

FILED
U.S. DISTRICT COURT
DISTRICT OF NEW MEXICO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
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CLERK-ALBUQUERQUE

LYNN BUCK, et al.,

Plaintiffs,

v.

NO. CIV 04-1000 JP/DJS

CITY OF ALBUQUERQUE, et al.

Defendants.

**DEFENDANTS' MOTION FOR PARTIAL SUMMARY
JUDGMENT No. 1: DISMISSAL OF PLAINTIFFS' OFFICIAL
CAPACITY CLAIMS AGAINST CHAVEZ, BAKAS, GALLEGOS, AND SCHULTZ**

Defendants, City of Albuquerque, Mayor Martin Chavez, Nick Bakas, Gilbert Gallegos and Ray Schultz, through their attorney, Deputy City Attorney Kathryn C. Levy, and Defendants, Raymond DeFrates, Michael Fisher, James Leroy Fox, Nicholas Gonzales, Allen S. Hancock, Steven Hill, Charles Lopez, Daniel Mageterri, James Montoya, Shawn O'Connell, Pablo Padilla, and James Perdue, through their attorneys Robles, Rael & Anaya, P.C. (Luis Robles, Esq.), and pursuant to Fed.R.Civ.P. 56 and D.N.M.LR-Civ. 56, state the following for their Motion for Partial Summary Judgment No. I: Dismissal of Plaintiffs' Official Capacity Claims against Chavez, Bakas, Gallegos, and Schultz:¹

INTRODUCTION

In this case, sixteen (16) plaintiffs brought a nine (9) count complaint against eighteen (18)

¹ As allowed by D.N.M.LR-Civ. 7.7, Defendants have combined this Motion with the memorandum in support thereof. As required by D.N.M.LR-Civ. 7.1(a), Defendants mailed a letter to Plaintiffs' counsel on January 27, 2006, to determine whether they concurred with or opposed this motion. Plaintiffs' counsel did not concur with this motion.

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Defendants. To markedly reduce the number of motions filed, seventeen (17) Defendants have combined their various defenses into three (3) motions for partial summary judgment. Collectively, the three (3) motions seek the dismissal of all of plaintiffs' claims against the seventeen (17) defendants.

Please note that the statements of the undisputed material facts for these three (3) motions are inter-related and dependent on one another. See Fed. R. Civ. P. 10(c) (adoption by reference; exhibits); D.N.M.LR-Civ. 10.7 (Non-Duplication of Exhibits). Specifically, Defendant will incorporate by reference the undisputed facts set forth in this motion to support the legal arguments made in the other two motions.

UNDISPUTED MATERIAL FACTS

In the present case, there is no genuine issue of *material* fact, and Defendants are entitled to partial summary judgment as a matter of law. The undisputed material facts are as follows:

1. On March 20, 2003, then DCOP Ray Shultz, Officer Raymond DeFrates, Officer Michael Fisher, Officer James Leroy Fox, Officer Nicholas Gonzales, Officer Allen S. Hancock, Sgt. Steven Hill, Officer Charles Lopez, Officer Daniel Mageterri, Officer James Montoya, Sgt. Shawn O'Connell, Officer Pablo Padilla, and Officer James Perdue (*hereinafter* collectively referred to as "Defendant Officers") were part of the Albuquerque Police Department's response to the anti-war protest which took place in the area surrounding the University of New Mexico ("UNM"). See *Affidavit of Raymond Schultz, Raymond DeFrates, James Leroy Fox, Nicholas Gonzales, Daniel Mageterri, James Montoya, Shawn O'Connell, and Pablo Padilla*, ¶ 2, which is attached hereto as *Exhibit A: Affidavit of Steven Hill, Charles Lopez, and Allen S. Hancock*, ¶ 2, which is attached as

Exhibit A to Defendants' Motion for Partial Summary Judgment No. II: Dismissal of Plaintiffs' § 1983 Wrongful Seizure and Arrest, Excessive Force, First Amendment, Retaliatory Prosecution, Malicious Prosecution and State Law False Imprisonment, Battery, and Malicious Abuse of Process Claims (hereinafter referred to as "MPSJ No. II"); Affidavit of Michael Fisher and James Perdue, ¶ 2, which is attached as Exhibit B to MPSJ No. II. See Fed. R. Civ. P. 10(c) (adoption by reference; exhibits); D.N.M.LR-Civ. 10.7 (Non-Duplication of Exhibits).

2. Defendant Officers were among the approximately sixty (60) APD officers who responded to the anti-war protest which took place in the area surrounding UNM.

I. PLAINTIFF LYNN BUCK

3. In her answers to interrogatories, Plaintiff Lynn Buck ("Buck"), set forth the following facts regarding the force which the Albuquerque Police Department ("APD") allegedly used against her and other protestors:

[Buck] first smelled tear gas at the intersection of University and Central as [they] were walking east up Central back toward the University. [Buck] heard the police say to get out of the street, so [she] went onto the university campus. [Buck] was in front of the bookstore at UNM. A teargas canister landed in a planter on the campus, near where [Buck] was standing. [Buck] saw a man being struck in the forehead with a teargas canister.

See Exhibit A, ¶ 7 (Exhibit 1); MPSJ No. II, Exhibit A, ¶ 7; MPSJ No. II, Exhibit B, ¶ 7.

4. Although Buck believed that she could not leave the area by traveling south or west through the police line, Buck acknowledged in her deposition that she was free to leave the area of Central, Ave. and Cornell, Dr. by traveling north onto the UNM campus or toward UNM's Johnson Field. *See Deposition of Lynn Buck, p. 132, l. 6 - p. 134, l. 7, which is attached as Exhibit A to Defendants' Motion for Partial Summary Judgment No. III: Dismissal of Plaintiffs' Municipal*

Liability (Policies, Customs, Patterns and Practices), Failure to Train, Supervisory Liability, and Injunctive Relief Claims (hereinafter referred to as "MPSJ No. III").

5. None of the Defendant Officers had any physical contact with Buck or otherwise personally participated in the physical force (if any) allegedly used against Buck. *See Exhibit A, ¶ 9; MPSJ No. II, Exhibit A, ¶ 9; MPSJ No. II, Exhibit B, ¶ 9.*²

II. PLAINTIFF ALMA ROSA SILVA-BANUELOS

6. In her answers to interrogatories, Plaintiff, Alma Rosa Silva-Banuelos ("Silva-Banuelos"), alleged the following facts regarding her arrest and the force which the APD used against her and other protestors:

[Silva-Banuelos] was part of the larger peace march on the intersection of University and Central, [they] were headed East bound. There was a group of young people that sat down [in] the intersection and APD moved in on them. Surrounding officers then began to spray 'pepper gas' on the crowd. This was also when there was an explosion in the crowd on the ground. The sound was so loud that the march began to run and move from that area and APD continued to spray the crowd with 'pepper gas.'

