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3
4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 ROBERT HICKEY, et al.,

8 Plaintiff(s),

9 v.

10 CITY OF SEATTLE, et al.,

11 Defendant(s).

No. C00-1672P

ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT

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14 This matter comes before the Court on the parties' cross motions for summary judgment.

15 This case arises out of the arrest of approximately 150 people during the 1999 World Trade
16 Organization ministerial conference, during which massive protests were conducted in the City of
17 Seattle. Plaintiffs, who are a class of persons who were arrested on December 1, 1999, at the corner
18 of First Avenue and Broad Street, move for a declaration of liability regarding deprivation of fourth
19 and fourteenth amendments resulting from their arrests without individualized probable cause.
20 Defendant City of Seattle moves for summary judgment on all claims on the ground that a
21 municipality cannot be held liable for constitutional violations on a theory of respondeat superior;
22 rather a policy, practice, or custom must have resulted in the constitutional rights deprivation, and
23 none can be shown here. Plaintiffs counter that either final policymaking authority was delegated to
24 the officer in charge of the arrests of the class members, or alternatively that the officer's actions were
25 ratified by persons with final policy making authority. Having reviewed the papers and pleadings
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1 submitted by the parties, and having heard oral argument on the issues, the Court hereby rules as follow

2 1) Defendant's motion for summary judgment is granted with respect to direct use of and
3 delegation of final policymaking authority.

4 2) Defendant's motion for summary judgment is denied with respect to ratification of
5 certain actions by persons with final policymaking authority, as disuptes of material
6 fact exist on this issue that are appropriately decided by the jury.

7 3) Plaintiff's motion for partial summary judgment is granted in part, insofar as the
8 motion calls for a determination of probable cause, but not as to liability. The Court
9 determines that the arrests of the class members was made without the requisite
10 individualized suspicion required to make an warrantless arrest.

11 BACKGROUND

12 On November 30, 1999, the ministerial conference of the World Trade Organization ("WTO")
13 convened in Seattle, Washington. Massive protests by a diverse array of groups were planned and
14 carried out that day, with protesters numbering in the tens of thousands. While there were many
15 permitted, well-planned and well-organized rallies and marches, a large number of protestors engaged
16 in civil disobedience by blocking streets and sidewalks, essentially shutting down the opening day of
17 the WTO conference. Others engaged in violent acts, including destruction of property and assault
18 on police officers.

19 In response, then Mayor Paul Schell declared a state of emergency in the city, and directed the
20 police chief and fire chief to take those steps necessary to maintain the peace and protect property.
21 Bissell Decl. Ex. 1. A general nighttime curfew was imposed on the downtown area. Id. Ex. 2. The
22 following day, Mayor Schell signed an additional emergency order establishing a limited access zone
23 encompassing a 25-block area centered on the venues utilized by the WTO delegates and conferees.
24 That same day, various groups of protesters formed both inside and outside the "No-Protest" or
25 "limited access" zone.

1 The facts relevant to the present suit and motions involve a mass arrest of approximately 150
2 people that took place on First Avenue between Broad and Clay Streets. Most of the relevant
3 factual backdrop regarding the events leading up to the arrests is not seriously in dispute, although
4 the spin on the facts differs between the parties. In short, a group of protestors was pushed by police
5 lines from downtown Seattle toward the Belltown area. Eventually, an order was given by Captain
6 Pugel, the "Demonstration Management Commander," to stop the group's northbound progress,
7 surround the group, and arrest its members. It is disputed whether members of the group were
8 ordered to disperse once they arrived at the intersection of First and Broad, and whether or not they
9 were given a meaningful opportunity to comply with that order. However, as explained in more
10 detail below, these disputed facts are not relevant to a determination of individualized probable cause
11 to make the eventual arrests. Plaintiffs further allege that no effort was made to differentiate between
12 those herded and innocent bystanders caught up in the corral. Members of the plaintiff class were
13 then arrested, transported to Sandpoint Naval Facility, booked and jailed. Most of the class members
14 were held for three days, then released, yet never faced prosecution for any charges arising out of this
15 arrest.

16 Critical to the present case, each of the arrestees was booked using photocopied arrest
17 records without any documentation about what each individual might have done to warrant his or her
18 arrest. See Weaver Decl. Exs. 7-21. Each arrest form lists Lt. Black as the arresting officer, though
19 he admitted in his deposition that he did not perform a single arrest. Each arrest form has the same
20 hand-written, photocopied statement that says that "Susp. failed to clear street in the area of 1st and
21 Broad to 1st and Denny in accordance with Mayor order. Warning given by Lt. Black. Susp.
22 arrested after returning to refusing to leave the area. No photo taken in field due to number of
23 arrestees." These arrest forms are inaccurate, as admitted by the City's agents including Captain
24 Pugel, in that the arrests were not made pursuant to the Mayor's order, since they took place outside
25 the no-protest zone, and that Lt. Black did not give any of the warnings. It is clear that the police
26 processed everyone in the class, at least on paper, as if they had been arrested inside the no-protest

1 zone. As stated in the photocopied arrest form, no photos were taken because of the number of
2 arrestees. Thus, plaintiffs contend that the City arrested them without any individualized evidence of
3 probable cause.

