

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TIMOTHY C. NELSON,
Plaintiff,

No. 2:05-cv-1193-MCE-KJM

v.

MEMORANDUM AND ORDER

CITY OF DAVIS; JAMES HYDE,
individually and in his
official capacity as Chief of
Police for the CITY OF DAVIS;
CALVIN HANDY, SERGEANT MICHAEL
MASON, OFFICER JAVIER BARRAGAN,
OFFICER BRANDON JONES, OFFICER
CALVIN CHANG, OFFICER M. GARCIA,
individually and DOES 1-100,
inclusive,

Defendants.

----oo0oo----

Plaintiff Timothy C. Nelson ("Plaintiff") seeks damages as
result of injuries he sustained during law enforcement activities
arising from a disturbance at an apartment complex in Davis,
California. Defendants include the City of Davis, Davis Chief of
Police James Hyde, and Davis Police Sergeant John Wilson.

///

1 In addition, because University of California, Davis ("U.C.
2 Davis" or "University") police personnel assisted the City of
3 Davis Police Department in quelling the disturbance, Plaintiff
4 has sued U.C. Davis Officers Calvin Handy, Javier Barragan, and
5 Mary Garcia. Plaintiff alleges that Defendants violated his
6 constitutional rights by subjecting him to unreasonable seizure
7 in violation of both the United States and California
8 Constitutions. Plaintiff further asserts constitutional equal
9 protection claims, as well as additional common law and statutory
10 claims sounding under California law.

11 By Memorandum and Order dated September 19, 2007, this Court
12 granted summary judgment in favor of Defendants on the basis of
13 Plaintiff's own version of events. Plaintiff appealed that
14 decision and the Ninth Circuit reversed, citing potentially
15 conflicting evidence from other witnesses. Following remand of
16 the matter back to this Court for further proceedings, Defendants
17 have filed three renewed Motions for Summary judgment, which
18 alternatively request partial summary judgment of certain issues.
19 The motions are brought on behalf of 1) the City of Davis
20 Defendants (Davis, Hyde and Wilson); 2) the U.C. Davis Defendants
21 with the exception of Calvin Chang (Handy, Barragan and Garcia)
22 and 3) Defendant Calvin Chang, individually.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 For the reasons set forth below, Defendants' Motions will be
2 granted in part and denied in part.¹

3
4 **BACKGROUND**

5
6 On the evening of April 16, 2004, following the annual
7 Picnic Day festivities held at U.C. Davis, as many as a thousand
8 young people gathered at the Sterling Apartment complex on
9 Cantrill Drive in Davis. One resident of the complex described
10 the gathering as "the biggest party in history". Plaintiff, a
11 twenty-year old college student, was in attendance.

12 The City of Davis police became aware of the party after
13 noticing virtually gridlocked traffic along Cantrill Drive, and
14 upon observation of illegally parked cars on both sides of the
15 street for almost its entire length. The police station itself
16 was located near the apartments at the corner of Cantrill and
17 Fifth Street, and the sergeant on duty, Defendant Wilson,
18 dispatched police officers to begin issuing parking citations to
19 clear the improperly parked vehicles. The police also checked
20 the party itself, which Sergeant Wilson described as both
21 unusually large and loud.

22 ///

23
24

¹ In conjunction with their Motions, the attorneys for
25 Defendant Chang and the other U.C. Davis Defendants have asked
26 the Court to take judicial notice, pursuant to Federal Rule of
27 Evidence 201, of certain documents filed in support of the
28 initial round of summary judgment motions filed in this case,
along with the Court's prior Order of September 21, 2007 and the
Ninth Circuit's subsequent decision of July 7, 2009. Those
requests are unopposed and well-taken, and are accordingly
granted.

1 Underage alcohol violations were observed, and Wilson claims he
2 observed individuals trying to vandalize vehicles by rocking them
3 back and forth. One resident described a chair being thrown from
4 an upper story window. After apprising an agent for the complex
5 owner of the situation, Sergeant Wilson was asked shortly before
6 midnight to request that all non-residents leave the premises
7 under penalty of trespass.

8 The crowd did not respond to the police's initial request to
9 disperse. Sergeant Wilson ordered two of the officers, who had
10 been on foot, to go back to the nearby station and return with
11 their patrol vehicles for an additional police presence. As one
12 of the vehicles drove through the complex, a group of three to
13 four-story buildings situated on a rectangular lot, Wilson
14 observed partygoers surround the vehicle and begin throwing
15 bottles. Although the patrol vehicle activated its emergency
16 lights and siren, Wilson states that it was unable to exit the
17 complex absent rescue intervention from both himself and other
18 officers. Wilson then called for backup as both he and the
19 officers retreated back to the driveway at entrance to the
20 complex.

21 About forty officers arrived at the Davis Police station in
22 response to Defendant Wilson's request, including Lieutenant
23 Darren Patel, who upon arrival assumed the role of incident
24 commander. U.C. Davis police officers, including Defendants
25 Chang, Barragan and Garcia, were among those who responded.
26 Unlike their City counterparts, the U.C. Davis officers had
27 pepperball launchers in their arsenal for crowd dispersal.

28 ///

1 Pepperball launchers are dual purpose weapons that shoot round
2 plastic balls filled with Oleoresin Capsicum ("OC") powder, a
3 substance similar to pepperspray. Such launchers combine the
4 shock of kinetic impact (similar to paintballs) with the sensory
5 discomfort associated with pepperspray. They are designed to
6 break apart and disperse the OC powder upon impact.

