UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Packard et al.,

Plaintiffs,

-against-

The City of New York et al.,

Defendants.

1:15-cv-07130 (AT) (SDA)

REPORT AND RECOMMENDATION

STEWART D. AARON, UNITED STATES MAGISTRATE JUDGE.

TO THE HONORABLE ANALISA TORRES, UNITED STATES DISTRICT JUDGE:

Remaining before this Court are the claims of Plaintiffs George Packard ("Packard"), Edward Beck ("Beck"), Michelle Berger ("Berger") and Ari Cowan ("Cowan") (collectively, "Plaintiffs"), pursuant to 42 U.S.C. § 1983, against the City of New York (the "City" or "Defendant") arising out of their arrests on September 17, 2012 during protests that occurred in downtown Manhattan as part of the first anniversary of Occupy Wall Street ("OWS").[1] (Compl., ECF No. 7, ¶¶ 1, 10, 13.) Plaintiffs allege that the City failed to train members of the New York City Policy Department ("NYPD") on the proper application of the disorderly conduct statute, among other topics, which led to violations of Plaintiffs' First and Fourth Amendment rights. (*Id.* ¶¶ 67, 70, 73.)

[1] Plaintiffs' claims against the individual defendants and Plaintiffs' false arrest claims against the City previously were dismissed by this Court. (*See* 3/2/17 Order, ECF No. 59; 7/17/17 Order, ECF No. 83.) In addition, certain plaintiffs voluntarily dismissed their claims. (*See* Notice of Voluntary Dismissal, ECF No. 120; Stipulation for Voluntary Dismissal, ECF No. 182.)

Now before the Court are the parties' cross-motions for summary judgment (ECF Nos. 256 & 264) and Plaintiffs' motion for certification of an issue class (ECF No. 299). For the reasons set forth below, I recommend that the parties' cross-motions for summary judgement be DENIED and that Plaintiffs' motion for certification of an issue class be DENIED.

FACTUAL BACKGROUND[2]

I. September 17, 2012 Protests And Plaintiffs' Arrests

From September 15 through September 17, 2012, thousands of individuals came to New York City to participate in protests in connection with the first anniversary of OWS. (Def.'s Local Civil Rule 56.1 Statement ("Def.'s 56.1"), ECF No. 258, ¶ 2.) The facts regarding the arrests of each of the four Plaintiffs are discussed separately below.

A. Plaintiff Packard

Plaintiff Packard arrived at the "Red Cube" across from Zuccotti Park at 6:30 a.m. on September 17, 2012. (Pls.' Response to Def.'s Local Civil Rule 56.1 Statement ("Pls.' 56.1 Response"), ECF No. 282, ¶ 6-2.) Packard led a group of approximately 500 individuals heading south on Broadway towards the Vietnam Memorial. (Pls.' 56.1 Response ¶ 8-5.) Packard testified that they were "just going to circle Wall Street[.]" (*Id.* ¶ 8-1.) At approximately 7:47 a.m., Packard and the group of 500 marchers arrived at the intersection of Broadway and Wall Street. (NYPD ARGUS Video 1 SEC Broadway-Wall, Decl. of Amy Robinson in Support of Def.'s Mot. for Summary

[2] The relevant facts are taken from materials submitted in connection with the parties' motions and are either undisputed or construed in the light most favorable to the non-moving party. *See Krauss v. Oxford Health Plans, Inc.*, 517 F.3d 614, 621–22 (2d Cir. 2008) (on cross-motions for summary judgment, the court must "in each case constru[e] the evidence in the light most favorable to the non-moving party.") (citation omitted). Citations to the parties' respective Local Civil Rule 56.1 Statements incorporate by reference the parties' citations to underlying evidentiary submissions.

J. ("Robinson Decl.") Ex. F, ECF No. 257-6, at 47:00-48:45.[3]) Packard told NYPD Chief Thomas Purtell that he wanted to turn down Wall Street, but Chief Purtell told Packard to turn the group of marchers around and go back north on Broadway. (Pls.' 56.1 Response ¶¶ 15-1, 16-1.) Packard then told the group "we're just not going anywhere, folks." (*Id.* ¶20-1.) Approximately five to ten minutes later, Packard sat down on the sidewalk. (*Id.* ¶ 21-7.) Packard was arrested while sitting on the sidewalk and charged with disorderly conduct for blocking pedestrian traffic. (Pls.' 56.1 Response ¶ 31-1; Def.'s 56.1 ¶ 32.) Packard was in custody for approximately eight hours and forty-five minutes and was released with a Desk Appearance Ticket ("DAT"). (Def.'s 56.1 ¶ 35.) At his first court appearance, Packard accepted an Adjournment in Contemplation of Dismissal ("ACD") on the blocking pedestrian traffic charge. (*Id.* ¶ 36.)

B. Plaintiff Beck

Plaintiff Beck arrived in the Wall Street area between 9:00 and 10:00 a.m. on September 17, 2012. (Def.'s 56.1 ¶ 39.) Beck was on a section of sidewalk near 26 Broadway, across the street from the "Charging Bull." (Def.'s 56.1 ¶ 41; Pls.' 56.1 Response ¶ 41-1.) Approximately 50 to 100 other people were at that location. (Pls.' 56.1 Response ¶ 41-1.) Beck was near the intersection of Broadway and Exchange Place when an NYPD officer gave the following order: "If you continue to block the sidewalk you will be arrested. Please keep moving. Keep moving. If you continue to block the sidewalk, you will be arrested. Please keep moving." (Def.'s 56.1 ¶ 42; TARU Defranco Video 9:09, Robinson Decl. Ex. U, ECF No. 257-21, at 01:14.) At some point thereafter,

[3] The Court notes that the time citations to this video in Defendant's 56.1 Statement and Plaintiffs' 56.1 Response appear to refer to the actual time of day as reflected in the video time stamp, not the time elapsed that appears on the video player. (*See* Def.'s 56.1 ¶ 14; Pls.' 56.1 Response ¶ 14-1.) For clarity and consistency, the Court cites to the time on the video player.

NYPD Captain Iocco tells protestors in Beck's vicinity: "Guys, keep moving, you're blocking the sidewalk. Keep moving, you're blocking the sidewalk. Keep moving." (Def.'s 56.1 ¶ 45; TARU Marini Video 9:34:29, Robinson Decl. Ex. Z, ECF No. 257-26, at 00:18-00:24.) A few minutes later, Beck and two other protesters were arrested farther along on the sidewalk. (TARU Marini Video 9:37:05 at 1:20-1:45.) Beck was charged with disorderly conduct for blocking pedestrian traffic. (Pls.' 56.1 Response ¶ 48-1.) Beck was in custody for approximately thirteen hours and was released with a DAT. (Def.'s 56.1 ¶ 49.) Later, the charge against him was dismissed on speedy trial grounds. (*Id.* ¶ 50.)

