

FILED

UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

FEB 01 2006



IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

LYNN BUCK, et al.,

Plaintiffs,

vs.

CIV- 04-01000 JAP/DJS

CITY OF ALBUQUERQUE, et al.,

Defendants.

MATTHEW J. DYKMAN
CLERK

**MEMORANDUM IN SUPPORT OF DEFENDANT GONZALES' MOTION FOR
SUMMARY JUDGMENT**

COMES NOW John Gonzales, hereinafter referred to as "Defendant Gonzales", or "Captain Gonzales", in his official and individual capacity, by and through his counsel, Jerry A. Walz, Walz and Associates, hereby submits this memorandum in support of Captain Gonzales' motion for summary judgment pursuant to Rule 56 F.R.C.P.

I. Procedural History

The operative complaint before the Court is Plaintiffs' First Amended Complaint For Injunctive Relief, Declaratory Relief and For Damages Caused By Deprivation of Civil Rights And Tortious Conduct filed June 11, 2004, in the Second Judicial District Court. The First Amended Complaint was removed to United States District Court on September 7, 2004, pursuant to a Notice of Removal filed on behalf of Defendants City of Albuquerque, Mayor Martin Chavez, Department of Public Safety Chief Nick Bakas, Chief of Police Gilbert Gallegos and Deputy Chief of Police Ray Schultz.

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The multiple plaintiff lawsuit named multiple defendants in nine counts. Captain Gonzales is among those defendants. This memorandum brief will address those claims advanced against Captain Gonzales.

II. Claims Made Against Defendant Gonzales

Captain Gonzales is specifically identified in seven counts. These counts are identified to assist the Court in determining which claims are alleged against him. The following counts are brought by Plaintiffs against Defendant Gonzales:

(a) Count III – Malicious Abuse of Process brought by Plaintiffs Silva-Banuelos, Michael Kisner, Doyon, Against Individual Defendant police officers, Defendant John Gonzales and Defendant City. Complaint at page 19.

(b) Count IV – 42 U.S.C. § 1983 – WRONGFUL SEIZURE AND ARREST (By Plaintiffs Silva-Banuelos, Michael Kisner, Doyon Against Individual Defendant police officers, and Defendant Gonzales). Complaint at page 20.

(c) Count V – 42 U.S.C. § 1983 - EXCESSIVE USE OF FORCE (By all named Plaintiffs Against Individual Defendant police officers and Defendant Gonzales) Complaint page 21.

(d) Count VI – 42 U.S.C. § 1983 – SUPPRESSION OF RIGHTS TO FREEDOM OF EXPRESSION AND ASSEMBLY (By all named Plaintiffs Against Individual Defendant Officers and Defendant John Gonzales). Complaint at page 22.

(e) Count VII – 42 U.S.C. §1983 – RETALIATORY PROSECUTION (By Plaintiffs Silva-Banuelos, Michael Kisner, Doyon, Against Individual Defendant police officers, and Defendant John Gonzales) Complaint at page 23.

(f) Count VIII – 42 U.S.C. § 1983 – MALICIOUS PROSECUTION (By Plaintiffs Silva-Banuelos, Michael Kisner, Doyon Against Individual Defendant Police Officers, and Defendant John Gonzales). Complaint at page 24.

(g) Count IX – 42 U.S.C. § 1983 – CLAIM OF SUPERVISORY LIABILITY AND MUNICIPAL LIABILITY FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS (By All named Plaintiffs Against Defendants City, Chavez, Bakas, Gallegos, Schultz, and John Gonzales). Complaint at pages 25, 26.

III. General Overview

Captain Gonzales will show through the uncontested material fact and on point case law, that at all times relevant to the allegations made against him pursuant to Plaintiffs' First Amended Complaint, that he neither performed, directed or acquiesced in any acts that violated Plaintiffs' federally protected rights¹.

The undisputed material facts will prove that Captain Gonzales was the incident commander relating to APD's response to a large scale rally and march that occurred on March 20, 2003, in Albuquerque. The evidence will show that a rally commenced at the UNM Bookstore, however, the rally became an illegal march as up to one thousand protestors took to the street in the westbound lanes of Central Avenue. Based on this action, a section of Central Avenue was closed off for the protection of the protestors, as Central Avenue is a very busy city thoroughfare. The westward march commenced at approximately 5 p.m.

The marchers traveled west on Central, north on University, west on Copper, south on Cedar, which resulted in the protestors reemerging back on west Central near the onramp to 1-25. There were several protestors who discussed the possibility of taking

¹ Captain Gonzales was not named in the state tort claims set forth in counts I and II.

the march onto I-25. However, APD, at the direction of Captain Gonzales did not let the protestors proceed further west on Central, and in fact turned the protestors in an easterly direction wherein the protestors returned to the UNM Bookstore area.

Based on the unruly nature of many of the protestors, and the failure to follow repeated lawful police commands, Captain Gonzales authorized a limited deployment of gas on two occasions. Further Captain Gonzales authorized only reasonable and necessary use of force based on split second decisions that he was making to minimize physical altercations between the police and protestors.

The actions taken by Captain Gonzales were objectively reasonable, and likewise did not interfere with any of Plaintiffs Constitutional rights. Captain Gonzales was not involved in the arrest or prosecution of any of the Plaintiffs. In fact there is no evidence that Captain Gonzales ever directly interacted with any of the Plaintiffs.

IV. Uncontested Material Facts

1. Captain Gonzales is a well-trained officer. *See, Exhibit A, Resume of John Gonzales.*
2. The protest event began about 5:00 pm on March 20, 2003 with a gathering of about 900 to 1,000 people in front of the University of New Mexico Bookstore at the intersection of Central Avenue and Cornell. Most all of the crowd then moved onto Central Avenue and proceeded westbound on the sidewalks and the street in the westbound lanes, toward University Avenue whereupon it was met with a police skirmish line directing the crowd north on University Avenue. At the intersection of Copper Avenue, the crowd then turned westbound and proceeded westbound on Copper Avenue until Cedar Avenue where it was met with a line of police officers directing the crowd to

proceed south on Cedar to Central Avenue. Some of the crowd cut across vacant lots and other streets to the east of Cedar in order to return to Central Avenue. More police officers were present at the intersection of Central and Cedar to direct the crowd east on Central to return to the UNM Bookstore area at Central and Cornell. The crowd was dispersed by about 7:45 pm and the protest event was over. The crowd became spread out over the scene as individuals proceeded at varying paces throughout the scene, some running at times and others walking, some leaving the event at various points and others returning at different times to the UNM Bookstore area. *See, Exhibit B Deposition of Buck at pp. 47 to 77; see also, Exhibit C Deposition Hancock at p. 33, lines 5-12, 23-25, p. 34, lines 1-4 and p. 35, lines 7-9.*

3. When the crowd first moved onto Central Avenue it became an unlawful assembly. *See, Exhibit D Deposition of Reiter at p. 182, lines 6-19.*