4 The City, on the other hand, asserts that the group was ordered to disperse, and that the class
5 members were arrested after failure to comply with that order, and for pedestrian interference. In fact,
6 the City claims that many of the protestors stated that they wanted to be arrested in order to make a
7 statement. However, the City's witnesses have provided the Court with no information regarding any
8 individual they claim to have violated the orders to disperse or the code provision on pedestrian
9 interference.

10 Numerous cases were filed in federal court alleging various constitutional violations. The
11 present suit, as well as other suits, challenged the constitutionality of the mayor's order establishing
12 the "No-protest"/"limited access" zone. The cases were consolidated for resolution of this and
13 several other smaller legal issues. Judge Rothstein then granted summary judgment to the City,
14 entering a declaration that the Zone was constitutional, both facially and as applied.

15 The Court later entered an order certifying certain issues for interlocutory appeal, but the
16 Ninth Circuit declined to hear the case on an interlocutory basis. Certain claims and parties, including
17 some of the parties in this case, were then dismissed from the case through entry of Rule 54(b)
18 judgment, and those claims are currently on appeal before the Ninth Circuit. Finally, Judge Rothstein
19 approved a class in this specific case consisting of all persons arrested in the afternoon of December 1
20 at the intersection of First Avenue and Broad Street in Seattle.

21 The two motions presently before the Court address the two central issues that must be
22 decided. Defendant moves for summary judgment on all remaining claims on the basis that the City
23 of Seattle cannot be held liable under § 1983 for alleged violations of plaintiffs' fourth and fourteenth
24 amendment rights because § 1983 does not allow for respondeat superior liability, and because
25 plaintiffs cannot show a municipal policy, practice or custom that led to the deprivations. Further,
26 defendant asserts that the City cannot be held directly liable for acts of a person with "final policy

1 making authority.” Plaintiffs counter that final policymaking authority was delegation to Captain
2 Pugel, or in the alternative that Captain Pugel’s actions were ratified by Chief Stamper and/or Mayor
3 Schell. Plaintiffs also move for a declaration of liability regarding deprivation of Fourth and
4 Fourteenth Amendment rights resulting from arrest without individualized probable cause. The City
5 opposes this motion, and moves for summary judgment on this ground in its motion as well.

6 ANALYSIS

7 As defendant states, absent a predicate federal constitutional violation, a plaintiff cannot
8 sustain a claim against a municipality under § 1983 even if an alleged policy, custom, or practice
9 exists. Jackson v. City of Bremerton, 268 F.3d 646, 683 (9th Cir. 2001). On the other hand, absent
10 the existence of a policy, custom, or practice allowing liability to flow to a municipal defendant, a
11 plaintiff cannot succeed in bringing a claim against a municipality even if his rights were violated.
12 Board of County Commissioners v. Brown, 520 U.S. 397, 403-4 (1997). The Court begins by
13 analyzing the more general issue of municipal liability first, then the issue of probable cause.

14 A. Summary Judgment Standard

15 This matter is before the Court on cross motions for summary judgment. Summary judgment
16 is not warranted if a material issue of fact exists for trial. Warren v. City of Carlsbad, 58 F.3d 439,
17 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996). The underlying facts are viewed in the light
18 most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
19 475 U.S. 574, 587 (1986). “Summary judgment will not lie if . . . the evidence is such that a
20 reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc.,
21 477 U.S. 242, 248 (1986). The party moving for summary judgment has the burden to show initially
22 the absence of a genuine issue concerning any material fact. Adickes v. S.H. Kress & Co., 398 U.S.
23 144, 159 (1970). However, once the moving party has met its initial burden, the burden shifts to the
24 nonmoving party to establish the existence of an issue of fact regarding an element essential to that
25 party’s case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett,

1 477 U.S. 317, 323-24 (1986). To discharge this burden, the nonmoving party cannot rely on its
2 pleadings, but instead must have evidence showing that there is a genuine issue for trial. Id. at 324.

3 B. Municipal Liability Under 42 U.S.C. § 1983

4 Title 42 U.S.C. § 1983 provides in part:

5 Every person who, under color of any statute, ordinance, regulation, custom or usage,
6 of any State or Territory or the District of Columbia, subjects, or causes to be
7 subjected, any citizen of the United States or other person within the jurisdiction
8 thereof to the deprivation of any rights, privileges, or immunities secured by the
9 Constitution and laws, shall be liable to the party injured in an action at law, suit in
10 equity, or other proper proceeding for redress . . .

11 Congress intended that the term “person” should include municipalities such as the City of Seattle in
12 this case. Monell v. Department of Social Serv. of N.Y., 436 U.S. 658, 694 (1978). However,
13 liability does not extend to municipalities simply because the municipality employs a tortfeasor – in
14 other words, a municipality cannot be held liable for constitutional rights deprivations on a theory of
15 respondeat superior. Id. at 691. “Instead, Congress intended to hold municipalities liable only when
16 ‘action pursuant to official municipal policy of some nature caused a constitutional tort.’” Christie v.
17 Iopa, 176 F.3d 1231, 1235 (9th Cir. 1999), quoting Monell, 436 U.S. at 691.

