UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TYRONE HIGHTOWER, et al., Plaintiffs,	)	
	)	No. 1:13-cv-469
-v-	)	
	)	Honorable Paul L. Maloney
CITY OF GRAND RAPIDS, et al., Defendants.	)	

OPINION

Following a city trespassing ordinance, police officers in the City of Grand Rapids have arrested individuals who are in the parking lot of an area business when an officer concluded that the individual was not on the property for the purpose of patronizing the business. In March 2017, a panel of the Michigan Court of Appeals rejected the City's interpretation of the ordinance that would authorize such an arrest. Today, this Court reaches the same conclusion.

The City of Grand Rapids enacted and enforces a trespass ordinance. The City solicits, from area businesses, what the parties refer to as "No Trespass Letters" or NTLs. By completing the blank form and returning the form to the Grand Rapids Police Department, business owners indicate their intent to prosecute trespassers. Plaintiffs are four citizens that were arrested without a warrant and were issued a citation for trespassing. In all four instances, no one from the business had complained about the specific individual before he was arrested. And, in all four instances, the officer who issued the citation relied on an NTL to conclude that the owner would be willing to prosecute the suspect for trespassing. In one

instance, the individual who received the citation had recently patronized the business on whose property he was allegedly trespassing. In another instance, the individual who was cited for trespassing merely drove across the business's portion of a parking lot shared with the City.

Plaintiffs complain that their arrests violated the Fourth Amendment and the City's policy is unconstitutional. In the second amended complaint (ECF No. 36), the controlling pleading, Plaintiffs allege two counts: (1) violation of the Fourth Amendment and (2) violation of the void-for-vagueness doctrine of the Due Process Clause of the Fourteenth Amendment. Plaintiffs seek a declaratory judgment, injunctive relief, and judgments for damages against the arresting officers and against the City.

The parties have filed cross motions for summary judgment. Plaintiffs collectively filed a single motion for summary judgment. (ECF No. 149.) Defendants filed five separate motions for summary judgment (ECF Nos. 161-65), and a single brief in support (ECF No. 166). The Court has had the benefit of oral argument.

As part of the lawsuit, the Court must determine what the City's ordinance prohibits. The parties do not agree about what must occur before an individual becomes a trespasser or a suspected trespasser. Does an individual violate the ordinance by his or her presence on business property without an intent to patronize the business? Must the individual be told to leave the property before an ordinance violation occurs?

In their motion for summary judgment, Plaintiffs advance three general positions. First, Plaintiffs argue the NTL policy is unconstitutionally vague. Second, Plaintiffs argue they are entitled to summary judgment against the City and the Police Chief (sued in his

official capacity) because the City has a policy of using NTLs to make arrests, including the arrest of each Plaintiff. Finally, Plaintiffs request summary judgment against each defendant officer for a violation of Plaintiffs' clearly established constitutional rights.

For their motion, Defendants advance two positions. First, the individual defendant officers argue they are entitled to qualified immunity. Second, the municipal defendants argue they are entitled to summary judgment for any *Monell* claim.

To resolve the motions, the Court begins with a brief discussion of the ordinance before addressing Plaintiffs' vagueness argument. Second, the Court identifies the elements of a trespass and then outlines the circumstances leading to each arrest to determine whether probable cause existed. The Court then, considers the Defendant Officers' qualified immunity defenses on a plaintiff-by-plaintiff basis. Finally, the Court addresses Plaintiffs' *Monell* claim and resolves the City's liability.

I.

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories and admissions, together with the affidavits, show there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a) and (c); *Payne v. Novartis Pharms. Corp.*, 767 F.3d 526, 530 (6th Cir. 2014). The burden is on the moving party to show that no genuine issue of material fact exists, but that burden may be discharged by pointing out the absence of evidence to support the nonmoving party's case. Fed. R. Civ. P. 56(c)(1); *Holis v. Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 543 (6th Cir. 2014). The facts, and the inferences drawn from them, must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 255 (1986) (quoting *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Once the moving party has carried its burden, the nonmoving party must set forth specific facts in the record showing there is a genuine issue for trial. *Matsushita*, 475 U.S. at 574; *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 200 (6th Cir. 2010) ("After the moving party has met its burden, the burden shifts to the nonmoving party, who must present some 'specific facts showing that there is a genuine issue for trial.'") (quoting *Anderson*, 477 U.S. at 248). In resolving a motion for summary judgment, the court does not weigh the evidence and determine the truth of the matter; the court determines only if there exists a genuine issue for trial. *Tolan v. Cotton*, 134 S.Ct. 1861, 1866 (2014) (quoting *Anderson*, 477 U.S. at 249). The question is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-252.

II.

A.

The City of Grand Rapids enacted a trespass ordinance in 1976. (ECF No. 169-5.) The ordinance is found in the section for property offenses and provides that no person shall "[t]respass upon the premises of another or unlawfully remain upon the premises of another to the annoyance or disturbance of the lawful occupants." Grand Rapids, MI. Code Title IX, Chapter 152, Article 1, § 9.133(1).

For more than twenty years, the Grand Rapids Police Department (GRPD) has made available, in some form, No Trespass Letters. The NTLs are standardized, blank forms that may be completed by property owners or occupants and submitted to the GRPD. (Compl.

¶ 33 PageID.527; ECF No. 36-2 NTL PageID564-66.) To be effective, NTLs must be submitted each year, or when a tenant changes or when the ownership of the property changes. (Compl. ¶ 41 PageID.528; NTL PageID.566.) Between January 1, 2009, and May 15, 2012, more than 2000 NTLs were returned to the GRPD. (Compl. ¶ 45 PageID.528.) Of those, over 800 were submitted by a business.[1] (*Id.*) Many of the businesses that submitted NTLs are open the public and include retail stores, supermarkets, gas stations, and restaurants. (*Id.* ¶ 46 PageID.528.)

Over the years, the City has revised the NTLs. (Compl. ¶ 34 PageID.527.) When Plaintiffs were arrested, the NTLs were formatted as a letter to the Detective Unit in the GRPD.[2] (NTL PageID.564.) The letter states that it "serves notice to your office that the occupant (s) and/or owners of this address will prosecute all trespassers." (*Id.*) The form identifies information that needs to be provided, including the name of the business and the name of the owner of the property. (*Id.*) The instructions on the third page of the letter state that the "attached letter is intended to assist in keeping trespassers off your property." (*Id.* PageID.566.) Between 2011 and 2013, officers were involved in incidences where approximately 800 individuals were stopped for allegedly trespassing at a business with an NTL. (ECF No. 154-3 Baumgartner Addendum PageID.2304, 2310-11.) Officers initiated approximately 380 of those stops, as opposed to a citizen complaint. (*Id.* PageID.2311.)

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[1] The record does not clarify how many businesses filed NTLs with the GRPD during this time period. The Court assumes some of the 800 NTLs submitted over the three years included renewal letters.

[2] Since the four Plaintiffs were arrested, the City has again revised the NTLs. Because the Court has dismissed Plaintiffs' claims for prospective relief, the Court need not discuss how the NTLs have changed. For the purpose of the remaining claims, only the NTLs used at the time of the arrests are relevant.

B.

Plaintiffs challenge the City's "NTL Policy" as unconstitutionally vague. A careful reading of the briefs establishes that Plaintiffs are challenging the GRPD's reliance on NTLs, not the trespass ordinance itself. Plaintiffs complain that the "City's NTL program" gives unfettered discretion to the officers to determine who is or is not trespassing, which depends on whether the business has submitted an NTL. (ECF No. 150 Pl. Br. at 33 PageID.1820.) Plaintiffs also assert a lack of notice, arguing that the public does not know which businesses have submitted NTLs. (*Id.* at 37 PageID.1824.) In their response to Defendants' motion for summary judgment, Plaintiffs summarize their vagueness argument. "Plaintiffs' vagueness challenge is not to the language of the ordinance per se (though it could be clearer), nor to the language of the letter, but rather to the GRPD's *policy* of using generalized NTLs to arrest individuals for trespassing on commercial property." (ECF No. 182 Pl. Resp. at 16 PageID.3641.)