7 Pepperball launchers can be aimed reliably to subdue a
8 target suspect at distances up to thirty feet. After that point,
9 however, it is undisputed that their trajectory becomes less
10 reliable. (See Pl.'s Undisputed Fact ("PUF") No. 16). According
11 to Plaintiff's expert, Roger Clark, pepperballs should not be
12 fired into occupied areas at distances of more than thirty feet
13 because of the risk of striking unintended targets in vulnerable
14 body areas. Pl.'s Ex. 25, Clark Dep., 24:11-27:5.² Pepperball
15 launchers may, however, be launched at hard building surfaces
16 like walls, ceilings, doors and windows within a hundred-foot
17 radius for effective dispersal, or "area saturation", of the OC
18 to the surrounding vicinity. Within these parameters, pepperball
19 use in crowd control and riot situations meets Peace Officer
20 Standards Training ("POST") guidelines, and further was
21 authorized by U.C. Davis Police Department policy.

22 ///

23 ///

24 ///

25
26 ² For purposes of summary judgment, Defendants' objections
27 to the Clark deposition are hereby overruled. As discussed
28 infra, Clark's testimony with respect to the accurate range of
the pepperball launchers appears to be corroborated by at least
two of the officers who used the launchers during the incident in
question.

1 Following the officers' initial retreat, the evidence shows
2 that the Sterling party careened further out of control.
3 Sergeant Wilson could hear individuals shouting "fuck the police"
4 as the officers regrouped at the station. At about 1:00 a.m.,
5 after meeting together to form a dispersal plan, between thirty
6 and forty officers proceeded on foot to the southwest corner of
7 the apartment complex in full riot gear (helmets, shields and
8 batons). Four U.C. Davis officers, including Defendants Chang,
9 Garcia and Barragan, as well as another individual, Officer
10 Jones, carried pepperball launchers. Defendants claim that crowd
11 dispersal orders were given, although it appears undisputed that
12 the party was loud the police had no means with which to
13 mechanically amplify any such verbal commands. See PUF No. 6.

14 After observing the police, Plaintiff testified that he
15 retreated inside one of the complex buildings to a friend's
16 apartment. Both officers and partygoers attest to the fact that
17 bottles and other objects were being thrown at the police from
18 various vantage points at this juncture, including upper story
19 balconies. At least one officer was injured by a thrown bottle,
20 and several others reported only narrowly being missed on
21 numerous occasions.

22 There is no dispute that the officer's initial sweep through
23 the complex in riot gear failed to adequately disperse the
24 partygoers. Bottles and other debris continued to be thrown at
25 the police. A second sweep was thereafter ordered and began from
26 the southwest corner of the complex in front of a breezeway.

27 ///

28 ///

1 During that second sweep, officers observed a group of between
2 fifteen and twenty individuals congregated at the back of that
3 southwest breezeway. While Officer Chang claims that bottles
4 were being thrown from the rear of that group, (see Chang Decl.,
5 ¶ 14) two of the other officers present, Defendants Garcia and
6 Barragan, testified that they observed no one in the breezeway
7 throw anything at the police. See Pl.'s Ex. 16, Garcia Dep.,
8 103:10-12; Ex. 17, Barragan Dep., 58:2-18, 66: 2-4 (did not throw
9 bottles, did not come at police; just stood there). Garcia and
10 Barragan's testimony in this regard is corroborated by one of the
11 individuals present in the breezeway, Lee Lauduski. See Pl.'s
12 Ex. 6, Lauduski Dep., 26-3-12. In addition, it is undisputed
13 that Plaintiff himself threw nothing at the police. Def. Chang's
14 Undisputed Fact ("UF") No. 38.

15 According to Officer Wilson, after twice ordering those
16 present in the breezeway to disperse without success,³ he ordered
17 the three U.C. Davis officers with operable pepperball launchers
18 (Chang, Barragan, and Garcia) to fire.⁴ Estimates of the
19 distance between the officers, at the time they began firing, and
20 the crowd in the breezeway range from 45 to 150 feet. Pl's
21 Ex. 8, Dep. of Alicia Vittitoe, 42:6-19 (50 feet); Pl.'s Ex. 19;
22 Dep. of Lopamudra Sengupta, 38:17-25 (100 to 150 feet); Pl's
23 Ex. 10, Dep. of Defendant Wilson, 70:4-13 (45 feet).

24
25 ³ This testimony is countered from students present in the
26 breezeway who claim neither heard nor understood that any such
commands have been given before the launchers were employed. See
PUF No. 12.

27 ⁴ The launcher of the Officer Jones, the fourth U.C. Davis
28 Police officer equipped with the weapon, was apparently
inoperable.

1 It is undisputed that Chang, Garcia and Barragan all fired
2 pepperballs into the breezeway. The officers aimed both at hard
3 surfaces adjacent to the breezeway (the doors, ceiling and walls)
4 and at individuals who they observed throwing bottles (from below
5 the shoulders).

6 While Plaintiff testified that he remained inside in an
7 interior hallway until just before he was hit by a pepperball as
8 he attempted to exit the building, other witnesses place
9 Plaintiff as being outside in the breezeway for a significant
10 period of time before any pepperballs were launched. Bridget
11 Collins testified, for example, that she was outside with
12 Plaintiff in different parts of the breezeway area for close to
13 thirty minutes before he was shot. Pl.'s Ex. 2, Collins Dep.,
14 43:13-52:15. Bryan Lee-Lauduski and Alicia Vittitoe appear to
15 concur with that assessment. Pl.'s Ex. 6, Lee-Lauduski Dep.
16 13:5-19:22; Pl.'s Ex. 8, Vittitoe Dep., 24:15-25:9.

17 As a result of being struck in the left eye by one of the
18 pepperballs, Plaintiff experienced temporary blindness in that
19 eye and alleges a permanent loss of visual acuity. He had to
20 undergo multiple surgeries to repair the ocular injury he
21 sustained.

22 Despite complaints lodged on Plaintiff's behalf against both
23 the City of Davis and the University, no independent
24 investigation of the incident was undertaken. Defendant Hyde, as
25 Chief of Police for the City of Davis, approved of the decision
26 not to accept Plaintiff's complaint and relied solely on the
27 assurances of his staff in not ordering that a Use of Force
28 Report be prepared. Pl.'s Ex. 14, Dep. of Chief Hyde, pp. 52-57.

