Todd A. Hammer
Marcel A. Quinn
Benjamin J. Hammer
HAMMER, QUINN & SHAW, PLLC
100 Financial Drive, Suite 100
P.O. Box 7310
Kalispell, MT 59904-0310
Telephone: (406) 755-2225
Facsimile: (406) 755-5155
Email: toddhammer@attorneysmontana.com
marcelquinn@attorneysmontana.com
benjaminhammer@attorneysmontana.com

Attorneys for Defendant Bill Dial

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CANDI-LEE WEEKS, Plaintiffs, v. BRADLEY F. JOHNSON; BILL DIAL; KRISTI CURTIS; KEVIN CONWAY; SHANE ERICKSON; CHASE GARNER; CHUCK STEARNS; BRIDGER KELCH; JOHN MUHFELD; BILL HILL; and BRIAN CARTER. Defendants.	Cause No: CV-16-161-DLC-JCL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANT BILL DIAL

Comes now Defendant Bill Dial and submits the following brief in support of his motion for summary judgment:

SUMMARY JUDGMENT STANDARD

Summary judgment is governed by Fed. R. Civ. P. 56, which provides that summary judgment, shall be rendered forthwith if the record demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." All reasonable inferences as to the existence of genuine issues of material fact must be resolved against the moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986). If the moving party carries its burden, the party opposing summary judgment must then "set forth specific facts showing that there is a genuine issue for trial." *Kaiser Cement v. Fischback & Moore*, 793 F.2d 1100, 1103-04 (9th Cir. 1986) cert. denied, 469 U.S. 949 (1986). Nevertheless, "[d]isputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Electrical Serv. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The Ninth Circuit has held:

> A moving party without the ultimate burden of persuasion at trial--usually, but not always, a defendant--has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. See 10A Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 2727 (3d ed.1998). In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.

Nissan Fire & Marine Ins. v. Fritz Companies, 210 F.3d 1099, 1102 (9th Cir. 2000) (citation omitted).

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). A defendant who moves for summary judgment bears the initial burden of proving the absence of any triable issue of fact but need not produce evidence negating elements of a claim for which the plaintiff bears the burden of proof at trial. Id. A nonmoving plaintiff can defeat a motion for summary judgment by producing evidence "such that a reasonable jury could return a verdict" in his favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). Pursuant to Fed. R. Civ. P. 56(e)(2), a nonmoving plaintiff cannot rest upon the pleadings but must instead produce evidence to "set out specific facts showing a genuine issue for trial." A mere scintilla of evidence is insufficient to avoid summary judgment. *Anderson*, 477 U.S. at 251. If the plaintiff fails to satisfy Rule 56(e), the law requires entry of judgment in the defendant's favor. *Celotex Corp.*, 477 U.S. at 322.

DISCUSSION AND ARGUMENT

Defendant Dial seeks summary judgment regarding Plaintiff's excessive force claim on two grounds. First, Plaintiff has failed to demonstrate her Fourth Amendment rights were violated. Second, Plaintiff's claim under the Fourth Amendment against Dial is clearly barred by the doctrine of qualified immunity as his conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

I. Defendant Dial Did Not Violate Plaintiff's Fourth Amendment Rights

Dial first directs the Court's attention to the applicable law that should be applied to the facts of this case. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." To establish a seizure violated the Fourth Amendment, a plaintiff must show an unreasonable "governmental termination of freedom of movement through means intentionally applied." *Brower v. County of Inyo,* 489 U.S. 593, 597, 109 S.Ct. 1378, 1381, 103 L.Ed.2d 628 (1989). A traffic stop is a seizure within the meaning of the Fourth Amendment. *United States v. Garcia,* 205 F.3d 1182, 1186 (9th Cir.2000) citing *Delaware v. Prouse,* 440 U.S. 648, 653 (1979). "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe a traffic violation has

occurred." *Whren v. U.S.,* 517 U.S. 806, 810 (1996). Arrests for crimes committed in the presence of the arresting officer are reasonable under the Constitution. *Virginia v. Moore,* 553 U.S. 164, 176 (2008).

