 54-55.* Sr. Commander Neuberger, in the RNC Command Post (*Neuberger Dep. p. 19*), believed this same group of people made their way to Shepard and headed

³ The deposition transcripts of Defendants are attached to Second Aff. Tindal, Exhibits E through I. Hagy’s deposition transcript is attached to Fourth Aff. Tindal, Exhibit S.

east toward Sibley. *Neuberger Dep. p. 38*. Neuberger ordered officers not to let people downtown. *Neuberger Dep. p. 35*. Officers were trying to regain control of downtown from destruction and chaos. *Neuberger Dep. pp. 29-30, 38-39, 44, 46; Frazer Dep. p. 82; Englund Dep. p. 25*. They were trying to keep groups from getting to the Xcel Energy Center to commit violence. *Neuberger Dep. p. 39*. Officers also needed to keep downtown controlled so emergency vehicles could access downtown. *Henry Dep. p. 65*.⁴

B. Attack Against Officers

NRT36, a group of 21 officers (*Henry Dep. p. 29*), was sent to Jackson and Sibley where the streets intersect Shepard. NRT36 was split between the intersections of Sibley and Shepard, and Jackson and Shepard with approximately 11 officers at each intersection. *Frazer Dep. p. 17; Henry Dep. p. 73*. A crowd was walking east on Shepard and stopped at Jackson while growing in size. *Henry Dep. pp. 74-75*. Sgt. Henry stepped in the street and ordered the group not to cross. *Henry Dep. p. 75*. He told people they could go east or west and used hand signals to direct them. *Henry Dep. pp. 77, 85; Englund Dep. pp. 29, 33*. Henry turned around and Sgt. Cleveland yelled, “watch out for the guys behind the sign.” *Henry Dep. pp. 77-78; Englund Dep. p. 34*.

At approximately 4:30 p.m., a group of 20 people tried to cross Shepard to get to Jackson. *Henry Dep. p. 79; Aff. Frazer Ex. I (16:33); Aff. Frazer Ex. H (20:14)*. The crowd directly behind this group was about 40 people. *Henry Dep. p. 79*. The group on the sidewalk and street was approximately 250 people. *Henry Dep. p. 70*. Officers

⁴ See Affidavit of Anderson, Exhibit 1 for an overview of chaos and destruction that occurred on September 1, 2008.

believed both groups were working in concert; chanting, yelling at officers and staying focused on the officers. *Frazer Dep. pp. 54, 58; Henry Dep. pp. 80-81, 97, 103-104; Englund Dep. pp. 48-49.* People from both groups were throwing things at officers. *Frazer Dep. p. 58; Englund Dep. pp. 40-41.*

The group taunted law enforcement yelling “shoot.” *First Aff. Tindal Ex. B (1:02).* The protesters yelled, “go” and crossed Shepard. *First Aff. Tindal Ex. B (1:24-1:30).* Officers yelled for the group to stay back. *Henry Dep. p. 93; Englund Dep. p. 35.* A rock the size of a softball came right at Sgt. Henry and he had to move to avoid being hit. *Henry Dep. p. 94.* The group threw feces bags. *Henry Dep. p. 101; Englund Dep. p. 42; Aff. Frazer Ex. I (16:33); Aff. Frazer Ex. H (20:48).* NRT36 urgently requested assistance. *Aff. Frazer Ex. I (16:34); Aff. Frazer Ex. H (20:23).* Sgt. Henry and Sgt. Englund were nearly struck with bags of feces. *Henry Dep. p. 105; Englund Dep. p. 43.* Another officer was hit with fecal matter. *Henry Dep. p. 100; Englund Dep. p. 42.* The group threw a container with liquid that shattered and broke near officers. *Henry Dep. p. 107.* Objects thrown at officers were coming from the south and west. *Englund Dep. pp. 40-41.*

NRT36 defended themselves and threw a stinger blast ball. *Henry Dep. p. 109.* The group attempting to cross the street retreated. *Henry Dep. p. 110.* The large group behind and to the west of this group continued to come toward officers in the street, chanting and throwing things at them. *Henry Dep. pp. 110-111, 113.* Eleven officers formed a line covering the east/west lanes of Shepard. *Henry Dep. p. 121.* Several individuals were allowed to leave to the east. *Henry Dep. p. 152.* The crowd went west

on Shepard. *Henry Dep. p. 122; Aff. Frazer Ex. H (22:00); Aff. Frazer Ex. I (13:36).*

The crowd took over the street. *Aff. Frazer Ex. H (22:06).* Officers used riot control agents including inert gas, OC gas and marking rounds. *Aff. Tindal Ex. L.*

The crowd was still throwing objects at officers. *Aff. Frazer Ex. H (23:33); Clark Dep. p. 30.*⁵ The crowd was approximately 400 people. *Aff. Frazer Ex. H (24:00); Henry Dep. p. 72.* Protesters grossly outnumbered officers. *Aff. Frazer Ex. A (4:36-4:39); First Aff. Tindal Ex. B (3:36); Hagy Dep. p. 19.* The crowd was aggressive toward officers after being pushed west. *Aff. Tindal Ex. A.* The crowd repeatedly yelled profanities and shouted, “The Whole World is Watching.” *Id.; Henry Dep. p. 72; Englund Dep. p. 27.* They also took down a street sign in the median of Shepard Road. *First Aff. Tindal Ex. A (1:45); Henry Dep. p. 138.* People jumped on vehicles and broke windshields. *Henry Dep. pp. 131, 133; Englund Dep. p. 68; Clark Dep. pp. 37, 50.* The crowd continued to throw objects at officers including homemade bombs/fireworks. *Henry Dep. p. 127; Englund Dep. pp. 44, 47; Aff. Frazer Ex. G (photos).* It was “complete chaos.” *Henry Dep. p. 126; Clark Dep. p. 96.*

A Chemical Agent Response Team (CART) arrived to assist NRT36. *Clark Dep. p. 28.* CART left and Mobile Field Force Division Two (MFF2) arrived to assist. *Frazer Dep. pp. 22, 36.* When MFF2 arrived at Jackson and Shepard, there were spent munitions, fecal matter, bandanas, signs and sticks. *Frazer. Dep. pp. 40, 74; Frazer. Aff. Ex. G (photos).* The crowd was blocking the eastbound traffic and consuming all of the

⁵ Clark’s deposition transcript is attached to Third Aff. Tindal, Exhibit J.

walkway and grassway. *Frazer Dep. p. 53.* MFF2 formed a line of officers to assist in keeping the crowd moving west. *Frazer Dep. p. 116.*