1 In addition, the University's Use of Force Review was based
2 solely on the officers' written reports made in conjunction with
3 the incident. Pl.'s Ex. 21, Handy Dep., 34:7-42:14, 95:17-24.

4
5 **STANDARD**
6

7 The Federal Rules of Civil Procedure provide for summary
8 judgment when "the pleadings, depositions, answers to
9 interrogatories, and admissions on file, together with
10 affidavits, if any, show that there is no genuine issue as to any
11 material fact and that the moving party is entitled to a judgment
12 as a matter of law." Fed. R. Civ. P. 56(c). One of the
13 principal purposes of Rule 56 is to dispose of factually
14 unsupported claims or defenses. Celotex Corp. v. Catrett, 477
15 U.S. 317, 325 (1986).

16 Rule 56 also allows a court to grant summary adjudication on
17 part of a claim or defense. See Fed. R. Civ. P. 56(a) ("A party
18 seeking to recover upon a claim...may...move...for a summary
19 judgment in the party's favor upon all or any part thereof.");
20 see also Allstate Ins. Co. v. Madan, 889 F. Supp. 374, 378-79
21 (C.D. Cal. 1995); France Stone Co., Inc. v. Charter Township of
22 Monroe, 790 F. Supp. 707, 710 (E.D. Mich. 1992).

23 The standard that applies to a motion for summary
24 adjudication is the same as that which applies to a motion for
25 summary judgment. See Fed. R. Civ. P. 56(a), 56(c); Mora v.
26 ChemTronics, 16 F. Supp. 2d 1192, 1200 (S.D. Cal. 1998).

27 ///

28 ///

1 In considering a motion for summary judgment, the court must
2 examine all the evidence in the light most favorable to the non-
3 moving party. U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962).
4 Once the moving party meets the requirements of Rule 56 by
5 showing that there is an absence of evidence to support the non-
6 moving party's case, the burden shifts to the party resisting the
7 motion, who "must set forth specific facts showing that there is
8 a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477
9 U.S. 242, 256 (1986). Genuine factual issues must exist that
10 "can be resolved only by a finder of fact, because they may
11 reasonably be resolved in favor of either party." Id. at 250.
12 In judging evidence at the summary judgment stage, the court does
13 not make credibility determinations or weigh conflicting
14 evidence. See T.W. Elec. v. Pacific Elec. Contractors Ass'n, 809
15 F.2d 626, 630-631 (9th Cir. 1987), citing Matsushita Elec. Indus.
16 Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

17 18 ANALYSIS

19 A. Unreasonable Seizure Under The Fourth Amendment

20 1. Whether the requisite seizure occurred

21

22 Plaintiff's First and Fourth Claims for Relief assert his
23 right to be free from unreasonable seizures under the Fourth
24 Amendment of the United States Constitution and Article I,
25 Section 13 of the California Constitution, respectively.

26 ///

27 ///

28 ///

1 The Court must necessarily initially determine whether any
2 "seizure" has occurred giving rise to constitutional protection.⁵

3 "A seizure triggering the Fourth Amendment's protections
4 occurs only when government actors have, by means of physical
5 force or show of authority, in some way restrained the liberty of
6 a citizen." Graham v. Conner, 490 U.S. 386, 395 n.10 (1989).

7 The Supreme Court has further recognized that any constitutional
8 violation in this regard "requires an intentional acquisition of
9 physical control." Brower v. County of Inyo, 489 U.S. 593, 596
10 (1989). As the Brower court explained:

11 "[A] Fourth Amendment seizure does not occur whenever
12 there is a governmentally caused termination of an
13 individual's freedom of movement (the innocent
14 passerby), or even whenever there is a governmentally
15 caused and governmentally desired termination of an
16 individual's freedom of movement (the fleeing felon),
17 but only when there is a governmental termination of
18 freedom of movement through means intentionally
19 applied."

20 Id.

21 To constitute a seizure, "the taking or detention itself
22 must be willful. This is implicit in the word 'seizure,' which
23 can hardly be applied to an unknowing act." Id. (internal
24 quotations omitted).

25 ///

26 ///

27 ///

28 ///

26 ⁵ Because the instant federal constitutional protections
27 parallel those afforded by state constitution in this regard,
28 the discussion that follows relies upon Fourth Amendment
jurisprudence. See Sanchez v. County of San Diego, 464 F.3d 916,
928 (9th Cir. 2006).

1 In this case, being struck in the eye by a pepperball
2 clearly constituted an application of force which terminated
3 Plaintiff's movement. The critical issue in determining whether
4 a seizure occurred for Fourth Amendment purposes rests instead
5 with whether or not Plaintiff was an intended object of the
6 fusillade of pepperball bullets launched into the apartment
7 breezeway.

8 While Plaintiff's own testimony indicates that he literally
9 entered the breezeway as the projectiles were fired and was
10 struck as soon as he exited the double doors leading from an
11 interior hallway into the breezeway (see Pl.'s Dep., 104:18-23,
12 107:4-109:13), the testimony of other witnesses, as discussed
13 above, suggests that Plaintiff had been outside in the group
14 congregated in the breezeway for some time before the pepperballs
15 at issue were launched. That testimony, if given credence,
16 places Plaintiff squarely within the group of individuals in the
17 breezeway targeted by the police officers. Whether it was to
18 stop certain individuals who may have been throwing bottles at
19 the police or simply to target the walls and ceiling around the
20 group in order to disperse the crowd by way of "area saturation"
21 with OC spray, a reasonable inference can be drawn that the
22 officers intended to fire into the group of which Plaintiff may
23 have been a part.

