IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Case No. 3:23-cv-0006- RJC-SCR

KYRE MITCHELL, *Plaintiff* v. CITY OF CHARLOTTE, *et al.,* *Defendants*.	**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

Plaintiff Kyre Mitchell suffered a serious injury during a protest in uptown Charlotte on May 30, 2020, when he picked up an incendiary object that blew up in his hand. But he offers no plausible factual allegations as to ***who*** threw the object and only speculates that it was an officer with the Charlotte-Mecklenburg Police Department ("CMPD"). In filing a motion to dismiss at this early stage of the litigation, the law requires that Defendants credit all of Plaintiff's plausible factual allegations as being true. But even under that deferential standard, Plaintiff's Complaint should be dismissed. Among other failures, Plaintiff's Complaint:

- fails to allege facts that would allow his action to move forward against any defendant in their individual capacity;
- fails to state a claim under § 1983 for any constitutional violation against the City;
- fails to state a claim for any violation of the North Carolina Constitution; and
- includes immaterial and impertinent allegations that—even if a portion of the Complaint were to survive—should be struck pursuant to Rule 12(f).

FACTUAL ALLEGATIONS

Plaintiff alleges that on May 30, 2020, he participated in protests in uptown Charlotte against police violence (DE 1 ¶¶ 63, 66), during which police officers deployed teargas, pepper

bullets, and flashbang grenades (*id.* ¶ 73). Plaintiff alleges that at or around 9:13pm he "was fired upon and struck by pepper ball guns and forced to run through clouds of CS/OC gas" and that "[h]e suffered a burning sensation to his skin and eyes, and at times coughed violently . . . ." (*Id.* ¶ 72.) Plaintiff alleges that around 11:30pm, while he was standing near other protestors at the intersection of Fifth Street and North Tryon Street, he picked up an object that then exploded in his hand:

> Amidst the chaos, Mitchell noticed a white car immediately beside him with a family with children in it. At that moment, he observed a police officer standing 50 feet away throw a device that landed directly at his feet. To protect the people in the car and other persons in the immediate vicinity, Mr. Mitchell quickly picked up the device so as to throw it in the opposite direction from where the family and any other people were located. Unfortunately, a fraction of a second later, the device exploded violently in his hand.

(*Id.* ¶ 74.)

Plaintiff offers two alleged theories as to what happened. The first theory is that a CMPD police officer caused his injuries. Plaintiff names thirteen alleged CMPD officers—Tucker, Putnam, Martinez, Sherwood, Long, Broadway, Potter, Shue, Braswell, Kaminski, Dowell, Lee, and Keller (collectively, the "CMPD Officer Defendants") and alleges that "[o]n information and belief, one or more of these officers personally deployed the chemical munitions and the flash-bang grenade that caused the Plaintiff's injuries." (DE 1 ¶ 36.)

Plaintiff's second theory is that his injury was caused by a law enforcement officer from another jurisdiction. Plaintiff alleges that, at the time of his injuries in uptown Charlotte, the City had been receiving assistance from law enforcement officers from surrounding cities and counties as part of a "mutual aid network" (DE 1 ¶ 19.) Plaintiff alleges that the City had been coordinating with various "mutual aid agencies" to include "[t]he City of Concord, Town of Huntersville, City of Salisbury, Rowan County Sheriff's Office, NC State Highway Patrol, and other agencies . . . ." (*Id.* ¶ 28.) Plaintiff alleges that these agencies "provided support in the form of personnel, tactical

officers, and mobile support officers" (*id.* ¶ 32) on May 30 in uptown Charlotte and that officers from those mutual aid agencies used "chemical weapons, pepper balls, and flash-bang grenades" (*id.* ¶ 32). As to the incendiary object that he picked up causing injury to his hand, Plaintiff alleges "the device was thrown by one of [thirteen Deploying Officers] . . . **and/or** an officer from the CMPD's mutual aid network." (*Id.* ⁋ 75 (emphasis added).) Plaintiff names as defendants, in their individual capacities, 50 John Doe law enforcement officers "whom also deployed flash-bang grenades, kinetic projectiles and chemical weapons on May 30." (*Id.* ¶ 36.)

Plaintiff alleges that Defendants Major Robert Dance, Major Nelson Bowling, Lieutenant Christopher Rorie, and Sergeant Scott Sherwood (collectively, the "**CMPD Supervisory Defendants**") were on duty and present at the May 30, 2020, protest and that that they "directed and/or approved of the widespread and indiscriminate use of chemical weapons, flash-bang grenades, and kinetic projectiles on peaceful protesters." (DE 1 ¶ 38.)