The void-for-vagueness doctrine finds constitutional support in the Due Process Clauses of the Fifth and the Fourteenth Amendments. *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 556 (6th Cir. 1999). The void-for-vagueness doctrine requires that statutes define an "offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The latter concern is the "more important aspect of the vagueness doctrine," "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Id.* Courts have found statutes vague when the conduct involves "wholly subjective judgments without statutory

definitions, narrowing context, or settled legal meaning." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010).

Plaintiffs have not established that the City's trespass ordinance is unconstitutionally vague. As Plaintiffs have made clear, they are not asserting that any term used in the ordinance is vague. Plaintiffs have not alleged that the ordinance itself fails to provide the proper notice. Plaintiffs' challenge is simply that GRPD officers exercise wide discretion when choosing whom to arrest for trespassing when a business has filed an NTL. Understood in this way, Plaintiffs have not asserted a constitutional vagueness claim recognized by any court. Plaintiffs' vagueness challenge is untethered to a term in the ordinance. And, the ordinance does not authorize the use of NTLs.

In their response to Defendants' motion, Plaintiffs cite three cases for their conclusion that a vagueness challenge can be brought against municipal policies. Two of Plaintiffs' cases involve written policies, which is not the case here. *See United Food & Commercial Workers Union v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 352 (6th Cir. 1998) (involving a challenge to the written advertising policy of the regional transit authority); *Dambrot v. Central Michigan Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995) (involving a challenge the University's written definition of racial and ethnic harassment). The third opinion, *Diggs v. Housing Auth. of City of Frederick*, 67 F. Supp. 2d 522 (D. Md. 1999), involved an effort to reduce crime in a housing project through trespass notices. Like this case, the *Diggs* opinion considered a "policy" or program, that was not contained in a single written document. *Id.* at 526-27 ("Testimony and documents received at the hearing established that the 'policy' itself is not contained in a single written document."). Notably,

and the reason the opinion is not useful to Plaintiffs, the court did not address a void-for-vagueness challenge. The footnote Plaintiffs cite, footnote 19, contains a concern of the court about due process. The issue was not raised by the parties in *Diggs* and the court did not resolve its concern.

III.

The Court next considers whether officers had probable cause for the arrest of each Plaintiff. In this section, the Court identifies the elements necessary for the prosecution of a trespass under the ordinance. The Court then reviews the probable cause requirement for a warrantless arrest under the Fourth Amendment and the law of trespass. Finally, the Court considers the circumstances for each arrest from the perspective of both the suspect and the officer to determine if probable cause existed for an arrest or to issue a citation.

A.

The parties have offered competing interpretations of the ordinance. Plaintiffs urge the Court to construe the ordinance consistent with a typical criminal trespass statute. Defendants contend the ordinance should be construed in a manner similar to the civil tort. The Court finds the history of trespass in Michigan to be a useful starting point.

The State of Michigan has long recognized both civil trespass and criminal trespass. In Michigan, the tort of trespass occurs by the unauthorized invasion upon the private property of another. *Gidding v. Rogalewski*, 158 N.W. 951, 953 (Mich. 1916); *Cloverleaf Car Co. v. Phillips Petroleum Co.*, 540 N.W.2d 297, 302 (Mich. Ct. App. 1995) (citation omitted). And, "the actor must intend to intrude on the property of another without authorization to do so." *Cloverleaf Car*, 540 N.W.2d at 302. Under Michigan common law,

a person who enters upon the land or premises of another can be a trespasser, a licensee or an invitee. *Stitt v. Holland Abundant Life Fellowship*, 614 N.W.2d 88, 91 (Mich. 2000) (considering the duty owed by the landowner to a visitor). A trespasser is one who enters the land of another without that landowner's consent. *Id.* at 91. To be an invitee, the landowner must hold open the premises for a commercial purpose, *id.* at 95, and the individual entering the premise must be there for a commercial purpose, *id.* at 96. An invitee, however, becomes a trespasser when the property owner orders the invitee to leave, and the invitee does not comply. *See Breitenbach v. Trowbridge*, 31 N.W. 402, 404 (Mich. 1887.)

Michigan's criminal trespass statute currently provides, in relevant part, that a person shall not

> (a) Enter the lands or premises of another without lawful authority after having been forbidden to do so by the owner or occupant or agent of the owner or occupant.
> (b) Remain without lawful authority on the land or premises of another after being notified to depart by the owner or occupant or the agent of the owner or occupant.

Mich. Comp. Laws § 750.552(1). The statute dates to at least the early 1950s. *See* 1951 Mich. Pub. Acts No. 102. Michigan courts have referred to the state's trespassing statute as a "trespass-after-warning" statute. *See, e.g., People v. Harrison*, 163 N.W.2d 699, 702 (Mich. Ct. App. 1968), *reversed on other grounds*, 178 N.W.2d 650 (Mich. 1970). As noted by the United States Supreme Court, in most jurisdictions, criminal trespass statutes require some notice that the owner wants people to stay off of his or her property. *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 147-48 (1943) (considering an ordinance that prohibited the door-to-door distribution of handbills and advertisements).

> Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books in at least twelve more states. We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away.

Id. This passage was cited favorably by the Michigan Supreme Court in *Amalgamated Clothing Workers of America, AFL-CIO v. Wonderland Shopping Ctr., Inc.*, 122 N.W.2d 785,789 (Mich. 1963). In addition, criminal trespass statutes typically require an intent to remain upon the land after the notice or request to depart. *People v. Johnson*, 168 N.W.2d 913, 915 (Mich. Ct. App. 1969). The *Johnson* opinion quoted a lengthy passage from an Ohio court discussing the intent requirement in Ohio's criminal trespass statute.

> In accordance with the general rule that the existence of a criminal intent is an essential element of a statutory offense, it is the rule in many jurisdictions that criminal intent is an essential element of the statutory offense of trespass, even though the statute is silent as to intent; and if the act prohibited is committed in good faith under claim of right or color of title, although accused be mistaken as to his right, unless it is committed with force or violence of a breach of the peace, no conviction will lie, the view taken being that it will not be presumed that the legislature intended to punish criminally acts committed in ignorance, by accident or under claim of right, and in the bona fide relief that the land is the property of the trespasser, unless the terms of the statute prohibit any other construction.

Id. (quoting *Ohio v. Larason*, 143 N.E.2d 502, (Ohio Com. Pl. 1956)).

With the law of civil and criminal trespass providing context, the Court turns to the language off the disputed ordinance. The ordinance contains two prohibitions: (1) trespassing upon someone else's property and (2) unlawfully remaining on the premises of

another to the annoyance or disturbance of the lawful occupants.[3] *People v. Maggitt*, 903 N.W.2d 868, 872 (Mich. Ct. App. 2017) (considering the second prohibition). The City does not separately define the word "trespass" anywhere in its municipal code. Following § 9.133, the ordinance contains a reference to several state statutes, including the state statute for trespass, Mich. Comp. Laws § 750.546, *et seq.* The Grand Rapids City Code states that these references are called "catch-lines." Grand Rapids, MI. Code Title I, Chapter 1, § 1.6. The Code explains that catch-lines are adopted as part of the ordinance but are not substantive; they are included "to assist users of the Code but they should not be considered substantive or authoritative." *Id.* Violations of the City's code can result in a fine up to $500 or imprisonment for up to 90 days or both. Grand Rapids, MI. Code Title I, Chapter 1, § 1.13(1).

The parties offer different principles of statutory construction to support their competing interpretations. Plaintiffs interpret the ordinance as a typical trespass-after-warning statute. When the legislature fails to define a word, the word should be interpreted with its plain and ordinary meaning, which may be determined by using a dictionary. *People v. Morey*, 603 N.W.2d 250, 253 (Mich. 1999); *Pontiac Sch. Dist. v. Pontiac Educ. Ass'n*, 811 N.W.2d 64, 69 (Mich. Ct. App. 2012). Defendants, however, contend that the ordinance criminalizes Michigan's common law of civil trespass. When a statute employs a word with an established common-law meaning without indicating an intent to alter the common law,

[3] The second prohibition is not implicated by the circumstances leading to the arrests and citations of Plaintiffs. The circumstances for each arrest are discussed below. Without dispute, the lawful occupants did not know that these particular individuals were on the property. Thus, the lawful occupants could not have been annoyed or disturbed by Plaintiffs.

the word should be interpreted consistent with the common law. *In re Bradley Estate*, 835 N.W.2d 535, 550 (Mich. 2013).

