DENNIS CUNNINGHAM (Cal. Bar No. 112910)
ROBERT BLOOM
BEN T. ROSENFELD
115-A Bartlett Street
San Francisco, CA 94110
Tel: (415) 285-8091
Fax: (415) 285-8092

WILLIAM M. SIMPICH (Cal. Bar No. 106672)
1736 Franklin Street, 10th Floor
Oakland, CA 94612
Tel: (510) 444-0226
Fax: (510) 444-1704

Attorneys for Plaintiffs

JAMES R. WHEATON (Cal. Bar No. 115230)
DAVID A. GREENE (Cal. Bar No. 160107)
SOPHIA S. COPE (Cal. Bar No. 233428)
FIRST AMENDMENT PROJECT
1736 Franklin Street, 9th Floor
Oakland, CA 94612
Tel: (510)208-7744
Fax: (510)208-4562

Fee Counsel for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

VERNELL LUNDBERG, et al.,

Plaintiffs,

v.

COUNTY OF HUMBOLDT, et al.,

Defendants.

Case No. C-97-3989-SI

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ENTITLEMENT TO ATTORNEY'S FEES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[42 U.S.C. § 1988(b)]

Date: July 29, 2005
Time: 9:00 a.m.
Courtroom: 10
Judge: Hon. Susan Illston

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NOTICE OF MOTION

TO THE HONORABLE COURT, THE PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, pursuant to the parties' stipulation and this Court's order, on **Friday, July 29, 2005, at 9:00 a.m.** in Courtroom 10 of the Honorable Susan Illston, United States District Judge, at the United States Courthouse, Northern District of California, 450 Golden Gate Avenue, 19th Floor, San Francisco, California 94102, Plaintiffs VERNELL "SPRING" LUNDBERG, ERIC SAMUEL NEUWIRTH, NOEL TENDICK, MICHAEL MCCURDY, JENNIFER SCHNEIDER, MAYA PORTUGAL, LISA SANDERSON-FOX, and TERRI SLANETZ will and hereby do move the Court to hold that Plaintiffs are entitled to attorney's fees under 42 U.S.C. §1988(b).

This motion is based upon the attached memorandum of points and authorities, the pleadings and papers filed in this case, and such written and oral arguments as may hereinafter be made by the parties.

DATED: June 30, 2005 BY: _____

Sophia S. Cope
FIRST AMENDMENT PROJECT
Fee Counsel for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This case reaffirmed the Fourth Amendment right of every individual to be free from excessive police force, and illustrated the importance of keeping governmental power in check and continually refining the parameters of individual liberties. Not only did this case end in a constitutional and philosophical victory for Plaintiffs, it achieved an overall success that reaches beyond the boundaries of this litigation.

This case resulted in a multitude of positive effects from legal, practical, political and social-cultural perspectives, benefiting all future peaceful protestors and society as a whole. Specifically, this case created the legal precedent that using pepper spray against peaceful protestors can constitute excessive force under the Fourth Amendment. This case resulted in significant procedural rulings regarding qualified immunity and directed verdicts. This case also spawned state-level legislative and administrative action, changes in police policies and practices, legal proclamations from politicians at all levels of government, and public education and awareness of police use of force and constitutional rights.

Plaintiffs and their attorneys made immense personal sacrifices in fighting for the principles of this case and are entitled, consistent with the intent of Congress, to be justly compensated with reasonable attorney's fees for the successes they achieved.

FACTUAL BACKGROUND

In September and October of 1997, Plaintiffs participated in three peaceful protests against the destruction of ancient redwood forests in Humboldt County. During the "Scotia" demonstration, Plaintiffs locked their arms together using metal sleeves known as "Black Bears" and peacefully sat in the lobby of Pacific Lumber Company. During the "Bear Creek" demonstration, Plaintiffs locked themselves to tractors on Pacific Lumber property. And during the "Riggs" demonstration, Plaintiffs again used Black Bears to conduct a peaceful sit-in at the office of Congressman Frank Riggs.

In an effort to overcome the "lock down" devices and arrest Plaintiffs, Defendants first pulled back and restrained the heads of the protesters and applied Q-tips soaked in pepper spray (i.e. oleoresin capsicum or "OC") directly onto the corner of their eyes. Defendants then applied pepper

spray a second time, spraying within inches of Plaintiffs' faces despite the manufacturer's recommendation that OC be sprayed from at least three feet away.

At each incident, officers did not attempt to negotiate with the protesters. Rather they threatened the use of pepper spray and carried out those threats pursuant to blanket authorization from their superiors. The officers watched and waited while the protesters screamed in pain, waiting long periods of time before decontaminating, and finally doing so only with a spray bottle, rather than the recommended garden hose or bucket of water. The officers eventually broke the lock down devices by successfully using a Makita grinder like they had done hundreds of times before.

PROCEDURAL HISTORY

Plaintiffs filed a complaint in the Northern District of California on October 30, 1997, pursuant to 42 U.S.C. §1983 claiming that the Defendants' use of pepper spray to effectuate the arrests of Plaintiffs constituted excessive force and thus Defendants had violated Plaintiffs' right to be free from unreasonable seizure under the Fourth Amendment. Plaintiffs filed the First Amended Complaint on November 21, 1997. Defendants then moved for summary judgment. The district court granted qualified immunity to all individual Defendants except Humboldt County Sheriff Dennis Lewis and Chief Deputy Gary Philp but denied Defendants' summary judgment motion on the issue of excessive force.

The case proceeded to trial. Defendants Lewis and Philp again moved for qualified immunity. The district court granted them qualified immunity as a matter of law and dismissed the case against them. The jury then deliberated on the claims against the remaining Defendants (i.e. public entities) and ultimately announced that it could not reach a verdict. Because of the hung jury, the district court declared a mistrial, set a new trial date, and the remaining Defendants filed a renewed motion for judgment as a matter of law.

The district court granted the motion, directed a verdict in favor of the remaining Defendants, dismissed the action on the merits, and vacated the new trial date. The district court held as a matter of law that the use of pepper spray to effectuate Plaintiffs' arrests was not excessive force, and therefore Defendants had not violated the Fourth Amendment. The district court also held that "no reasonable jury could conclude otherwise." Headwaters Forest Defense v. County of Humboldt, 1998

WL 754575 (N.D.Cal.) at 5.

Plaintiffs appealed to the Ninth Circuit arguing that the district court erred in 1) holding that Sheriff Lewis and Chief Deputy Philp were entitled to qualified immunity as a matter of law, 2) that the district court erred in directing a verdict in favor of the remaining Defendants, and 3) holding as a matter of law that the use of pepper spray did not constitute excessive force. The three-judge panel reversed the district court's rulings, remanded the case to the district court for a new trial, and also denied Defendants' petition for an *en banc* rehearing. Headwaters Forest Defense v. County of Humboldt ("Headwaters I"), 240 F.3d 1185, 119-91 (9th Cir. 2001).[1]

Defendants appealed and the United States Supreme Court granted the writ of certiorari, vacated the Ninth Circuit's judgment, and remanded the case to the Court of Appeals for further consideration in light of Saucier v. Katz, 533 U.S. 194 (2001).[2] County of Humboldt v. Headwaters Forest Defense, 534 U.S. 801 (2001). On remand, the Ninth Circuit "reaffirm[ed] its conclusion that Lewis and Philp are not entitled to qualified immunity." Headwaters Forest Defense v. County of Humboldt ("Headwaters II"), 276 F.3d 1125 (9th Cir. 2002), *cert. denied*, County of Humboldt v. Burton, 537 U.S. 1000 (2002).

