

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MALIK FOGG,

Plaintiff,

v.

The City of New Rochelle; New Rochelle Police Department; Joseph Schaller, individually and as former Commissioner of the New Rochelle Police Department; Michael Vaccaro, individually and as a Police Officer; Matthew Velasco, individually and as a Police Officer; Scott Wallach, individually and as a Police Officer; Melvin Molina, individually and as a Police Officer.

Defendants.
-----X

COMPLAINT

2022 Civ.

ECF FILED CASE

JURY TRIAL DEMANDED

Plaintiff, MALIK FOGG, by his attorneys, Timko & Moses, LLP, brings this action to redress violations of his civil, constitutional and legal rights under the federal law, and alleges, as follows:

I. PRELIMINARY STATEMENT

1. This is a civil rights action in which Plaintiff seeks relief for the violation of his civil rights secured by 42 U.S.C. §1983 and the United States Constitution including, without limitation, the First, Fourth, Eighth and Fourteenth Amendment thereto. This case arises from a February 15, 2021, incident in which members of the City of New Rochelle Police Department subjected Plaintiff to excessive force, false arrest, false imprisonment and unlawful retaliation. Plaintiff seeks compensatory and punitive damages, an award of costs and attorneys fees and such other and further relief as the Court deems just and proper.

II. JURISDICTION

2. This action is brought pursuant to 42 U.S.C. §§1983 and 1988, and the Fourth Amendment to the U.S. Constitution. Jurisdiction is founded upon 28 U.S.C. §§1331 and 1343, and the aforementioned statutory and constitutional provisions. The Court has pendent jurisdiction over Plaintiff's claims brought under New York State Law pursuant to 28 U.S.C. §1367.

3. Venue resides in the Southern District of New York under 28 U.S.C. §1391 because Defendants' offices are and/or were, located in City of New Rochelle, County of Westchester and State of New York at the times said events took place in the City of New Rochelle, County of Westchester and State of New York.

III. JURY DEMAND

4. The Plaintiff demands that this case be tried by a jury.

IV. THE PARTIES

5. Plaintiff is, and at all times herein relevant was, a citizen of the United States residing in the City of Mt. Vernon, County of Westchester and State of New York.

6. Defendant THE CITY OF NEW ROCHELLE is and at all times herein relevant was a municipal corporation organized under the laws of the State of New York.

7. Defendant NEW ROCHELLE POLICE DEPARTMENT is, and at all times relevant herein was, a duly constituted department or agency of the Defendant CITY OF NEW ROCHELLE charged with the responsibilities of law enforcement and maintaining public order and security and was and is the department or agency of the Defendant CITY OF NEW ROCHELLE at which the police officers named as Defendants herein were employed at all relevant times.

8. Defendant POLICE OFFICER MICHAEL VACCARO is, and/or was, at all times relevant herein, a police officer in the Defendant NEW ROCHELLE POLICE DEPARTMENT

employed by the Defendant CITY OF NEW ROCHELLE to perform police duties within the City of New Rochelle. At all relevant times, Defendant VACCARO was acting in such capacity as an agent, servant and employee of the Defendant NEW ROCHELLE POLICE DEPARTMENT and Defendant CITY OF NEW ROCHELLE and within the scope of his employment. Defendant VACCARO is named herein individually and in his official capacity.

9. Defendant POLICE OFFICER MATTHEW VELASCO is, and at all times relevant herein was, a police officer in the Defendant NEW ROCHELLE POLICE DEPARTMENT employed by the Defendant CITY OF NEW ROCHELLE to perform police duties within the City of New Rochelle. At all relevant times, Defendant VELASCO was acting in such capacity as an agent, servant and employee of the Defendant NEW ROCHELLE POLICE DEPARTMENT and Defendant CITY OF NEW ROCHELLE and within the scope of his employment. Defendant VELASCO is named herein individually and in his official capacity.