The City's trespass ordinance must be interpreted as consistent with Michigan's criminal trespass statute, not with the common law of civil trespass. Weighing in favoring of this interpretation, the City's trespass ordinance references the State's trespass statute. Although the catch-line reference is not substantive, the catch-line assists those attempting to interpret the ordinance by directing them to the State's statute. Michigan's trespass statute had been the law in the state for more than twenty years when the City enacted its ordinance. Rather than writing the ordinance as adopting Michigan's common law of civil trespass, the City likely had in mind the State's statute, which is why the statute is reference in the catch-line. The canon of construction summarized in *Bradley* does not anticipate or address situations involving a City ordinance in light of a long-standing state statute on the same subject. Also weighing in favor of interpreting the ordinance consistent with Michigan's criminal trespass statute, the ordinance authorizes imprisonment, meaning that a violation of the ordinance constitutes a crime, not a civil infraction. *See People v. Schomaker*, 323 N.W.2d 461, 463 (Mich. Ct. App. 1982) ("The maximum penalty for a civil infraction is a $100 fine plus costs from $5 to $100; no imprisonment is authorized.").

While it may be possible that the City intended to adopt Michigan common law of civil trespass when it enacted the ordinance, there is nothing in the record to evidence that possibility. Defendants' theory hinges on a single canon of statutory construction. In light of the well-established history of both criminal and civil trespass in the United States generally

and in Michigan specifically, it would be highly unusual if Grand Rapids opted to criminalize, with the possibility of a fine and imprisonment, the civil tort.

For the City to successfully prosecute a violation of the ordinance, the prosecutor would have to show that the defendant was on someone else's property. The prosecutor would also have to show the defendant lacked authorization to be on the property. Either the defendant entered the property after having been forbidden to do so or the defendant remained on the property after having been told to leave. In other words, the defendant must have been given some notice that his or her presence on the land was not authorized. And, because this is a criminal ordinance, the alleged trespasser must also have the required intent or knowledge, meaning that the trespasser knows he or she is without authority to be on the property.[4] *See Johnson*, 168 N.W.2d at 915. Under Michigan's criminal statute, and under the common law of trespass, an individual entering a business that is open to the public does not become a trespasser until the license to enter the property is revoked by the owner, occupant or an agent.

This interpretation of the ordinance is consistent with opinion in *Maggit*, a Michigan Court of Appeals opinion issued after this lawsuit was filed. In *Maggit*, the prosecutor defended the arrest under the second prong of City's ordinance, which prohibits unlawfully remaining on property to the annoyance and disturbance of the lawful occupants. 903 N.W.2d at 873. The prosecutor relied on the fact that the business owner filed a no-trespass letter. The court summarized the prosecutor's theory.

[4] The intent requirement would also exist under Defendants' theory. *See Cloverleaf Car*, 540 N.W.2d at 302.

> Essentially, the prosecution contends that the no-trespassing letter informed the GRPD that the lawful property owners at 101 Sheldon were annoyed and disturbed by illegal activity occurring in the parking lot and that the no-trespassing sign on the property communicated as much to all who entered the property, including defendant. In other words, according to the prosecution, police had the unilateral authority to revoke defendant's permission to be on the property and arrest defendant *without* telling him he was not welcome on the property.

Id. at 874. The court rejected the State's theory finding the argument "unconvincing" and holding that the NTL only authorized the police to ask unwanted individuals to leave the parking lot before any arrest could be made. *Id.*

With these elements in mind, the Court considers whether officers had probable cause to arrest and issue a citation to each Plaintiff.

B.

A warrantless arrest by a law enforcement officer is reasonable under the Fourth Amendment where there exists probable cause to believe that a criminal offense has been or is being committed.[5] *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). "[I]t is well established that any arrest without probable cause violates the Fourth Amendment." *Crockett v. Cumberland Coll.*, 316 F.3d 571, 580 (6th Cir. 2003). For probable cause to exist to make an arrest, "there must be 'facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the

[5] At a minimum, each Plaintiff was detained long enough for an officer to issue a citation for trespassing. Although the Court has couched the probable cause analysis in terms of an arrest, the probable cause analysis applies to detentions or stops by an officer who has reason to believe the suspect has violated a city ordinance. *See, e.g., Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979) (probable cause analysis applied to an alleged violation of a city ordinance requiring a suspect to provide proof of identification); *United States v. Graham*, 483 F.3d 431, 437 (6th Cir. 2007) (probable cause analysis for an alleged violation of a city's parking ordinance)

circumstances shown, that the suspect has committed is committing an offense.'" *Id.* (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1970)). Probable cause is determined by the reasonable conclusions that can be drawn from the facts and circumstances known to the officer at the time of the arrest. *Devenpeck*, 543 U.S. at 152. Under ordinary circumstances, whether an officer is permitted to make an arrest will depend on state law. *Logsdon v. Hains*, 492 F.3d 334, 340-41 (6th Cir. 2007) (outlining the standard for a warrantless arrest for criminal trespass).

Probable cause requires only the probability of criminal activity, not the certainty that a crime has been committed. *Crockett*, 316 F.3d at 580. The Fourth Amendment does not require an officer to know that a crime has occurred at the time the officer arrests a suspect. *United States v. Strickland*, 144 F.3d 412, 415 (6th Cir. 1998). Officers must have more than a mere suspicion, but do not need to have evidence sufficient to establish a prima facie case at trial. *Id.* at 415-16. The Sixth Circuit has rejected the conclusion that an officer has a duty to investigate as a factor in determining probable cause. *See Gardenshire v. Schubert*, 205 F.3d 303, 318 (6th Cir. 2000). However, while an officer is in the process of determining whether probable cause exists, he or she cannot look only at evidence of guilt while ignoring exculpatory evidence. *Id.* Once an officer has probable cause to make an arrest, the officer is under no obligation to continue investigating and may arrest the suspect. *Crockett*, 316 F.3d at 581 (collecting cases).

Probable cause should be evaluated under the totality-of-the-circumstances. *Illinois v. Gates*, 462 U.S. 213, 231 (1983). The Supreme Court has held that, generally, "some quantum of individualized suspicion" is required "before a search or seizure may take place."

Carpenter v. United States, 138 S. Ct. 2206, 2221 (2018) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (2018)). Contextual factors, those that would apply to everyone in the area, are part of the totality-of-the-circumstances that may be considered by officers. *See United States v. Smith*, 594 F.3d 530, 541 (6th Cir. 2010) (discussing reasonable suspicion).

For a wrongful arrest claim under § 1983, a plaintiff must prove the officer lacked probable cause. *Fridley v. Horrighs*, 291 F.3d 867, 872 (6th Cir. 2002). In a § 1983 lawsuit, probable cause is a question for the jury, unless only one reasonable determination is possible. *Id.* (citations omitted).

C.

1. Tyrone Hightower

Tyrone Hightower was arrested on Sunday, September 4, 2011 around 1:30 a.m. (ECF No. 154-5 Hightower Incident Report PageID.2334-35.) Hightower was arrested in the parking lot of Cheero's, an establishment located at 2510 Burton Street in Grand Rapids. Cheero's is in the same building as the Michigan Athletic Club or MAC. (ECF No. 153-3 Leonard Dep. at 136 PageID.2103.) In August 2011, the owner of Cheero's filed an NTL with the police department.[6] (ECF No. 167-7 East Edge Newsletter PageID.2669; ECF No. 173-2 Vanderkooi Dep. at 19 PageID.3150.) Defendant Leonard was the arresting officer. The citation for trespassing was dismissed when the prosecuting attorney filed a nolle prosequi. (ECF No. 154-6 PageID.2338-39.)

[6] Defendants have not filed a copy of the NLT for Cheero's.

a. Plaintiff Hightower's Perspective

Hightower lives in Kalamazoo, not Grand Rapids. (ECF No. 175 Hightower Dep. at 17 PageID.3292.) On September 4, 2011, he and a friend, Khamisi Johnson, drove to Grand Rapids to go to Cheero's. Hightower was the designated driver (*id.* at 19 PageID.3293), and he drove Johnson's van (ECF No. 151 Hightower Dep. at 20 PageID.1907.) Hightower testified that he did not intend to go inside Cheero's, and that Johnson had an engagement there. (ECF No. 175 Hightower Dep. at 28-29 PageID.3295-96.) Kenyatta Williams also went with Hightower and Johnson. (*Id.* at 29-30 PageID.3296-97.)

