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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

VERNELL LUNDBERG, et al.

Plaintiffs,

vs.

COUNTY OF HUMBOLDT, et al.,

Defendants.

No. C-97-3989-SI

PLAINTIFFS' OPPOSITION TO DEFENDANTS' POST-TRIAL MOTIONS and RESPONSE TO THE COURT'S ORDER re: QUALIFIED IMMUNITY

Date: November 12, 2004
Time: 9:00 a.m.
Judge ILLSTON

Plaintiffs maintian their demand for judgment(s) on their own account, as prayed for in their motions, and respond to the renewed demands of defendants Lewis and Philp that they be granted judgment, and qualified immunity, and to the Court's Order For Briefing on Qualified Immunity, as follows:

I. Judgment As A Matter Of Law.

Defendants first demand judgment as a matter of law, on the purported grounds that their evidence — even taken in the light most favorable to plaintiffs, as they concede it must be — conclusively established that their use of pepper spray in the incidents in question was constitutionally reasonable. In support, they set out an elaborate description of some of the evidence in the recent proceedings — all taken in the light most favorable to themselves, of course — and call it uncontroverted. In particular, they rely on the elaborated claim of the company man, DuBay, that pepper spray is harmless, and the assertion of Deputy Daastol that a catastrophic accident with the grinder is inevitable. Dfts' Motions, p.2-3. A measure of the quality and efficacy of this evidence as support for their demand for judgment is the third New Thing from the second trial, which they say has changed the posture of their claim: the testimony of Ms. Rhonda Pellegrini, the ex-marine staff member in the Riggs office, to the effect that destitute, needy and crisis-ridden constituents of then-Congressman Riggs were at risk of imminent disaster and early death during the sit-in there, due to her purported inability to work on their problems while the sit-in was in progress — since she was so busy waiting for the bullet to follow the bomb, then bravely securing the perimeter, &tc. Id., p.3, __. As with so many of defendants' other assertions, maybe, maybe not, to say the least.

The DuBay testimony was wounding, perhaps, in the ways it tended to undercut the claim that the spray itself was harmful, and dangerous to physical health. Of course the danger to emotional and psychological health from the brutal applications — so profoundly demonstrated on and beyond the record by the plaintiffs' testimony, amplifying the torture issue from the victims' side —is ignored by defendants altogether. Nevertheless, the evidence in the plaintiffs' Best Light is clearly that the pepper spray assaults on them were profoundly upsetting psychologically, and left emotional scars which were deep and lasting — which rushed to the surface with devastating clarity during the testimony of several of them. This evidence of psychological injury and lasting harm was uncontradicted.

As for the issue of alleged physical harmlessness, DuBay's testimony — like the "research" along those lines by Sheriff Philp — was hardly conclusive. First, it was made clear

he was acting as a shill for the spray company, notwithstanding his disclaimers — he said he was not being "paid", only "compensated"— and he was obviously an intensely interested, partisan witness, defending his own supposed research in connection with a product he had been hired to help bring to market. His credibility was damaged to a further degree by his refusal to acknowledge — once he staked his claim of harmlessness substantially on the notion that the spray was not put in open eyes — the plain picture in the footage of Kirkpatrick and Manos forcing open Banka's eye and sluicing the spray right in there. *Falsus in uno, falsus in omnia*; once he denied what the picture plainly showed, it was hard to credit anything else he said. Similarly, his airy dismissal of the collected reports of more than 100 people who died after being pepper sprayed — on the rather prepossessing grounds that it had never been listed as the official cause of death — left him looking rather biased, to say the least; likewise, he had no honest answer for the clutch of problems associated with pepper spray victims suffering from asthma, heart trouble, contact lenses, etc, etc, and his assurance that the victims' 'airways' were avoided was belied by the testimony of at least four plaintiffs that their breathing was powerfully and terrifyingly affected by these doses.[1]

Plaintiffs — especially in the absence of any expert of their own — were not in a position to contradict DuBay's claims about "food-grade" contents, relative strength or weakness of the pepper mixtures, or the supposed irrelevance of the 'hydraulic needle effect' problem. His claim that these applications were mild in comparison to what is normally used served to point up the contradiction around using this weapon against people who aren't fighting you; since swabbing in the eyes and close spray in the face of unresisting protesters had never been done before, how was he in a position to assure the Jury that it was harmless? Certainly the six people who

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[1] "As an Uruguayan army interrogator put it, 'There is something more terrifying than pain, and that is the inability to breathe.'" Mark Danner, "Abu Ghraib: The Hidden Story", New York Review of Books, October 7, 2004

considered the issue disagreed with him, so it can hardly be said that his testy averments were uncontradicted in any significant respect.[2]

