IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

VERNELL LUNDBERG, et al.,

Plaintiffs,

v.

COUNTY OF HUMBOLDT, et al.,

Defendants.

/

No. C 97-3989 SI

FINAL PRETRIAL SCHEDULING ORDER

On March 29, 2005, the Court held a final pretrial conference for the retrial of the above captioned matter, which is set for jury trial beginning April 12, 2005. All parties were represented by counsel. The following matters were reaffirmed or, where newly disputed, resolved:

1. **Number of jurors and challenges:** There shall be a jury of 8 members. Each side shall have up to four peremptory challenges.

2. **Voir dire:** The court will conduct general voir, and the parties have been granted up to 1-1/2 hours for each side to question the panel during voir dire. No questionnaires will be used. Before any questioning begins, counsel for each side may give an abbreviated opening statement, up to 15 minutes per side, describing the issues in the case; no physical evidence or demonstrative exhibits may be shown to the venire during these statements.

3. **Trial exhibits:** No later than April 11, 2005, the parties shall submit their trial exhibits,

in binders with numbered tabs separating and identifying each exhibit. The court shall be provided with three sets (for the court, the file and the witness) and each side shall provide one set for the other side. To the extent that original documents are to be used as exhibits in the case, they should be included in the set of exhibits for the court.

4. **Timing of trial:** The parties have estimated that the trial should take approximately 8 days. Accordingly, each side shall have 45 minutes for opening statements; each side shall have up to 14 hours total for presentation of evidence, which includes direct and cross-examination and presentation of all exhibits; and each side shall have up to 1 hour for closing argument.

5. **Trial schedule:** Jury trials are generally conducted Monday through Thursday; jury trials are generally not conducted on Fridays, although deliberating juries are free to deliberate on Fridays. The trial day runs from 8:30 a.m. until 1:30 p.m., with a 15 minute break at about 10:00 a.m. and about 12:00 noon, all times approximate.

6. **Plaintiffs' motions in limine and objections to witnesses and evidence:**

Plaintiffs have renewed all of their previous motions in limine and objections to witnesses and evidence. The Court leaves its prior rulings undisturbed but considers the following two motions, which plaintiffs have expressly renewed.

(1) Plaintiffs' request for the Court to reconsider its prior exclusion of a letter from Attorney General Dan Lungren regarding the use of pepper spray is DENIED.

(2) Plaintiffs' request for the Court to reconsider its prior ruling excluding allegations of maltreatment of forest protesters, including plaintiffs, after their arrests by Humboldt County Sheriff's deputies. The Court did not previously rule on the admissibility of this information, but rather granted a prior motion by defendants to exclude evidence regarding "[t]he length or condition of plaintiffs' detention following the subject incidents," see Defs.' Mot. In Limine #15 (Attachment to Defs.' Mots.), based on the parties' stipulation dismissing plaintiffs' unlawful detention claims. The Court rules, as it did earlier, that evidence regarding the length of detention is excluded, but considers evidence

regarding any maltreatment of plaintiffs after arrest to be different and it may be relevant and admissible in this trial. Accordingly, this motion is GRANTED without prejudice to specific objections at time of trial.

Plaintiffs bring three new motions in limine.

(1) Plaintiffs' motion to exclude the testimony of Rhonda Pellegrini on the "danger" posed by the protesters is DENIED.

(2) Plaintiffs' motion to exclude the testimony of David Dubay regarding the use of pepper spray is DENIED.

(3) Plaintiffs' motion to exclude the testimony of Marvin Kirkpatrick or any defense witness regarding the 1998 POST standards on the use of pepper spray is DENIED.

7. **Defendants' motions in limine**

Defendants renew all previous motions in limine. The Court reaffirms its prior rulings on these motions. Defendants bring the following new motions, which the Court PARTIALLY GRANTS and PARTIALLY DENIES for the reasons set forth below.