Montana law also provides motor vehicle drivers are required to possess a valid driver's license and liability insurance. § 61-5-102, MCA; §61-6-301, MCA. These statutes are enacted in furtherance of the police powers of the State. *City of Billings v. Beckman*, 2002 MT 256, 313 Mont. 420, 63 P.3d 512. Other reasonable regulations enacted in furtherance of the police power include Montana's requirements for vehicle registration and insurance. *State v. Folda*, 267 Mont. 523, 526, 885 P.2d 426, 428 (1994); citing *State v. Skurdal*, 1988, 235 Mont. 291, 294-95, 767 P.2d 304. Constitutional challenges to this authority have been continuously rejected. *Skurdal,* 767 P.2d at 307.

Regarding claims of excessive force, well-settled law applies. As held by the United States Supreme Court, "Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." (emphasis added) *Graham v. Connor,* 490 U.S. 386, 395 (1989) (citing *Terry v. Ohio,* 392 U.S. 1, 22-27 (1968)).

Applying this law to the facts of this case, Plaintiff states she was riding in a vehicle on October 19, 2016 and was pulled over for expired registration. (SUF ¶¶

1-2, 6). The vehicle in which she was riding did not have valid registration, and the driver of the vehicle did not have a valid driver's license. (SUF ¶¶ 1-2, 6-7). Pursuant to Montana law, the vehicle was required to be registered, and its driver was required to have a valid driver's license. The Whitefish City Police had every right under these circumstances to stop the vehicle. The vehicle was lawfully stopped because the vehicle did not have a current registration. The Whitefish City Police also had every right to take further actions in regard to the vehicle. Any of the police, including Chief Dial, were entitled as a matter of course to order the occupants to exit the vehicle pending completion of the stop. This was especially true in light of a further undisputed fact, namely the driver's non-compliance in providing a Driver's License and proof of registration. Plaintiff's affidavit demonstrates, when asked by Officer Dial to exit the vehicle, the occupants did not comply. (SUF ¶ 3). The Affidavit of Brooke Weeks further demonstrates the occupants were asked multiple times to exit the vehicle and failed to comply. *Id.* Both Plaintiff and Brooke Weeks acknowledge they were asked by the Officers to exit the vehicle and failed to comply. Thus, Officer Dial's request for them to exit the vehicle and alleged action of banging the back window in effort to get the occupants out of the vehicle is objectively reasonable under the totality of circumstances.

Plaintiff's allegation Officer Dial smashed the rear window ("smashed" as meaning broke the rear window) are unsupported by the record. As demonstrated by the dash camera video on October 19, 2016, the Court can plainly see the window is not smashed in. (SUF ¶ 4). Further, the affidavit of Brooke Weeks additional states "The window did not break." (SUF ¶ 5). The level of force used by Officer Dial was objectively reasonable under the totality of circumstances as Plaintiff and the occupants failed to exit the vehicle after repeated and appropriate requests from the officers.

Plaintiff has failed to demonstrate any action of Officer Dial damaged the vehicle, or for that matter, violated her Fourth Amendment Rights. *See Foster v. Metro. Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990) (noting that a suspect's resistance to law enforcement commands to exit a vehicle justifies the forcible removal and handcuffing of the suspect by law enforcement).

Here, the case is even more compelling than *Foster.* Officer Dial did not go as far as to forcibly remove the vehicles occupants. (SUF ¶ 9). He did not smash any window. (SUF ¶¶ 4, 10). Instead, he pounded on the window without smashing it in an effort to get the occupants to comply with the officer's requests and gain access to the vehicle. (SUF ¶ 10). Such an action is not a violation of Plaintiff's Fourth Amendment Rights.

II. Qualified Immunity Bars Plaintiff's Claims Against Officer Dial

Furthermore, Plaintiff's claims are also barred by Qualified Immunity as Officer Dial did not violate a clearly established statutory or constitutional right.