Plaintiff alleges that he was taken by ambulance to an emergency room (DE 1 ¶ 77) where he received treatment for injuries to his hand, during which two fingers were amputated (*id.* ¶ 79). Plaintiff was not arrested. (*Id.* ⁋ 130.) Plaintiff's injury and amputation caused ongoing pain, loss of sensation, and diminished use in his hand. (*Id.* ¶ 80.) Plaintiff alleges suffering embarrassment and fear in social interactions because of his hand's appearance. Plaintiff alleges that stress caused by the injury contributed to his girlfriend to miscarriage. (*Id.* ⁋ 81.) Plaintiff alleges that he is now too traumatized and fearful of CMPD to speak publicly about important issues. (*Id.* ⁋ 82.)

PROCEDURAL BACKGROUND

Plaintiff filed this lawsuit under 42 U.S.C. § 1983, along with supplemental state claims, naming as defendants:

- the City of Charlotte;

- CMPD Chief Johnny Jennings and retired CMPD Deputy Chief Steven Voorhees in their **official capacities**;

- 17 current or former CMPD employees as defendants in their official and **individual capacities** (retired CMPD Chief Kerr Putney, Major Robert Dance, Major Nelson Bowling, Lieutenant Christopher Rorie, and Sergeant Scott Sherwood, and CMPD officers Kenneth Tucker, Michael Putnam, Daniel Martinez, JC Long, William Broadway, Gary Potter, Casey Shue, Mason Brian Braswell, Edward Kaminski, S. Dowell, and Amanda Keller); and

- John Does 1-50, alleged "officer[s] from the CMPD's mutual aid network" (¶ 75), in their **individual capacities**.

Plaintiff seeks damages for alleged constitutional violations under 42 U.S.C. § 1983 (DE 1 ⁋⁋ 133-57; 192-206); state common law claims for Assault and Battery (*id.* ¶ 158-63), False Imprisonment (¶ 164-67), Willful, Wanton, or Gross Negligence (¶ 168-79), Simple Negligence (¶ 180-85), and Negligent Infliction of Emotional Distress (¶ 186-91); and the North Carolina constitution (¶¶ 207-234).

ARGUMENT

I. Because Plaintiff fails to allege facts that would allow him to impose personal liability on any one of the defendants in their individual capacities, each of them should be dismissed from this lawsuit.

An individual capacity suit seeks to impose personal liability upon a government officer. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985). As a result, there must be some allegation of wrongdoing or involvement against each of the defendants to assert an individual capacity claim against any of them. *Vinnedge v. Gibbs*, 550 F.2d 926, 928 (4th Cir.1997) ("[L]iability will only lie where it is affirmatively shown that the official charged acted personally in the deprivation of the plaintiffs' rights.").

A. Plaintiff uses improper group-pleading and fails to allege plausible facts showing that any of the individual defendants caused his injuries.

The mere possibility that a defendant acted unlawfully is not sufficient for a claim to survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)); *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009). "Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 545. A plaintiff's conclusory statements are not entitled to presumption of truth. *Iqbal*, 556 U.S. at 678. Neither are "unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Market Inc. v. J.V. Associates, LP*, 213 F.3d 175, 180 (4th Cir. 2000).

"Plaintiffs are forbidden from 'group[ing] defendants together without specifying which defendant committed which wrong' and are required instead to 'set forth with particularity each defendant's culpable conduct.'" *In re First Union Corp. Sec. Litig.*, 128 F. Supp. 2d 871, 884 (W.D.N.C. 2001) (quoting *Apple v. Prudential–Bache Sec., Inc.*, 820 F.Supp. at 987 (W.D.N.C. 1992) (dismissing complaint where plaintiff improperly grouped defendants in securities fraud claim).

1. Plaintiff does not plausibly allege that any of the CMPD Officer Defendants caused his injuries.

Plaintiff offers multiple theories as to who allegedly threw the object that injured his hand. In one theory, Plaintiff makes identical allegations against each of the thirteen CMPD Officer Defendants (*see* DE 1 ¶¶ 36, 75, 170, 182, and 188) and alleges that "one or more of these officers personally deployed the chemical munitions and the flash-bang grenade that caused the Plaintiff's injuries." (*Id.* ¶ 36.) In another theory, Plaintiff alleges that his injuries may have been caused by someone else—either a different CMPD police officer or "law enforcement officers employed by neighboring Cities and Counties who provided aid to the CMPD on May 30, 2020." (*Id.* ¶ 36).

Plaintiff alleges that these other defendants—whom he sued in their individual capacities as John Does 1-50—"also deployed flash-bang grenades, kinetic projectiles and chemical weapons on May 30." (*Id.* ¶ 36).