When the three arrived at Cheero's, Hightower found a place to park the van while Williams and Johnson got out and stood in line to get inside Cheero's. (ECF No. 175 Hightower Dep. at 41-42 PageID.3302-03.) Hightower parked in reverse, so that the van faced the entrance to Cheero's. (*Id.* at 161-62 (PageID.3324-25.) Hightower stayed in the van. (*Id.* at 42 PageID.3303.) Hightower intended to stay in the van until he saw the two go inside, then he was going to go somewhere else. (*Id.* at 43 PageID.3304 and at 46 PageID.3305.) Shortly after leaving the van, Williams came back to the vehicle. (*Id.* at 46 PageID.3305.) Williams was gone for about five minutes. (*Id.* at 47 PageID.3306.) Williams denies he was there for thirty minutes. (*Id.* at 51 PageID.3309.) Williams also denies that he had music playing loudly. (*Id.* at 56 PageID.3311.)

The police officers approached the van at the same time Williams returned. (*Id.* at 165 PageID.3326.) One of the officers asked Hightower how long he had been there, and Hightower said thirty minutes. (*Id.* at 168 PageID.3327.) Hightower thought the officer

meant how long he had been in Grand Rapids. (*Id.*) Hightower was pulled out of the van by his left arm and was told to put his hands on the side of the van. (*Id.* at 168-69 PageID.3327-28.) He was handcuffed, walked to the police car, and told he was going to jail for trespassing. (*Id.* at 169 PageID.3328.)

b. Defendant Leonard's Perspective

Leonard and another officer were monitoring Cheero's on September 3 and 4, 2011. (ECF No. 167 Leonard Affidavit ¶ 33 PageID.2625.) Leonard had issued open container tickets to two individuals sitting in a car when he observed Hightower's van. (*Id.* ¶ 38 PageID.2625.) The van was backed into the parking spot, Leonard could see people in the car, and he could hear music coming from the car. (*Id.* PageID.2625-26.) Leonard made contact with Hightower, who was in the driver's seat, and the other officer made contact with Williams, who was in the passenger seat. (*Id.* PageID.2626.) Hightower told the officers that they were waiting for a friend and that they had been there for about half an hour. (*Id.* ¶ 39 PageID.2626.) Leonard claims he could see a bag containing a green leafy substance in Williams' lap, which Williams was trying to conceal. (*Id.* ¶ 40 PageID.2626.)

At his deposition, Leonard testified that, when he approached the van, he knew it had been there for at least ten to fifteen minutes because he observed the van while he was making contact with the two other men. (ECF No. 171-3 Leonard Dep. at 143 PageID.2924.) Leonard agreed that Hightower said he was waiting for a friend and that he had been there for thirty minutes. (*Id.* at 145 PageID.2927.) With that information, Leonard then arrested Hightower for trespassing. (*Id.*) Leonard summarized his assessment of the situation as follows: the van was parked for 15 to 20 minutes, blaring loud music, the individuals in the

van were not making any effort to go into the club, and they saw officers proactively dealing with other people who are just sitting in their cars. (*Id.* at 152-53 PageID.2929-30.) Leonard acknowledged he did not see Williams' marijuana until after the officers had started to handcuff Hightower and Williams. (*Id.* at 154 PageID.2931.)

c. Probable Cause

The undisputed evidence establishes that Defendant Leonard did not have probable cause to arrest Hightower for trespassing. Cheero's was open when Hightower arrived. At no point did anyone from any of the local businesses complain about Hightower or indicate that he must leave the parking lot. The officers did not ask Hightower to leave before arresting him. Leonard admitted that he did not see the marijuana until he was already arresting Hightower. Viewing the evidence in the light most favorable to Plaintiffs, Defendants would not be entitled to summary judgment on the question of probable cause. When the evidence is viewed in the light most favorable to Defendants, Plaintiffs would be entitled to summary judgment on the question of probable cause. To the extent there are disputes of fact, such as the noise level of the music and the length of time that Hightower had been in the parking lot, those disputes do not implicate whether Hightower was on notice that he could not be in the parking lot.

2. Percy Brown

Percy Brown was arrested on Sunday, January 8, 2012, around 1:30 a.m. (ECF No. 154-10 Brown Incident Report PageID.2323-54.) Brown was arrested in the parking of Cheero's. Defendant Leonard was the arresting officer. When the officers first observed Brown, he was in the driver's seat of a car in the parking lot. Brown was issued a citation for

trespassing. Brown eventually performed 20 hours of community service, after which the case was dismissed with the prosecuting attorney filed a nolle prosequi. (ECF No. 155 PageID.2356-57.)

a. From Brown's Perspective

Brown arrived at Cheero's sometime after midnight and probably closer to 1:30 a.m. (ECF No. Brown Dep. at 17 PageID.2825.) Brown backed his car into a parking space so that he could see the front of Cheero's bar. (*Id.* at 18 PageID.18 PageID.2826.) Brown was texting his friend who was inside the bar. (*Id.* at 20 PageID.2827.) Brown and his friend exchanged texts for a couple of minutes. (*Id.* at 24 PageID.2831.) Cheero's has a cover charge and, at that point in the evening, there was no line to enter. (*Id.* at 28-29 PageID.2833-34.) Brown testified that he is patted down by security almost every time he went into Cheero's. (*Id.* 31 PageID.2836.) From where he was parked, Brown could see the bouncers or security standing outside the door to Cheero's. (*Id.* at 62-63 PageID.2853-54.)

While Brown was sitting in his vehicle, a police car pulled up and stopped in front of his car. (Brown Dep. at 36 PageID.2841.) Brown recalled that he was probably sitting in his car for about ten minutes when the police car pulled in front of him. (*Id.* at 57 PageID.2851.) Two officers got out and approach Brown. (*Id.* at 36 PageID.2841.) The officers asked Brown what he was doing and then asked for his license and registration. (*Id.* at 37 PageID.2842.) The officer also asked Brown if they could search his vehicle, and he assented. (*Id.*) The officers asked Brown to get out of his vehicle and then asked him to get in the back of the police car. (*Id.*) Brown was issued a citation for trespassing. (*Id.* at 39 pageID.2844.)

b. From Defendant Leonard's Perspective

Leonard recalled the evening of January 7 and morning of January 8 was hip-hop night at Cheero's. (ECF No. 171-3 Leonard Dep. at 161 PageID.2933.) Leonard and another officer saw Brown sitting in a car, by himself, in the parking lot of Cheero's. (*Id.* at 162 PageID.2935.) The owners of Cheero's had told the police department that he did not want people hanging out in the parking lot. (*Id.* at 164 PageID.2936.) Leonard did not know how long Brown had been there, but Percy told the officer he had been sitting his vehicle for about ten minutes and was waiting for a friend. (*Id.*) Leonard testified that sitting in the car was consistent with waiting for a friend, and that it was also consistent with the sort of problems that the owner of Cheero's had been complaining about. (*Id.* at 163-64 PageID.2935-36.)

Leonard was deposed on January 22, 2014. On October 13, 2014, Leonard signed an affidavit, which was attached as an exhibit to Defendants' motion. In the affidavit, Leonard states that, on weekends, Cheero's was a nightclub and was the only business in the area open after midnight. (ECF No. 167 Leonard Affidavit ¶ 20 PageID.2623.) On the weekends, the parking lot was often chaotic and the police attempted to monitor the parking lot as time permitted. (*Id.*) On January 4, 2012, Leonard received an email sent by Captain VanderKooi. (*Id.* ¶ 43 PageID.2625.) The email, called the East Edge, summarizes recent crimes. (ECF No. 174-2 PageID.3209.) The January 4 email identified a murder attempt in Cheero's parking lot, which occurred on January 1, 2012, in the early morning. (*Id.*)

c. Probable Cause

The undisputed facts establish that Leonard did not have probable cause to arrest Brown for trespassing. Cheero's was open when Brown arrived. No one from any of the area businesses complained about Brown or indicated that he must leave the parking lot. Leonard did not warn Brown that he needed to leave the parking lot before issuing the citation. When this evidence is viewed in the light most favorable to Plaintiff, Defendants are not entitled to summary judgment on the issue of probable cause. When viewed in the light most favorable to Defendants, Plaintiffs are entitled to summary judgment on the question of probable cause. In fact, the record does not weigh strongly in favor of finding that the officers had a reason to investigate Brown's presence. Most of the reasons provided by Leonard for his investigation are contextual factors that would apply to anyone in the parking lot. Brown had only been in the parking lot for about ten minutes and was texting with a friend inside the establishment. Brown was cooperative with the officers and even consented to a search of his vehicle. The parties do not dispute any of these facts. The record does not indicate whether the parking lot was busy or congested when Brown was arrested.