* * *

On the evening of March 20th, [Silva-Banuelos] was wrongfully arrested near Central and Yale. [Silva-Banuelos] was just east of Yale when it seemed that APD was slowing down and was allowing the march to return to its starting point and come to a peaceful end. At this moment the police on horses were slowly following the march. There was a gap in the march and some peace protestors had fallen behind. In that moment someone began to chant "police strike." There were two other protestors near [Silva-Banuelos] at the time chanting "police strike." To [Silva-Banuelos'] recollection, the peace protestors near [her] were Kendra Ellis and Alex (LNU). At this time in the City of Albuquerque, it was [Silva-Banuelos'] understanding that Mayor Chavez was cutting benefits and pay to APD. As others began to join in the chant [Silva-Banuelos] began chanting as well, "police strike." [Silva-Banuelos] spoke out and said we understand how you are being treated by the

² Please note that Defendants will address APD's use of pepper spray, tear gas, and pepper ball rounds in the undisputed material facts section of MPSJ No. II.

City. The police officers on the horse began to laugh. [They] continued to walk past Yale and all of a sudden [Silva-Banuelos] noticed that police on horseback began to charge forward. [Silva-Banuelos] was stepping onto the sidewalk, in front of Papa John's pizza, when they began to charge. [Silva-Banuelos] put [her] arms in the air with peace signs when [she] notice[d] they were charging at the three of [them].

We were rounded up by police and police on horses. [Silva-Banuelos] was circled many times by the police on horseback and was told not to move. [Silva-Banuelos] stood still on the sidewalk with [her] hands up in the air in peace signs. [Silva-Banuelos] was facing East since that is the direction [she] was walking on the sidewalk. The next thing was a shock to [Silva-Banuelos] when [she] was ambushed from behind by a police officer. He grabbed [Silva-Banuelos] and grabbed [her] arms twisting them behind [her] and above [her] shoulders near [her] head. He kept [Silva-Banuelos] in this painful hold which forced [her] to walk on [her] tippy toes all the way to the patty wagon. This is where [Silva-Banuelos] was cuffed and put in a wagon with other peace protestors. [Silva-Banuelos] never saw the police officers until [they] were being booked and transported.

See Exhibit A, ¶ 10 (Exhibit 2); MPSJ No. II, Exhibit A, ¶ 10; MPSJ No. II, Exhibit B, ¶ 10.

7. With regard to Silva-Banuelos' claim that an APD officer twisted her arms and placed them above her shoulders, none of the Defendant Officers had any physical contact with Silva-Banuelos or otherwise personally participated in the physical force allegedly used against her. *See Exhibit A, ¶ 12; MPSJ No. II, Exhibit A, ¶ 12; MPSJ No. II, Exhibit B, ¶ 12.*

8. None of the Defendant Officers participated in the seizure, detention, or arrest of Silva-Banuelos. *See Exhibit A, ¶ 13; MPSJ No. II, Exhibit A, ¶ 13; MPSJ No. II, Exhibit B, ¶ 13.*

9. None of the Defendant Officers prepared a police report about Silva-Banuelos. *See Exhibit A, ¶ 14; MPSJ No. II, Exhibit A, ¶ 14; MPSJ No. II, Exhibit B, ¶ 14.*

10. None of the Defendant Officers participated in the decision to charge Silva-Banuelos with the violation of a criminal law. *See Exhibit A, ¶ 15; MPSJ No. II, Exhibit A, ¶ 15; MPSJ No. II, Exhibit B, ¶ 15.*

11. None of the Defendant Officers participated in the preparation of the criminal complaint filed against Silva-Banuelos. *See Exhibit A, ¶ 16; MPSJ No. II, Exhibit A, ¶ 16; MPSJ No. II, Exhibit B, ¶ 16.*

12. None of the Defendant Officers participated in the criminal proceedings brought against Silva-Banuelos. *See Exhibit A, ¶ 17; MPSJ No. II, Exhibit A, ¶ 17; MPSJ No. II, Exhibit B, ¶ 17.*

13. On the day that she was arrested (March 20, 2003), Silva-Banuelos knew the name of the APD officer who arrested her. *See Deposition of Alma Rosa Silva-Banuelos, p. 136, l. 7 - p. 137, l. 6, which is attached as Exhibit B to MPSJ No. III.*

14. Silva-Banuelos did not name as a defendant the APD officer who arrested and filed a criminal complaint against her.

III. PLAINTIFF CAMILLE CHAVEZ

15. In her answers to interrogatories, Plaintiff, Camille Chavez ("Chavez"), alleged the following facts regarding the force which the APD used against her and other protestors:

[Chavez] was in the street, sitting down, not posing any threat, when [she] was first 'gassed,' then shot repeatedly with 'pepper balls' fired from a gun. [Chavez] had joined the demonstration in order to peacefully protest the war, and [Chavez] sat down in the street as a sign of peaceful protest. [Chavez] knew [she] might be arrested for sitting in the street, but [she] did not expect to be gassed or shot. After [Chavez] was gassed and was being fired upon, [she] felt like [she] could not move. [Chavez] laid down to show that [she] was not a threat, but the shooting continued. [Chavez] was eventually pulled from the street by other protestors on the scene, trying to help [her]. As they tried to lead [Chavez] to safety, away from the area, [Chavez] was shoved hard by an officer from behind, with his 'baton,' knocking [Chavez] down onto Central Avenue. [Chavez] lay there, trying to breathe, [her] eyes still burning, coughing, and feeling unable to stand. Once [Chavez] could stand, [she] was helped by other protestors onto the sidewalk in front of the Frontier. [Chavez] leaned against a light pole, trying to recover, when more police officers,

yelling and screaming and pushing with their batons; forced [Chavez] back onto Central Avenue. [Chavez] didn't know what they wanted [her] to do, so [Chavez] yelled out to them just to tell [her] where to go, and one of them yelled at [Chavez] to go across the street, so [Chavez] did.

See Exhibit A, ¶ 18 (Exhibit 3); MPSJ No. II, Exhibit A, ¶ 18; MPSJ No. II, Exhibit B, ¶ 18.

16. Although she was "shot repeatedly with 'pepper balls' fired from a gun," Chavez did not feel the impacts of the pepper ball rounds as they struck her body. *See Deposition of Camille Chavez, p. 70, ll. 7-8, which is attached as Exhibit C to MPSJ No. III.* The pepper ball rounds which struck Chavez did not leave any welts, marks, and bruises on her body. *See MPSJ No. III, Exhibit C, p. 70, ll. 18-20.* In fact, the only reason that Chavez knew that the police shot her with pepper ball rounds is that other people told her after the fact that she had been shot. *See MPSJ No. III, Exhibit C, p. 71, ll. 3-12.*

17. The investigation by the Independent Review Officer concluded that Chavez was shot by Defendant Officer Michael Fisher.

18. Acknowledging the Independent Review Officer's finding that Chavez was shot by Officer Fisher, none of the other Defendant Officers used a pepper ball gun to shoot Chavez. *See Exhibit A, ¶ 20; MPSJ No. II, Exhibit A, ¶ 20.*

19. With regard to her allegation that she was struck with a baton, Defendant Officers did not strike Chavez with a baton or otherwise personally participate in the use of the baton against Chavez. *See Exhibit A, ¶ 21; MPSJ No. II, Exhibit A, ¶ 21; MPSJ No. II, Exhibit B, ¶ 20.*

IV. PLAINTIFF DENIS DOYON

20. In his answers to interrogatories, Plaintiff, Denis Doyon ("Doyon"), alleged the following facts regarding his arrest and the force which the APD used against him and other

protestors:

[Doyon] notice[d] that the crowd was being followed by several police officers on horseback and apparently at least fifty officers on foot. When [Doyon] heard a commotion behind [him], [Doyon] stopped to see what was happening, and saw an officer on horseback approximately 20 feet away spray an aerosol over the crowd. [Doyon's] eyes, nasal passages and throat immediately began burning.