18 This “official policy” requirement for municipality liability may be satisfied in a number of
19 ways. Most obviously, it may be shown directly, as through an official, legislatively or
20 administratively adopted policy. Hyland v. Wonder, 117 F.3d 405, 414 (9th Cir. 1997). Official
21 policy may also be established through evidence of a “longstanding practice or custom.” Gillette v.
22 Delmore, 979 F.2d 1342, 1346 (9th Cir. 1992). In contrast, isolated constitutional violations can
23 constitute municipal “policy” if 1) the person causing the violation has “final policy making authority”
24 or has been delegated such authority by someone with final policy making authority; 2) the acts
25 constituting the constitutional violation were later ratified by one with final policy making authority;
26 or 3) the failure to train subordinates in light of substantial need for such training constitutes
“deliberate indifference” on the part of the policy maker. Christie, 176 F.3d at 1235-41.

In this case, plaintiffs assert that 1) the arrests were made pursuant to Mayor Schell’s declared
policy, and/or that 2) final policymaking authority with respect to crowd management and mass

1 arrests during the WTO conference was delegated to Captain Pugel, and/or that 3) Mayor Schell and
2 Police Chief Stamper ratified Captain Pugel's actions.

3 In analyzing these issues, the Court must look first to what constitutes "final policymaking
4 authority." The Court makes this determination with respect to a particular official's authority "in a
5 particular area, or on a particular issue." McMillan v. Monroe County, Alabama, 520 U.S. 781, 785
6 (1997). This determination of whether an official has "final policymaking authority" is dependent on
7 an analysis of state law. Id.

8 In this case, authority to make municipal policy flows from the Seattle City Charter. The
9 Charter designates the Mayor and the Police Chief as final policymakers. Most relevant to the
10 present case is Article VI of the Charter, which directs the Police Chief to "manage the Police
11 Department" and to "prescribe rules and regulations, consistent with the law, for its government and
12 control." Charter of the City of Seattle, Art. VI, Sec. 4. The Charter also directs the Chief of Police
13 to "maintain the peace and quiet of the City" and provides police officers with the power to arrest.
14 Id. Sec. 5. Article VI, Section 4 has been cited as establishing the Chief of Police as a policymaker
15 for § 1983 purposes. Baldwin v. Seattle, 55 Wn.App. 241, 776 P.2d 1377 (1989). This has also
16 been cited as the authority for promulgation of the police manual of rules and procedures. Punton v.
17 Seattle Public Safety Commission, 32 Wn.App. 959, 650 P.2d 1138 (1982).

18 Having established the source of final policymaking authority, the Court turns to plaintiff's
19 three theories regarding the direct use, delegation, or ratification of that authority.

20 1. Liability Based on Mayor Schell's Declared Policy Through the Emergency
21 Orders

22 Plaintiffs' first theory of municipal liability is that the arrests were made pursuant to Mayor
23 Schell's emergency order. Their primary evidence of this is the photocopied arrest forms which each
24 state that the person was arrested because he or she "failed to clear the street in accordance with
25 mayor order." See e.g., Weaver Decl. Ex. 7. Plaintiffs also rely on the City's misguided argument
26 that the mayor's order was the source of the police officer's authority to order persons to disperse
and to arrest them for failure to obey those orders. See City's Mot. for Sum. Jud. at 19-20. The

1 Court agrees with plaintiff that the City cannot on the one hand argue that the Mayor's order had
2 nothing to do with the arrests, then reverse course and argue that the failure to obey an order issued
3 under the mayor's authority gave the officers' probable cause to arrest the class members. The
4 record reflects that the paperwork is in error. The testimony of several of the officers was that the
5 class members were arrested for pedestrian interference and failure to disperse, neither of which
6 require a mayor's emergency order to be effective. Captain Pugel himself specifically stated under
7 oath that the arrest reports were in error. Pugel Dep. 282: 15-16. Neither party can have it both
8 ways. The Mayor's order cannot be used to show action pursuant to City policy, nor can it be used
9 to justify the arrests. Likewise, the arrest forms cannot be used to show action pursuant to policy,
10 nor can they be used to establish probable cause. It is clear that these arrests, made outside the no-
11 protest zone, were not made pursuant to the Mayor's emergency order.

12 2. Liability Based on Delegation of Final Policymaking Authority

13 Plaintiffs next argue that Captain Pugel had been delegated relevant final policymaking
14 authority, and as such, his actions related to that authority can result in liability for the City.
15 Delegation of final policymaking authority complicates the analysis. As the Supreme Court has
16 recognized:

17 If the mere exercise of discretion by an employee could give rise to a constitutional
18 violation, the result would be indistinguishable from respondeat superior liability. If,
19 however, a city's lawful policymakers could insulate the government from liability
simply by delegating their policymaking authority to others, § 1983 could not serve its
intended purpose.

20 City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988). "The question therefore becomes whether
21 the policymaker merely has delegated discretion to act, or whether it has done more by delegating
22 final policymaking authority." Christie, 176 F.3d at 1236. See also, Pembaur v. City of Cincinnati,
23 475 U.S. 469, 483 (1986). Two factors have been identified in determining whether the official's
24 discretionary decisions constitute final policymaking:

25 When an official's discretionary decisions are constrained by policies not of that
26 official's making, those policies, rather than the subordinate's departures from them,
are the act of the municipality. Similarly, when a subordinate's decision is subject to

1 review by the municipality's authorized policymakers, they have retained the authority
2 to measure the official's conduct for conformance with their policies.