24 ///

25 ///

26 ///

27 ///

28 ///

1 In determining the critical issue of the officer's intent in
2 launching the pepperballs, the proper inquiry must be whether any
3 rational trier of fact could conclude that Plaintiff was an
4 intended object of the police action. In assessing the propriety
5 of summary judgment, the court must credit all inferences
6 supported by Plaintiff's evidence. Blankenhorn v. City of
7 Orange, 485 F.3d 463, 470 (9th Cir. 2007), quoting Anderson v.
8 Liberty Lobby, Inc., 477 U.S. at 25. Because of the conflicting
9 evidence as to Plaintiff's whereabouts at the time of the
10 shooting, and the fact that the evidence in this regard must
11 arguably be weighed in order to reach any conclusion about
12 whether Plaintiff was among the group intentionally targeted by
13 the police, summary judgment on the question of whether a seizure
14 occurred for purposes of the Fourth Amendment cannot be had.

15 If indeed Plaintiff was a member of the breezeway group
16 targeted by the police, as the evidence arguably suggests, the
17 so-called "bystander" line of cases may be inapplicable. In
18 Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 795 (1st Cir. 1990),
19 the First Circuit found that no Fourth Amendment seizure occurred
20 because the plaintiff in that case was inadvertently shot during
21 the police pursuit of a robbery suspect and hence was not
22 intentionally seized by the police bullet that struck him. As
23 the Landol-Rivera court noted, the plaintiff there "was not the
24 object of the police bullet that struck him." Id. Here, on the
25 other hand, the pepperspray bullets were launched at the group of
26 which Plaintiff was a part.

27 ///

28 ///

1 Similarly, in Rucker v. Harford County, 946 F.2d 278, 280 (4th
2 Cir. 1991), the Fourth Circuit ruled that a seizure within the
3 Fourth Amendment could not be demonstrated where the victim, a
4 spectator who decided to watch an unfolding police pursuit, was
5 not the "intended object" of law enforcement activity when he was
6 shot and killed by police officers attempting to apprehend a
7 fleeing criminal. Caselaw from other circuits is also in accord.
8 See, e.g., Childress v. City of Arapaho, 210 F.3d 1154, 1157
9 (10th Cir. 2000) (no seizure of hostages because officers
10 intended to restrain fugitives and the vehicle they were driving,
11 not the hostages); Medeiros v. O'Connell, 150 F.3d 164, 169 (2d
12 Cir. 1998) (same).

13 In Fisher v. City of Memphis, 234 F.3d 312 (6th Cir. 2000)
14 while the victim shot by police was only the passenger in a car
15 that attempted to strike two pedestrians, including a police
16 officer, there was no question that the police officer intended
17 to shoot generally at the vehicle in order to stop it. The
18 Fisher court found that because the car was the intended target
19 of the officer's intentionally applied force, everyone in the
20 car, including the passenger, was effectively seized. Id. at
21 319. Just as the officer in Fisher took aim at the car as an
22 entity rather than at its specific occupants, so too may the
23 officers here have aimed at the individuals standing in the
24 breezeway, which may have included Plaintiff, as a group, and
25 likewise may Plaintiff as a member of the group been targeted and
26 accordingly seized under a Fourth Amendment analysis.

27 ///

28 ///

1 Also instructive, and perhaps the closest case factually to
2 the matter at bar, is the Eastern District of Washington's
3 decision in Logan v. City of Pullman, 392 F. Supp. 2d 1246 (E.D.
4 Wa. 2005). In Logan, like this case, a student disturbance,
5 there at a nightclub rather than at an apartment complex, ensued
6 during the course of a party. Fighting broke out involving
7 numerous individuals and two competing groups. The description
8 employed in both cases of "mass chaos" and a "melee" is also
9 strikingly similar, as is the fact that perceptions of what was
10 occurring diverged markedly between those present. After the
11 police were called, the officers who responded sprayed OC towards
12 the group that were actively fighting. That spray ultimately
13 drifted into the upstairs portion of the nightclub, where panic
14 erupted as the partygoers attempted to exit the building. In
15 analyzing the issue of whether a seizure occurred, the court
16 found that those present on the second floor were not subjected
17 intentionally to any direct spraying of the OC, and consequently
18 were not seized within the meaning of the Fourth Amendment. The
19 Plaintiffs present on the first floor, and subject to direct
20 spraying by officers who aimed towards the group that included
21 fighting individuals, were found to be seized since the officers
22 had intentionally "dispersed O.C. in an attempt to gain physical
23 control over those individuals." Id. at 1260.

24 ///

25 ///

26 ///

27 ///

28 ///

1 While the Logan opinion is clear in indicating that those present
2 on the first floor, who were not within the group of fighting
3 individuals, were not deliberately targeted for purposes of a
4 Fourth Amendment seizure, it also appears that the group against
5 whom spraying was directed included both fighting and non-
6 fighting students (the case described the first floor "melee" as
7 involving six to eight people along with twenty to thirty others,
8 id. at 1256). Consequently this Court reads Logan as standing
9 for the proposition that OC intentionally directed towards a
10 group of individuals may indeed effectuate a seizure of all those
11 present in the group to whom the dispersal is aimed. That is the
12 very situation present here.

13 Given evidence indicating that Plaintiff in this case was
14 present in a group intentionally targeted by the Defendant
15 Officers with pepperspray launchers, the Court cannot conclude as
16 a matter of law that no seizure of Plaintiff was effectuated
17 here.

18 The fact that the pepperspray bullet that hit Plaintiff
19 necessarily came from only one of the officers does not, as
20 suggested by Defendant Chang, necessarily absolve everyone from
21 liability since Plaintiff cannot show which officer fired the
22 bullet that struck him. Excessive force liability under 42
23 U.S.C. § 1983 may be predicated on an officer's "integral
24 participation" in the alleged violation. Blankenhorn v. County
25 of Orange, 485 F.3d 463, 481 n.12 (9th Cir. 2007), citing Chuman
26 v. Wright, 76 F.3d 292, 294-95 (9th Cir. 1996).

27 ///

28 ///

1 Here, at a minimum, every officer who participated in firing
2 pepperball launches participated in a "meaningful way" in the
3 events constituting the claimed violation, and consequently they
4 may be liable. Id. at 481, citing Boyd v. Benton County, 374
5 F.3d 773, 780 (9th Cir. 2004).