10. Defendant POLICE OFFICER SCOTT WALLACH is, and at all times relevant herein was, a police officer in the Defendant NEW ROCHELLE DEPARTMENT employed by the Defendant CITY OF NEW ROCHELLE to perform police duties within the City of New Rochelle. At all relevant times, Defendant WALLACH was acting in such capacity as an agent, servant and employee of the Defendant NEW ROCHELLE POLICE DEPARTMENT and Defendant CITY OF NEW ROCHELLE and within the scope of his employment. Defendant WALLACH is named herein individually and in his official capacity.

11. Defendant NEW ROCHELLE POLICE SERGEANT MELVIN MOLINA is now a police Lieutenant and, at all times herein relevant was, a police Sergeant for Defendant CITY OF NEW ROCHELLE employed by the Defendant CITY OF NEW ROCHELLE to perform police duties within the City of New Rochelle. At all relevant times, Defendant MOLINA was acting in

such capacity as an agent, servant and employee of the Defendant NEW ROCHELLE POLICE DEPARTMENT and Defendant CITY OF NEW ROCHELLE and within the scope of his employment. Defendant MOLINA is named herein individually and in his official capacity.

12. Defendant MOLINA is and at all relevant times was charged by the CITY OF NEW ROCHELLE and the NEW ROCHELLE POLICE DEPARTMENT with, inter alia, the duties and responsibilities of implementing policies and oversight of activities of the CITY OF NEW ROCHELLE POLICE DEPARTMENT personnel.

13. Defendant former CITY OF NEW ROCHELLE POLICE COMMISSIONER JOSEPH SCHALLER was at all times herein relevant the commissioner of and member of the Defendant NEW ROCHELLE POLICE DEPARTMENT employed by the Defendant CITY OF NEW ROCHELLE to perform police duties within the City of New Rochelle. At all relevant times, Defendant SCHALLER was acting in such capacity as an agent, servant and employee of the Defendant NEW ROCHELLE POLICE DEPARTMENT and Defendant CITY OF NEW ROCHELLE and within the scope of his employment. Defendant SCHALLER is named herein individually and in his official capacity.

14. Defendant SCHALLER was, at all times relevant herein, the highest ranking member of the NEW ROCHELLE POLICE DEPARTMENT and was charged by the CITY OF NEW ROCHELLE and the NEW ROCHELLE POLICE DEPARTMENT to implement policies and provide oversight of all activities of the NEW ROCHELLE POLICE DEPARTMENT.

V. STATEMENT OF FACTS

15. On February 15, 2021, at approximately 12:40 p.m., Plaintiff was lawfully standing outside of his mother's car at a gas station located at 720 Main Street in the City of New Rochelle.

16. Plaintiff was having a conversation with his mother who was seated in her car when Plaintiff noticed Defendant MICHAEL VACCARO sitting in his own vehicle, a white Acura, holding up his phone and videotaping Plaintiff's discussion with his mother.

17. Defendant MICHAEL VACCARO, at all times relevant herein, was dressed in civilian clothing and did not, at any time, identify himself as a member of law enforcement.

18. Concerned at what Plaintiff considered to be an unwarranted intrusion into a private matter, Plaintiff asked Defendant VACCARO why he was videotaping him and his mother.

19. Defendant VACCARO did not respond to Plaintiff's question and continued to videotape Plaintiff and his mother, at which point Plaintiff began to approach defendant VACCARO's car, again demanding to know why Defendant VACCARO was videotaping him.

20. Defendant VACCARO again did not respond but began driving out of the gas station and away.

21. Plaintiff got into his own vehicle and began to follow Defendant VACCARO.

22. When Defendant VACCARO stopped his car in the vicinity of 635 Main Street in the City of New Rochelle, Plaintiff exited his own car and approached the driver's side window of Defendant VACCARO's car, again demanding to know why Defendant VACCARO had been videotaping him.

23. As Plaintiff was questioning Defendant VACCARO, Defendant MATTHEW VELASCO arrived on the scene, in a marked radio motor patrol and in full uniform, and began pushing Plaintiff away from Defendant VACCARO's car and towards the sidewalk.