* * *

After walking to the intersection of Central and Harvard, [Doyon and his friends] met the crowd of demonstrators walking back toward the bookstore, in the eastbound traffic lanes of Central Avenue. By this time, traffic in both directions on Central Avenue had been blocked by several police cars. [Doyon] met some friends of [his] in the crowd, and [they] started playing samba music on drums and percussion instruments [they] had brought, walking slowly back toward the bookstore.

When the crowd arrived at the intersection of Central and Cornell, most of [the protestors] remained in the intersection. Traffic was still blocked in both directions by police cars. Tensions were running high due to police use of threats and chemical weapons. [Doyon's] friends and [Doyon] resumed playing samba, and the other drummers joined [them]. The drumming appeared to ease some of the tension in the crowd. Many people began to smile and sing, and some people started dancing. [Doyon] saw this as an important function for [their] drumming - to defuse tension.

Eventually, several police officers on horseback approached the edge of the crowd from the west, in the westbound traffic lanes of Central Avenue. Several other officers in riot gear approached the crowd on foot. [Doyon] saw Officer Larry Campbell - APD Badge # 663 speak to these officers, pointing to [Doyon] and the other drummers. These officers in riot gear immediately entered the crowd, passing several people in order to grab four of the drummers from amidst the crowd. [Doyon and the other drummers] were arrested and charged with creating a public nuisance and resisting/obstructing an officer. [Doyon] was booked at the police substation on Menaul Avenue just west of I-25, and then held in a cell at the Bernalillo County Detention Center until [he] was released on [his] own personal recognizance after midnight.

* * *

When [Doyon] was arrested, as [he] [has] described in [his] answer to Interrogatory No. 1, two officers grabbed [Doyon] by the shoulders and pushed [him], causing [Doyon] to trip. They dragged [Doyon] out of the crowd and pushed [him] onto the pavement face down; one officer placed his knee on the small of [Doyon's] back, pinning [him] to the ground. After a minute or two in this position, the officer got off [Doyon's] back and [Doyon] was allowed to stand. [Doyon] was pushed face forward onto the hood of a police car and handcuffed with plastic flexicuffs.

See Exhibit A, ¶ 22 (Exhibit 4); MPSJ No. II, Exhibit A, ¶ 22; MPSJ No. II, Exhibit B, ¶ 21.

21. With regard to Doyon's claim that an APD horse mounted officer sprayed Doyon and other protestors with pepper spray, none of the Defendant Officers worked as a horse mounted officer on March 20, 2003. See Exhibit A, ¶ 24; MPSJ No. II, Exhibit A, ¶ 24; MPSJ No. II, Exhibit B, ¶ 23.

22. With regard to Doyon's claim that he was dragged out of the crowd, was pushed onto the pavement face down, and had an officer place his knee on the small of Doyon's back, none of the Defendant Officers used force against a protestor in the same or similar manner as alleged by Doyon. See Exhibit A, ¶ 25; MPSJ No. II, Exhibit A, ¶ 25; MPSJ No. II, Exhibit B, ¶ 24.

23. None of the Defendant Officers had any physical contact with Doyon or otherwise personally participated in the physical force allegedly used against Doyon. See Exhibit A, ¶ 26; MPSJ No. II, Exhibit A, ¶ 26; MPSJ No. II, Exhibit B, ¶ 25.

24. None of the Defendant Officers participated in the seizure, detention, or arrest of Doyon. See Exhibit A, ¶ 27; MPSJ No. II, Exhibit A, ¶ 27; MPSJ No. II, Exhibit B, ¶ 26.

25. None of the Defendant Officers prepared a police report about Doyon. See Exhibit A, ¶ 28; MPSJ No. II, Exhibit A, ¶ 28; MPSJ No. II, Exhibit B, ¶ 27.

26. None of the Defendant Officers participated in the decision to charge Doyon with the violation of a criminal law. See Exhibit A, ¶ 29; MPSJ No. II, Exhibit A, ¶ 29; MPSJ No. II, Exhibit B, ¶ 28.

27. None of the Defendant Officers participated in the preparation of the criminal complaint filed against Doyon. See Exhibit A, ¶ 30; MPSJ No. II, Exhibit A, ¶ 30; MPSJ No. II,

Exhibit B, ¶ 29.

28. None of the Defendant Officers participated in the criminal proceedings brought against Doyon. *See Exhibit A, ¶ 31; MPSJ No. II, Exhibit A, ¶ 31; MPSJ No. II, Exhibit B, ¶ 30.*

29. On the day that he was arrested (March 20, 2003), Doyon knew the name of the APD officer who ordered his arrest. *See Deposition of Denis Doyon (Volume II), p. 15, l. 14 - p. 17, l. 5, which is attached as Exhibit D to MPSJ No. III.*

30. On the day that he was arrested (March 20, 2003), Doyon knew the name of the APD officer who filed a criminal complaint against him. *See MPSJ No. III, Exhibit D.*

V. PLAINTIFF LORI EATON

31. In her answers to interrogatories, Plaintiff, Lori Eaton ("Eaton"), alleged the following facts regarding the force which the APD used against her and other protestors:

[Eaton] was standing on the wall just east of the bookstore plaza facing Central Avenue observing events in the street. [Eaton] felt [she] was a safe distance from the riot activity. This occurred at the end of the march. Without any warning, a teargas canister came sailing through the air and struck a protester standing directly to [Eaton's] left. It hit him between the eyes. Gas was released and [Eaton] started running back towards the back of the plaza. Then, Holley told [Eaton] that the protestor had collapsed and [Eaton] returned to him as [Eaton] is a healthcare professional (RN) and felt [she] should stay with him.

* * *

[Eaton] was grabbed and forcefully pulled to [her] feet and away from the unconscious protestor that [she] was attending. This incident occurred at the east edge of the plaza of UNM bookstore at the end of the march. Specifically, [Eaton] was down on [her] knees next to the protestor who was unconscious when 3 or 4 police officers on horses rode up onto the plaza and encircled the protestor and [Eaton], with the horses extremely close to [Eaton] on all sides. One of the officers who was not on a horse told [Eaton] to get up and away from the protestor. As [Eaton] began to get to [her] feet to move away, this officer grabbed [Eaton] by the back of the shirt and yanked [Eaton] to [her] feet. [Eaton] told him he didn't have to do that because [Eaton] was moving.

* * *

[Eaton] was shoved by a riot officer when attempting to speak to the paramedics about the injured protestor [Eaton] had been attending. This took place at the end of the march on the East edge of the plaza in front of the UNM bookstore. [Eaton] had been tending to an injured unconscious protestor and was told to step back and away from this injured person as riot police surrounded the protestor. See B, *infra*, for a description of the officers' conduct at that point. (The protestor had been down for approximately 30 minutes with no medical attention beyond [Eaton's] presence.) Specifically, as [Eaton] attempted to pass the officer in order to speak to the emergency medical team, the officer dodged back and forth in front of [Eaton] to prevent [her] passing and then shoved [Eaton] in the upper chest with his nightstick in a horizontal position.