C. Plaintiff Cowan

Plaintiff Cowan participated in an OWS march and protest in the Wall Street area on September 17, 2012. (Def.'s 56.1 ¶ 52.) Cowan and others marched down the sidewalk on Broadway near Liberty Street carrying a sign. (Def.'s 56.1 ¶ 58; Pls.' 56.1 Response ¶ 58-1, 58-2.) The group then turned left on Cortlandt Way and continued marching. (Def.'s 56.1 ¶ 60.) An NYPD officer gave the following order using a bullhorn: "Hey, folks, listen up. You have to leave room for people to move on the sidewalk." (Pls.' 56.1 Response ¶ 63-1; Video, Decl. of Wylie Stecklow ("Stecklow Decl.") Ex. 133, ECF No. 266-133, at 1:02-1:06.[4]) The same officer gave the following

[4] Defendant cites to a different video, which it contends is a duplicate of the video produced by Plaintiffs, but "visually clearer." (Def.'s 56.1 ¶ 58 n.5.) Plaintiffs object, arguing that the video cited by Defendant is incomplete and was not produced during discovery. (*See, e.g.*, Pls.' 56.1 Response ¶ 63.) The Court relies on the version of the video produced by Plaintiffs during discovery. *See John Wiley & Sons, Inc. v. DRK Photo*, 998 F. Supp. 2d 262, 269 n.4 (S.D.N.Y. 2014) (on motion for summary judgment, court may not consider document not produced during discovery), *aff'd*, 882 F.3d 394 (2d Cir. 2018); *see also* Fed. R. Civ. P. 37(c) ("If a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."). The Court notes, however, that consideration of Defendant's version of the video would not alter the outcome reached herein.

additional order: "Let's go. Listen, you have to leave room for people to walk in the sidewalk." (Pls.' 56.1 Response ¶ 64-1; Stecklow Decl. Ex. 133 at 1:09-1:11.) Cowan was arrested and charged with disorderly conduct for blocking pedestrian traffic and failing to obey a lawful order to disperse. (Def.'s 56.1 ¶ 69; Pls.' 56.1 Response ¶ 69-1.) Cowan was in custody for at least six hours and was released with a DAT. (Def.'s 56.1 ¶ 70; Pls.' 56.1 Response ¶ 70-1.) At his first court appearance, Cowan accepted an ACD on the blocking pedestrian traffic charge. (Def.'s 56.1 ¶ 71.)

D. Plaintiff Berger

On September 16, 2012, Plaintiff Berger came to New York City and spent the night in or near Zuccotti Park. (Pls.' 56.1 Response ¶¶ 73, 74-1.) At approximately 7:56 a.m. on September 17, 2012, Berger was near the intersection of Pine and Nassau Streets. (Def.'s 56.1 ¶ 76; Pls.' 56.1 Response ¶ 76-1.) At that time, an NYPD officer using a bullhorn gave an order to protestors near that intersection. (Def.'s 56.1 ¶ 77; Pls.' 56.1 Response ¶ 77-1.) Officers gave further orders to protestors, though the parties dispute what the officers said. (Def.'s 56.1 ¶ 82; Pls.' 56.1 Response ¶ 82-1.) Berger was arrested for disorderly conduct. (TARU Hujel Video 7:56:48, Robinson Decl. Ex. MM, ECF No. 257-39, at 7:33; Pls.' 56.1 Response ¶ 97-1.) Berger was in custody for approximately eight hours and given a DAT. (Pls.' 56.1 Response ¶ 97-2.) The District Attorney's Office declined to prosecute her case. (*Id.* ¶ 98-1.)

LEGAL STANDARDS

I. Summary Judgment

Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986). The moving party has the initial burden of demonstrating

the absence of a disputed issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-23 (1986). A dispute concerning a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 523 (2d Cir. 1992) (quoting *Anderson*, 477 U.S. at 248). In making its determination, the court must resolve all ambiguities and draw all reasonable inferences in favor of the non-movant. *Anderson*, 477 U.S. at 255.

Video evidence may be considered on a motion for summary judgment to determine whether material questions of fact exist. *See Mediavilla v. City of New York*, 259 F. Supp. 3d 82, 94 (S.D.N.Y. 2016) (citing *Scott v. Harris*, 550 U.S. 372, 379-80 (2007)); *Fabrikant v. French*, 691 F.3d 193, 201 (2d Cir. 2012) (affirming grant of summary judgment based on probable cause and qualified immunity relying, in part, on video evidence where plaintiff did not dispute accuracy of video, but "dispute[d] only how to characterize that evidence")) (additional citations omitted).

II. Municipal Liability For Failure To Train

In order to hold a municipality liable for a constitutional violation under § 1983, a plaintiff must prove that an "action pursuant to official municipal policy" caused their injury. *Monell v. New York City Dep't of Social Servs.,* 436 U.S. 658, 691 (1978). "In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). "To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" *Id.* (alteration in original) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). "Only then 'can such a shortcoming

be properly thought of as a city "policy or custom" that is actionable under § 1983.'" *Id.* (quoting *Canton*, 489 U.S. at 389).

"Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick*, 563 U.S. at 61 (internal citation, brackets, and quotation omitted). "Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program." *Id.* (internal citation omitted). The Second Circuit applies a three-pronged test for demonstrating deliberate indifference in the context of a failure to train claim. *See Walker v. City of New York*, 974 F.2d 293, 297-98 (2d Cir. 1992). Plaintiffs must show that: (1) the City knew to a moral certainty that it would confront a given situation; (2) there was a history of the City mishandling the situation; and (3) the wrong choice by the City would frequently cause the deprivation of Plaintiffs' rights. *See id.*; *see also Jenkins v. City of New York*, 478 F.3d 76, 94 (2d Cir. 2007).

In addition to a showing of deliberate indifference, Plaintiffs also must "identify a specific deficiency in the [C]ity's training program and establish that that deficiency is 'closely related to the ultimate injury,' such that it 'actually caused' the constitutional deprivation." *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 129 (2d Cir. 2004) (quoting *Canton*, 489 U.S. at 391); *see also Reynolds v. Giuliani*, 506 F.3d 183, 193 (2d Cir. 2007). These elements "require the plaintiffs to prove that the deprivation occurred as the result of a municipal policy rather than as a result of isolated misconduct by a single actor" and, thus, "ensure that a failure to train theory does not collapse into *respondeat superior* liability." *Amnesty Am.*, 361 F.3d at 130; *see also Roe v. City of*

Waterbury, 542 F.3d 31, 37 (2d Cir. 2008) (plaintiff must demonstrate that municipality was "moving force" behind alleged injury). "The evidence must allow a trier of fact to determine whether the officers were poorly trained—which could be attributable to the City—or whether they 'deviate[d] from what they were taught.'" *Harris v. City of New York*, No. 15-CV-08456 (CM), 2017 WL 6501912, at *10 (S.D.N.Y. Dec. 15, 2017) (quoting *Jenkins*, 478 F.3d 76, 95).

