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11 UNITED STATES DISTRICT COURT

12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 VERNELL LUNDBERG, et al.,
 14 Plaintiffs,
 15 vs.
 16 COUNTY OF HUMBOLDT, et al.,
 17 Defendants.

Case No.: C97-3989-SI

SUPPLEMENTAL
 BRIEFING OF
 DEFENDANTS ON
 QUALIFIED IMMUNITY

DATE: November 12, 2004
 TIME: 9:00 a.m.
 CTRM: 10, 19th Floor

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1 Pursuant to the Court's Order, defendants submit the following supplemental
2 briefing with respect to the issue of qualified immunity. Defendants further incorporate
3 and refer the Court to defendants' Rule 50 motion for judgment as a matter of law, filed
4 before the Order was received.

5 **THE FACTUAL RECORD PRODUCED AT THE SECOND TRIAL**
6 **ESTABLISHES ALL FACTS NECESSARY FOR QUALIFIED IMMUNITY**

7 Initially, it warrants noting that, unlike the usual case where the on-scene officer
8 asserts the defense of qualified immunity, defendant Philp and Lewis are policymakers,
9 and were not on-scene. Accordingly, the focus must be on those facts known to
10 defendants Lewis and Philp at the time of the authorization of the use of pepper spray at
11 the policy level. *Anderson v. Creighton*, 483 U.S. 635, 641 (1997) (A law enforcement
12 officer is entitled to qualified immunity from suit for actions that are objectively
13 reasonable in light of clearly established law and the facts known by the officer at the
14 time of his actions.)

15 It should also be noted that law enforcement officers are not required to select and
16 use the least intrusive degree of force possible; they are required only to act within a
17 reasonable range of conduct. See *Forrester v. City of San Diego*, 25 F.3d 804, 806-807
18 (9th Cir.1994); see also *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir.1994) (requiring
19 officers to find and choose least intrusive alternative would require them to exercise
20 "superhuman judgment"). Yet this is precisely what occurred in this case. That is, the
21 defendants researched and selected a means to effect arrest with no known risk of lasting
22 physical injury, i.e., pepper spray – as an alternative to a method with an obvious and
23 inherent risk of injury (which was later validated when a protester was cut during
24 extraction), i.e., physical extraction with power tools.

25 Finally, it must be recognized that the "necessity" for the use of force embraces all
26 circumstance in the context of the Fourth Amendment analysis. "The question is not
simply whether the force was necessary to accomplish a legitimate police objective; it is

1 whether the force used was *reasonable* in light of all the relevant circumstances.”

2 *Forrester*, 25 F.3d at 806, (emphasis added), quoting *Hammer v. Gross*, 932 F.2d 842,
3 846 (9th Cir.) (en banc) (1991).

4 With these points in mind, defendants will address the seven factual issues
5 identified by the Court.

6 1. The “Pepper Spray Was Unnecessary To Subdue, Remove, Or Arrest The
7 Protesters”

8 (a) The uncontroverted evidence adduced at the second trial established that it
9 *was necessary* to use some force to effect lawful arrests of plaintiffs because their use of
10 steel devices to resist arrest posed a risk of serious injury to the protesters and the
11 officers:

- 12 ■ Then-Chief Deputy Philp testified that he was informed through the chain of
13 command that the continued use of the Makita grinders and other power tools
14 to extract protesters from devices designed to resist arrest posed a risk of
15 serious injury to both the officers and the locked-down protesters. This was
16 corroborated with the testimony of Special Services Deputies Held, Reynolds
17 and Daastol, that the devices had continued to evolve, making it more difficult
18 and dangerous to use the Makita grinders and other power tools.
 - 19 ■ Although the Special Services deputies had been successful in quickly
20 defeating the earlier devices, the black bear devises posed a much greater
21 safety threat, and experience using the Makita grinder on these devises (20-30
22 occasions) was more limited. (Testimony of Daastol, Held, Reynolds.)
 - 23 ■ Prior to the incidents in question, officers had reported injuries from carrying
24 non-compliant protesters. One officer was permanently disabled and had to
25 retire. (Testimony of Kim Kerr.)
- 26

- 1 ▪ Prior to the pepper spray authorization, officers in the field involved in the
2 extraction of protesters suggested the use of pepper spray as a way to avoid
3 serious physical injuries. (Testimony of Philp, Reynolds, Daastol, Ciarabellini,
4 Kirkpatrick.)
- 5 ▪ Following extensive research and consultation, Philp determined that the direct
6 application of pepper spray, as well as a spray application to closed eyes, posed
7 no known risk of physical injury or adverse health effects. (Testimony of
8 Philp.)
- 9 ▪ Research scientist DuBay confirmed the soundness of Chief Deputy Philp’s
10 conclusions concerning the safety of pepper spray, as well as the application
11 techniques. (Testimony of DuBay.)
- 12 ▪ The use of pain compliance holds exposed the protesters to risk of lasting
13 physical injuries. (Testimony of Manos.)
- 14 ▪ In each of the subject incidents, the use of the Makita grinders posed a serious
15 risk of physical injury to both the officers and the plaintiffs. These included
16 the possibility of injury as a result of a grinding wheel exploding, the risk of
17 cutting the protester, or the leg of the operator, and the risk of fire caused by
18 the sparks. (Testimony of Held, Reynolds, Daastol.)
- 19 ▪ The use of pepper spray posed no known risk of lasting physical injury.
20 (Testimony of DuBay, Philp.)
- 21 ▪ In the Scotia incident, the configuration of the group and the placing of their
22 legs over the devices (the “human pretzel”) made it “impossible” to use the
23 Makita grinder to extract the plaintiffs. (Videotape, Testimony of Held,
24 Ciarabellini.)
- 25 ▪ The Special Services Deputies had never been confronted with the problem of
26 using the Makita grinders inside a building before the Scotia and Riggs’ office

1 incidents. This increased the safety concerns due to the possibility of fire from
2 sparks generated by the grinding process. (Plaintiffs, Held, Reynolds.)

3 ■ Fuel and oil on the equipment which plaintiffs Tendick and McCurdy were
4 attached to in Bear Creek also posed a risk of fire from sparks. (Testimony of
5 Reynolds.)

6 (b) The uncontroverted evidence adduced at the second trial also established that
7 the use of pepper spray to remove and arrest the protesters was necessary because:

8 ■ In each of the subject incidents, the lawful owner of the property asked law
9 enforcement to remove the protesters.

10 ■ In each of the subject incidents, the plaintiffs were subject to lawful arrest for
11 trespassing.

12 ■ In each of the subject incidents, the plaintiffs ignored repeated requests to
13 release from the devices and voluntarily submit to arrest.

14 ■ In each of the subject incidents, the plaintiffs were subject to arrest for resisting
15 or delaying arrest by failing to comply with lawful orders and by using devices
16 to delay arrests as long as possible. (Penal Code Section 148.)

17 ■ In each of the subject incidents, it was the sworn duty of the law enforcement
18 officers to effect the lawful arrests and remove the plaintiffs from the property
19 of the complaining property owner. Under the specific circumstances of each
20 incident, to simply walk away would be a dereliction of duty.

21 ■ In the Bear Creek incident, failing to remove and arrest the plaintiffs would
22 have exposed them to possible retaliation and injury from loggers on the scene,
23 whose operations were halted because plaintiffs had locked on to their
24 equipment. (Videotapes, Testimony of Ciarabellini, Reynolds.)

25 ■ In the Riggs incident, the option of simply walking away or “waiting them
26 out” would have interfered with the delivery of vital government services, and

1 jeopardized confidential constituent information contained in the office.

2 (Testimony of Pellegrini.)

- 3 ▪ In each of the subject incidents, the officers had a right to use force to effect
4 arrest. (Penal Code Section 835a - “Any peace officer who has reasonable
5 cause to believe that the person to be arrested has committed a public offense
6 may use reasonable force to effect the arrest, to prevent escape, or to overcome
7 resistance.”)
- 8 ▪ It was the intent of plaintiffs to refuse to comply with the lawful directives of
9 law enforcement officers and to remain on the premises as long as possible.
10 (Videotapes, Testimony of plaintiffs – see, e.g., Exhibit D, interview of Ms.
11 Lundberg confirming she would not “walk” out of the Scotia office.)

12 2. “The Officers Could Safely And Quickly Remove The Protesters, While In ‘Black
13 Bears,’ From Protest Sites”

14 The uncontroverted evidence established that the officers could *not* safely and
15 quickly remove the protesters, while they were wearing the “black bear” devices, from
16 the three protest sites:

- 17 ▪ Each black bear device weighed between twenty-five and thirty pounds, and
18 the combined weight of the protesters and the devices made it impossible to lift
19 and carry the protesters out of the offices in Scotia (seven protesters before the
20 initial applications of pepper spray) and Eureka (four protesters) while the
21 protesters were attached as a group. (Videotapes, testimony of Ciarabellini,
22 Held, Reynolds.)
- 23 ▪ Even after the use of pepper spray at Scotia reduced the configuration (and
24 accompanying weight) to two pairs of protesters with one black bear between
25 each pair, plaintiffs complained of discomfort from their movement as they
26 were carried out on stretchers, positioned side-by-side. (Exhibit B, Lundberg.)

- 1 ▪ In the Bear Creek incident, it was patently impossible to move plaintiffs
2 Tendick and McCurdy from the property of Pacific Lumber Company while
3 they were attached together through the tracks of a bulldozer. (Exhibit II.)
4 ▪ Officers had previously suffered back injuries from carrying protesters. One
5 deputy went on disability retirement due to these injuries. (Testimony of Kerr.)

6 3. “The Officers Could Remove The ‘Black Bears’ With Electric Grinders In A
7 Matter Of Minutes And Without Causing Pain Or Injury To The Protesters”

8 As outlined above, the uncontroverted evidence adduced at the second trial
9 established that it had become increasingly dangerous to use the Makita grinders to remove
10 the devices, and the circumstances in each incident posed safety concerns, including:

- 11 ▪ The risk of an exploding cutting wheel, cutting of a protester, or the leg of an
12 officer, or the risk of starting a fire. (See points under 1(a), above.)
13 ▪ Special Services Deputy Daastol testified that the injury concern was validated
14 after the incidents in question, when a protester was cut during an extraction.
15 (Daastol.)

16 4. “The Protesters Were Sitting Peacefully, Were Easily Moved By The Police,
17 And Did Not Threaten Or Harm The Officers”

- 18 ▪ The uncontroverted evidence, as set forth above, established that the protesters
19 could *not* be “easily moved by the police” while they were attached together
20 with twenty-five pound steel sleeves (Scotia and Riggs’ incidents), or while
21 attached to a bulldozer (Bear Creek).
22 ▪ In addition, the fact that plaintiffs were “sitting peacefully” or “did not do harm
23 to the officers” begs the question as the evidence was that any other removal
24 method posed a risk of significant injury. (Daastol, Ciarabellini, Reynolds,
25 Held, Kerr.)
26

1 5. “[B]ecause The Officers Had Control Over The Protesters. . . It Was Unnecessary
2 To Use Pepper Spray To Bring Them Under Control, And Even Less Necessary
3 To Repeatedly Use Pepper Spray Against The Protesters When They Refused To
4 Release From The ‘Black Bears’”

5 The uncontroverted evidence pertinent to this issue established the following:

- 6 ■ From a law enforcement perspective, the officers did not “ha[ve] control over
7 the protesters” until the metal sleeves were removed. (Philp.)
- 8 ■ Each plaintiff was subject to lawful arrest for trespassing, as well as resisting
9 arrest in violation of Penal Code Section 148.
- 10 ■ The officers had a sworn duty to complete the arrests, remove the plaintiffs
11 from the premise, and take the plaintiffs into custody so they could be
12 transported to jail for booking.
- 13 ■ So long as the plaintiffs were attached to the devices, the officers could not
14 complete the arrests. (Videotapes.)
- 15 ■ In each of the subject incidents, the officers had a right to use force to complete
16 the arrests. (Penal Code Section 835a - “Any peace officer who has reasonable
17 cause to believe that the person to be arrested has committed a public offense
18 may use reasonable force to effect the arrest, to prevent escape, or to overcome
19 resistance.”)
- 20 ■ The plaintiffs acknowledged that their intent was to remain attached to the
21 devices and delay being taken into custody for as long a possible. (Videotapes,
22 Testimony of plaintiffs.)
- 23 ■ “Waiting them out,” or simply walking away, posed risk of injury from the
24 possible retaliation of loggers (Bear Creek), would have interfered with the
25 delivery of vital government services (Riggs' office), and would have
26 prevented the use of a business premises by the lawful owner (Scotia).
(Videotapes, Ciarabellini, Pellegrini.)

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- The second application repeated use of pepper spray at the Riggs incident caused all of the plaintiffs to release from the devices, enabling the officers to carry out their sworn duties *without* exposing the protesters and the officers to risk of injury posed by the use of the Makita grinders. (Videotapes.)
- The configuration of the plaintiffs at Scotia rendered the Makita grinders useless. (Videotapes, Testimony of Ciarabellini, Held.)
- The completion of the arrests at the Scotia and Riggs' incidents were necessary to diffuse potential crowd control concerns, and allowed the officers to service other needs of the community. (Videotapes, Testimony of Ciarabellini, Philp, Millsap, Manos.)

6. The Evidence Was Uncontroverted That “The Manner In Which The Officers Used The Pepper Spray” Was Calculated To Achieve The Most Minimal Intrusion And To Avoid The Purported “Hydraulic Needle Effect” Risk Of A Less Than Three Feet Application To The Open Eye.

- The evidence was uncontroverted that direct application by finger tip is a common academy technique used by officers to achieve minimal applications and that Chief Deputy Philp developed the q-tip technique in consultation with the chemical agent instructor to minimize the exposure. (Testimony of Philp.)
- According to Mr. DuBay, the person responsible for the “three feet” label warning, the direct application by q-tip did achieve the most minimal exposure and negated any potential risk of injury from a close (less than three feet) application spray by assuring that the eyes would be closed as a consequence of the initial application (and additionally, because of the warning of intended use). (Testimony of DuBay.)

1 7. At The Policy Level, Use Of First Aid Was Part Of The Authorization And No
2 Videotaped Evidence Of Any Event Reflects Refusal To Apply Water.

- 3 ■ New evidence at the second trial included the fact that the spray bottle
4 employed to deliver water to the protesters following application of pepper
5 spray, was precisely what the manufacturer recommended and the
6 manufacturer sold a smaller version of this. (Testimony of DuBay.)
- 7 ■ The use of force policy of the County of Humboldt establishes that any use of
8 force requires appropriate first aid and Chief Deputy Philp confirmed this
9 includes application of water after use of pepper spray. (Exhibit AA3, Philp.)
- 10 ■ No videotape of any event in issue reflects the use of pepper spray without
11 affording an opportunity for use of water immediately after (and often before)
12 compliance with the lawful order of the arresting officer to cease resistance.
13 (Videotapes, Testimony of Lundberg, Philp, Ciarabellini, Kirkpatrick.)

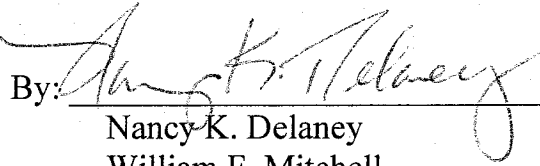
14 CONCLUSION

15 As set forth above, and more extensively in the briefing in connection with the
16 motion of defendants for judgment as a matter of law, all of the “factual disputes”
17 originally identified by the Ninth Circuit panel in *Headwaters I* and *II*, were answered by
18 uncontroverted evidence at the second trial, from which, viewing the evidence in the light
19 most favorable to plaintiffs, no reasonable inference could be drawn that any event
20 involved the use of excessive force. More significantly for the purposes elicited by the
21 Court, at the policymaking or ratification level, plaintiffs produced absolutely no
22 evidence to support any inference that defendants Lewis and Philp acted in a manner that
23 suggests either was a “plainly incompetent” policymaker or exhibited “reckless or
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1 callous indifference” with respect to any federally protected right of plaintiffs.

2 DATED: October 29, 2004

MITCHELL, BRISSO, DELANEY & VRIEZE

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4 By: 

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