3 Propotnik, 485 U.S. at 127 (emphasis in original). Finally, the question of whether a subordinate has
4 been delegated final policymaking authority on a particular issue is an issue of law for the court to
5 decide. Id. at 126.

6 Thus the Court must first identify what authority was alleged to have been delegated, then
7 determine whether that authority in fact "final policymaking authority." In the present case, plaintiffs
8 have had substantial difficulty defining exactly what authority they allege had been delegated to
9 Captain Pugel. Some of plaintiffs' contentions are as follows:

- 10 1. "with regard to all crowd management and mass arrests" during the WTO (Opp'n at 1).
- 11 2. "to make all decisions concerning the management, and arrest, of any and all
12 demonstrations during the WTO." (Opp'n at 6).
- 13 3. "to direct a force of at least 240 officers to respond to demonstrations and make whatever
14 arrests Capt. Pugel determined were necessary." (Opp'n at 7)
- 15 4. "demonstration management" (Opp'n at 8).
- 16 5. "to manage any demonstrations during the WTO." (Opp'n at 9).
- 17 6. "for purposes of all arrests made during the WTO" (Opp'n at 9).
- 18 7. "with regard to any arrests that he determined were necessary in his role as Demonstration
19 Management Commander." (Opp'n at 10).
- 20 8. "for purposes of the arrest of the Class" (Opp'n at 10).

21 The discretionary authority to make arrests is given to every police officer on the beat. This cannot
22 be the final policy making authority that would be delegated to Captain Pugel. From the other
23 statements of authority made in plaintiff's briefing, the Court finds that the appropriate alleged
24 authority delegated to Captain Pugel was that of "demonstration management" during the 1999 WTO
25 conference.
26

1 With that definition in mind, the Court next makes a determination of whether this authority
2 constitutes “final policymaking authority” for purposes of § 1983 liability. At oral argument, counsel
3 for the City made the distinction between “policy making authority” and “policy implementing
4 authority,” then argued that Captain Pugel had nothing more than the power to implement policy
5 already established by the Chief of Police. The Court finds this rationale persuasive. Plaintiffs point
6 to the following facts to establish delegation of policy making authority:

- 7 1. Captain Pugel’s title as “demonstration management commander,”
- 8 2. the testimony of Assistant Chief Joiner stating that he “gave the field commander – in most
9 cases during my shift, it was Captain Pugel – the authority to take whatever action
10 was necessary, initially to open a corridor and then maintain order and restore order.”
- 11 3. Chief Stamper’s full approval of all actions taken by Captain Pugel, as well as full
12 delegation of discretion without limits.
- 13 4. The “Demonstration Management Plan,” which stated that Pugel had the authority “to
14 determine that enforcement or arrest action [was] warranted . . .”
- 15 5. his designation as the point person in charge of WTO demonstration planning prior to the
16 conference.
- 17 6. Captain Pugel’s own understanding of his authority.

18 Yet none of these facts demonstrate that Captain Pugel was not operating under the police manual of
19 rules and procedures, and that he could not be held accountable for his decisions by Chief Stamper, or
20 even that those decisions would not be subject to review. In fact, the record reflects that Captain
21 Pugel’s decisions were at least cursorily reviewed in the City’s After Action Report, reporting that
22 persons at First and Broad were arrested for committing “criminal acts.” Second Weaver Decl. Ex. 5
23 at 44.

24 At oral argument, the City submitted relevant portions of the Seattle Police Department’s
25 policies and procedures specifically addressing mass protest and civil disobedience. See Operational
26 Procedures, Section 2.031, Unusual Occurrences. These policies specifically address how

1 demonstration management should be carried out, and how those involved in civil disobedience
2 should be treated and processed. They also prescribe guidelines for the use of chemical agents and
3 “less lethal weapons.” Based on an analysis of the record as a whole, the Court finds that Captain
4 Pugel, acting as “demonstration management commander,” had been delegated authority to
5 implement the City’s previously established policies and procedures regarding demonstration
6 management and control. These were policies not of Captain Pugel’s own making, and there is no
7 evidence that his implementation actions could not have been subject to subsequent review.

8 The Court holds, as an issue of law, that Captain Pugel had not been delegated final
9 policymaking authority with respect to demonstration management. The entirety of the record and
10 the totality of the circumstances indicate that Captain Pugel’s authority was the discretionary
11 authority to implement previously created policies and procedures not of his own making, within the
12 context of the WTO conference demonstrations. This is not a basis for § 1983 municipal liability.

13 3. Liability Based on Ratification by a Person With Final Policymaking Authority

14 In the alternative, plaintiffs assert that the City can be held liable for the acts of Captain Pugel
15 on the theory that persons with final policymaking authority, namely Mayor Schell and Police Chief
16 Stamper, ratified those acts at a later date. “Ordinarily, ratification is a question for the jury.”
17 Christie, 176 F.3d at 1238-39. Of course there must be an issue of fact for the jury to decide.