See Exhibit A, ¶ 32 (Exhibit 5); MPSJ No. II, Exhibit A, ¶ 32; MPSJ No. II, Exhibit B, ¶ 31.

32. With regard to Eaton's claim that an APD officer shoved her with a baton, none of the Defendant Officers used a baton in the same or similar circumstances alleged by Eaton. See Exhibit A, ¶ 34; MPSJ No. II, Exhibit A, ¶ 34; MPSJ No. II, Exhibit B, ¶ 33.

33. None of the Defendant Officers had any physical contact with Eaton or otherwise personally participated in the physical force allegedly used against Eaton. See Exhibit A, ¶ 35; MPSJ No. II, Exhibit A, ¶ 35; MPSJ No. II, Exhibit B, ¶ 34.

VI. PLAINTIFF LUCY GILSTER

34. In her answers to interrogatories, Plaintiff, Lucy Gilster ("Gilster"), alleged the following facts regarding the force which the APD used against her and other protestors:

[Gilster] was struck twice, once at the corner of Buena Vista and Central as [Gilster's] friends, Natalie and Jeremy Sherrod, Claire Ralph and Alex Adams, with whom [Gilster] had been marching, were being arrested. [Gilster] stood by them as they were being arrested. An officer came up behind [Gilster] and hit [her] in the back with his club. The second time was at the intersection of Cornell and Central. An officer pulled [Gilster] out of the crowd by [her] collar and took [her] drum away from [her]. Following this, that officer shoved [Gilster] back into the crowd with his club at [her] back.

* * *

The first time, [Gilster] was in the crowd of protestors at the intersection of Cornell

and Central. Prior to the shooting of tear gas, [Gilster] was playing music and dancing in the rain with [her] fellow protesters. Tear gas canisters were shot into the crowd. The second time, [Gilster] was forced onto the sidewalk along with most of the rest of the crowd. [Gilster] was standing on the UNM bookstore plaza, looking out at the police. Then someone yelled, "Tear gas!" and [Gilster] saw the can land on the sidewalk a few feet away from [her]. [Gilster] turned and ran away.

See Exhibit A, ¶ 36 (Exhibit 6); MPSJ No. II, Exhibit A, ¶ 36; MPSJ No. II, Exhibit B, ¶ 35.

35. With regard to Gilster's claim that an APD officer shoved her with a baton, none of the Defendant Officers used a baton in the same or similar circumstances alleged by Gilster. *See Exhibit A, ¶ 38; MPSJ No. II, Exhibit A, ¶ 38; MPSJ No. II, Exhibit B, ¶ 37.*

36. With regard to Gilster's claim that an APD officer pulled her by the collar and took her drum away from her, none of the Defendant Officers used force in the same or similar circumstances alleged by Gilster. *See Exhibit A, ¶ 39; MPSJ No. II, Exhibit A, ¶ 39; MPSJ No. II, Exhibit B, ¶ 38.*

37. None of the Defendant Officers had any physical contact with Gilster or otherwise personally participated in the physical force allegedly used against Gilster. *See Exhibit A, ¶ 40; MPSJ No. II, Exhibit A, ¶ 40; MPSJ No. II, Exhibit B, ¶ 39.*

VII. PLAINTIFF BRIAN HANEY

38. In his answers to interrogatories, Plaintiff Brian Haney ("Haney"), alleged the following facts regarding the force which the APD used against him and other protestors:

[Haney] [does] not claim that [he] was hit, shoved, or struck by the defendants. Neither [does] [Haney] claim [he] was grabbed, pushed and shoved or purposefully struck by police horses. [Haney] [does] claim, however, to be part of a group into which defendants shot tear gas canisters. When [Haney] joined the protest of March 20, 2003, it was already well under way. Protesters were moving east along Central Ave. They were in the street and on the sidewalk. When [Haney] arrived some people told [him] that there had been several arrests. One person told [Haney] that

he had been shoved with a baton, even though he was in the process of following police orders to move east on Central. [Haney] could not see the line of police, but [he] was told there were a large number of officers to the west at University Blvd. The police did not seem to be trying to clear the streets. When we arrived at Cornell Avenue the protesters remained in the street. Some people were drumming. Many people were chanting anti-war slogans. [Haney] could hear some sirens, though they were off to the west and [Haney] assumed they were coming from the University and Central intersection where [Haney] had been told the police were blocking the streets. [Haney] at no time heard any orders from the police. At one point, a line of officers marched quickly in formation through the crowd from the east side of the protest heading west. [Haney] had to quickly jump out of their way to avoid being pushed aside. Some time later, police began moving on the crowd, spraying people with some sort of mace or pepper spray. [Haney] was unable to identify any of the police officers because their faces were covered and they wore no insignia. [Haney] saw that people were sprayed with the pepper spray on the sidewalks as well as the streets, though [Haney] was not sprayed with this substance. If there were any orders the police were issuing these were at no time clear to [Haney]. At the southwest corner of Cornell and Central, [Haney] met a man in his 50s who had been sprayed directly in the face. He was in a great deal of pain and [Haney] and others tilted his head back and dumped water bottles over his face to try and flush his eyes. When [their] bottles were empty [Haney] ran to the Frontier Restaurant to fill [his] bottle and continue flushing [the man's] eyes. [Haney] was very worried about the man because he could not see at all. Someone in the crowd who knew him led him away south down Cornell Avenue. The police had begun firing tear gas canisters at this time into the protest. The canisters were being launched into the street and onto the sidewalks. The tear gas made it difficult to breathe and burned [Haney's] nose and throat. [Haney's] eyes began to burn. In an effort to escape the gas, [Haney] ran south along Cornell with many people. Once [Haney] escaped the gas it was easier to breathe, though [his] eyes continued to burn. Despite feeling afraid of the police and what they might be liable to do next, [Haney] had many friends in the protest and [he] felt very anxious for their safety, so [Haney] walked north along the sidewalk back to the intersection of Cornell and Central to see what was happening. Police eventually positioned themselves to block the intersection on all sides. Officers with dogs were positioned along the median of Central. [Haney] saw police drag protesters from the crowd that had gathered on the campus of UNM out into the street to arrest them. The police blocked the intersection for some time and then suddenly pulled back, loaded into their vehicles and left. There were still many protesters on the scene and it would have been easy for [them] to reoccupy the streets with no police presence at all, but no one did. [Haney] felt shaken and angry that [the police] had acted so violently toward [himself] and others to keep [them] out of an intersection that they then left so quickly.

See Exhibit A, ¶ 41 (Exhibit 7); MPSJ No. II, Exhibit A, ¶ 41; MPSJ No. II, Exhibit B, ¶ 40.