4. Police Officers, Gregory Cunningham and Danny Garcia were assigned undercover to mingle into the protestors and report attitudes and events as they were unfolding. The crowd was physically aggressive. Some protestors came prepared for confrontations; they were dressed in black wearing shinguards, riot masks and backpacks. There was concern over the presence of persons involved with the Black Bloc, a nationwide organization involved in protests and civil disobedience nationwide. They dress in black and act aggressively within the crowd. Some protestors came prepared with rags and vinegar to stop the tear gas. Their superior, Sergeant Davis, did not feel that it was safe for he and his partner to be in the crowd because the crowd was aggressive and confrontational. During the time he was in the crowd he heard people saying "Let's go, let's take the streets, let's take the freeway." When the crowd

“eventually turned back eastbound, . . . it was pretty obvious that there was going to be, at least with some of the people in the crowd, some kind of confrontation.” The mood had accelerated throughout the course of events. Things were happening so fast, he did not have time to identify people causing trouble for them to be removed from the protest. Cunningham and Garcia were ordered out of the crowd after the crowd turned eastbound on Central. *See, Exhibit E, Deposition of Cunningham at 36, lines 9-21, p. 63, lines 9-25; p. 64, lines 1-25; p. 75, lines 11-25; p. 76, lines 1-2; p. 77, lines 1-12; p. 100, lines 2-19; p. 101, lines 3 and 6-10; p. 102, lines 4-10 and 14-17; p. 103, lines 1-7; p. 105, lines, 24-25; p. 106, lines 1-16; p. 107, lines 17-20 and 23-25; p. 108, lines 1-8; p. 112, lines 3-16; p. 117, lines 5-21; p. 119, lines 5-14, 17-19 and 25; p. 120, lines 1-7; p. 131, lines 10-14 and 17-19. See also, Exhibit F, Deposition of Garcia at p. 16, lines 9-19.*

5. At all times material hereto Captain John Gonzales was the incident commander and therefore the immediate supervisor of all police officers assigned to duty at the incident of March 20, 2003. *See, Exhibit G Deposition of John Gonzales at p. 22, lines 9-15.*

6. In his role as supervisor, Captain John Gonzales was physically present at the scene and moved from location to location as was required to generally observe the events and give supervisory direction to the police officers under his command. *See, Exhibit G at p. 128, lines 3-12.*

7. At all times material hereto, Captain John Gonzales specifically denies that he had any intent, interest or motive to deny, suppress or otherwise infringe upon the Plaintiffs' rights to free speech or assembly as they may be protected by the First Amendment to the United States Constitution. *See, Exhibit H Affidavit of John Gonzales.*

8. The police officers received training in crowd control, both prior to the incident and after it, from the Secret Service, private contractors who were former Navy Seals, Homeland Security and on the job training from fellow officers who had already received training. *See, Exhibit F, at p. 32, lines 1-25, p. 34, lines 1-2, 8-9, 11-14, 18-20 and 25; Exhibit C, p. 33, lines 5-12 and 23-25; p. 64, lines 4-6; Exhibit E at p. 125, lines 6-21; p. 126, lines 9-15; p. 127, 3-13.*

9. Although Captain Gonzales was on the scene throughout the evening, he was not directly involved in any of the specific situations described by the individual Plaintiffs. *See, Exhibit H.*

10. Plaintiff Alma Rosa Silva-Banuelos attended and participated in the protest event and was in the street on the south side of Central in front of Papa John's Pizza yelling "police strike", then moved to the sidewalk where she was circled by police on horseback and arrested east of the intersection of Central and Yale as the protestors were returning to their starting point at the UNM Bookstore. She was handcuffed and placed in a wagon with other protesters. *See, Exhibit I, Silva-Banuelos' Answer to Interrogatories, at Interrogatory No. 2, section C, subpart 1; see also, Exhibit J, Deposition of Silva-Banuelos, p. 127, lines 7-10; p. 128, lines 6-8, 20-22; p. 129, lines 7-8 and p. 138, lines 3-5.*

11. Plaintiff Alma Rosa Silva-Banuelos was charged with the misdemeanor offenses of Resisting, evading or obstructing an officer pursuant to § 30-22-1 NMRS (2005) and Public Nuisance pursuant to § 30-8-1 NMRS (2005) in a Criminal Complaint dated 3/20/03 and signed by Officer Sadler, #256 of the APD. On April 28, the City filed a motion to amend the charges to reflect a violation of the City Code Section 12-2-19

(Refusal to Obey a Lawful Order of a Peace Officer) and dismiss the Public Nuisance charge. The Motion and a jury trial were set for May 28, 2003 and on said date all charges were dismissed by the Bernalillo Metropolitan Court. *See, Exhibit K, Criminal Complaint, Exhibit L, Motion to Amend Criminal Complaint and Exhibit M, Case History from Magistrate Court file.*

12. At all times material to the individual instances out of which Plaintiff Alma Rosa Silva-Banuelos claims injury, Captain John Gonzales did not direct any specific action by any police officers against said Plaintiff. *See, Exhibit J p. 161, lines 18-21 and p. 162, lines 9-23. See also, Exhibit H.*

13. Plaintiff Michael Kisner had attended and participated in the protest event and at about 7:30 pm when most of the people had been dispersed, he was standing on the sidewalk at the intersection of Central and Cornell with a group of people chanting "Shame". The police on horseback demanded that everyone leave by proceeding south down Cornell and moved the horses to push the people in that direction. The horse made contact with the Plaintiff, whereupon he positioned himself between two posts on the edge of the sidewalk on Central. Plaintiff was then sprayed with pepper spray, covered his face and proceeded to walk south down Cornell, whereupon two mounted police officers came up on either side of him and grabbed him by the straps of his backpack and thrust him forward. He continued to walk south down Cornell when the officers on horseback came alongside and held him while an officer on foot arrested him and took him to a van whereupon he was hand cuffed and placed in the van with a few other people. *See, Exhibit N, Michael Kisner's Answers to Interrogatories, Interrogatory No.*

1, part A; see also, Exhibit O, Deposition of Michael Kisner p. 114, line 13- p. 118, line 5.

14. Plaintiff Michael Kisner was charged with the misdemeanor offenses of Resisting, evading or obstructing an officer pursuant to § 30-22-1(D) NMRS (2005) and Public Nuisance pursuant to § 30-8-1 NMRS (2005) in a Criminal Complaint dated 3/20/03 and signed by Officer Hensley, #285 of the APD. After successfully completing the Alternative Sentencing Program all charges were dismissed on June 2, 2003. See, Exhibit P, Criminal Complaint; Exhibit Q, Alternative Sentencing Programs Information Sheet, and Exhibit R, Case History from Magistrate Court File.

15. At all times material to the individual instances out of which Plaintiff Michael Kisner claims injury, Captain John Gonzales did not direct any specific action by any police officers against said Plaintiff. See, Exhibit H.

16. Plaintiff Denis Doyon arrived at the UNM Bookstore about 6:00 pm and joined the marching protestors coming east on Central Avenue. He and others began to play samba music on the drums and percussion instruments they had brought to the event as they walked back to the UNM Bookstore. When they arrived at the intersection of Central and Cornell most of them remained in the intersection. He saw the police officers point to the drummers and then they grabbed Doyon and three others from the crowd and arrested them. See, Exhibit S, Denis Doyon's Answers to Interrogatories, Interrogatory No. 1, part A.