More to the point, Mr. DuBay's blandishments were collateral to the real issues raised by torture, or 'pain coercion': pepper spray hurts, a lot, and is dangerous at least to persons suffering various conditions and disabilities; the burning pain also frightens the wits out of its victims, particularly when they find they can't breathe. It leaves, or in this case it left lasting deleterious effects, especially psycho-emotional effects, especially when administered so brutally and abruptly, with alternating harsh threats and soft cajolerie from the perpetrators, in the manner of much more severe torture modalities. And there were evident physical effects as well, including not least — according to uncontradicted testimony — the type of serious physical eye problems still being experienced by plaintiffs Slanetz and Sanderson-Fox, seven years later, which to their knowledge were caused by the spray assaults. Still, little of this modified on the central facts of the case.

By contrast, the apparently biblical inevitability of a calamity with the grinder, in the gravely-intoned prophesies of Deputy Dostaal and his special service cohorts, is at the heart of the matter. Without the purported nightmare fears of Dostaal & Co., there is no defense at all to the charge of excessive force, because they can offer no other rationale for the spray assaults — not that this one holds water. Nevertheless, the defense makes bold to assert that the purported concrete basis for this claim: 'not if but when' a catastrophic injury will occur, 'has gone from potential to actual' since the time of these events, because of the non-cooperating oddball

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[2] It should also definitely be noted, in connection with DuBay's appearance as defendants' stealth expert, that the undersigned will not be asleep a second time, and thereby fail to raise the needed objection to the witness running on and on in an expert vein, to the strong but obtusely unchallenged prejudice of plaintiffs, about how benign his product is, assuring the Jury that the horrors it saw on the videotapes were not real. Plaintiffs assume there will be an adequate place for expert testimony on both sides in the next trial — in keeping with their pending motion — or there won't be, on either side. In either case there will be no such free ride the next time around, so this testimony, on a secondary issue — which has meaning only in defendants' best light in any case — should not be given any real weight in the context of defendants' new qualified immunity demand.

grindee with the apparent auxiliary binding in his black bear, who got his finger cut (not his hand; cf. Dfts memo at p.13:17). That shows how honest they are (not) about the presence and absence of *"evidence"* on this record...

The point is, as we assert in our own motions and further below, the deputies' dutiful recitations of their "nightmare", are no substitute for *evidence* that could be taken to show that the grinder was not completely adequate as the police remedy of last resort for lockbox sit-ins, and not sufficient to even place that proposition in dispute within the meaning of Rule 56. *A fortiori*, it cannot remotely serve to conclude the issue against the plaintiffs, as the basis for a Rule 50 judgment; that claim is ludicrous. "A party to a lawsuit cannot ward off summary judgment with an affidavit or deposition based on rumor or conjecture," *Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1572 (7th Cir. 1989); "Conclusory allegations..., without factual support, are insufficient to defeat summary judgment." *National Steel Corp. v. Golden Eagle Ins. Co.* 121 F.3d 496, 502 (9th Cir. 1997). Defendants' demand for judgment must fail; plaintiffs' should succeed.

II. Qualified Immunity, Again, Forever . . .

A. The Factual Record After the Second Trial.

Preliminarily, it should be noted that, since 'a mistrial is no trial at all,' it cannot be said that the facts of the case are in any much different posture than they were before the recent proceedings; much less is the test for granting qualified immunity changed at all by the mistrial. The Court's judgment must still be based on the facts in the light most favorable to plaintiffs (cites omitted). We can agree that the way those facts appear in plaintiffs' Best Light has shifted somewhat, in light of the evidence presented, but without significant impact on the merits of the renewed qualified immunity claim; it having been denied four times, remains unavailing.

In that context we address the Court's inquiry regarding the propositions from *Headwaters II* it has designated, as plaintiffs' Best Light now shows them:

1**. The pepper spray was unnecessary to subdue, remove or arrest the protesters.** First, it must be recognized that this initial statement by the Court totally begs the question raised in its immediately preceding discussion of the excessive force standard, under *Graham v.*

Connor, as centered around "the need for the use of force which is at the heart of the *Graham* standards." In truth, the six other statements identified by the Court are subsumed in the first one. And, it is clear the weight and cogency of the central facts, with respect to the plaintiffs' entitlement to judgment and the bankruptcy of defendants' instant claims, has not changed by way of the evidence in the recent trial, but only deepened.

The Central Facts, now conclusively established, are that grinders and other cutting devices were used successfully without mishap 200-300 times.[3] Means were readily devised by the special service deputies to meet the problems and alleged dangers the use of the grinder and the 'increasing sophistication' of the protesters' locking devices presented. Other methods had also been successful in the past, including waiting, moving and negotiation; and the reasons advanced by the defense for using the spray instead were all shown to be speculative, imaginary or plain false — not to mention slanderous, where the issue was supposed "organized lawlessness" on the part of plaintiffs and their comrades, all pledged to Nonviolence, in the various protests. There had never been a lockdown in which the police had not been able to open the boxes and arrest the protesters (nor yet any where the protesters had attacked or threatened the police in any way).

As noted in plaintiffs' own pending post-trial motions, these central facts, discussed further below, were actually 'established', by admissions and concessions in defendants' own testimony. Indeed, because it is thus concluded upon defendants that, in any light, **'**the pepper spray was unnecessary to subdue, remove or arrest the protesters', the Court should grant judgment(s) for plaintiffs. Q.E.D. See plaintiffs' motions.

2. **The officers could safely and quickly remove the protesters in black bears from protest sites.** There is some doubt of this flat statement, at least if the grinder is left out of account. While defendants' employees admitted that physical removal from a site, or even from

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[3] Defendants debunk the 200-300 figure, saying the officers testified there were only 20-30 times they ground people out of the later, "more sophisticated" lockboxes. Even if this is true, it remains uncontradicted that they were well able to keep pace with the inventiveness of the protesters, defeating whatever devices the protesters came up with, *every time*.

a position taken at a given site, had been effective in some cases in the past, it is probable that these protesters could not have been removed without at least some grinding; certainly at Bear Creek, probably at Scotia. In plaintiffs' Best Light, however, there were double doors at the Scotia office, and it would have been complicated but certainly not impossible to get a tarp or blanket under the people sitting in and, with all the brawny deputies hauling together, drag them out the door.[4]

More to the point, the police could have used the grinder, with protective quilts, to open the circle, and then moved people out or continued to use the grinder, to 'remove and arrest' the protesters at Scotia. The plaintiffs showed this bodily with their floorwork during the testimony of Deputy Held.

As to the Riggs action, we say it would have been a simple matter to take the stump from the middle of the circle and move the people out the door for grinding; but simpler still to grind them out on the spot (assuming a broom could be found to remove the sawdust) — as the officers undoubtedly would have done routinely, there and at Scotia (rather than let the terrorists win), if they had not been spoiling to try out the spray-swabbing alternative. As it was, the elaborate charade the officers conducted in removing the spray victims at Scotia, using emergency carry-boards from the fire department to take them out the long way, through the back and down the stairs, was obviously staged for the videotape — just as the craven brutalities against Noel Tendick and Mike McCurdy *after* they were ground out at Bear Creek were left *off* the tape. The plaintiffs were sitting a few feet away from double doors which opened to the front of the office at Scotia, and it would clearly have been ten times easier to move them out that way. Again, the purported rationale for doing it the hard way — supposedly out of the view of the supporters out

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[4] It should be noted, in connection with defendants assertion that moving lockdowners is not an option because an officer once threw his back out (Memo, p.2) refers to the story of a deputy, Johnson, who, years before, insisted on bodily lifting and carry a protester to the paddy wagon, where the convention was for two or more officers to drag them. This can and will be shown at the next trial.

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front, but not really — was nothing more or less than a creepy and dangerous police slander against this non-violent movement.

3. The officers could remove the black bears with grinders without pain or injury. This, we say again, was conclusively established in the mistrial: it had been done again and again, and the alleged risk conjured by the defense was illusory and conclusory. The woven plastic wheel could not fly apart, as they said they feared it would, and the motor housing would prevent any deep penetration of the cutting wheel into the pipe. This was graphically shown, and constitutes a substantial enhancement of the strength of plaintiffs' evidence that the grinder was a an effective alternative to torture lite. The only *evidence* offered to oppose the plain fact of the grinder's efficacy, as we've argued, was speculation at best; more accurately, it was opportunistic, fear-mongering police bunk, offered up to justify what they wanted to do for reasons they can't say out loud. The same carries no weight as evidence, no matter whose best light is shined on it. See below.

4. **The protesters were sitting peacefully, were easily moved, and did not threaten or harm the officers.** This is key, leaving aside the issue of moving people, because pepper spray is a weapon, for use in self defense and to overcome physical resistance, as plaintiffs' Best Light evidence shows, and its proper use is limited to forms of combat. The videotapes show conclusively that plaintiffs were peaceful, made no threats, did no harm, etc, and — prescinding from the police canard that there's no such thing as passive resistance — all the police witnesses acknowledged this one way or another. The need that pepper spray was invented for, and brought to market to fill, did not arise.

5. **The officers had control over the protesters, (so) it was unnecessary to use pepper spray, and even less necessary to use it repeatedly when the protesters refused to release.** Like Item #1, this statement is not so much a 'fact' as it is another, subsidiary, holding, on a mixed question as it were, based on facts which the Court knew — as this Court knows — were established beyond dispute. To the extent it represents an issue of fact, however, it was proved on the videotape. This point is the same as the argument we've been making about the

constitutional illegitimacy of 'pain coercion', as discussed in *Headwaters I* (240 F.3d at 11XX); and the police pretense that they can, *ex cathedra,* simply abolish the category of 'passive resistance'— again, in order to implement what they wish to do for unspeakable reasons — is another fine example of their (unconstitutionally) expedient approach to Law Enforcement. And the contested **P.O.S.T.** imprimatur is more of the same.

It is certainly incontestable that the police had control of the protesters throughout all these three situations. This meant, as was then without question Clearly Established under *Graham* and the Ninth Circuit cases, that they lacked legal authority to begin simply hurting them, to get them to submit to the order to release from the boxes. Of course it can be argued — and, given defendants' dependence on semantic manipulations to establish their case, it undoubtedly will be argued — that the officers' control was not complete, or effective, because the protesters would not obey their orders to release themselves. Suffice to say, that is obviously not how the Court of Appeals interprets the matter, or the word or concept of control, and especially in plaintiffs' Best Light, again, the pepper spray and its repetitive uses by the police were clearly "unnecessary", as the Court found.

6. **Lewis and Philp authorized 'full spray blasts' despite the manufacturer's warning which 'expressly discouraged' spraying from less than three feet.** This was well established in the trial in admissions by Lewis and Philp, and testimony from Ciarabellini and Kirkpatrick, and is incontrovertible on this record. Defendants explain it away by dismissing the warning as directed only at the possibility of "hydraulic needle effect", which they self-servingly and implausibly claimed could not occur in these circumstances, supposedly because the plaintiffs' eyes were closed when they were close-sprayed. More to the point is the fact that the authorization was given after Philp and Lewis debriefed the deputies, reviewed the videotape of the Scotia incident, and directed Sgt. Ciarabellini and his officers to use the spray "longer and stronger"; that is, they decided and directed the officers to escalate their cruelty to get the desired result; think "torture"...

And, when that escalation still didn't work at Bear Creek, the level of brutality and intimidation were escalated further, in the Riggs operation, to include the yanking of hair,

twisting of heads, prying open of eyes, withholding of water, and use of the spritzer by Deputy Kirkpatrick to renew and prolong the pain. Among other things, there is no doubt the incontrovertible *evidence* of these intensified cruelties cemented plaintiffs' showing of defendants' reckless and callous disregard for the plaintiffs' rights, warranting punitive damages. See below.

7. The officers refused to wash out protesters' eyes, threatened to withhold rinse water if they didn't release, and in one case withheld water for over 20 minutes. This is all true, it was shown on the videotape. The 20-minute torment span befell plaintiff Terri Slanetz, at the Riggs office. Like the factual essence of the two preceding points, this part of the story goes mainly to show the defendants' "reckless disregard" of plaintiffs' basic rights — their willingness, readiness and apparent eagerness, given the precipitous way they went about it, to inflict intense pain on these plaintiffs — in retaliation for their victims' refusal to submit to the Sheriffs' orders to desist from the protest they had come to conduct — and for other protests, past and passing and to come. The Court said the withholding of water — particularly given that the problems involved in promptly ending the pain after the spray was applied, as the Court of Appeals saw, disqualified this tactic as proper 'pain compliance' — constituted a separate Fourth Amendment violation. See *Headwaters I*, 240 F.3d at 1200-1201; *Headwaters II*, 276 F.3d at 1131, and *laLonde v. County of Riverside*, 204 F.3d 947, 961, cited by the Court.

B. The Renewed Demand for Qualified Immunity Must Fail, Again.

1. The 'Central Facts': the grinder. Plaintiffs are of the belief, as noted, that the central, dispositive facts of this case show the categorical utility and sufficiency of the 'Makita grinder', in the hands of trained, seasoned, resourceful, attentive and greatly experienced, specially assigned officers, as a fully adequate, readily available alternative to this pepper spray 'torture', as a means of reducing locked down protesters to ultimate custody when other means are unavailing. We say these facts are concluded on defendants by their own testimony, and by the physical characteristics of the grinder itself, demonstrated in open court. Therefore, we say there are no *material* facts remaining in controversy, and under the clearly established rules governing the use of force laid out in *Graham v. Connor* and its Ninth Circuit progeny, as

articulated and applied in *Headwaters II*, plaintiffs are entitled to judgment as a matter of law on the liability of all defendants (cites omitted).

Defendants' attack on the ring of evidentiary truth which supports such a judgment, centers around the bugbear repeatedly invoked by the defense witnesses, to the effect that there is great actual danger of catastrophe with the grinder, in the possibility that the cutting wheel might spontaneously drive through the pipe, or "explode" and fly up in fragments, during a cut, ripping nearby flesh with hideous shrapnel, killing, maiming, disfiguring, ruining a life or lives; a grim nightmare indeed. The specter of such a disaster has been thrown up to us by the deputies, and the defense lawyers, again and again and again.[5] But it is a will-o-the-wisp, something that 'deludes or misleads by luring on', which is to say it is not a matter of *evidence*, but of police bunk, again.

It's not that the grinder deputy might not feel stressed about grinding, obviously, but he's stressed by the nightmare, not any facts about construction of the grinder or grinder wheel; meanwhile, he's doing what he always does; the stress, like the nightmare, is in his mind, and he blocks it out and does his job. It is not *evidence* of any real possibility that the blade could actually explode, or suddenly pull the whole machine deep into the pipe where the hand is. On that question, the evidence was all to the contrary: the blade is made of woven strips of some plastic compound, it is tested at much higher speeds than it's used at, none of them ever saw such a wheel explode, and the motor housing restricts the cut to a shallow depth.

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[5] The 'exploding blade' canard was already deployed as part of the coercion of the plaintiffs, at the Riggs office, captured on the tape, at 10:57am:

Lisa: You know what you can do is take us outside and cut this off outside.

Cop: No.

Lisa: Why not?

Cop: Because the wheel still may explode and hurt you.

Lisa: Because what? You're lying to us now. You not concerned about hurting us because we're in pain right now, obviously.

2nd Cop: Soon to get worse...

Cop: You have about 45 seconds...

SO, while the defendants and their lawyers have insisted vigorously throughout these proceedings that the special service deputies' nightmare fears — because they were the grinder operators — were *ipso fucto* grounded in fact, *in* fact, they were based on opinion only — if nightmares even qualify as opinions — and thus were really inadmissible. Again, the undersigned's own tactical misplay figures in the story, in not having fought to greatly qualify the operators' fearful assertions of 'not if but when', or keep them out; but that's water under the mistrial now.

Now, we believe the 'nightmare' testimony is fundamentally incompetent under R.701, F.R.E., and must be excluded from any present consideration of the balance of reasonableness as to the need for the use of force. The grinder officers were not qualified or presented as experts under R.702, nor did they offer any expert knowledge about the composition or fabrication of a grinder wheel; their opinion testimony is subject to the limitations of R.701. The nightmare is not 'rationally based on perception', as part (a) of the rule requires; it's irrationally based on apperception: a (purported) fear of the worst. Likewise, to the extent it is not merely a nightmare, it is a matter necessarily based on technical knowledge — particularly about the construction and work-worthiness and explosion-proofing of the wheel — prohibited under part (c). "This rule does not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness." *Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 846 (C.A. Okl. 1979)

> (I)t is not to be inferred that the opinions of ordinary witnesses are competent as to subjects which require special study and skill and which are proper for the testimony of the expert as distinguished from the ordinary witness.

Id., at 847, quoting 2 Jones on Evidence, s 14:3 (1972). The court in *Randolph* upheld a trial court's exclusion of lay witness testimony as to the relative feasibility of "shields" as a safety mechanism for pressure cookers in a restaurant kitchen, despite the witness being a restaurant owner with years of experience operating pressure cookers. The court said,

> The testimony of witnesses is admissible only if predicated upon concrete facts within their own observation and recollection that is facts perceived from their own senses, *as distinguished from their opinions or conclusions drawn from such facts*."

Id., at 847-848 (Emphasis added), citing *United States v. Brown*, 540 F.2d 1048, 1053 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100, (1977); Wigmore on Evidence, 3rd Ed., Vol. VII, ##2078-2081; 31 Am.Jur.2d, Expert and Opinion Evidence, #2.

Here there has been no *evidence* ever presented by defendants to establish the slightest concrete *possibility* — as opposed to an unfounded fear (or at best an inadmissible lay opinion) — that a grinding wheel is a threat to "explode" or otherwise malfunction in such a way as to make its use as defendants used it here a matter of grave risk, or any real risk; rather, we have been presented, again and again, with the famous 'nightmare'. But a nightmare — even a real one, let alone an *ad hoc* construct arranged to provide justification in a lawsuit for police wrongdoing — is not a substitute for *evidence*; that is patent.

2. Secondary Questions.

a. The Pain. The other facts placed in dispute by conflicting claims on the two sides do not fairly modify on the question of whether the pepper spray force was necessary in this case; rather, they go to issues of damages, and punitive damages. For the plaintiffs have nightmares of their own, recalling the torment they were so brutally subjected to under the defendants' orders and directions, and anti-constitutional policy. The evidence, with respect to the Court's inquiry, showed they sustained physical harm from the pepper spray assaults which was real, and serious. In particular, plaintiffs Lundberg, Neuwirth, McCurdy, Schneider and Sanderson-Fox all experienced great difficulty breathing after being daubed and doused. Spring said the feeling was excruciating; Sam said he felt he was choking; Banka though she was experiencing respiratory failure, whereby she couldn't breathe or speak, and believed she was going to die. Several of them hyperventilated, out of control. Likewise, plaintiffs Neuwirth, Tendick, Schneider, Portugal and Sanderson-Fox all testified that the burning juice ran into their mouths, either by itself or carried by tears; Noel Tendick said the spritzer water carried the spray into his mouth.

b. The Spritzer as First Aid. Noel and the women who sat in at the Riggs office testified that the spritzer was ineffective as first aid, and several said it made the pain worse, or revived it. Against this truth, defendants offered no more or less than a dismissive fiat (instead

of *evidence*): the water spray was proper first aid because the company, and its redoubtable spokesperson Mr. DuBay, said so; contrary experience was just the plaintiffs' imagination. Indeed, that was defendants' answer to everything: it's the way we say it is because we say it: the grinder is dangerous, pepper spray is safe, pain and lasting trauma are irrelevant. That's no better evidence than a nightmare; it is a nightmare...

c. Philp's Research. Similarly, the adequacy and good faith of Sheriff Philp's alleged "extensive research and consultation" (Memo, p.18:20) remains in strong dispute, being revealed to have really only involved concerns about possible legal liability for this use of the spray, and about disruption of possible prosecutions of sprayees, with a lick and a promise as to the possible harm the spray could cause. In particular, Philp was shown to have misrepresented the spray use to the Risk Management officer, Ms. Kerr, and to have ignored readily available information about the many deaths which have occurred in incidents where people were pepper-sprayed. So his investigation was self-serving, to say the least.

D. The P.O.S.T. Flim-flam. As spelled out in our own motions, there is a renewed challenge to the *ex post facto* imprimatur for the spray practice obtained from P.O.S.T. coming into evidence, and we still believe and hope to show it cannot fairly be weighed in any consideration of the alleged reasonableness of defendants' 'pain coercion' expedient.

III. Punitive Damages.

Defendants heap scorn on plaintiffs' assertions about their repressive evil motives and illicit intentions against Earth First! and the broad movement protesting the destruction of the forest and the Headwaters sell-out, which were evident in the lead-up to the spraying incidents as well as the assaults themselves. They say we showed not even the proverbial scintilla to support our claims, but of course that is according to their highly flexible and self-serving definition of what *evidence* is; and of course their definition automatically excludes any inferences from the facts which go against them.

Chief among the inferences here are those which flesh out plaintiffs' claims of 'collusion' (or conspiracy, as defendants would have it) between the Sheriff's Department and Pacific Lumber, through Sheriff Lewis and PL "security" chief Carl Anderson representing those

entities, in an attempt to 'crush the movement', as defendants have it (Memo, p.5). Defendants' attack is predicated on an implicit requirement that we produce a turncoat witness, or 'fly on the wall', who can affirm that the proven conversations included the particulars of the alleged plot. In point of fact (or law), a different standard applies: 'by the fruits' of their nefarious activities, is how we know the plotters, every time. CITATION

That is to say, the fact that stands out in this context is that there was a sharp escalation — really a re-escalation — of the harshness and hostility of police tactics against the protest movement, in the wake of the giant rally at Carlotta in September, 1996 — where more than ten thousand came to protest and more than a thousand people were arrested. PL and the cops were shown up, and the movement to save Headwaters was burgeoning and threatening to succeed; intolerable! So, according to plaintiffs, particularly Spring Lundberg — and as confirmed by statements in the 'up the ante' newspaper clipping, ultimately confirmed by Philp — felony arrests and pepper spray use were threatened at the anniversary actions at Fortuna, Stafford and Carlotta a week or so before the Scotia event. The Pacific Lumber security man, Carl Anderson, admitted his intimate, long-standing connections with the Sheriff's Department — even as Sheriff Lewis admitted his innumerable family and other connections with PL, and pressure he got through them — and both admitted that PL wanted "stronger measures" against the protesters; Anderson said he "wanted to see something happen to these people." Something did happen to them, and then PL supported Lewis in the next election...

So it was fairly (begun to be) shown that there was an effective if deniable alliance with the private interest, which — in addition to defendants' desire to eliminate the nuisance and cost of dealing with lockdowns — helped take things beyond the normal level of endemic police antagonism, and often barely contained rage, against young people who defy authority and the powers that control the status quo. As the evidence showed, and should show much more clearly in the next trial, the status quo in Humboldt County in 1997 was very strenuously defended by the Establishment, with defendants in the thick of it, when it came to the political and socio-economic reality of what are known as the "Timber Wars".

Plaintiffs believe the bare facts of this case showing the defendants' policy decisions and

directions, and the ratifications, refinements, escalations, enhancements thereof as the matter developed — especially taken with their dogged legal defense of their own correctness, in the teeth of the unmistakable if still not fully pronounced Court of Appeals decision(s) authoritatively applying the *Graham* standard to show them they're wrong — will fully support a finding that defendants Lewis and Philp acted with callous and reckless disregard of the rights of plaintiffs to be free of such a wholly unjustifiable, heedlessly cruel and dangerous, morally unacceptable use of force. Plus, we have all these 'historical facts' as further grounds for such a finding, all these particulars which arise from the Context — as we came to know large parts of it — in which the use of force took place.

That is, we have circumstances, like those discussed above, from which *circumstantial evidence* is gleaned, showing that, indeed, the Sheriffs' natural disposition to serve Establishment interests is oriented to Big Timber, in timber country, in specific invidious ways, vis-a-vis the protest movement and the interests of the community at large. Thus, there were references in the context evidence to the defendants' telling failures — over the whole 12- to 15-year history of their alliance with MAXXAM-PL, and of the struggle against MAXXAM/PL's ravaging of the environment and the local economy, led by Earth First! — ever to take action against the uncounted, flagrant logging violations by which the ravaging was accomplished (which the new, reform D.A. is exposing by the hundreds today) or ever to respond to attacks on protesters by timber goons, even vicious, lethal attacks, such as the murder/manslaughter of Gypsy Chain in 1998, and numerous lesser assaults and threats before that.

These and other actions in the history of police hostility and active prejudice to the movement plaintiffs are part of, are of the essence of the context in which the illicit pepper spray strategy arose and was put into action by these defendants. They can be proved to show the Sheriffs' motives were bad enough and their animus great enough to cause them to recklessly disregard rights, and they did recklessly disregard rights; so there is an even broader evidentiary basis for the punitive damages claim. In addition, the presence of the bad motive or animus, while it might not bear directly on the analysis of excessiveness under an 'objective' test, as defendants point out, is still relevant to the credibility of the defendants' purported reasons for

needing to spray. These were all flimsy enough to begin with; again, will-o-the-wisps: the grinder was unsafe, there was danger of a fire, the arrest process had to be speeded up (yeah, right...), and the Big Lie, that shows — *falsus in uno, falsus in omnia* — the corruption in defendants' position: that the friends and supporters outside — all well-known to defendants to be pledged to Nonviolence, and steadfast over years of often vicious provocation — would stage violent attacks on the police as their part of the "organized lawlessness" plaintiffs were leading and inspiring with the lockdowns.

In reality, point, these fear-mongering canards were the substance of defendants' cover-up of their true intentions, grist for the mill of animus, of repression. Thus, the whole Big Picture bears on the issue of reckless and callous disregard...

Plaintiffs say now that the Context in which the constitutional transgressions complained of herein occurred was shown in the trial to need substantial broadening and deepening, for its full, relevant presentation in the next trial. As to the viability of the punitive damages claim in that trial, suffice to say, when it comes to the meaning and relevance of *evidence* under the rules, Context is all. The claim is still perfectly good, and we will expect to be able to prepare the evidence accordingly.

IV. Conclusion

This case is most unusual in that there are virtually no disputes of fact which bear importantly on the outcome, in the way that, normally, a Jury would be presented with issues about "who did what to whom", what really did or didn't take place, or get said, whether things went as the plaintiffs claim or as the defendants claim, or who to believe; as we saw, there were no disagreements about what happened. Rather, the issue was, and is: how do you feel about what happened, or more precisely, about what the police did? Was it (un)reasonable? As everyone recognized, this was, and is, truly a 'visceral' issue; and it will undoubtedly remain that way in future proceedings.

Legally speaking, however, it is no toss-up. Rather, the Court of Appeals has long since made it clear that what the police did, in using force against the unresisting plaintiffs while putting them under arrest, was constitutionally unacceptable. The Court said the Law was

Clearly Established, under *Graham v. Connor*, that force — the deliberate infliction of hurt and pain on a person — cannot be used by police when it is unnecessary for the task at hand. In this connection, the facts, or the facts that matter, were not disputed; they scarcely could be, since the police preserved a record of what they did (or most of it) on videotape.

Facts that didn't matter, or mattered less — or some of those facts — were certainly disputed: how strong the pepper spray was, how dangerous medically (or psychologically), how seriously the plaintiffs or any of them were injured, how well the spritzer worked in relieving the pain, etc.; but those disputes were distinctively secondary to the central issue: Was it necessary to use the force that was used? Not, 'was it more convenient for the police' to use force, or 'were the police more comfortable using force, or less frustrated', nor yet, 'did the plaintiffs bring it on themselves', or 'deserve what they got' when force was used against them? The question was as it was put by the Court of Appeals: was this force needed 'to subdue, remove or arrest' these protesters?

As the Court also recognized, this question, as a practical matter, turns on the further question of whether the police had alternative means — not involving force, or (torture) — available to accomplish the task? In plaintiffs' Best Light, the answer is obviously Yes, as the Court saw; indeed the police had a variety of other means, as they all testified: they could wait them out, talk them out, move them out, or grind them out. By their own admissions, these methods had worked, one way or another, 100% of the time in the past — with the grinder as an infallible last resort. Since these non-forcible means were available, the use of force was unnecessary, and therefore unreasonable, and constitutionally prohibited; and, as the Court said, any reasonable police officer would have known this, *because that rule of law was Clearly Established*, under *Graham* and its Ninth Circuit progeny. *Nothing whatsoever was added to the facts in this trial that would remotely change any purported basis upon which a reasonable officer in defendants' position could have believed the* Graham *rule did not apply.*

Therefore, 'it must follow as the night the day', defendants may not have judgment as a matter of law, or qualified immunity. That is so patent that the strenuous, unflagging arguments to the contrary with which defendants have doggedly beset the Courts for seven years, often

seem like little more than an excuse to run up a bill for legal services.

But those arguments, that demand, are much more substantial and serious than a little fee-gouging; they are a vehicle for the invariable demand of the police, no less imperious when addressed to this Court and the Court of Appeals than to a locked-down protester, a drunk in the gutter, or a suspected terrorist: Obey! Submit! We rule. We determine the truth; We make the law; We are the law. Whatever We Say, no matter how far-fetched, arbitrary, self-serving, cruelty-fostering, or counter-productive of justice, must be accepted at face value. Otherwise, the Republic will collapse into anarchy, the crazies will run the asylum, and the sun will not come up. It is because of the powerful penchant for this outlook which always arises among the police, or the King's soldiers, that we have a Bill of Rights in the first place; and so urgently need One, and need it to be Strictly Enforced. When that outlook is mobilized in support of the authority to engage in torture, however mild, the ultimate threat to the possibility of democratic self-rule has materialized. Without question, it is that plain, manifest circumstance which inspired the powerful pronouncements in the Court of Appeals decisions now before us.

Those statements, and that core principle restricting the use of force against members of the community by those who otherwise legally monopolize it, should now be honored, confirmed and implemented by this Court. Defendants' motions must be denied, and plaintiffs' should be granted, or at a minimum, our claims now fully explored and determined.

WHEREFORE, plaintiffs ask that defendants' motions be denied in their entirety, that plaintiffs' motions be granted, and that the Court grant such other and further relief as is meet and just in the premisees.

Respectfully submitted,

DATED: October 22, as of
October 25, 2004

Dennis Cunningham
One plaintiffs' attorney

Of Counsel: Gordon Kaupp

Plaintiffs gratefully acknowledge the excellent and crucial assistance of Josh Morsell, paralegal, in the preparation of this Memorandum.

CERTIFICATE

I certify that I served the within Memorandum in Opposition, etc. on defendants by FAX and mailing a copy to Nancy Delaney and Will Mitchell, Esqs. at their offices in Eureka, CA, on

October 25, 2004.

Dennis Cunningham