

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

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

8 Attorneys for Plaintiffs

9 JAMES R. WHEATON (Cal. Bar No. 115230)
DAVID A. GREENE (Cal. Bar No. 160107)
10 SOPHIA S. COPE (Cal. Bar No. 233428)
FIRST AMENDMENT PROJECT
11 1736 Franklin Street, 9th Floor
Oakland, CA 94612
12 Tel: (510)208-7744
Fax: (510)208-4562

13 Fee Counsel for Plaintiffs
14

15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISCO DIVISION

18 VERNELL LUNDBERG, et al.,

19 Plaintiffs,

20 v.

21 COUNTY OF HUMBOLDT, et al.,

22 Defendants.
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) Case No. C-97-3989-SI

) **PLAINTIFFS' REPLY TO**
) **DEFENDANTS' COSTS OBJECTIONS**

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

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1 **I. PLAINTIFFS ARE ENTITLED TO COSTS UNDER F.R.C.P. 54(d)(1)**

2 There is a strong *presumption* that a prevailing party is entitled to costs (not including
3 attorney’s fees), which the losing party must overcome. Federal Rule of Civil Procedure 54(d)(1)
4 provides that “costs other than attorneys’ fees shall be allowed *as of course* to the prevailing party
5 unless the court otherwise directs.” Fed. R. Civ. P. 54(d)(1) (emphasis added). “By its terms, the rule
6 creates a presumption in favor of awarding costs to a prevailing party, but vests in the district court
7 discretion to refuse to award costs.” Ass’n of Mexican-American Educators v. California, 231 F.3d
8 572, 591 (9th Cir. 2000).

9 However, the district court’s discretion to deny costs to the prevailing party is limited and
10 the court must “specify reasons” for its refusal. Id. (citation omitted). Given the presumption “that
11 costs are to be awarded as a matter of course in the ordinary case,” the court is required to “explain
12 why a case is not ‘ordinary’ and why, in the circumstances, it would be inappropriate or inequitable
13 to award costs.” Id. at 593.

14 Some reasons for denying costs include misconduct by the prevailing party and the losing
15 party’s limited financial resources. Id. at 592. Neither of these reasons applies to this case. Plaintiffs
16 have not engaged in any misconduct, and Defendants City of Eureka and Humboldt County, and
17 their respective law enforcement departments, do not have such limited resources that would justify
18 denying Plaintiffs costs; as stated in footnote 13 of Plaintiffs’ reply brief, defendants have liability
19 insurance for millions of dollars. Furthermore, it is *Plaintiffs* who have extremely limited financial
20 resources. [Lundberg Decl. (filed June 30, 2005) ¶5.] Being prevailing parties, Plaintiffs are entitled
21 to be compensated, consistent with the Federal Rules, for the costs incurred during the past eight
22 years of litigation.

23 While *other circuits* have denied a prevailing plaintiff costs due to a nominal damages award
24 in civil rights cases, the Ninth Circuit has not yet chosen to do so. In Mexican-American Educators,
25 231 F.3d at 592 n.15, the court explicitly held that a great disparity between the amount of damages
26 sought and the amount awarded can justify denial of costs in a *contract claim*, but it did “not address
27 the propriety of these reasons in non-contract actions.” Champion Produce, Inc. v. Ruby Robinson
28 Co., Inc., 342 F.3d 1016,1023 (9th Cir. 2003). In any event, as Plaintiffs explained in their opening

1 brief, they did not ask for a specific or large amount of money, either in their pleading papers or at
2 trial, and have always focused on the important principle of this case. [Lundberg Decl. (filed June
3 30, 2005) ¶3.] More importantly, as this case has achieved significant successes in addition to the
4 nominal damages award.

5 Defendants argue that costs incurred by Plaintiffs' attorneys in the first trial (Macon Cowles
6 and Mark Harris) should not be taxed because the trial resulted in a hung jury. However, the Federal
7 Rules provide that a prevailing party is entitled to all costs. Plaintiffs in this case are prevailing
8 parties because they received a judgment enforceable against defendants on the claim of excessive
9 force. Farrar v. Hobby, 506 U.S. 103, 112 (1992) (holding that plaintiffs who receive nominal
10 damages are prevailing parties under §1988); see also Barber v. T.D. Williamson, Inc., 254 F.3d
11 1223, 1234 (10th Cir. 2001) (noting that the prevailing party requirement is generally the same for
12 the purposes of costs and attorney's fees and finding that plaintiff was the prevailing party for the
13 purpose of costs because he was awarded nominal damages); Miles v. California, 320 F.3d 986, 988
14 (9th Cir. 2003). It is of no consequence that *individual attorneys* from earlier stages of the litigation
15 were no longer involved at the time judgment was entered. *Plaintiffs* prevailed and so are entitled
16 to all costs incurred during all stages of this litigation that ultimately lead to the favorable verdict.

17 **II. THE CHARGES RELATED TO VIDEOTAPE PRODUCTION SHOULD BE TAXED**

18 The \$1079 cost incurred in the preparation of video exhibits is reimbursable under Local
19 Rule 54-3(d)(5), which states "The cost of preparing . . . videotapes . . . to be used as exhibits is
20 allowable." These were videotapes of the incidents themselves and were reasonably necessary to
21 assist the juries in understanding the issues at trial.

22 Additionally, the \$267.27 for videotapes used in taking the depositions of defense witnesses
23 is reimbursable as part of the cost incurred in videotaping a deposition. Tilton v. Capital Cities/ABC,
24 115 F.3d 1471,1477 (10th Cir. 1997) (finding that F.R.C.P. 30(b)(2)-(3) and 28 U.S.C. §1920(2),
25 when read together, authorize taxation of the costs of video depositions); Nicolaus v. West Side
26 Transp., Inc., 185 F.R.D. 608, 612 n.2 (D.Nev. 1999) ("[T]he costs of videotaping and transcribing
27 a deposition are taxable"); Cherry v. Champion Int'l Corp., 186 F.3d 442, 448 (4th Cir. 1999)
28 (agreeing with the Tenth Circuit's interpretation in Tilton). The cost of blank videotapes is a part

1 of the cost necessarily incurred in videotaping depositions. It is irrelevant that an attorney, and not
2 a certified videographer paid for these videotapes and taped the deposition. Plaintiffs are not
3 claiming costs for the attorney's time in videotaping the deposition, only the raw materials – the
4 blank videotapes.

5 **III. CONCLUSION**

6 The entire amount claimed in Plaintiffs' Bill of Costs should be taxed. Defendants have not
7 overcome the strong presumption that Plaintiffs are entitled to costs.

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9 DATED: July 20, 2005

BY: _____

10 Sophia S. Cope
11 FIRST AMENDMENT PROJECT
12 Fee Counsel for Plaintiffs
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