The case was retried and again resulted in a hung jury. The case was tried for a third time, and the jury returned a verdict on April 28, 2005, in favor of Plaintiffs. In a special verdict, the jury found that Defendants' application of pepper spray to Plaintiffs constituted excessive force in violation of the Fourth Amendment and awarded Plaintiffs one dollar each. [Special Verdict (April 28, 2005) ¶¶1, 4.]

ARGUMENT

I. PLAINTIFFS ARE "PREVAILING PARTIES"

In determining whether a party is entitled to attorney's fees under §1988, the threshold inquiry is whether that party "prevailed." 42 U.S.C. §1988(b) (2000). In Farrar v. Hobby, 506 U.S. 103 (1992), the United States Supreme Court stated that "a plaintiff 'prevails' when actual relief on the

[1]The first Ninth Circuit opinion, which was amended and superceded on denial of rehearing, is Headwaters Forest Defense v. County of Humboldt, 211 F.3d 1121 (9th Cir. 2000).

[2]That case overturned a separate Ninth Circuit opinion and held that "[t]he inquiries for qualified immunity and excessive force remain distinct," id. at 204, and should not "be treated as one question, to be decided by the trier of fact [jury]," id. at 197.

merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Id. at 111-12 (citations omitted). The Court held "that a plaintiff who wins nominal damages is a prevailing party under §1988." Id. at 112. The Court explained that "[a] judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." Id. at 113.

In the present case, the jury found that Defendants' application of pepper spray to Plaintiffs constituted excessive force in violation of the Fourth Amendment. [Special Verdict (April 28, 2005) ¶¶1, 4.] They also awarded nominal damages memorialized in a judgment. [Judgment (May 4, 2005).] Therefore, Plaintiffs are "prevailing parties" for purposes of §1988.

II. THIS COURT HAS *DISCRETION* TO AWARD PLAINTIFFS REASONABLE ATTORNEY'S FEES

Regardless of whether Plaintiffs, as prevailing parties, were awarded nominal damages or instead some larger amount of compensatory damages, this Court has the discretion to award attorney's fees. Section 1988 explicitly states that "the court, *in its discretion*, may allow the prevailing party . . . a reasonable attorney's fee. . . ." 42 U.S.C. §1988(b) (2000) (emphasis added).

An award of nominal damages does add a wrinkle to the analysis of whether a plaintiff deserves attorney's fees, but it does not change the fact that the district court has discretion to do so. While the Court in Farrar opined that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all," 506 U.S. at 115 (citation omitted), the Court did not establish a rigid rule. As the Ninth Circuit held in Wilcox v. City of Reno, 42 F.3d 550 (9th Cir. 1994), "Nothing in Farrar . . . suggests that district courts may *never* award fees to a party who recovers only nominal damages. Farrar does not establish a per se rule that an award of fees premised upon an award of nominal damages is *always* an abuse of discretion." Id. at 554 (emphasis added); see also Farrar, 506 U.S. at 124 (White, J., concurring in part and dissenting in part, stating that the majority "clearly" does not hold that "recovery of nominal damages *never* can support the award of attorney's fees" (emphasis in original)).

Instead, a district court must exercise guided or "measured" discretion by considering a handful of factors, discussed below. See Farrar, 506 U.S. at 121-22 (O'Connor, J., concurring). The Wilcox court stated, "Farrar teaches that district courts, in the exercise of their discretion, should consider the extent of success in calculating a fee award." 42 F.3d at 554.[3]

Therefore, this Court has discretion to award Plaintiffs attorney's fees under §1988 even though they were awarded nominal damages. "This allocation of decisionmaking authority makes sense. The district court is in the best position to ascribe a reasonable value to the lawyering it has witnessed and the results that lawyering has achieved." Id. at 555; see also Farrar, 506 U.S. at 123 (White, J., concurring in part and dissenting in part, stating, "Civil rights cases are often complex, and we therefore have committed the task of calculating attorney's fees to the trial court's discretion for good reason").

III. PLAINTIFFS ARE ENTITLED TO REASONABLE ATTORNEY'S FEES

A. IN DETERMINING PLAINTIFFS' ENTITLEMENT TO ATTORNEY'S FEES, THE "OVERALL SUCCESS" OF THE LITIGATION MUST BE CONSIDERED

In determining Plaintiffs' entitlement to attorney's fees, this Court must look to the litigation's "overall success," guided by several factors. See Farrar, 506 U.S. at 114 (quoting Texas Teachers Ass'n v. Garland School Dist., 489 U.S. 782, 792 (1989)); Wilcox, 42 F.3d at 556-57. While the Farrar majority, in holding that the plaintiffs in that case were not entitled to attorney's fees under §1988, focused heavily on the nominal damages award, 506 U.S. at 114-16, Justice O'Connor offered a more balanced consideration of "relevant indicia of success," id. at 122 (O'Connor, J., concurring).[4]

In her concurrence, Justice O'Connor listed three factors that a district court should consider when determining a plaintiff's entitlement to attorney's fees under §1988: 1) the amount of monetary relief awarded in light of the amount sought (the sole factor on which the majority focused); 2) the significance of the legal issue on which the plaintiff prevailed; and 3) the public purpose served or

[3]The Wilcox court also used the term "limited" to characterize a district court's discretion. Id. at 555.

[4]Justice O'Connor's opinion should be considered. In the 5-4 vote, she joined the majority opinion but also filed a separate concurrence.

public goal accomplished. Id. at 121-22 (O'Connor, J., concurring). The Tenth Circuit noted that these factors are not rigidly applied. Barber v. T.D. Williamson, Inc., 254 F.3d 1223, 1233 (10th Cir. 2001).

> No one factor is necessarily controlling; nor should all three factors necessarily be given equal weight. The bottom line is that all three factors should be given due consideration but ultimately it is within the *discretion* of the magistrate judge (or the district court) to determine what constitutes a reasonable fee given the particular circumstances.

Id. (emphasis added); see also Milton v. City of Des Moines, 47 F.3d 944, 946-47 (8th Cir. 1995) ("these factors do not dictate an award of attorney's fees. The district court retains its discretion and specifically considered all of the relevant factors of this case in making the fee determination").

In Wilcox, the Ninth Circuit interpreted Farrar and held, following Justice O'Connor's reasoning, that a plaintiff may be entitled to attorney's fees despite a nominal damages award. "[A]n award of nominal damages is not enough. If a district court chooses to award fees after a judgment for only nominal damages, it must point to some way in which the litigation succeeded, *in addition* to obtaining a judgment for nominal damage." 42 F.3d at 555 (emphasis in original). The "overall success" that counsel obtained must have gone "well beyond the one dollar verdict." Id. at 557.[5]

As Justice O'Connor stated, "Nominal relief does not necessarily a nominal victory make," Farrar, 506 U.S. at 121 (O'Connor, J., concurring), because "[r]egardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards," City of Riverside v. Rivera, 477 U.S. 561, 574 (1986).