6
7 **2. Whether unreasonable force was employed**
8

9 Even though the Court has concluded that Defendants cannot
10 avoid potential liability under the Fourth Amendment on grounds
11 that no qualifying seizure occurred, a seizure still does not
12 qualify for Fourth Amendment protection unless it also deemed
13 unreasonable. This is because the Fourth Amendment permits
14 police officers to use such force as is "objectively reasonable
15 in light of the facts and circumstances confronting them."
16 Graham v. Connor, 490 U.S. 386, 397 (1989). Whether or not force
17 is objectively reasonable must be assessed by weighing "the force
18 which was applied.... against the need for that force." Liston
19 v. County of Riverside, 120 F.3d 965, 976 (9th Cir. 1997). That
20 assessment "must be judged from the perspective of a reasonable
21 officer on the scene, rather than with the 20/20 vision of
22 hindsight." Graham, 490 U.S. at 396.

23 According to Defendants, the use of pepperball launchers was
24 objectively reasonable because the police was faced with a large
25 crowd of partygoers, some of whom were throwing bottles and other
26 items at the police.

27 ///

28 ///

1 Plaintiff, on the other hand, contends that various disputed
2 issues preclude the grant of summary judgment as to excessive
3 force, including the propriety of launching pepperballs against a
4 group of individuals located beyond the accurate target range of
5 the weapons, and evidence suggesting that proper crowd dispersal
6 orders may not have been issued before the fusillade began.

7 Defendants' request that the issue of excessive force be
8 determined by the Court through summary judgment must, as a
9 fundamental matter, be considered narrowly given clear precedent
10 to the effect that unreasonable force claims are generally
11 questions of fact for the jury. Hervey v. Estes, 65 F.3d 784,
12 791 (9th Cir. 1991). Such claims may be decided as a matter of
13 law on summary judgment only if this Court can conclude, after
14 resolving all factual disputes in favor of Plaintiff, that the
15 officers' use of force was objectively reasonable under the
16 circumstances present. Scott v. Henrich, 39 F.3d 912, 915 (9th
17 Cir. 1994). Summary judgment "should be granted sparingly"
18 because this inquiry "nearly always requires a jury to sift
19 through disputed factual contentions, and to draw inferences
20 therefrom." Santos v. Gates, 287 F.3d 846, 853 (9th Cir. 2002).

21 As indicated above, it is undisputed that the ability to
22 reliably aim a pepperball launcher decreases once the distance to
23 an intended target exceeds thirty feet. PUF No. 16. Officer
24 Chang himself admitted at deposition that accuracy of fired
25 pepperballs decreases after that point. Pl.'s Ex. 15, Chang
26 Dep., 26:22-27:9.

27 ///

28 ///

1 Defendant Garcia, another officer who launched pepperballs on the
2 evening in question, agreed that the ability to strike an
3 individual safely at center mass decreases after thirty feet,
4 explaining that at such distance one "would not have any
5 precision to striking what you were trying to hit." Pl.'s Ex. 16,
6 Garcia Dep., 27:10-29:9. Plaintiff has also produced expert
7 testimony that pepperballs should not be fired towards
8 individuals beyond that thirty-foot range because the anticipated
9 trajectory of the bullet degrades beyond that point, with an
10 increased risk of striking vulnerable body parts. Pl.'s Ex. 25.
11 Clark Dep., 24:11-27:5.

12 Defendant Wilson, the officer who ordered the volley of
13 pepperballs that resulted in Plaintiff's injury, himself provides
14 an estimate of approximately forty-five feet between the officers
15 and the group congregated in the breezeway. Pl.'s Ex. 10, Dep.
16 of Defendant Wilson, 70:4-13 (45 feet) Other evidence suggests
17 that the distance in fact approached 150 feet. See Pl.'s Ex. 19;
18 Dep. of Lopamudra Sengupta, 38:17-25. Since a distance outside
19 the thirty-foot accurate target range of the weapons appears
20 virtually undisputed, Plaintiff argues that the objective effect
21 of the officers' intentional discharge of their launchers at
22 distances outside that range was to create a risk of striking
23 members of the group, including Plaintiff.

24 ///

25 ///

26 ///

27 ///

28 ///

1 Even though Defendants claim that the weapons can be
2 discharged at greater distances against fixed objects like walls
3 and ceilings in order to achieve "area saturation", the dispute
4 concerning the propriety of aiming such weapons towards a group
5 under the circumstances still raises triable issues of fact not
6 amenable to disposition on summary judgment. Additional areas
7 of factual dispute include whether anyone in the breezeway group
8 was even throwing bottles at the officers in the first place,
9 thereby calling into question the propriety of firing the
10 potentially lethal pepperballs in the first place into a crowd
11 that may have included Plaintiff.⁶ Here, at least some testimony
12 suggests that the group in the breezeway was no more than a
13 frightened group of non-threatening students trying to leave the
14 party. See PUF No. 10.

15 Chemical irritants like the OC used in pepperballs have been
16 deemed to constitute injuring force that should not be used
17 against passive/non-violent subjects. Headwaters Forest Defense
18 v. County of Humboldt, 276 F.3d 1125, 1131 (9th Cir. 2002).

19 ///

20 ///

21 ///

22 ///

23

24 ⁶ Here, the fact that evidence has been proffered suggesting
25 that no one in the breezeway group had been throwing bottles
26 distinguishes the present case from the circumstances confronted
27 by the police in Jackson v. Bremerton, 268 F.3d 646 (9th Cir.
28 2001). In Jackson, the peppersprayed plaintiff had unquestionably
been actively interceding in a physical fight between the officer
and a suspect. In the instant matter, on the other hand, whether
the group of students gathered in the breezeway did anything to
provoke the police remains in stark dispute.