17. Plaintiff Denis Doyon was charged with the misdemeanor offenses of Resisting, evading or obstructing an officer pursuant to § 30-22-1(D) NMRS (2005) and Public Nuisance pursuant to § 30-8-1 NMRS (2005) in a Criminal Complaint dated 3/20/03

and signed by Officer Campbell, #663 of the APD. After successfully completing the Alternative Sentencing Program all charges were dismissed on December 6, 2003. See, *Exhibit T, Criminal Complaint; and Exhibit U, Stipulated Order of Dismissal.*

18. At all times material to the individual instances out of which Plaintiff Denis Doyon claims injury, Captain John Gonzales did not direct any specific action by any police officers against said Plaintiff. See, *Exhibit H.*

19. Captain Gonzales was not wearing headgear or a gas mask. Further, one of the Plaintiffs was able to identify Captain Gonzales and she admits that he had no interaction with her whatsoever. See, *Exhibit H; see also, Exhibit J, p. 161, lines 5-9.*

20. Captain Gonzales allowed only himself, Steve Hill and Nick Lopez to deploy tear gas. See, *Exhibit G at p. 178, lines 8-12.*

V. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Jurasek v. Utah State Hosp.*, 158 F.3d 506, 510 (10th Cir. 1998) (quoting Fed. R. Civ. P. 56(c)). When applying this standard, the court reviews the factual record and all subsequent reasonable inferences in the light most favorable to the party opposing the summary judgment. *Id.* The initial burden of showing that there is no genuine issue of material fact lies with the movant. Generally see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The moving party may meet this burden by demonstrating the lack of evidence to support one or more essential elements of the non-moving party's claim, as "a complete failure of proof concerning an essential element of

the non-moving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986).

Under Rule 56(c), upon the movant meeting its burden, the burden shifts to the non-moving party, who must do more than simply show that there is some metaphysical doubt as to the material facts. See, *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The opposing party must set forth specific facts showing a genuine issue for trial. *Anderson*, 477 U.S. at 248, 256. To meet this burden, the non-moving party must specify evidence in the record and demonstrate the specific manner in which that particular evidence supports its claims. *Gross v. Burggraf*, 53 F.3d 1531, 1546 (10th Cir. 1995). Unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment. *Id.* If the record taken as a whole could not lead a rational trier of fact to find for the non-movant, there is no genuine issue for trial. *Matsushita*, 475 U.S. at 597.

VI. Legal Issues Presented for Summary Judgment As To Captain Gonzales

The claims asserted against Captain Gonzales fall into two categories (1), federal claims as set forth in Counts IV through IX, and (2), a state claim for Malicious Abuse of Process as identified in Count III. Captain Gonzales will first address the federal claims, and then the sole state claim as the state claim is subsumed in the analysis of Counts VII and VIII.

A. As to Count IV, Captain Gonzales did not wrongfully seize and arrest Plaintiffs Silva-Banuelos, Michael Kisner and Denis Doyon in violation of their Fourth Amendment rights, and if in fact such violations occurred, Captain Gonzales is entitled to Qualified Immunity for his actions.

Violation of the Fourth Amendment requires an intentional acquisition of physical control. *Brower v. County of Inyo*, 489 U.S. 593 (1989). Further, *Tennessee v. Garner*, 471 U.S. 1 (1985), makes it clear that the Fourth Amendment requires an examination of “the reasonableness of the manner in which a search or seizure is conducted.

Three Plaintiffs were arrested and taken into custody in a manner that was objectionable to them. They challenge both the fact of their seizure and arrest as well as the force used in taking them into custody. Although they all experienced some level of discomfort with the force of the arrest, that discomfort dissipated very quickly. None of the three arrested Plaintiffs claim any injury that lasted longer than the next day and no one sought medical treatment for any injury sustained by the arrest itself. Fourth Amendment jurisprudence has long recognized that the right to make an arrest carries with it the right to use some degree of physical coercion or threat thereof to effect it. *Graham v. Connor*, 490 U.S. 386, 396 (1989). The determination of whether excessive force was used must be made with careful attention to the facts and circumstances of each particular case. *Ibid.*

(i) Factual backgrounds as to Plaintiffs

Plaintiff Alma Rosa Silva-Banuelos was arrested with some stragglers at or near the intersection of Central and Yale as the protestors were returning to the UNM Bookstore near the end of the incident. *See, Uncontested Fact ¶ 10.* She was standing on the street in the gutter with two or three other people chanting “police strike” when she

noticed the mounted police coming toward them. *See, Uncontested Fact ¶ 10.* She then stepped up onto the curb and was arrested on the sidewalk. *Ibid.* The arresting officer approached her from behind and lifted her arms. *See, Uncontested Fact ¶ 10.* She was taken to the transport van parked in the middle of the intersection of Central and Yale. *See, Uncontested Fact ¶ 10.* She was not struck by any of the police officers and had no permanent injury, just initial short term pain. *See, Uncontested Fact ¶ 10.* The pain was temporary and went away as soon as she was released from the handcuffs. *See, Uncontested Fact ¶ 10.* She had no physical injuries that required emergency treatment, did not lose work and did not forgo going to school, but claims emotional injuries. *See, Uncontested Fact ¶ 10.* From the standpoint of an excessive force analysis there was nothing out of the ordinary with the general force necessary to effectuate an arrest of any subject, virtually in any context.

The situation giving rise to this arrest occurred behind the police skirmish line where the mounted police were monitoring crowd control to protect the rear of the skirmish line. Protestors had been confronting the officers on the skirmish line throughout the course of events beginning with the westbound part of the protest march at University and Central. Therefore, vociferous protestors behind the skirmish line presented a potential danger to the line and impeded the ability of the officers on the line to concentrate on the more critical tasks before them.

Plaintiff Denis Doyon arrived at the protest late and joined the group proceeding eastbound on Central Avenue. He brought a drum to the event and became one of a group of drummers that positioned themselves in the intersection of Central and Cornell toward the end of the event. *See, Uncontested Fact ¶ 16.* Captain Gonzales did generally

direct the police officers to remove the drummers. *See, Exhibit G, p. 170, lines 16- p. 171, line 6.* Doyon saw police officers point to the drummers and the officers came into the crowd, grabbed Doyon, pulled him from the crowd and effectuated the arrest. *See, Uncontested Fact ¶ 16.* Another drummer, Lucy Gilster, was simply taken aside, her drum taken away, then she was returned to the crowd. The context of the arrest was near the end of the protest event where the protestors had positioned themselves blocking the intersection of Central and Cornell and refusing to obey lawful police orders to disperse. The drumming was becoming rhythmic and incited the crowd. The protestors were increasing in number in the intersection. The drumming was impeding the ability of the crowd to hear the lawful orders of the police to leave the road and disperse. *See Exhibit G, p. 170, line 16 - p.171, line 6.* Although it is dangerous for the police to enter the crowd to arrest an individual, such a risk was felt necessary for the police to give lawful commands to the crowd and perform the duties of crowd control required of them.