In the present case, the "overall success" of the litigation should be analyzed from the time that the very first complaint was filed on October 30, 1997, until the third jury verdict came down on April 28, 2005. This case has had a long and high-profile history, involved several different legal

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[5] Wilcox is an important case because the facts are very similar to those of the present case:

> William Wilcox instituted a section 1983 action against the City of Reno (City) and three of its police officers after an officer twice punched him in the face in the course of an arrest. The jury found that the City of Reno had a policy that resulted in the use of excessive force and that the policy proximately caused Wilcox's injuries. It awarded him one dollar in damages. The District Court deemed Wilcox the prevailing party and awarded him $66,535 in fees from the City of Reno . . . For the reasons that follow, we affirm the award of fees.

Id. at 551-52.

proceedings, and even reached the United States Supreme Court. A multitude of positive effects have resulted from this case along the way – from legal, practical, political and social-cultural perspectives – and all should be considered in determining the litigation's "overall success."

B. FACTOR 1: AMOUNT OF DAMAGES AWARDED AS COMPARED TO THE AMOUNT SOUGHT BY PLAINTIFFS

By any standard, a one dollar verdict (to each of the eight Plaintiffs) is small. But the Farrar Court did not just remark on the size of a damages award standing alone. The Court focused on the "difference between the amount recovered and the damages sought," 506 U.S. at 121 (O'Connor, J., concurring). In holding that the plaintiff was not entitled to attorney's fees under §1988, id. at 105, the Court highlighted the fact that one dollar was a long way from the $17 million he had originally asked for, id. at 114, 116.

In contrast, Plaintiffs in the present case did not pray for damages anything like $17 million. In fact, they did not ask for a specific amount of damages in their complaints and have always focused on the principle of the case. See Richard v. City of Harahan, 6 F.Supp.2d 565, 576 (E.D.La. 1998) (holding that the plaintiff was entitled to reasonable attorney's fees under §1988 and noting that "[t]he petition specifically sought an award of compensatory damages, but it did not specify an amount. The pre-trial order did not mention damages"); Romberg v. Nichols, 48 F.3d 453, 455 (9th Cir. 1995) (affirming denial of §1988 attorney's fees and noting that the jury awarded plaintiffs $1 each while the complaint sought $2 million in compensatory and punitive damages); Lucas v. Guyton, 901 F.Supp. 1047, 1053-54 (D.S.C. 1995) (granting §1988 attorney's fees despite ten-cent damages award and stating "this court does not believe that the monetary amount alone should be determinative of the degree of success – especially in light of the fact that Plaintiff's trial strategy did not include a high demand for monetary damages . . . Recovering large sums of money was not the theme nor the trial strategy of this case. Plaintiff's Complaint simply requested compensatory or nominal damages 'in an appropriate amount'").

In both complaints – the first filed on October 30, 1997, and the amended filed on November 21, 1997 – Plaintiffs requested non-specific "compensatory damages according to proof." Plaintiffs' attorneys in the first two trials did not ask the jury for a specific amount of money. As this Court will

recall, during the third trial lead counsel for Plaintiffs, Dennis Cunningham, did not request a specific amount of money from the jury, though he did mention that $10,000 might be too much money according to some people, while $100,000 would be too little according to others.

Throughout this entire case, Plaintiffs have made it clear that their primary motivation was the principle of the case and not any monetary award they might have received. They were morally and philosophically compelled to take a stand against abuse of governmental power and to vindicate an important constitutional right. Plaintiffs were, of course, aware that they could have received monetary compensation, but it was their dedication to the principle of the case that gave them strength and endurance over eight years of litigation, comprising three trials and two rounds in the Ninth Circuit and one in the United States Supreme Court. [Declaration of Vernell Lundberg ("Lundberg Decl.") ¶3.]

In the fall of 1997, shortly after the complaint was filed, Plaintiffs petitioned the court for a preliminary injunction, which was denied. Plaintiffs also repeatedly tried to settle with Defendants. In the spring of 1998, Plaintiffs wrote two letters, one to Defendants' counsel and one to the Humboldt County Board of Supervisors, stating that they would be willing to settle the case for *no money* (apart from costs and fees for their attorneys) if Defendants agreed to never again use pepper spray against peaceful protestors. [Lundberg Decl. ¶3 & Exh. A.] In a January 31, 2003, settlement letter to Defendants' counsel, Mr. Cunningham on behalf of Plaintiffs explained that

> the money really is of secondary interest over here, and I feel sure that if meaningful agreements can be reached, on (not) using gratuitous force (by pepper spray or otherwise), (not) turning the blind eye to attacks from the private sector, and (not) arresting identified legal observers at protest sites in the woods, my clients will be very amenable to reasonable resolution of the money part.

[Declaration of Sophia S. Cope ("Cope Decl.") ¶2 & Exh. A.] In a March 31, 2005, Eureka Times-Standard article, Plaintiff Vernell "Spring" Lundberg was quoted as saying, "The reason we filed this lawsuit was to protect the rights of everyone." [Cope Decl. ¶3 & Exh. B.] In a April 23, 2005, Eureka Reporter article, Ms. Lundberg said, "We've never been in it for the money." [Cope Decl. ¶4 & Exh. C.] Finally, as this Court will recall, Mr. Cunningham made the point during his closing argument on April 26, 2005, that Plaintiffs deeply believed in the principled stand they had taken. Thus Plaintiffs were primarily motivated by the principle of the case and not the possibility of money.

Therefore, while Plaintiffs received only nominal damages, the difference between the amount asked for and the amount received – the focus of the first Farrar factor – was not substantial because there is no point of comparison; they did not request a specific amount of money. More importantly, Plaintiffs cared more about securing a finding that Defendants' actions were unconstitutional, rather than receiving monetary compensation.

C. FACTOR 2: SIGNIFICANCE OF LEGAL ISSUE ON WHICH PLAINTIFFS PREVAILED

Several courts have reasonably equated legal "significance" with legal "importance." As the Seventh Circuit stated in Maul v. Constan, 23 F.3d 143, 145 (7th Cir. 1994), "[W]e understand the second Farrar factor to address the legal import of the constitutional claim on which plaintiff prevailed." See also Piper v. Oliver, 69 F.3d 875, 877 (8th Cir. 1995); Jones v. Lockhart, 29 F.3d 422, 424 (8th Cir. 1994); Lucas, 901 F.Supp. at 1055. The legal significance of this case is illustrated in several ways.

1. Winning on the Merits of a Fourth Amendment Claim is Always Significant

Civil rights cases brought under 42 U.S.C. §1983 are significant because they vindicate individuals' rights guaranteed by the United States Constitution, specifically those found in the Bill of Rights. "[A] civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. And, Congress has determined that the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in §1988." Rivera, 477 U.S. at 574 (citation and internal quotation marks omitted). This point directly supports Plaintiffs' focus on the principle of the case, rather than monetary compensation (discussed *supra*, Part III.B.).