Plaintiff fails to even state the factual basis for his conclusory allegation that the person who threw the device was "a police officer." (DE 1 ¶ 74.) Plaintiff specifically alleges that at least some "police officers . . . were dressed in plainclothes on May 30, 2022." (*Id.* ¶ 18). Nowhere does Plaintiff describe the person who threw the device that ultimately injured his hand. To the extent Plaintiff is alleging that the person who threw the incendiary device could have been "dressed in plainclothes," that further contradicts his speculation as to the identity of the person.

To avoid dismissal, Plaintiff must have expressly alleged that force was used against him "by a defendant to maintain a viable § 1983 claim against *that* defendant, and even then, *that* defendant must have *intentionally* [used force]" on him. *Swann v. City of Richmond*, 498 F.Supp.2d 847, 857 (E.D. Va. 2007) (emphasis added). Plaintiff is not entitled to impose personal liability on every defendant based on his speculation that one of them—or else one of 50 other people he has not identified yet—could be responsible. *See Iqbal*, 556 U.S. 662, 678 (requiring "more than a sheer possibility that a defendant has acted unlawfully"). Having failed to plausibly allege that any of the CMPD Officer Defendants was directly involved with causing his injuries, Plaintiff's claims against them must be dismissed.

2. Plaintiff does not plausibly allege that any of the CMPD Supervisory Defendants or Chief Putney caused his injuries.

Plaintiff's claims against the four CMPD Supervisory Defendants and Chief Putney are similarly insufficient. The Fourth Circuit has established three elements necessary to establish supervisory liability under § 1983:

> (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices,"; and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994). Plaintiff cannot satisfy any of the elements.

"To satisfy the requirements of the ***first element***, a plaintiff must show the following: (1) the supervisor's knowledge of (2) conduct engaged in by a subordinate (3) where the conduct poses a pervasive and unreasonable risk of constitutional injury to the plaintiff." *Shaw*, 13 F.3d at 799 (citing *Slakan v. Porter*, 737 F.2d 368, 373 (4th Cir. 1984)).

Plaintiff cannot do that here. While Plaintiff alleges on information and belief that the CMPD Supervisory Defendants, "were on duty and present at the May 30, 2020 protest" (DE 1 ¶ 38, 155), Plaintiff only offers identical conclusory allegations as to the their alleged collective involvement:

- that they "lead or directed various 'platoons' of CPMD officers and police officers from other departments in neighboring Cities or Counties" (*id.* ¶¶ 38, 155); and
- that they "directed and/or approved of the widespread and indiscriminate use of chemical weapons, flash-bang grenades, and kinetic projectiles on peaceful protesters on that date" (*id.* ¶¶ 38, 155, 172, 183, 188).

It is not sufficient for a plaintiff to allege that a supervisor was in the proximity of an alleged incident and that the supervisor "failed adequately to supervise their subordinates." *Layman v. Alexander*, 294 F. Supp. 2d 784, 794 (W.D.N.C. 2003) (granting motion to dismiss supervisory liability claim where plaintiff made only conclusory allegations). Instead, a plaintiff must plausibly allege that each defendant supervisor "had actual or constructive knowledge that their subordinates posed a pervasive and unreasonable risk of constitutional injury to citizens like [plaintiff]." *Layman*, 294 F. Supp. 2d at 794. To state a § 1983 claim against a supervisor, "a plaintiff must

plead that each Government-official defendant, through the official's own ***individual*** actions, has violated the Constitution." *Iqbal*, 556 U.S. 662, 676 (emphasis added). And while Plaintiff speculates that a subordinate to one of the CMPD Supervisory Defendants may have used a device that allegedly caused Plaintiff's injuries, Plaintiff also speculates that someone ***outside*** CMPD—who Plaintiff never plausibly alleges to be subordinates—caused his injury.

Neither can Plaintiff show a pervasive and unreasonable risk of constitutional injury. "Establishing a "pervasive" and "unreasonable" risk of harm requires evidence that the conduct is widespread, or at least has been used on several different occasions and that the conduct engaged in by the subordinate poses an unreasonable risk of harm of constitutional injury." *Shaw*, 13 F.3d at 799 (quoting *Slakan*, 737 F.2d at 373–74). Plaintiff fails to allege evidence of widespread conduct here. Although Plaintiff generally alleges that CMPD had a prior incident of alleged excessive force against protestors four years previously in 2016 (¶100), Plaintiff does not allege any specific prior actions by any alleged subordinates (i.e., the CMPD Officer Defendants) that would have put the CMPD Supervisory Defendants on notice of a "pervasive" and "unreasonable" risk of harm.