Finally, "[t]he City cannot be liable under *Monell* where a plaintiff cannot establish a violation of his constitutional rights." *Garcia v. Bloomberg*, 662 F. App'x 50, 52 (2d Cir. 2016) (summary order).

III. False Arrest, First Amendment Retaliation And Probable Cause

"A § 1983 claim for false arrest, resting on the Fourth Amendment right of an individual to be free from unreasonable seizures, including arrest without probable cause, is substantially the same as a claim for false arrest under New York law." *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996) (citations omitted). "Under New York law, there are four elements to a false arrest claim: (1) defendant's intention to confine the plaintiff, (2) the plaintiff was aware of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not privileged." *Posr v. Dolan*, No. 02-CV-00659 (LBS), 2003 WL 22203738, at *2 (S.D.N.Y. Sept. 23, 2003). "The existence of probable cause to arrest constitutes justification and 'is a complete defense to an action for false arrest,' whether that action is brought under state law or under § 1983." *Jenkins*, 478 F.3d at 84 (quoting *Weyant*, 101 F.3d at 852).

"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 his exercise of that right; and (3) the defendant's actions caused him some injury."

Dorsett v. Cty. of Nassau, 732 F.3d 157, 160 (2d Cir. 2013). Probable cause is a complete defense to a retaliatory arrest claim, unless "a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1728 (2019); *see also McKenzie v. City of New York*, No. 17-CV-04899 (PAE), 2019 WL 3288267, at *9 (S.D.N.Y. July 22, 2019).[5]

"Probable cause exists when one has knowledge of, or reasonably trustworthy information as to, facts and circumstances that are sufficient 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." *Oquendo v. City of New York*, 774 F. App'x 703, 704 (2d Cir. 2019). "Probable cause is determined on the basis of facts 'known to the arresting officer at the time of the arrest[.]'" *Shamir v. City of New York*, 804 F.3d 553, 557 (2d Cir. 2015) (quoting *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004)). "As the Second Circuit has emphasized, 'probable cause is a fluid standard that does not demand hard certainties or mechanistic inquiries; nor does it demand that an officer's good-faith belief that a suspect has committed or is committing a crime be correct or more likely true than false.'" *Johnson v. City of New York*, No. 15-CV-06915 (ER), 2019 WL 294796, at *5 (S.D.N.Y. Jan. 23, 2019) (quoting *Figueroa v. Mazza*, 825 F.3d 89, 99 (2d Cir. 2016)). "Rather, it requires only facts establishing the kind of fair probability on which a reasonable and prudent person, as opposed to a legal technician, would rely." *Id.* (internal citation omitted). "In

[5] Plaintiffs cite to *Lozman v. City of Riveria Beach, Fla.*, 138 S. Ct. 1945, 1952 (2018) for the proposition that a plaintiff may prevail on a claim against a municipality for First Amendment retaliation, even if there was probable cause for the arrest, if the alleged constitutional violation was a but-for cause of the arrest. (Pls.' Opp. Mem. at 16-17.) However, the parties' briefings were filed prior to the Supreme Court's decision in *Nieves*. Nonetheless, to the extent that *Lozman* survives *Nieves*, *Lozman* involved allegations of an official policy motivated by retaliation, which is not the case here. *See Lozman*, 138 S. Ct. at 1954.

determining whether probable cause existed to support an arrest, courts must consider the totality of the circumstances, including the facts available to the arresting officer both immediately before and at the time of arrest." *Id.* (citing *Simpson v. City of New York*, 793 F.3d 259, 265 (2d Cir. 2015)).

"Probable cause need not have existed for the charge actually invoked by the arresting officer at the time of the arrest, what matters is whether probable cause existed to arrest the plaintiff for any single offense." *Ackerson v. City of White Plains*, 702 F.3d 15, 20 (2d Cir. 2012) (internal quotation marks omitted). Moreover, "[t]he existence of probable cause 'need not be assessed on the basis of the knowledge of a single officer.'" *Gonzalez v. City of New York*, No. 14-CV-07721 (LGS), 2016 WL 5477774, at *4 (S.D.N.Y. Sept. 29, 2016) (quoting *Zellner v. Summerlin*, 494 F.3d 344, 369 (2d Cir. 2007)). "An arrest is permissible where the actual arresting or searching officer lacks the specific information to form the basis for probable cause or reasonable suspicion but sufficient information to justify the arrest or search was known by other law enforcement officials initiating or involved with the investigation." *Id.* (internal citations and quotation marks omitted).

"On summary judgment, the existence of probable cause may be determined as a matter of law 'if there is no dispute as to the pertinent events and the knowledge of the officers.'" *McKenzie*, 2019 WL 3288267, at *6 (quoting *Weyant*, 101 F.3d at 852). "Where, however, the parties dispute material facts bearing on such events and knowledge, summary judgment is not appropriate." *Id.*

IV. Issue Class Certification

Rule 23(c)(4) provides that "an action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). The Second Circuit has stated that "[d]istrict courts should 'take full advantage of th[is] provision' to certify separate issues 'in order to reduce the range of disputed issues in complex litigation' and achieve judicial efficiencies." *Robinson v. Metro-N. Commuter R.R., Co*., 267 F.3d 147, 168 (2d Cir. 2001) (quoting *Cent. Wesleyan Coll. v. W.R. Grace & Co*., 6 F.3d 177, 185 (4th Cir. 1993)) (quotation marks and alterations omitted). However, issue certification is not appropriate where certifying an issue "would not materially advance the litigation because it would not dispose of larger issues . . .." *McLaughlin v. Am. Tobacco Co*., 522 F.3d 215, 234 (2d Cir. 2008).

DISCUSSION

Defendant moves for summary judgment on the ground that there is no genuine dispute that NYPD officers had probable cause to arrest each of the Plaintiffs. The probable cause inquiry also is central to Plaintiffs' motion for summary judgment as they cannot prevail on their *Monell* claim without evidence of an underlying constitutional violation and, as set forth above, probable cause is a complete defense to both of their underlying claims. Therefore, I first address the parties' arguments regarding probable cause. Because I find that there are genuine issues of material fact as to whether probable cause existed for each Plaintiff's arrest, I recommend that both parties' motions for summary judgment be denied.[6] I then address Plaintiffs' motion, in the

[6] In their affirmative motion, Plaintiffs do not attempt to establish an underlying constitutional violation, a necessary element of their claims. *See Mediavilla*, 259 F. Supp. 3d at 109 ("*Monell* does not create a stand-alone cause of action"); *Garcia*, 662 F. App'x at 54 ("the simple existence of a [municipal] policy, without [a] corresponding violation, may not be challenged under § 1983"). Instead, Plaintiffs state they incorporate their Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment in

alternative, that the Court deem certain issues relating to their failure to train claim established for trial. As set forth below, I also recommend that Plaintiff's motion for such alternative relief be denied.