39. None of the Defendant Officers had any physical contact with Haney or otherwise personally participated in the physical force (if any) allegedly used against Haney. *See Exhibit A, ¶ 43; MPSJ No. II, Exhibit A, ¶ 43; MPSJ No. II, Exhibit B, ¶ 42.*

VIII. PLAINTIFF ALICIA KISNER

40. In her answers to interrogatories, Plaintiff, Alicia Kisner, alleged the following facts regarding the force which the APD used against her and other protestors:

After being corralled back to the bookstore on UNM campus [Alicia Kisner] joined other peacemakers on the street intersection of Central and Cornell. The peacemakers, including [Alicia Kisner], were singing and dancing when the first tear gas canister was shot into the crowd. In order to avoid being hit, [Lisa Kisner] and [Alicia Kisner] stepped on to the nearby north sidewalk. Shortly after, another tear gas canister was shot within about three feet of [Lisa Kisner] and [Alicia Kisner], on the sidewalk. [Alicia Kisner] would estimate [she] was tear gassed between 6-7p.m.

* * *

After being tear gassed (explained in D) [Lisa Kisner] and [Alicia Kisner] had to move to the south side of Central (in front of the frontier) to try to escape the gas. We we(sic) were standing on the sidewalk and [Alicia Kisner] was standing behind [her] Mom facing toward the west watching the policemen. As [they] watched, [Lisa Kisner] was pushed with an officer's baton and fell back into [Alicia Kisner], knocking [her] back as well. [Alicia Kisner] [estimates] this was between 6-7pm. -

See Exhibit A, ¶ 44 (Exhibit 8); MPSJ No. II, Exhibit A, ¶ 44; MPSJ No. II, Exhibit B, ¶ 43.

41. With regard to Alicia Kisner's claim that an APD officer shoved Lisa Kisner with a baton, none of the Defendant Officers used a baton in the same or similar circumstances alleged by Alicia Kisner. *See Exhibit A, ¶ 46; MPSJ No. II, Exhibit A, ¶ 46; MPSJ No. II, Exhibit B, ¶ 45.*

42. None of the Defendant Officers had any physical contact with Alicia Kisner or otherwise personally participated in the physical force allegedly used against Alicia Kisner. *See Exhibit A, ¶ 47; MPSJ No. II, Exhibit A, ¶ 47; MPSJ No. II, Exhibit B, ¶ 46.*

IX. PLAINTIFF LISA KISNER

43. In her answers to interrogatories, Plaintiff, Lisa Kisner, alleged the following facts regarding the force which the APD used against her and other protestors:

[Alicia Kisner] and [Lisa Kisner] were part of the Peacemakers' March on March 20, 2003. [They] were corralled to the Central and Cornell area. Some of the Peacemakers began to play their drums and sing. [They] joined them in the street. APD pepper-sprayed the crowd and then shot the crowd with tear gas. [Lisa Kisner] grabbed [her] daughter to move to the sidewalk north of Central and Cornell just east of the UNM bookstore. [Lisa Kisner] told [her] daughter it was insane how the police were acting - treating [them] like criminals. Shortly after, more shots of tear gas landed within a few feet of [them]. [Lisa Kisner] was badly gassed.

* * *

[Alicia Kisner] and [Lisa Kisner] were on the north side of Central Avenue and Cornell on the sidewalk when a teargas canister landed on the sidewalk within a couple of feet of [them]. [Lisa Kisner] could not see or breathe. [Lisa Kisner] grabbed [her] daughter and she led [them] to the south side of Central Avenue and Cornell on the sidewalk just outside of the Frontier Restaurant. [Lisa Kisner] was bent over trying to get [her] breath and wiping [her] face when two APD officers dressed in black riot gear with masks and billy clubs approached. One of them shoved [Lisa Kisner] twice without saying a word. [Lisa Kisner] fell into [her] daughter. This occurred around 6:30 or 7:00 p.m.

See Exhibit A, ¶ 48 (Exhibit 9); MPSJ No. II, Exhibit A, ¶ 48; MPSJ No. II, Exhibit B, ¶ 47.

44. With regard to Lisa Kisner's claim that an APD officer shoved her with a baton, none of the Defendant Officers used a baton in the same or similar circumstances alleged by Lisa Kisner.

See Exhibit A, ¶ 50; MPSJ No. II, Exhibit A, ¶ 50; MPSJ No. II, Exhibit B, ¶ 49.

45. None of the Defendant Officers had any physical contact with Lisa Kisner or otherwise personally participated in the physical force allegedly used against Lisa Kisner. *See Exhibit A, ¶ 51; MPSJ No. II, Exhibit A, ¶ 51; MPSJ No. II, Exhibit B, ¶ 50.*

X. PLAINTIFF MICHAEL KISNER

46. In his answers to interrogatories, Plaintiff, Michael Kisner, alleged the following facts

regarding his arrest and the force which the APD used against him and other protestors:

[Michael Kisner] was wrongfully arrested on March 20th 2003 between 7:30-8:00 p.m. [Michael Kisner] was standing on the sidewalk on the corner of the Cornell and Central intersection in front of the Frontier Restaurant's main entrance. [Michael Kisner] had participated in a peace rally that began that same evening at five o'clock. The rally had ended due to an attack on the crowd by the police. [Michael Kisner] was not committing any crimes, nor was [he] engaged in the activities described by officers in the criminal complaint.

Specifically, [Michael Kisner] attended a peace rally at the UNM bookstore in order to voice [his] opposition to the war in Iraq, just initiated by the United States government. [Michael Kisner] arrived at the rally around 5:00 p.m. — the time it was scheduled to begin. [Michael Kisner] participated in the demonstration from beginning to end, including when the Albuquerque Police Department (APD) attacked the group of peacemakers and made several arrests. [Michael Kisner's] arrest occurred at the end of the rally after APD had dispersed most of the crowd. After the attack by APD, [Michael Kisner] was separated from the majority of the peacemakers and the friends [he] came with. At approximately 7:30 p.m. [Michael Kisner] was standing on the sidewalk on the southeast corner of the Cornell and Central intersection, directly in front of the Frontier Restaurant's main entrance. The majority of the remaining members of the rally had been pushed out of the street onto the sidewalk and steps near the bookstore, directly across from [Michael Kisner]. A skirmish line of police in riot gear (gas masks, guns, bulletproof vests, batons, boots, etc.) held the crowd on the sidewalk. About four APD officers on horseback marched into the remaining crowd and continued to arrest people. Around seven other people and [Michael Kisner] watched from the corner previously mentioned. Several of us looked on in disbelief as the police sustained harassment of the crowd, which was posing no threat to anyone, nor engaging in any illegal activity. Several of the people, including [Michael Kisner], standing on the corner chanted, "Shame" to the police. The officers on horseback came out of the crowd and marched their horses across the street passing directly in front of everyone on the corner. The officers did not say a word, nor did they look at us. They came onto the sidewalk approximately fifty feet east of the corner and proceeded to march toward us. A male officer dressed in black, with black plastic shin guards, and mounted on a horse demanded that everyone on the corner leave. Several people including [Michael Kisner] questioned the officer as to why [they] could not be on the sidewalk and why he was demanding that [they] leave. The officer continued to demand our departure. [Michael Kisner] agreed, telling the officer that [he] would leave immediately, but [Michael Kisner's] car was parked on UNM campus. He would not allow [Michael Kisner] to pass him and said [Michael Kisner] could not go in the direction of [his] car. [Michael Kisner] insisted that if [the officer] wanted [him] to leave, [he] would;