(1) Defendants' motion to exclude any testimony by, or still images of, Carl Anderson, and any suggestion that there was a connection between the pepper spray authorization and any directive or request by Anderson or Pacific Lumber is DENIED.

(2) Defendants' motion to prohibit any questioning of law enforcement officers regarding "purported connections to Pacific Lumber" is DENIED.

(3) Defendants' motion to prohibit argument, testimony, or reference to the defendants' alleged "get tough policy" with respect to mass protest activities, specifically the annual Headwaters Forest rallies, is DENIED.

(4) Defendants' motion to prohibit all reference to a 1998 incident in which activist David Chain was killed when a redwood tree fell on him is GRANTED. Because the incident occurred on year after the protests at issue, the Court considers it irrelevant to the issues in the case.

(5) Defendants' motion to prohibit any reference to an ACLU article regarding pepper spray without first laying a foundation outside the presence of the jury is PARTIALLY GRANTED. Plaintiffs

must lay a proper foundation for the article before referencing it, although the foundation need not be laid outside the jury's presence.

(6) Defendants' motion to exclude the enlarged video-still image of Q-tip near eye of plaintiff Jennifer Schneider is DENIED.

(7) Defendants' motion to prohibit any suggestion "that the use of force in this case was unreasonable because it could lead to encourage future abuses, i.e., plaintiffs' 'slippery slope' or 'Abu Grabe' [sic] theories, or other references to Abu Grabe," is DENIED.

(8) Defendants' motion to exclude any testimony or evidence that plaintiffs have suffered emotional distress or other damage related to fear of cancer, loss of vision, or some other future malady is PARTIALLY GRANTED. Defendants rely on Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 996 (1993), which held that: "with respect to negligent infliction of emotional distress claims arising out of exposure to carcinogens or toxic substances, in the absence of present physical injury or illness, damages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant's negligent breach of a duty owed to plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop cancer in the future." The Court agrees with plaintiffs that Potter applies in the specific context of emotional distress claims based on actual exposure to carcinogens, but finds that it prohibits plaintiffs here from testifying that they have or are likely to develop a medical condition from the exposure to OC because there has been no medical evidence in the case. Plaintiffs may still testify, as they did in the prior trial, about the anxiety and fear they experienced when the OC was in their eyes, including that they did not know what effect it might have or that they feared it might have negative effects.

(9) Defendants' motion to prohibit any reference to the absence of female officers in effecting the arrests of plaintiffs is DENIED.

(10) By separate motion, defendants seek to exclude plaintiffs' police practices expert, Anthony Bouza. Defendants argue that Defendants argue that Bouza offers no scientific, technical, or other specialized knowledge to assist the trier of fact because (1) he is not an expert in the use of OC; (2) he used a "risk-benefit" analysis to arrive at his opinion about the reasonableness of force, which did not

account for the risk of injury to law enforcement, as Graham v. Connor requires; and (3) Bouza's opinions are based entirely on the facts as described in the Ninth Circuit's decisions in Headwaters I and II, not evidence from the trial in this case.

Defendants do not challenge Bouza's qualifications in the field of policing. According to defendants, his testimony that pain compliance is not an acceptable police practice in non-violent situations demonstrates that he has not applied the proper premise in conducting his expert analysis. Under Federal Rule of Evidence 702, an expert may give an opinion if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) he applied them reliably to the facts of the case. F.R.E. 702. As plaintiffs state, Bouza was provided with various pieces of information about the case, including videos of the protests and OC applications. In addition, although he did not use Graham v. Connor by name, he articulated and considered the proper standard for excessive force. Defendants' arguments present appropriate topics for their cross-examination of Bouza, but their contentions go to the weight of his testimony, not its admissibility.

Accordingly, defendants' motion to exclude plaintiffs' expert is DENIED.

8. **Other matters:** The parties shall inform each other 48 hours in advance of the names of witnesses to be called at trial. Any party bringing audio-visual equipment to the courtroom shall make that equipment available to the other side.

Dated: April 4, 2005

SUSAN ILLSTON
United States District Judge