1 Further, to the extent that some in the breezeway group (although
2 not apparently the Plaintiff) deny that they even were able to
3 hear dispersal orders from the police before they resorted to
4 firing the pepperballs, this also creates an issue of fact with
5 respect to the reasonableness of the force employed that cannot
6 be resolved at the present time as a matter of law. See, e.g.,
7 Deorle v. Rutherford, 272 F.3d 1272, 1283-84 (9th Cir. 2001)
8 (appropriate warnings should be provided in accordance with
9 proper police practice even where less than deadly force like the
10 use of a so-called "beanbag round" is to be employed).

11 In sum, given all the factual issues presented by this case,
12 the Court is unable to determine that the force employed here was
13 not excessive as a matter of law. Consequently, Plaintiff's
14 Fourth Amendment claim for unreasonable seizure, as well as his
15 corresponding claim under the California Constitution, as set
16 forth in Plaintiff's First and Fourth Claims for Relief,
17 respectively, survive summary judgment.

18

19 **B. Qualified Immunity**

20

21 The qualified immunity doctrine shields public officials
22 liability for the performance of their discretionary functions
23 unless the official violates a clearly established constitutional
24 norm of which a reasonable person would have known. Harlow v.
25 Fitzgerald, 457 U.S. 800, 818 (1982).

26 ///

27 ///

28 ///

1 Qualified immunity consequently protects an officer from suit for
2 a decision that, even if constitutionally deficient, reasonably
3 misapprehends the law governing the circumstances with which the
4 officer is confronted. See, e.g., Malley v. Briggs, 475 U.S.
5 335, 341 (1986).

6 In Saucier v. Katz, 533 U.S. 194 (2001), the Supreme Court
7 identified the purpose of the qualified immunity doctrine as an
8 acknowledgment "that reasonable mistakes can be made as to the
9 legal constraints on particular police conduct", and a safeguard
10 to ensure that officers are on clear notice of unconstitutional
11 conduct before they can be sued. Id. at 205-06. The Court went
12 on to articulate a two-step analysis for resolving claims of
13 qualified immunity. First, a court must resolve the threshold
14 question of whether the facts, taken in the light most favorable
15 to the part asserting the injury, show that the officer's conduct
16 violated a constitutional right. Second, if that question can be
17 answered in the affirmative, the court must then determine
18 whether the right in question is "clearly established". Id. at
19 201.

20 Here, as the preceding sections of this Memorandum and Order
21 already indicate, taking the evidence in the light most favorable
22 to Plaintiff may well allow the trier of fact to determine that
23 Defendant Officers fired their pepperball launchers into a crowd
24 of non-threatening students in the apartment breezeway, without
25 affording adequate warnings. This Court has already found that
26 such conduct may constitute a constitutional violation under the
27 Fourth Amendment.

28 ///

1 The dispositive question therefore becomes whether the right
2 abridged by that violation was "clearly established." To the
3 extent that the force used was excessive, the right of non-
4 dangerous subjects to be free from injuring force has long been
5 clear. See, e.g., Deorle v. Rutherford, 272 F.3d 1272, 1285 (9th
6 Cir. 2000) (every police officer should know it is objectively
7 unreasonable to use even a less-lethal beanbag round against an
8 unarmed individual who presents no reasonable safety threat);
9 Headwaters Forest Defense v. County of Humboldt, 276 F.3d 1125,
10 1131 (9th Cir. 2002) (should have been clear to a reasonable
11 officer that it was excessive to use pepper spray against non-
12 violent protestors).⁷ This Court is consequently unable to grant
13 summary judgment on the issue of qualified immunity.

14

15 **C. Due Process Claims**

16

17 In addition to claims under the Fourth Amendment as
18 discussed above, Plaintiff argues, in his Second and Fifth Claims
19 for Relief, that his substantive due process rights were also
20 violated by Defendants' use of force, citing the Fourteenth
21 Amendment of the United States Constitution and Article I, § 7(a)
22 of the California Constitution.

23

24 ⁷ While Defendants argue that the Ninth Circuit's decision
25 in Boyd v. Benton, 374 F.3d 773 (9th Cir. 2004) should control,
26 that case is distinguishable. In Boyd, even though the Court
27 found excessive force in an officer's decision to toss a "flash
28 bang" device into an apartment where innocent bystanders were
present, immunity was afforded only because, at the time, several
published cases had approved prior use of such devices, and no
cases had found their use to be excessive. Id. at 781-84. That
is not the case here.

1 The concept of substantive due process protects against
2 arbitrary governmental action lacking "any reasonable
3 justification in the service of a legitimate governmental
4 objective." County of Sacramento v. Lewis, 523 U.S. 833, 846
5 (1998). As the Supreme Court explains, "only the most egregious
6 official conduct can be said to be arbitrary in the
7 constitutional sense" on due process grounds. Id. Even
8 negligently inflicted conduct fails to satisfy this high
9 threshold; rather, only conduct "so egregious, so outrageous that
10 it may fairly be said to shock the contemporary conscience" may
11 suffice. Id. at 847.

12 As a preliminary matter, it appears that a due process
13 analysis may well be unnecessary here, since only "constitutional
14 claims asserted by persons...who were not intended targets of an
15 attempted official seizure are adjudged according to substantive
16 due process norms." Claybrook v. Birchwell, 199 F.3d 350, 359
17 (6th Cir. 2000), citing County of Sacramento v. Lewis, 523 U.S.
18 833, 843 (1997) (substantive due process analysis inappropriate
19 if a claim is covered by the Fourth Amendment).

20 Even if Plaintiff was not an intended target of the
21 officers' pepperball launchers, however, Defendants' conduct
22 still cannot be deemed egregious and/or outrageous, as it must in
23 order to trigger due process liability. Where, as here, police
24 officers are called in to restore order in a rapidly evolving,
25 tense environment fraught with potential danger, any due process
26 violation turns on "whether force was applied in a good faith
27 effort to maintain or restore discipline or maliciously and
28 sadistically for the very purpose of causing harm."