Plaintiffs' Fourth Amendment right to be free from unreasonable seizure (i.e. excessive force) was the significant legal issue central to the present case. See Milton, 47 F.3d at 946 (stating that "a claim of excessive force is of great public importance" and that "the civil right [the plaintiff] sought to vindicate was a significant issue contrary to the issue in Farrar")[6]; Richard, 6 F.Supp.2d at 576

[6]While the plaintiffs in Farrar also sued under §1983 (and §1985), their underlying constitutional claim was a garden-variety due process claim where they alleged that the state of Texas and a local county had conspired to close their school for "delinquent, disabled, and

(holding that the plaintiff was entitled to reasonable attorney's fees under §1988 because he "prevailed on a significant substantive issue – the Fourth Amendment right to be free from unreasonable searches and seizures").

"The Fourth Amendment, like the other central provisions of the Bill of Rights that loom large in our modern jurisprudence, was designed . . . to identify a fundamental human liberty that should be shielded forever from government intrusion." Oliver v. U.S., 466 U.S. 170, 186 (1984) (Marshall, J., dissenting) (footnote omitted). And it was the claim of a Fourth Amendment violation on which Plaintiffs prevailed at trial. [Special Verdict (April 28, 2005) ¶ 1.] Justice O'Connor stated in Farrar that succeeding on the merits or "liability" is a significant issue. 506 U.S. at 121 (O'Connor, J., concurring).[7] This win is important for Plaintiffs, and for society as a whole, because,

> In making the specific guarantees of the Bill of Rights a part of our fundamental law, the Framers recognized that limitless state power afflicts the innocent as well as the guilty, that even a crime-free world is not worth the fear and oppression that inevitably follow unrestricted police power, and that a truly free society is one in which every citizen – guilty or innocent – is treated fairly and accorded dignity and respect by the State.

Colorado v. Connelly, 474 U.S. 1050, 1053 (1986). Therefore, the fact that Plaintiffs prevailed on the merits of their Fourth Amendment claim is significant in and of itself.

2. A Novel Set of Facts Resulted in Significant Legal Decisions

This case, as all cases do, involved a novel fact pattern. But it established a significant legal issue and ultimately helped define the line between constitutional and unconstitutional use of force against all peaceful protestors. The Ninth Circuit acknowledged that, even though "the law

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disturbed teens" after a student died there. 506 U.S. at 105-06. In contrast, the present case centered on the Fourth Amendment right of an individual to be free from excessive police force.

[7]Additionally, Justice O'Connor suggested that the number of defendants prevailed against and the number of claims prevailed upon is relevant in determining legal significance. Id. (O'Connor, J., concurring); see also Barber, 254 F.3d at 1231; Joseph Bean, Note, Felling the Farrar Forest: Determining Whether Federal Courts Will Award §1988 Attorney's Fees to a Prevailing Civil Rights Plaintiff Who Only Recovers Nominal Damages, 33 U. Mem. L. Rev. 573, 601 (2003); but see Stivers v. Pierce, 71 F.3d 732, 753 (9th Cir. 1995) (holding that plaintiffs were entitled to §1988 attorney's fees even though they "did not obtain all the relief sought"). In the present case, Plaintiffs really had only one claim (i.e. excessive force under the Fourth Amendment via §1983) and they prevailed on that claim against six of the eleven named Defendants (those not entitled to qualified immunity). The third jury found that Sheriff Lewis and Chief Deputy Sheriff Philp were not "personally involved in the use of excessive force" but that "there was a sufficient causal connection between" their "conduct and the use of excessive force." [Special Verdict (April 28, 2005) ¶¶ 2-3.]

concerning the use of excessive force is clearly established" and "Sheriff Lewis and Chief Deputy Sheriff Philp were aware of the law governing" the use of pepper spray, "police use of pepper spray on nonviolent protestors engaged in civil disobedience [was] unprecedented." Headwaters I, 240 F.3d at 1206.[8] Defendants tried to push back the Fourth Amendment line, but Plaintiffs successfully brought the line back to where it should be.

Given the unique factual posture of this case, the Ninth Circuit in Headwaters I conducted an exhaustive and detailed "analysis of the reasonableness of the force used," id. at 1199, and weighed in on the merits.[9] After scrupulously reviewing the record, and considering the intrusion on Plaintiffs' bodily integrity under the Fourth Amendment, as well as the governmental interests at stake, the court concluded, "It is *clear* to us that a fair-minded jury could return a verdict for the plaintiff[s] on the evidence presented," id. at 1205 (emphasis added); or, put another way, "a rational juror could *easily* conclude that there was sufficient evidence for a verdict in favor of the plaintiffs," id. at 1206 (emphasis added).

In the Ninth Circuit's view, the "evidence reveals" that the pepper spray caused Plaintiffs "immediate and searing pain" and thus the intrusion was more than "minimal." Id. at 1205 (citation omitted). The court further stated, "Under the Fourth Amendment, using such a 'pain compliance technique' to effect the arrests of *nonviolent protestors* can only be deemed reasonable force if the countervailing governmental interests at stake were particularly strong. Our analysis of those interests here, however, reveals just the opposite." Id. (emphasis added).

Thus the Ninth Circuit in Headwaters I was clearly convinced that the use of pepper spray against peaceful protestors could (and probably would) constitute excessive force in violation of the

[8]The court likely relied, in part, on a November 17, 1997, letter from former California Attorney General Dan Lungren to state Senator Mike Thompson explaining that, based on over 2,000 law enforcement pepper spray use reports submitted to the Attorney General, "swabbing of [pepper spray] into the eyes of passive resistors as well as close (within three feet) spraying of [pepper spray]" was "unprecedented." [Cope Decl. ¶5 & Exh. D.] See also Headwaters I, 240 F.3d at 1192.

[9]The court made the following distinction: "We are not asked to decide whether the use of pepper spray in this case constituted excessive force or not. We are only to decide whether the district court erred in directing a verdict for the defendants in light of the evidence in the record." Id. at 1200. However, the precedential force of the Ninth Circuit's ruling with regard to the merits of the case is undeniable.

Fourth Amendment. The third jury unanimously answered this question when it found that Defendants' application of pepper spray to Plaintiffs constituted excessive force in violation of the Fourth Amendment. [Special Verdict (April 28, 2005) ¶ 1.][10] In a figurative sense, the jury verdict put a period on the end of the Ninth Circuit's sentence. Therefore, applying well-established legal precedent to a novel set of facts created fresh law by helping define what does and does not count as reasonable force against peaceful protestors – including not just Plaintiffs but all future nonviolent demonstrators.

This case also had a unique *procedural* posture that resulted in a significant legal ruling. Although "[a] jury's inability to reach a verdict does not necessarily preclude a judgment as a matter of law," the Ninth Circuit noted that "we know of no other excessive force case that presents the unique procedural posture of this case; i.e., a directed verdict for the defendants after the jury deadlocked and a mistrial was declared." Headwaters I, 240 F.3d at 1197.

