APPENDIX

Appendix A

Summary Order of The United States Court of Appeals for The Second Circuit Affirming Dismissal

SUMMARY ORDER

CHARLES MEYERS, JOHN BAKER, JUSTIN STREKAL, MILES WALSH,

Plaintiffs-Appellants,

v.

CITY OF NEW YORK, MICHAEL R. BLOOMBERG, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS FORMER MAYOR OF THE CITY OF NEW YORK, CHIEF OF DEPARTMENT JOSEPH J. ESPOSITO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, NYPD COMMISSIONER RAYMOND KELLY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY,

Defendants-Appellees.

19-892

Appeals from the United States District Court for the Southern District of New York in

No. 1:14-cv-9142 (ALC), Judge Andrew L. Carter.

Decided: April 30, 2020

PRESENT:

RALPH K. WINTER,

RICHARD C. WESLEY,

RICHARD J. SULLIVAN,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York (Carter, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiffs-Appellants appeal the district court's orders and judgment dismissing Plaintiffs' 42 U.S.C. § 1983 claims in favor of the City of New York (the "City"), former mayor Michael Bloomberg (the "Mayor"), former New York Police Department ("NYPD") Commissioner Raymond Kelly, former Chief of Department of the NYPD Joseph J. Esposito, and individual officers employed by the NYPD (collectively with the City, the Mayor, Kelly, and Esposito, "Defendants"). We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision.

Between September 2011 and November 2011, a group of protestors known as "Occupy Wall Street" started a demonstration to protest what they saw as rising economic inequality and the improper influence of corporations on government. To amplify that message, hundreds of protestors, Plaintiffs among them, took up residence in Zuccotti Park (the "Park"), a privately-owned plaza in Manhattan's Financial District.

Over the course of many weeks, the protestors erected tents and other structures – which Defendants say violated the City's sanitation laws – and limited the public's access to the Park. In time, crime and hazardous conditions began to proliferate, including the use of gasoline and diesel generators near large quantities of flammable materials.

On November 15, 2011, NYPD officers ordered all persons present in the Park to leave with their personal belongings or face arrest. While many protestors complied with the dispersal order, approximately 150 (including Plaintiffs) refused to leave and were subsequently arrested. Plaintiffs thereafter sued, alleging violations of their First, Fourth, and Fourteenth Amendment rights. Ultimately, the district court entered judgment on the pleadings in favor of Defendants, finding that Plaintiffs had failed to allege a constitutional violation. This appeal followed.

"We review *de novo* a district court's decision on a motion to dismiss or for judgment on the pleadings, accepting all factual allegations as true and drawing all reasonable inferences in the plaintiff's favor." *Hogan v. Fischer*, 738 F.3d 509, 515 (2d Cir. 2013). In so doing, we may consider "the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case." *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (quoting *Roberts v. Babkiewicz*, 582 F.3d 418, 419 (2d Cir. 2009)). "A complaint is [also] deemed to include . . . materials incorporated in it by reference[] and documents that, although not incorporated by

reference, are integral to the complaint." *Id.* (internal quotation marks omitted).

Discussion

Though Plaintiffs set forth a number of different grounds for relief, the gravamen of their claims is that the NYPD's dispersal order, and the arrests that followed, were part of an unlawful scheme to muzzle the protestors and deprive them of their right to remain in the Park. Upon review, we conclude that the district court properly granted judgment on the pleadings in favor of Defendants because Plaintiffs have failed to plead any cognizable constitutional violations.

I. False Arrest and Malicious Prosecution

"Probable cause is a complete defense to a constitutional claim of false arrest" and "continuing probable cause is a complete defense to a constitutional claim of malicious prosecution." *Betts v. Shearman*, 751 F.3d 78, 82 (2d Cir. 2014). "Probable cause exists when 'the facts and circumstances within . . . the [police] officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested.'" *Kass v. City of New York*, 864 F.3d 200, 206 (2d Cir. 2017) (quoting *Marcavage v. City of New York*, 689 F.3d 98, 109 (2d Cir. 2012)). To determine whether probable cause exists, we must "examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause."

Marcavage, 689 F.3d at 109 (quoting *Maryland v. Pringle*, 540 U.S. 366, 371 (2003)).

The record makes plain that the NYPD officers had probable cause to arrest Plaintiffs for, among other offenses, disorderly conduct under N.Y. Penal Law § 240.20(6) and trespass under N.Y. Penal Law § 140.05, after Plaintiffs refused to leave the Park following the dispersal order.

As an initial matter, we conclude that the dispersal order was lawful because it was intended to promote several legitimate governmental goals and was therefore not arbitrary. *See Kass*, 864 F.3d at 212; *see also Crenshaw v. City of Mount Vernon*, 372 F. App'x 202, 206 (2d Cir. 2010). The City had a legitimate interest in ensuring that the Park remained accessible to all members of the public – not just the protestors – and free of congestion. *See Kass*, 864 F.3d at 208; *Int'l Action Ctr. v. City of New York*, 587 F.3d 521, 527 (2d Cir. 2009); *see also Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 298 (1984) (acknowledging that "the Government [need not] tolerate" demonstrations that render parks "partial[ly] inaccessib[le] to other members of the public"). In addition, the City had a significant interest in clearing the Park of unlawful structures, *Betancourt v. Bloomberg*, 448 F.3d 547, 553–54 (2d Cir. 2006); *see also Gersbacher v. City of New York*, No. 14-cv-7600 (GHW), 2017 WL 4402538, at *7–8 (S.D.N.Y. Oct. 2, 2017) (acknowledging that N.Y.C. Admin. Code § 16-122(b), which prohibits the erection of "shed[s], building[s] or other obstruction[s]" in public spaces, applies to the Park), and mounting fire hazards, *Marcavage*, 689 F.3d at 105 ("The government interest in security is . . . significant.").

Plaintiffs' refusal to comply with that lawful dispersal order supplied probable cause to arrest them for disorderly conduct. Even in the early morning, it was entirely reasonable for the arresting officers to assume that nearly 150 protestors refusing to leave a public area in downtown Manhattan would risk "public inconvenience." *Kass*, 864 F.3d at 211; *see also People v. Weaver*, 16 N.Y.3d 123, 128 (2011) ("We have made clear that a defendant may be guilty of disorderly conduct regardless of whether the action results in public inconvenience, annoyance or alarm if the conduct recklessly creates a risk of such public disruption."). In any event, the NYPD also had probable cause to arrest Plaintiffs for trespassing once they refused to leave the Park after being ordered to do so. *See Williams v. Town of Greenburgh*, 535 F.3d 71, 79 (2d Cir. 2008); *Berger v. Schmitt*, 91 F. App'x 189, 190 (2d Cir. 2004) ("[U]nder New York law it is unlawful to remain on the premises after being personally given a lawful order to depart.").

II. Retaliatory Arrest and First Amendment Discrimination

"The existence of probable cause defeats a First Amendment claim premised on the allegation that defendants arrested a plaintiff based on a retaliatory motive." *Caravalho*, 732 F. App'x at 23 (citing *Fabrikant v. French*, 691 F.3d 193, 215 (2d Cir. 2012)). Though a narrow exception exists where there is "objective evidence" that the police refrained from arresting similarly situated people not engaged in speech, *Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019), no such facts were alleged here. As Plaintiffs admit, the NYPD arrested "everyone who remained in the [P]ark" following the dispersal order. Pls.' Br. at 35.

Plaintiffs fair no better in trying to classify the City's temporary closure of the Park as discriminatory. In public fora, "the government may apply content-neutral time, place, and manner restrictions . . . [that] are 'narrowly tailored to serve a significant government interest'" so long as "'ample alternative channels of communication' are available." *Kass*, 864 F.3d at 208 (quoting *Zalaski v. City of Bridgeport Police Dep't*, 613 F.3d 336, 341 (2d Cir. 2010)). Assuming that the Park is such a public forum, the City's temporary closure satisfied these requirements.

First, the order was content neutral; just because protestors were the only ones impacted does not change that fact. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 762–63 (1994). Second, as described above, the dispersal order was motivated by significant City interests, including the need to address mounting fire hazards and reduce congestion. Third, the dispersal order was appropriately tailored to achieve those interests and the City was not required to use the absolute "least restrictive or least intrusive means" possible. *Caravalho*, 732 F. App'x at 23 (quoting *Marcavage*, 689 F.3d at 106). Lastly, the dispersal order left open ample alternative channels for speech: the protestors were free to exercise their rights in any other public area within the vicinity of the Park (or even to return to the Park after it was cleaned).

III. Eviction from the Park Without Due Process

To assert a due process claim, a plaintiff must show that he has been "deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (quoting U.S.

Const. amend. XIV § 1). Such an interest must be "*individual* in nature." *Harrington v. County of Suffolk*, 607 F.3d 31, 34 (2d Cir. 2010). "Thus, where the 'intended beneficiaries' of a particular law 'are entirely generalized,' . . . the law does not create a property interest protected by the Due Process Clause." *Id.* at 34–35.

Here, Plaintiffs claim that they had a protected interest to remain in the Park because of an "easement" created by a City zoning resolution, Pls.' Reply at 11, and because the Mayor "publicly announced that so long as the camping demonstrators continued to obey the law they must and would be allowed to stay in the [P]ark," App'x 89. Neither source created an individualized right to remain in the Park, let alone to do so while flouting City rules. The City's zoning laws granting access to the Park "run[] to the public generally;" "[s]uch universal benefits are not property interests protected by the Due Process Clause." *Harrington*, 607 F.3d at 35 (internal quotation marks omitted). And setting aside whether the Mayor's general statement could even create an individualized entitlement, Plaintiffs ignore the Mayor's qualification that they could remain in the Park only so long as they obeyed the law. Since Plaintiffs refused to comply with a lawful dispersal order – necessitated in part by the protestors' own habitual violation of City rules – the Mayor's statement provides them with no basis for asserting a property interest in remaining permanently at the Park.