however, [Michael Kisner's] car and the friends that [Michael Kisner] had come with were on UNM campus. The officer refused to let [Michael Kisner] pass and commanded [Michael Kisner] to proceed south down Cornell. [Michael Kisner] questioned him as to where [he] was supposed to go once [he] was on Cornell seeing that [his] vehicle was not in that direction. He said he did not care so long as [Michael Kisner] moved south down Cornell. He then moved the horse forward and brought the horse's muzzle down on [Michael Kisner's] face. [Michael Kisner] must note that from this moment on nothing else was said to [him] by any of the officers involved in [his] arrest. The officer advanced toward [Michael Kisner] with his horse. The head of the horse repeatedly hit [Michael Kisner's] face and head; the legs of the horse hit [Michael Kisner's] chest. Fearing the horse would trample [him], [Michael Kisner] moved toward Cornell, where there was another male officer on horseback blocking [Michael Kisner's] retreat and advancing toward [him]. [Michael Kisner] positioned [himself] between two posts on the very edge of the sidewalk to avoid being trampled by the horses. As [Michael Kisner] stood between the posts facing Central, a white male officer in a standard issue APD uniform and no mask turned around. Proceeding toward [Michael Kisner], he raised an enormous can of pepper spray and sprayed a huge cloud of it at [Michael Kisner]. [Michael Kisner] quickly turned [his] back to [the officer] and, using [his] arms and hands, covered [his] face and ears. [Michael Kisner] then proceeded to walk south down Cornell. As [Michael Kisner] was walking, the two officers on horseback mentioned before came up on either side of [Michael Kisner], and smashed [him] between the horses as one of the officers kicked [Michael Kisner] in the middle of [his] back. One of the officers grabbed the shoulder strap of the backpack [Michael Kisner] was wearing. [Michael Kisner] immediately stopped moving. The officer holding [Michael Kisner's] backpack shook [him] violently back and forth. He then thrust [Michael Kisner] forward in the direction [Michael Kisner] was previously heading and let go of [Michael Kisner's] backpack. At this time, [Michael Kisner] was no longer between the horses. This time both mounted officers grabbed a shoulder strap of [Michael Kisner's] backpack and lifted [him] to [his] toes as another officer on foot in a typical APD uniform had [Michael Kisner] put [his] hands behind [his] back. The officer on foot led [Michael Kisner] down Central to a van, only loosely holding [Michael Kisner's] thumbs together behind [Michael Kisner's] back. [Michael Kisner] was never informed by any officer that [he] was under arrest.

See Exhibit A, ¶ 52 (Exhibit 10); MPSJ No. II, Exhibit A, ¶ 52; MPSJ No. II, Exhibit B, ¶ 51.

47. In his deposition, Michael Kisner testified that the APD horse mounted officers who "hit" and "smashed" Kisner with their horses were wearing standard APD blue uniforms and were not wearing gas masks. *See Deposition of Michael Kisner, p. 118, l. 1 - p. 120, l. 12, which is*

attached as Exhibit E to MPSJ No. III.

48. With regard to Michael Kisner's claim that APD officers used horses to "hit" and "smash" him, none of the Defendant Officers worked as horse mounted officers on March 20, 2003. *See Exhibit A, ¶ 54; MPSJ No. II, Exhibit A, ¶ 54; MPSJ No. II, Exhibit B, ¶ 53.*

49. In his deposition, Michael Kisner testified that the APD officer who sprayed him with pepper spray wore a standard APD blue uniform and was not wearing a gas mask. *See MPSJ No. III, Exhibit E, p. 120, l. 17 - p. 123, l. 11.*

50. With regard to Michael Kisner's claim that an APD officer sprayed him with pepper spray, all of the Defendant Officers wore their tactical gear, including helmets, and gas masks, which the protestors describe as riot gear, not their standard APD blue uniforms. *See Exhibit A, ¶ 55; MPSJ No. II, Exhibit A, ¶ 55; MPSJ No. II, Exhibit B, ¶ 54.*

51. With regard to Michael Kisner's claim that an APD officer sprayed him with pepper spray, none of the Defendant Officers used pepper spray in the same or similar circumstances alleged by Michael Kisner. *See Exhibit A, ¶ 56; MPSJ No. II, Exhibit A, ¶ 56; MPSJ No. II, Exhibit B, ¶ 55.*

52. None of the Defendant Officers had any physical contact with Michael Kisner or otherwise personally participated in the physical force allegedly used against Michael Kisner. *See Exhibit A, ¶ 57; MPSJ No. II, Exhibit A, ¶ 57; MPSJ No. II, Exhibit B, ¶ 56.*

53. None of the Defendant Officers participated in the seizure, detention, or arrest of Michael Kisner. *See Exhibit A, ¶ 58; MPSJ No. II, Exhibit A, ¶ 58; MPSJ No. II, Exhibit B, ¶ 57.*

54. None of the Defendant Officers prepared a police report about Michael Kisner. *See Exhibit A, ¶ 59; MPSJ No. II, Exhibit A, ¶ 59; MPSJ No. II, Exhibit B, ¶ 58.*

55. None of the Defendant Officers participated in the decision to charge Michael Kisner with the violation of a criminal law. *See Exhibit A, ¶ 60; MPSJ No. II, Exhibit A, ¶ 60; MPSJ No. II, Exhibit B, ¶ 59.*

56. None of the Defendant Officers participated in the preparation of the criminal complaint filed against Michael Kisner. *See Exhibit A, ¶ 61; MPSJ No. II, Exhibit A, ¶ 61; MPSJ No. II, Exhibit B, ¶ 60.*

57. None of the Defendant Officers participated in the criminal proceedings brought against Michael Kisner. *See Exhibit A, ¶ 62; MPSJ No. II, Exhibit A, ¶ 62; MPSJ No. II, Exhibit B, ¶ 61.*

XI. PLAINTIFF LANE LECKMAN

58. In his answers to interrogatories, Plaintiff Lane Leckman ("Leckman"), alleged the following facts regarding the force which the APD used against him and other protestors:

[Leckman] was standing under the UNM bookstore porch, on the southeast corner of the bookstore walkway. An officer came up to [Leckman] and told [him] to "move." [Leckman] asked what the problem was, as [he] wasn't doing anything but standing there. He responded by shoving [Leckman] with his baton, which caused [Leckman] to fall backwards on to [his] wife, fiancée at the time, Deborah Hall. She proceeded to fall to the ground and sustained a large bruise to her leg. [They] were trying to comply with the officer's orders, however, there was a bike rack behind [them] which prevented [them] from moving backwards any farther. Without further warning, the same officer hit two other protestors that were near [Leckman] with his baton, one being a 67 year old woman. Although [they] were all peacefully assembled citizens, he gave none of us any warning before he used excessive force. When [Leckman] asked the officer for his name, he refused to give it to [Leckman].

See Exhibit A, ¶ 63 (Exhibit 11); MPSJ No. II, Exhibit A, ¶ 63; MPSJ No. II, Exhibit B, ¶ 62.

59. With regard to Leckman's claim that an APD officer struck him with a baton, none of the Defendant Officers used a baton in the same or similar circumstances alleged by Leckman.

See Exhibit A, ¶ 65; MPSJ No. II, Exhibit A, ¶ 65; MPSJ No. II, Exhibit B, ¶ 64.