After concluding that the evidence supported a verdict for Plaintiffs, the Ninth Circuit went on to hold "that whether the use of pepper spray in this case constituted excessive force is a question of fact that should have been submitted to the jury for its decision," id. at 1201, and ultimately to reverse the district court's directed verdict, id. at 1209. The court stated that "[t]he inherently fact-specific determination whether the force used to effect an arrest was reasonable under the Fourth Amendment should only be taken from the jury in rare cases." Id. at 1205-06. Thus the opinion suggests that in a high-stakes civil rights case where excessive police force is the issue (as opposed to a more benign contract issue, for example; see id. at 1197), a district court should not direct a verdict for the defendants following a hung jury.

Finally, on remand from the United States Supreme Court, the Ninth Circuit in Headwaters II revisited the issue of qualified immunity for law enforcement officials. 276 F.3d 1125 (9th Cir. 2002). After considering Saucier per the Supreme Court's directive, the same Court of Appeals panel "reaffirm[ed] its conclusion that [sheriffs] Lewis and Philp are not entitled to qualified immunity." Id.

[10] Additionally, four jurors in the first trial and six jurors in the second trial came to this same conclusion. Thus 18 out of 24 jurors agreed that the use of pepper spray against peaceful protestors constitutes excessive force in violation of the Fourth Amendment.

at 1127. The Supreme Court declined to review this second Headwaters opinion. County of Humboldt v. Burton, 537 U.S. 1000 (2002).

Relying on its prior Headwaters I opinion where the Ninth Circuit found that "a rational juror could conclude that the use of pepper spray against the protestors constituted excessive force and that Lewis and Philp were liable for the protestors' unconstitutional injury," the Headwaters II Court first held that, "viewing the facts in the light most favorable to the protestors, Lewis and Philp violated the protestors' Fourth Amendment right to be free from excessive force," Headwaters II, 276 F.3d at 1129-30.

The Ninth Circuit then conducted a detailed analysis and held, given Graham v. Connor's objective reasonableness test,[11] that it would be *clear to a reasonable officer* that it constituted excessive force (i.e. was unreasonable) to use pepper spray against the protestors because of their nonviolent nature; that it constituted excessive force to *repeatedly* use pepper spray against the protestors; that it constituted excessive force to apply the pepper spray not only with Q-tips but also with full spray blasts inches from the face; and that it constituted excessive force to refuse to wash out the protestors' eyes with water. Id. at 1130-31.

In light of this two-pronged Saucier analysis, the court held that Lewis and Philp were not entitled to qualified immunity. Id. at 1127. Therefore, not only did the Ninth Circuit once again weigh in on the merits of the case, it also made poignantly clear that future officers in a similar situation will not be eligible for qualified immunity if they are involved with the use of pepper spray against peaceful protestors.

3. Published Court of Appeals Opinions Created Legal Precedent

While it is extraordinarily significant that the Ninth Circuit weighed in on the merits of the case and ruled on important procedural issues, it is also significant that Headwaters I and Headwaters II are published opinions. As such, they are binding precedent in this circuit and are citable by all

[11] 490 U.S. 386, 397 (1989).

courts and secondary legal sources. Both cases have in fact been cited by numerous courts, treatises and law review articles.[12]

D. FACTOR 3: PUBLIC PURPOSE SERVED

In her Farrar concurrence, Justice O'Connor discussed a third factor relevant to the determination of a plaintiff's entitlement to attorney's fees under §1988: whether a public purpose was served or a public goal was accomplished "other than occupying the time and energy of counsel, court, and client." 506 U.S. at 121-22 (O'Connor, J., concurring).

This factor appears to include more practical effects or "tangible results" of the litigation, "such as sparking a change in policy or establishing a finding of fact with potential collateral estoppel effects," Wilcox, 42 F.3d at 555, or deterring "future lawless conduct," Farrar, 506 U.S. at 122 (O'Connor, J., concurring); see also Morales v. City of San Rafael, 96 F.3d 359, 364 (9th Cir. 1997); O'Connor v. Huard, 117 F.3d 12, 18 (1st Cir. 1997); Richard, 6 F.Supp.2d at 576. In addition to creating strong legal precedent that solidifies the Fourth Amendment rights of all future peaceful protestors, this case has had several other positive effects that have benefitted society as a whole. See

[12]For Headwaters I, a Westlaw "KeyCite" search revealed 29 citations in cases, not including the cite in Headwaters II; only two of the cases distinguished Headwaters I. See, e.g., Fontana v. Haskin, 262 F.3d 871 (9th Cir. 2001); Bastien v. Goddard, 279 F.3d 10 (1st Cir. 2002); Miller v. Clark County, 340 F.3d 959 (9th Cir. 2003); Veney v. Ojeda, 321 F.Supp.2d 733 (E.D.Va. 2004). There were 27 citations to Headwaters I in secondary sources. See, e.g., Police Misconduct & Civ. Rts.: Fed. Jury Prac. & Inst., §§ 1-3.14 to 1-3.20; 6-1.82; 7-2.5 (2002); Police Misconduct: Law & Litig., § 3:14 (2004); Rutter Practice Guide: Fed. Civ. Trials & Ev., Ch. 13-A (2005); Renee Paradis, Note, Carpe Demonstratores: Towards a Bright-Line Rule Governing Seizure in Excessive Force Claims Brought by Demonstrators, 103 Colum. L. Rev. 316 (2003); Michael Avery, Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People, 34 Colum. Hum. Rts. L. Rev. 261 (2003).

For Headwaters II, a Westlaw "KeyCite" search revealed 19 citations in cases; only one of the cases distinguished Headwaters II. See, e.g., San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962 (9th Cir. 2005); Smith v. City of Hemet, 394 F.3d 689 (9th Cir. 2005); Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002); Wong v. City & County of Honolulu, 333 F.Supp.2d (D.Hawai'i 2004). There were 21 citations to Headwaters II in secondary sources. See, e.g., Rutter Cal. Practice Guide: 9th Cir. Civ. App. Prac., Ch. 12-D (2005); Police Misconduct & Civ. Rts.: Fed. Jury Prac. & Inst., §§ 1-3.68.1, 1-3.68.2, 1-3.9.2 (2004); 21 Am. J. Proof of Facts 3d 685, Excessive Force by Police Officer (2005); 59 Am. Jur. Proof of Facts 3d 291, Proof of Qualified Immunity Defense in 42 U.S.C.A. §1983 or Bivens Actions Against Law Enforcement Officers (2005); Amanda A. Johnson and Megan Geunther, Prisoners' Rights: Procedural Means of Enforcement Under 42 U.S.C. §1983, 91 Geo. L.J. 2046 (2002).

Morales, 96 F.3d at 365 (discussing "significant nonmonetary results [plaintiff] achieved for himself and other members of society").

This factor should be interpreted "broadly" or "generously," Barber, 254 F.3d at 1232, and given "substantial consideration," Bean, Felling the Farrar Forest: Determining Whether Federal Courts Will Award §1988 Attorney's Fees to a Prevailing Civil Rights Plaintiff Who Only Recovers Nominal Damages, 33 U. Mem. L. Rev. at 601.