Conclusion

We have reviewed the remainder of Plaintiffs' arguments and find them to be without merit.

Accordingly, we AFFIRM the judgment of the district court.

Appendix B

Order of The United States District Court for The Southern District of New York Dismissing Municipal Defendant City of New York

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF NEW YORK

CHARLES MEYERS, ET AL.,	:	
Plaintiffs,	:	1:14-cv-09142 (ALC)
-against-	:	
THE CITY OF NEW YORK, ET AL.,	:	OPINION & ORDER
Defendants.	:	

ANDREW L. CARTER, JR., United States District Judge:

Plaintiffs Charles Meyers, John Baker, Justin Strekal, and Miles Walsh, who were Occupy Wall Street protestors, bring this putative class action pursuant to 42 U.S.C. § 1983 against Defendant City of New York for allegedly evicting Plaintiffs from Zuccotti Park and arresting them in violation of their First, Fourth, and Fourteenth Amendment rights. Am. Compl., ECF No. 48. Parties now cross move for judgment on the pleadings under Fed. R. Civ. P. 12(c). After considering parties' motions, Defendant's Motion for Judgment on the Pleadings is GRANTED;

Plaintiffs' motion is DENIED as moot. ECF Nos. 109, 106.

BACKGROUND

I. Statement of Facts

As the Court has described the facts in greater detail in its earlier opinions, only a brief overview is provided here. Between September and October of 2011, Plaintiffs began residing in Zuccotti Park, a privately-owned public space in New York City's financial district, as part of the Occupy Wall Street movement. *Id.* at ¶¶155-181. Zuccotti Park was developed as a result of a bargain between U.S. Steel and the City whereby the City provided U.S. Steel a Special Permit to build an office tower without regard to height and setback regulations in exchange for U.S. Steel developing and maintaining a permanent open park. *Id.* at ¶¶48-50. On October 10, 2011, the Wall Street Journal published an article regarding the protestors' right to occupy Zuccotti Park, which included then-Mayor Michael Bloomberg's position on the issue. *Id.* at Ex. G. Mayor Bloomberg stated, *inter alia,* that "'as long as [the protestors] obey the laws, we'll allow them to [express themselves] ... If they break the laws, then, we're going to do what we're supposed to do: enforce the laws.'" *Id.*

On or about 1:00 a.m. of November 15, 2011, NYPD officers, via bullhorn, ordered all individuals in the park to leave and to take their personal possessions, or to face arrest. *Id.* at ¶¶151, 197. The NYPD's actions were allegedly motivated by the unsafe conditions that had developed in Zuccotti Park due to protestors prolonged occupation, including fire hazards and criminal activity. Def.'s Mem. Supp. Mot.

J. Pleadings 3, ECF No. 111. Additionally, the owners of Zuccotti Park at the time of the occupation, Brookfield Properties, requested the City's assistance in temporarily relocating the occupants of Zuccotti Park on the understanding that Zuccotti Park would be reopened to the public once safe conditions were restored. *Id.* at 3-4.

After ordering the occupants of Zuccotti Park to disperse, NYPD officers and other City workers allegedly destroyed tents "using dangerous edged tools" and "seized all of the property [Plaintiffs] had on their persons, including their household property." Am. Compl. ¶¶152-154, ECF No. 48. Approximately 148 of the 350 protestors, including Plaintiffs, chose not to comply with the NYPD's dispersal order, choosing instead to lock their arms together while sitting on the ground and refusing to leave. Def.'s Mem. Supp. Mot. J. Pleadings 5-6, ECF No. 111. In response, NYPD officers arrested Plaintiffs and charged them with trespass, obstruction of governmental administration, and disorderly conduct. Def.'s Mem. Supp. Mot. J. Pleadings 6, ECF No. 111.

II. Relevant Procedural History

Defendants had previously moved to dismiss the complaint for failure to state a claim, which the Court granted in part and denied in part. ECF No. 47. After remand by the Second Circuit regarding the qualified immunity of the individual Defendants named in the case, the Court granted Defendants' Motion to Dismiss as to the individual Defendants leaving the City of New York as the sole Defendant. ECF Nos. 68, 78. Defendant City of New York answered the Amended Complaint and, in its answer, asserted the affirmative defense of probable cause.

ECF No. 93. Plaintiff has now moved for judgment on the pleadings per Fed. R. Civ. P. 12(c) on Defendant's affirmative defense of probable cause, which Plaintiff argues Defendant cannot properly assert as a matter of law to Plaintiffs' Fourteenth Amendment claims. ECF No. 106. Conversely, Defendant has cross-moved for judgment on the pleadings for Plaintiffs failure to allege municipal liability, which Defendant argues warrants dismissal of the case as a matter of law. ECF Nos. 109.

STANDARD OF REVIEW

"When deciding Rule 12(c) motions for judgment on the pleadings, a court employs the standard that applies to motions to dismiss a complaint under Rule 12(b)(6). Thus, a court must accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the non-movant." *Walker v. Sankhi,* 494 F. App'x 140, 142 (2d Cir. 2012) (citing *L-7 Designs, Inc. v. Old Navy, LLC,* 647 F.3d 419,429 (2d Cir. 2011)). This tenet, however, is "'inapplicable to legal conclusions.'" *Martine's Serv. Ctr., Inc. v. Town of Wallkill,* 554 F. App'x 32, 34 (2d Cir. 2014) (citing *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)). Simply put, to survive a Rule 12(c) motion, "[t]he complaint must plead 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* Finally, "[o]n a 12(c) motion, the court considers the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case." *L-7 Designs, Inc.,* 647 F.3d at 422.

Here, the Court need only decide Defendant's motion because a finding that Plaintiffs' Complaint does not provide factual content from which the Court can infer that Defendant, a municipality, is liable, would warrant a wholesale dismissal of the Complaint. The foregoing analysis will show that Defendants are entitled to judgment on the pleadings because Plaintiffs have not plead a constitutional violation, which in tum renders Plaintiffs' Motion for Judgment on the Pleadings as to the affirmative defense of probable cause moot.

ANALYSIS

Defendant's primary contention is that Plaintiffs have failed to meet the standard under the law to allege municipal liability; namely, Plaintiffs have not adequately pleaded either that Defendant had a formal policy that led to a constitutional violation, or that Defendant's failure to train officers led to a constitutional violation. Def.' s Mem. Supp. Mot. J. Pleadings 9-13, ECF No. 111. Defendant further asserts that regardless of whether the Court finds that Plaintiffs have not plead municipal liability, Plaintiffs have failed to plead a constitutional violation, which absolves the City of any liability. *Id.* at 13-14.

In *Monell v. Dep 't of Soc. Servs. of City of New York,* the Supreme Court held that a municipality can be liable under § 1983 where the "action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. 658, 690 (1978). Thus, to successfully lodge a claim against a municipality for the actions of a public official, a plaintiff must prove: "(1) actions taken

under color of law; (2) deprivation of a constitutional or statutory right; (3) 4 causation; (4) damages; and (5) that an official policy of the municipality caused the constitutional injury." *Roe v. City of Waterbury,* 542 F.3d 31, 36 (2d Cir. 2008).

In the absence of an official policy, *Monell* liability can also attach based on a single decision by a municipal policymaker so long as a plaintiff can show (1) "that the official had final policymaking power;" (2) that the challenged action was within the "official's area of policymaking authority;" and (3) that the policymaker had "final authority," meaning that her "decisions, at the time they are made, may fairly be said to represent official policy." *Id.* at 37.

The Supreme Court has been clear, however, that a municipality "cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell,* 436 U.S. at 659. As "governmental bodies can act only through natural persons ... these governments should be held responsible when, and only when, their official policies cause their employees to violate another person's constitutional rights." *City of St. Louis v. Praprotnik,* 485 U.S. 112, 122 (1988). In other words, "a plaintiff must demonstrate that, through its deliberate conduct, the municipality was the moving force behind the alleged injury." *Roe,* 542 F.3d at 37.

Finally, even if there was a municipal policy or a policymaker whose decision led to a plaintiffs injuries, such injury provides no basis for liability unless it amounts to a constitutional violation. *City of Los Angeles v. Heller,* 475 U.S. 796, 799, 106 S. Ct. 1571, 1573, 89 L. Ed. 2d 806 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the

departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point."); *Matican v. City of New York,* 524 F.3d 151, 154 (2d Cir. 2008) (holding that if an officer's actions did not violate the plaintiffs constitutional rights, the "City cannot be liable to [the plaintiff] under § 1983, regardless of whether the officers acted pursuant to a municipal policy or custom."); *Fappiano v. City of New York,* 640 F. App'x 115, 121 (2d Cir. 2016) ("In the absence of an underlying constitutional violation by a city employee there is no municipal liability under *Monell."); Burgess v. DeJoseph,* 725 F. App'x 36, 40 (2d Cir. 2018) (affirming dismissal of the plaintiffs claims against a municipality because there "no underlying constitutional violation .... ").