Qualified immunity balances two important but competing interests "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity protects government officials from liability for civil damages "unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Wood v. Moss*, 134 S. Ct. 2056, 2066–67 (2014) (quoting *Ashcroft v. al–Kidd*, 131 S. Ct. 2074, 2080 (2011)); *Harlow*, 457 U.S. at 818. Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236. "If an official could reasonably have believed her action were legal in light of clearly established law and the information she possessed at the time, she is protected by qualified immunity." *Franklin v. Fox*, 312 F.3d 423, 437 (9th Cir. 2002).

The reasonableness of an officer defendant's conduct is analyzed under the substantive law of *Graham v. Connor*, 490 U.S. 386 (1989). *See Coles v. Eagle*, 704 F.3d 624, 628 (9th Cir. 2012). The court first considers "the nature and quality of the alleged intrusion" and "then consider[s] the governmental interests at stake by looking at (1) how severe the crime at issue is, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight." *Id.*; *see also Graham*, 490 U.S. at 396. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. These factors are not exclusive, and a court must examine the totality of circumstances. *Coles*, 704 F.3d at 628.

a. Nature and Quality of the Intrusion

Case law first considers "the nature and quality" of the intrusion on Plaintiff's rights. *Coles*, 704 F.3d at 628. "The gravity of the particular intrusion that a given use of force imposes upon an individual's liberty interest is measured with reference to 'the type and amount of force inflicted.'" *Young v. Cty. of Los Angeles*, 655 F.3d 1156, 1161 (9th Cir. 2011) (quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1279 (9th Cir. 2001).

Here, it is respectfully submitted Plaintiff has not established a prima facie case of a significant Fourth Amendment intrusion. Rather, the evidence on record establishes that Officer Dial employed a level of force which was "low on the continuum of tactics available to police officers." *Donovan v. Phillips*, No. 3:14-CV-00680-CRB, 2015 WL 993324, at *5 (N.D. Cal. Mar. 4, 2015). Officer Dial pounded on the window with his flash light in an effort to get the occupants to comply with the Officer's request to exit the vehicle after multiple warnings were given to the occupants and they failed to comply. (SUF ¶ 10). Plaintiff's sole complaint is the flashlight pounding on the window and causing a loud noise for which Plaintiff and/or the occupants affected their hearing. (Doc. 21, ¶ 43).

Chief Dial did not use any further escalation of force, such as kicks, punches, pepper spray, or baton blows, to any person. (SUF ¶ 11).The force used was not "capable of inflicting significant pain and causing serious injury." *Young*, 655 F.3d at 1162. It is therefore respectfully submit Plaintiff has not demonstrated evidence Chief Dial used any force greater than necessary as established by case law. By disregarding the Officers' orders to exit the vehicle, and by using a low level of force to effect compliance, the intrusion on Plaintiff's Fourth Amendment interests was minimal and well within legal standards.

b. Governmental Interests at Stake

Further analysis turns to the severity of the crime, the immediacy of the threat, and whether Plaintiff evaded arrest to determine whether the use of force was reasonable. *Graham*, 490 U.S. at 396. A further factor is whether the occupants were "actively resisting arrest or attempting to evade arrest by flight and whether any other exigent circumstances . . . existed at the time of the arrest." *Coles*, 704 F.3d at 629.

As demonstrated *supra*, the vehicle was pulled over because of invalid registration and plates. The driver also failed to provide a valid driver's license. The occupants thereafter refused to exit the vehicle. The officers were within proper legal authority in asking the occupants to step out of the vehicle. When they actively resisting by failing to get out of the vehicle, it was not excessive force for Chief Dial to pound on the window. He did not smash it as seen by video. While the crime here was not a felony, the officers, including Chief Dial, were well within the rights in doing what they did. In other cases, some officers have gone further than Chief Dial and employed a greater amount of force than applied under the circumstances of this case. See *Mattos*, 661 F.3d at 445 (suspect who "refused to get out of her car when requested do so and later stiffened her body and clutched her steering wheel to frustrate the officers' efforts to remove her from her car" had "engaged in some resistance to arrest"); *Gravelet-Blondin v. Shelton*, 728 F.3d