As to the ***second element***, "[a] plaintiff may establish deliberate indifference by demonstrating a supervisor's 'continued inaction in the face of documented widespread abuses.'" *Shaw*, 13 F.3d at 799 (quoting *Slakan*,737 F.2d at 373). "The plaintiff assumes a heavy burden of proof in establishing deliberate indifference." *Shaw*, 13 F.3d at 799. "Ordinarily, he cannot satisfy his burden of proof by pointing to a single incident or isolated incidents . . . ." *Slakan*, 737 F.2d at 373. "[T]he 'deliberate indifference' standard as applied to policymaking or supervising officials under § 1983 requires continued inaction or an unreasonable response to a pattern of conduct that threatens the constitutional rights of citizens." *Layman*, 294 F. Supp. 2d at 795.

Here, Plaintiff makes another group of allegations collectively against the CMPD Supervisory Defendants, Chief Putney, and Deputy Chief Voorhees. (DE 1 ¶¶ 193, 194, 195, 196.):

- that they "failed to properly supervise mutual aid agencies, despite having actual knowledge of the need for better and additional training and supervision" (*id.* ¶ 193);
- that they were "informed . . . after the 2017 protests use of mutual aid agencies of the need for better training and supervision" (*id.* ¶ 194);
- that none of them "adequately supervised their subordinate office[rs] or intervened to ensure that mutual aid agencies or CMPD officers complied with the Department's policies for use of force" (*id.* ¶ 195); and
- that they "failed to take any steps to correct or prevent unconstitutional activity from recurring as again on June 2, 2022, protestors were kettled and harmed" (*id.* ¶ 196).

Again, Plaintiff's improper group pleading demonstrates that he cannot articulate a plausible allegation against any of them as individuals.

The same is true of Plaintiff's allegations against Chief Putney. Plaintiff does nothing more than make conclusory statements—predominantly made upon information and belief. For example, Plaintiff alleges in information and belief that "then-Chief Putney was the final policymaker on police practices and provided the 'marching orders' to quell the protests rather than just to prevent a riot—and that resulted in their constitutional violations." (DE 1 ¶ 105.)

To support his speculative allegations, Plaintiff contends the Court should consider that Chief Putney would have seen video streamed from a local newspaper showing events that took place on June 2—three days after Plaintiff's injury. (DE 1 ¶ 60.) Plaintiff's conclusory allegations against Chief Putney are insufficient. *See Iqbal* at 664 (allegations that one individual was a policy's "principal architect" and that another was "instrumental" in its adoption and execution—are conclusory and not entitled to be assumed true").

Further, Plaintiff does not and cannot allege facts showing "that there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by

the plaintiff." *Shaw*, 13 F.3d at 799. For all the reasons stated above, Plaintiff cannot meet this ***third element***. Moreover, Plaintiff concedes that he believed the incendiary object to be dangerous and yet "picked up the device so as to throw" it anyway. (DE 1 ¶ 74.) Even assuming Plaintiff's allegations to be true, his injury was not caused by any of the CMPD Supervisory Defendants.

B. All defendants sued in their individual capacities are entitled to qualified immunity on Plaintiff's § 1983 claims.

Even if Plaintiff's § 1983 claims could be adequately pleaded against a particular defendant, each of the defendants sued in their individual capacities still would be entitled to qualified immunity. Although a motion pursuant to Rule 12(b)(6) invites an inquiry into the legal sufficiency of the complaint, not an analysis of potential defenses to the claims set forth therein, dismissal nevertheless is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense. *See Richmond, Fredericksburg, & Potomac R.R. Co. v. Forst,* 4 F.3d 244, 250 (4th Cir. 1993).

The doctrine of qualified immunity protects government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). It is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Qualified immunity is a two-step inquiry "that asks first whether a constitutional violation occurred and second whether the right violated was clearly established." *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (en banc). The Court need not, however, necessarily address these inquiries in that order. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Plaintiff must show that *each* of the individual defendants' actions were not "actions that a reasonable officer could have believed [were] lawful." *Anderson v. Creighton*, 483 U.S. 635, 647

(1987) (n.6). Plaintiff fails to do that for either his First Amendment or Fourth Amendment claims, because the Complaint fails to plausibly allege that any one of them violated Plaintiff's clearly established constitutional rights.

1. Plaintiff's First Amendment claim fails.

While the First Amendment protects the right of free speech and the right to assemble peacefully, "where demonstrations turn violent, they lose their protected quality as expression under the First Amendment." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972); *see also Feiner v. New York*, 340 U.S. 315, 320 (1951) ("When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace , or order, appears, the power of the State to prevent or punish is obvious.").