Accordingly, the Court will first consider whether Plaintiff has sufficiently pleaded that an official policy or the decision of a policymaker motivated the actions of the NYPD in this case. Next, the Court will determine if Defendant's officers' actions rise to the level of a constitutional violation. Based on an analysis of parties' briefs and the underlying supporting documents of which the Court takes judicial notice, the Court holds Plaintiffs' *Monell* claim fails because there is no constitutional violation alleged.

I. Policymaker Decision

Plaintiffs assert in their opposition papers that they have sufficiently plead municipal liability under the policymaker prong. 1 [1]Pls.' Mem. Opp. Def.'s Mot.

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[1]Plaintiffs do not argue in their opposition papers, nor can they, that there is any official custom or policy that provides the basis

J. Pleadings 16-17, ECF No. 112. Specifically, Plaintiffs point to their pleadings that Mayor Bloomberg, NYPD Commissioner Raymond Kelly, and NYPD Chief of Department Joseph Esposito approved the allegedly unconstitutional acts at issue in this case. *Id.; see also* Compl. ¶¶17-19, 199,216, ECF No. 48. Plaintiffs also argue that in deciding Defendant's Motion to Dismiss, ECF No. 47, the Court already held that the facts in the Complaint were "adequate to establish municipal liability." Pls.' Mem. Opp. Def.'s Mot. J. Pleadings 16-17, ECF No. 112. *See Meyers v. City of New York,* No. 1 :14-CV-9142 ALC, 2015 WL 6503825, at *17 (S.D.N.Y. Oct. 27, 2015), *vacated on other grounds,* 675 F. App'x 93 (2d Cir. 2017) ("Because Meyers alleges that the former mayor devised and ordered the OWS demonstrators' allegedly unconstitutional arrests, and because the

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for Monell liability here. Indeed, the Complaint does not identify any official policy or custom; it only asserts in conclusory fashion that the alleged constitutional violations resulted from city policy that mandated false arrests and malicious prosecutions of persons engaged in First Amendment activity. See Compl. ¶¶211-216, ECF No. 48. Courts have routinely held such general assertions to be insufficient to survive a motion for judgment on the pleadings. See, e.g., Cuevas v. City of New York, No. 07 CIV. 4169 (LAP), 2009 WL 4773033, at *4 (S.D.N.Y. Dec. 7, 2009) ("Baldly asserting that Plaintiff's injuries are the result of the City's policies does not show this Court what the policy is or how that policy subjected Plaintiff to suffer the denial of a constitutional right."); Brodeur v. City of New York, No. 99 CIV. 651 (WHP), 2002 WL 424688, at *6 (S.D.N.Y. Mar. 18, 2002) ("The complaint flatly asserts that the City had a policy of stifling, discouraging and suppressing critics of the former Mayor and his administration by arresting them. However, absent from the complaint are specific factual allegations sufficient to establish that a municipal policy or custom caused Brodeur's alleged injury.").

mayor may be treated as a policymaker without proof of his specific powers and responsibilities, the *Monell* claim against the City of New York survives.").

After taking judicial notice of all the documents in this case available to the Court, the Court maintains its previous holding that Plaintiffs' have sufficiently alleged that a policymaker with final decision-making authority made a decision that represented official policy. The Affirmation of Deputy Mayor Cas Holloway confirms that former Mayor Bloomberg made the decision to remove Plaintiffs from the park, noting that the Mayor issued a statement regarding the removal a few hours after it had taken place. Decl. of Brachah Goykadosh (hereinafter "Goykadosh Decl.") Ex. C. ¶4, ECF No. 110-3. In his statement, which the Court also takes judicial notice of, Mayor Blomberg asserts in no uncertain terms that the "final decision to act was [his]." *Statement Of Mayor Michael R. Bloomberg On Clearing And Re-opening Of Zuccotti Park,* https://wwwl.nyc.gov/office-of-the-mayor/news/410-11/statement-mayormichael-bloomberg-clearing-re-opening-zuccotti-park (last visited January 31, 2019). Given that Mayor Bloomberg did in fact devise and order the removal of Plaintiffs, and given that he had final decision-making authority, his decision can be treated as official policy for the purposes of *Monell* liability. The City, however, is ultimately not liable under *Monell* as Plaintiffs have failed to allege a constitutional violation.

II. Constitutional Violation

a. First and Fourth Amendment Claims

Defendant is entitled to judgment on the pleadings as to Plaintiffs' First and Fourth Amendment claims of false arrest, malicious prosecution, and First Amendment retaliation because there was probable cause for Plaintiffs arrests. Defendant is also entitled to judgment on Plaintiffs' First Amendment discrimination claim because Defendant's decision to temporarily close that park was a constitutional time, place, and manner restriction.

"The First Amendment, applicable to the States through the Fourteenth Amendment, provides that 'Congress shall make no law ... abridging the freedom of speech.'" *Virginia v. Black,* 538 U.S. 343, 358 (2003) (quoting U.S. Const. amend. 1). Moreover, state actors may not take actions in retaliation for individuals exercising their First Amendment rights, i.e., take actions to harm individuals *because* they exercised their First Amendment rights. *Smith v. Campbell,* 782 F.3d 93, 100 (2d Cir. 2015); *Hartman v. Moore,* 547 U.S. 250,256 (2006) ("[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.") (citations omitted).

On the other hand, "[u]nder the Fourth Amendment, made applicable to the States by the Fourteenth Amendment, the people are 'to be secure in their persons ... against unreasonable searches and seizures .... " *Maryland v. Pringle,* 540 U.S. 366,369 (2003) (quoting U.S. Const. amend. IV). This includes protection from false arrest and malicious prosecution. *See Weyant v. Okst,* 101 F.3d 845,852 (2d Cir. 1996) (the Fourth Amendment protects the "right of an individual to be free from unreasonable seizures,

including arrest without probable cause .... "); *Murphy v. Lynn,* 118 F.3d 938, 944 (2d Cir. 1997) (the Fourth Amendment provides the basis for a § 1983 claim that a "criminal prosecution was initiated against [an individual] without probable cause .... "). In this case, Plaintiffs claim that they were lawfully occupying Zuccotti Park, hence their arrests and prosecution for refusing to vacate the park in response to an order by the NYPD allegedly amounted to false arrest, malicious prosecution, and First Amendment retaliation and discrimination. Compl. 53-59, ECF No. 48. Defendant argues their actions were supported by probable cause.

It is well established that probable cause is a complete defense to both First Amendment retaliation and Fourth Amendment false arrest and malicious prosecution claims. *See, e.g., Caravalho v. City of New York,* 732 F. App'x 18, 23 (2d Cir. 2018) (dismissing false arrest and First Amendment retaliation claims against the City of New York and individual officers where the officers had probable cause to arrest six Occupy Wall Street demonstrators who refused to comply with a dispersal order); *Fabrikant v. French,* 691 F.3d 193,215 (2d Cir. 2012) (holding that the plaintiff's "claims of malicious prosecution, unreasonable search and seizure, and First Amendment retaliation fail because defendants had probable cause .... "). The Court holds that Defendant's actions were supported by probable cause thereby defeating Plaintiffs' claims of false arrest, malicious prosecution, and First Amendment retaliation. The Court will consider Plaintiff's First Amendment discrimination claim separately.

[2] 1. False Arrest

To prevail on a claim of false arrest under New York state law a plaintiff must allege that "(1) the defendant intended to confine him [or her], (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged." *Sinagra v. City of New York,* 127 A.D.3d 729, 730 (N.Y. App. Div. 2015); *accord Jocks v. Tavernier,* 316 F.3d 128, 134 (2d Cir. 2003). As already noted, probable cause is a complete defense to false arrest. In this

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[2] In its previous opinion, the Court found that the officers in this case entitled to qualified immunity because the officers had arguable probable cause for the arrests. *Meyers v. City of New York,* No. 14-CV-9142 (ALC), 2017 WL 4803922, at *1 (S.D.N.Y. Oct. 20, 2017), *appeal dismissed* (Jan. 10, 2018). The Court reached this conclusion because Plaintiffs' belief that they need not comply with the officers' dispersal order rested on a legal theory that was not clearly established at the time of arrest, and hence, it could not be said that "any reasonable officer would understand that an arrest under the circumstances would be unlawful." *Id.* at *2. Though the Court already concluded there was no constitutional violation in this case due to existence of arguable probable cause, the Second Circuit has held that "the entitlement of the individual municipal actors to qualified immunity because at the time of their actions there was no clear law or precedent warning them that their conduct would violate federal law is also irrelevant to the liability of the municipality .... Municipalities are held liable if they adopt customs or policies that violate federal law and result in tortious violation of a plaintiff's rights, regardless of whether it was clear at the time of the adoption of the policy or at the time of the tortious conduct that such conduct would violate the plaintiff's rights." *Askins v. Doe No. I,* 727 F.3d 248,254 (2d Cir. 2013). In light of the holding in *Askins,* the Court must now analyze whether the facts warrant a finding of probable cause, which would absolve the City of liability under *Monell* for Plaintiffs' false arrest, malicious prosecution, and First Amendment retaliation claim.

context, "[p]robable cause exists where the facts and circumstances within ... the officers' knowledge and of which they had 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 by the person to be arrested." *Marcavage v. City of New York,* 689 F.3d 98, 109-10 (2d Cir. 2012) (citing *Dunaway v. New York,* 442 U.S. 200,208 n.9 (1979)). Practically speaking, this requires courts to "look at the facts as the officers knew them in light of the specific elements of the offense [while] considering the totality of the circumstances and the perspective of a reasonable police officer in light of his training and experience." *Caravalho,* 732 F. App'x at 22 (citing *Gonzalez v. City of Schenectady,* 728 F.3d 149, 155 (2d Cir. 2013)) (citing *United States v. Delossantos,* 536 F.3d 155, 159 (2d Cir. 2008)).