I. Probable Cause

The City argues that there was probable cause to arrest Plaintiffs for: (1) disorderly conduct for blocking pedestrian traffic under New York Penal Law § 240.20(5), (2) disorderly conduct for failing to comply with a lawful order to disperse under New York Penal Law § 240.20(6), and (3) obstruction of governmental administration ("OGA") under New York Penal Law § 195.05. (Def.'s Mem. at 9-10.) The City also argues that there was probable cause to arrest Plaintiff Berger for violation of the New York Vehicle and Traffic Law ("VTL") § 1156(a) and § 1102. (*Id.* at 10.) I first summarize the elements for each of these offenses and then consider the parties' arguments with respect to each Plaintiff.

A. Overview Of Charges Under New York Law

1. Disorderly Conduct

Section 240.20 of the New York Penal Law provides, in relevant part, that "[a] person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof . . . [h]e obstructs vehicular or pedestrian traffic; or . . . [h]e congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse." N.Y. Penal Law § 240.20(5)-(6). "To prove the crime of disorderly conduct under § 240.20, the following must be established: '(i) the defendant's conduct must be

support of their motion. (Pls.' Reply Mem., ECF No. 294, at 4.) Even assuming this is sufficient, as set forth herein, the Court finds there are genuine issues of material fact as to probable cause for each Plaintiff's arrest and, thus, whether each Plaintiff has established the necessary constitutional violation.

public in nature, (ii) it must be done with 'intent to cause public inconvenience, annoyance or alarm' or with recklessness as to a risk thereof, and (iii) it must match at least one of the descriptions set forth in the statute.'" *Johnson*, 2019 WL 294796, at *8 (quoting *Provost v. City of Newburgh*, 262 F.3d 146, 157 (2d Cir. 2001) (internal quotation marks omitted)).

"In determining whether probable cause exists to arrest a person for disorderly conduct . . . the circumstances must indicate that the arresting officer was justified in concluding that the defendant was intentionally or recklessly creating a substantial risk that public inconvenience, annoyance or alarm would occur." *Brown v. Starrett City Assocs.*, No. 09-CV-03282, 2011 WL 1897651, at *5 (E.D.N.Y. May 18, 2011) (internal citation, brackets and quotation marks omitted); *see also Mediavilla*, 259 F. Supp. 3d at 97 (quoting *People v. Johnson*, 22 N.Y.3d 1162, 1164 (2014)).

For arrests pursuant to § 240.20(5), "[t]he Second Circuit requires a showing that the putative offender was 'actually and immediately blocking' the pedestrian or vehicular traffic in question." *Case v. City of New York*, No. 14-CV-09148 (AT), 2019 WL 4747957, at *3 (S.D.N.Y. Sept. 30, 2019) (quoting *Zellner*, 494 F.3d at 372). "Further, 'New York courts have interpreted this statute to permit punishment only where the conduct at issue does more than merely inconvenience pedestrian or vehicular traffic.'" *Id.* (quoting *Jones v. Parmley*, 465 F.3d 46, 59 (2d Cir. 2006)).

For individuals charged with disorderly conduct pursuant to § 240.20(6), whether or not probable cause existed depends on whether a dispersal order was given to the entire crowd; whether the order was lawful; and/or whether protestors were given an opportunity to comply with the order before being arrested. *See Case*, 2019 WL 4747957, at *4; *see also Collins v. City*

of New York, 295 F. Supp. 3d 350, 367 (S.D.N.Y. 2018) ("Orders to disperse must be lawful before failure to obey it gives rise to liability for committing the offense disorderly conduct . . . [a]s a result, courts have considered whether officers' orders to disperse violated demonstrators' First Amendment rights before finding that officers had arguable probable cause to arrest the demonstrators.") (internal citation and quotation omitted).

2. Obstructing Governmental Administration

A person is guilty of OGA when he "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[.]" N.Y. Penal Law § 195.05; *see also Cameron v. City of New York*, 598 F.3d 50, 68 (2d Cir. 2010) (listing four elements of OGA under New York law). "The crime requires one of the following: '(1) intimidation, (2) physical force or interference, or (3) any independently unlawful act.'" *Dancy v. McGinley*, 843 F.3d 93, 111 (2d Cir. 2016) (internal citation and quotation marks omitted). When OGA is based on interference, the "interference must be physical, and must obstruct an official function authorized by law." *Id.* (internal citations, quotation marks and alterations omitted). Criminal violations of § 195.05 "overlap to a large degree" with criminal violations of § 240.20(6) "because '[a]n officer has probable cause to arrest for [OGA] where a person refuses to comply with an order from a police officer.'" *Mediavilla*, 259 F. Supp. 3d at 97 (quoting *Marcavage v. City of New York*, No. 05-CV-04949, 2010 WL 3910355, at *10 (S.D.N.Y. Sept. 29, 2010), *aff'd*, 689 F.3d 98 (2d Cir. 2012)).

3. Vehicle And Traffic Law

Pursuant to § 1156(a), it is unlawful to walk in the street when "sidewalks are provided and they may be used with safety[.]" N.Y. Veh. & Traf. Law § 1156(a). Pursuant to § 1102, "[n]o

person shall fail or refuse to comply with any lawful order or direction of any police officer or flagperson or other person duly empowered to regulate traffic." *Id.* § 1102. "Although a violation of this statute is a traffic infraction, it still constitutes probable cause for a custodial arrest for purposes of federal law." *Lynch v. City of New York*, No. 16-CV-07355 (LAP), 2018 WL 1750078, at *7 (S.D.N.Y. Mar. 27, 2018).

B. Application

1. Plaintiff Packard

Plaintiffs contend that "the evidence presents at least a jury question regarding: (1) whether any of the Plaintiffs intended to or recklessly created the risk of 'public inconvenience, annoyance or alarm' and (2) whether any pedestrian was 'actually obstructed.'" (Pls.' Opp. Mem. at 7 (emphasis omitted) (quoting *Johnson*, 22 N.Y.3d at 1164).) With respect to his arrest, Packard argues that there is a question of fact as to his intent because he, and the group he was leading, made an effort not to sit in the middle of the sidewalk and he did not believe they were blocking the sidewalk. (*Id.*)

It is undisputed that Packard, part of a group of approximately 500 marchers, told the group "we're just not going anywhere, folks" and sat down on the sidewalk with a group of people. (Pls.' 56.1 Response ¶¶ 20-1, 21-7.) While Packard may not have believed that he was blocking pedestrian traffic, "the state of mind of the demonstrators—whether they thought that they were participating in a sanctioned, First-Amendment-protected roadway march or whether they were intentionally or recklessly blocking traffic—is irrelevant to the question of probable cause, although it is a potential defense to the underlying criminal charge." *Garcia*, 662 F. App'x

at 53 (citing *Curley v. Vill. of Suffern*, 268 F.3d 65, 70 (2d Cir. 2001) ("[T]he arresting officer does not have to prove plaintiff's version wrong before arresting him.")).