Plaintiff Michael Kisner attended the protest event and was arrested about 7:30 pm after the most of the protestors had been dispersed. He was standing on the sidewalk at the intersection of Central and Cornell with a group of people chanting "shame". By his own admission, the mounted police had demanded that everyone leave by proceeding south on Cornell. The people were slow to respond and the police moved the horses to herd people south on Cornell. Instead of obeying the lawful commands, he positioned himself between two posts on the edge of the sidewalk on Central. He was then sprayed by pepper spray, then turned and walked south down Cornell. Two mounted police placed him between their horses and grabbed him by the straps of his backpack and thrust him forward. Apparently, he was not proceeding as directed, because the two mounted

police officers repeated the process and held him while an officer on foot arrested him and took him to a van whereupon he was cuffed and placed in the van with a few other people. He was uninjured by the physical arrest itself. *See, Uncontested Fact ¶ 13.* The police were still in the process of dispersing the unlawful assembly and Plaintiff was still attempting to engage in verbal protest. When he positioned himself between the two posts it could reasonably be inferred that he was refusing to obey lawful orders. The use of pepper spray was the alternative to arrest and it was effective in encouraging him to move as directed.

Nevertheless, for some reason the cumulative effect of his activity caused him to be arrested for refusing to obey lawful commands and public nuisance. He felt the effects of the pepper spray but any effect of the chemical agents was gone within 24 hours. He claims no injury from the arrest itself. *See, Uncontested Fact ¶ 13.*

(ii) Involvement of Captain Gonzales

Here the facts are uncontroverted that Captain Gonzales did not personally arrest, seize or detain the Plaintiffs identified in Count IV. *See Uncontested Facts 13, 16 and 19.* Therefore, based on his lack of direct participation, Plaintiffs only potential claim against Captain Gonzales as to Count IV would be found in Captain Gonzales' supervisory role as incident commander.

A supervisor may be held liable for the alleged unconstitutional acts of his subordinates if Plaintiffs can demonstrate an "affirmative link" through facts showing that the supervisor actively participated or acquiesced in the constitutional violation. *See Winters v. Board of County Comm'rs, 4 F.3d 848, 855 (10th Cir. 1993).* *See also Snell v. Tunnell, 920 F.2d 700 (10th Cir. 1990),* which states, "Plaintiffs must show that a

supervisory defendant, expressly or otherwise, authorized, supervised, or participated in conduct which caused the constitutional deprivation.”

The record here simply does not support any finding that Captain Gonzales should be held liable as to Count IV based on his supervisory role.

Arguendo, even if Captain Gonzales somehow violated these three Plaintiffs’ Fourth Amendment rights, Captain Gonzales is nonetheless entitled to qualified immunity for his actions. The undisputed facts show that for safety reasons Captain Gonzales made on the scene judgments in a rapidly changing situation when he authorized the very limited deployment of tear gas and other non lethal measures in order to disburse the crowd, prevent a public disturbance and keep the peace. See N.M. Stat. Ann § 3-13-2 (2005).

In fact, Captain Gonzales was not wearing a gas mask or other protective headgear and exposed himself to the tear gas. Captain Gonzales went beyond any duty recognized in the case law to ensure crowd safety as he used himself as a human barometer to measure the effects of the gas. See Undisputed Fact 20.

The Tenth Circuit has cautioned that in a Fourth Amendment search and seizure analysis that “the reasonableness of an officer’s conduct must be assessed from the perspective of a reasonable officer on the scene, recognizing the fact that the officer may be forced to make split-second judgments under stressful and dangerous conditions. See *Holland v. Harrington*, 268 F. 3d 1179 (10th Circuit 2001).

Further, the Supreme Court in deciding excessive force Fourth Amendment claims has held that police officers who make reasonable mistakes in evaluating whether a particular use of force is legal in the circumstances are protected by qualified immunity.

Saucier v. Katz, 533 U.S. 194 (2001); *Brosseau v. Haugen* 125 S.Ct. 596 (2004). Further, in a civil rights action seeking damages from governmental officials, “those officials may raise the affirmative defense of qualified immunity, which protects all but the plainly incompetent or those who knowingly violate the law.” *Gross v. Pirtle*, 245 F.3d 1151, 1155 (10th Cir. 2001) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 89 L. Ed. 2d 271, 106 S.Ct. 1092 (1986)).

In conclusion as to Count IV, the Fourth Amendment claims against Captain Gonzales for wrongful seizure and arrest asserted by Ms. Silva-Banuelos, Mr. Kisner and Mr. Doyon, should be dismissed with prejudice as Plaintiffs cannot show any direct involvement by Captain Gonzales, nor can they show any affirmative link that as the supervisor in charge that Captain Gonzales directed or acquiesced in any unconstitutional conduct. Notwithstanding that fact, the amount of force used to seize and arrest these plaintiffs under the circumstances are objectively reasonable pursuant to a Fourth Amendment analysis. Finally, Captain Gonzales is cloaked with qualified immunity relating to this claim.

B. Captain Gonzales did not engage in the excessive use of force as to all named Plaintiffs as alleged in Count V.

In Count V, all Plaintiffs assert a host of Fourth Amendment excessive force claims against Defendant Gonzales. In describing the alleged excessive force in Count V, Plaintiffs in paragraph 178 refer to the body of their complaint and also to the battery count to identify the allegations against Defendant Gonzales. It should be noted that nowhere in Plaintiffs’ First Amended Complaint are any allegations made against Defendant Gonzales based on direct contact with him. Plaintiffs at all times proceed against Captain Gonzales in an amorphous manner.

Again, it is important to this analysis to point out that Captain Gonzales never had any direct contact or interactions with any of these Plaintiffs. *See, Uncontested Fact ¶ 9.* Therefore to find any liability, it must first be determined that Captain Gonzales either directed, allowed or acquiesced in the constitutional impermissible conduct as a supervisor. Plaintiffs have no evidence other than conclusory allegations that Captain Gonzales acted in a constitutionally deficient manner as a supervisor. Conclusory allegations are insufficient to support Plaintiffs' claims in Count V.

Further, an examination of the record and claims made against Captain Gonzales bears out that none of the force utilized against any Plaintiff was excessive in nature, and further, that Captain Gonzales is entitled to qualified immunity relating to the use of authorized force for reasons previously discussed. In review of the operative complaint, Plaintiffs' excessive force claims also have been couched pursuant to Count II for the state common law intentional tort of battery and Count V pursuant to 42 U.S.C. § 1983 for excessive use of force in violation of the Fourth Amendment.

The excessive force claims of the Plaintiffs generally arise out of the following four categories: (1) deployment of chemical agents, (2) use of the police batons, (3) use of horses and K-9 units and (4) the physical arrest and misdemeanor charge of three Plaintiffs.