Defendant arrested Plaintiffs for disorderly conduct, trespass, and obstruction of governmental administration when Plaintiffs refused to vacate Zuccotti Park in response to Defendant's dispersal order. Defendant argues that it had probable cause for arresting Plaintiffs for each of these offenses, Plaintiff asserts otherwise. The Court concurs with Defendant and considers each offense in tum below.

1. *Disorderly Conduct*

The Court first holds that Defendant had probable cause to arrest Plaintiffs for disorderly conduct. Disorderly conduct "consists of the following elements: the individual (1) congregated with other persons in a public place; (2) was given a lawful order of the police to disperse; (3) refused to comply with that order; and (4) acted with intent to cause or

recklessly created a risk of public inconvenience, annoyance or alarm." *Kass v. City of New York,* 864 F.3d 200,211 (2d Cir.), *cert. denied sub nom. Kass v. City of New York,* N.Y., 138 S. Ct. 487 (2017); New York Penal Law§ 240.20(6). Plaintiffs dispute that the third and fourth elements were present in the instant case. The Court disagrees-even drawing all reasonable inferences in favor of Plaintiffs, the facts and circumstances suggest that a Defendant's officers had sufficient information to warrant a reasonable belief that Plaintiffs were violating the disorderly conduct statute.

a. Lawful Dispersal Order

Under N.Y. Penal Law§ 240.20(6), an officer's dispersal order is unlawful if it "was purely arbitrary and not calculated in any way to promote the public order." *Crenshaw v. City of Mount Vernon,* 372 F. App'x 202,206 (2d Cir. 2010); *Kass,* 864 F.3d at 212 (accord). The facts here point to a dispersal order that was calculated to promote the public order and was not purely arbitrary. Defendant asserts that the dispersal order was issued because (1) conditions in the Park constituted a fire hazard; (2) there were increasing rates of criminal activity in the park; and (3) Brookfield Properties requested that the City temporarily remove occupants to redress these unsafe conditions. Def.'s Mem. Supp. Mot. J. Pleadings 2-4, ECF No. 111. The Court finds that any of these three circumstances would justify Defendant's dispersal order.

The City first notes that there were combustible items, smoking, and obstructions that created a fire hazard in Zuccotti Park. Goykadosh Decl., Ex. C. ¶7-8, ECF No. 110-3. This finding was made, in part, by

visual inspections conducted by Deputy Mayor Holloway the day prior to the removal of occupants as well as by inspections by the Fire Department ("FDNY"), who issued a fire code violation order to Brookfield Properties due to these conditions. *Id.* Plaintiffs argue, however, that the Fire Department was previously able to remove fire hazards without requiring dispersal of the demonstrators, and that the FDNY violation orders were sham ex post facto orders created by the City to cover their unlawful acts, vitiating the argument for probable cause. Pls.' Opp. Def. Mot. J. Pleadings 12, 14-15, ECF No. 112. Specifically, Plaintiffs note that the violation orders were dated November 15, 2011, the same day the park was cleared and cleaned at 1 :00 a.m., and despite this, state that the park was filed with dangerous structures and personal property. *Id.* at 14-15.

There is undoubtedly ambiguity regarding the timing of the FDNY violation order and the City did not provide an explanation in response to Plaintiffs' argument. Yet this alone does not mean the City's conclusion that there was a fire hazard necessitating the removal occupants was arbitrary and not in furtherance of promoting public order. For example, Deputy Mayor Holloway's visual inspection, which confirmed there were combustible items, smoking, and other obstructions, provided one basis for the City to conclude that fire hazards existed in Zuccotti Park. Goykadosh Decl., Ex. C. ¶7, ECF No. 110-3. Additionally, FDNY had previously removed gasoline and diesel generators because there were safety concerns arising from their "proximity to a large quantity of flammable materials." *Id.* at ¶20. This provides further circumstantial evidence supporting Holloway and the City's conclusion that there were in

fact an abundance of flammable materials in Zuccotti Park. Though FDNY took steps to redress the risk a few weeks prior to the removal of the occupants, this does not mean the fire hazard was sufficiently minimized or that the risk of fires did not increase in the weeks following the initial steps taken by FDNY.

Regardless of how strong the City's basis was for concluding that there was a fire hazard, the City reasonably concluded that the increase in criminal activity in Zuccotti Park warranted a dispersal order. According to Holloway, "what was before a park with little to no crime [saw] approximately 73 misdemeanor and felony complaints and approximately 50 arrests since the movement began, and people who [had] a known history of violent interactions with the police [had] been observed." *Id.* at ¶18. Holloway also noted that "[m]akeshift items that can be used as weapons, such as cardboard tubes with metal pipes inside, had been observed ... and, after the march on the Brooklyn Bridge, knives, mace and hypodermic needles were observed discarded onto the roadway." *Id.* at ¶17. Plaintiffs provide no response regarding why the increased rates of crime in Zuccotti Park coupled with the potentially dangerous items in the possession of some protestors did not provide a valid basis for a dispersal order. Given the appreciable risk to public safety, the City's dispersal order was calculated to uphold the public order, meaning the order was not arbitrary.

Finally, the City was acting, in part, at the behest of Brookfield Properties, which provides another basis for its dispersal order. On November 14, 2011, Brookfield expressed concern for "public safety and the fact that it [could not] operate the Park as it

[was] required under its special permit" and requested assistance in removing occupants and their belongings so that Zuccotti Park could be "restored to its intended use and reopened to all." *Id.* at ¶23. It is undisputed that Brookfield is required to maintain Zuccotti Park as a public space open to all at all times, and Brookfield believed that it was unable to meet its obligations under the Special Permit while protestors continued to occupy Zuccotti Park. Plaintiffs instead assert that Brookfield did not take any legal steps prior to November 15, 2011 to meet its obligations and did not obtain permission from the City Planning Commission ("CPC") for a nighttime closure as Plaintiffs claim Brookfield was required to under applicable zoning regulations. Pls. Opp. M. J. Pleadings 12, ECF No. 112; N.Y.C. Zoning Resolution§ 37-727 ("All public plazas shall be accessible to the public at all times, except where the City Planning Commission has authorized a nighttime closing."). Plaintiffs arguments lack merit.

The Holloway Affirmation clarifies that in "mid-October, at the request of Brookfield Properties, the City worked with Brookfield to facilitate Brookfield's ability to remove demonstrators and their belonging on a temporary and section-by-section basis. Demonstrators were given approximately 24-hours advance notice of Brookfield's intent to conduct the cleaning effort." Goykadosh Decl., Ex. C. ¶14, ECF No. 110-3. In other words, Brookfield did attempt to take legal steps to meet its obligations under the Special Permit; but, in response to the notice that this cleaning would take place, 2000 protestors overflowed Zuccotti Park and made it "difficult and dangerous for the Police Department to attempt to remove people under those conditions." *Id.* at ¶15.

Next, Plaintiffs argument that only the City Planning Commission, not Brookfield, could have issued a nighttime closure is an incorrect interpretation of the zoning regulations. Under § 37-623 of the N.Y.C. Zoning Regulations, "[t]he City Planning Commission may, upon application, authorize the closing during certain hours of an existing plaza." The regulation categorizes "nighttime closings" as related to "hours of access," which leads the Court to conclude that permission is needed where a property owner seeks to limit the hours the public can access a public plaza generally. This regulation does not speak to Brookfield's prerogative to request police assistance to remove persons who hamper Brookfield's ability to maintain a public space or those who create unsafe conditions for others. Moreover, Plaintiffs' interpretation of the regulation is nonsensical. Under Plaintiffs' interpretation, Brookfield could avoid violating the regulation by closing the park during the day to remove occupants. Considering that Brookfield was concerned about the conditions at Zuccotti Park, which was supported by the City's own investigation of the premises, the decision to issue a dispersal order was lawful because it was calculated to promote the public order and thus, not arbitrary.

b. Public Inconvenience

Plaintiffs assert that the fourth element of disorderly conduct, that Plaintiffs acted with intent to cause or recklessly create a risk of public inconvenience cannot be met because there were no members of public present during the arrests to inconvenience. Courts have interpreted the fourth element of disorderly conduct to require proof of that the conduct at issue had (1) public ramifications, and

(2) was intended to disrupt. *Caravalho, v. City of New York,* No. 13CV4174PKCMHD, 2016 WL 1274575, at *7 (S.D.N.Y. Mar. 31, 2016) (citing *Provost v. City of Newburgh,* 262 F.3d 146, 157 (2d Cir. 2001)).

To assess whether conduct has public ramifications, courts consider "the time and place of the episode under scrutiny; the nature and character of the conduct; the number of other people in the vicinity; whether they are drawn to the disturbance and, if so, the nature and number of those attracted; and any other relevant circumstances." *People v. Weaver,* 16 N.Y.3d 123, 128 (2011). The New York Court of Appeals has clarified that "there is no per se requirement that members of the public must be involved or react to the incident. Rather, the attention generated by a defendant's activities, or the lack thereof, is a relevant factor to be considered .... " *Id.* As to intent, the statute does not require that the conduct at issue result "in public inconvenience, annoyance or alarm if the conduct recklessly creates a risk of such public disruption." *Id.* (citing *People v. Todaro,* 26 N.Y.2d 325, 329 (1970)); *Caravalho,* 2016 WL 1274575, at *7 (accord). Plaintiffs primarily contest whether their actions had public ramifications.