Nonetheless, the Court finds there is an issue of fact as to whether Packard was "actually and immediately blocking" pedestrian traffic. *See Case*, 2019 WL 4747957, at *4 (denying summary judgment on false arrest claim by OWS protester arrested for disorderly conduct). Packard contends that he was not blocking pedestrian traffic because he was sitting near the side of the building and not in the middle of the sidewalk. (Pls.' 56.1 Response ¶ 21-3, 22-1.) Packard further contends that it was in fact the police who were blocking the sidewalk and the west side of Broadway was clear for pedestrian use. (Pls.' 56.1 Response ¶¶ 26, 28-30.)

The Court carefully has studied the video evidence regarding Packard's arrest. The video shows that the sidewalk where Packard was arrested was extremely congested, but the view of Packard's arrest is partially obstructed. One cannot discern from the video precisely where Packard was sitting on the sidewalk or whether pedestrians were actually blocked by his actions. (*Id*. ¶ 22-2; *see also* ARGUS Video 1 SEC Broadway-Wall at 52:15-16.) Thus, a reasonable jury could conclude that there was a lack of probable cause for Packard's arrest for disorderly conduct under § 240.20(5). *See Soto v. City of New York*, No. 13-CV-08474 (LTS) (JLC), 2017 WL 892338, at *3 (S.D.N.Y. Mar. 6, 2017) ("The evidence proffered by Plaintiff that a substantial number of NYPD officers and other members of the public were also present in the intersection at the time of Plaintiff's arrest provides a sufficient basis for a reasonable jury to conclude that there were no grounds for the police to believe that Plaintiff personally intended to cause public inconvenience, or that she actually obstructed any traffic.").

Similarly, I find there are genuine disputes as to whether there was probable cause to arrest Packard for failing to comply with a lawful dispersal order or for OGA. These issues are related, as the City argues that there was probable cause to arrest each Plaintiff for OGA because their alleged failure to comply with orders to disperse "amounted to an intentional interference with the officers' duties to maintain congestion-free sidewalks and streets[.]" (Def.'s Mem. at 16.)

The Court cannot conclude as a matter of law that Packard failed to obey a lawful order. Packard testified that he never heard a dispersal order until he was under arrest.[7] (Pls.' 56.1 Response ¶ 24.) Nor is the video evidence conclusive. Thus, summary judgment in favor of Defendant is not warranted on this basis. *See Gogol v. City of New York*, No. 15-CV-05703 (ER), 2017 WL 3449352, at *5 (S.D.N.Y. Aug. 10, 2017) ("Construing these facts in the light most favorable to Plaintiff, the Court cannot conclude that she failed to obey [officer's] instruction.") (citing *Bryant v. Serebrenik*, No. 15-CV-03762 (ARR) (CLP), 2016 WL 6426372, at *4 (E.D.N.Y. Oct. 28, 2016) (finding that summary judgement is not warranted because there is dispute as to whether or not plaintiffs' children were attempting to comply with officers' orders when they were arrested)).

2. Plaintiff Beck

With respect to obstruction of pedestrian traffic, Beck admits that there were approximately 50 to 100 people near his location by 26 Broadway, but disputes that the sidewalks were blocked and that the all of those people were protesters. (Pls.' 56.1 Response ¶¶ 41-1, 41-

[7] The precise moment of his arrest also is a relevant question of fact for the jury. *See Jackson v. City of New York*, 939 F. Supp. 2d 235, 249 (E.D.N.Y. 2013) ("The issue of precisely when an arrest takes place is a question of fact.") (internal citation omitted).

2.) While the City contends that people can be seen walking in the street to avoid Beck, the video evidence also shows that Beck was walking and was not stationary, and that other people, some of whom may have been pedestrians, were moving about on the sidewalks. (*See* Def.'s 56.1 ¶ 44 (citing TARU Marini Video 9:34, at 00:50-00:54; Robinson Decl. Ex. Y, ARGUS Video East Broadway, ECF No. 257-25, at 18:54).) Whether Beck was obstructing pedestrian traffic under these circumstances is a question for the jury, not the Court, to resolve. *See Jackson*, 939 F. Supp. 2d at 249 (denying summary judgment on § 1983 claims when genuine dispute as to when and whether plaintiff's behavior created probable cause to justify arrest).

As for whether Beck failed to respond to a lawful dispersal order, video evidence shows that Beck was in the vicinity of an officer who ordered the crowd to "keep moving" and warned them that if they continued to block the sidewalk, they would be arrested. (TARU Defranco Video 9:09 at 01:37-01:42.) However, video evidence also shows that Beck began moving following those orders. (*Id.* at 01:42-02:31.) Similarly, later video evidence shows Beck in the vicinity of Captain Iocco, who ordered the crowd to "keep moving." (TARU Marini Video 9:34 at 00:18-00:24.) The video shows that, following that order, Beck continued walking, albeit slowly at first. (*Id.* at 00:26-01:01.) Based on this record, there are genuine disputes as to whether Beck failed to comply with officers' orders to disperse. Thus, the Court cannot conclude, as a matter of law that there was probable cause to arrest Beck for disorderly conduct. *See Case,* 2019 WL 4747957, at *4 (genuine issues of fact as to whether dispersal orders were sufficiently communicated and whether plaintiff was given adequate opportunity to comply); *see also C.G. ex rel. Gonzalez v. City of New York*, No. 12-CV-01606 (ARR) (VVP), 2013 WL 5774291, at *5 (E.D.N.Y. Oct. 24, 2013) ("Drawing all inferences in favor of plaintiff, as the court must do at this stage, the court cannot

find as a matter of law that defendant officers had probable cause to arrest plaintiff for disorderly conduct. Instead, the record shows that one of the essential elements of the offense is disputed: whether or not plaintiff complied with [the officer's] order to disperse.").

The City also argues that there was probable cause to arrest Beck for OGA "due to his physical obstruction and interference with Captain Iocco during the arrest of another protester." (Def.'s Mem. at 17.) According to the City, Beck physically inserted himself between Captain Iocco and the arrestee by crossing his arm over Iocco's arm and pushing Iocco out of the way. (*Id.* at 17-18; *see also* Def.'s 56.1 ¶ 47.) Beck disputes the City's version of events. (Pls.' 56.1 Response ¶¶ 47-1 to 47-4.) Beck testified that his friend fell while being arrested and Beck put his hands down to catch him, but did not try to pick him up. (*Id.* ¶ 47-3.) The video evidence does not conclusively establish either side's version of events. Moreover, Beck only was charged with obstructing pedestrian traffic and there is no other evidence in the record regarding what the arresting officer reasonably believed at the time of the arrest. Thus, the Court finds there is a genuine dispute for trial as to whether there was probable cause to arrest Beck for OGA. *See Evans v. City of New York*, No. 12-CV-05341 (MKB), 2015 WL 1345374, at *9 (E.D.N.Y. Mar. 25, 2015) ("Because there is a dispute of fact as to whether [officer] had reason to believe that Plaintiff 'physically interfered' with his efforts, summary judgment is not warranted on this issue.") (*citing Dowling v. City of New York*, No. 11-CV-04954, 2013 WL 5502867, at *6 (E.D.N.Y. Sept. 30, 2013) (denying summary judgment on whether there was probable cause for [OGA] charge because "[k]ey questions of fact to be resolved in th[e] [case] include whether [the] [p]laintiff placed himself physically in between the police . . . and whether [p]laintiff remained calm or became disorderly enough to interfere with police action")).