1. State Legislative and Administrative Action

The seriousness of the three pepper spray incidents was obvious from the moment they occurred. However, the filing of a federal lawsuit grounded in the Constitution against public entities and officials lent a greater degree of seriousness to the situation. Recognizing that a lawsuit had been filed and that this case had significant legal and social implications, the California legislature decided to take action by passing Penal Code §13514.5.[13]

Penal Code §13514.5 requires the Commission on Peace Officer Standards and Training (P.O.S.T.)[14] to "develop a training course for law enforcement officers in handling acts of civil disobedience and adopt guidelines that may be followed by police agencies" by July 1, 1999. [Cope Decl. ¶6 & Exh. E.] The California legislature recognized that there had been a training gap with respect to using police force to manage civil disobedience situations.

In response to Penal Code §13514.5, the Commission on August 1, 2003, issued a Notice of Proposed Regulatory Action (Bulletin No. 03-18) proposing new Regulation 1081(a)(35). [Cope

[13]S.B. 1844 was chaptered on July 21, 1998. The Senate Committee on Public Safety's Bill Analysis (March 31, 1998) states, "It is the intent of the of the Legislature in enacting this section to provide law enforcement officers with additional training so as to control acts of disobedience with *reasonable use of force* and to ensure public and officer safety with minimum disruption to commerce and community affairs." (Emphasis added). The Assembly Committee on Public Safety's Bill Analysis (June 9, 1998) states, "Several incidents involving law enforcement and civil disobedience protests by Earth First and other environmental activists made news last fall. The first three of these incidents took place in Humboldt County and resulted in lawsuits filed by the protestors . . . for excessive force."

[14]The Commission on Peace Officer Standards and Training is a state agency established by the California legislature to set minimum selection and training standards for California law enforcement. The participation of local law enforcement agencies in the P.O.S.T. program is voluntary. Defendants Eureka Police Department and Humboldt County Sheriff's Department are member agencies and so have agreed to abide by the standards set by P.O.S.T. [Cope Decl. ¶8 & Exh. F.]

Decl. ¶6 & Exh. E.] However, due to Governor Arnold Schwarzenegger's Executive Order No. S-2-03 (November 17, 2003) that put a moratorium on administrative rule-making, P.O.S.T. formally withdrew its proposal on December 8, 2003. But the Commission plans on resubmitting the proposed regulation sometime this summer. [Cope Decl. ¶7.]

Regulation 1081(a)(35) would add "the Acts of Civil Disobedience topics as identified in Penal Code §13514.5 to the list of legislatively-mandated courses." [Cope Decl. ¶6 & Exh. E.][15] P.O.S.T. gave the following explanation in the Initial Statement of Reasons for proposing the new regulation, which reflects the legislative history and shows this case's impact:

> Several incidents involving law enforcement and civil disobedience protests have resulted in lawsuits filed by the protestors against members of law enforcement. These incidents highlight the difficulties that law enforcement faces when responding to acts of civil disobedience. Given the ever changing nature of these acts, it is important that our state's peace officers have at their disposal the most comprehensive and up to date training available in the nation. This legislation seeks to provide law enforcement officers with optional training necessary to control acts of civil disobedience with reasonable use of force and ensure public and officer safety with minimum disruption to commerce and community affairs.

2. Changes in P.O.S.T. Guidelines and Training Materials

In addition to proposing Regulation 1081(a)(35), the Commission responded to this case and the resulting legislation by creating and later updating new training guidelines and materials to fill the training gap with respect to the use of police force, including pepper spray use, in civil disobedience situations. P.O.S.T. announced on November 5, 1998, that it had "approved new guidelines for law enforcement's response to crowd management and acts of civil disobedience," published as Crowd Management and Civil Disobedience Guidelines, November 1998. [Cope Decl. ¶9 & Exh. G.][16] *Guideline 10: Use of Nonlethal Chemical Agents* includes the "policy consideration" of "delivery methods to be utilized (direct application, spray, expulsion, pyrotechnics, etc.)." [Cope Decl. ¶10 &

[15] Civil disobedience topics to be addressed in police training include reasonable use of force (the issue central to this case); dispute resolution; nature and extent of civil disobedience, whether it be passive or active resistence (an issue that also arose during the case); media relations; documentation, report writing, and evidence collection; crowd control.

[16] An issue that arose during this litigation is the meaning or relevance of the Commission's recommendations. Plaintiffs maintain that although P.O.S.T. might suggest that law enforcement personnel take certain actions, that does not mean that such recommendations are always constitutional. Nevertheless, to the extent that local law enforcement agencies follow P.O.S.T.'s recommendations, it is relevant that the Commission developed and changed guidelines and training materials in response to this case.

Exh. H.] The word "direct" sparked much controversy. [Cope Decl. ¶11 & Exh. I.] In response, P.O.S.T. reissued the guidelines in December 1998, omitting the word "direct." [Cope Decl. ¶12 & Exh. J.]

The Commission updated the guidelines again in March 2003, over a year after Headwaters II was decided (January 30, 2002). [Cope Decl. ¶¶6, 13 & Exhs. E, K.] In this most recent version of the Crowd Management and Civil Disobedience Guidelines, new language was added to *Guideline 9: Use of Force: Force Options*. [Cope Decl. ¶13 & Exh. K.] The Commission found it important to emphasize that use of police force, which includes the use of pepper spray, must be "objectively" reasonable given the totality of the circumstances, with new citations to Graham v. Connor, 490 U.S. 386 (1989), and Chew v. Gates, 27 F.3d 1432, 1443 (9th Cir. 1994).

Finally, the Commission on March 11, 2005, issued a Notice of Proposed Regulatory Action (Bulletin No. 2005-05) proposing amendments to select Learning Domains, including *Learning Domain 20: Use of Force* and *Learning Domain 35: Firearms/Chemical Agents*, which are used to create training materials for law enforcement personnel. [Cope Decl. ¶¶14, 15 & Exhs. L, M.] The Commission explained, "The purpose of the amendments is to update the curriculum to reflect emerging training needs, new legislatively mandated subject matter, [and] changes in law." [Cope Decl. ¶14 & Exh. L.] The proposed effective date for the changes is July 1, 2005. Id.

3. Changes in Defendants' Policies

Defendant Eureka Police Department's current policies, found in *Section 308: Control Devices and Techniques* (January 2005), appear to endorse the use of *non*-pepper spray alternatives to deal with demonstrators using "lock down" devices, specifically emphasizing the use of a band saw. [Cope Decl. ¶16 & Exhs. N, O.]

> Occasions may arise when department supervisors determine that the *safest, quickest and most reasonable method* of removing persons in lock down devices would be with the use of the department's *band saw* or other departmentally approved control device. (§308.9) (emphasis added)
>
> [The lock down device] can be safely defeated with the use of the band saw as it causes *no sparks* and very little heat. (§308.93) (emphasis added)

In addition, the new policies describe in detail *how* pepper spray should be applied if a decision is made to use it in a given situation. [Cope Decl. ¶16 & Exh. N.]