18 Ratification is simply the flip side of the delegated authority coin. As the Supreme Court
19 noted,

20 when a subordinate’s decision is subject to review by the municipality’s authorized
21 policymakers, they have retained the authority to measure the official’s conduct for
22 conformance with their policies. If the authorized policymakers approve a
subordinate’s decision and the basis for it, their ratification would be chargeable to the
municipality because their decision is final.

23 Proprotnik, 485 U.S. at 127 (emphasis in original). To show ratification, then, a plaintiff may show
24 evidence that the actions of the subordinate were expressly ratified, Hyland v. Wonder, 117 F.3d 405,
25 416 (9th Cir. 1997), or impliedly (yet affirmatively) ratified. Christie, 176 F.3d at 1239-40. To do so,
26 the plaintiff must first show that the relevant policymaker had “knowledge of the alleged

1 constitutional violation.” Id. at 1239.¹ But knowledge alone does not establish ratification – “a
2 policymaker’s mere refusal to overrule a subordinate’s completed act does not constitute approval.”
3 Id. Instead, it must be shown that the policymaker made a “deliberate choice to endorse” the
4 subordinate’s action. Gillette v. Delmore, 979 F.2d 1342, 1348 (9th Cir. 1992). Thus, if “a rational
5 juror could infer that [the policymaker’s] acts showed affirmative agreement with [the subordinate’s]
6 actions,” there will be at least an issue of fact with respect to ratification. Christie, 176 F.3d at 1240.

7 In the present case, there is at least an issue of material fact on the question of whether
8 Captain Pugel’s decisions were ratified with those with policymaking authority. Viewing the evidence
9 presented in the light most favorable to the plaintiff, rational jurors could infer that Captain Pugel’s
10 actions were ratified by Mayor Schell and/or Chief Stamper. First, there is no dispute that the Mayor
11 and the Police Chief, who the City acknowledges and even argues have final policymaking authority,
12 knew of the alleged constitutional violations. For example, plaintiffs have submitted testimony of
13 Ron Judd, who testified that he actually spoke with the Mayor on the phone while the incidents at
14 issue in this lawsuit were happening. Judd Decl. at ¶¶ 11-13. Both the Mayor and the person running
15 the “Multi-Agency Command Center” attempted to get in touch with Captain Pugel during the
16 incident, but were unsuccessful. A rational juror could infer from this information that Pugel was the
17 one in charge, and that either policymaking authority had been delegated to him (relevant to the
18 above analysis) or, based on comments by the Command Center chief reciting the point of view of the
19 police, that Captain Pugel’s decision to corral and arrest the plaintiff class had been ratified by the
20 Mayor.

21 Next, plaintiffs point to the City’s After-Action Report, which references this incident in
22 rather cursory fashion, reporting that persons were arrested who were committing “criminal acts.”

23
24 ¹The City mischaracterizes the knowledge requirement by stating that the final policymaker must
25 know that of the actions of the subordinate and must know that those actions constitute a deprivation
26 of constitutional rights. That is not what the Ninth Circuit opinions state and is not the state of the law.
To so hold would be to create a type of qualified immunity at the municipal level. See Saucier v. Katz,
533 U.S. 194 (2001) (qualified immunity for individual officers’ discretionary conduct exists absent a
showing that the conduct violates a clearly established constitutional or statutory right of which a
reasonable person would have known).

1 This also sheds light on whether the actions directed by Captain Pugel were ratified by SPD and in
2 turn Chief Stamper. In addition, while it is true that mere refusal to overrule a subordinate's decision
3 is not enough to establish ratification, it is certainly relevant to the analysis. This is particularly true in
4 a case such as this where a highly publicized arrest involving alleged corralling of individuals with
5 impossible-to-obey orders to disperse, looking at the case in the light most favorable to the plaintiffs
6 on this issue, which the Court must do on summary judgment.

7 Finally, and in most importantly, both Chief Stamper and Assistant Chief Joiner testified at
8 their depositions that there was not a single arrest made during the WTO event that they questioned,
9 and that they supported Captain Pugel's decisions. Stamper Dep. 23:1 - 24:4; Joiner Dep. 55:17 -
10 56:10. These depositions were taken in the context of this litigation, with full knowledge that the
11 plaintiff class was alleging a constitutional violation in the form of a warrantless arrest without
12 probable cause. This is solid evidence of knowledge of an alleged constitutional violation, and the
13 deposition statements of these officials easily imply, if not directly state, their ratification of Captain
14 Pugel's decisions and specifically the arrests of the class members.

15 The Court must address two arguments made by counsel for the City. First, in its briefing, the
16 City argues that there must be "express" approval. This is not the law. As stated above, ratification
17 may be express, as through a formal adoption of a policy established by a subordinate, or implied
18 through the affirmative actions of the policymaker tending to show that there was deliberate
19 endorsement or approval of the actions of the subordinate. If "a rational juror could infer that [the
20 policymaker's] acts showed affirmative agreement with [the subordinate's] actions," there will be at
21 least an issue of fact with respect to ratification. Christie, 176 F.3d at 1240. A rational juror "infers"
22 something that is "implied" by statements or actions of a policymaker. Thus, evidence such as the
23 Mayor's comments to the Mr. Judd or the vague references to the arrest of the class members can be
24 used to show implied ratification of Captain Pugel's actions and specifically the arrests. In any event,
25 even if there were an "express" approval requirement, the deposition statements of Captain Pugel's
26

1 supervisors, including the Chief of Police, tend to show express approval of the actions taken by
2 Pugel and the arrests made under his command.