1 County of Sacramento v. Lewis, supra, 523 U.S. at 853. Even
2 "precipitate recklessness" does not suffice to "spark the shock"
3 required to state a viable due process excessive force claim.

4 Id.

5 Plaintiff argues that the officers' conduct in attempting to
6 disperse the crowd was deliberately indifferent. He alleges that
7 "firing indiscriminately into a crowd was outrageous", and that
8 the police had time to consider other means available at their
9 disposal before resorting to the use of pepperball bullets.

10 Plaintiff's position that this equates into egregious behavior
11 sufficient to shock the conscience simply cannot be maintained
12 under the circumstances. Initial verbal requests for dispersal
13 went unheeded, and the size of the crowd, violence in the form of
14 throwing objects and vandalizing property, and threats against
15 the police officers (chants of "fuck the cops") made it necessary
16 for the police to regroup before returning in force and in riot
17 gear to quell what was rapidly devolving into full-blown riot
18 conditions. Launching pepperballs, under those circumstances,
19 even if ultimately misplaced, simply does not amount to the
20 egregious indifference needed to state a due process claim.

21 Consequently, Plaintiff's claim under the Fourteenth Amendment
22 must fail, either because it is unavailable in the first place or
23 because it lacks merit on a substantive basis.

24 Moreover, given the fact that the California Supreme Court
25 has held that damages claims cannot be stated for violations of
26 Article I, § 7(a) of the California Constitution in any event,
27 Plaintiff's due process claim founded on the state constitution
28 is also unavailing.

1 Katzberg v. Regents, 29 Cal. 4th 300, 324 (2002). Therefore, the
2 Second and Fifth Claims for Relief will be adjudicated in favor
3 of the defense.
4

5 **D. Violation of Equal Protection Rights**
6

7 Plaintiff's Third and Sixth Claims for Relief are asserted
8 on equal protection grounds, also pursuant to the Fourteenth
9 Amendment to the United States Constitution and Article I, § 7(a)
10 of the California Constitution. This claim is based on
11 Plaintiff's contention that the police shot him in the eye with a
12 pepperball "due to the fact that he was a University student."
13 See Defendant Chang's Undisputed Fact No. 47.

14 Because Plaintiff's Oppositions to Defendants' Motions
15 concede any cause of action premised on equal protection, stating
16 that he does not oppose dismissal of either the Third and Sixth
17 Claims for relief (see, e.g., Pl.'s Opp. to Def. Chang's Mot. for
18 Summ. J., p. 25, n.2) summary adjudication as to those claims
19 will consequently be granted.
20

21 **E. Supervisory/Monell Liability**
22

23 Defendant Calvin Handy, as Chief of the University of
24 California, Davis Police Department, seeks summary adjudication
25 as to any claims against him on grounds of negligent hiring,
26 training supervision, and/or discipline, as set forth in the
27 Plaintiff's Eleventh Claim for Relief.

28 ///

1 Defendant Handy further seeks summary adjudication as to any
2 claim that he is otherwise liable for the alleged constitutional
3 violations of his subordinates. Defendant James Hyde, as Chief of
4 the City of Davis Police Department, requests similar relief. In
5 addition, The City of Davis, which has also been named as a
6 Defendant by Plaintiff, argues that there is no basis for any
7 liability against it, either.

8 The argument with respect to Handy's liability under the
9 Eleventh Claim for Relief is easily disposed of since Plaintiff's
10 Opposition papers unequivocally express Plaintiff's agreement to
11 dismiss that claim. See Pl.'s Opp. to Def. Handy's Mot. for
12 Summ. J., p. 26, n.2.

13 Defendant Handy, however, as well as Chief Hyde, may still
14 incur personal liability if they are found to have ratified the
15 use of excessive force, even if they did not otherwise
16 participate in any wrongful activity. Larez v. City of Los
17 Angeles, 946 F.2d 630, 646 (9th Cir. 1991); Cunningham v. Gates,
18 229 F.3d 1271, 1292 (9th Cir. 2000). In addition, the City of
19 Davis can be liable, under 42 U.S.C. § 1983 and pursuant to the
20 Supreme Court's decision in Monell v. New York City Dept. of
21 Social Services, 436 U.S. 658 (1978) if a direct causal link is
22 identified between its own policy or custom and the alleged
23 constitutional deprivation.

24 ///

25 ///

26 ///

27 ///

28 ///

1 Plaintiff has produced evidence that a complaint was
2 submitted to the University Police Department following his
3 injury in the subject incident. Although Defendant Handy
4 ostensibly ordered that an investigation be conducted, none of
5 the officers who fired the pepperballs were questioned; instead,
6 according to Plaintiff, the incident report itself was accepted
7 without any further internal investigation. See PUF 27-29.
8 Since Handy knew that pepperballs could not be accurately
9 launched at distances greater than thirty feet (Pl.'s Exh. 21,
10 Handy Dep., 74:21-76:3), Plaintiff argues that Handy in effect
11 ratified what he knew, or should have known, amounted to
12 excessive force. Evidence that a supervisor failed to act on
13 information which supported an inference of unconstitutional
14 conduct is sufficient to defeat summary judgment. Watkins v.
15 City of Oakland, 145 F.3d 1087, 1093-94 (9th Cir. 1998). The
16 Court consequently cannot grant qualified immunity to Defendant
17 Handy.

18 Defendant Hyde and the City of Davis fare no better. Hyde
19 appears to have approved of the decision not to order a citizen's
20 complaint investigation into the allegations Plaintiff lodged
21 against the City (see Pl.'s Exh. 14, Hyde Dep., 54:7-56:15),
22 despite the fact that two of the students present at the time of
23 Plaintiff's injury, Bridget Collins and Bryan Lee-Laudusky, went
24 to the Davis Police Department and submitted statements to the
25 effect that Plaintiff had simply been trying to leave the party
26 and had done nothing to threaten the police at the time he was
27 shot. PUF No. 23.