1086, 1091 (9th Cir. 2013) (While "purely passive resistance can support the use of some force, the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance."); See also *Evans v. Solomon*, 681 F. Supp. 2d 233, 252 (E.D.N.Y. 2010)(Officer was required to apply some force because Plaintiff thrice failed to volunteer his driver's license upon request. "There may be certain circumstances where the alleged unconstitutional act and injury are so *de minimis* that it cannot rise to a constitutional violation as a matter of law."). Ultimately, the severity of "the force which is applied must be balanced against the need for that force." *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1057 (9th Cir. 2003); *Young*, 655 F.3d at 1166 ("We conclude our analysis of whether the force used by [the defendant] was reasonable by balancing "the gravity of the intrusion on the individual against the government's need for that intrusion."). The force used by Chief Dial was low on a continuum, and the government had an interest in using that level force in addressing the infractions. Here, Officer Dial and the other officers gave multiple warnings of what he was about to do if the occupants failed to exit the vehicle. (SUF ¶¶ 8-9). Chief Dial did not hit, kick, punch or otherwise physically injure any individual. (SUF ¶ 11). Rather, Dial attempted to gain access to the vehicle or encourage the occupants to exit the vehicle. (SUF ¶ 10). As the level of force was

minimal, the force used was not excessive and did not violate the Fourth Amendment.

c. Violation of a Clearly Established Law.

Additionally, Plaintiff has not demonstrated any existing precedent would have placed Officer Dial on notice his action in pounding on the vehicle's rear window was unlawful.

The force used by Officer Dial did not violate clearly established law such that the he would be "on notice their conduct [was] unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). See also *Pearson*, 555 U.S. at 244 ("This inquiry turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken."); *al-Kidd*, 131 S.Ct. 2074, 2083 (2011) ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.").

Plaintiff has not demonstrated Officer Dial's actions were violations of clearly established law. Accordingly, Officer Dial is entitled to qualified immunity.

Conclusion

For the above reasons, Defendant's Motion for Summary Judgment should be granted.

Dated this 7th day of June, 2017.

HAMMER, QUINN & SHAW, PLLC

/s/ Todd A. Hammer
Todd A. Hammer
Hammer, Quinn & Shaw, PLLC
P.O. Box 7310
Kalispell, MT 59904-0310
Attorneys for Defendant Bill Dial

CERTIFICATE OF COMPLIANCE

The undersigned certifies this brief in support complies with LR 7.1(d)(2)(A). This brief contains 2,854 words, excluding the caption, certificates of service and compliance, table of contents and authorities and exhibit index. The word count function of the word-processing system used to prepare this brief was relied up on in this calculation.

DATED this 7th day of June, 2017.

HAMMER, QUINN & SHAW, PLLC

/s/ Todd A. Hammer
Todd A. Hammer
Hammer, Quinn & Shaw, PLLC
P.O. Box 7310
Kalispell, MT 59904-0310
Attorneys for Defendant Bill Dial

CERTIFICATE OF SERVICE

I certify that on June 7th, 2017, a copy of the foregoing document was served on the following persons by the following means:

__X__ CMF/ECF
_____ Hand delivery
_____ Mail
_____ Overnight delivery service
_____ Fax
_____ E-mail.

Candi-Lee Weeks 175 Hutton Ranch Rd #103-231 Kalispell, MT 59901 Candi-Lee.Weeks@truevine.net *Pro Se Plaintiff*	Robert C. Lukes Tessa A. Keller Garlington, Lohn & Robinson, PLLP Missoula, MT 59807-7909 rclukes@garlington.com takeller@garlington.com *Attorney for Defendant Brian Carter*

__/s/ Todd A. Hammer_____
Todd A. Hammer
Hammer, Quinn & Shaw, PLLC
P.O. Box 7310
Kalispell, MT 59904-0310
Attorneys for Defendants Johnson, Dial, Curtis, Conway, Erickson, Garner, Stearns, Kelch. and Muhfeld