3 Second, counsel for the City argued at oral argument that ratification contains a “causation”
4 element, namely that the ratification must have caused the constitutional violation. In support of this
5 premise, counsel demonstrated that the only cases in which there has been either a finding of
6 ratification or an issue of fact as to ratification are cases in which the final policymaker has concurrent
7 knowledge of the alleged constitutional violations and at least impliedly (but affirmatively) approves
8 of such conduct, Christie, 176 F.3d at 1239-40, or cases in which there is an on-going harm, such as
9 the unconstitutional deprivation of employment. Hyland, 117 F.3d. at 416. The City also stated that
10 Trevino v. Gates, 99 F.3d 911 (9th Cir. 1996), stands for the proposition that the ratification must
11 have caused the alleged constitutional harm. Yet the section of that opinion dealing with ratification
12 simply states that “municipal liability on the basis of ratification [can be shown] when the officials
13 involved adopted and expressly approved of the acts of others who caused the constitutional
14 violation.” Id. at 920. There is a substantial difference between the ratification causing the
15 constitutional violation, as the City argues, and approval of the “acts of others” that caused the
16 violations, as the cases hold.

17 Finally, the City’s interpretation would mean that ratification could effectively never happen
18 post hoc. In other words, if causation were an element to ratification, a policymaker could not incur
19 liability on behalf of the municipality for a one-time constitutional violation, even if that policymaker
20 at some later date fully approved of the actions taken by the actor. This interpretation is contrary to
21 any traditional legal notion of ratification. For example, Black’s Law Dictionary defines ratification
22 as “confirmation and acceptance of a previous act, thereby making the act valid from the moment it
23 was done.” Blacks Law Dictionary, 1268, (7th Ed. 1999). Though ratification in the context of §
24 1983 liability has taken on some special connotations, causation is not one of them.

1 The Court hereby finds that material issues of fact exist as to whether the decisions and
2 actions of Captain Pugel that resulted in the arrest of the class members were ratified by appropriate
3 final policymakers.

4 C. Probable Cause

5 As there is at least an issue of fact as to the City's potential for liability, the Court proceeds to
6 address the issue of individualized probable cause. A claim for unlawful arrest is cognizable under §
7 1983 as a violation of the Fourth Amendment provided that the arrest was made without probable
8 cause or "other justification." Dubner v. City and County of San Francisco, 266 F.3d 959, 964 (9th
9 Cir. 2001). Making out a claim for unlawful arrest involves a burden shifting analysis:

10 Although the plaintiff bears the burden of proof on the issue of unlawful arrest, she can
11 make out a prima facie case simply by showing that the arrest was conducted without
12 a valid warrant. At that point, the burden shifts to the defendant to provide some
13 evidence that the arresting officers had probable cause for a warrantless arrest. The
14 plaintiff still has the ultimate burden of proof, but the burden of production falls on the
15 defendant. If the defendant is unable or refuses to come forward with any evidence
16 that the arresting officers had probable cause and the plaintiff's own testimony does
17 not establish it, the court should presume the arrest was unlawful.

18 Id. at 965 (internal citations omitted). Probable cause, meanwhile, exists when, "under the totality of
19 the circumstances known to the arresting officers (or within the knowledge of the other officers at the
20 scene), a prudent person would believe the suspect had committed a crime." Id. at 966. "When there
21 has been communication among agents, probable cause can rest upon the investigating agents'
22 'collective knowledge.'" United States v. Valencia, 24 F.3d 1106, 1108 (9th Cir. 1994). Nevertheless,
23 an warrantless search or seizure ordinarily must be based on individualized suspicion of wrongdoing.
24 City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000). Thus the Court must piece together the
25 totality of the circumstances known to the officers at the time based on their testimony, the plaintiffs'
26 testimony, and any other undisputed facts. Dubner, 266 F.3d at 966.

1. The City's Stated Reason for the Arrests

24 As discussed above and below, the stated reason for the arrests of the class members in terms
25 of the arrest records was the Mayor's emergency order. Also as stated above and below, the Court
26 will not credit these arrest records as proof of exercise of policymaking authority or as proof of

1 probable cause. The arrest records have been specifically discredited by officer testimony and the
2 record as a whole. As probable cause of a specific crime does not need to be determined at the time
3 of arrest, the Court looks to what other crimes may have allegedly been the justification for these
4 arrests.

5 Officers have testified that the plaintiffs were actually arrested for "Failure to Disperse" and
6 "Pedestrian Interference." Thus it would seem that any probable cause analysis should be done under
7 these provisions. The text of those code provisions, in relevant part, is as follows:

8 12A.12.020 - Failure to Disperse

- 9 D. As used in subsection B of this section, "public safety order" is an order issued
by a peace officer designed and reasonably necessary to prevent or control a
serious disorder, and promote the safety of persons or property. . . .
10 E. A person is guilty of failure to disperse if:
11 A. . . .
B. He refuses or intentionally fails to obey a public safety order to move,
disperse or refrain from specified activities in the immediate vicinity.