Here, Plaintiff alleges that a protest that began peacefully at 1:00pm in Marshall Park changed "as the afternoon wore on." (DE 1 ¶ 63.) Plaintiff admits witnessing instances where protestors "damaged property or displayed anger and aggression towards officers." (*Id.* ¶ 64.) Plaintiff describes law enforcement efforts to disperse the crowd in uptown Charlotte for hours and Plaintiff's witness to those events—from at least 9:13 p.m. until 11:30 p.m., when he injured himself by picking up an incendiary object for the purposes of throwing it. (*Id.* ¶¶ 72-74.) Plaintiff appears to concede that there were "'bad actors' who damaged property or posed a threat to safety" (*id.* ¶ 84) but alleges that CMPD officers "overuse[d] chemical weapons . . . with no attempt to ascertain or isolate any individuals who posed a threat of harm" (i*d.* ¶ 86). Plaintiff alleges that he was not one of the violent protestors (*id.* ¶ 68) but appears to concede that "a small subset of protesters act[ed] aggressively towards police" (*id.* ¶ 86).

Under North Carolina law, a riot is defined as:

> [A] public disturbance involving an assemblage of three or more persons which by disorderly and violent conduct, or the imminent threat of disorderly and violent conduct,

> results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property.

N.C. Gen. Stat. § 14-288.2(a). Given Plaintiff's description of the tense and evolving situation on May 30, 2020, *any* of the CMPD Officer Defendants would have been objectively reasonable in believing that their actions in using crowd control techniques were justified under the then-existing state of the law. Plaintiff's description of the incidents surrounding his alleged injuries meets the definition of a "riot" under North Carolina law.

In *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107 (D.C. 1976), the court expressly rejected the same theory of liability from peaceful protestors that Plaintiff makes here:

> It is axiomatic however that the police may, in conformance with the First Amendment, impose reasonable restraints upon demonstrations to assure that they be peaceful and not destructive… And by the same token the First Amendment permits the police to contain or disperse demonstrations that have become too violent or obstructive…
>
> …It is the tenor of the demonstration on a whole that determines whether the police may intervene; and if it is substantially infected with violence or obstruction the police may act to control it as a unit. 'Where demonstrations turn violent, they lose their protected quality as expression under the First Amendment…' Confronted with a mob the police cannot be expected to single out individuals; ***they may deal with the crowd as a unit***.

Id. at 119-120 (emphasis added) (quoting *Grayned*, 408 U.S. at 116). Plaintiff's theory of liability that the CMPD Officer Defendants had a legal obligation to root out bad actors from this crowd, rather than "deal[ing] with the crowd as a unit," is misplaced.

In 2001, the Ninth Circuit upheld a qualified immunity defense in similar circumstances to this one. In *Barney v. City of Eugene*, 20 F. Appx. 683 (9th Cir. 2001), the court concluded that the plaintiff was not entitled to relief under § 1983 for deprivations of her First Amendment rights. That case is instructive because the plaintiff in *Barney* was in a similar situation as Plaintiff allegedly found himself here—a peaceful protestor who was subjected to crowd control agents, including tear gas, while participating in a demonstration. *Id.* at 684. The Ninth Circuit concluded that the plaintiff's "exposure to tear gas and any effect on her First Amendment activities were . .

. the unintended consequence of an otherwise constitutional use of force under the circumstances." *Id.* at 685.

In the alternative, any allegedly violated right was not clearly established at the time. "For a right to be 'clearly established,' in a qualified immunity case, 'the contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right.'" *Hill v. Crum*, 727 F.3d 312, 321 (4th Cir. 2013) (quoting *Wilson v. Layne*, 526 U.S. 603, 615 (1999). The purpose for this prong of qualified immunity is to protect government officials from liability any time they make a reasonable mistake of law in the undertaking of their discretionary duties. The decisions discussed here show that the state of the law on May 30, 2020, *authorized* "dealing with the crowd as a unit." As such, the individually named defendants are entitled to qualified immunity.

2. Plaintiff's Fourth Amendment claim fails.

In use of force cases asserted under § 1983, "reasonableness . . . must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). As discussed above, the crowd dispersal tactics used on May 30, 2020 were authorized by law. Moreover, and notwithstanding his injuries from picking up an incendiary object, Plaintiff was not seized under the meaning of the Fourth Amendment.

> [A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*.

Brower v. County of Inyo, 489 U.S. 593 (1989) (emphasis in original).

Here, Plaintiff alleges that he "observed a police officer standing 50 feet away throw a device," that the object "landed directly at his feet," and that he "picked [it] up." (DE 1 ¶ 74.) The object then exploded in his hand. (*Id.*) Plaintiff does not allege that any person singled him out to thrown the incendiary object at him. He identifies flashbangs as being "distraction devices" used "as part of crowd control or dispersal, particularly in the context of large unruly crowds, including street demonstrations." (*Id.* ¶ 76.) Plaintiff describes flash bang grenades as "emitting an intense flash of light and a loud explosion with sound to distract and disorient temporarily." (*Id.* ¶ 91.)