24. Plaintiff complied with Defendant VELASCO instructions to retreat from Defendant VACCARO's location.

25. As Plaintiff was complying with Defendant VELASCO's instruction, Defendant VACCARO exited his vehicle and approached Plaintiff aggressively, whereupon Plaintiff began shouting that he would beat Defendant VACCARO up. At this point, Defendant VACCARO has still not been identified as a New Rochelle police officer.

26. At no time did Plaintiff raise his hands from his sides or otherwise physically menace Defendant VACCARO, or Defendant VELASCO.

27. As Defendant VELASCO was pushing Plaintiff to the rear of Plaintiff's own vehicle, Defendant VACCARO, who at no time had identified himself as a Police Officer, reached out and grabbed Plaintiff's left wrist and repeatedly punched Plaintiff in the head.

28. As Defendant VACCARO was punching Plaintiff, Defendants SCOTT WALLACH and MELVIN MOLINA arrived on the scene.

29. Neither Defendants VELASCO, WALLACH nor MOLINA attempted to stop Defendant VACCARO from assaulting Plaintiff though they were in extremely close proximity to Plaintiff and all had an opportunity to do so.

30. Instead, Defendants VELASCO, WALLACH and MOLINA continued to restrain Plaintiff so that he could neither protect himself nor escape from Defendant VACCARO's assault.

31. When Defendant VACCARO finally moved away from Plaintiff, Defendants VELASCO, WALLACH and MOLINA told Plaintiff to get down on the ground as Defendant WALLACH threatened Plaintiff with a Taser.

32. As Plaintiff was complying with Defendant WALLACH's instruction to get down on the ground, Defendant VACCARO returned and grabbed Plaintiff's head and forced it into the pavement, whereupon Defendant VACCARO continued to push Plaintiff's face into the cement.

33. As Defendant VACCARO was pushing Plaintiff's face into the cement, none of the other Defendants took any action to stop Defendant VACCARO from assaulting Plaintiff.

34. Plaintiff was handcuffed and placed into a New Rochelle Police Department vehicle and transported to the New Rochelle Police Department and placed in a jail cell.

35. Defendant VELASCO prepared charges against Plaintiff charging the following:

- (A) Reckless Endangerment in violation of Section 120.20 of the New York State Penal Law;
- (B) Stalking in violation of Section 120.50 of the New York State Penal Law;
- (C) Criminal Mischief in violation of Section 145.05 of the New York State Penal Law;
- (D) Disorderly Conduct in violation of Section 240.20 of the New York State Penal Law;
- (E) Resisting Arrest in violation of Section 205.30 of the New York State Penal Law;
- (F) Reckless Driving in violation of Section 1212 of the New York Vehicle and Traffic Law;
- (G) Three traffic violations for Sections 1128D, 1127A and 1128B of the New York Vehicle and Traffic Law.

36. On or about May 11, 2021, Plaintiff filed a Notice of Claim against Defendants CITY OF NEW ROCHELLE, WALLACH, VELASCO, VACCARO and three "John Doe" defendants and more than thirty (30) days have elapsed since service of the Notice of Claim and the claim has not been adjusted or paid by the City of New Rochelle or any of the Defendants.

37. Upon information and belief, Defendant VACCARO had a history and reputation within the New Rochelle Police Department for aggressive and abusive behavior towards citizens and had been the subject of multiple complaints and disciplinary proceedings within the New Rochelle Police Department and Defendants knew, or should have known, that Plaintiff was a risk of being assaulted by Defendant VACCARO.

38. Defendant SCHALLER knew, or should have known, that Defendant VACCARO posed a risk to the general public and failed to discipline, supervise, train or otherwise address Defendant VACCARO as a know risk to the community.

AS AND FOR A
FIRST CAUSE OF ACTION

**VIOLATION OF PLAINTIFF'S RIGHTS PURSUANT
TO THE FOURTH AMENDMENT TO THE
THE UNITED STATES CONSTITUTION
BY DEFENDANTS VACCARO, VELASCO, WALLACH AND MOLINA**

39. Plaintiff reasserts and realleges paragraphs "1" through "38" with the same force and effect as if fully set forth herein at length.