12 12A.12.015 Pedestrian Interference

- 13 A. The following definitions apply in this section:
14 1. . . .
15 2. . . .
16 3. . . .
17 4. "Obstruct pedestrian or vehicular traffic" means to walk, stand, sit, lie,
or place an object in such a manner as to block passage by another
person or a vehicle, or to require another person or a driver of a vehicle
to take evasive action to avoid physical contact. Acts authorized as an
exercise of one's constitutional right to picket or to legally protest, and
acts authorized by a permit issued pursuant to the Street Use
Ordinance, Chapters 15.02 through 15.50 of the Seattle Municipal
Code, shall not constitute obstruction of pedestrian or vehicular traffic.
18 5. . . .
19 B. A person is guilty of pedestrian interference if, in a public place, he or she
intentionally:
20 1. Obstructs pedestrian or vehicular traffic; or
21 2. . . .
C. Pedestrian interference is a misdemeanor.

22 SMC 12A.12.020 and 015.

23 Thus there must be evidence in the record that the officers had individualized probable cause
24 to believe that the class members had committed or were in the process of committing the above
25 crimes.
26

1 2. Mass arrests and the issue of individualized probable cause

2 Plaintiffs base the vast bulk of their argument on the fact that the City cannot establish
3 individualized probable cause. The City responds that it does not need to. The following is a brief
4 examination of relevant case law regarding mass arrests.

5 Plaintiffs rely heavily on Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973), which dealt with
6 the validity of mass arrests in the D.C. area during the Vietnam War protests. The Court was faced
7 with a situation much like the one in the present case.

8 Generally, the issue of probable cause for an arrest is a highly individual matter,
9 depending both upon the specific objective conduct of the particular arrestee at the
10 time of his apprehension and upon the state of knowledge and reasonable belief of the
11 arresting officer. Ordinarily, therefore, we would have serious misgivings concerning
12 any effort to litigate the validity of several thousand separate arrests through the
13 mechanism of a class action.

14 In the present case, however, we are confronted by a situation in which the police did
15 not govern themselves by their ordinary procedures, which are calculated to guard a
16 against an arrest without probable cause, even in the case of a massive civil arrest
17 without probable cause, even in the case of a massive civil disturbance.

18 . . . The premise of the legal system, that unlawful arrests can be avoided or remedied
19 by holding individual policemen accountable, evaporated when field arrest procedures
20 were suspended and when persons other than arresting officers were permitted to
21 execute field arrest forms. . . .

22 In view of the circumstances and considerations described, the protection of the
23 Fourth Amendment rights warrants not only the remedy of a class action to test the
24 validity of the arrests made during the critical May, 1971, period in connection with
25 the anti-war demonstrations but also a declaration, as a legal principle corollary to the
26 Fourth Amendment's legal protection, that holds presumptively invalid any arrest that
was not accompanied by a contemporaneous Polaroid photograph and field arrest
form executed by the one who was in fact the arresting officer, this presumption being
of course subject to rebuttal upon an affirmative showing by Defendants that any
particular arrest was based upon probable cause.

21 Sullivan, 478 F.2d at 966-67 (internal citations omitted, emphasis added). Defendant, meanwhile,
22 relies heavily on a later D.C. Circuit case that overturned a District Court's order enjoining the
23 District of Columbia Police Department from "instituting mass arrests without the contemporaneous
24 completion of field arrest forms or other administrative device or procedure for recording information
25 necessary to establish probable cause for the arrest." Washington Mobilization Committee v.

1 Cullinane, 566 F.2d 107, 120 (D.C. Cir. 1977). The Court described its view of mass arrest
2 procedures as follows:

3 It is the tenor of the demonstration as a whole that determines when the police may
4 intervene; and if it is substantially infected with violence or obstruction the police may
5 act to control it as a unit. Where demonstrations turn violent, they lose their protected
6 quality as expression under the First Amendment. Confronted with a mob the police
7 cannot be expected to single out individuals; they may deal with the crowd as a unit.

8 We do not suggest of course that one who has violated no law may be arrested for the
9 offenses of those who have been violent or obstructive. As we have seen however the
10 police may validly order violent or obstructive demonstrators to disperse or clear the
11 streets. If any demonstrator or bystander refuses to obey such an order after fair
12 notice and opportunity to comply, his arrest does not violate the Constitution even
13 though he has not previously been violent or obstructive.

14 Id. (internal citations and quotations omitted, emphasis added). The court then went on to address
15 the propriety of the District Court's injunction, which was founded on Sullivan. The court first noted
16 that while an arrest was presumed invalid if not accompanied by a field arrest form, that that
17 presumption could be rebutted "upon an affirmative showing by [the prosecution] that any particular
18 arrest was based on probable cause." Id. at 121. Obviously, the court noted, "probable cause may
19 exist even though evidence of it is not recorded at the time of arrest." Id. The Court then held that
20 an order enjoining police from making arrests without a field form could not stand, as "a prosecutor
21 in the future will be entitled to an opportunity to make "an affirmative showing" of probable cause in
22 each case of a mass arrest, and the District Court erred in cutting off that opportunity by a blanket
23 prohibition." Id. Thus the court in Cullinane did not overturn the holding of Sullivan, nor did it
24 negate the need for individualized probable cause in warrantless arrest. The Cullinane court simply
25 held that the documentation requirements outlined in Sullivan were not the only means of showing
26 that probable cause existed - the prosecution must be afforded the opportunity to show it in other
ways. Thus a prospective injunction mandating that specific procedures be used was inappropriate.