The Court holds that Plaintiffs' conduct both had public ramification and was intended to disrupt. Plaintiffs' assertion that there is no evidence on the record that members of the public were present during the arrest is of no moment. At bottom, Plaintiffs refused to follow a dispersal order in a presumptively public space. Even if Plaintiffs are correct that no members of the public were present, it was not unreasonable for police officers to believe there could

be bystanders present in the area even at 1 :00 a.m. given that Zuccotti Park was widely-publicized as the epicenter of a significant political demonstration. *See generally Zalaski v. City of Hartford,* 723 F.3d 382, 393 (2d Cir. 2013) ("[B]ecause the practical restraints on police in the field are greater with respect to ascertaining intent ... , the latitude accorded to officers considering the probable cause issue in the context of mens rea crimes must be correspondingly great.") (citation omitted).

Furthermore, it is not clear why the Plaintiffs do not consider the 202 protestors who followed the dispersal order, who did not seek to cause unrest, who did not risk arrest, and who were not arrested to be members of the public inconvenienced by Plaintiffs actions. As the facts strongly suggest that Plaintiffs conduct had public ramifications and was intended to disrupt, even if it failed to do so, the final element of disorderly conduct was present. Accordingly, the City had probable cause to arrest Plaintiffs for disorderly conduct.

2. *Trespass*

The Court next holds that Defendant had probable cause to arrest Plaintiffs for trespass. To support a prima facie case of criminal trespass in a public place, three elements must be met: "(1) that a lawful order excluding the defendant from the premises was issued, (2) that the order was communicated to the defendant by a person with authority to make the order, and (3) that the defendant defied that order." *Carpenter v. City of New York,* 984 F. Supp. 2d 255,265 (S.D.N.Y. 2013) (citing *People v. Munroe,* 18 Misc. 3d 9, 11, (App. Term 2007)); N.Y. Penal Law § 140.05. The Court has already

concluded that the dispersal order was lawful; Plaintiffs remaining arguments are that Plaintiffs were not sufficiently warned regarding what constituted trespassing and that the officers did not have the authority to issue the dispersal order so there was no probable cause to arrest for trespass. Pls.' Opp. Def. Mot. J. Pleadings. 19-21, ECF No. 112.

Taking the issue of the authority of the police officers first, there is no question that Brookfield, the property owner, granted authority to the NYPD to carry out the removal of protestors. Plaintiffs cite *People v. Dailey* to argue that a property owner, not a police officer, has the authority to order the removal of persons who had a license to be on the property owner's land.[3] 69 Misc. 2d 691, 694 (Co. Ct. 1972). *Dailey,* however, also notes that police officers would be authorized to remove trespassers where they "have specific written authority to speak for an absent owner." *Id.* This was the case here. According to Holloway, Brookfield in a letter dated November 14, 2011 requested "that the City provide necessary assistance in having the tents and other belongings stored at the Park removed, and in having occupants temporarily relocated from the Park on the understanding that after this has occurred the Park will be restored to its intended use and reopened to all." Goykadosh Decl., Ex. C. ¶23, ECF No. 110-3.

On notice, Plaintiffs' argument misses the mark. Plaintiffs claim that they did not have fair

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[3]Dailey appears to be discussing New York law in the context of private rather than public property. The Court, however, need not delve deeper into this analysis, as the City's officers had clear permission to carry out the removal of occupants in this case.

warning that their conduct had become criminal and warranted their arrests. Pls.' Opp. Def. Mot. J. Pleadings 19-20, ECF No. 112. First, there were rules that Brookfield promulgated in September 2011, two months before the removal took place, which gave occupants notice of the types of conduct that Brookfield considered problematic. *See People v. Nunez,* 36 Misc. 3d 172, 180 (Crim. Ct. 2012) ("These rules included a prohibition on (i) camping and the erection of tents and other structures; (ii) lying down on the ground or lying down on benches, sitting areas or walkways in a manner that unreasonably interferes with the use of benches, sitting areas or walkways by others; (iii) the placement of tarps or sleeping bags or other coverings on the property; and (iv) the storage or placement of personal property on the ground, benches, sitting areas or walkways in a manner that unreasonably interferes with the use of such areas by others."). But, more importantly, Plaintiffs were not arrested for violating the rules, but for failing to comply with a valid dispersal order. That is the root of the trespass offense at issue in this case, and that is what provided the officers with probable cause.

To the extent that Plaintiffs claim that not everyone heard the order, this does not hinder a finding of probable cause. The Second Circuit has held that"[o]nce a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." *Panetta v. Crowley,* 460 F.3d 388, 396 (2d Cir. 2006) (citation omitted). After the dispersal order was issued via bullhorn, and officers observed that Plaintiffs and others chose not to leave and instead began locking their arms together to protest the dispersal order, the

officers had a reasonable basis for believing there was probable cause to arrest Plaintiffs. Even if some Plaintiffs had not heard the order, the officers could have reasonably believed from Plaintiffs' decision to lock arms that they heard the order and were refusing to follow it. Considering these facts, the Court finds that there was probable cause for arresting Plaintiffs for trespass.

3. *Obstructing Governmental Administration*

The Court also holds that there was probable cause for arresting Plaintiffs for obstructing governmental administration. A person obstructs governmental administration where she "intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act .... " N.Y. Penal Law§ 195.05. "An individual, therefore, may be convicted under this statute when (1) a public servant is performing an official function; (2) the individual prevents or attempts to prevent the performance of that function by interfering with it; and (3) the individual does so intentionally." *Kass,* 864 F.3d at 207.

Defendant claims that Plaintiffs' choice to erect tents and other structures in Zuccotti park was in contravention of N.Y.C. Admin. Code § 16-122(b), which makes it unlawful for any person "to erect or cause to be erected thereon any shed, building or other obstruction" in a public place. As Plaintiffs refused to allow Defendant to bring Zuccotti Park in line with the administrative code, Defendant argues that its

officers had probable cause to arrest Plaintiffs for obstructing governmental administration. Defendant relies on *Betancourt v. Bloomberg,* 448 F.3d 547, 554 (2d Cir. 2006), where the Second Circuit found that police officers had probable cause to arrest the plaintiff after they "observed him in a cardboard structure large enough to house an adult human being, which he had erected in a public space." Plaintiffs raise two contentions in response to Defendant's claim of probable cause: (1) § 16-122(b) only applies to city-owned property, not to a privately-owned public space such as Zuccotti Park; and (2) the N.Y.C. Administrative Code does not prohibit the use of tents in public spaces, it only regulates their use. Plaintiffs arguments are unavailing.

There is no convincing rationale to exempt Zuccotti Park from § 16-122(b). The statute applies to public places, of which Zuccotti Park is a variant, as Plaintiffs argue in earnest in their Complaint and motion papers. *Gersbacher v. City of New York,* No. 1:14-CV-7600-GHW, 2017 WL 4402538, at *7 (S.D.N.Y. Oct. 2, 2017) (accord). There is nothing in the statute that limits its applicability based upon who has an ownership interest in a public space, and Plaintiffs provide no reason as to why this interpretation should be applied here.

Next, the N.Y.C. Administrative Code provisions that regulate the use of tents in public spaces in circumstances authorized by the city[4] have no bearing on whether another provision of the code,

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[4]*See* Plaza Events, https://wwwl.nyc.gov/site/cecm/permitting/permit-types/plaza-events.page (las accessed January 31, 2019).

such as § 16-122(b), prohibits such use in other circumstances. Here, Plaintiffs did not have permission to erect structures or tents in Zuccotti Park per the rules espoused by Brookfield and certainly did not have permission from the City. *People v. Nunez,* 36 Misc. 3d 172, 180 (Crim. Ct. 2012). Despite this, Plaintiffs and others erected tents, including a medical tent, and other structures during their time at Zuccotti Park. Goykadosh Decl., Ex. C. ¶11-13, ECF No. 110-3. And, the weekend prior to their removal, protestors also allegedly brought in "wooden pallets to elevate their tents and erect a wooden structure .... " *Id.* at ¶7. Plaintiffs do not contest these allegations, all of which point to an attempt to erect structures in contravention of§ 16-122(b). Because Plaintiffs attempted to impede the NYPD from removing the tents and structures that were in violation of § 16-122(b), the NYPD had sufficient probable cause to arrest Plaintiffs for obstructing governmental administration.

ii. Malicious Prosecution & First Amendment Retaliation

For malicious prosecution, a plaintiff must allege "(1) that the defendant initiated a prosecution against the plaintiff, (2) that the defendant lacked probable cause to believe the proceeding could succeed, (3) that the defendant acted with malice, ... (4) that the prosecution was terminated in the plaintiffs favor[, and] (5) a sufficient post-arraignment liberty restraint to implicate the plaintiffs Fourth Amendment rights." *Rohman v. New York City Transit Auth.* (NYCTA), 215 F .3d 208, 215 (2d Cir. 2000) (citations omitted). "To plead a First Amendment retaliation claim a plaintiff must show:

(1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by [plaintiffs] exercise of that right; and (3) the defendant's actions caused him some injury." *Smith v. Campbell,* 782 F.3d 93, 100 (2d Cir. 2015) (citation omitted).