3. Kirk McCroner

McConer was arrested around 7 p.m. on Monday, March 21, 2012. (ECF No. 154-7 McConer Incident Report PageID.2341.) Rau's Party Store had an NTL on file with the Grand Rapids Police Department. (ECF No. 155-6 PageID.2413.) Defendant Niemeyer was the arresting officer. (*Id.*) Niemeyer arrested McConer in an area behind Rau's Party Store. McConer was charged with trespassing, creating a disturbance, and with failing or

refusing to obey a lawful order. (ECF No. 154-9 Docket Sheet PageID.2350.) All three charges were dismissed when the prosecuting attorney filed a nolle prosequi. (*Id.*)

Rau's Party Store is located at 2015 South Division, on the northwest corner of the intersection of Division (north-south) and Cutler (east-west). (*See* ECF No. 152-1 PageID.1958.) There is a back entrance to Rau's. The back entrance sits back from an alleyway, a path for cars, that runs north-south between Cutler and Burton. There are three or four parking spaces in Rau's parking lot, on Rau's side of the alleyway, all facing Cutler. On the other side of the alleyway, west of the back entrance to Rau's, is a city-owned parking lot. McConer parked in the city-owned lot.

a. From McConer's Perspective.

McConer and a friend went to several stores looking for diet soda. (ECF No. 151-2 McConer Dep. 73-77 PageID.1926.) McConer parked on the north side of the city-owned lot close to the grocery store that faces Burton. (*Id.* at 76-78 PageID.1927.) McConer went to Rau's Party Store and purchased a diet soda. (*Id.* at 81-83 PageID.1928.) When he exited Rau's Party Store, McConer saw an acquaintance and the two began speaking. (*Id.* at 87-88 PageID.1929-30.)

A police officer in a vehicle told the men they had to move on because it was a bad neighborhood and the two could not stand there talking. (McConer Dep. at 92 PageID.1931.) McConer told the officer he just purchased a drink inside. (*Id.* at 93 PageID.1931.) The officer asked McConer for identification; the officer did not inform McConer he was trespassing. (*Id.*) As McConer handed this license to the officer, the officer jumped out of the car and informed McConer he was under arrest. (*Id.* at 94 PageID.1931.)

Later at his deposition, McConer testified that the officer got out of the car when he asked for identification. (*Id.* at 159-60 PageID.1939-40.) Rather than providing identification, McConer asked if he was under arrest, to which the officer replied "yes." (*Id.* at 160 PageID.1940.) When asked why, the officer stated that it was for trespassing. (*Id.*) McConer recalled he then told the officer he had just purchased a pop at the party store. (*Id.*)

McConer denies that the officer asked him to leave the parking lot. (*Id.* at 94-95 PageID.1931.) McConer admits that the officer asked McConer's acquaintance to leave. (*Id.* at 95 PageID.1931.) McConer denies that the officer asked him how long he had been in the parking lot. (*Id.* at 96 PageID.1932.)

b. From Officer Niemeyer's Perspective

Officer Niemeyer testified that the area where he observed McConer has a history of drug and weapons problems, prostitution and trespassing. (ECF No. 153-8 Niemeyer Dep. at 57 PageID.2168.) He knows the parking lot there and has had personal experience where he has been in fights with people who have drugs and weapons on them. (*Id.*) Niemeyer admitted that he does not know where the line is that divides the City's parking lot from Rau's parking area. (*Id.* at 63 PageID.2169; 94 PageID.2177.) However, both the City and Rau's do not want people trespassing in the lot and will prosecute trespassers. (*Id.* at 63 PageID.2169

When Niemeyer pulled into the parking lot, he observed McConer and his acquaintance standing and looking at some young women. (ECF No. 153-8 Niemeyer Dep. at 59 PageID.2168.) The two men were not going into Rau's and were not exiting the store either. (*Id.*) Niemeyer asked the two men what they were doing, and one of them responded

that they were staring at the pretty young ladies. (*Id.* at 130 PageID.2186.) Niemeyer informed the men that there were ongoing problems in the neighborhood and they needed to leave the lot. (*Id.* at 59 PageID.2168; at 105 PageID.2180; at 107 PageID.2180; at 108 PageID.2181; and at 131 PagID.2186.) McConer became belligerent and stated that he had just made a purchase at Rau's. (*Id.* at 131 PageID.2186.) McConer initially did not leave the lot as instructed, but then he began to walk away and did not tell Niemeyer where he was going or why. (*Id.* at 107 PageID.2180; at 108 PageID.2181; at 109 PageID.2181; and at 110 PageID.2181.) When McConer started to walk away, Niemeyer told him to stop, but McConer did not and kept walking. (*Id.* at 132 PageID.2187.)

After arresting McConer and placing him in handcuffs, Niemeyer spoke with the salesperson in Rau's. (Niemeyer Dep. at 122 PageID.2184.) Niemeyer confirmed that McConer had been in the store and had made a purchase. (*Id.*) Niemeyer did not release McConer because McConer had continued to hang around the parking lot after making the purchase and had ignored the command to vacate the lot. (*Id.*)

c. Probable Cause

There remain disputed material facts that preclude this Court from concluding that Niemeyer had probable cause to arrest McConer and to issue his a citation for trespassing. Niemeyer claims to have told McConer he needed to leave the property; McConer denies he was given this warning. Niemeyer conceded that no business owner had complained about McConer. (*Id.* at 95 PageID.2177.) Niemeyer did not know how long McConer and his friend had been talking when Niemeyer approached the two men. (*Id.* at 96 PageID.2178.) It is unclear from the record where McConer was standing, in Raus's or in

the City's lot, when he was approached by Niemeyer. Although Niemeyer testified that there were no trespassing signs posted for all of the parking lots (*id.* at 97 PageID.2178), at least one of the signs read "business patron's only" (ECF No. 151-6 PageID.1954). Without dispute, Niemeyer had patronized Rau's within minutes of being approached by Niemeyer. This evidence, viewed in the light most favorable to Plaintiffs, contains genuine issues of material fact that preclude granting Defendants' motion for summary judgment. In this light, Niemeyer did not order McConer to leave the lot. And, when viewed in the light most favorable to Defendants, genuine issues of material facts preclude granting summary judgment to Plaintiffs. In this light, Niemeyer ordered McConer to leave the parking lot, and McConer initially manifested an intent not to leave.

That McConer was arrested for other crimes does not change the conclusion that Niemeyer lacked probable cause to believe McConer was committing a crime. On this record, the Court cannot conclude that McConer disobeyed a lawful order. McConer contends he did provide his identification to Niemeyer. Niemeyer apparently told McConer both to leave the area and then to stop walking away. It is not clear which of these to orders were violated. If McConer had a reason to be in the parking lot, Niemeyer likely should not have ordered McConer to leave. If McConer was leaving as Niemeyer requested, then Niemeyer had no reason to order McConer to stop. Also, when McConer was walking away, he was headed in the direction of his parked car. Therefore, he had a legitimate reason to go in that direction. Finally, the record does not contain sufficient evidence for this Court to conclude that McConer was disturbing the peace, at least the evidence does not suggest one and only one conclusion with regard to that charge.