> Once the [OC liquid] has been placed into a container, the administering officer will retrieve . . . a . . . sterile gauze . . . The officers then will fold the gauze in half and dip it into the [OC liquid]. The application officer then will squeeze a small amount of the [OC liquid] onto the corner of the suspect's eye. The agent should be allowed to run from the corner of the eye into the eye. (At no time will the administering officer touch the suspect with the gauze. The [OC liquid] is only to be dripped onto the suspect's face.) (§308.97)

These new policies are consistent with aspects of the Ninth Circuit opinions and the jury's apparent position. The Court of Appeals, in particular, found it unreasonable to *spray* OC liquid within inches of the faces of peaceful protestors and to apply it *repeatedly*. The court also focused on alternatives to overcoming lock down devices. Eureka Police Department's polices, however, currently state that pepper-sprayed persons should only be treated "after control/compliance" is achieved. (§308.43) This policy will have to change to the extent it is inconsistent with current law, especially the Ninth Circuit's admonition of waiting to wash out the protestors' eyes with water and then doing so only with a spray bottle. See Headwaters II, 276 F.3d at 1128-31.

Defendant Humboldt County Sheriff's Department's *General Order 92-3: Use of Physical Force* first went into effect on January 31, 1992. It was revised March 17, 1997; May 20, 1997; and January 27, 2003. The latest version has a greatly expanded section IV., which provides in more detail officers' responsibilities when using force and reporting its use. [Cope Decl. ¶17 & Exhs. P, Q.] The Sheriff's Department also has *General Order 75-5*, last revised March 10, 1992, addressing the use of pepper spray and other non-lethal chemical agents. As far as Plaintiffs are aware, this set of policies has not been recently updated. It still states,

> The chemical agent is intended for use in those cases wherein a member of the Department is attempting to subdue an attacker or a violently resisting suspect, *or under other circumstances which under the law permit the lawful and necessary use of force, which is best accomplished by the use of a chemical agent*.

(Emphasis added.) To the extent that these policies and the Sheriff's Department's current practices are inconsistent with the jury verdict and Ninth Circuit opinions, they will need to be changed accordingly. [Cope Decl. ¶18 & Exhs. R, S.]

4. Deterrent Effect on Law Enforcement

Regardless of what Defendants' current written polices provide regarding the use of force and pepper spray, or how they may be interpreted, there is no question that there has been a *de facto* change in policy and that Defendants have been strongly deterred from using pepper spray against

nonviolent demonstrators. Plaintiffs understand that pepper spray was used twice in October 1998 shortly after the first trial. However, to the best of Plaintiffs' knowledge, pepper spray has not been used against passive or locked-down protestors in Humboldt County in the past seven years. [Lundberg Decl. ¶2.] After the verdict, Sheriff Philp was quoted in news articles as saying, "Whatever the final outcome of the case is, we'll work within it," and, "We're not going to do a practice that is just going to put us back in court." [Cope Decl. ¶19 & Exh. T.]

There is also no doubt that this litigation has had an impact and created a deterrent effect throughout the greater law enforcement community. Peter Reedy, former Police Sergeant and 25-year veteran of the Sacramento Police Department, knows "of no other time or place anywhere in the United States other than the Humboldt County Sheriff's Office that pepper spray has been used as a coercive agent on peaceful non-violent protestors" since the beginning of this case, and concludes that this case "has been an important factor in keeping this unorthodox use of a chemical agent from being used by other police agencies through the United States." [Declaration of Peter A. Reedy ¶¶9-10.]

Similarly, Larry Danaher is a former Captain and 20-year veteran of the Lafayette, Indiana, Police Department and is a nationally-recognized trainer in the use of force by law enforcement. He testifies that he has used this case to train other officers in pepper spray and police use of force. He believes this case made clear that law enforcement officers should not use pepper spray on passive protestors who pose no threat to themselves or others. This new rule, he believes, will help law enforcement individuals and agencies avoid liability in the future, and it reinforces the use of pepper spray as a defensive tool to be used only in extreme circumstances. [See Declaration of Larry P. Danaher.]

Additionally, articles in national law enforcement publications indicate that the national law enforcement community is aware of this case, is on notice of the possibility of civil liability if pepper spray is used against peaceful protestors, and has thus effectively been deterred. An article in the July/August 2003 issue of The Police Marksman magazine entitled "The Impact of Headwaters Forest v. Humboldt County: An OC Training Perspective" discusses this case in detail. [Cope Decl. ¶20 & Exh. U.]

> Earlier this year, I happened to be in a discussion with another force trainer over whether the use of OC spray on passive resisters constitutes excessive force. What prompted the conversation was two recent decisions from the 9th Circuit Court of Appeals on that issue. (p. 43)
>
> West Coast officers who fall under the 9th Circuit Court of Appeals jurisdiction have to consider the impact this decision has on their use of OC spray against noncompliant suspect . . . [C]ourts may now start to look at the techniques of how a particular use-of-force tool is used . . . in accordance with manufacturer's specifications. (p. 45)
>
> [U]ntil this case is finally resolved, it would be beneficial for departments around the country to take heed. (p. 45)
>
> Review the ways your agency trains in the use of OC/pepper spray, and where they place it on their force continuum. It would appear that the 9th Circuit Court considers it pretty high up in the continuum . . . Review your department's use-of-force policy pertaining to less lethal, less-than-lethal and/or physical force, specifically OC or pepper spray, as well as how their response to passive resisters meshes with use-of-force. (p. 45)

Similarly, an article in the April 2005 issue of Police Chief magazine entitled "Chief's Counsel: Police Use of Force: The Problem of Passive Resistance," discusses and cites Headwaters II. [Cope Decl. ¶21 & Exh. V.]

> Police used pepper spray on the protestors, and then refused to give them water to wash out their eyes, in order to force the protestors to release themselves from the black bears. On appeal, the court held that the use of pepper spray on the eyes and faces of these nonviolent, passive protestors was excessive force under the circumstances . . .
>
> Usually the severity of the crime being committed is minimal; nonviolent protestors generally pose no immediate threat to the safety of the officers or others; the protestors do not actively resist arrest; and the protestors invite arrest, rather than attempting to evade arrest by flight. For these reasons, when confronting passive resistance strategies during protests and demonstrations, law enforcement officials must carefully select use-of-force tactics and properly control their application.

5. Political Messages

A public purpose is served when "a message is sent." See Choate v. County of Orange, 86 Cal.App.4th 312, 326 (2001). In addition to the clear legal messages sent by the Ninth Circuit and third jury verdict regarding excessive police force, a political message was sent by the San Francisco Board of Supervisors. In response to the directed verdict for Defendants, the San Francisco Board of Supervisors passed Resolution No. 941-98 on November 2, 1998, "deploring the United States District Court ruling that the dabbing of pepper spray directly into the eyes of nonviolent protestors constitutes reasonable force." [Cope Decl. ¶22 & Exh. W.] The Arcata City Council passed two similar resolutions, one early in the case and one later in 2003. [Lundberg Decl. ¶3.]