40. At all times relevant herein, Defendants VACCARO, VELASCO, WALLACH and MOLINA were acting under color of state law, which is under the color of the constitution, the statutes, ordinances, regulations, customs, usages, laws and rules of the State of New York, the City of New Rochelle, the New Rochelle Police Department and/or the United States of America.

41. Defendants VACCARO, VELASCO, WALLACH and MOLINA, separately and in concert with each other, engaged in acts and omissions which constituted deprivation of Plaintiff's right to be free from excessive force at the hands of law enforcement personnel.

42. Defendants VELASCO, WALLACH and MOLINA had the power and duty to protect Plaintiff's right to be free from excessive force under the Fourth Amendment to the United States Constitution and had the affirmative obligation to take reasonable steps to intervene, restrain and prevent other Defendant Police Officers from violating Plaintiff's Fourth Amendment rights. Defendants VELASCO, WALLACH and MOLINA failed and refused to perform that duty.

43. Defendants VACCARO, VELASCO, WALLACH and MOLINA subjected Plaintiff to excessive force.

44. The aforesaid conduct, to which the Defendants VACCARO, VELASCO, WALLACH and MOLINA subjected Plaintiff, violated and deprived Plaintiff of his rights, privileges and immunities under the Fourth Amendment to the United States Constitution.

45. As a result of this deprivation of Plaintiff's rights, privileges and immunities, Plaintiff suffered serious physical harm and injuries, pain and suffering, emotional distress, psychological injury, humiliation, embarrassment, and anxiety.

46. By reason of the aforesaid, Plaintiff is entitled to full and fair compensatory and punitive damages to be determined by a jury.

AS AND FOR A
SECOND CAUSE OF ACTION

**VIOLATION OF PLAINTIFF'S RIGHTS PURSUANT
TO THE FOURTH AMENDMENT TO THE
UNITED STATES CONSTITUTION
BY DEFENDANTS CITY OF NEW ROCHELLE, NEW
ROCHELLE POLICE DEPARTMENT AND SCHALLER**

47. Plaintiff reasserts and realleges paragraphs "1" through "46" with the same force and effect as if fully set forth herein at length.

48. At all times relevant herein, Defendant SCHALLER, as supervisor of the NEW ROCHELLE POLICE DEPARTMENT was acting under color of state law, which is under the color of the constitution, the statutes, ordinances, regulations, customs, usages, laws and rules of the State of New York, the City of New Rochelle, the City of New Rochelle Police Department and/or the United States of America.

49. The Defendant Police Officers named herein, separately and in concert with each other, engaged in acts and omissions which constituted deprivation of the rights, privileges and immunities of Plaintiff.

50. Upon information and belief, Defendants THE CITY OF NEW ROCHELLE, NEW ROCHELLE POLICE DEPARTMENT and SCHALLER were aware that one or more members of the NEW ROCHELLE POLICE DEPARTMENT including one or more of the Defendant officers named herein have been the subject of excessive force claims and exercised deliberate indifference by failing to take remedial actions, investigate, train, retrain, supervise, discipline or monitor the officers.

51. Upon information and belief, Defendants the CITY OF NEW ROCHELLE, NEW ROCHELLE POLICE DEPARTMENT, and SHALLER at all relevant times herein, have acted with a callous and deliberate indifference to Plaintiff's rights under the Constitution and laws of the United States, in that they failed to adequately investigate, discipline, sanction, train, supervise or otherwise direct police officers concerning the rights of citizens thereby causing and enabling the Defendant Police Officers to engage in the aforementioned conduct.

52. Upon information and belief, Defendants the CITY OF NEW ROCHELLE and NEW ROCHELLE POLICE DEPARTMENT, at all relevant times herein, have acted with a callous and deliberate indifference to the rights of Plaintiff, and others similarly situated, under the Constitution and laws of the United States, in that they failed to establish fair and adequate procedures to identify, investigate and discipline acts of misconduct by CITY OF NEW ROCHELLE police officers.