When a peaceful and lawful protest becomes unlawful and the police are confronted with the real potential for violence and the disruption of civic order, there must necessarily be consequences for all if a city and its law enforcement officers are to satisfy their duty to provide safety and security. *See Menotti v. City of Seattle, supra* at 1157-58.

The deployment of chemical agents

Most all the Plaintiffs were directly or indirectly affected by the deployment of chemical deterrents (e.g. tear gas). Some simply smelled the gas (e.g., Wechselberger), others had reactions ranging from discomfort to fairly severe stinging and burning sensations of the eyes and skin (e.g. Chavez and Michael Kisner). Since for the purposes of this Motion, the incidents must be taken as Plaintiffs make their claims, the Answers to Interrogatories are attached hereto as exhibits along with selected pages of their depositions. Tear gas was not directed at any of the Plaintiffs in particular (Chavez was struck by pepper balls), and the effects were general in nature (except pepper spray on Michael Kisner). The effects were immediate, causing a burning sensation in the eyes and difficulty breathing. Generally these effects dissipated quickly within an hour and some Plaintiffs had residual effects lasting for up to 24 hours. No Plaintiff sought medical treatment for these injuries. The purpose of the use of chemical agents is to encourage the crowd to disperse without having to make arrests. It is a less restrictive and safer alternative to the officers actually going into the crowd and making arrests. It is a standard method of crowd control and even Plaintiffs' expert conceded that the City's written policy in this regard was within standard and accepted police practices. Depo. Reiter at 7-8. There is no evidence that the police or Captain Gonzales deviated from those standards when Captain Gonzales authorized the deployment of chemical agents on the unruly and unlawful assembly. *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005).

The use of the police batons

Three Plaintiffs were “shoved” or “hit” by the police who had their batons in a horizontal position held with both hands for the purpose of moving the crowd or an individual along in a given general direction. The fourth Plaintiff was prevented from interfering with aid being given another protestor near the Bookstore. The fifth Plaintiff was pushed back into the crowd after her drum was removed. All five incidents occurred at or near the intersection of Central and Cornell after the protestors had returned to the area. Even if a Plaintiff was injured, no plaintiff sought medical treatment.

Plaintiff Lori Eaton was kneeling next to a protestor lying on the ground. She claims she was told to get up and back away by the police officers. She was grabbed by her shirt and lifted to her feet. When she tried to get by a police officer she was shoved in the upper chest by the officer holding his nightstick in a horizontal position. Her injury, if any was temporary. *See, Exhibit V, Deposition of Lori Eaton at p. 104, line 22 – p. 105, line 10.*

Plaintiff Lucy Gilster described two encounters with police officers. The first was at Central and Buena Vista where she was shoved away from where four friends were being arrested. *See, Exhibit W, Deposition of Lucy Gilster at p. 84, line 1 – p. 86, line 23.* The second was at the intersection of Central and Cornell after she was removed from the crowd and her drum was taken away when she was shoved back into the crowd. If she suffered an injury, it was not permanent. *Exhibit W at p. 113, line 19 – p. 114, line 19.*

After the deployment of the tear gas in the intersection of Cornell and Central, Plaintiff Susan Schuurman was standing in front of the Frontier Restaurant on Central to the east of Cornell when she felt a huge push in her back, which pushed her into the street

where she was met with more officers in the street who shoved her back onto the sidewalk. In the process her knee buckled and she almost fell. *See Exhibit X, Deposition of Susan Schuurman at p. 64, lines 17 – p. 65, lines 8..* She had a previous injury from playing soccer and wore a knee brace after the incident for about a week, but she doesn't claim permanent injury and has no medical bills. *See, Exhibit X at p. 78, lines 13-20..* She remained at the protest for about a half an hour after the incident, standing in the rain. *See, Exhibit X at p. 79, line 24 – p. 80, line 9.*

Plaintiff Lisa Kisner was also standing on the sidewalk in front of the Frontier Restaurant to the east of Cornell on Central when she was pushed by two police officers holding batons. *See, Exhibit Y, Deposition of Lisa Kisner at p. 94, lines 1-20.* She was pushed into her daughter, Alicia Kisner. *See, Exhibit Y at p. 94, lines 1-20.* She was not bruised and had no physical injury. *See, Exhibit Y at p. 97, lines 23 – p. 98, line 6.*

Plaintiff Lane Leckman was standing on the sidewalk on the north side of Central at the corner of the building where the UNM Bookstore is located. The police officer said "Move" and Leckman questioned him why as he was on the sidewalk. *See, Exhibit Z, Deposition of Lane Leckman at p. 105, lines 13-22..* He was hit hard in the chest and pushed backwards into his fiancée. The pain passed readily and he was sore for about a day; there was no redness or swelling. *See, Exhibit Z at p. 108, lines 21 – p. 109, line 4.*

All of these last three incidents occurred when the police were attempting to disperse the crowd and involved the use of the baton in fairly standard crowd control techniques. All occurred after orders to move had been given and the contact was described as a "shove" by two Plaintiffs and a "hit" by the third. From the testimony of the third plaintiff he was questioning the officer in front of him and indicating a refusal to

obey the lawful command. Since the officer was at the flank of the skirmish line next to the bookstore, it would be of great concern that the protesters not be permitted to get around the flank position of the line. Furthermore, the injuries, if any, were *de minimus*. E.g., *Secot v. City of Sterling Heights*, 985 F.Supp. 715 (DCSDMI 1997).

The use of horses and K-9 Units

Although the Plaintiffs have claimed that the mere presence of the K-9 unit was intimidating, the K-9 unit was not involved with any incident for which the Plaintiffs claim redress. Plaintiff Silva-Banuelos was surrounded by mounted police when she was taken into custody. No horse touched her and she has made no claim that there was improper use of the mounted unit other than the horses might have been intimidating. See, *Uncontested Fact* ¶ 10. Two mounted police officers attempted to get Michael Kisner to move along and when that did not work, the horses were used to arrest him by holding him between the horses while an officer on foot approached him from behind and took him into custody. See, *Uncontested Fact* ¶ 13.

Lastly, Plaintiff Curtis Trafton claims injury from a horse. Trafton's injury took place as he was walking along the median on Central Avenue at a point west of University Avenue. He claims a mounted police officer came from behind and the horse turned its head and struck him in the chest knocking him backwards into another marcher. This Plaintiff suffered no injury as a result of this event. However, he claims to not know whether this event potentially exacerbated his chronic back problem caused by years of physically demanding cement contracting work. He has not sought any medical treatment for this event, nor has he divulged the event to any health care provider. His injury from this event, if any, was *de minimus*.

However, it should be noted that a claim for excessive force may be maintained without the suffering of a physical injury. *Holland v. Harington*, 268 F.3d 1179 (10th Cir. 2001).

As to all acts described above Captain Gonzales is entitled to qualified immunity. Captain Gonzales acted in an objectively reasonable manner and his action did not violate any law which was clearly established at that time. In *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992), the Court held that in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as plaintiff maintains.”

Here, no Supreme Court, Tenth Circuit, or established weight of authority from other courts can be found which would have precluded Captain John Gonzales and other APD officers from engaging in the limited employment of tear gas, use of pepper spray and pepper balls, and the use and show of force given the situation that they were facing.

The inquiry as to clearly established rights is more specific: “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier*, 121 S. Ct. at 2156. Qualified immunity “operates in this case, then, just as it does in others, to protect officers from the sometimes ‘hazy border between excessive and acceptable force,’ . . . and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.” *Id.* at 2158 (citing *Priester v. Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000)). It grants “officers immunity for reasonable mistakes as to the legality of their actions,” and in excessive force cases, “in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can

apply in the event the mistaken belief was reasonable.” 121 S. Ct. at 2159. “Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred.”

Id.

“If the officer’s mistake as to what the law requires is reasonable,” *Saucier* explains, “the officer is entitled to the immunity defense.” *Id.*

Count V should be dismissed as no excessive force was utilized or authorized by Captain Gonzales. Further, he is cloaked with qualified immunity for his actions.

C. Captain Gonzales did not engage in the suppression of rights to freedom of expression and assembly as alleged by all named Plaintiffs in Count VI.

In order to demonstrate a First Amendment violation, as set forth in Count VI of Plaintiffs’ complaint, the Plaintiffs must provide evidence showing that by his actions that Captain Gonzales deterred or chilled the Plaintiffs’ political speech and such deterrence was a substantial or motivating factor in the conduct of Captain Gonzales. “In other words, to establish a constitutional violation, a plaintiff must demonstrate that the defendant intended to interfere with her First Amendment rights. Besides bare conclusory allegations, a plaintiff must offer a genuine issue for trial that deterrence or chilling of First Amendment activity was a substantial and motivating factor for the defendant’s conduct.” *Barney v. City of Eugene*, 20 Fed. Appx. 683 (9th Cir. 2001)

In *Barney*, a lawsuit was brought against several individual police officers and the city pursuant to 42 U.S.C. § 1983 which alleged that deployment of tear gas at a peaceful protest violated plaintiff’s First Amendment rights of free speech and assembly. In *Barney*, the protestors were allowed to conduct their activities peacefully for several

hours before violence erupted. Finally, the protestors were warned repeatedly to clear the street or tear gas would be deployed, and there was no disputed that a small group of the crowd became violent. The tear gas was used in response to the violence.

Further, the crowd had become unruly, and failed to respond to lawful and repeated police commands. *See, Exhibit H.* A number of the protestors staged an act of civil disobedience by sitting down in Central Avenue and refusing to leave despite repeated lawful commands. *See, Exhibit H.* The crowd was being excited and agitated by drummers who were interfering with the ability of the police to communicate with the crowd. *See, Exhibit H.* Upon assessment of an escalating dangerous situation for all concerned, Captain Gonzales authorized and participated in a limited deployment of tear gas.

As in *Barney*, prior to the introduction of gas, the protestors had engaged for a lengthy time in their rally and march. It wasn't until the crowd dynamics changed, and the protestors refused to follow repeated police commands when gas was deployed.²

In *Barney*, the Ninth Circuit held that the tear gas was used in response to the conditions that developed. Further, "Barney has provided no basis to create a material issue of fact that her exposure to tear gas and any effect on her First Amendment activities were anything other than the unintended consequence of an otherwise constitutional use of force under the circumstances." *Id.*

Also dispositive of this issue in favor of Captain Gonzales is the fact that Plaintiffs cannot show that Captain Gonzales intended to interfere with Plaintiffs' First Amendment rights. To the contrary, Captain Gonzales did not have the purpose of mind

² Captain Gonzales only allowed three APD officers to deploy gas. Those officers were Captain Gonzales, Sergeant Steven Hill and Charlie Lopez.

to interfere with Plaintiffs' First Amendment rights, rather, his authorization and deployment of minimal force was designed solely to keep the peace. *See, Uncontested Fact* ¶ 7. There has been no evidence that has been developed by Plaintiffs throughout these proceedings that even suggest that Captain Gonzales engaged in or authorized the use of force to interfere with Plaintiffs' First Amendment rights.

The protest had been allowed to continue for over two hours, had become an unlawful assembly for over three-quarters of that time, and had been allowed to proceed in directions that were unplanned and unpredictable. In view of the forbearance of the police in balancing the rights of the protestors with the rights of the general public to the free flow of traffic and the protection of local businesses, it is a disingenuous assertion at best to claim that the police intended to suppress, block or impede the Plaintiffs' First Amendment rights. Plaintiffs implicit assertion is that because they are exercising their right of free speech and assembly, they can do and go wherever they choose to effectuate their message. That, simply stated, is not the law.

Liberty can only be exercised in a system of law which safeguards order. We affirm the repeated holdings of this Court that our constitutional command of free speech and assembly is basic and fundamental and encompasses peaceful social protest, so important to the preservation of the freedoms treasured in a democratic society. We also reaffirm the repeated decisions of this Court that there is no place for violence in a democratic society dedicated to liberty under law, and that the right of peaceful protest does not mean that everyone with opinions and beliefs to express may do so at any time and place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations.

Cox v. Louisiana, 379 U.S. 559, 574 (1965); *Accord: Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965) (companion case to the above quoted case); *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966); *Greer v. Spock*, 424 U.S. 828, 836 (1976) ("The guarantees of the First Amendment have never meant that people who want to propogandize protests or views

have a constitutional right to do so whenever and however and wherever they please.”). To allow this case to proceed further would render Qualified Immunity into a pleading game contrary to its purpose. *Harlow v. Fitzgerald, supra; Anderson v. Creighton*, 483 U.S. 635 (1987).

Further, Captain Gonzales is cloaked with qualified immunity for his actions relating to the use of force as previously identified. In addition, in particular to Plaintiffs’ First Amendment claim, there is no clearly established law that would have prohibited Captain Gonzales from deploying tear gas or authorizing reasonable use of force for crowd control purposes. In fact, evidence would need to be presented by Plaintiffs that the tear gas was utilized for the purpose of punishing a prior lawful exercise of the right of free speech.

Even if more than a scintilla of evidence can be mustered that there may be an impingement of First Amendment rights, there is no clear establishment of the right. Although, the government cannot regulate free speech based upon content, it may regulate speech with respect to its time, place and manner. *E.g., Ward v. Rock Against Racism*, 491 U.S. 781, 795-98 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984); *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968). Even though content-based regulations are presumptively invalid, there are limited categories of content that may be subject to governmental regulation. *E.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-85 (1992). It is one thing to look at the cold letter of governmental regulations and subject them to critical analysis as to whether they are in fact controlling time, place and manner or are they really intended to stifle the free speech sought to be exercised. It is a wholly different proposition to apply any meaningful set of

guidelines to the moving and dynamic large scale event of a public protest. In its best light, the law is far from clear concerning a dynamic enforcement of time, place and manner restrictions.

Here, much like the aforementioned First Amendment cases, the police officers and their supervisors are charged with the control of the time, place and manner of the protest event. Where, as here, when no parade permit is obtained, the crowd of almost 1,000 people became an unlawful assembly when it moved onto Central Avenue and began to march westward toward the Interstate freeway. Thus, the "scene" is immediately enlarged and the boundaries become amorphous subject only to the management of the law enforcement officials reacting to the whim and caprice of a crowd under the organization and control of no one. A recent example of a purportedly peaceful demonstration turning violent was the protests at the 1999 World Trade Organization conference in Seattle, WA. *See Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2004).

In the instant case, Officers Gregory Cunningham and Danny Garcia were assigned undercover to mingle into the protestors and report attitudes and events as they were unfolding. *See, Uncontested Fact ¶ 4*. Cunningham described the protestors as a physically aggressive crowd. *See, Uncontested Fact ¶ 4*. Some protestors came prepared for confrontations; they were dressed in black wearing shinguards, riot masks, backpacks. *See, Uncontested Fact ¶ 4*. There was concern over the presence of persons involved with the Black Bloc, a nationwide organization involved in protests and civil disobedience nationwide. *See, Uncontested Fact ¶ 4*. They dress in black and act aggressively within the crowd. *See, Uncontested Fact ¶ 4*. Some protestors came prepared with rags and vinegar to stop the tear gas. *See, Uncontested Fact ¶ 4*. His

superior, Sergeant Davis, did not feel that it was safe for he and his partner to be in the crowd because the crowd was aggressive and confrontational. See, *Uncontested Fact* ¶ 4. During the time he was in the crowd he heard people saying "Let's go, let's take the streets, let's take the freeway." See, *Uncontested Fact* ¶ 4. When the crowd "eventually turned back eastbound, . . . it was pretty obvious that there was going to be, at least with some of the people in the crowd, some kind of confrontation." See, *Uncontested Fact* ¶ 4. The mood had accelerated throughout the course of events. See, *Uncontested Fact* ¶ 4. Things were happening so fast, he did not have time to identify people causing trouble for them to be removed from the protest. See, *Uncontested Fact* ¶ 4. Cunningham and Garcia were ordered out of the crowd after the crowd turned eastbound on Central. See, *Uncontested Fact* ¶ 4.

A parade permit provides an agreed upon definition of a route and an acceptable boundary for the protest event. It affords the opportunity for proper policing to, among other things, secure convenient use of the streets by other travelers and minimize the risk of disorder. See *Cox v. Louisiana*, *supra* 379 U.S. at 355-56; *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941). However, a permit must be sought and applied for by the event organizers. When this is not done, it places the law enforcement officials in the difficult position of having to be reactive to what has now become the vagaries of a leaderless mob engaged in an unlawful assembly. The momentum builds to the point where even the police, as described by one Plaintiff, may become agitated, if not "almost frantic". Deposition of Schuurman at 31-32. Plaintiffs assert that they have no responsibility to cooperate with the permit requirements and the police must react with forbearance because the Plaintiffs have adopted the subjective mindset that they were peaceful

demonstrators. Thus, they reason, any force exerted by the police violates their civil rights and even police presence intimidates and therefore inhibits their freedom of speech and assembly. This argument is simply a restatement in a different form of a position that has long been repudiated by the United States Supreme Court. *E.g. Adderley v. Florida*, 385 U.S. 39, 47-48 (1966). When a dynamic unlawful assembly occurs, the law enforcement officials have no choice but to regain control of the situation to protect and preserve the public peace and safety. In such a context the officers should be granted immunity for reasonable mistakes as to the legality of their actions. *Brosseau v. Haugen*, 543 U.S. 194, 197-98 (2004); *Saucier v. Katz*, supra at 206; *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987).

Regarding other examples of the alleged use of excessive force in the First Amendment context, the Plaintiffs must show that the officer's action was motivated, even in part, by the desire to interfere with the Plaintiffs' speech rights.

In *Secot v. City of Sterling Heights*, 985 F. Supp. 715, 721 (DCSDMI 1997), summary judgment was granted in favor of the police officer who was sued for a claimed violation of his First Amendment pursuant to 42 U.S.C. § 1983. In *Secot*, the plaintiff was hit with a baton when the demonstration was being broken up. However, the plaintiff could not show that the officer's conduct was designed to interfere with his First Amendment speech rights. *Id.*

Here, Captain Gonzales is entitled to summary judgment as to Count VI, on two separate grounds:

1. Plaintiffs cannot prove factually that Captain Gonzales' conduct was motivated or designed to interfere with their First Amendment rights;

2. The law was not clearly established that the use of force engaged in or authorized by Captain Gonzales given the circumstances presented would have been precluded as a matter of clearly established law. Therefore, the claims in Count VI should be dismissed with prejudice.

D. Captain Gonzales did not engage in retaliatory prosecution or malicious prosecution as alleged by Plaintiffs Silva-Banuelos, Michael Kisner and Denis Doyon as alleged in Count VII and VIII of Plaintiffs' Complaint.

Captain Gonzales did not engage in retaliatory prosecution or malicious prosecution as alleged by Plaintiffs Silva-Banuelos, Michael Kisner and Denis Doyon as alleged in Count VII And VIII of Plaintiffs' Complaint.

Captain Gonzales lumps these two alleged constitutional claims together for purposes or argument and analysis, as both claims involve many of the same underlying facts, and both invoke the Fourth Amendment. However, it should be noted that Count VII also claims violation of the Fourteenth Amendment as well.

Both counts sound of impermissible actions allegedly taken by Defendant Gonzales for constitutional claims of "Retaliatory Prosecution" and "Malicious Prosecution." Retaliation, though it is not expressly referred to in the Constitution, is nonetheless actionable because retaliatory actions may tend to chill individuals' exercise of constitutional rights. *Dawes v. Walker*, 239 F.3d 489 (2nd Cir. 2001). Further the courts have recognized that a trivial or *de minimis* injury will not support a retaliatory prosecution claim. *See Id at 493; Block v. Ribar*, 156 F.3d 673, 679 (6th Cir. 1998).

The Tenth Circuit has suggested that the alleged injury should be one that "would chill a person of ordinary firmness from continuing to engage in that activity." *Worell v. Henry*, 219 F.3d 1197, 1213 (10th Cir. 2000).

Plaintiffs claims against Captain Gonzales in these two counts must fail as a matter of law factually as there is no evidence of any type or nature that Captain Gonzales engaged in either retaliatory prosecution or malicious prosecution. Captain Gonzales did not initiate prosecution against any of these named plaintiffs, nor did he file or oversee the filing of any charging documents. Based on the discovery conducted, it is unknown why Plaintiffs have not dismissed on their own initiative these claims against Captain Gonzales.

Here, there is no evidence that Captain Gonzales engaged in either retaliatory or malicious prosecution motivated by the improper purpose of interfering with the Plaintiffs constitutionally protected speech. *See, Poole v. County of Otero*, 217 F.3d 955 (10th Cir. 2001).

Regarding Count VIII, malicious prosecution, brought pursuant to 42 U.S.C. § 1983 with reference to the Fourth Amendment, that count also must fail as a matter of law as to Captain Gonzales.

To show malicious prosecution a frame work is provided in the state tort of Malicious Abuse of Process. The elements of that tort are as follows:

1. The initiation of judicial proceedings against the plaintiff by defendant;
2. an act by the defendant in the use of process other than what would be proper in the regular prosecution of the claim;
3. a primary motive by the defendant in misusing the process to accomplish an illegitimate end; and,
4. damages.

See, DeVaney v. Thriftway Marketing Corporation, 124 N.M. 512, 418, 953 P.2d 277, 283 (1997). *See also, Valles, et al., v. Silverman, et al.*, 135 NM 91, 94-98, 84 P.3d 1056, 1059-62 (Ct. App. 2003); *Gallegos v. State of New Mexico*, 107 NM 349, 353-54, 758 P.2d 299, 303-04 (Ct. App. 1987); *Kennedy v. Dexter Consolidated Schools*, 124 NM 764, 775, 955 P.2d 693, 704 (Ct. App. 1998).

The tort of malicious abuse of process is disfavored in the law, thus it must be construed narrowly. *Id.*, 124 N.M. at 519, 953 P.2d at 284. These elements of the foregoing New Mexico common law tort prove a sound analytical guide for discussion with respect to Plaintiffs' constitutional theory of recovery.

Initially, the first element of this cause of action is not met as Captain Gonzales did not effectuate the arrest of any of the Plaintiffs nor did he sign the respective criminal complaints. The participation and causation elements needed to advance this claim against Captain Gonzales are simply not present.

Second, Plaintiffs cannot show any misuse of process or in advancing any prosecution against them by Captain Gonzales.

Third, Plaintiffs can show no improper motive by Captain Gonzales.

Arguendo, should the Court conclude differently that somehow Captain Gonzales was involved in the prosecution of these matters in respect, Captain Gonzales would nonetheless be entitled to qualified immunity for reasons previously discussed.

E. Captain Gonzales did not engage in malicious abuse of process as set forth in Count III

Defendant Gonzales in the interest of judicial economy adopts the case law and arguments set forth in the previous section as if set out fully herein. There simply is no viable claim for malicious abuse of process.

F. The actions of Captain Gonzales did not create any liability for either Captain Gonzales or Municipal Liability as alleged in Count IX

The actions of Captain Gonzales did not create any liability for either Captain Gonzales or the municipality as alleged in Count IX. However, Captain Gonzales will defer to the City Defendants to argue whether he was a policy maker as alleged in Count IX.

Count IX appears to be a catch all of constitutional claims previously asserted by Plaintiffs, as Plaintiffs in conclusory allegations determine that Captain Gonzales' actions as the on-sight supervisor become the official policy of the City, Complaint at paragraph 213, and that Captain Gonzales issued orders that resulted in the violation of Plaintiffs' rights and failed to stop unlawful activity by the individual Defendant police officers, as described in the complaint. Complaint at paragraph 214.

Captain Gonzales, in the interest of judicial economy, hereby incorporates his citation to case law and arguments that he advanced that he is not liable through his direct actions or as a supervisor. Captain Gonzales authorized and utilized the minimal amount of force necessary to maintain crowd control and keep the peace. There is no evidence that Captain Gonzales witnessed, participated in, ratified, or acquiesced in the use of any excessive force from other officers under his command. Plaintiffs cannot prove supervisory liability claims against Captain Gonzales as identified in Count IX.

VII. Conclusion

Summary judgment should be granted in favor of Captain Gonzales as to all counts that pertain to him. No one has or will challenge the rights of Plaintiffs to exercise their First Amendment right of free speech. However, based on the totality of the circumstances, it became objectively reasonable and necessary for Captain Gonzales to authorize the limited use of force to protect the public, the officers and those participating in the march. Under the direction of Captain Gonzales, remarkable restraint was used when the protestors without a parade permit spilled onto westbound Central which is a heavily traveled area for motorists. In order to ensure the safety of these protestors, that section of the roadway was eventually closed. In order to keep the peace and ensure the public safety, it became necessary not to allow the protestors further access west on Central near the on ramp at I-25, notwithstanding the fact that the protestors had also clogged the traffic artery to Presbyterian Hospital. Assuredly, these were some marchers who were probably exposed to a whiff of tear gas, or a push or nudge from an officer who may have been trying to clear the roadway and ensure that matters did not escalate. However, these actions from law enforcement came only after repeated warnings to disburse or clear the streets which were ignored.

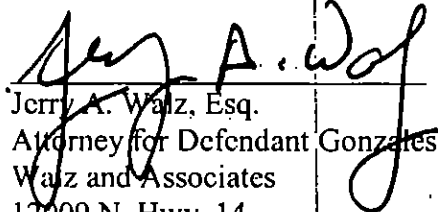
Captain Gonzales did not personally participate in or have direct contact with any of the named Plaintiffs. His only potential liability would be that of a supervisor. Based on the longstanding case precedent, Plaintiffs cannot show that Captain Gonzales participated in, directed or was acquiescent in any unconstitutional conduct allegedly committed by those APD officers who were under his command. Further, the record demonstrates that the use of force by his subordinates was at all times reasonable and

necessary. Notwithstanding the fact that the use of force was reasonable, Defendant Gonzales is cloaked with qualified immunity regarding his directives and actions as the scene supervisor. There were no violations of the First, Fourth and Fourteenth Amendments as alleged by Plaintiffs. Further Plaintiffs have no facts against Captain Gonzales to support their state claim for malicious abuse of process.

Respectfully, Captain Gonzales requests that Plaintiffs' claims against him be dismissed with prejudice and that he be awarded attorney fees, costs, and such other relief as the Court deems just and proper.

Respectfully submitted,

WALZ AND ASSOCIATES

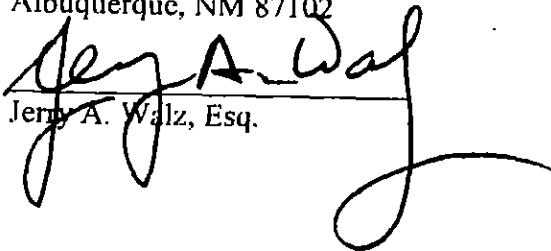

Jerry A. Walz, Esq.
Attorney for Defendant Gonzales
Walz and Associates
12009 N. Hwy. 14
Cedar Crest, NM 87008
(505) 281-3414 Telephone

I HEREBY CERTIFY that a true and accurate copy of the foregoing pleading was sent via U.S. Mail to the following counsel of record on this 1ST day of February, 2006.

Peter Schoenburg, Esq.
Carolyn M. "Cammie" Nichols, Esq.
Rothstein, Donatelli, Hughes,
Dahlstrom & Schoenburg, LLP
Attorneys for Plaintiff
500 4th Street NW, Ste. #400
Albuquerque, NM 87102-2174

Kathryn Levy, Esq.
Attorney for City Defendants
P.O. Box 2248
Albuquerque, NM 87103

Luis E. Robles, Esq.
Attorney for Defendant Officers
Robles, Rael & Anaya, PC,
500 4th St, NW, Ste. 400
Albuquerque, NM 87102


Jerry A. Walz, Esq.

**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...**