Additionally, California state Senator Mike Thompson requested an inquiry into the law enforcement use of pepper spray from former California Attorney General Dan Lungren, who responded in a November 17, 1997 letter, discussed above. [Cope Decl. ¶5 & Exh. D.] It was Senator Thompson who authored S.B. 1844 creating Penal Code §13514.5. In that letter, Attorney General Lungren weighed in on the issue of excessive force, explaining that "swabbing of [pepper spray] into the eyes of passive resistors as well as close (within three feet) spraying of [pepper spray]" was "unprecedented." He stated that these were "not accepted police community practices" and recommended that pepper spray "should generally be used to control hostile or violent individuals," thus tacitly communicating that excessive force was used by Defendants.[17]

Finally, United States Senator Diane Feinstein wrote a letter on October 31, 1997, to former Humboldt County Sheriff Dennis Lewis expressing her view that the use of pepper spray against the nonviolent protestors was "unwarranted and unnecessary." [Cope Decl. ¶23 & Exh. X.]

Thus this case gained the attention of and sparked responses from key political leaders who represent Californians on the local, state and federal levels. Such political proclamations and inquiries illustrate the importance of this case and send a powerful message that politicians, representing the interests of the people, will not stand for abuses of police power and violations of constitutional rights.

6. Public Education and Awareness

In the past eight years, this case has received an immense amount of public attention and resulted in a voluminous amount of media coverage – locally, nationally and internationally. News articles have explained the significant legal issues of the case and updated the public on trial and appellate proceedings. Editorials and letters to the editor also have been published in major newspapers expressing opinions about the case, many supportive of Plaintiffs' position. [Cope Decl.

[17] Attorney General Lungren did state that "situations can be envisioned where the use of [pepper spray] *might* be appropriate to control nonviolent demonstrators. For instance, demonstrators could shut down commerce and impact emergency services by blocking for long periods of time a major traffic artery (e.g. the Golden Gate Bridge)." Id. (emphasis added). However, he qualified this statement by saying that "the application of [pepper spray] *may* be appropriate as long as accepted application techniques are utilized." Id. (emphasis added). Thus he implied that the use of pepper spray against nonviolent demonstrators even in such a situation might constitute excessive force.

¶24 & Exh. Y.] Plaintiffs also received much positive feedback from members of the public both locally and abroad. [Lundberg Decl. ¶¶3-4.]

This high-profile case with its many legal proceedings educated the public and raised the awareness of law enforcement practices and constitutional rights. This is important because an educated populace is essential to the health and integrity of our constitutionally-based republic. Individuals must know what rights they have and be able to recognize when those rights have been infringed. The public also has a right to know when the police, paid with public money, abuse their specially granted enforcement power. Taxpayers should know when their money is being used to violate their constitutional rights or those of fellow citizens.

E. SUMMARY OF "OVERALL SUCCESS"

In summary, the "overall" success of this litigation is clearly greater than the jury's nominal damages award. This case went beyond giving a plaintiff "the moral satisfaction of knowing that a federal court concluded that their rights had been violated in some unspecified way." Farrar, 506 U.S. at 114 (citation and internal quotation marks omitted).

In contrast, this case effectuated a multitude of positive effects. It helped define under the Fourth Amendment what does and does not constitute reasonable force against peaceful protestors. This case also made clear that law enforcement officials will not have the benefit of qualified immunity should they engage in similar conduct in the future. This case also resulted in a significant procedural ruling, namely, that district courts should not direct a verdict for the defendant in an excessive force case following a hung jury. See Choate, 86 Cal.App.4th at 326 (discussing the creation of a new rule of liability or breaking ground).

Finally, this case instigated state-level legislation and administrative action, actual and *de facto* changes in law enforcement policies and actions, political proclamations from politicians at all levels of government, and general public education and awareness of law enforcement practices and constitutional rights. Therefore, this litigation has achieved an "overall success" that entitles Plaintiffs to attorney's fees under §1988.

IV. ATTORNEY'S FEES ARE ESSENTIAL IN GIVING PRIVATE PARTIES AND THEIR ATTORNEYS INCENTIVE TO BRING IMPORTANT CIVIL RIGHTS CLAIMS

In the present case, Plaintiffs are individuals of modest means and so could not afford to pay for private attorneys to take them through the many trials and appellate proceedings. Plaintiffs' attorneys essentially worked for free, having taken the case under contingency fee agreements or with the intent of seeking attorney's fees under §1988. One attorney worked on the case *pro bono*. Plaintiffs organized fundraising events along the way just to cover costs. [Lundberg Decl. ¶5.] [Cope Decl. ¶3 & Exh. B.]

Congress has noted that the prospect of attorney's fees creates a powerful incentive for private parties and their attorneys to bring important civil rights claims. Senate Report No. 94-1011 (June 29, 1976), which was part of the legislative history of §1988, explained that civil rights laws in particular "depend heavily on private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." Id. at 2. The Senate noted that

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court. . . . If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest. . . .

Id. at 2-3; see also Rivera, 477 U.S. at 576-78; Bean, Felling the Farrar Forest: Determining Whether Federal Courts Will Award §1988 Attorney's Fees to a Prevailing Civil Rights Plaintiff Who Only Recovers Nominal Damages, 33 U. Mem. L. Rev. at 574.

Justice O'Connor in Farrar noted that §1988 "is a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory." 506 U.S. at 122 (O'Connor, J., concurring). Similarly, the Supreme Court in Blanchard v. Bergeron, 489 U.S. 87, 93 (1989), stated that "the purpose of §1988 was to make sure that competent counsel was available to civil rights plaintiffs." See also Lucas, 901 F.Supp. at 1055 (stating that "[t]he purpose for awarding attorney's fees under 42 U.S.C. §1988 is

to provide an incentive for competent and skilled attorneys to take on unpopular cases and indigent clients thereby acting as a 'private attorney general'").

The Senate concluded that a party seeking to enforce her civil rights, "if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" S. Report No. 94-1011 (June 29, 1976) at 4 (quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968)).[18] Ultimately, Plaintiffs' constitutional rights were vindicated and Plaintiffs are, therefore, entitled to attorney's fees under §1988. There are no special circumstances, including nominal damages, that would render such an award unjust.

CONCLUSION

Even though Plaintiffs received nominal damages, this Court has discretion to award Plaintiffs attorney's fees under §1988. Plaintiffs are "prevailing" parties and their case has achieved an "overall success" that includes several positive effects from legal, practical, political and social-cultural perspectives. Furthermore, §1988 was meant to provide an incentive to indigent plaintiffs and their attorneys to litigate significant constitutional claims. In short, Plaintiffs respectfully ask that this Court hold them entitled to attorney's fees under §1988. A second motion following this one will address what *amount* of attorney's fees would constitute a reasonable award.

DATED: June 30, 2005 BY: _____

Sophia S. Cope
FIRST AMENDMENT PROJECT
Fee Counsel for Plaintiffs

[18]The Senate made the qualification, with regard to *amount*, that awards of attorney's fees in civil rights cases should be "adequate to attract competent counsel" but should "not produce windfalls to attorneys." Id. at 6; see also Farrar, 506 U.S. at 115; Wilcox, 42 F.3d at 554.