The Second Circuit has held that "in the absence of exculpatory facts which became known after an arrest, probable cause to arrest is a complete defense to a claim of malicious prosecution." *D'Angelo v. Kirschner,* 288 F. App'x 724, 726 (2d Cir. 2008). In other words, so long as there was probable cause to arrest Plaintiffs for each of the crimes for which they were prosecuted, Plaintiffs malicious prosecution will fail in the absence of evidence to the contrary. The Second Circuit has also held that "[t]he existence of probable cause defeats a First Amendment claim premised on the allegation that defendants arrested a plaintiff based on a retaliatory motive." *Caravalho,* 732 F. App'x at 23 (citing *Fabrikant,* 691 F.3d at 215). As the Court has established why probable cause to arrest existed for each offense, Defendant is granted judgment on the pleadings as to Plaintiffs' malicious prosecution and First Amendment retaliation claim.

iii. First Amendment Discrimination

As Zuccotti Park is a public forum "the government may apply content-neutral time, place, and manner restrictions only if they are 'narrowly tailored to serve a significant government interest' and if 'ample alternative channels of communication' are available." *Kass,* 864 F.3d at 208 (citing *Zalaski v. City of Bridgeport Police Dep 't,* 613 F.3d 336,341 (2d Cir. 2010) (per curiam)). Plaintiffs discrimination claim is simply that Defendant's removal of Plaintiffs

could not have been content neutral because (1) police action was only taken against protestors and not Brookfield, who allegedly could have been held accountable by the City for failing to maintain Zuccotti Park in accordance with the Administrative Code; and (2) the occupation of the park was in and of itself Plaintiffs' speech given that the purpose of the movement was to "Occupy Wall Street," ergo removing Plaintiffs was an attempt to stifle said speech. Pls.' Opp. Def. Mot. J. Pleadings 29-30, ECF No. 112.

Drawing all reasonable inferences in favor Plaintiffs, the Court holds that Defendant's decision to remove protestors and temporarily close Zuccotti Park was a content neutral and narrowly tailored restriction. Plaintiffs' argument that Defendant selectively applied police action to protestors is disingenuous when the facts show that Brookfield was cooperating with Defendant to ensure that it could maintain its obligations under the Special Permit. In other words, there was no basis for Defendant to take action against Brookfield and thus, there is no basis to infer that Defendant's restrictions were geared toward the content of Plaintiffs speech.

Furthermore, temporarily removing Plaintiffs may have stifled a portion of their speech, i.e., the occupation, but the removal was constitutional because it was narrowly tailored. "A restriction is narrowly tailored if it '"promotes a substantial government interest that would be achieved less effectively absent the regulation"' and it is '"not substantially broader than necessary to achieve the government's interest."' *Caravalho,* 732 F. App'x at 23 (citing *Marcavage,* 689 F.3d at 106). As the Second Circuit noted in *Caravalho,* New York City has a

substantial interest in ensuring public spaces, like Zuccotti Park, remain safe and clean. *Id.* Defendant's decision to *temporarily* remove Plaintiffs to redress the safety issues already described was a narrowly tailored restriction-Plaintiffs were not being permanently denied access to Zuccotti Park or being denied the ability to protest Wall Street. Even if there were a better way for Defendant to have redressed the safety issues without hampering one aspect of Plaintiffs' expression "[a] narrowly tailored restriction need not be the least restrictive or least intrusive means of serving the government's interest" to be constitutional. *Id.* It being the case that protestors could return to Zuccotti Park after it was cleaned to continue their protest or protest elsewhere, the Court holds that Defendant's actions were constitutional. Defendant is granted judgment on the pleadings as to Plaintiffs First Amendment discrimination claim.

b. Fourteenth Amendment Claim

Defendant is also entitled to judgment on the pleadings as to Plaintiffs' Fourteenth Amendment claim that Plaintiffs' were evicted without due process because Plaintiffs fail to identify a property or liberty interest at stake. "The Due Process Clause of the Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property, without due process of law.'" *Tenenbaum v. Williams,* 193 F.3d 581,592 (2d Cir. 1999) (quoting U.S. Const. amend. XIV§ 1). Plaintiffs assert that the Fourteenth Amendment applies here because Plaintiffs had a property and liberty interest in remaining in Zuccotti Park that they were deprived of without due process when Defendants removed Plaintiffs without "fair

warning" and without a hearing. Pls.' Reply Supp. Mot. Partial J. Pleadings 5, ECF No. 115.

When assessing a due process claim, the first step is to ascertain "whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty. '" *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 59 (1999) (quoting U.S. Const. amend. XIV§ 1). Previously, Plaintiffs asserted that they had a property interest because the zoning regulations coupled with the statements of public officials created an easement granting Plaintiffs continuous access to Zuccotti Park. *Meyers,* 2015 WL 6503825, at *4 (S.D.N.Y. Oct. 27, 2015), *vacated on other grounds,* 675 F. App'x 93 (2d Cir. 2017). The Court rejected this argument and held that no easement existed to provide a basis for a Fourteenth Amendment claim. *Id.* at *4-*6.

Plaintiffs now assert that their property interest is an express easement that stems from Plaintiffs status as third-party beneficiaries of the contract between U.S. Steel (the original developer of Zuccotti Park) and the City that established Zuccotti Park as a permanent open park for the public benefit. Plaintiffs rely primarily on *McNeill v. New York City Housing Authority,* 719 F. Supp. 233, 248-49 (S.D.N.Y. 1989). In *McNeill,* the court held that public housing tenants could bring an action to enforce a contract between their landlord and the New York City Housing Authority because the tenants were third party beneficiaries of the contract and thus, had standing. *Id.* The court reasoned that the plaintiffs were "the sole and direct third-party beneficiaries" of the contracts and held that if plaintiffs' landlord breached the contract and the City failed to enforce

the contract, then the tenants could "undertake such enforcement themselves." *Id.* at 249. *McNeill,* however, does not apply to the case at bar.

At the outset, *McNeill* is not binding on the Court; but, even if it were, the court in *McNeill* limited its holding to the facts of that case noting that "[i]n finding that plaintiffs are intended third-party beneficiaries, the [c]ourt does not open the door for all beneficiaries of government contracts to attempt to enforce such contracts." *Id.* Moreover, the question in *McNeill* was not whether the tenants had a property interest at stake-this was undisputed as plaintiffs faced the possibility of permanent eviction from their homes as compared to protestors who were temporarily removed from a public space-rather, the question was whether tenants had standing to sue to enforce a contract to which they were not signatories. As such, *McNeill* does not stand for the proposition that an individual's status as third-party beneficiary creates a property interest. Rather, *McNeill* holds that a third-party beneficiary to a contract between a municipality and a private party has standing to bring a suit under § 1983 where the municipality and private party's failure to meet their contractual duties harms the beneficiary's *pre-existing property rights.* Consequently, even assuming Plaintiffs were the intended third-party beneficiaries of the contract between U.S. Steel and the City, this fact alone would be insufficient to find a cognizable property interest under the Fourteenth Amendment.

Plaintiffs also assert that their right to due process was violated when they were arrested without fair warning from Defendant that Plaintiffs occupation was unlawful. In their motion for judgment

on the pleadings, Plaintiffs argue that Defendant's defense of probable cause cannot apply to Fourteenth Amendment claims. In making their argument, Plaintiffs cite *Cox v. Louisiana,* 379 U.S. 559 (1965) for the proposition that public officials violate due process where they do not provide fair warning to protestors before arresting them for violating in the law. Pls. Mem. Supp. Mot. J. Pleadings 11-12, ECF No. 107. Though the Court has already explained why Plaintiffs' motion is moot and the Court need not decide it, the Court will treat *Cox* as Plaintiffs' basis for arguing they had a liberty interest under the Fourteenth Amendment in this case that was violated without due process.

In *Cox,* a group of individuals protesting segregation on a street opposite to a courthouse were arrested and convicted of violating a statute that prohibited picketing or parading in or near a courthouse. *Cox v. State of La.,* 379 U.S. 559,568 (1965). Prior to the protest, B. Elton Cox, the leader of the protestors, sought permission for the demonstration and "the highest police officials of the city, in the presence of the Sheriff and Mayor, in effect told the demonstrators that they could meet where they did, 101 feet from the courthouse steps, but could not meet closer to the courthouse." *Id.* But, even after the protestors followed the officials' instructions, they were arrested because officials believed their protest breached the peace. *Id.* at 571- 72.

In reversing Cox's conviction for violating the statute, the Supreme Court held: (1) because the dispersal order based on the breach of peace rationale was not valid, Cox was "still justified in his continued belief that because of the original official grant of

permission he had a right to stay where he was for the few additional minutes required to conclude the meeting," *Id.* at 572; and (2) "convicting the demonstrators of demonstrating near the courthouse violated due process because the demonstrators were entitled to rely upon the police's interpretation of the statute, and thus lacked fair warning that they were violating the law." *Garcia v. Does,* 779 F.3d 84, 94 (2d Cir. 2015) (citing *Cox,* 379 U.S. at 571). Taken together, the Second Circuit has explained that "[a]s a matter of law, *Cox* establishes that, *under some circumstances,* demonstrators or others who have been advised by the police that their behavior is lawful may not be punished for that behavior. The extent of that principle is less than clear .... " *Id.* at 96 (emphasis added).