3. Plaintiff Cowan

As with the other Plaintiffs, the Court finds genuine issues of material fact with respect to whether Cowan actually was blocking pedestrian traffic and/or whether he failed to comply with a lawful order to disperse. Video evidence shows an NYPD officer give an order warning marchers, including Cowan, to leave room for people to walk on the sidewalk. (Stecklow Decl. Ex. 133, at 1:03 -1:11.) The officer starts to give a second order, but the video cuts out and switches to a different angle. (*Id.* at 1:11-1:12.) It is unclear from the video how much time passes between these scenes. The video then shows an NYPD officer standing on the sidewalk ordering marchers, including Cowan, to move off to the right side of the sidewalk. Seconds later, Cowan is arrested. (*Id.* at 1:19-1:35.) As with Beck, there are questions of fact as to the dispersal orders given and whether Beck was given sufficient time to respond. Further, Cowan testified that he responded to police orders to leave room for pedestrians to walk and that pedestrians walked in both directions during the march. (Pls.' 56.1 Response ¶ 65-1.) Plaintiffs also cite to video evidence that shows police officers standing on the sidewalk between the protesters and the curb, indicating that there may have been room for pedestrians on the sidewalk as Cowan contends. (*Id.* ¶ 66 (citing Video Ex. 133 at 000:16-00:30.) Thus, the Court finds that there are genuine issues of material fact as to whether there was probable cause to arrest Cowan for disorderly conduct or OGA.

4. Plaintiff Berger

Similar issues of fact prevent summary judgment as to Plaintiff Berger. First, there is a genuine dispute as to whether Berger complied or attempted to comply with one or more lawful dispersal orders. As for the dispersal order given at approximately 7:56 a.m., the parties dispute

the precise language of that order and the video evidence is not conclusive, as there is chanting and other background noise, which makes it difficult to determine the officer's order. (*See* Pls.' 56. 1 Response ¶ 77-1; TARU Hujel Video 7:56:48 at 00:00-00:16.) In any event, as Plaintiffs contend, there is no evidence that Berger was present at the time that order was given. (Pls.' 56.1 Response ¶ 77-2.) It is not until almost a minute later that Berger first appears in the video walking across the street. (TARU Hujel Video 7:56:48 at 1:08-01:12.) Approximately a minute-and-a-half later, Berger is seen standing on the sidewalk at the same intersection. (*Id.* at 02:27.) Four-and-a-half minutes later, video shows Berger standing in the street shortly before being arrested. (*Id.* at 06:54-07:35). At the time Berger was arrested, it is not clear from the video whether she was in a crosswalk. (*Id.* at 07:33-07:35.) Berger testified that the orders from police instructed protesters to get on the sidewalk or in the crosswalk, and that she was in the crosswalk at the time of her arrest. (Pls.' 56.1 Response ¶¶ 85-87.) Thus, there is a material dispute as to whether Berger complied with one or more dispersal orders. There also is a material dispute as to whether Berger was actually blocking pedestrian or vehicular traffic. (*See* Pls.' 56.1 Response ¶¶ 80-81.) Based on this evidence, there are genuine issues of material fact as to whether there was probable cause to arrest Berger for disorderly conduct or OGA.

Finally, with respect to the VTL, Berger admits that she crossed the street, but disputes that she was "standing in the street." (Pls.' 56.1 Response ¶ 76-1.) While video evidence shows Berger in the street at several points prior to her arrest (TARU Hujel Video at 1:08-01:12; 02:25-02:27; TARU Lee 6:56:42, Robinson Decl. Ex. RR, ECF No. 257-44, at 06:43-06:44), this evidence is not dispositive because the parties also dispute whether the sidewalk could be used safely. (*See* Pls.' Opp. Mem. at 16; Pls.' 56.1 Response ¶ 82-1.) Thus, there is a genuine issue of fact for trial.

See Eldridge v. Hofstetter, No. 16-CV-01281 (GTS) (CFH), 2018 WL 5961289, at *6 (N.D.N.Y. Nov. 14, 2018) (finding genuine dispute of material fact as to, among other things, "whether the adjacent sidewalk may have been used by Plaintiff with safety."); *cf. Pinto v. City of New York*, 728 F. App'x 26, 30 (2d Cir. 2018) (affirming grant of summary judgment on qualified immunity grounds when, *inter alia*, video evidence contradicted plaintiff's claim that sidewalk could not be used safely).

Because I find genuine issues of material fact with respect to the existence of probable cause for each Plaintiffs' arrest, I recommend that the parties' motions for summary judgment be DENIED.[8]

II. Failure To Train[9]

As set forth above, in order to prevail on their failure to train claim, Plaintiffs must: (1) establish that the City should have known its training was so likely to result in false arrests and/or

[8] Because, in the circumstances of this case, probable cause is a complete defense to First Amendment retaliation claims (*see* Legal Standards, Section III), and I find genuine issues of fact as to probable cause for Plaintiffs' arrests, I do not address Plaintiffs' separate arguments as to the elements of their First Amendment retaliation claims. (*See* Pls.' Opp. Mem. at 16-25.)

[9] In considering Plaintiffs' motion, the Court has considered, along with all other relevant filings, Plaintiffs' response to Defendant's Affirmative Statement of Facts, belatedly filed on July 1, 2019. (*See* Letter, ECF No. 298.) Though Defendant opposed Plaintiff's request that the Court treat the filing as timely, the Court finds no prejudice to Defendant in considering such evidence particularly in light of the Court's recommendation that Plaintiffs' motion be denied.

First Amendment violations so as constitute deliberate indifference under *Walker*, 974 F.2d at 297-98; (2) identify "obvious and severe deficiencies" in the City's training program that "reflect a purposeful rather than negligent course of action;" and (3) show a causal relationship between the failure to train and the alleged deprivations to Plaintiffs. *Reynolds*, 506 F.3d at 193. The Court considers each of these elements below.

A. Whether The Training Program Was Deficient

Plaintiffs argue that "[t]he City failed to properly and appropriately train its executive level officers on the lawful application of the disorderly conduct and [OGA] statutes, and failed to properly train on requirements of dispersal orders to those participating in sidewalk protests." (Pls.' Mem. at 14.) Plaintiffs also seek to establish that the NYPD's training was deficient through evidence that the NYPD removed certain training materials and ignored recommendations for more training. (*Id.* at 22-27.)