Officers did not arrest individuals at Jackson and Shepard because they did not have resources or tactical advantage to surround the group of that size. *Frazer Dep. pp. 59, 213-214; Henry Dep. pp. 134-135; Englund Dep. p. 28.* Commander Frazer ordered the group to leave to the west eight times. *Frazer Dep. pp. 60, 62, 63; Aff. Frazer Ex. D (5:29; 6:18; 9:06).* Some people left the area. *Frazer Dep. p. 72.* Officers lined the west edge of the park and allowed people to leave. *Frazer Dep. p. 66; Clark Dep. pp. 63, 65-66.* It was critical the crowd leave because it was an unlawful assembly; Shepard is a route for emergency vehicles to the Xcel Center, a route for delegate buses and the First Lady's Motorcade was expected at 5:30 p.m. on Shepard. *Aff. Frazer ¶ 18; Aff. Pye ¶ 3; Dec. Kirkwood ¶¶ 3-4.*

C. Arrest

As officers moved west, Commanders Neuberger and Frazer decided to surround and arrest individuals. *Frazer Dep. p. 78.* The group that attacked NRT36, stayed together as a group. *Frazer Dep. pp. 79, 101, 136-137.* When the officers moved westbound, only inert blast balls and smoke with no OC was used to keep the crowd moving. *Henry Dep. pp. 138-139.* A few less lethal munitions were used on individuals to stop crimes. *Henry Dep. p. 139; Clark Dep. p. 50.*

The crowd arrived at a park on Shepard near Ontario and were encircled by officers. *Neuberger Dep. p. 80; Frazer Dep. pp. 89-92.* An announcement was given over a loud speaker those persons were under arrest. *Neuberger Dep. p. 95; Frazer Dep.*

p. 128; Clark Dep. p. 83. People were taken out of the encirclement who were not involved in the attack against officers. *Frazer Dep. p. 133; Henry Dep. p. 166.*

Approximately 200 people were allowed to leave. *Frazer Dep. pp. 133-135; Clark Dep. pp. 85, 88; Aff. Frazer Ex. L (00:10-00:25).* An announcement was made to the press to leave the area. *Clark Dep. p. 91; Aff. Tindal Ex. M, p. 52.* Arrest teams came in and arrested most of the remaining individuals. *Frazer Dep. p. 134.*

D. Plaintiffs on September 1, 2008

1. Brook Bernini

Bernini was acting as a “legal observer” in St. Paul. *Sixth Aff. Tindal Ex. MM, Bernini Answers to Interr. #6.* Upon learning persons were tear-gassed on Shepard, she went to observe. Bernini walked east on Shepard until she came to an intersection blocked by police. Bernini moved westbound. Police pushed people into a park on Shepard. Bernini sat in the park for about 30 minutes and was then allowed to leave. *Id.*

2. Matthew Byrnes

Byrnes was bicycling around St. Paul. *Fourth Aff. Tindal Ex. V, Byrnes Answers to Interr. #3.* He biked near the park on Shepard. A line of police formed on the northeast side of the road. Byrnes turned to go the way he came, but it was blocked by a new line of officers. Byrnes was released from the park. *Id.*

3. Simon Cecil

Cecil volunteered as a medic in downtown St. Paul. *Sixth Aff. Tindal Ex. NN, Cecil Answers to Interr. #6.* Cecil walked eastbound on Shepard toward Jackson. As he got to the intersection of Shepard and Jackson, there was a long line of people on the

sidewalk. A small group of people at the front of the line attempted to cross Shepard, where there was a line of police. The officers threw “concussion grenades” toward people. *Id.* Cecil turned and ran west and was arrested.

4. Andrew Cohen

Cohen and his friend walked to Shepard with a crowd of people after an earlier march. *Fourth Aff. Tindal Ex. W, Cohen Answers to Interr. #6.* Cohen walked east on Shepard. Near the Robert Street bridge, Cohen encountered a large crowd and police firing tear gas. Cohen then walked west on Shepard and was arrested.

5. David Drew, Jr.

Drew volunteered as a medic. *Fourth Aff. Tindal Ex. X, Drew Answers to Interr. #6.* In the afternoon, he walked behind a group of protesters when the group got to Shepard and were blocked by police. Drew walked west and was arrested.

6. Kellan Dubbels

Dubbels was in St. Paul to protest during the RNC. *Sixth Aff. Tindal Ex. OO, Kellan Dubbels Answers to Interr. #6.* Dubbels walked on Shepard with a group heading east. When the group reached Shepard and Jackson, they were stopped by officers. Dubbels turned and walked to the west and was arrested.

7. Kristofer Dubbels

In the afternoon, Dubbels walked with a group of people from the capitol lawn down to Shepard. *Fourth Aff. Tindal Ex. U, Dubbels Dep. p. 23.* When the group got to Shepard and Jackson, the front of the group tried to cross the street to head back

downtown. *Id.*, p. 26. The line of police at the intersection responded with chemical munitions. Dubbels went west and was arrested. *Id.*, pp. 35, 43.

8. Alana Michelle Exum

Exum was with friends in downtown St. Paul after the main march had ended. *Third Aff. Tindal Ex. R, Exum Dep.* p. 10. Exum saw people he knew and walked toward the river with them and others. *Id.*, p. 12. Exum walked down Shepard and the group came to an intersection blocked by police. *Id.*, p. 13. Exum tried to cross the street toward officers. *Id.*, p. 14. Exum turned around and headed west. *Id.*, pp. 16-17. Exum claims an officer pushed him in the back with a baton and told him to keep moving. *Id.*, p. 18. Exum never sought medical treatment and claims he had only a small bruise from the baton. *Id.*, pp. 23-24. Exum was arrested. *Id.*, p. 23.

9. Bobby Reese Hagy, Jr.

Hagy was in St. Paul and intended to go to the “Take Back Labor Day” concert on Harriet Island. *Fourth Aff. Tindal Ex. S, Hagy Dep.* p. 11. While walking down Shepard toward a bridge to get to Harriet Island, Hagy was stopped by people who instructed him not to go that way, as they had just been fired upon by officers using chemical irritants. Hagy then headed west. *Id.*, pp. 30-34. Hagy was arrested. *Id.*, p. 46.

10. Adam Hayden

Hayden went with friends to see the “Taking Back Labor Day” show on Harriet Island. *Fourth Aff. Tindal Ex. T, Hayden Dep.* pp. 10-11. When they got to the path along Shepard, Hayden and his friends headed toward the Wabasha Bridge and observed the roadway blocked by officers. *Id.*, p. 16. Hayden stood on the sidewalk along

Shepard trying to figure out how to get to Harriet Island, when a group tried to cross Shepard to go downtown. *Id.*, p. 17. Hayden and his friends eventually headed west on Shepard. *Id.*, p. 14. Hayden was arrested. *Id.*, p. 32.