60. None of the Defendant Officers had any physical contact with Leckman or otherwise personally participated in the physical force allegedly used against Leckman. *See Exhibit A, ¶ 66; MPSJ No. II, Exhibit A, ¶ 66; MPSJ No. II, Exhibit B, ¶ 65.*

61. With regard to the identity of the APD officer who allegedly struck him, Leckman knew that the Independent Review Officer had identified the APD officer who struck Leckman at or about the date that Leckman filed this lawsuit. *See Deposition of Lane Leckman, p. 120, l. 2 - p. 121, l. 23, which is attached as Exhibit F to MPSJ No. III.*

XII. PLAINTIFF MARIA SANTELLI

62. In her answers to interrogatories, Plaintiff, Maria Santelli ("Santelli"), alleged the following facts regarding the force which the APD used against her and other protestors:

At the intersection of University and Central, a police line was held obstructing movement on Central to the west, while most demonstrators had already begun to head east. [Santelli] was facing west with several other demonstrators, facing the police line, when the police began to shove us backwards using their large sticks. An individual who was standing immediately to [Santelli's] right was shot at point blank range (from no more than 12 inches away) in the stomach with what [Santelli] think[s] was a bean bag gun. The shot made a very loud noise and was very scary to witnesses. Once [Santelli] made sure the man was still standing [she] turned and ran east down Central fearing the next shot by police. [Santelli] slowed down to a walk when [she] reached Buena Vista, where the distance from police allowed the tone of the demonstration was able to return to calm. When [Santelli] reached Cornell Avenue, [she] was on the south side of Central and joined a very peaceful crowd of people drumming and dancing. Shortly thereafter, a line of armed police jogged west on Central, through the crowd, past Cornell, and lined up just west of Cornell in an offensive formation facing the crowd—closing us in the intersection. Without warning, the police began shooting tear gas canisters into the peaceful crowd. People immediately suffered the terrible effects of the tear gas and began running around in fear and panic, trying to get fresh air.

See Exhibit A, ¶ 67 (Exhibit 12); MPSJ No. II, Exhibit A, ¶ 67; MPSJ No. II, Exhibit B, ¶ 66.

63. With regard to Santelli's claim about the use of a beanbag shotgun, none of the Defendant Officers fired a bean bag round at a female protestor. *See Exhibit A, ¶ 69; MPSJ No. II, Exhibit A, ¶ 69; MPSJ No. II, Exhibit B, ¶ 68.*

64. None of the Defendant Officers had any physical contact with Santelli or otherwise personally participated in the physical force allegedly used against Santelli. *See Exhibit A, ¶ 70; MPSJ No. II, Exhibit A, ¶ 70; MPSJ No. II, Exhibit B, ¶ 69.*

XIII. PLAINTIFF SUSAN SCHUURMAN

65. In her answers to interrogatories, Plaintiff, Susan Schuurman ("Schuurman"), alleged the following facts regarding the force which the APD used against her and other protestors:

[Schuurman] arrived late to the protest. It was nightfall, around 7 o'clock. [Schuurman] went back and forth from the sidewalk and steps in front of the University of New Mexico bookstore to the street (Central at Cornell). [Schuurman] was attempting to light a candle (that [she] had received at a peace vigil the night before) but was having difficulty due to the light drizzle of rain. Suddenly a tear gas canister was launched into the intersection and a huge cloud of chemicals wafted towards [Schuurman]. [Schuurman] covered [her] mouth and ran to the sidewalk on the south side of Central, directly in front of the Frontier Restaurant entrance, which was upwind from the chemicals.

* * *

[Schuurman] was standing on the sidewalk on the south side of Central Avenue just east of the intersection of Central and Cornell. [Schuurman] was holding an umbrella over [her] head to shield [herself] from the falling rain. [Schuurman] was silently watching vocal protesters who were standing on the Central Avenue median. [Schuurman's] back was to the police. Suddenly [Schuurman] was hit by a baton in the small of [her] back and shoved violently from the sidewalk into the street. [Schuurman] turned around and saw several different officers with helmets and face masks shoving [her]. [Schuurman] couldn't identify them: [she] saw no names embroidered on the uniforms or badges or numbers. Several more officers shoved [Schuurman] again with their batons from the street back onto the sidewalk. [Schuurman] was sandwiched between two groups of officers. Then they shoved [her] back into the street. These three maneuvers took place in quick succession. [Schuurman] pleaded to them, "I thought you wanted us out of the street? Where do you want me to be?" and one of the officers sneered, "You should have thought of

that before.” This incident took place directly in front of the Frontier Restaurant, originating on the sidewalk. It was approximately 7 pm.

See Exhibit A, ¶ 71 (Exhibit 13); MPSJ No. II, Exhibit A, ¶ 71; MPSJ No. II, Exhibit B, ¶ 70.

66. With regard to Schuurman’s claim about the use of batons, none of the Defendant Officers used a baton in the same or similar circumstances alleged by Schuurman. *See Exhibit A, ¶ 73; MPSJ No. II, Exhibit A, ¶ 73; MPSJ No. II, Exhibit B, ¶ 72.*

67. None of the Defendant Officers had any physical contact with Schuurman or otherwise personally participated in the physical force allegedly used against Schuurman. *See Exhibit A, ¶ 74; MPSJ No. II, Exhibit A, ¶ 74; MPSJ No. II, Exhibit B, ¶ 73.*

XIV. PLAINTIFF CHRISTINA MAYA TRAFTON

68. In her answers to interrogatories, Plaintiff, Christina Maya Trafton (“Christina Trafton”), alleged the following facts regarding the force which the APD used against her and other protestors:

On the evening of March 20, 2003 [Christina Trafton] decided to attend the anti-war protest at the last moment and after work. [Christina Trafton] stopped at Walgreens and made a sign from a poster board and magic marker [she] bought there that said “No War for Oil” and “God Save our Troops.” [Christina Trafton] went past the bus station on Yale as [she] headed north toward Central and saw the Albuquerque Police Department apparently preparing for the protest. There were officers putting on riot gear, horse unit police armoring their horses and making adjustments and there was like an armored tank or ‘patty’ wagon type vehicle. [Christina Trafton] think[s] there were over 100 police and 30 or more vehicles. To [Christina Trafton], they looked highly organized. At this time a surge of fear ran through [her] for everyone who was attending the rally. The Albuquerque police force seemed to be preparing to use force.

Also of critical importance, as [Christina Trafton] noticed later, there did not seem to be any plan to help or treat injured people. After the first shots of tear gas were fired into the crowd, [Christina Trafton] called 911. It took several attempts to get through to someone to tell them there was gas moving throughout the crowd and

while there were hundreds of cops, cop cars and weapons, there was not a single ambulance or safety rescue plan to be seen. The gas looked orange, and it burned [Christina Trafton's] eyes and skin. Luckily, the falling rain seemed to ease the effects, at least for [Christina Trafton]. It took many minutes before rescue ambulances responded. [Christina Trafton] was at Central and University when the gas was fired and it spread quickly. People were screaming and yelling "oh my God, oh my God," and [Christina Trafton] heard some people wailing.

See Exhibit A, ¶ 75 (Exhibit 14); MPSJ No. II, Exhibit A, ¶ 75; MPSJ No. II, Exhibit B, ¶ 74.