4. Jacob Manyong

Jacob Manyong was arrested around 8:00 p.m. on Sunday, February 19, 2012. (ECF No. 155-1 Manyong Incident Report PagerID.2359.) Defendant Leonard was the arresting officer. (*Id.* PageID.2360.) When Leonard first observed Manyong, Manyong was in a car parked at one of the City's metered parking spots in a lot shared by Robbins Lock Shop. Robbins Lock Shop had an NTL on file with the police department. (ECF No. 155-8 PageID.2419.) Leonard followed Manyong's car as Manyong exited the parking lot on to Burton Street. Leonard pulled Manyong over and arrested him. Defendant Niemeyer assisted Defendant Leonard after Manyong had been pulled over. Two cases were filed against Manyong. One case was for trespassing, which was dismissed when the prosecuting attorney filed a nolle prosequi. (ECF No. 155-2 PageID. 2362.) The second case, failing to provide proof of insurance, was resolved by a plea. (ECF No. 155-3 PageID2365.)

Robbins Lock Shop is located at 2004 South Division in Grand Rapids. The parking lot and store are the southeast corner of the intersection of Division (north-south) and Burton (east-west). Robbins Lock Shop faces Division Street. One entrance to and exit from the parking lot is on Division Street. A second entrance to and exit from the lot is on Burton Street. The parking spaces inside the lot and next to the building are considered Robbins Lock Shop's lot. The metered parking spaces that face Burton and Division Streets on the outside of the lot are operated by the City. Manyong had parked at one of the metered spaced facing Division Street.

a. From Manyong's Perspective.

Manyong is not a native English speaker. Although he does speak some English, his primary language is Dinka, a language spoken in South Sudan. His family is still in Sudan and Manyong usually calls them on the weekends. (ECF No. 152-2 Manyong Dep. at 41 PageID.1968.) On the evening of the incident, Manyong was at a friend's house and the store he usually buys calling cards from was already closed. (*Id.* at 42 PageID.1968.) His friend said that there was a store at Division and Burton that should be open and sells calling cards. (*Id.* at 43 PageID.1968.) Manyong was not familiar with the store and had never been to that store before. (*Id.*)

Manyong remembered entering the parking lot from Division Street. (Manyong Dep. at 26 PageID.1964.) Manyong parked his car, got out, and walked across the street. (*Id.* at 18 PageID.1962.) He did not wait in the car. (*Id.*) Manyong did not find the store he was looking for, so he went back to his car. (*Id.* at 38 PageID.1967.) Manyong recalled he did not walk more than one block. (*Id.* at 20 PageID.1963.) Manyong got back in his car and left. (*Id.* at 23-24 PageID.1963-64.) He exited the parking lot using the entrance and exit on Burton Street. (*Id.* at 26 PageID.1964.) He thought his car might have been parked in the lot for two to three minutes total. (*Id.* at 51 PageID.1970.)

Manyong recalled seeing a police car while he was walking back to his car. (Manyong Dep. at 24 PageID.1964.) The police car stopped on Division Street. (*Id.* at 26 PageID.1964.) As he was driving home on Burton Street, a police car turned on its lights and siren. (*Id.* at 27 PageID.1964.) Manyong pulled over and was surrounded by other police cars. (*Id.* at 28 PageID.1965.) Manyong produced his license to the officer, but could not show proof of insurance because it was in the glove compartment and the lock was

broken. (*Id.* at 29 PageID.1965.) The officer left with the license. When the officer returned, he asked Manyong to get out of the car and Manyong complied. (*Id.* at 30 PageID.1965.) The officer then ordered Manyong to put his hands on his head and the officer performed a pat down. (*Id.*) Manyong was then placed in the back seat of a patrol car. (*Id.*)

b. From Defendant Leonard's Perspective

Officer Leonard was in his patrol car on Division Street approaching Burton when he observed a man sitting in a parked car in a parking lot. (ECF No. 171-3 Leonard Dep. at 84-85 PageID.2895-96.) The vehicle was parked at a metered spot. (*Id.* at 88 PageID.2899.) Leonard thought he had seen the same car about an hour earlier, but would not say for certain so he omitted his belief from the police report. (*Id.* at 86 PageID.2897.) Robbins Lock Shop was closed. (*Id.* at 93 PageID.2901.) Leonard was aware that the owners of the lock shop did not want people in their parking lot during non-business hours. (*Id.*)

Leonard was driving north on Division Street when he made eye contact with Manyong. (Leonard Dep. at 95 PageID. 2903.) Leonard applied his brakes and began to back up, intending to enter the parking lot. (*Id.*) At that point, Leonard saw Manyong back up and leave the parking lot onto Burton Street. (*Id.*) Leonard followed Manyong and executed a traffic stop. (*Id.* at 96 PageID.2904.) In the police report, Leonard stated that he stopped Manyong because the license plate light on Manyong's car was not working. (*Id.*) At his deposition, Leonard said he also stopped Manyong because Manyong had been trespassing. (*Id.*) Leonard acknowledged that he observed Manyong parking in a public parking place (*id.* at 98 PageID.2905) and admitted that using a public parking spot to go

into a business that is open is not trespassing (*id.*). Leonard thought that Manyong's explanation did not make sense because there were parking spaces behind Rau's that would have been closer.[7] (*Id.*) After Leonard executed the traffic stop, he verified that Robbins Lock Shop had an NTL on file with the police department. (ECF No. 158 Transcript of Video of Manyong Traffic Stop PageID.2515.) Manyong was issued a citation and was released.

At his deposition, Leonard was asked about probable cause to execute the traffic stop. Leonard conceded that whether Manyong entered into the property of Robbins Lock Shop when he backed up was not something Leonard considered when he stopped Manyong that evening. (Leonard Dep. at 119 PageID.2917.) And, he conceded that the alleged trespass onto the parking spot for the lock shop did not provide probable cause to execute the traffic stop. (*Id.* at 121 PageID.2919.)

c. From Defendant Niemeyer's Perspective

Officer Niemeyer searched Manyong's car. Around two minutes into the video, Leonard asks Manyong if he has anything illegal, like guns or drugs. Manyong says "no," "you can check, you can check." Around minute seven, just after Manyong is put in the back of the police car, one of the officers says something about looking in the car. Leonard can then be heard saying "he already said yes." Leonard then says "It's ok if we check your car, right?" Manyong says something in response, but the audio is not clear.

d. Probable Cause

[7] This rationale could not justify executing the traffic stop for trespassing. Manyong did not provide this explanation until after the traffic stop was executed.

There exist genuine issues of material fact whether Leonard had probable cause to execute the traffic stop for a defective light. Manyong was not cited for having a defective license plate light. Manyong testified that the light was working and that the officer never told him that the license plate light was not working. (Manyong Dep. at 52-53 PageID.1971.) It is not clear from the video whether the license plate light is functioning. Manyong's car can be seen momentarily as it exits the parking lot. When Leonard's car pulls behind Manyong's car on Burton Street, the headlights from Leonard's police car illuminate the license plate. Leonard concedes he did not consider the alleged trespass when he executed the traffic stop and that the alleged trespass would not have been a reason for him to execute the traffic stop. Viewed in the light most favorable to Plaintiffs, the light was not defective and Defendants' motion for summary judgment on the issue of probable cause must be denied. Viewed in the light most favorable to Defendants, Leonard thought the tail light was defective and Plaintiffs' motion must be denied.

The undisputed evidence establishes that Defendant Leonard did not have probable cause to issue Manyong a citation for trespassing. No business owner complained about Manyong or asked Manyong to leave the property. Manyong was parked on public property. Leonard did not warn Manyong before issuing the citation. And, Manyong had already left the property. On this record, Manyong never evidenced an intent to either enter or remain on the lock shop's property. On this issue, Plaintiffs' motion must be granted and Defendants' motion must be denied.

There are no genuine issues of material fact concerning Niemeyer's search of Manyong's car. The evidence establishes that Manyong gave consent to the search. *See*

United States v. Purcell, 526 F.3d 953, 960 (6th Cir. 2008) ("An officer with consent needs neither a warrant not probable cause to conduct a constitutional search.") (citation omitted).

IV.

The individual defendants have asserted qualified immunity. In this section, the Court reviews the relevant law and then considers whether each defendant is entitled to the defense.

A.