To start, the parties dispute the types of training that are relevant to the Court's analysis. Plaintiffs focus only on training provided by the NYPD Disorder Control Unit ("DCU"), which they contend was responsible for training the NYPD on how to police protest activity.[10] (*Id.* at 15-22.) Plaintiffs argue that the City admits that DCU training from 2009 through 2012 did not include any training on the First Amendment or the disorderly conduct statute, among other relevant topics, but, in fact, the City denies each of the statements of fact that Plaintiffs cite. (*See* Def.'s 56.1 Response ¶¶ 160, 162, 171.) Moreover, while the City disputes Plaintiffs' premise that the

[10] In their Reply Memorandum, Plaintiffs further contend that their *Monell* claim is about the adequacy of post-Academy training. (*See* Pls.' Reply Mem. at 2-3, 9 (citing *Gerskovich v. Iocco*, 15-cv-07280 (RMB), 2017 WL 3236445 (S.D.N.Y. July 17, 2017)). However, the Court finds no legal basis to narrow the scope of the training to post-Academy training. Ultimately, it is a question for the jury as to whether the training provided by the NYPD was adequate. Indeed, in *Gerskovich*, the court denied summary judgment.

DCU was solely responsible for the type of training at issue, the City has presented evidence that the NYPD conducted training in 2011 on the constitutional rights of protesters pursuant to a DCU lesson plan on legalities at protests and demonstrations and that the DCU trained Probationary Lieutenants and Probationary Sergeants on policing in the First Amendment context. (*Id.* ¶ 160.)

In addition, the City has presented evidence that the NYPD conducted training on the First Amendment and the application of the disorderly conduct statute through its Police Academy and through "Command Level training" at the precincts. (Def.'s Opp. Mem., ECF No. 278, at 7-13.) For example, the City points to information in the NYPD Police Student's Guide regarding the First Amendment and the disorderly conduct statute, which include specific guidelines for demonstrations. (*Id.* at 7-10.) Among other things, the guidelines explain that "[i]ncidental obstruction is not illegal if it is less than a ***serious annoyance*** or only ***mere inconveniencing*** of pedestrians." (*Id.* at 10 (emphasis in original).) The City also points to a 2007 NYPD Police Academy Training Memo that provided guidance to officers specifically on the application of New York Penal Law § 240.20(5) as an example of Command Level training, which is training given to precinct-level training sergeants who, in turn, train individual members of their commands.[11] (*Id.*

[11] There is pending before the Court a motion by the City to preclude the opinion and report of Plaintiffs' expert Robert Brown. (4/5/19 Notice of Mot., ECF No. 260.) According to the City, "Brown opines that NYPD 'Executive Level Officers' were not properly trained in policing 'sidewalk protests,' and that the named plaintiffs were arrested without probable cause." (Preclusion Mem., ECF No. 262, at 1.) However, Plaintiffs' only reference to Brown's report or opinion is a Declaration submitted by Plaintiffs in connection with their Reply Memorandum, which Plaintiffs assert is evidence that NYPD Command Level training was ineffective and was not attended by Executive Level Officers. (*See* Pls.' Reply Mem. at 10 (citing Decl. of Robert Brown, dated May 23, 2019, ECF No. 295-1).) Because I find that Defendant has raised genuine disputes of material fact as to the adequacy of its training program, I do not rely on the Brown Declaration in making my recommendations herein. Thus, to the extent Defendant seeks to preclude the report and opinion of Brown in the context of the pending cross-motions for summary judgment, I recommend that the motion be denied as moot. *See Vazquez v. City of New York*, No. 10-CV-06277 (JMF), 2014 WL 4388497, at *11 (S.D.N.Y. Sept. 5, 2014) (motion to strike expert report moot when Court did not rely on report in reaching its conclusions on motion for summary judgment). To the extent Defendant seeks to exclude

at 12-13.) The Court finds this evidence sufficient to create a triable issue of fact as to whether Plaintiffs have met their burden to identify obvious and severe deficiencies in the training provided by the NYPD.

Finally, to the extent that Plaintiffs seek to establish that the NYPD's training program was deficient based on the knowledge and/or conduct of two executive officers, Edward Winski and Retired Chief Purtell (*see* Pls.' Mem. at 27-28), that evidence is insufficient because "[a] valid claim for failure to train must be 'based on more than the mere fact that the misconduct occurred in the first place.'" *Amnesty Am.*, 361 F.3d at 130; *see also Jenkins*, 478 F.3d at 95 ("The mere fact that [the plaintiff] was falsely arrested, without more, does not show that the City's training program is inadequate.").

B. Deliberate Indifference[12]

Even if the Court were to conclude, as a matter of law, that the NYPD's training program was deficient, in order to prevail on their summary judgment motions, Plaintiffs also must establish that the City's failure to train amounted to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Connick*, 563 U.S. at 61 (internal citation omitted). As set forth above, Plaintiffs must establish that: (1) the City knew to a moral certainty that it would confront a given situation; (2) the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or

Brown's report and opinion at trial, that motion is properly before District Judge Torres.

[12] If the Court finds that there are genuine issues of fact as to the adequacy of the NYPD's training program and causation, it need not decide "whether plaintiffs have proffered sufficient evidence to allow a factfinder to conclude that any failure to train would have been deliberately indifferent within the meaning of *Walker*, 974 F.2d at 297-98." *Amnesty Am.*, 361 F.3d at 130 n.11.

there is a history of employees mishandling the situation; and (3) the wrong choice by the City would frequently cause the deprivation of Plaintiffs' rights. *See Walker,* 974 F.2d at 297-98.

The parties do not dispute the first prong. (*See* Def.'s Opp. Mem. at 20.) As for the second prong, the Court recognizes that "[p]olicing demonstrators presents hard questions." *Case*, 2019 WL 4747957, at *10. As such, the Court finds that there is a genuine issue of material fact as to whether additional training on the First Amendment or how to make probable cause determinations, for example, would make "the 'difficult choice[s]' inherent in policing large demonstrations 'less difficult.'" *Id.* (quoting *Walker*, 974 F.2d at 297).

As for the third prong, Plaintiffs can establish that the wrong choice by the City would frequently cause the deprivation of their rights through evidence that the City was aware of a pattern of false arrests or First Amendment violations by police officers, but failed to institute appropriate training or supervision. *See Walker*, 974 F.2d at 299-300; *see also Connick*, 563 U.S. at 62 ("A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train.") (internal quotation marks and citation omitted). Similarly, "when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain the program." *Connick*, 563 U.S. at 61.