Although the case before the Court shares some similarities with *Cox,* these similarities are superficial-Cox is readily distinguished. Plaintiffs argue that the dispersal order was unlawful because of the Mayor's prior statement granting Plaintiffs permission to protest in Zuccotti Park, meaning Plaintiffs were justified in their noncompliance. But, unlike *Cox,* Mayor Bloomberg's prior statement did not advise Plaintiffs that the behavior for which they were evicted was lawful. Bloomberg's statement was only that protestors could remain in the park so long as they did not violate any laws-Bloomberg did not state they could erect tents or other structures that violated N.Y.C. Administrative Codes and Zuccotti Park Rules, and that also created potential fire hazards. Put simply, the protestors in *Cox* were arrested for doing what they were told they could do, which was unlawful, whereas Plaintiffs were arrested

for doing what they were never given permission to do in the first place.

And as to Plaintiffs' claim of a lack of fair warning prior to their arrest, the NYPD tried to remove protestors' tents at least twice before the events at issue here, and one of those instances appears to be after Bloomberg's statement. Goykadosh Decl., Ex. C. ¶¶11-13, ECF No. 110-3. Both of these attempts, neither of which resulted in criminal consequences for protestors as far as the Court is aware, arguably gave Plaintiffs constructive notice and fair warning that the way in which they were occupying Zuccotti Park was unlawful further dampening their Fourteenth Amendment claim. Accordingly, Plaintiffs fail to allege a violation of their Fourteenth Amendment rights and Defendant is entitled to judgment on the pleadings.

CONCLUSION

For the reasons set forth above, Defendant's motion is GRANTED; Plaintiffs' motion is DENIED as moot.

SO ORDERED.

Dated: March 28, 2019
New York, New York

ANDREW L. CARTER, JR.
United States District Judge

Appendix C

Order of The United States District Court for The Southern District of New York Amending Prior Order of Dismissal

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF NEW YORK

CHARLES MEYERS, ET AL.,	:	
Plaintiffs,	:	1:14-cv-09142 (ALC)
-against-	:	
THE CITY OF NEW YORK, ET AL.,	:	ORDER
Defendants.	:	

ANDREW L. CARTER, JR., United States District Judge:

Plaintiffs move pursuant to Fed. R. Civ. P. 60(a), or alternatively Fed. R. Civ. P. 60(b), for the Court to amend its October 20, 2017 Opinion and Order to clarify that the Plaintiffs' claims against the three individual Defendants-Michael Bloomberg, Raymond Kelly, and Joseph Esposito-are dismissed, and not their claims against the fourth Defendant, the City of New York. Plaintiffs essentially argue that the Court erred in dismissing the case in its entirety. The Court agrees. For the reasons that follow, the motion is GRANTED, and the matter is REOPENED.

BACKGROUND

On October 27, 2015, the Court ruled on Defendants' motion to dismiss. In its Opinion and Order, the Court denied qualified immunity to the three individual Defendants, denied dismissal of the *Monell* claim against the City of New York, and granted Plaintiffs leave to amend the Complaint as to certain additional bases for liability asserted in the Complaint. ECF No. 47. Afterwards, Plaintiffs filed their Amended Complaint. ECF No. 48. On November 24, 2015, Defendants appealed the Court's denial of qualified immunity as to the three individual Defendants, and on February 2, 2017, the Second Circuit remanded to the Court for reconsideration of the three individual Defendants' claims of qualified immunity, in light of the Second Circuit opinion in *Garcia v. Does,* 779 F.3d 84 (2d Cir. 2015) *("Garcia")* and in light of the allegations of the Amended Complaint. On remand, the Court held in the October 20, 2017 Opinion and Order that the three individual Defendants were entitled to qualified immunity. ECF No. 68.

In the October 20, 2017 Opinion, the Court stated that the "Defendants' motion to dismiss is granted in its entirety." ECF No. 68, at 1. On October 26, 2017, the Clerk of the Court filed a Judgment of Dismissal in favor of Defendants and terminated the action. ECF No. 69. Plaintiffs argue that the phrase "in its entirety" is either a clerical error because it does not accurately reflect the decision of the Court, or the result of inadvertence because it is unsupported by the reasoning of the decision and outside the scope of the Second Circuit Mandate to the Court. Therefore, Plaintiffs ask for relief pursuant to Rule 60.

DISCUSSION

Rule 60(b)(1) allows for relief from judgment based on "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(l). Rule 60(b)(l) is available for a district court to correct legal errors by the court. *In re 310 Assocs.,* 346 F.3d 31, 35 (2d Cir. 2003); *see also Parks v. US. Life & Credit Corp.,* 677 F.2d 838, 839 (11th Cir. 1982) (per curiam) ("The 'mistakes' of judges may be remedied under this provision.").

As a threshold matter, Defendants argue that Plaintiffs filing of a notice of appeal (ECF No. 72) divests this court of jurisdiction. Under Fed. R. App. P. 4(a)(4)(A)(vi) and (B)(i), the district court retains jurisdiction over timely filed motions for relief from the judgment pursuant to Federal Rule of Civil Procedure 60(b)-despite the filing of a notice of appeal before the[1] court's disposal of them. *See id.* Fed. R. App. P. 4(a)(4); *see also Brewer v. Hashim,* No. 2:16-cv-326, 2017 WL 3433904, at *2 (D. Vt. Aug. 10, 2017). Where, as here, the notice of appeal is filed after a Rule 60(b) motion is timely filed, the notice only becomes effective when the motion is decided. *See* Fed. R. App. P. 4(a)(4)(B)(i) ("If a party files a notice of appeal after the court announces or enters a judgment-but before it disposes of any motion listed in Rule 4(a)(4)(A)-the notice becomes effective to appeal a judgment or order, in whole or in part, when the

[1] "If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure--and does so within the time allowed by those rules--the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: [motion] for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered." Fed. R. App. P. 4(a)(4)(A)(vi).

order disposing of the last such remaining motion is entered."). The timely filing of the Plaintiffs' Rule 60(b) motion, thus, allows the Court to retain jurisdiction over Plaintiffs' motion, despite the subsequent filing of their notice of appeal. *See, e.g., Rudgayzer v. Google, Inc.,* 13 CV 120, 2014 WL 12676233, at *2 (E.D.N.Y. Feb. 10, 2014).

As to the merits of Plaintiffs' motion, relief is warranted. The Mandate of the Second Circuit was limited to an analysis of qualified immunity as to the three individual Defendants, and the reasoning of the October 20, 201 7 Opinion was limited to that issue, neither discussing the dismissal of Defendant City of New York nor Plaintiffs' *Monell* claim against the Defendant City. Moreover, as Defendants concede (ECF No. 74, at 2), a municipality cannot be shielded by qualified immunity, *Curley v. Village of Suffern,* 268 F.3d 65, 71 (2d Cir. 2001), and liability may attach to the municipality even when individual defendants are shielded by qualified immunity. *Fisk v. Letterman,* 501 F. Supp. 2d 505, 528 (S.D.N.Y. 2007). Accordingly, under Rule 60(b)(1), the Court may correct the judgment to limit dismissal as to those three individual defendants.

CONCLUSION

Plaintiffs' motion is granted. The October 20, 2017 Opinion is amended to limit dismissal to individual Defendants Michael Bloomberg, Raymond Kelly, and Joseph Esposito from the action, and the case is reopened.

SO ORDERED.

Dated: December 5, 2017, New York, New York

Appendix D

Order of
The United States District Court for
The Southern District of New York
Dismissing Action In Its Entirety

Case 1:14-cv-09142-ALC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
Meyers et al
Plaintiffs,
-against-
City of New York et al,
Defendants.
----------x
OPINION AND ORDER
ANDREW L. CARTER, JR., United States District Judge:

Plaintiffs bring this action against Defendants, alleging violation of their constitutional rights, unlawful arrest, imprisonment, and malicious prosecution in retaliation for engaging in political speech. On October 27, 2015, the Court issued an Opinion and Order, familiarity with which is assumed, granting in part and denying in part Defendants' motion to dismiss. Subsequently, Plaintiffs filed an amended complaint, and Defendants filed an interlocutory appeal based on qualified immunity. In a February 2, 2017 summary order, the Second Circuit vacated the Court's Opinion and Order and remanded the matter back to the Court so it can undertake a complete analysis of qualified

immunity in light of the Second Circuit's holding in *Garcia v. Does,* 779 F.3d 84 (2d Cir. 2014) and the Amended Complaint. *Meyers v. City of New York,* 675 Fed. App'x 93 (2d Cir. 2017). Specifically, the Second Circuit requested that the Court conduct an adequate analysis of arguable probable cause in light of *Garcia.* After reviewing subsequent letter briefs and the Amended Complaint,[1] the Court finds that qualified immunity shields Defendants from Plaintiffs' claims. For the reasons that follow, Defendants' motion to dismiss is granted in its entirety.

GOVERNING LAW

Public officials are entitled to qualified immunity and thus shielded from liability for civil damages if either (1) their actions did not violate clearly established law, or (2) it was objectively reasonable for them to believe that their actions did not violate such law. *Garcia v. Does,* 779 F.3d 84, 92 (2d Cir. 2015). In a suit for false arrest, an officer is entitled to qualified immunity "if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." *Id.* The Second Circuit has referred to the latter category as "arguable probable cause." *Cerrone v. Brown,* 246 F.3d 194, 202-03 (2d Cir. 2001). The Court's prior opinion focused on the

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[1] The additional allegations in the Amended Complaint need not be summarized as it does not change the Court's analysis. As familiarity with the Court's vacated opinion, and thus the factual allegations supporting the claims in the Amended Complaint, is assumed, a reiteration of the facts is unnecessary.

first basis, while neglecting the second basis. Although "[t]here is a seeming circularity to inquiring first whether the circumstances as perceived by a reasonably prudent [public official] would justify the belief that the persons to be arrested had committed a crime, and, after finding that the circumstances would not justify such a belief, proceeding to inquire whether a [public official] could reasonably believe that the [official's] conduct was lawful," *Oliveria v. Mayer,* 23 F.3d 642, 648 (2d Cir. 1994), no inquiry into qualified immunity is complete, as the Second Circuit has instructed, without considering whether "one 'reasonably' acted unreasonably." *Id.* at 648-49 (quoting *Anderson v. Creighton,* 483 U.S. 635,643 (1987)).