"[G]overnment officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is a legal question for the court to resolve. *Everson v. Leis*, 556 F.3d 484, 494 (6th Cir. 2009). When resolving a governmental employee's assertion of qualified immunity, the court determines (1) whether the facts the plaintiff has alleged or shown establishes the violation of a constitutional right, and (2) whether the right at issue was clearly established at the time of the incident. *Stoudemire v. Michigan Dep't of Corr.*, 705 F.3d 560, 567 (6th Cir. 2013) (citing *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). The Court has determined that either the officer lacked probable cause or that a genuine issue of material fact exists concerning probable cause.

Once the qualified immunity defense is raised, the plaintiff bears the burden of demonstrating both that the challenged conduct violates a constitutional or statutory right and that the right was so clearly established at the time that "every reasonable official would have understood that what he [was] doing violate[d] that right." *T.S. v. Doe*, 742 F.3d 632,

635 (6th Cir. 2014) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)) (alterations in *T.S.*). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" *al-Kidd*, 563 U.S. at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

When determining if the law was clearly established, district courts look to the decisions of the United States Supreme Court and then to the decisions of the circuit court. *Carver v. City of Cincinnati*, 474 F.3d 283, 287 (6th Cir. 2007). After considering binding authority, a district court may consider persuasive authority from other circuit courts. *See Andrews v. Hickman Cty. Tennessee*, 700 F.3d 845, 853 (6th Cir. 2012); *see also Wilson v. Layne*, 526 U.S. 603, 617 (1999) ("Petitioners have not brought to our attention any case of controlling authority in their jurisdiction at the time of the incident which clearly establish the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."). Although a prior case need not be directly on point, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741.

The clearly established prong will depend "substantially" on the level of generality at which the legal rule is identified. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The right must be clearly established in a particularized sense and not in a general or abstract sense. *Id.* at 640. "The contours of the right 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, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* (internal citation and quotation marks omitted). "This standard requires the courts to examine the right at a relatively high level of specificity an on a fact-specific, case-by-case basis." *Bletz v. Gribble*, 641 F.3d 743, 750 (6th Cir. 2011) (edits omitted) (quoting *Cope v. Heltsley*, 128 F.3d 452, 458-59 (6th Cir. 1997)).

B.

Plaintiffs have not established that the relevant law was clearly established at the time of each arrest such that each defendant would have known that what he was doing violated the suspect's constitutional rights. Part of the dispute in this lawsuit is what the ordinance requires for probable cause to exist, which distinguishes this case from all others that Plaintiffs have identified. Plaintiffs asserts a very broad approach to the clearly established requirement. Plaintiffs argue that the probable cause requirement is clearly established. Plaintiffs' approach is far too general to be useful for determining whether the officers had probable cause to believe each Plaintiff violated the trespass ordinance.

Plaintiffs have not identified any state or federal court opinion that has discussed a statute or ordinance similar to the one at issue here. The *Maggit* opinion was issued after this lawsuit was filed. The City's ordinance merely prohibits trespassing, without defining the term. Unlike most other criminal trespass statutes, the ordinance does not address what notice must be given. The ordinance does not indicate whether notice must be posted that entry is forbidden. The ordinance does not indicate when an entry becomes trespassing after the individual is asked or told to leave. In either case, notice before or after entry, the alleged trespasser would have no knowledge that he or she must leave the property. When the Sixth

Circuit has considered probable cause in connection with a trespass statute or ordinance, the legislative act has provided for some form of notice. *See, e.g., Thompson v. Ashe*, 250 F.3d 399, 408-09 (6th Cir. 2001) (involving Tennessee's trespass statue which prohibits entering or remaining on property without the consent of the owner, which may be inferred if the property is used for commercial purposes); *United States v. Reid*, 220 F.3d 476, (6th Cir. 2000) (involving a municipal ordinance which prohibited entering or remaining on the property of another without privilege).

The cases cited by Plaintiffs on the issue of probable cause are distinguishable and do not show that the law was clearly established. In one case involving Ohio's criminal trespass statute, *Logsdon v. Hains*, 492 F.3d 334 (6th Cir. 2007), the court reversed the district court's decision to grant qualified immunity to the arresting officers on a Rule 12(b)(6) motion. Ohio's statute prohibited entering or remaining on someone else's property without the privilege to do so. *Id.* at 241 (citing Ohio Rev. Code § 2911.21(A)(1)). According to the complaint, the arresting officer, who did not observe the alleged trespass, refused to listen to exculpatory evidence from witnesses at the scene, which would have implicated the officer's assessment of privilege and, therefore, probable cause to arrest. *Id.* at 342-43. The court concluded that the complaint pled sufficient facts to show the officer lacked probable cause. *Id.* at 343. For the clearly established prong of the analysis, the court held only that the requirements for probable cause were well established. *Id.* But, unlike this lawsuit, the scope of Ohio's statute—what knowledge was necessary to believe a crime was committed—was not in dispute.

Radvansky v. City of Olmsted Falls, 395 F.3d 291, 302-03 (6th Cir. 2005) involved an arrest under Ohio's burglary law, of which trespass was an element. The court explained that the plaintiff's criminal liability under the burglary statute would resolve by determining whether he was a current or former tenant on the evening of the incident. *Id.* at 304. The court concluded that there were disputes of fact about Radvansky's status as a tenant, which precluded a finding of probable cause on summary judgment. *Id.* at 304-10. The court then reversed the district court's decision to grant qualified immunity, finding that the probable cause requirement for an arrest was well established. *Id.* at 310. Like *Logsdon*, the requirements for a determination of probable cause that a criminal trespass was occurring were not in dispute. Here, the parties do dispute what an officer must know to have probable cause to believe the City's trespass statute was violated.

The conclusion that the individual officers are entitled to qualified immunity is consistent with one court opinion issued since these incidents occurred and after this lawsuit was filed. Kenyatta Williams, one of the individuals arrested with Plaintiff Hightower, filed a separate lawsuit in this Court. *Williams v. City of Grand Rapids*, No. 1:13-cv-653 (W.D. Mich.) In that lawsuit, the Court found that Officers Leonard and Rekucki were entitled to qualified immunity on both prongs of the inquiry. *Williams v. City of Grand Rapids*, No. 1:13-cv-653, 2014 WL 5539639, at *6 (W.D. Mich. Sept. 2, 2014) (report and recommendation), *adopted* 2014 WL 5506820 (W.D. Mich. Oct. 31, 2014).

Accordingly, individual defendants are entitled to qualified immunity.

V.

In this final section, the Court considers Plaintiffs' allegations against the City of Grand Rapids. In addition to suing the City, Plaintiffs also sued the Chief of Police in his official capacity. A claim against the Chief of Police in his or her official capacity is really a claim against the municipality. *See Myers v. Potter*, 422 F.3d 347, 357 (6th Cir. 2005). And, because the City is a named defendant, the claim against the Chief of Police is redundant. Accordingly, Defendants' request to dismiss the Chief of Police as a defendant is granted.

A.

"To succeed on a municipal liability claim, a plaintiff must establish that his or her constitutional rights were violated and that a policy or custom of the municipality was the 'moving force' behind the deprivation of the plaintiff's rights." *Miller v. Sanilac Cty.*, 606 F.3d 240, 254-55 (6th Cir. 2010). A plaintiff has at least four methods for proving the existence of an unconstitutional policy or custom: (1) the municipality's legislative enactments or official agency policies, (2) actions taken by officials with final decision-making authority, (3) a policy of inadequate training or supervision, and (4) a custom or tolerance or acquiescence of federal rights violations. *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005) (citations omitted); *see Burgess v. Fischer*, 735 F.3d 462, 477 (6th Cir. 2013). A municipality policy results from the decisions of its legislative body or those officials whose acts may be said to be those of the municipality. *Ford v. Cty. of Grand Traverse*, 535 F.3d 483, 495 (6th Cir. 2008) (quoting *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 403-04 (1997)). "To be sure, 'official policy' often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembauer v. City of*

Cincinnati, 475 U.S. 469, 480-81 (1986). And, federal courts have "long recognized that a plaintiff may be able to prove the existence of a widespread practice that, although not authorized by a written law or express municipal policy, is 'so permanent and well settled as to constitute a custom or usage with the force of law.'" *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)).

B.