It follows logically from the above analysis that if the prosecution (or the defense in a
wrongful arrest case) cannot make the required affirmative showing of individualized probable cause
in the absence of proper documentation, the arrest is invalid. As stated above, existence of probable

1 cause can be shown based on testimony of the officers, the plaintiffs' testimony, and any other
2 undisputed facts. Dubner, 266 F.3d at 966.

3 In the present case, then, the Court must decide whether 1) the field documentation was
4 sufficient to establish justification, and 2) whether other testimony given establishes probable cause.
5 The Court notes from the outset that one key source of information that can be used to establish
6 probable cause has not been presented at all in this case, and that is the testimony of the class
7 members, in particular the absent class members. The Court is aware that the City at some point
8 moved to take discovery of the unnamed class members, but later decided not to do so. This could
9 have been an important source of information in making this determination. Those persons who have
10 submitted affidavits, as is understandable, have testified to facts tending to support a finding that
11 probable cause may not have existed.

12 The Court next examines the evidence that is before it. First, the documentation in this case is
13 atrocious. Each arrest form lists Lt. Black as the arresting officer, though he admitted in his
14 deposition that he did not perform a single arrest. Each arrest form has the same hand-written,
15 photocopied statement that says that "Susp. failed to clear street in the area of 1st and Broad to 1st
16 and Denny in accordance with Mayor order. Warning given by Lt. Black. Susp. arrested after
17 returning to refusing to leave the area. No photo taken in field due to number of arrestees." These
18 arrest forms are inaccurate, as admitted by the City's agents including Captain Pugel, in that the
19 arrests were not made pursuant to the Mayor's order, since they took place outside the no-protest
20 zone, and that Lt. Black did not give any warnings. It is clear that the police processed everyone in
21 the class, at least on paper, as if they had been arrested inside the no-protest zone. As stated in the
22 photocopied arrest form, no photos were taken because of the number of arrestees.² Thus, the
23 documents cannot be held to satisfy probable cause, and the arrests must be presumed invalid. The
24 defense would then have to show that other evidence presented establishes probable cause.

25
26 ²The Court wonders how 150 arrestees is such a great number that pictures could not be taken. The D.C. Circuit effectively held that this is a reasonable requirement even in the context of arresting thousands during the Vietnam era protests.

1 As to the testimony and other evidence, including the police reports regarding this incident,
2 there is absolutely no evidence relating to any individual class member. The arrest report is a general
3 description of what the group as a whole did or was told. Most of this description relates to events
4 and warnings that were given long before the arrests actually took place. There is no information in
5 this report regarding any individual class member, nor is there any information about which officers
6 were present, who gave warnings (if any were given) at First and Broad, and who was involved in the
7 arrests. The officer testimony presented indicates that no officer who was actually involved in the
8 arrest has any recollection of any individual. Thus, the other evidence before the Court does not
9 provide evidence of "individualized" probable cause. The City has therefore not effectively rebutted
10 the presumption that the arrests were invalid.

11 The import of this decision is not so far reaching as it may first appear. It certainly is not a
12 declaration that mass arrests are never appropriate. Even protestors would agree that sometimes
13 mass arrest is an effective vehicle for getting a political message across through media coverage of the
14 arrest. This Court simply holds that when the decision to make a mass arrest is made, the arrest must
15 be properly documented in order to later make the requisite showing that individualized probable
16 cause existed to make the arrest of each person involved in the mass action. This documentation is
17 important in the later prosecution of the alleged wrongdoers, as well as in the defense against
18 allegations of unlawful arrest. Without such documentation, and absent any recollection of any
19 individual arrestee by any arresting officer or the testimony of class members tending to show
20 probable cause, the City simply cannot meet its burden of showing that it had individualized probable
21 cause to arrest.

22 It is important to note that in finding that the City did not have individualized probable cause
23 to make these arrests, or at the very least did not document it, the Court does not make a
24 determination on liability. The determination of the City's liability based on this constitutional
25 violation does not rest solely on a finding that the violation occurs, but requires a more fundamental
26 finding of City action as described in the section on municipal liability. In the present case, there is

1 still a triable issue as to whether the actions of Captain Pugel and the officers were later ratified with
2 persons with final policymaking authority. Only upon an affirmative finding on that issue will liability
3 be determined.

4 CONCLUSION

5 Having reviewed the substantial record and the briefing submitted by the parties, and having
6 heard oral argument on the issues, the Court holds that final policymaking authority was not exercised
7 in the first instance, nor was it delegated to those persons who directed and carried out the arrests of
8 the class members. However, the Court finds that there are issues of material fact as to whether the
9 actions of Captain Pugel in directing the arrests were later ratified by officials with final policymaking
10 authority. Finally, the Court finds that the City has not met its burden of showing that individualized
11 probable cause existed for making the arrests of the class members.

12 The Clerk is directed to send copies of this order to all counsel of record.

13 Dated: December ____, 2003.

14 _____
15 Marsha J. Pechman
16 United States District Judge
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