In other words, and even assuming Plaintiff's allegations about how his injury occurred to be true, Plaintiff concedes that the "means" of his alleged seizure were not directed at him—but rather "as part of crowd control or dispersal." (DE 1 ¶ 76.) Plaintiff does not allege facts showing that that his injury was a termination of "freedom of movement through means intentionally applied." At worst, Plaintiff alleges facts showing that his injury was caused unintentionally when he voluntarily picked up—with the intention of throwing it—a device deployed for "distraction purposes." Because there was no seizure of Plaintiff, even under his own telling of the events of May 30, there can be no Fourth Amendment violation.

C. The doctrine of public official immunity bars Plaintiff's state law claims.

"Public official immunity precludes suits against public officials in their individual capacities and protects them from liability '[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption[.]'" *Hart v. Brienza*, 246 N.C. App. 426, 431, 784 S.E.2d 211, 215 (2016) (quoting *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976)).

"A plaintiff seeking to hold a public official liable for conduct in the performance of official or governmental duties involving the exercise of discretion, therefore, must allege and prove corruption or malice; allegations of negligence or even 'reckless indifference' are not sufficient." *Layman*, 294 F. Supp. 2d at 795 (quoting *Schlossberg v. Goins*, 141 N.C. App. 436, 446, 540 S.E.2d 49, 56 (2000). Here, Plaintiff repeatedly alleges that the individual defendants alleged wrongful conduct occurred within the scope of their employment. (DE 1 ¶¶ 174, 185, 191). There can be no dispute that public official immunity bars the state law claims here.

D. Plaintiff's official capacity claims should be dismissed as redundant.

An official capacity claim is a claim against the governmental entity employing the official. *Nivens v. Gilchrist*, 444 F.3d 237, 249 (4th Cir. 2006). As official capacity claims "are essentially the same as a claim against the entity", they "should be dismissed as duplicative when the entity is also named as a defendant." *Love-Lane v. Martin*, 355 F.3d 766, 783 (4th Cir. 2004); *see also Armstrong v. City of Greensboro*, 190 F.Supp.3d 450, 463 (M.D.N.C. 2016) ("[D]uplicative claims against an individual in his official capacity when the government entity is also sued may be dismissed.").

Here, Plaintiff names the City expressly. Thus, the official capacity claims against Chief Jennings, Deputy Chief Voorhees, and various other defendants, should be dismissed on the same grounds. *See Wright v. Town of Zebulon*, 202 N.C. App. 540, 543, 688 S.E.2d 786, 789 (2010).

E. The intracorporate conspiracy doctrine bars Plaintiff's civil conspiracy claim.

"The intracorporate conspiracy doctrine recognizes that a corporation cannot conspire with its agents because the agents' acts are the corporation's own." *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 352–53 (4th Cir. 2013). Here, Plaintiff repeatedly alleges that the individual

defendants' alleged wrongful conduct occurred within the scope of their employment. (DE 1 ¶¶ 174, 185, 191). Thus, Plaintiff's conspiracy claim is barred. *Buschi v. Kirven*, 775 F.2d 1240, 1252 (4th Cir.1985) (suing agents individually does not destroy immunity granted under the doctrine); *Linberger v. Newton Police Dept*., No. 5:14-CV-137, 2016 WL 5376290 (Sept. 23, 2016).

II. Because Plaintiff does not allege an underlying constitutional injury, or that any policy of the City caused his injury, his § 1983 claims should be dismissed.

Under *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978) and its progeny, a municipality is subject to § 1983 liability only when "it causes such a deprivation through an official policy or custom." *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999). The Supreme Court has made it abundantly clear that a plaintiff seeking to impose *Monell* liability bears a heavy burden:

> Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee.

Bd. of County Com'rs of Bryan County v. Brown, 520 U.S. 397, 405(1997). The Fourth Circuit has confirmed that "[t]he substantive requirements for proof of municipal liability are stringent." *Jordan by Jordan v. Jackson*, 15 F.3d 333, 338 (4th Cir. 1994).

Initially, there can be no municipal liability without any underlying violation of Plaintiff's constitutional rights by one or more of the CMPD Officer Defendants. *See Grayson v. Peed*, 195 F.3d. 692, 697 (4th Cir. 1999) ("As there are no underlying constitutional violations by any individual, there can be no municipal liability."); *Smith v. Atkins*, 777 F. Supp.2d 955, 966 (E.D.N.C. 2011) ("[B]ecause there is no underlying constitutional violation, plaintiffs' claim . . . concerning defendants' customs, policies, practices, procedure, and training fails."). Because

Plaintiff has not plausibly alleged that any of the CMPD Officer Defendants are liable under § 1983, there can be no surviving *Monell* claim against the City. *See Grayson*, 195 F.3d at 697. All the § 1983 official capacity claims should be dismissed on this basis alone.