The undisputed evidence in the record establishes that the City of Grand Rapids has a policy that no-trespass letters filed by area business authorized the City's police officers to revoke a suspect's invitation to be on commercial property and to arrest those suspects without first informing them that they were no longer welcome on the property. That the officers considered the totality of the circumstances to determine, in their discretion, that the suspect was not on the property for a commercial purpose, does not save the policy. Criminal trespass requires notice to the suspect that his or her presence is unwanted.

For Defendants' motion, the Court must view the evidence in the light most favorable to Plaintiffs. Viewed from this perspective, the evidence against the City is overwhelming.

Without dispute, the City has a policy or custom of promoting NTLs to local businesses. Defendants admit this in their response to Plaintiff's motion; "[t]o be clear, use of no-trespass letters is a city custom or practice, but is not a formally promulgated, written policy." (ECF No. 183 Def. Resp. at 17 PageID.3907.) The City has issued blank NTLs dating back at least to 1994. (ECF No. 155-9 PageID.2433.) The Grand Rapids Police Department distributes a pamphlet titled "Protect Your Property With a Trespass Letter of Authorization." (ECF No. 150-7 PageID.1848-49.) Lieutenant Michael Maycroft testified

that the Police Department uses both formal and informal channels, including neighborhood associations, to promote NTLs throughout the City of Grand Rapids. (ECF No. 172-4 Maycroft Dep. at 46-47 PageID.3076-77.) But, having a policy or custom of promoting NTLs, even soliciting NTLs from area business, does not resolve the question of whether the City can be held liable. A program of promoting NTLs does not violate anyone's constitutional rights.

How the City used the NTLs, however, did violate constitutional rights. The Police Department has compiled a field training manual for its officers. (ECF No. 150-8.) Under the section for Selected Ordinance Violations, the trespassing ordinance is discussed. (*Id.* PageID.1854.) The handbook instructs officers that a "[c]omplainant and/or valid 'No Trespass' letter necessary for arrest." (*Id.*) Neither document instructs that the officer must first ask or order the suspect to leave the property. Viewed in the light most favorable to Plaintiffs, these documents authorize an arrest for trespassing without notice to the suspect that he or she should leave the property. ~~In th~~

Most of the officers who have been deposed testified to the same interpretation of the ordinance. Chief Kevin Belk, Captain Curtis Vanderkooi and Lieutenant Maycroft, none of whom are defendants, were deposed and discussed the City's trespass ordinance. Chief Belk did not think that notice was an element of the crime of trespass reasoning that "if I'm on your property, I know I'm on your property, I know I am there for a purpose that you don't intent me to be there for, I am trespassing." (ECF No. 173-1 Belk Dep. at 38 PageID.3129.) And, Chief Belk admitted that a no-trespass letter is not publicly available and provides no information to the public about the intent of the business owner. (*Id.* at 33 PageID.3133

and 51 PageID.3138.) Captain Vanderkooi explained that a no-trespass letter "transfers authorization to determine if you're trespassing to the police." (ECF No. 153-1 Vanderkooi Dep. at 81 PageID.2070.) Captain Vanderkooi distinguished the City ordinance from the state criminal trespassing law. Under the ordinance, "[a]ll we have to do is determine that they are on the property unlawfully. That's all that the law requires." (*Id.* at 82 PageID.2070.) In contrast, "[t]he state law requires that somebody tell them, 'You're forbidden to be on this property' before they can be arrested." (*Id.*) And, when no letter has been filed, the owner or agent of the business must order the suspect to leave the property before the police can arrest for trespassing. (*Id.*) Captain Vanderkooi was insistent that the ordinance does not require a police officer to first ask a suspect to leave the premise before the officer can make an arrest. (*Id.* at 97 PageID.2072.) Lieutenant Maycroft testified that an NTL is an "explicit authorization for us to make that arrest without having to contact the owner." (ECF No. 172-4 Maycroft Dep. at 67 PageID.3087.) According to Maycroft, officers have discretion to ask individuals to leave the property, but "the crime of trespassing can occur without asking them to leave." (*Id.* at 85 PageID.3091.)

The defendant officers testified that submitting an NTL was sufficient for the officers to know that the business owner did not want people on the property who were not doing business. Defendant Rekucki testified that the City ordinance "essentially" authorizes him to arrest someone when he observes that individual on someone else's property, doing something he or she should not be doing, if there is a valid NTL for that property. (ECF No. 172-1 Rekucki Dep. at 44 PageID.2949.) Defendant Niemeyer testified that, when a business owner has filed an NTL, the owner does not have to ask a person to leave and the

officer can execute an arrest for trespassing if the officer believes the totality of the circumstances establishes probable cause. (ECF No. 172-2 Niemeyer Dep. at 43 PageID.2992.) Defendant Niemeyer also testified that he does not need to ask someone to leave before making an arrest for trespassing. (*Id.* at 82 PageID.3011.) Defendant Leonard testified that, by verifying that an owner has filed an NTL, he functionally accomplishes contact with the property owner. (ECF No. 153-3 Leonard Dep. at 60 PageID.2089.)

Contrary to what Defendants argue in their motion, Plaintiffs are not relying on a theory of inaction. The evidence discussed above, the pamphlet, the training manual, the statement of supervising officers, and the testimony of the individual defendants, establish the City's policy or custom of using no-trespass letters as authorization to arrest for trespassing, assuming the officer determines that the suspect is not patronizing the business, even when the suspect has not been warned to leave.

Defendants' other evidence is not sufficient to create genuine issues of material fact. That the GRPD's Manual of Procedures (ECF No. 183-3) does not mention the ordinance or no-trespass letters is not helpful. Other documents do specifically mention the ordinance and explain how the City uses NTLs.

Turning to Plaintiffs' motion, the same result occurs when viewing the record in the light most favorable to Defendants. The record contains no evidence from which the Court could conclude GRPD officers do not rely on NLTs to make an arrest without first warning the suspect to leave the area. This result should not come as a surprise to Defendants. Defendants have consistently defended their interpretation of the ordinance, which is apparent from the testimony from all of the officers. In the *Maggit* lawsuit the City offered

the same probable cause defense for the ordinance, which was rejected by the State Court. The state court explained that the ordinance merely empowered officers to ask the suspected trespassers to leave the property. *Maggit*, 903 N.W.2d at 874.

VI.

Both parties are entitled to partial summary judgment. Plaintiffs are entitled to summary judgment against Defendant City of Grand Rapids. Plaintiffs have demonstrated that the City has an unconstitutional policy or custom whereby police officers arrest individuals for trespassing on property covered by a no-trespass letter without first informing the suspect that he or she must leave the property. The individual defendants, however, are entitled to summary judgment on the basis of qualified immunity. At the time of the citations and arrests, it was not clearly established law what knowledge the officers must have before concluding that they had probable cause to arrest a suspect for violating the City's ordinance. Plaintiffs are not entitled to summary judgment on their claim that the City's no-trespass letter policy is unconstitutionally vague. As presented to the Court, Plaintiffs' theory is not supported by any law.

ORDER

For the reasons provided in the accompanying Opinion, both sides have established entitlement to partial summary judgment. Plaintiffs' motion for summary judgment (ECF No. 149) is **GRANTED IN PART and DENIED IN PART.** Plaintiffs are entitled to summary judgment on their municipal liability claim against Defendant City of Grand Rapids. Plaintiffs are not entitled to summary judgment on their void-for-vagueness claim. Because the individual defendants have established their qualified immunity defenses, Plaintiffs' claims against the individual defendant are dismissed.

Defendants' motions for summary judgment are **GRANTED IN PART and DENIED IN PART:**

1. Defendants City of Grand Rapids and Chief David Rahinsky's motion (ECF No. 161) is granted in part and Defendant Rahinsky, who is sued only in his official capacity, is dismissed. The rest of the City's motion is denied.

2. Defendants Leonard and Rekucki's motion regarding Plaintiff Hightower (ECF No. 162), Defendant Niemeyer's motion regarding Plaintiff McConer (ECF No. 163), Defendant Leondard's motion regarding Plaintiff Brown (ECF No. 164), and Defendants Niemeyer and Leonard's motion regarding Plaintiff Manyong (ECF No. 165) are granted in part. The defendant officers are entitled to qualified immunity because the relevant law was not clearly established at the time of the incidents.

IT IS SO ORDERED.

Date: October 17, 2018

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge