IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-00217-REB-KLM

WILLIAM MONTGOMERY,

Plaintiff,

v.

MATTHEW CHERNAK,
MIKE HOWARD,
MATTHEW BROUGH.

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiff, by and through undersigned counsel, hereby responds in opposition to Defendants' Motion to Dismiss ("Defs. MTD") (Doc. 17), and in support states as follows:

INTRODUCTION

This case involves straight-forward constitutional claims, seeking justice for the unconstitutional detention, arrest, and prosecution of Plaintiff after Plaintiff verbally questioned, criticized, and observed the conduct of the Defendant Officers during a routine consensual encounter with a different person. Am. Compl. at ¶¶ 1-3. The Defendant officers knew Plaintiff as an activist for homeless populations in the Ft. Collins area, where the incident took place. *Id*. Plaintiff acted as a peaceful protester attempting to raise awareness to homelessness issues when the Defendant officers incidentally made contact with him and perceived his questions, criticism, and observation to be an annoying intrusion. *Id.* at ¶¶ 34-36, 38. The Defendant officers, visibly "irritated," "upset," and "offen[ded]," reacted to the perceived challenge to their authority by punishing Plaintiff – they manufactured unsubstantiated a number of criminal charges against him

and took him to jail. *Id*. at ¶¶ 2, 38, 51, 58. The Defendant officers cooperatively seized him without probable cause in violation of the Fourth Amendment. *Id.* at ¶¶ 36-49, 71-94. The Defendant officers initiated and sustained a criminal prosecution against him, without probable cause, that dragged on for almost two years. *Id*. at ¶ 56-59, 63-64. While some of the background facts relating to the history of the public plaza at issue are lengthy (*See Id*. at ¶¶ 14-32), the type of claims at issue are not complex, nor are they novel. *See id.* at ¶¶ 72-75, 78-82, 85-93. Despite Defendants' assertion to the contrary, the law is clearly established in this area. Plaintiff provides numerous non-conclusory facts, in context, from which this court may easily conclude that Fed.R.Civ.P. Rule 8 has been satisfied at this early stage of the proceedings.

EVIDENCE OUTSIDE THE PLEADINGS

It is axiomatic that a properly situated motion to dismiss tests "the sufficiency of the allegations made within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick,* 40 F.3d 337, 340 (10th Cir. 1994). Reliance on outside materials is generally improper. *Swoboda v. Dubach,* 992 F.2d 286, 290 (10th Cir. 1993). Only in very "limited" circumstances should a document outside of the pleadings be considered at the motion to dismiss stage. *Gee v. Pacheco,* 627 F.3d 1178, 1186 (10th Cir. 2010). Defendants assert that the Court should take judicial notice of Defendants' probable cause affidavit, the county court judge's determination of probable cause, and Plaintiff's prior non-operative Complaint. But these documents are not the type of documents incorporated by reference into the complaint, attached by the parties in the briefing, and uniquely central to the claims, such that they should be considered. *See GFF Corp. v. Associated Wholesale Grocers, Inc.,* 130 F.3d 1381, 1384-85. (10th Cir. 1997). Defendants assert that those outside documents will provide additional evidence of probable cause. But such expanded review of outside evidence will only raise issues of fact to be

reviewed on a summary judgment standard. If the court were to consider materials outside of the complaint (not expressly incorporated) it would *sua sponte* convert Defendants' motion to dismiss into a motion for summary judgment. Fed. R. Civ. P. 12(d). At that point, plaintiff must be given notice and the opportunity to respond with affidavits or similar evidence, after seeking appropriate discovery. *See* Fed. R. Civ. P. 12(d); *see also Reed v. Dunhan*, 893 F.2d 285, 287 n. 2 (10th Cir. 1990). The Court should not consider these additional materials.

STANDARD OF REVIEW: 12(b)(6)

The "notice pleading" required by Fed.R.Civ.P. 8 does not entail the strict level of specific and individualized detail that Defendants' motion claims it does. *Twombly* and *Iqbal* have not created a heightened pleading standard for civil rights claims. *See Johnson v. Shelby*, 135 S.Ct. 346, 347 (2014) (citing *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 164 (1993)) and *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 512 (2002) (imposing a "heightened pleading standard conflicts with the Federal Rule of Procedure 8(a)(2)")); *Robbins v. Oklahoma,* 519 F.3d 1242, 1247-49 (10th Cir. 2008); Rule 8 "does not require detailed factual allegations…" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-81 (2009); *Erickson v. Pardus,* 551 U.S. 89, 95, 127 (2007) (quoting *Twombly,* 550 U.S. at 555). Rule 8 requires only facts sufficient to put Defendants on "'fair notice' of the nature of the claim and the 'grounds' on which the claim rests," in a manner that is not "so sketchy" that a defendant "would have little idea of where to being" in understanding the nature of the allegations. *Robbins,* 519 F.3d at 1248. It is the absence of facts such as "time, place, and persons involved" that tend to suggest untethered "conspiracy theories" may be involved and that allegations may be unacceptably conclusory. *Id.* (citing *Twombly,* 550 U.S. at 566, n. 10).

Rule 8 permits the use of collective allegations against similarly situated defendants or similar conduct committed by multiple defendants. *See Wynder v. McMahon,* 360 F.3d 73, 79 (2d Cir. 2004) (noting that "[t]he key to Rule 8(a)'s requirements is whether adequate notice is given," and that "fair notice" is "that which will enable the adverse party to answer and prepare for trial, allow the application of res judicata, and identify the nature of the case so that it may be assigned the proper form of trial.").[1] The Tenth Circuit's pronouncement that a complaint should, generally, make clear exactly "who is alleged to have done what to whom" is not meant to prohibit collective allegations against similarly situated Defendants who are alleged to have acted together in concert. It is meant to preclude the type of "generalized and undifferentiated" allegations that "indiscriminately" lump together differently-situated defendants and different types of claims (such as individual claims, municipal claims, and tort claims) without regard to the difference between them. *See Robbins,* 519 F.3d at 1250. *Cf. Booker v. Gomez,* 745 F.3d 405, 422 (10th Cir. 2014) (even on summary judgment, qualified immunity may be properly denied where "all Defendants" are alleged to have "actively and jointly" participated in a coordinated, group violation). Plaintiff's Amended Complaint sets out in detail the individualized conduct of each officer to the extent it can be differentiated, including specific ways in which each "personally participated" by obtaining and sharing information and then collectively agreeing to (and in fact

[1] *See also Angermeir v. Cohen,* No. 12-cv-55-KMK (D.N.Y. March 27, 2014) (describing that a complaint can provide fair notice even though it includes certain allegations against "Defendants" collectively); *Hudak v. Berkley Grp., Inc.,* No. 13-CV-89, 2014 WL 354676, at *4 (D. Conn. Jan. 23, 2014) ("Nothing in Rule 8 prohibits collectively referring to multiple defendants where the complaint alerts defendants that identical claims are asserted against each defendant."); *Harris v. NYU Langone Med. Ctr.,* No. 12-CV-454, 2013 WL 3487032, at *7 (S.D.N.Y. July 9, 2013) ("Rule 8(a)… requires that a complaint against multiple defendants indicate clearly the defendants against whom relief is sought and the basis upon which the relief is sought" (internal quotation marks and citations omitted) (alterations in original)), *adopted by* 2013 WL 5425336 (S.D.N.Y. Sept. 27, 2013); *Howard v. Municipal Credit Union,* No. 05-CV-7488, 2008 WL 782760, at *12 (S.D.N.Y. Mar. 25, 2008) ("While Rule 8 does not prohibit `collective allegations' against multiple defendants it does require that the allegations be sufficient to put each [d]efendant on notice of what they allegedly did or did not do").

acting to) seize, arrest, and prosecute Plaintiff, in a coordinated, joint effort. Thus, the type of consolidated allegations in the Complaint against "all three Defendants" in this context are not the type of "indiscriminate" allegations that should be ignored as conclusory.

The court must construe the factual allegations and any reasonable inferences from them in the light most favorable to the non-moving party, here, the Plaintiff. *Sanchez v. Hartley*, 810 F.3d 750, 754 (10th Cir. 2016).

I. The Defendant Officers Lacked Probable Cause to Arrest Plaintiff

A Fourth Amendment violation occurs where an officer arrests or detains a person without possessing probable cause that the person committed a crime. *Cortez v. McCauley,* 478 F.3d 1108, 1116-17 (10th Cir. 2007). Probable cause is more than mere suspicion; probable cause requires "a substantial probability" that a suspect committed a crime. *Stonecipher v. Valles,* 759 F.3d 1134, 1141 (10th Cir. 2014). It exists only where the objective "facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Fogarty v. Gallegos,* 523 F.3d 1147, 1156 (10th Cir. 2008). It is axiomatic that officers must obtain factual information regarding each element of a suspected crime in order to possess probable cause that such crime was committed. *Id.* at 1156-57. Because probable cause is an assessment based on the totality of the circumstances, officers cannot look only at information suggesting the possibility of guilt while ignoring exculpatory evidence; a police officer may not close her or his eyes to facts that would help clarify the circumstances relating to an arrest. *Baptiste,* 147 F.3d at 1257 (citing *BeVier v. Hucal,* 806 F.2d 123, 128 (7th Cir. 1986)); *see also Deitrich v. Burrows,* 167 F.3d 1007, 112 (6th Cir. 1999). Officers are required to conduct an adequate investigation involving collection and review of basic fundamental evidence available to them

before invoking the power of warrantless arrest and detention. *Romero v. Fay,* 45 F.3d 1472, 1476-77 & n. 2 (10th Cir. 1995). Reasonable avenues of investigation must be pursued, especially when it is unclear whether a crime has even taken place. *Cortez,* 478 F.3d at 1116. Officers are liable for knowledge of any "readily available exculpatory evidence" that they unreasonably fail to ascertain or consider. *Maresca v. Bernalillo,* 804 F.3d 1301 (10th Cir. 2015). The Court should leave to the jury questions regarding the existence of probable. *See Cortez*, 478 F.3d at 1120; *DeLoach v. Bevers,* 922 F.2d 618, 623 (10th Cir. 1990).

Defendants' principal challenge to the Amended Complaint (on all three claims) is that Defendants possessed probable cause to arrest at the time they seized Plaintiff. However, an examination of the elements of each crime charged demonstrates that Defendants' assertion lacks substantial basis and that the assertion of criminal activity was likely pretextual.

a. Obstruction of a Police Officer

Defendants allege that Plaintiff's criminal conduct began with him "insert[ing] himself into the officers' response to the 7-11 trespass complaint to such a degree he became an obstacle to the investigation." Defs. MTD at 5. However, criminal obstruction occurs where "a person intentionally obstructs, impairs, or hinders the performance of a governmental function *by using or threatening to use violence, force, physical interference, or an obstacle."* C.R.S. § 18-8-102 (emphasis added); Colo. Jury Instr., Criminal 8-1:05. None of the complaint allegations support the interpretation that plaintiff threatened the use of physical force or violence or intentionally used any type of "physical obstruction." The elements of "physical interference or an obstacle" are not satisfied by mere verbal opposition or remonstration. *See Dempsey v. People,* 117 P.3d 800, 810-11 (Colo. 2005). Plaintiff's conduct in asking a reasonable question about the officers' conduct is, plainly, protected First Amendment speech. *See City of Houston v. Hill*, 482 U.S. 451, 461-63

(1987); *see also Reiss v. M.T. Luchetta,* 78 F.3d 597 (10th Cir. 1996). Defendant officers' assertions that Plaintiff's verbal questioning criminally "injected" himself as an obstacle into the police encounter reinforces Plaintiff's allegation that the Defendant officers arrested him and charged him for his protected First Amendment conduct, and not for any other legitimate law enforcement reason.

Defendants also appear to argue that Plaintiff, later, obstructed a peace officer by failing to affirmatively climb back over the fence after he had climbed into the public plaza, so that Defendants could carry out their plan of arrest. *See* Defs. MTD at 7. But the allegations make clear Plaintiff did not climb over the fence in the first place to avoid arrest or to use the fence as an obstacle; he climbed over the fence after being told to leave so that he could observe from a safe distance *without being considered a physical obstacle*.[2] *Id.* at ¶¶ 36-37. This was well before he was threatened with arrest. *Id.* at ¶¶ 38-43. Additionally, staying-put within the fenced-in area is a null action that only maintains the status quo during such an encounter. Such a "non-act" could not reasonably be interpreted to be an intentional criminal act designed to "obstruct" or "hinder" the officers in the performance of their duties. *Cf. Kaufman v. Higgs,* 697 F.3d 1297, 1301 (finding that silently doing nothing does not obstruct police investigation). Importantly, the obstruction statute does not criminalize a person's failure to follow the general wishes and desires of an officer. *See* § C.R.S. 18-8-102. The mere failure to obey an officer's order does not provide an officer with probable cause without a narrowly-tailored statute and does not ripen into obstruction without a threat of real and often, physical, harm. *See Wilson v. Kittoe,* 229 F. Supp. 2d 520, 532-33 (W.D. Va. 2002); *see also Buck v. City of Albuquerque,* 549 F.3d 1269, 1286 (10th Cir. 2008).

[2] Defendants' assertion that Plaintiff committed a crime fares no better under analysis of Fort Collins Municipal Code Section 17-63, which requires a person to "move on and away" from an officer in the performance of his duties once ordered to do so. *See* Defs. MTD at fn 5. As noted above, Plaintiff substantially complied.

Obstruction does not occur when a person fails to cooperate fully with an officer or when the person's conduct merely renders the officer's task more difficult but does not impede or prevent the officer from performing that task. *Ruckman v. Commonwealth,* 505 S.E.2d 388, 389 (VA. Ct. App. 1998) (analyzing an almost identical statute). The failure to obey an order when there is no underlying probable cause to support a seizure does not provide a basis to believe a crime was committed. *Buck,* 549 F.3d at 1286.

Contrary to Defendants' assertions, none of the Complaint allegations demonstrate that Plaintiff "refused" to provide his identification. *Id.* at ¶ 42. Plaintiff provided his name, along with information regarding the alleged trespass violation, and he confirmed his date of birth when he heard it communicated over the radio. *Id*. Such compliance can hardly be considered a "refusal" sufficient for a criminal violation. *See Buck*, 549 F.3d at 1286 (posing questions in the face of an order to obey does not constitute obstruction); *Cortez,* 478 F.3d at 1128 (briefly asking questions before complying does not amount to resisting the officer); *Lundstrom v. Romero,* 616 F.3d 1108, 1123-24 (initially failing to obey and then, later, complying after receiving additional information is not the same as refusing to comply).

b. Second Degree Trespass

Second degree criminal trespass occurs when a person "unlawfully enters or remains in or upon the premises of another which are enclosed in a manner designed to exclude intruders or are fenced." C.R.S. § 18-4-503. This involves at least three key elements – that a person (1) "unlawfully" enters or remains, (2) in or upon the premises "of another" (3) which premises are "enclosed" and/or "fenced." *Id.*; *see also Jury Instructions* (Colo. Jury Instr., Criminal 4-5:04); The definition of second degree trespass differs from First and Third-degree trespass only by designation of the type of private property a person "unlawfully" enters or remains upon. *See*

C.R.S. § 18-4-502 ("unlawfully … in a *dwelling* of another"); C.R.S. § 18-4-504 ("unlawfully … in or upon the *premises* of another."). Thus, the core concept of criminal trespass under Colorado law is whether one enters or remains on that property "unlawfully."

"A person unlawfully enters or remains in or upon premises when he is not licensed, invited, or otherwise privileged to do so." *People v. Johnson,* 906 P.2d 122, 124 (Colo. 1995). A reasonable officer may conclude that a suspect enters or remains "unlawfully" when a witness reports that another person is in "his" house, the witness reportedly tells the suspect repeatedly to "get out," and then the witness called the police to report the crime. *Santistevan v. Steginik,* No. 15-cv-00198-RM-KMT, 2016 WL 1388018, at *8 (D. Colo. Apr. 8, 2016).

No complaining owner ever provided the Defendants any basis to believe Plaintiff's entry onto the property was unlawful. There were no signs posted at the property to provide any type of notice that Plaintiff's presence would be unauthorized by anyone not present (obviously, because the property was meant to be held open to the public). Plaintiff's complaint allegations expressly make clear that the Defendant officers *did not* obtain *any* information indicating Plaintiff was unwelcome or needed to be removed from the property by any alleged property owner. Am. Compl. at ¶ 40. Defendants did not so much as inquire into whether Plaintiff may have had consent to be present there or whether he had unlawfully entered the premises. *Id.* Moreover, the Amended Complaint alleges that the property was known to be public in nature, having been created and held open for the public by the City of Ft. Collins for at least 20 years. *Id.* **at ¶ 3, 14.** Defendants likely knew this because they were assigned to patrol the area and had numerous contacts with "transients" whom were considered eyesores. *Id*. at ¶ 19-22. Thus, Defendants could not have had reason to believe a private property owner legally restricted Plaintiff's access to the land or that Plaintiff could be trespassing onto someone else's private property by entering without

authorization. Defendants may have had information regarding one element of a possible trespass violation – that a fence existed around the property – but they lacked information critical to the very *core* concept of a trespass pertaining to whether Plaintiff unlawfully entered. The only information Defendants obtained about the potential "unlawfulness" of Plaintiff's entry onto the property was information directly provided by Plaintiff, indicating that the property remained open to the public, that he had personally spoken to a city official that provided him consent to be present, along with written communications corroborating this information *Id*. at ¶¶ 39-49.

Defendants cite to *Williams v. Greenburgh,* 535 F.3d 71 (2nd Cir. 2008) for the premise that "a mistake about relevant facts - in this case, the adequacy of a trespass warning sign - does not undermine the existence of probable cause." However, Defendants' citation is misleading and, ultimately, supportive of Plaintiff's position - not Defendants. The *Greenburgh* court addressed the adequacy of a verbal warning, not a warning sign, that was directly provided to Williams by a former employer after Williams was terminated and a physical encounter ensued on the property. Id. at 73. Williams was escorted off the property by an officer and told not to return without permission. Id. The officer saw Williams return to the property and arrested Williams. Id. A municipal court acquitted Williams of the trespass charge on the narrow basis that the officer's verbal warning not to return did not specify the length of his exclusion from the facility. Id. at 74. The *Greenburgh* court determined that the officer may have made a mistake in not providing a length of time for the exclusion at the time of the ejection, but that a person of reasonable caution who (1) knew that Williams had been expelled and warned not to return without permission, and (2) observed Williams return to the property without obtaining permission, would possess sufficient information to reasonably believe Williams was trespassing. Id. at 79. Unlike the Defendants in the case at bar, the officer in *Greenburgh* had facts from which a reasonable officer

could conclude that Williams entry onto the property was "unlawful." The lesson to be gleaned from *Greenburgh* is not that *any* mistake of fact made by an officer should be forgiven - it is that *reasonable* mistakes that are not central to a probable cause inquiry may not substantially compromise an otherwise fair and good-faith probable cause determination. But on the flip side of the coin, "unreasonable mistakes" based on the failure to investigate, the failure to obtain and appreciate readily available exculpatory information, and the failure to recognize commonsense information provided by a suspect cannot be overlooked. *See Maresca*, 804 F.3d at 1310-11.

Defendants' motion essentially admits the officers hastily concluded a trespass occurred with limited information pertaining to only one element of second degree trespass when they assert that the "officers saw him climb the fence and concluded that he was trespassing." Defs. MTD at 6. Defendants argue that climbing the fence "would constitute a crime to anyone." But such assertion is plainly conclusory and contrary to law. Under Defendants' interpretation of the law, any person who climbs a fence would be subject to immediate arrest, regardless of the ownership of the property, the authorization a person might implicitly or expressly have to enter, and/or the public or private character of the property. That implies citizens are always in danger of arrest should an officer witness fence-climbing and decide not to investigate whether the person might be authorized, licensed, or otherwise be privileged to enter. Such an interpretation must be forcefully rejected. Probable cause requires policework substantiating that there are reliable and trustworthy facts supporting each element of an alleged crime, not guess work and assumptions. Defendants lacked critical information about whether a crime could have been committed and acted in contravention of information that clearly discounted the probability Plaintiff could have committed any crime.

Even if Defendants arguably possessed sufficient information to reasonably believe

Plaintiff trespassed by climbing the fence of the public plaza, Plaintiff provided plainly exculpatory evidence in the form of the printed email from Ft. Collins city officials. Am. Compl. at ¶¶ 45-49**.** The email not only demonstrated that the property was public and not private in character, but expressly recognized that the private fence had been ordered to be removed so as not to obstruct public access. *Id*. at ¶ 49. The email was an order from a city official that public access to the property was not to be obstructed so that members of the public (including Plaintiff) would continue to have access. *Id*.. This substantiated Plaintiff's assertion that he was given consent to be there and provided an independent, written account that corroborated Plaintiff's verbal communications. This information goes to the very core concept of whether plaintiff was likely to have been "licensed, invited, or otherwise privileged to enter the property" and made it dramatically less likely that a reasonably prudent officer could continue to reasonably conclude that Plaintiff entered the property unlawfully.

Defendants argue that it "strains credulity" for them to have "known" the fence erected around the public plaza was "illegal." Defs. MTD at 6. This argument, at first blush, has some intuitive appeal when reflecting on the imperfectness of the "reasonableness" standard of probable cause. However, it is ultimately a red-herring. Defendants need not have personal knowledge about the history of the fence or its "illegality" to realize the exculpatory import of the information Plaintiff provided.[3] Defendants' entire assumption that a trespass occurred was dependent on the existence of a fence. If a city official declared that the fence was not supposed to be there because

[3] Defendants argue at length that Plaintiff had to go through extensive efforts to discover that the fence around the property was unlawful, but Defendants exaggerate the complexity of the issue and the minimal steps Plaintiff went through. *See* Am Compl. at ¶ 27-28. Moreover, since the City Inspector took care of the legal analysis regarding the illegality of the fence and ordered it to be removed in the email provided, the officers would have known that they didn't need to wade into any deep water to analyze legality of the fence. A municipal representative had already done so.

it obstructed public access, the email communication, on its face, casts serious doubt on any belief that Plaintiff "unlawfully" trespassed by climbing the fence. What really "strains credulity" is Defendants' assertion that the email evidence should not be considered because it was somehow "unauthenticated" and/or "potentially fraudulent." *Id*. at 8. It strains credulity to believe that Plaintiff spontaneously thought up and drafted an email containing the kind of communications and contact information of the City Planner and City Inspector, within the minutes, in order to try to "fraudulently" mask an allegedly unlawful trespass. However, if the Defendants had doubts about the veracity of the email, the officers could have further investigated by quickly and easily contacting a supervisor or representative of the city and/or the DA's office to corroborate any of the information in the email, including the identity/contact information of the city officials involved, the nature of the dispute at issue, the public character of the property identified, or any other information that they had doubts about.[4] There was no exigent need to arrest Plaintiff immediately – he was confined within the fenced-in area for as long as the officers needed to conduct a reasonable pre-arrest investigation. Moreover, Defendants obviously had time and the means to communicate with others because they contacted another officer and waited for him to bring bolt cutters to cut the fence. *Id*. at ¶ 51. The fact that the officers completely disregarded the evidence – without so much as a phone call or any other investigatory effort – demonstrates the unreasonableness of their conduct and the strength of their improper motive. Defendants were committed to arrest regardless of what Plaintiff said or did and regardless of the information

[4] Defendants argue that the arrest occurred too late in the evening to reasonably make a call to the city official who drafted the email, even though his cell phone was listed in the email. That may be a fair consideration, but a call to *someone* would represent only a late-night inconvenience lasting minutes, while Defendants rash action in the face of doubtful circumstances cost Plaintiff his liberty for three days (and more, later). Defendants conduct does not reflect the balance meant to be struck by the probable cause standard. *See Brinegar v. United States,* 338 U.S. 160, 176 (1949).

reasonably available to them.

c. Resisting arrest

Defendants do not address resisting arrest in their brief. This is likely because the statute requires that a person "knowingly prevent or attempt to prevent a peace officer from effecting an arrest by … *using or threatening to use physical force or violence*…" C.R.S. § 18-8-103 (emphasis added); *see also* Colo. Jury Instr., Criminal 8-1:03. There is no allegation that Plaintiff committed anything resembling forceful or threatening conduct. However, the fact that the Defendant officers asserted that Plaintiff committed such crime, in absence of any supporting conduct, further demonstrates the unreasonableness of the criminal accusations and the pretextual motivation behind the arrest and charging decisions.

d. Disorderly Conduct

Defendants claim that Plaintiff engaged in "disorderly conduct" by making loud noises as he protested the officers' assertion that he committed a crime and the officers arrested him. Defendants cite to the disorderly conduct statute in C.R.S. § 18-9-106 for the premise that a person engages in criminal activity when that person "makes a coarse and obviously offensive utterance, gesture or display" that tends to "incite an immediate breach of the peace" or "makes unreasonable noise in a public place or near a private residence that he has no right to occupy." *Id.; see also* Colo. Jury Instr., Criminal 9-1:10; Colo. Jury Instr., Criminal 9-1:11. However, defendants fail to note that "unreasonable noise," as defined by C.R.S. § 18-09-106(1)(c), encompasses communication made in a loud manner "only when there is a clear and present danger of violence or where the communication is not intended as such but is merely a guise to disturb persons." *People v. Fitzgerald*, 194 Colo. at 415, 419–20 (1978). The complaint allegations do not identify any coarse language that would incite a breach of the peace, and none of the noise could reasonably

be considered "unreasonable" under the circumstances of this encounter – where Plaintiff only verbally question/criticized the officers' conduct and/or verbally defended himself from the officers' use of their authority. Moreover, the reach of the disorderly conduct statute is inherently limited by basic principles of freedom of speech, including the right to object to and criticize an officer's conduct while in the performance of their duties. *Hill*, 482 U.S. at 463; *Stearns v. Clarkson,* 615 F.3d 1278, 1283 (10th Cir. 2010). This includes the right to a "loud and boisterous" response to an officer's treatment leading up to and during a highly questionable arrest. *Norwell v. City of Cincinnati,* 414 U.S. 14, 16 (1973). Defendants' attempt to punish Plaintiff for this protected speech further reflects on the general unreasonableness of their arrest and charging decisions, and the pretextual nature of the arrest and prosecution.

II. The Defendant Officers Initiated and Continued a Malicious Proseuction Against Plaintiff by Misrepresenting Evidence in Charging Documents and By Omitting Exculpatory Evidence Material to the Assessment of Probable Cause.

A Constitutional violation for malicious prosecution may be shown where an officer contributes to the continued confinement or prosecution of a plaintiff without probable cause. *Wilkins v. Reyes,* 528 F.3d 790, 802 (10th Cir. 2008); *Pierce v. Gilchrest,* 359 F.3d 1279, 1292 (10th Cir. 2004). This includes liability for providing misleading information in an arrest affidavit upon which a judicial officer relies to make a determination of probable cause. *See DeLoach,* 922 F.2d at 621-22; *Stewart v. Donges,* 915 F.2d 572, 582 (10th Cir. 1990) (regarding material omissions of material fact). An officer may also be held constitutionally liable for making false and/or misleading statements to a prosecutor, which results in continued prosecution without probable cause. *Taylor v. Meachum,* 82 F.3d 1556, 1564 (10th Cir. 1996) (citing *Reed v. City of Chicago,* 77F.3d 1049 (7th Cir. 1996)).

Defendants were the persons that caused Plaintiff to be wrongly confined *and* prosecuted

by directly filing false and misleading criminal complaints and affidavits into the county court, while Plaintiff was incarcerated, which caused the prosecution to begin almost immediately after Plaintiff was booked into the jail. Am. Compl. at ¶ 59. This occurs due to Colorado's unique simplified misdemeanor criminal procedure that permits the arresting officer to "initiate" a criminal prosecution, instead of leaving the decision to a prosecutor. *See* C.R.S. § 16-2-104; Colo.R.Crim.P 4.1(b) (identifying that a criminal prosecution pursuant to Colorado's simplified misdemeanor procedure is "initiated" by an officer's filing of a criminal complaint and submitting it directly to the criminal court); *See also Jeffrey v. Dist. Court in and For the Eighth Judicial Dist.,* 626 P.2d 631, 634-35, 638 (Colo. 1981) (discussing Colorado's simplified misdemeanor procedure and identifying that an officer's initial summons and complaint documents "initiate" the criminal prosecution in county court). Importantly, this procedure precludes a criminal defendant from challenging probable cause at an adversarial hearing. *People v. Garcia,* 176 P.3d 872, 874 (Colo. App. 2007).

Defendants argue that a county court judge found probable cause to believe the crimes alleged were committed and that such a decision "breaks the chain of causation" for liability of the officers. However, that is not the case where an officer misrepresents or omits material facts in an affidavit, which infects the probable cause evaluation and causes the judicial officer to be materially misled about the existence of probable cause. Plaintiff's Amended Complaint clearly alleges that Defendants materially misrepresented numerous pieces of information critical to a fair determination of probable cause in the charging documents and affidavits submitted to the court. *Id*. at ¶¶ 53-59. Defendants also omitted the exculpatory evidence regarding the email and information Plaintiff provided about the nature of the public property, the fence, and the consent he obtained from the city planner and inspector to enter the property, which all demonstrated that

Plaintiff could not have "unlawfully" entered and/or trespassed onto private property. *Id*. at ¶¶ 54-55. Colorado's simplified criminal procedure ensured that the county court judge relied upon the officers' misleading representations of the evidence, as facially presented by the officers in the charging documents. Defendants must be held liable for their misrepresentations and omissions of material fact.

Defendants allege that there are no facts substantiating the favorable termination requirement of the malicious prosecution claims, but the Amended Complaint articulates that the prosecutor dismissed the charges after calling the city attorney and confirming Montgomery was "correct about the nature of the public property and about plaintiff's presence there." Am. Compl. at ¶¶ 68-70. Thus, the dismissal was made under circumstances suggestive of innocence sufficient to meet the favorable termination requirement.

As articulated above, the Defendants did not have probable cause to believe Plaintiff committed any of the crimes alleged on the night of the incident. However, should the court conclude that probable cause existed for any one crime, the complaint allegations and prevailing law demonstrate that the Defendant officers alleged a number of crimes for which there was no factual support and/or for which Plaintiff's conducted was protected by the First Amendment. Each individual criminal charge that was asserted without legal justification provides support for a malicious prosecution claim, because there is a long history of assessing such allegations on a charge-by-charge basis. *See Miller v. Spiers,* 339 Fed. Appx. 862, 867-68 (10th Cir. 2009) (probable cause to pursue one charge does not prevent a claim for malicious prosecution based on simultaneous pursuit of a separate charge); *accord Holmes v. Vill. of Hoffman Estates,* 511 F.3d 673, 682 (7th Cir. 2007); *Posr v. Doherty,* 944 F.2d 91, 100 (2d Cir. 1991); *See also Elbrader v. Blevins,* 757 F. Supp. 1174, 1180 (D. Kans. 1991) (probable cause involving disorderly conduct

charge does not prevent the pursuit of malicious prosecution claim for factually separate offenses charged without probable cause, including obstruction and resisting arrest); *Brown v. Willoughby,* 5 Colo. 1, 5 (Colo. 1879) ("If groundless charges are maliciously and without probable cause, coupled with others which are well founded, they are not on that account less injurious, and therefore constitute a valid cause of action.").

III. The Circumstances of the Arrest and Defendants' Explanation of Probable Cause in Their Motion Strongly Suggest That the Officers Retaliated Against Mr. Montgomery for his, protected, First Amendment Expressions.

"To establish a First Amendment retaliation claim, a plaintiff must show that (1) he was engaged in constitutionally protected activity, (2) the government's actions caused him injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the government's actions were substantially motivated as a response to his constitutionally protected conduct. *Stonecipher v. Valles,* 759 F.3d 1134, 1147 (10th Cir. 2014) (citing *Nielander v. Bd. Of Cnty. Comm'rs of Cnty of Republic,* 582 F.3d 1155, 1165 (10th Cir. 2009). The scope of protection for speech under the First Amendment is extremely "broad." *See, e.g., Spence v. Washington*, 418 U.S. 405, 410 (1974). "The freedom of individuals verbally to oppose or challenge police action *without thereby risking arrest* is one of the principal characteristics by which we distinguish a free nation from a police state." *Hill*, 482 U.S. at 462-63. There can be no question that an arrest and prosecution, used in retaliation for the exercise of protected speech constitutes an injury cognizable under the Tenth Circuit's First Amendment jurisprudence. *See Worrell v. Gary,* 219 F.3d 1197, 1212 (10th Cir. 2000) ("[A]ny form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom."); *Howards v. McLaughlin,* 634 F.3d 1131, 1144 (10th Cir. 2011) (arrest made after officer overheard plaintiff speaking on the phone

and became "visibly angry" sufficient for First Amendment retaliation claim.) (vacated on other grounds by *Reichle v. Howards,* 132 S.Ct. 2088 (2012)).

Plaintiff's Amended Complaint identifies a number of ways in which Plaintiff engaged in First Amendment conduct, including, *inter alia*, when he questioned and criticized the officers during the consensual encounter, communicated that his presence in the plaza was meant in part to raise awareness to the illegal obstacle that discriminated againt he homleess, challenged the erroneous determination that he trespassed, and protested the officers treatment and/or arrest. Am. Compl. at ¶¶ 2, 3, 36, 38, 41, 44, 51, 54. At each turn, the officers responded with visible and audible expressions of annoyance and irritation, as they viewed Plaintiff's conduct as offensive disobedience and a challenge to their authority. *Id*. Instead of reasonably considering the exculpatory information and evidence Plaintiff provided, the officers irrationally ignored it and failed to reasonably investigate and/or weigh its exculpatory value. *Id*. at ¶¶ 3, 54-55. Instead of simply issuing a citation through the fence, the officers grew more and more intent to arrest Plaintiff as they grew more and more upset. *Id*. at ¶¶ 38, 51, 53. The officers colluded to charge Plaintiff with five crimes that could not possibly have been supported by probable cause. *Id*. at ¶¶ 51, 55-58; *see also*, argument in Section I, *supra*. The officers each filed police reports with false, exaggerated, and misrepresentative information. *Id*. at ¶ 58. Days later, Defendant Chernak went above and beyond to ensure that Plaintiff's bail bond in another case was revoked and that Plaintiff was sent back to jail for approximately thirty (30) days more than the original arrest. *Id*. at ¶¶ 61, 65, 67. This is despite the fact that he would have, by then, had plenty of time to clear up the matter by contacting the city official who drafted the email or any other person likely to have knowledge (such as the city attorney). *Id.* at 49, 68. The officers' continued to press the criminal prosecution so that it dragged out for almost two, long, years. *Id*. at ¶¶ 57-58, 63-64, 70.

The extent of this conduct, growing from simple expressions of annoyance to intentional fabrication of evidence in support of a two-year criminal prosecution strongly suggests the officers harbored animus and an intent to punish that went well beyond the ordinary pursuit of justice. It suggests the Defendant officers sought to cause Plaintiff harm well after the incident, which continued not only through a retaliatory arrest, but also throughout a retaliatory prosecution. Defendants reactions to Plaintiff's protected conduct are sufficient to demonstrate retaliatory animus. Defendants assertions in their motion that Plaintiff's speech was criminal behavior amounts to an admission of unconstitutionally retaliatory conduct.

Contrary to Defendants' assertions, there can be no doubt that the injuries Plaintiff complains of would be sufficient to chill a person of ordinary firmness from speaking out after being retaliated against. Some special individuals may have thicker skin than others, but the inquiry is an objective one, not a subjective one.

IV. Defendants are not entitled to qualified immunity.

Qualified immunity should only protect an officer if the existing law could not be said to have put an official on fair notice that their conduct would be unconstitutional. *See Games v. Wood,* 451 F.3d 1122, 1134 (10th Cir. 2006). Generally, this means that 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 the plaintiff maintains." *Maresca,* 804 F.3d at 1308. But "[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (internal quotation marks omitted). Consequently, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope,* 536 U.S. at 741. The *Hope* decision shifted the qualified

immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional." *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) (internal quotations omitted). This Circuit has adopted a sliding scale to determine when law is clearly established. *Id*. "The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Id*.; *see also Davis v. Clifford*, 825 F.3d 1131, 1136 (10th Cir. 2016) (concluding that the court need not have decided a case involving similar facts to say that no reasonable officer could believe he was entitled to behave as the defendant officers did). "[Q]ualified immunity will not be granted if government defendants fail to make 'reasonable applications of the prevailing law to their own circumstances.'" *Pierce,* 359 F.3d at 1298.

a. Unlawful Arrest

In the context of an unlawful arrest, "the law was and is unambiguous: a government official must have probable cause to arrest an individual." *Fogarty,* 523 F.3d at 1158-59 (internal quotation marks omitted). It has long been clearly established that an arrest made without probable cause violates the Fourth Amendment. *Id. See, also Keylon v. City of Albuquerque,* 535 F.3d 1210, 1216 (10th Cir.2008); *Cortez,* 478 F.3d at 1116; *Stonecipher,* 759 F.3d at 1141. While an officer may be forgiven for reasonable, good faith mistakes, "unreasonable mistakes" such as the failure to investigate in good faith, the failure to obtain and appreciate readily available exculpatory information, and the failure to recognize commonsense information provided by a suspect cannot be so readily overlooked. *See Maresca*, 804 F.3d at 1310-11. The Defendant officers would have had fair notice that speech cannot reasonably be construed to be criminal conduct. *Hill,* 482 U.S.

at 462-63; *Norwell,* 414 U.S. at 16; *Buck,* 549 F.3d at 1286; *Dempsey,* 117 P.3d at 810-11. Thus, Defendants should not be provided qualified immunity.

b. Malicious prosecution

It has long been established that a Constitutional violation for malicious prosecution may be shown where an officer contributes to the continued confinement or prosecution of a plaintiff without probable cause. *Wilkins v. Reyes,* 528 F.3d 790, 802 (10th Cir. 2008); *Pierce,* 359 F.3d at 1292. Defendants would have been on notice that this may occur where an officer misleads a judicial officer to find probable based upon misrepresentative information provided in an arrest affidavit. *See Wolford v. Lasater,* 78 F.3d 484, 489 (10th Cir. 1996); *Deloach,* 922 F.2d at 621-23; *see also Stewart,* 915 F.2d at 582-84 (broadly adopting various circuit's reasoning with regard to judicial deception stemming from material omissions in arrest affidavits). It is also clearly established that an officer may be held constitutionally liable for making false or misleading statements to a prosecutor, which results in continued prosecution without probable cause. *Meachum,* 82 F.3d at 1564; *Pierce,* 359 F.3d at 1292; *see also Barton v. City and County of Denver,* 432 F. Supp. 2d 1178, 1194 (D. Colo. 2006). Thus, defendant should not be granted qualified immunity for initiating and continuing the, long, drawn out criminal prosecution.

Plaintiff has provided a litany of cases demonstrating that malicious prosecution claims should be assessed on a charge-by-charge basis. *See Miller,* 339 Fed. Appx. at 867-68, *Holmes,* 511 F.3d at 682, *Posr,* 944 F.2d at 100; *Elbrader,* 757 F. Supp. at 1180.; *Brown,* 5 Colo. at 5. While the Tenth Circuit in an unpublished case (*Van De Weghe v. Chambers*) concluded that the plaintiff in that case had not "borne his burden" of putting forth clearly established case law demonstrating that the case-by-case treatment of criminal charges was required under malicious prosecution precedent, the court failed to credit the deep roots of the case-by-case review found in

Colorado's malicious prosecution history. *See Brown v. Willoughby,* 5 Colo. 1, 5 (Colo. 1879). The common law tort of malicious prosecution has been the starting point for determining the contours of the constitutional violation under Section 1983 since its inception. *See Becker v. Kroll,* 494 F.3d 904, 913-14 (10th Cir. 2007). This centuries-old precedent, combined with the adoption of the analysis in *Miller v. Spiers* and the weight of precedent from the Second and Seventh Circuits, all provide hefty weight of authority from a variety of courts that counsel in favor of applying the charge-by-charge analysis.

Moreover, the pertinent question in a qualified immunity analysis is whether the "violative nature" of particular conduct has been clearly established. *Patel v. Hall,* 849 F.3d 970, 980 (10th Cir, 2017). While academics may debate about whether malicious prosecution analysis should properly be conducted on a charge-by-charge basis, it cannot be fairly said that the case law cited above would not have put the Defendant officers on notice that their conduct in making false criminal allegations does violence to the Fourth Amendment rights of a suspect. Thus, although some may think the question has not been formally put to rest because there is a circuit split, ultimately, the question may not be a legal question that requires clearly established law in order to hold Defendants accountable.

c. First Amendment Retaliation

It has been clearly established since at least 2000 that "any form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom." *Worrell* v. *Gary,* 219 F.3d 1197, 1212 (10th Cir. 2000). This obviously includes retaliatory arrest and prosecution. Moreover, it has been clearly established since at least 2011 that, in the Tenth Circuit, the presence of probable cause is not fatal to a First Amendment Retaliation claim for retaliatory arrest.

Howards v. McLaughlin, 634 F.3d 1131, 1145-1146 (10th Cir. 2011) (overruled on qualified immunity grounds by *Reichle v. Howards,* 132 S.Ct. 2088 (2012)). While the Supreme Court overruled *Howards* in *Reichle*, the Supreme Court did so only on qualified immunity grounds, holding that "at the time of Howard's arrest, it was not clearly established that an arrest supported by probable cause could violate the First Amendment." *Reichle*, 566 U.S. at 2093. Because the court elected not to overturn the Tenth Circuit's decision on the basis of whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest, the original Tenth Circuit holding in *Howards* that probable cause is *not a bar* remains the clearly established law in the Tenth Circuit. "Ordinarily, 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 the plaintiff maintains." *Becker v. Bateman,* 709 F.3d 1019, 1023 (10th Cir. 2013). Thus, even though the plaintiff in *Howards could not* get over the hurdle of qualified immunity (because the Supreme Court found that no case prior to *Howards* clearly established the law), Mr. Montgomery *can* claim the right today for actions that occurred in 2016. The Tenth Circuit's decision in *Howard, itself,* clearly established the law in this regard, in this circuit, in 2011.

Defendants cite *Wilson v. Village of Los Lunas*, 572 Fed. Appx. 635 (10th Cir. 2014) and *Moral v. Hagen*, 553 Fed. Appx. 839 (10th Cir. 2014) for the premise that courts analyzing claims after *Reichle* have repeatedly granted qualified immunity based on the "uncertainty for officers rooted in the Supreme Court's acknowledgment that the law is not clearly established." See Def. Mot. at 3. But Defendants' claim and citations are misleading. Each of the two cases cited by

Defendants involve incidents that occurred before *Howard* was decided in 2011.[5] Thus, the grant of qualified immunity in *Wilson* and *Moral* was not a result of *Reichle's* impact on incidents occurring after 2011, but only *Reichle's* impact on cases that occurred before *Howard. Howard* clearly established the law in this Circuit as of 2011. Thus, *Howard* enables Plaintiff to assert a clearly established right to retaliatory arrest regardless of the existence of probable cause, today.

WHEREFORE, for all the foregoing reasons, Plaintiff respectfully requests that this Court DENY Defendants' Motion to Dismiss.

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[5] The date of the underlying incident for *Wilson* occurred on July 13, 2009; the complaint for *Moral* was filed November 1, 2010.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2018 I electronically filed the foregoing **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF systems which is expected to send notification of such filing to the following e-mail addresses:

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