Moreover, there can be no municipal liability under *Monell* without an allegation of "a policy, custom, or practice that resulted in a violation of Plaintiff's rights as guaranteed by the United States Constitution." *Petty v. Byers*, No. 1:16-CV-237, 2017 U.S. Dist. LEXIS 30452, 2017 WL 870468, at *4 (W.D.N.C. Feb. 1, 2017). A policy or custom under *Monell* may arise in four ways:

> (1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure to properly train officers, that "manifest[s] deliberate indifference to the rights of citizens"; or (4) through a practice that is so "persistent and widespread" as to constitute a "custom or usage with the force of law."

Lytle v. Doyle, 326 F.3d 463, 471 (4th Cir. 2003) (quoting *Carter*, 164 F.3d at 217.

Plaintiff's claims of a City custom or policy are the type of labels, conclusions, and naked assertions that fail the *Iqbal* and *Twombly* standard. For example, Plaintiff claims that "[o]n information and belief, the crowd management and crowd control policies, training, strategies, and tactics of the CMPD at the time of the George Floyd protests in the City of Charlotte were woefully deficient . . . .") (DE 1 ¶ 84). But he alleges zero facts.

Plaintiff's suggestion that a previous lawsuit put the City "on notice of the need to overhaul its approach to crowd management and control during demonstrations of free speech . . . ." is speculative and entirely unsupported by the facts. (DE 1 ¶ 100.) As the Court can take judicial notice of its own docket, that 2016 complaint Plaintiff references was voluntarily dismissed within days of filing and never reached disposition on the merits. Plaintiff is far-fetched in his contention that the allegations in a quickly dismissed lawsuit would provide the City with the requisite notice of a widespread and pervasive pattern of unconstitutional conduct needed to adequately allege a

pattern/practice/custom claim under § 1983. This singular event is "exceedingly thin gruel" that the City or its supervisory employees were "deliberately indifferent to or condones improper behavior" of their subordinates. *Carter*, 164 F.3d at 219-20.

Moreover, by complaining that Chief Putney, Deputy Chief Voorhees, and CMPD Supervisory Defendants failed to ensure that unnamed CMPD officers and mutual aid agencies "complied with the Department's policies for use of force" (DE 1 ¶ 195), Plaintiff tacitly admits that CMPD's policies for use of force were worth following. In sum, Plaintiff's attempt to conjure a *Monell* claim here should fail.

III. Because Plaintiff has adequate remedies under state law, his state constitutional claims are barred.

An individual may have a direct cause of action against a state official under the provisions of the North Carolina Constitution only when there is no adequate remedy provided by state law. *Corum v. Univ. of North Carolina Bd. of Governors*, 330 N.C. 761, 787, 413 S.E.2d 276, 292 (1992). In this case, Plaintiff has alleged numerous state law causes of action, showing he has an adequate remedy under state law. Consequently, his direct claims under the North Carolina Constitution must be dismissed. Moreover, Plaintiff's North Carolina constitutional claims appear to be based on the events of June 2, days after his injuries. (DE 1 ¶¶ 222-23; 231-32.) They have no place in this lawsuit.

IV. Because Plaintiff failed to effect service of process as to several defendants, the Court lacks personal jurisdiction over them and should dismiss those individual capacity claims.

Under Federal Rule of Civil Procedure 12(b)(2), Plaintiff bears the burden of establishing proper process and proper service of process. *Mylan Labs., Inc. v. Akzo*, N.V., 2 F.3d 56, 59-60 (4th Cir. 1993). A summons must be issued properly and served before a federal court may exercise

personal jurisdiction over a defendant. *Omni Capital Int'l v. Rudolf Wolff & Co*., 484 U.S. 97, 104 (1987). When process or service of process is deficient, dismissal is proper under Rule 12(b)(2) for lack of personal jurisdiction. *See, e.g., Armco, Inc. v. Penrod-Stauffer Bldg. Sys., Inc.*, 733 F.2d 1087, 1089 (4th Cir. 1984).

Once the sufficiency of process or service of process is challenged by a motion to dismiss, Plaintiff bears the burden of establishing that process was sufficient, and that service of process was effectuated in accordance with Rule 4 of the Federal Rules of Civil Procedure. *Scott v. Md. State Dep't of Labor*, 673 F. App'x 299, 304 (4th Cir. 2016) (per curiam).

The undersigned counsel is without sufficient knowledge or information to form a belief as to whether Plaintiff has obtained actual service of process upon CMPD Officer Defendants Johnny Lee or Daniel Martinez. As such, these defendants assert and raise all affirmative defenses related to insufficiency of process and insufficiency of service of process, pursuant to Rules 4 and 12 of the Federal Rules of Civil Procedure, and N.C. Gen. Stat. § 1-75.1 et seq.