Here, Plaintiffs assert that the City ignored known or obvious problems in how the NYPD policed sidewalk protests. (Pls.' Mem. at 4-14.) Plaintiffs contend that the NYPD has been on notice of deficiencies in its training regarding policing of sidewalk protests based on: (1) prior lawsuits; (2) data from the New York County District Attorney's Office that "revealed trends and

problems with the arrests and methods of the policing of Occupy Wall Street protests[;]" (3) complaints from members of the public, social justice groups and public officials about NYPD's conduct at sidewalk protests; and (4) the publication by the Global Justice Clinic of a report entitled "Suppressing Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street" (the "Suppression Report"), but chose not to change its methods or training. (Pls.' Mem. In Support, ECF No. 268, at 5; Pls.' 56.1 ¶ 10.)

As an initial matter, the City is correct that this Court already has rejected Plaintiffs' attempt to prove their claims through evidence of other lawsuits and statistics. (*See* Decision & Order, ECF No. 59, at 16.) In any event, the City disputes that these data points prove a pattern of unlawful arrests and, thus, there is a genuine dispute about whether there was a pattern of constitutional violations that they City should have responded to. (Def.'s Mem. at 22-25.) As for evidence that the City ignored specific complaints, the City points to evidence that it did investigate the incident raised in letters from New York State Senator Krueger and Council Member Lappin regarding arrests made at a sidewalk protest in the Bronx. (Def.'s Mem. at 25-26.) Thus, there are questions of fact as to whether the City "meaningful[ly] attempt[ed]" to "investigate or to forestall further incidents." *Vann v. City of New York*, 72 F.3d 1040, 1049 (2d Cir. 1995). The same is true with respect to the City's response to the Suppression Report, which was not sent to the NYPD until at least July 25, 2012, less than two months before the arrests at issue. (*See* Def.'s Mem. at 27; Pls.' Reply Mem. at 7 n.4.)

C. Causation

Finally, the City argues that Plaintiffs' motion should be denied because Plaintiffs have not presented any evidence that the alleged failure to train was the "moving force" behind

Plaintiffs' alleged injuries. (Def.'s Mem. at 28-29.) The Court agrees that Plaintiffs have not met their burden on this issue and therefore are not entitled to summary judgment. While the allegations regarding specific training deficiencies coupled with the facts surrounding Plaintiffs' arrests may be sufficient to establish causation, *see, e.g.*, *Case*, 2019 WL 4747957, at *11 (jury could conclude causal link to false arrest based on specific training deficiencies), that is not the only conclusion a reasonable jury could reach. *Cf. Amnesty Am.*, 361 F.3d at 130 (recognizing causes of officer's conduct that would not support municipal liability, such as negligent administration of a valid program, or one or more officers' negligent or intentional disregard of their training). Because Plaintiffs have not attempted to satisfy this element of their claim, I recommend that summary judgment be denied. *See Gerskovich,* 2017 WL 3236445, at *10 (denying motions for summary judgment when, *inter alia*, material issue of disputed fact as to whether the City's alleged failure to train caused plaintiff's constitutional injury).

For the foregoing reasons, I find that there are genuine issues of material fact with respect to each element of Plaintiffs' failure to train claim. Thus, I recommend that Plaintiffs' motion be denied in its entirety.

D. Certification Of An Issue Class Pursuant To Rule 23(c)(4)

This Court previously recommended to Judge Torres that she deny Plaintiffs' motion for class certification without prejudice to renewal of "their motion in order to propose subclasses and/or an issue class to satisfy the requirements of Rule 23." *Packard v. City of New York*, 2019 WL 2493515, at *10 (Mar. 8, 2019). Judge Torres thereafter adopted my recommendation. *See Packard v. City of New York*, 2019 WL 1714669, at *3 (S.D.N.Y. Apr. 16, 2019).

Plaintiffs have not sought to propose subclasses. Rather, they now move "for certification of the City of New York's *Monell* liability." (*See* Pls.' 7/1/19 Not. of Mot., ECF No. 299, at 1.) Specifically, "Plaintiffs seek certification of the common issue of whether the City is liable for its failure to train the NYPD on the First and Fourth Amendment rights of sidewalk protestors, *i.e.*, 'whether the City's training was inadequate and whether the City's failure to train amounted to deliberate indifference.'" (Pls.' 7/1/19 Mem., ECF No. 300, at 6 (citation omitted).) I recommend that certification of such an issue class be denied.

"For particular issues to be certified pursuant to Rule 23(c)(4), the requirements of Rules 23(a) and (b) must be satisfied only with respect to those issues." *Charron v. Pinnacle Grp. N.Y. LLC*, 269 F.R.D. 221, 239 (S.D.N.Y. 2010). However, even assuming these requirements are met, *see id.* at 241 (when class certification limited only to certain common issues under Rule 24(c)(4), those issues "necessarily predominate" and "[it] therefore goes almost without saying that the related requirements of commonality and typicality are also met") (internal citations and quotation marks omitted), the Court finds that certification of an issue class would not meaningfully reduce the range of issues in dispute or promote judicial economy.

First, because issue certification is appropriate, at best, with respect to certain portions of Plaintiffs' failure to train claim, many individual issues would remain. These issues include, not only the individual questions regarding probable cause, but also individualized determinations regarding whether the City's alleged failure to train was the cause of each of the class member's alleged injuries. If this Court's recommendation regarding the denial of summary judgment is adopted, this case will proceed to trial for the four named Plaintiffs. If the City can establish that probable cause existed to arrest the four Plaintiffs, then the jury need not reach the issues of

whether the City's training program was deficient or whether the City's conduct amounted to deliberate indifference.[13] In these circumstances, the Court find that issue certification is not warranted.[14] *See Dungan v. Acad. at Ivy Ridge*, 344 F. App'x 645, 647 (2d Cir. 2009) (issue certification would not meaningfully reduce range of issues in dispute and promote judicial economy).

Thus, I recommend that the Court deny Plaintiffs' motion for certification of an issue class.

CONCLUSION

For the foregoing reasons, I recommend that the parties' cross-motions for summary judgment, and Plaintiffs' motion for certification of an issue class, be DENIED in their entirety.

DATED: October 30, 2019
New York, New York

STEWART D. AARON
United States Magistrate Judge

* * *

NOTICE OF PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION

The parties shall have fourteen (14) days (including weekends and holidays) from service of this Report and Recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. *See also* Fed. R. Civ. P. 6(a), (d) (adding

[13] The parties dispute the proper order for adjudicating the elements of Plaintiffs' claims at trial.

[14] The Court also notes that should any of the named Plaintiffs succeed at trial, other would-be plaintiffs may be able to rely on the doctrine of non-mutual, offensive collateral estoppel to estop the City "from relitigating the issues which [it] previously litigated and lost against another plaintiff." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979).

three additional days when service is made under Fed. R. Civ. P. 5(b)(2)(C), (D) or (F)). A party may respond to another party's objections within fourteen days after being served with a copy. Fed. R. Civ. P. 72(b)(2). Such objections, and any response to objections, shall be filed with the Clerk of the Court. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Torres.

FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b); *Thomas v. Arn,* 474 U.S. 140 (1985).