69. None of the Defendant Officers had any physical contact with Christina Trafton or otherwise personally participated in the physical force (if any) allegedly used against Christina Trafton. *See Exhibit A, ¶ 77; MPSJ No. II, Exhibit A, ¶ 77; MPSJ No. II, Exhibit B, ¶ 76.*

XV. PLAINTIFF CURTIS TRAFTON

70. In his answers to interrogatories, Plaintiff, Curtis Trafton ("Curtis Trafton"), alleged the following facts regarding the force which the APD used against him and other protestors:

[Curtis Trafton] was chanting and moving with the group of protestors when [he] saw a horse move near [him] with it's head down. This was odd as all the other horses kept their heads up while moving. [Curtis Trafton] glanced over toward the officer and saw him tap the horse. The horse then threw his head into [Curtis Trafton's] chest. It was like being hit by a pile driver. [Curtis Trafton] was lifted off [his] feet by the force and was unable to regain [his] balance, staggering backwards for several yards. [Curtis Trafton] was stunned. [Curtis Trafton] didn't look for the horse or rider to get a name. [Curtis Trafton] just recovered. As [Curtis Trafton] was already frightened, [he] left the march at that point and attempted to head for [his] car. [Curtis Trafton] was eastbound on Central. This all took place sometime during the evening hours of March 20, 2003.

See Exhibit A, ¶ 78 (Exhibit 15); MPSJ No. II, Exhibit A, ¶ 78; MPSJ No. II, Exhibit B, ¶ 77.

71. Based on his review of videotape footage of the March 20th protest, Curtis Trafton testified that he was able to identify the APD horse which struck him. *See Deposition of Curtis Duard Trafton, p. 89, l. 13 - p. 91, l. 14, which is attached as Exhibit G to MPSJ No. III.* The APD

horse which struck Curtis Trafton was silver or shiny gray in color as opposed to the other eight (8) APD horses which were all dark colored animals. See MPSJ No. III, Exhibit G, p. 91, l. 5 - p. 92, l. 11. Despite knowing that the APD horse which struck him was silver or shiny gray as opposed to the other APD horses which were all dark colored, Curtis Trafton made no effort to identify the APD officer who was riding the silver or shiny gray colored APD horse. See MPSJ No. III, Exhibit G, p. 91, l. 25 - p. 94, l. 20.

72. With regard to Curtis Trafton's claim that an APD officer used a horse to strike him, none of the Defendant Officers worked as horse mounted officers on March 20, 2003. See Exhibit A, ¶ 80; MPSJ No. II, Exhibit A, ¶ 80; MPSJ No. II, Exhibit B, ¶ 79.

73. None of the Defendant Officers had any physical contact with Curtis Trafton or otherwise personally participated in the physical force allegedly used against Curtis Trafton. See Exhibit A, ¶ 81; MPSJ No. II, Exhibit A, ¶ 81; MPSJ No. II, Exhibit B, ¶ 80.

XVI. PLAINTIFF NICK WECHSELBERGER

74. In his answers to interrogatories, Plaintiff Nick Wechselberger ("Wechselberger") alleged the following facts regarding the force which the APD used against him and other protestors:

[Wechselberger] was standing on the university campus, in front of the bookstore when a teargas canister landed near where [Wechselberger] was standing. It seemed like the police weren't interested in allowing us to leave. Lynn's eyes were burning, which concerned [Wechselberger]. [Wechselberger] smelled the tear gas.

See Exhibit A, ¶ 82 (Exhibit 16); MPSJ No. II, Exhibit A, ¶ 82; MPSJ No. II, Exhibit B, ¶ 81.

75. Although Wechselberger believed that he could not leave the area by traveling south or west through the police line, Wechselberger acknowledged in his deposition that he was free to leave the area of Central, Ave. and Cornell, Dr. by traveling north onto the UNM campus or toward

UNM's Johnson Field. *See Deposition of Nick Wechselberger, p. 83, l. 14 - p. 85, l. 25, which is attached as Exhibit H to MPSJ No. III.*

76. None of the Defendant Officers had any physical contact with Wechselberger or otherwise personally participated in the physical force (if any) allegedly used against Wechselberger.

See Exhibit A, ¶ 84; MPSJ No. II, Exhibit A, ¶ 84; MPSJ No. II, Exhibit B, ¶ 83.

LEGAL ARGUMENT

I. AS A MATTER OF LAW, MAYOR CHAVEZ, DEPUTY CAO BAKAS, CHIEF GALLEGOS, AND THEN DCOP SCHULTZ ARE ENTITLED TO THE DISMISSAL OF THE OFFICIAL CAPACITY CLAIMS BROUGHT AGAINST THEM BECAUSE SUCH CLAIMS ARE ACTUALLY CLAIMS AGAINST THE CITY.

In their First Amended Complaint, Plaintiffs brought municipal liability claims against the City and against Mayor Chavez, Deputy CAO Bakas, Chief Gallegos, and then DCOP Schultz in their official capacities. *See First Amended Complaint, p. 1:* When governmental officials, such as Mayor Chavez, Bakas, Gallegos, and Schultz, are sued in their official and individual capacities for acts performed in each capacity, those acts are "treated as the transactions of two different legal personages." Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 543 n. 6 (1986) (internal quotation marks omitted). Personal or individual capacity suits "seek to impose personal liability upon a government official for actions he takes under color of state law," while an official capacity suit is "only another way of pleading an action against an entity of which an officer is an agent." Kentucky v. Graham, 473 U.S. 159, 165 (1985) (internal quotation marks omitted); Monell v. Dept. of Social Services, 436 U.S. 658, 690 n. 55 (1978) (same). "As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity," and not as a suit against the official personally, "for

the real party in interest is the entity.” Graham, 473 U.S. at 166; Thompson v. City of Lawrence, Kan., 58 F.3d 1511, 1517 (10th Cir. 1995) (holding that “a suit against a city official in his official capacity is no different from a suit against the City itself.”).

In the present case, Plaintiffs brought municipal liability claims against the City and also against Mayor Chavez, Bakas, Gallegos, and Schultz, in their official capacities. As such, Plaintiffs’ official capacity claims against Mayor Chavez, Bakas, Gallegos, and Schultz are subject to dismissal as they are duplicative and do not afford Plaintiffs additional relief because there is no need to bring an official capacity claim against the individual defendants when Plaintiffs have already brought a claim against the City. See Graham, 473 U.S. at 166; Thompson, 58 F.3d at 1517. Thus, Plaintiffs’ duplicative and legally unnecessary official capacity claims against Mayor Chavez, Bakas, Gallegos, and Schultz are subject to dismissal.

WHEREFORE, Defendants respectfully request that this Court grant their Motion for Partial Summary Judgment No. I, dismiss Plaintiffs’ official capacity claims against Mayor Martin Chavez, Nick Bakas, Gilbert Gallegos, and Ray Shultz with prejudice, and for all other relief this Court deems just and proper.

**THE EXHIBITS ATTACHED TO
THIS PLEADING ARE TOO
VOLUMINOUS TO SCAN. SAID
EXHIBITS ARE ATTACHED TO THE
ORIGINAL PLEADING IN THE CASE
FILE WHICH IS LOCATED IN THE
RECORDS DEPARTMENT, U.S.
DISTRICT COURT CLERK'S
OFFICE...**