11. Adryn Hayes

Hayes was in downtown St. Paul with a group of medics. *Third Aff. Tindal Ex. Q, Westlund Dep. p. 29.* Hayes followed an unpermitted march around the Xcel Center. *Id.* Once the group reached Shepard, they headed east. At Shepard and Jackson, the group encountered officers. Marchers at the front carrying banners stepped into the street. Hayes went west and was arrested.

12. Kevin Hundt

Hundt rode his bicycle to St. Paul because he wanted to see what was going on by the river. *Fourth Aff. Tindal Ex. Y, Hundt Answers to Interr. #6.* Hundt observed traffic blocked on Shepard and saw police coming toward him. Hundt was detained for a short time and released. *Id.*

13. Rachel Jackson

Jackson was with other medics in St. Paul. *Fourth Aff. Tindal Ex. Z, Jackson Answers to Interr. #6.* After the large protest, Jackson followed a group of protesters through downtown streets, a residential area, and eventually onto Shepard. When the group reached Jackson, there were officers. A group of protesters took a sign and started walking toward police. When the protesters were halfway across the intersection, police fired smoke grenades and other projectiles at the group. Jackson was arrested.

14. Tiana Johnson and Andrew Temperante

After the march had ended, Johnson and Temperante were near the capitol and heard a police riot was occurring. *Sixth Aff. Tindal Ex. PP, Johnson Dep. p. 23.* Johnson decided to go down and witness this. Johnson and Temperante walked toward the river with about 20 people. *Id., p. 20.* Half of the group, but not Johnson or Temperante, moved forward toward police. Johnson and Temperante headed west and were arrested. *Id., p. 28.*

15. Garth Kahl

Kahl was in St. Paul volunteering as a medic. *Fifth Aff. Tindal Ex. II, Kahl Answers to Interr. #6.* After the main march, Kahl walked east down Shepard and heard explosions. As he continued east, people were running toward him. Kahl provided saline water to flush eyes and skin and encouraged people to retreat west. Kahl was arrested.

16. Vain Mainstream

Mainstream was in St. Paul to go to work. *Fourth Aff. Tindal Ex. AA, Mainstream Answers to Interr. #6.* Mainstream arrived three hours early for his shift. He parked at the St. Paul Cathedral, walked down Kellogg and saw a large group of protesters heading south. He figured they knew where they were going, so he followed them. The group made its way through the city, and eventually emerged onto Shepard heading east. A small group of protesters held their sign as a shield and began walking toward officers. Mainstream went west to the park. After being told to put his hands on his head, Mainstream did crunches (sit-ups). *Sixth Aff. Tindal Ex. QQ, Mainstream Response to*

Admis. #41. Mainstream gave officers the name Cedric Kangas. Mainstream was arrested.

17. David Morse

Morse was in St. Paul documenting the RNC for San Francisco Bay Indymedia. *Fourth Aff. Tindal Ex. BB, Morse Answers to Interr. #6.* After the permitted march, Morse followed Anti-Capitalist Bloc protesters around downtown St. Paul. After walking down Shepard, Morse saw gas and smoke bombs released. Morse went west and was released in the park. *Id.*

18. Jared Lanctot

Lanctot was in St. Paul to cover the RNC for The Agenda (a quarterly publication based in Providence). *Sixth Aff. Tindal Ex. RR, Lanctot Answers to Interr. #6.* After covering the march from the capitol to the Xcel Center and back, Lanctot began walking to Harriet Island to cover the Take Back Labor Day Show. He was passing through the park along Shepard when he found the road blocked by police. Lanctot was arrested. *Id.*

19. Michael Larson II

Larson was in St. Paul to protest the RNC. *Fourth Aff. Tindal Ex. CC, Larson Answers to Interr. #6.* Larson was near the capitol when he heard protesters were going down by the river. Larson followed the protest west on Shepard until he got to Jackson where officers blocked the road. Some people in the group tried to cross the road. Larson headed west and was arrested.

20. Craig Neef

Neef was in St. Paul documenting protests against the RNC. *Third Aff. Tindal Ex. P, Neef Dep. p. 13.* Neef followed a group of protesters east on Shepard. *Id., p. 27.* People in the front of the group tried to cross Shepard and were stopped by police. *Id., p. 28.* Neef was arrested in the park. *Id., p. 42.*

21. Mary Ogle

On September 1, 2008, Ogle was in St. Paul to protest the RNC. *Sixth Aff. Tindal Ex. JJ, Ogle Answers to Interr. #6.* After the march, Ogle and her friends walked around the city. They walked from the capitol toward the river. When Ogle got to the river, she stopped to talk to people. While in the park, Ogle heard popping sounds and saw tear gas three blocks away. Ogle walked in the direction of the gas and popping sounds to find her friends who had earlier walked on ahead. Ogle went west on Shepard and was released in the park.

22. Tim Phillips

Phillips was in St. Paul as a legal observer. *Fifth Aff. Tindal Ex. DD, Phillips Answers to Interr. #6.* Phillips followed members of the Anti-Capitalist Bloc as they walked downtown. At Shepard and Jackson, some of the group tried to cross the street toward Jackson. Police fired concussion grenades at them. Phillips moved westbound on Shepard and was released in the park.

23. Raphi Rechitsky

Rechitsky was in St. Paul volunteering as a legal observer. *Fifth Aff. Tindal Ex. EE, Rechitsky Answers to Interr. #6.* He learned people near the river were tear-gassed.

He and Bernini walked to Shepard and saw people rushing toward the park. Rechitsky and Bernini passed the park and walked to where a large group of people were crowded on the sidewalk. A line of police was moving toward the crowd from the east. Rechitsky was released from the park.

24. Lambert Rochfort

Rochfort was in St. Paul to videotape protests against the RNC. *Third Aff. Tindal Ex. O, Rochfort Dep. p. 14.* After the march, Rochfort videotaped the Anti-Capitalist Bloc as they walked from downtown toward Shepard. *Id., p. 29.* At Jackson and Shepard, officers were waiting and as the group got near, fired concussion grenades, tear gas, and other projectiles. *Id., p. 31.* Rochfort went west and was arrested. *Id., p. 44.*

25. Nicholas Segner

Segner was in St. Paul to attend the march against the RNC. *Fifth Aff. Tindal Ex. FF, Segner Answers to Interr. #6.* After the march, Segner followed a group to Shepard. When the group got near Jackson, Segner saw police. The police started throwing tear gas at the group. Segner went west to the park and was arrested.

26. Ryan Solem

Solem and his girlfriend rode their bicycles to St. Paul to attend a concert on Harriet Island. *Fifth Aff. Tindal Ex. GG, Solem Answers to Interr. #6.* They rode down Shepard to figure out how to get up to the bridge. Solem heard explosions, was pushed to a park and arrested.

27. Zach Swift

Swift attended a march in St. Paul. *Sixth Aff. Tindal Ex. KK, Swift Answers to Interr. #6*. After the march, Swift walked toward Harriet Island to attend the concert. As Swift was walking east along Shepard, he noticed people heading west suffering from the effects of tear gas. Swift was forced west and arrested.

28. Michael Ward II

Ward was in St. Paul, in the park along Shepard in order to listen to a concert on Harriet Island. *Sixth Aff. Tindal Ex. SS, Ward Answers to Interr. #6*. After listening to the concert for awhile, Ward headed east along Shepard, but stopped near Ontario when he heard explosions and saw tear gas. Ward turned around and was arrested in the park.

29. Rachel Westlund

Westlund was in St. Paul with a group of medics. *Westlund Dep. p. 19*. Westlund followed a group of protesters from the capitol toward Shepard. *Id., p. 22*. Once the group reached Shepard, they headed east. At Shepard and Jackson, the group encountered officers. A small group of protesters with a banner began crossing the street. The officers advanced toward the group and Westlund headed west. *Id., p. 26*.

In the park, Westlund was approached by an officer with handcuffs and arrested. Westlund requested not to be handcuffed behind his back. *Id., p. 31*. The officer handcuffed Westlund behind his back. Westlund was booked and searched; however, an officer moved Westlund's handcuffs to the front. *Id., p. 34*. Westlund claims permanent injuries to his wrists but has not treated with a doctor. *Id., p. 39*.

30. Nelson Whitmore

Whitmore was in St. Paul to attend a concert on Harriet Island. *Sixth Aff. Tindal Ex. LL, Whitmore Answers to Interrogatories #6.* Whitmore planned to listen to the concert from the river in the park along Shepard. After arriving at Shepard, Whitmore decided to cross the river to attend the concert. Whitmore walked east along Shepard and encountered a large group of people also heading east. Everyone walking eastbound along Shepard was stopped by police. Whitmore went west and was arrested.

31. Bruce Wilkinson

Wilkinson was in St. Paul and participated in a march. *Fifth Aff. Tindal Ex. H, Wilkinson Answers to Interr. #6.* When a large group of people left the capitol area in the afternoon, Wilkinson followed. Once he reached Shepard, Wilkinson heard the concert taking place on Harriet Island and decided to attend. Wilkinson was walking east on Shepard when a large number of people started running west. When Wilkinson saw police, he turned around and started heading back to the park and was arrested.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no dispute between the parties about any genuine issues of material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

ARGUMENT

I. OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY

An officer is entitled to qualified immunity unless his or her conduct violated clearly established statutory or constitutional rights of which a reasonable person would

have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). Simply put, “[q]ualified immunity is an entitlement not to stand trial or face the other burdens of litigation.” *Saucier v. Katz*, 533 U.S. 194, 200 (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)). Like absolute immunity, qualified immunity is effectively lost if a case is erroneously permitted to go to trial. *Id.*

Courts have traditionally applied a two-step analysis to determine whether a government official is protected by qualified immunity. *Saucier*, 533 U.S. at 200-01. The first step is whether, taken in the light most favorable to the plaintiff, the facts alleged show the officer’s conduct violated a constitutional right. *Id.* If the answer is yes, the second step is whether the constitutional right at issue was clearly established. *Id.* Because the sequence set forth under *Saucier* is not always convenient, the Supreme Court permits courts to exercise their discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first, in light of the circumstances of the particular case at hand. *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009).

A. No Violation of a Constitutional Right

Plaintiffs claim the officers violated their “Fourth Amendment rights to be free from arrest without probable cause and the use of excessive force when they authorized and directed their detainment and arrest at the Park, their jailing, and the deployment of chemical irritants and concussion grenades against them.” *2nd Amend. Compl.* ¶ 76. Also, “individual defendants violated [P]laintiffs’ ... First Amendment right to free speech when they authorized and directed their detainment and arrest at the Park, their

jailing, and the deployment of chemical irritants and concussion grenades against them on account of their perceived political expression.” *2nd Amend. Compl.* ¶ 77.

In *Malley v. Briggs*, 475 U.S. 335, 341 (1986), the Supreme Court explained:

[Police officers] will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have [acted similarly] . . . but if officers of reasonable competence could disagree on this issue, immunity should be recognized.

Qualified immunity shields an officer from personal liability when an officer reasonably believes his conduct complies with the law. *Pearson*, 129 S. Ct. at 823.

1. No Plaintiff Was Unlawfully Arrested.

Contrary to Plaintiffs’ assertion, officers only need, and indeed had, *arguable* probable cause to make arrests. “To justify a warrantless arrest, probable cause must exist.” *United States v. Adams*, 346 F.3d 1165, 1169 (8th Cir. 2003). When reviewing an allegation probable cause was lacking to make a warrantless arrest the Court should:

consider whether the totality of facts based on reasonably trustworthy information would justify a prudent person in believing the individual arrested had committed . . . an offense. Probable cause is to be assessed in terms of the circumstances confronting a reasonably cautious police officer at the time of the arrest, and the arresting officer is entitled to consider the circumstances, including arguably innocent conduct, in light of his training and experience. The probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause.

Myers v. Morris, 810 F.2d 1437, 1455 (8th Cir. 1987), *cert. denied*, 484 U.S. 282 (1987) (citations omitted); *United States v. Houston*, 548 F.3d 1151, 1154 (8th Cir. 2008).

In determining whether officers are entitled to qualified immunity for an unlawful arrest claim, the issue is not probable cause in fact but ‘arguable’ probable cause because “the qualified immunity privilege extends to a police officer who is wrong, so long as he

is reasonable.” *Walker v. City of Pine Bluff*, 414 F.3d 989, 992 (8th Cir. 2005). “Under this standard, all public officials are protected except the ‘plainly incompetent’ and those who are deemed to have ‘knowingly violate[d] the law.’” *Gorra v. Hanson*, 880 F.2d 95, 97 (8th Cir. 1989) (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). “The Constitution does not guarantee that only the guilty will be arrested.” *Baker v. McCollan*, 443 U.S. 137, 145 (1979)).

The District of Minnesota and the Eighth Circuit recognize the Collective Knowledge Doctrine which allows probable cause calculations to add up information known to different, but not all officers, as long as they are working as a team. *United States v. Gregoire*, 2009 U.S. Dist. LEXIS 120803, *42-43 (D. Minn. 2009) (citing *United States v. Gillette*, 245 F.3d 1032, 1034 (8th Cir. 2001)).

When it comes to the nuance of probable cause determinations for arresting riotous crowds, however, neither the Eighth Circuit nor the District of Minnesota has well developed case law. The United States Court of Appeals for the District of Columbia has more experience and recently clarified its line of cases in *Carr v. District of Columbia*, 587 F.3d 388 (D.C. Cir. 2009). The *Carr* court held probable cause “is satisfied if the officers have grounds to believe all arrested persons were a part of the unit observed violating the law.” *Id.* at 407. Plaintiffs will likely argue officers did not have probable cause without giving a sufficient dispersal warning and reasonable opportunity for Plaintiffs to leave. The plaintiffs in *Carr* made the same argument and the court pointed out dispersal orders are not “a constitutional prerequisite before every group arrest. If police have probable cause to believe that the group they are arresting is committing or

has committed a crime, no more is necessary.” *Id.* at 410. Such requirement would be especially anomalous in dangerous riot situations where swift arrests are essential to quickly quell disruption. *Id.* Plaintiffs may also claim officers needed to separately determine probable cause for each individual. The *Carr* court also rejected such assertion explaining:

[a] requirement that the officers verify that each and every member of a crowd engaged in a specific riotous act would be practically impossible in any situation involving a large riot ... To satisfy [plaintiffs’] suggested standard of proof would require virtually as many officers as rioters – and even then it is doubtful that it could be met. ... To be sure, under the standard of our cases – that the police are obliged to show that the crowd acted unlawfully as a unit – it is possible that an entirely innocent person would be mistaken for a rioter. But it should be borne in mind that the legal issue is probable cause, not ultimate conviction.

Id. at 408.

Similar to this case, in *Carr*, after officers witnessed protesters destroy property and hurl objects at police, an order was given for the protesters to be arrested. *Id.* at 403-04. The protesters moved to an alley where they were corralled and arrested. *Id.* No order to disperse was given at any time. *Id.* Plaintiffs moved for summary judgment. *Id.* at 405. Plaintiffs argued even if it reasonably appeared to officers everyone in the street was rioting, probable cause did not exist to make arrests in the alley because uninvolved people could have been in the alley. *Id.* at 408-09. The court rejected the argument because officers only had to show reasonable grounds to believe everyone arrested was a part of the riotous group. *Id.* at 409. Officers demonstrated reasonable grounds by testifying they blocked one side of the alley; did not make indiscriminate arrests, only members of the crowd; and attempted to clear the alley of non-protesters prior to the

protesters' arrival. *Id.* The court held the officers' version of events, "certainly permitted the police to believe reasonably that everyone in the alley had been a marcher" and denied plaintiffs' motion for summary judgment. *Id.*

In the present case, no Plaintiff was unlawfully arrested. Under the Minnesota Statutes someone is guilty of riot "[w]hen three or more persons assembled disturb the public peace by an intentional act or threat of unlawful force or violence to person or property" and guilty of unlawful assembly when "three or more persons assemble ... [with a lawful] purpose, but the participants so conduct themselves in a disorderly manner as to disturb or threaten the public." §§ 609.71 & 609.705.

At Jackson and Shepard, officers came under siege from a barrage of rocks, urine, feces and other makeshift weapons thrown by the assembled crowd. The officers were outnumbered and overpowered by the crowd growing from 40 up to 400 people. The crowd was working in concert and chanting together. Additional officers were called in and at least eight warnings were given to the crowd explaining they would be arrested if they did not disperse. Some members of the crowd left, but many remained in violation of the dispersal order. All those who remained were on notice they were committing an unlawful assembly. Due to the crowd outnumbering the officers, officers could not safely surround the remaining crowd and pushed everyone back to a nearby park to conduct arrests. The entire crowd sat together in the park while officers individually arrested those believed seen hurling objects for felony riot and the rest of the crowd for unlawful assembly. These arrests were supported by arguable probable cause because they were founded upon the officers' personal observations of the group. Other people

dispersed throughout the park, including eight Plaintiffs who were released after a brief investigation by officers, cannot sustain unlawful arrest claims because they were merely detained.

While it is possible one or more innocent people were arrested, such fact is inconsequential because officers had a reasonable basis to believe each person they arrested was a part of the riotous crowd. When the crowd entered the park, they congregated in one particular area. People who were located in other areas of the park as well as elderly citizens and families were released because officers knew they were not members of the criminal group. Additionally, the number of bystanders in the park was significantly limited because the Minneapolis MFF blocked the park entrance and evacuating visitors before protesters entered the park. Officers did not indiscriminately arrest everyone in the park. Hundreds of people were allowed to leave. Because the officers acted reasonably in very dangerous, rapidly evolving circumstances, even if they made a mistake, they are entitled to qualified immunity and Plaintiffs' unlawful arrest claims must be dismissed.

2. No Violation of Free Speech Occurred.

Plaintiffs' First Amendment rights to free speech were not violated by the arrests. In order to state claims under the First Amendment, Plaintiffs must be able to show officers were using law enforcement to retaliate against them for engaging in a prior act of free speech. *Williams v. City of Carl Junction*, 480 F.3d 871, 874-875 (8th Cir. 2007). However, while "[i]t is undisputed that protesting peaceably is protected speech. Violent protest is not." *Cross v. Mokwa*, 547 F.3d 890, 896 (8th Cir. 2008); *NAACP v. Claiborne*

Hardware Co., 458 U.S. 886, 933 (1982) (“violent conduct is beyond the pale of constitutional protection”). First Amendment protections, while broad, are not absolute. *Elrod v. Burns*, 427 U.S. 347, 360 (1976). It is axiomatic police may stop or disperse public demonstrations or protests where “clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order appears.” *Cartwell v. Connecticut*, 310 U.S. 296, 308 (1940).

Plaintiffs failed to show any of them were engaged in protected free speech at the time of the arrests. The permitted marches had concluded. No Plaintiff claims they were participating in a protest, peaceful or otherwise; engaged in political speech; or carrying a banner. Even so, what may have originally been a peaceful protest was violent when the decision to disperse and arrest was made. The crowd was assaulting police officers, they were disorderly and disturbing the public peace. They were not engaged in protected free speech. Likewise, those who claim they were bystanders listening to or on their way to a concert were not engaged in a protected free speech activity. Moreover, Plaintiffs have absolutely no evidence officers specifically targeted them in retaliation for listening to the concert. *Habiger v. City of Fargo*, 80 F.3d 289, 296 (8th Cir. 1996) (dismissing protester’s First Amendment claim for failing to show officers’ pretext). Accordingly, all Plaintiffs’ First Amendment claims must be dismissed.

3. No Unlawful Force Was Used Against Any Plaintiff.

The force used by officers to stop the riot and move everyone to a nearby park was reasonable under the circumstances. While the right to be free from excessive force is clearly established, “Fourth Amendment jurisprudence has long recognized that the right

to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” *Graham*, 490 U.S. at 396; *Guite v. Wright*, 147 F.3d 747, 760 (8th Cir. 1998). “Not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates the Fourth Amendment. Excessive force claims are analyzed under the Fourth Amendment’s “objective reasonableness” standard. *Graham*, 490 U.S. at 388; *see also Saucier*, 533 U.S. at 209-10. “The reasonableness of a particular use of force depends on the circumstances of each case, including ‘the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.’” *Wertish v. Krueger*, 433 F.3d 1062, 1066 (8th Cir. 2007) (quoting *Graham*, 490 U.S. at 396). The use of some force by police is reasonable when an arrestee flees, resists arrest, or disobeys orders. *See e.g., Foster v. Metro. Airports Comm’n*, 914 F.2d 1076, 1082 (8th Cir. 1990).

“We entertain no doubts that the privilege of individual police officers to fire in self defense or to quell a riot are such common law defenses and may be asserted in response to the §1983 cause of action.” *Burton v. Waller*, 502 F.2d 1261, 1274-76 (5th Cir. 1974) (“one may use deadly force ‘for the purpose of suppressing a riot or preventing the other [person] from participating in it . . . if the riot is one which threatens death or serious bodily harm.’ Restatement Second § 142(2).”). ““The wholesale commission of common state-law crimes creates dangers that are far from ordinary. Even in the context of political protest, persistent, organized, premeditated lawlessness menaces in a unique

way the capacity of a State to maintain order and preserve the rights of its citizens.”

Forrester v. City of San Diego, 25 F.3d 804 (9th Cir. 1994) (citation omitted).

Federal courts around the country have upheld the use of force among unruly assemblies of people who create riotous circumstances. *Barney v. City of Eugene*, 20 Fed. Appx. 683, 685 (9th Cir. 2001) (using tear gas after violence erupted and protesters refused to move back); *Darrah v. City of Oak Park*, 255 F.3d 301, 307 (6th Cir. 2001) (finding hand-strike to the face of plaintiff who was trying to stop an arrest in the midst of an unruly crowd was reasonable); *Forrester v. City of San Diego*, 25 F.3d 804, 807-08 (9th Cir. 1994) (using pain compliance techniques on protesters who refused to move was reasonable); *Burton v. Waller*, 502 F.2d 1261, 1276-81 (5th Cir. 1972) (holding officers were reasonable to fire weapons in the air to disperse crowd); *Winston v. City of Shreveport*, 2010 U.S. App. LEXIS 16887, *4 & 17-18 (5th Cir. Aug. 12, 2010) (using baton to push plaintiff who failed to disperse); *Ellsworth v. City of Lansing*, 2000 U.S. App. LEXIS 2049, *10-13 (6th Cir. Feb. 10, 2000) (releasing tear gas to compel protesters who refused to move).

Officers at Jackson and Shepard faced a boisterous crowd of up to 400 people. The crowd became increasingly agitated because it was prevented from entering downtown and took out its anger by destroying property and confronting officers. The crowd waged its battle by launching bricks, rocks, urine, feces and other projectiles at officers and yelling obscenities. The officers, who were greatly outnumbered and feared for their safety, reasonably defended themselves with pepper spray, pepper balls, tear gas and other non-lethal force to quell the violence.

Once the decision was made to make a mass arrest and the crowd was given numerous orders to disperse, it was reasonable for the officers to use some degree of force to compel the remaining crowd to follow their directions. Out of concern for everyone's safety, officers decided to move the crowd to a nearby park. The officers' dispersement of tear gas and other non-lethal weapons just behind the crowd to motivate their movement was not unlawful because officers may use a reasonable amount of force to conduct arrests.

Moreover, since the right to make an arrest carries with it the right to use some degree of physical coercion, excessive force claims lie only when a plaintiff suffers "actual injury" resulting from force employed during an arrest. *E.g., Hanig v. Lee*, 415 F.3d 822, 824 (8th Cir. 2005). Simply put, "a *de minimus* [sic] . . . injury is insufficient to support a finding of a constitutional violation." *Crumley v. City of St. Paul*, 324 F.3d 1007 (8th Cir. 2003).

No Plaintiff sustained a substantial injury as a result of the mass arrest. Vague allegations of physical pain, emotional distress, humiliation and mental anguish are insufficient to support an excessive force claim. *2nd Amend. Compl.* ¶ 65; *see Cook v. City of Bella Villa*, 582 F.3d 840, 853 (8th Cir. 2009) ("Generally, allegations of an officer's use of a *de minimis* amount of force, without any resulting injury, are insufficient to support a finding of a constitutional violation."); *Wertish v. Krueger*, 433 F.3d 1062, 1067 (8th Cir. 2006) ("[R]elatively minor scrapes and bruises and the less-than-permanent aggravation of a prior shoulder condition were *de minimis* injuries that support the conclusion that [the officer] did not use excessive force."); *Crumley v. City of*

St. Paul, 324 F.3d 1007 (8th Cir. 2003) (holding handcuffs applied so tight they caused plaintiff's wrists to bleed was insufficient to establish excessive force); *Foster v. Metro. Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990) ("[A]llegations of pain . . . without some evidence of more permanent injury, are [not] sufficient to support [a] claim of excessive force."). Plaintiffs' allegations of mild temporary irritation from pepper spray are simply not sufficient to support a claim for excessive force. *See Jones v. City of Minneapolis*, 2007 U.S. Dist. LEXIS 56280, *26-28 (D. Minn. Aug. 1, 2007) (dismissing excessive force claims because injury from mace used to disperse crowd was de minimis). Furthermore, only one Plaintiff has alleged a permanent injury, but he has not sought treatment. Accordingly, Plaintiffs' claims for unlawful force must be dismissed.

B. The Individual Defendants Did Not Violate Clearly Established Constitutional Rights.

"Clearly established Federal law . . . refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions at the time of the relevant state-court decision."

Carey v. Musladin, 549 U.S. 70, 74 (2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). As the Supreme Court determined in *Hope v. Pelzer*, 536 U.S. 730, 739 (2002):

[Q]ualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, [533 U.S., at 206]. *For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.* This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see *Mitchell [v. Forsyth]*, 472 U.S. 511, 535 (1958)]; but it is to say that in the light of pre-existing law

the unlawfulness must be apparent.” *Anderson v. Creighton*, [483 U.S. 635, 640] (1987).

(*emphasis added*).

On September 1, 2008, case law had not clearly established officers would violate First and Fourth Amendment rights by making a mass arrest after coming under attack by a crowd which far outnumbered officers.

1. Unlawful Arrest.

In *Owaki v. City of Miami*, 491 F. Supp. 2d 1140, 1146 & 1152 (S.D. Fla. 2007), plaintiff alleged he was arrested without probable cause during a protest of the 2003 meeting of the Free Trade Area of the Americas (“FTAA”). Officers testified many of the protesters in the area had become violent and unruly throwing objects at them like ball bearings, screws, bolts, rocks and paint. *Id.* at 1153. In response to the violence, officers made multiple announcements asking people to move to specific streets. *Id.* at 1154. Plaintiff did not leave. *Id.* The court held it was undisputed a reasonable officer could believe plaintiff meant to disobey the dispersal order and thus knowingly participated in an unlawful assembly; therefore, the arrest was supported by probable cause. *Id.* The court also held officers could rely on information from one officer to another, to develop probable cause and the fact a criminal “defendant is subsequently acquitted or charges are dropped against the defendant is of no consequence in determining the validity of the arrest itself.” *Id.* at 1154-55.

Additionally, in *Delgado v. Miami-Dade County*, 456 F. Supp. 2d 1234, 1235-36 (S.D. Fla. 2006) a journalist who started walking with a group of protesters at the same

2003 FTAA meeting was arrested, handcuffed and made to lie on the ground face down for at least an hour and a half because the protesters she was with matched a description of people who were seen throwing rocks. *Id.* at 1236. She was later booked into a correctional facility until her arraignment the next morning where all charges were dropped. *Id.* The court held:

Plaintiff admits to being in an area where protesters of the FTAA summit had gathered ..., understood that it was an area of heightened police activity, and admits to meeting and traveling with a group of protesters in the midst of this heightened activity. She admits that she encountered different groups of police officers seeking to disperse the protesters, and was with a group of protesters ... when she was initially detained. Plaintiff also does not know what the subjects of her interview were doing immediately before she joined the group.

Id. at 1239. The court held collective knowledge of the officers gave rise to arguable probable cause to arrest plaintiff under these circumstances and the fact the charges were later dropped was irrelevant. *Id.*

This case involved similar chaotic circumstances where officers reacted swiftly in conducting a mass arrest to regain control of downtown St. Paul from a group of protesters. Like *Owaki* and *Delgado*, officers had a reasonable basis to believe Plaintiffs who did not disperse and intermixed among the protesting crowd were in fact members of the rioting group. It was not clearly established in September 2008 the officers' mass arrest would violate Plaintiffs' rights to be free from an unlawful seizure; therefore, the officers are entitled to qualified immunity and Plaintiffs' unlawful arrest claims must be dismissed.

2. Excessive Force.

This Court has held, “the need to use force in making a swift arrest is magnified when the officer is surrounded by a hosti[l]e crowd.” *Spoo v. Maciejewski*, 2004 U.S. Dist. LEXIS 21985, *24 (D. Minn. Oct. 14, 2004). In *Spoo*, Michael Spoo left a bar and joined a group of a couple hundred individuals in the street. The atmosphere was described as somewhat hostile with people fighting, throwing bottles and blocking traffic. Spoo confronted an officer he saw push a woman and told the officer to leave her alone. When the officer accused him of obstructing, Spoo demanded an explanation. The officer responded by pushing Spoo and instructing him to go home. Spoo initially complied, but returned and demanded the officer’s badge number. According to Spoo, the officer charged at him, yelled “[t]hat’s it, you’re going to jail,” clothes-lined him and tackled him to the ground. *Id.* at *4. The officer then held Spoo down and punched him in the head. Spoo denied resisting the arrest.

Although the Court determined the strike to Spoo’s head was excessive, the Court recalled the “fluid and rapidly developing conditions [the officer] faced” and determined that “[u]nder the circumstances, [the officer] needed to swiftly arrest and remove Spoo from the scene.” *Id.* at *22. The Court explained “[a]s in *Saucier*, ‘[i]t cannot be said there was a clearly established rule that would prohibit’ [the officer] from tackling Spoo and striking him to accomplish these legitimate goals.” *Id.* In concluding the force the officer used was not objectively unreasonable under clearly established law, the Court explained:

Faced with tense, uncertain situations-where a show of weakness or indecision can fuel an explosive outburst-we ask [police officers] to make difficult judgment calls in real time. The confrontation between [the officer] and Spoo took a mere instant-far less time than needed to read a page of this opinion. Under such circumstances, officers will make mistakes. But the community confers qualified immunity upon police officers to ensure that they cannot be sued for every mistake they make. They are properly made to answer only for their unreasonable mistakes, the kind that demonstrate “plain incompetence” or “knowing” violations of the law. [The officer’s] alleged mistakes do not fall into this category. He is entitled to qualified immunity.

Id. at 24; *see also Kenyon v. Edwards*, 462 F.3d 802, 804-07 (8th Cir. 2006) *aff’d* on rehearing, 503 F.3d 722 (2007) (holding officers’ force during arrest was not excessive where plaintiff suffered a rotator cuff injury because the officers faced such a “charged and potentially dangerous atmosphere” in which violence had already occurred amidst a “large crowd of people in an atmosphere of hostility.”)

In *Forrester*, 25 F.3d at 805, protesters at abortion clinics blocked clinic entrances and refused to leave after ordered to do so. Officers forcibly moved the arrestees by tightening Orcutt Police Nonchakus (two sticks of wood connected at one end by a cord) around the protesters’ wrists until they stood up and walked or by other direct physical contact including: firm grip, wrist and arm twisting, and pressure point holds. *Id.* at 805-806. Arrestees complained of injuries to their hands and arms including bruises, a pinched nerve and one broken wrist. *Id.* at 806. The court held evidence supported the jury’s conclusion the officers’ use of pain compliance techniques was reasonable under the circumstances. *Id.* at 807. The court reasoned:

the city clearly had a legitimate interest in quickly dispersing and removing lawbreakers with the least risk of injury to police and others. The arrestees were part of a group of more than 100 protesters operating in an organized

and concerted effort to invade private property, obstruct business, and hinder law enforcement. Although many of these crimes were misdemeanors, the city's interest in preventing their widespread occurrence was significant.

Id. Plaintiffs argued officers could have used less intrusive force, but the court pointed out whether officers could have used less painful, less injurious force was “simply not the issue.” *Id.* at 808. The evidence showed demonstrators ignored orders to move and “officers used minimal and controlled force in a manner designed to limit injuries to all involved.” *Id.*; *see also Barney*, 20 Fed. Appx. at 685 (holding deployment of tear gas against protesters was reasonable force and conclusory allegations officers intended to interfere with plaintiff's First Amendment right, without more, was insufficient to sustain §1983 claim).

The circumstances faced by officers were chaotic, intense and violently hostile. The entire day for officers was strained and nearly resulted in an overthrow of the city. To officers on the scene, the crowd at Jackson and Shepard appeared intent on committing further lawlessness. The city had a significant interest in regaining control of the crowd. Officers lawfully defended the immediate attacks on their own safety and determined the safest method of arrest for everyone involved would be to encircle protesters in the nearby park. The use of less-than-lethal munitions just behind the crowd as a threat to encourage movement toward the park was a controlled use of force to safely accomplish arrests and was certainly less severe than pain compliance maneuvers. Certainly, on September 1, 2008, it was not clearly established the officers' actions would violate Plaintiffs' Fourth Amendment rights and they are entitled to qualified immunity.

II. PLAINTIFFS' *MONELL* CLAIM AGAINST THE CITY OF ST. PAUL MUST FAIL.

“Under 42 U.S.C. §1983, a municipality may not be held vicariously liable for the unconstitutional acts of employees.” *Mettler v. Whittedge*, 165 F.3d 1197, 1204 (8th Cir. 1999). “A municipality may be held liable under Section 1983 only if a municipal custom or policy caused the deprivation of the right protected by the constitution or federal law.” *Angarita v. St. Louis County*, 981 F.2d 1537, 1547 (8th Cir. 1992). “For a municipality to be liable, a plaintiff must prove that municipal policy or custom was the ‘moving force [behind] the constitutional violation.’” *Mettler*, 165 F.3d at 1204. The Eighth Circuit does not use “policy” and “custom” interchangeably. *Id.* “[A] ‘policy’ is an official policy, a deliberate choice of a guiding principle or procedure made by the municipal official who has final authority regarding such matters.” *Id.* Plaintiffs only allege an unconstitutional policy, they do not allege an unconstitutional custom. *See 2nd Amend. Compl.*

A. No Unconstitutional Policy.

A municipal policy is not unconstitutional if it might permit unconstitutional conduct in some circumstances; it is unconstitutional only if it requires its officers to act unconstitutionally. *See Handle v. City of Little Rock*, 772 F.Supp. 434, 438 (E.D.Ark. 1991). The lack of a pattern of unconstitutional misconduct effectively ends the court’s inquiry. *See Thelma D. ex rel. Delores A. v. Board of Education*, 934 F.2d 929, 933 (8th Cir. 1991). “[A] ‘policy’ is an official policy, a deliberate choice of a guiding principle or procedure made by the municipal official who has final authority regarding such

matters.” *Id.* The record contains no evidence of a widespread policy that would require or cause any individual’s constitutional rights to be violated.

Plaintiffs claim the City implemented a policy of isolation and containment of protesters during the RNC claiming the policy directed police to arrest protesters if they “appeared downtown in the City during the RNC.” *2nd Amend. Compl.* ¶ 78. There was no policy to keep people from downtown during the RNC. Commander Neuberger made a tactical decision during the afternoon of day one, to keep people out of downtown until officers regained control. The city faced significant property damage and chaos on day one of the convention. Access to downtown was only restricted for a short amount of time, from approximately 2:00 p.m. (*Aff. Frazer, Ex. I (15:13)*) to the time when the arrests on Shepard started. *Neuberger Dep. p. 119; Aff. Frazer Ex. I (17:24)*. This brief restriction on access to downtown is not an unconstitutional policy.

Plaintiffs also claim the city’s policy authorized “force to intimidate protesters and quash political expression.” *2nd Amend. Compl.* ¶ 78. The Civil Disturbance Management Plan for the RNC’s mission statement was:

To provide a safe environment that protects life, property and free speech through a tolerant approach by well-trained, disciplined Minnesota peace officers relating to the lawful activities conducted by those who wish to exercise their First Amendment Rights in the Minneapolis/St. Paul metropolitan area.

Aff. Frazer Ex. M, p. 3. Clearly, this policy is not unconstitutional. Plaintiffs fail to produce evidence of an official policy suppressing free speech rights.

Plaintiffs also claim the policy authorized arrests without probable cause and the use of excessive force. *2nd Amend. Compl.* ¶ 78. The city’s policy stated: “where

crowds are engaged in unlawful conduct, the MFF will make reasonable efforts to employ ‘non-arrest’ methods of crowd management as the primary means of restoring order...” *Aff. Frazer Ex. M*, p. 5. There is nothing unconstitutional about this policy. Additionally, for non-peaceful civil disobedience, like the situation on Shepard and Jackson, where there was property damage, an attack on officers and interference with a roadway,⁶ officers could use less-lethal munitions against the crowd to prevent injuries, damage to property and to move the crowd. *Aff. Frazer Ex. M*, p. 8. This policy is not unconstitutional. *See Ellsworth v. City of Lansing*, 2000 U.S. App. LEXIS 2049, *7 (6th Cir. Feb. 10, 2000) (citing to the district court who found using tear gas, when the crowd was warned but it is not clear it was heard by the crowd, to get the crowd to move was not an unconstitutional policy.)

The record contains no evidence of a widespread policy that would require or cause a violation of an individual’s constitutional rights. Plaintiffs challenge the use of force and arrests on Shepard Road on September 1, 2008. However, a single incident in no way constitutes a custom or practice of illegal seizure. *Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985). Furthermore, Plaintiffs have not shown “deliberate indifference to or tacit authorization of such conduct by the governmental entity’s policy making officials”

⁶ It was critical Shepard remain accessible during the RNC. Shepard between Chestnut and Sibley was a primary route for delegate buses. Shepard needed to be accessible for emergency access to the Xcel Energy Center. Shepard was also a route for anyone needing a motorcade including the President, First Lady and Vice President. *Aff. Pye* ¶ 3. Shepard was the route for the First Lady’s Motorcade at approximately 5:30 p.m. on September 1, 2008. *Dec. Kirkwood* ¶¶ 3-4.

Mere allegations without factual proof cannot support a claim for improper custom or policy. *Russell v. Hennepin County*, 420 F.3d 841, 848 (8th Cir. 2005) (requiring evidence in record to support *Monell* claim). All claims against the City of St. Paul must be dismissed.

CONCLUSION

For the foregoing reasons, Defendants request the Court grant their Motion for Summary Judgment and dismiss Plaintiffs' claims in their entirety, with prejudice, together with costs and disbursements.

IVERSON REUVERS

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