53. Defendant SCHALLER, as supervisor of the NEW ROCHELLE POLICE DEPARTMENT, had the obligation to create and implement policies, practices and customs that would prevent or deter the use of excessive force by CITY OF NEW ROCHELLE police officers.

54. At all times relevant herein, Defendants VACCARO, VELASCO, WALLACH and MOLINA were acting pursuant to the policies, practices and customs developed and implemented

by Defendants SCHALLER, NEW ROCHELLE POLICE DEPARTMENT and CITY OF NEW ROCHELLE.

55. As a direct result of the failure of Defendants SCHALLER, NEW ROCHELLE POLICE DEPARTMENT and CITY OF NEW ROCHELLE, to implement adequate policies, practices and customs, and their failure to properly train, supervise, and discipline New Rochelle Police personnel, the individual Defendants subjected Plaintiff to excessive force, thus depriving Plaintiff of his rights, privileges and immunities under the Fourth Amendment to the United States Constitution.

56. The violations of Plaintiff's civil and constitutional rights resulted directly from the policies, practices, customs, usages and climate created and promulgated by the CITY OF NEW ROCHELLE, the NEW ROCHELLE POLICE DEPARTMENT and SCHALLER.

57. As a result of this deprivation of Plaintiff's rights, privileges and immunities, Plaintiff suffered serious physical harm and injuries, pain and suffering, emotional distress, psychological injury, humiliation, embarrassment, and anxiety.

58. By reason of the aforesaid, Plaintiff is entitled to full and fair compensatory and punitive damages to be determined by a jury.

AS AND FOR A
THIRD CAUSE OF ACTION

**BATTERY UNDER NEW YORK STATE LAW
AGAINST DEFENDANTS VACCARO, VELASCO AND MOLINA**

59. Plaintiff reasserts and realleges paragraphs "1" through "58" with the same force and effect as if fully set forth herein at length.

60. Defendant VACCARO intentionally and with malice and aforethought punched and kicked Plaintiff while he was being restrained by Defendants VELASCO and MOLINA.

61. Defendant VACCARO further grabbed Plaintiff's head and pushed Plaintiff's face into a concrete sidewalk and continued to hold Plaintiff's head pressed into the sidewalk.

62. Defendants VELASCO and MOLINA assisted, aided and abetted Defendant VACCARO in his assault upon Plaintiff by also grabbing and restraining Plaintiff in a prone position on the sidewalk.

63. Plaintiff did not consent to the offensive contact he suffered at the hands of DefendantS VACCARO, VELASCO and MOLINA and was not resisting or otherwise struggling or fighting with Defendant VACCARO or any of the Defendants at the time of their actions.

64. In punching, kicking, and pushing Plaintiff's face into a concrete sidewalk, Defendants VACCARO, with the aid of Defendants VELASCO and MOLINA, either intended to cause Plaintiff pain and a loss of personal dignity and humiliation or he should have reasonably known that his actions would have that effect.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally, as follows:

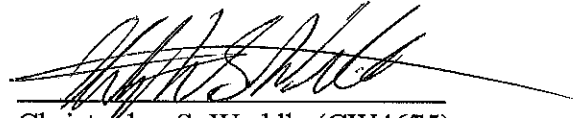
A. That Plaintiff be awarded compensatory damages for violations of his Federal and New York State civil and constitutional rights in an amount to be determined by a jury; and,

B. That Plaintiff be awarded punitive damages in an amount to be determined by a jury; and,

C. That Plaintiff be awarded attorneys fees, costs and disbursements pursuant to 42 U.S.C. §1988; and,

D. That Plaintiff be awarded such other and further relief as this Court deems just and equitable.

Dated: White Plains, New York
May 14, 2022

A handwritten signature in black ink, appearing to read 'Christopher S. Weddle', is written over a horizontal line.

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