28 ///

1 That ratification on Hyde's part is enough to support an
2 inference that the allegedly unconstitutional conduct was
3 consistent with the policies of the City of Davis itself. St.
4 Louis v. Praprotnik, 485 U.S. 112, 127 (1988); Larez v. City of
5 Los Angeles, 946 F.2d at 645-46.

6
7 **F. Causes of Action Premised Upon State Law**
8

9 Pendent state claims asserted by Plaintiff include claims
10 for assault and battery, negligence, violation of the Bane Act,
11 California Code of Civil Procedure § 52.1, and intentional
12 infliction of emotional distress. The Court's findings with
13 respect to potential Fourth Amendment liability for unreasonable
14 seizure largely mandate that Defendants' requests for summary
15 adjudication as to the state claims fail as well.

16 Turning first to assault and battery, it is clear that an
17 assault and battery claim against a police officer requires that
18 unreasonable force be established. Edison v. City of Anaheim, 63
19 Cal. App. 4th 1269, 1272 (1998); Finley v. City of Oakland, 2006
20 WL 269950, *14 (N.D. Cal. 2006). Because the same standards
21 apply to both state law assault and battery and Section 1983
22 claims premised on constitutionally prohibited excessive force,
23 the fact that Plaintiff's § 1983 claims under the Fourth
24 Amendment survive summary judgment also mandates that the assault
25 and battery claims similarly survive.

26 ///

27 ///

28 ///

1 See, e.g., Susag v. City of Lake Forest, 94 Cal. App. 4th 1401,
2 1412-13 (2002) ("it appears unsound to distinguish between
3 section 1983 and state law claims arising from the same alleged
4 misconduct"); Saman v. Robbins, 173 F.3d 1150, 1156-57 (9th Cir.
5 1999) (treating Section 1983 and state law battery claim as
6 synonymous).

7 Second, Plaintiff's negligence claim requires an assessment
8 of whether the officers used reasonable care in quelling the
9 subject disturbance. Miller v. Kennedy, 196 Cal. App. 3d 141, 144
10 (1987). This is akin to the analysis employed under the Fourth
11 Amendment, as set forth above. The fact that the Court has
12 already determined, after resolving all inferences in favor of the
13 Plaintiff, that unreasonable force for purposes of the Fourth
14 Amendment may have been employed similarly directs a conclusion
15 that Plaintiff's negligence claims survive as well. See, e.g.,
16 David v. City of Fremont, 2006 WL 2168329 at *21 (N.D. Cal. 2006)
17 (California courts apply the same standard used under a Fourth
18 Amendment analysis in evaluating a state law negligence claim).

19 Third, with respect to California Code of Civil Procedure
20 § 52.1, that section enables individuals to sue for damages as a
21 result of constitutional violations. Reynolds v. County of San
22 Diego, 84 F.3d 1162, 1170-71 (9th Cir. 1996), aff'd in part and
23 rev'd in part on other grounds in Acri v. Varian Assocs.,
24 114 F.3d 999 (9th Cir. 1997). The Court has already identified a
25 potential constitutional violation in this case. The unjustified
26 use of force by a police officer is a recognized basis for
27 liability under § 52.1. Venegas v. County of Los Angeles,
28 32 Cal. 4th 820, 843 (2004).

1 The analogous nature of the state law claims to violations
2 sounding under the Fourth Amendment, however, does not extend to
3 Plaintiff's claim for intentional infliction of emotional
4 distress. Under California law, the tort of intentional
5 infliction requires Defendants to have engaged in extreme and
6 outrageous conduct with the intention of causing severe emotional
7 distress. Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965,
8 1001 (1993). The requirement of "extreme and outrageous" conduct
9 for purposes of intentional infliction closely follows the
10 "egregious and outrageous" standard for due process liability
11 under the Fourteenth Amendment. See County of Sacramento v.
12 Lewis, 523 U.S. at 847. The Court's dismissal of Plaintiff's due
13 process claim compels the rejection of his analytically similar
14 cause of action for intentional infliction of emotional distress.

15 Finally, while Defendants also argue that statutory immunity
16 under California Government Code § 820.2 should also apply to bar
17 Plaintiff's state law claims, that contention too is misplaced.
18 Section 820.2 shields governmental employees from liability for
19 exercising their discretionary functions. The discretionary
20 immunity conferred by the statute, however, is reserved for basic
21 policy-level decisionmaking. Johnson v. State, 69 Cal. 2d 782,
22 793 (1968). It does not protect tactical choices found to be
23 unreasonable, like firing pepperball launchers into a group of
24 non-violent students attempting to leave an out-of-control party
25 (if the inferences from some of Plaintiff's evidence is
26 ultimately given credence).

27 ///

28 ///

1 See Bell v. State of California, 63 Cal. App. 4th 919, 929
2 (1998). Nor does § 820.2 provide protection against allegations
3 that police officers used excessive force. Scruggs v. Haynes,
4 252 Cal. App. 2d 256, 264 (1967).

5
6 **CONCLUSION**

7
8 Based on the foregoing, Defendants' Motions for Summary
9 Judgment (Docket Nos. 136, 137 and 139) are DENIED. To the
10 extent that said motions also request summary adjudication as to
11 certain claims, however, they are GRANTED in part and DENIED in
12 part.⁸ Summary adjudication is granted as to the Second, Third,
13 Sixth, Ninth and Eleventh Claims for Relief. Defendants'
14 requests for summary adjudication are, however, otherwise denied.

15 IT IS SO ORDERED.

16 Dated: April 28, 2010

17
18 

19 MORRISON C. ENGLAND, JR.
20 UNITED STATES DISTRICT JUDGE

21
22
23
24
25
26
27

⁸ Because oral argument will not be of material assistance,
28 the Court ordered this matter submitted on the briefing. E.D.
Cal. Local Rule 230(g).