V. Plaintiff's claim for injunctive relief should be dismissed for lack of subject matter jurisdiction.

Plaintiff's requested injunctive relief is the type that has been directly rejected by the Supreme Court. In *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), a young man was assaulted by a police officer by being held in a chokehold until he passed out following a traffic stop in which he was indisputably compliant with the officer's commands. *Id.* at 97-98. The plaintiff presented evidence of a series of unconstitutional applications of the chokehold by the Los Angeles Police Department. *Id*. at 98. Lyons sought damages under § 1983 as well as an injunction against the use of chokeholds by LAPD.

The Court concluded that, while he certainly had standing to seek damages under § 1983, he did not have standing to bring a petition for injunctive relief:

> In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner."

461 U.S. 95, 105-106 (emphasis in original).

Here, Plaintiff seeks a permanent injunction from this Court as follows:

> That this Court issues an order that Defendant cannot utilize flash bombs, in a highly dense public space, on an individual engaged in peaceful, non-criminal activity in the City of Charlotte for the purpose of frightening them or punishing them for exercising their constitutional rights [and];
>
> …Enjoin[] all unlawful practices complain[ed] about herein and impose[] affirmative injunctive relief requiring each Defendant and its partners and/or agents to take affirmative steps to counteract and cure their unlawful and discriminatory practices . . . .

(DE 1 p. 52.)

Just as the plaintiff in *Lyons*, however, Plaintiff here lacks standing to bring a suit for injunctive relief against Defendants and, as such, that portion of the Complaint must be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. 461 U.S. 95, 101 (standing is jurisdictional; "the federal courts are without jurisdiction to entertain Lyons' claim for injunctive relief").

Plaintiff has failed to make any of the requisite allegations to establish standing over their requested injunctive relief. Moving forward from the incident described in the Complaint, Plaintiff is in no different position than any other citizen of the City of Charlotte, just as Mr. Lyons was held to be in no future different position than any other citizen of the City of Los Angeles. *See id*., 461 U.S. 95, 111. As such, Plaintiff's request for injunctive relief against the Defendants should be dismissed with prejudice for lack of subject matter jurisdiction.

VI. The Court should exercise its discretion to strike immaterial and prejudicial allegations.

Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, "[t]he court may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Rule 12(f) motions to strike "are generally viewed with disfavor" *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001), most often in the context of striking an entire legal defense and not merely individual allegations, and a motion to strike typically requires a showing that the denial would prejudice the moving party. *GLF Constr. Corp. v. Heartland Concrete, L.L.C.*, No. 1:22-CV-97-MR-WCM, 2022 WL 5027618, at *1 (W.D.N.C. Oct. 4, 2022) (quoting *Miller v. Rutherford Cnty.*, No. 1:08-CV-441-LHT-DLH, 2008 WL 5392057, at *4 (W.D.N.C. Dec. 19, 2008)); *see also Poulos v. Poulos*, No. 15 CVS 1116, 2015 WL 3537743, at *6 (N.C. Super. June 2, 2015) (granting motion to strike paragraphs that "do not contain allegations that are necessary to support or advance Plaintiff's claims in this lawsuit, and are unnecessarily derogatory . . . .").

Plaintiff's Complaint is replete with immaterial and prejudicial allegations—most of which are based on things he presumably has conjured from sources other than his own person experience. These allegations should be struck pursuant to Rule 12(f) as immaterial, impertinent, and prejudicial:

- Plaintiff quotes Dr. Martin Luther King, Jr. (DE 1, Introduction, p. 2.)
- Plaintiff shows a photo of his bloody, injured hand. (*Id.* ¶ 10.)
- Plaintiff makes a series of allegations concerning events that occurred in 2011 surrounding the death of CMPD officer Fred Thornton. (*Id.* ¶ 115-125.) None of these allegations pertains to Plaintiff's injury, and none is based on his own experience.
- Plaintiff makes a series of cut and pasted allegations concerning "case law"—presumably written legal opinions or decisions from other courts—related to "last year's protests in the wake of George Floyd's killing." (*Id.* ¶ 127-129.)
- Plaintiff makes various allegations about CMPD activity on June 2, three days after his injury. (*Id.* ¶¶ 222-23; 231-32.

None of these allegations are relevant to Plaintiff's injury. All of them are prejudicial to the defendants.

CONCLUSION

No one doubts the severity of Plaintiff's hand injury. But Plaintiff offers nothing more than speculation that his injuries were caused by one of the 17 named defendants in this case, each of whom Plaintiff seeks to hold personally liable. Neither is there any plausible allegation that a policy or custom of the City is to blame. His Complaint should be dismissed.

This the 6th day of April 2023.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day electronically filed the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system which will send electronic notification of the filing to the following:

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This the 6th day of April 2023.

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