Arguable probable cause for arrest is also a defense to any related claims for First Amendment retaliation. *Wiles v. City of New York,* 13-cv-2898, 2016 WL 6238609, at *11 (citing *Blue v. Koren,* 72 F.3d 1075, 1083 n.5 (2d Cir. 1995)); *see also Singer v. Fulton County Sheriff,* 63 F.3d 110, 120 (2d Cir. 1995). For example, in *Magnotti v. Kuntz,* the plaintiff brought a First Amendment retaliation claim and the Second Circuit refused to inquire into the defendant's motive for seeking an arrest warrant because there was arguable probable cause for the warrant-therefore entitling the defendant to qualified immunity. 918 F.2d 364, 367-68 (2d Cir. 1990). Accordingly, the Court should have considered whether there was arguable probable cause for any of the three relevant offenses-trespass, disorderly conduct, and obstruction of government administration-before considering qualified immunity in the context of the First Amendment retaliation claim.

DISCUSSION

The individual defendants are entitled to qualified immunity on the facts alleged here. *Garcia* is controlling. Plaintiffs alleged that they ignored the officers' announcement by bullhorn to leave the park and take all their personal possessions, implicating potential violations for trespass, disorderly conduct, and obstruction of government administration. Plaintiffs justify their refusal to follow the officers' orders because they reasonably believed that they were in compliance with all applicable laws and they could not be evicted absent a court order or an emergency. Thus, the legal theory Plaintiffs relied on was untested at the time (at least by any federal court). Am. Compl. ¶¶5-6. The problem with Plaintiffs' defense is that it requires the officers "to engage in an essentially speculative inquiry into the potential state of mind" of the protestors. *Garcia,* 779 F.3d at 84. The Second Circuit has stated that the law of qualified immunity does not require such an inquiry. *Id.* The correct inquiry is whether plaintiffs' defense "rests on facts that are so unclear, or a legal theory that is not so clearly established, that it cannot be said that any reasonable officer would understand that an arrest under the circumstances would be unlawful." *Id.*

The officials here faced "ambiguities of fact and law." *Id.* There was the uncertainty surrounding the status of Zuccotti as a privately owned public space and its implications, and the potential fire hazard the protestors' gathering posed (according to the City). There was also uncertainty as to whether the Plaintiffs' legal defense would prove viable. This Court found that, as alleged in the Complaint, Plaintiffs' honest belief that they had a legal right to remain in

Zuccotti Park and that the officers were aware of such belief generally negated a finding of probable cause to arrest for any of the three relevant violations, but that same belief is insufficient to negate arguable probable cause under *Garcia.* Given the circumstances the officials faced, government officials could reasonably disagree that the Plaintiffs' refusal to leave rendered their continued presence unlawful.

Plaintiffs' argument that *Garcia* calls for a contrary conclusion is unavailing. In *Garcia,* the Court held that the officials were entitled to qualified immunity where the plaintiff-protestors alleged that they had implied permission to enter the roadway. *Id.* at 96. Plaintiffs argue that the conduct here involved express permission by Mayor Bloomberg, who announced on October 10, 2011 that the Wall Street protestors could stay indefinitely as long as they comply with all laws (Am. Compl. ,r 119, Ex. G), not implied permission as in *Garcia.* Plaintiffs essentially argue there was no ambiguity in regards to Plaintiffs' having permission to stay. The argument ignores that officers' orders to disperse from the park could be reasonably construed to dispel whatever permission to remain the Plaintiffs inferred from Bloomberg's statement from a month prior. Accordingly, under these facts, officials faced enough ambiguity that arguable probable cause is warranted, thus entitling them to qualified immunity.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is granted.

SO ORDERED.

Dated: October 20, 2017
New York, New York

ANDREW L. CARTER, JR.
United States District Judge

Appendix E

Summary Order of The United States Court of Appeals for The Second Circuit Vacating and Remanding

15-3841
Meyers v. City of New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at 40 Foley Square, in the City of New York, on the 2nd day of February, two thousand seventeen.

Present:
ROBERT A. KATZMANN,
Chief Judge,
RALPH K. WINTER,
Circuit Judge,
SIDNEY H. STEIN,
District Judge.*

CHARLES MEYERS, JOHN BAKER, JUSTIN STREKAL, MILES WALSH,

Plaintiffs-Appellees,

- v - No. 15-3841

CITY OF NEW YORK, MICHAEL BLOOMBERG, individually and in his official capacity as former Mayor of the City of New York, CHIEF OF DEPARTMENT JOSEPH J. ESPOSITO, Individually and in his official capacity, NYPD COMMISSIONER RAYMOND KELLY, individually and in his official capacity,

Defendants-Appellants,

* Judge Sidney H. Stein of the United States District Court for the Southern District of New York, sitting by designation.

OFFICER DOES 1 THROUGH 100, NYPD PATROL OFFICER FREDDY YNOA, NYPD Patrol Officer, Shield # 18851; HANS FRANCOIS, Shield #25825, JOHN ZARANIS, Shield # 09645, VASILE DUBOVICI, Shield # 28892,

Defendants.

For Plaintiffs-Appellees:
PAUL L. MILLS, Law Office of Paul L. Mills, New York, NY.

For Defendants-Appellants:
MAX MCCANN, Assistant Corporation Counsel, (Richard Dearing and Devin Slack, *on the brief*), *for* Zachary W. Carter,
Corporation Counsel of the City of New York, New York, NY.

Appeal from the United States District Court for the Southern District of New York (Carter, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the judgment of the district court is VACATED and REMANDED.

Plaintiffs-appellees, participants in an Occupy Wall Street protest, were arrested and charged with trespass and disorderly conduct after they refused a police order to vacate Zuccotti Park in lower Manhattan. Plaintiffs brought this suit challenging the lawfulness of their removal from Zuccotti Park and the decisions of defendants-appellants, New York City officials at the time, to arrest and charge plaintiffs. The district court dismissed several of plaintiffs' claims but left intact plaintiffs' Fourth Amendment claims for false arrest and malicious prosecution and First Amendment retaliation claims. The district court also denied qualified immunity to defendants-appellants, which allowed defendants-appellants to bring the present interlocutory appeal. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

"We review a district court's denial of qualified immunity on a motion to dismiss de novo, accepting as true the material facts alleged in the complaint and drawing all reasonable inferences in plaintiffs' favor." *Garcia v. Does*, 779 F.3d 84, 91 (2d Cir. 2014) (internal quotation marks omitted).

"Qualified immunity protects public officials from liability for civil damages when one of two conditions is satisfied: (a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe

that his action did not violate such law." *Id.* at 92. For instance, "[a]n officer is entitled to qualified immunity against a suit for false arrest if he can establish that he had arguable probable cause to arrest the plaintiff." *Id.* (internal quotation marks omitted).

Although the district court considered the issue of probable cause, the district court needed also to conduct adequate analysis of arguable probable cause and of whether qualified immunity protects defendants-appellants – a more "forgiving" standard than the probable cause inquiry. *Amore v. Novarro*, 624 F.3d 522, 530, 536 (2d Cir. 2010). In particular, we respectfully think the district court did not sufficiently take into account our holding in *Garcia*:

> police officers [are not required] to engage in an essentially speculative inquiry into the potential state of mind of . . . [arrestees]. Neither the law of probable cause nor the law of qualified immunity requires such speculation. Whether or not a suspect ultimately turns out to have a defense, or even whether a reasonable officer might have some idea that such a defense could exist, is not the question. An officer still has probable cause to arrest, and certainly is entitled to qualified immunity, so long as any such defense rests on facts that are so unclear, or a legal theory that is not so clearly established, that it cannot be said that any reasonable officer would understand that an arrest under the circumstances would be unlawful.

Garcia, 779 F.3d at 96 (citations omitted).

Upon remand, the district court should undertake a complete analysis of the qualified immunity issue. The district court should do so in light of the Amended Complaint filed in this case.

We have considered the parties' remaining arguments on appeal and find in them no basis for altering our decision. For the foregoing reasons, the judgment of the district court is VACATED and REMANDED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

Appendix F

Order of
The United States Court of Appeals for
The Second Circuit
Denying Rehearing

ORDER

Docket No. 19-892

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of June, two thousand twenty.

Charles Meyers, John Baker, Justin Strekal, Miles Walsh,

Plaintiffs - Appellants,

v.

City of New York, Michael R. Bloomberg, individually and in his official capacity as former Mayor of the City of New York, Chief of Department Joseph J. Esposito, individually and in his official capacity, NYPD Commissioner Raymond Kelly, individually and in his official capacity, NYPD Patrol Officer Freddy Ynoa, Shield # 18851, Hans Francois, Shield # 25825, John Zaranis, Shield # 09645, Vasile Dubovici, Shield # 28892,

Defendants – Appellees

Officer Does 1-100,

Defendant.

Appellants, Charles Meyers, John Baker, Justin Strekal and Miles Walsh, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT
Catherine O'Hagen Wolfe, Clerk