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' REPLY TO DEFENDANTS' EVIDENTIARY OBJECTIONS TO PLAINTIFFS' MOTION FOR ENTITLEMENT TO ATTORNEY'S FEES** [42 U.S.C. § 1988(b)] Date: July 29, 2005 Time: 9:00 a.m. Courtroom: 10 Judge: Hon. Susan Illston

REPLY TO DEFENDANTS' EVIDENTIARY OBJECTIONS

The evidence offered in support of this fee motion is not inadmissible under the Federal Rules of Evidence. Rather, the Court must determine how much weight to give the evidence submitted. Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 688 (9th Cir. 1976) ("Admissibility is one thing: weight and probative value another").[1]

I. DECLARATION OF LARRY P. DANAHER

Defendants argue that Mr. Danaher's declaration "is inadmissible because no information is provided establishing [his] competence to provide opinions germane to this case." [Defendants' Objections to Evidence Submitted in Support of Motion for Entitlement to Attorneys' Fees ("Def. Evid. Obj.") at 1:4-5.] Defendants argue that Mr. Danaher must have expertise in California law enforcement, P.O.S.T. guidelines, the use of pepper spray in situations involving civil disobedience, and the extraction of protestors from mechanical devices such as those used by Plaintiffs. [Id. at 1:7-9.]

Mr. Danaher is competent to provide expert opinions in this case consistent with Federal Rule of Evidence 702. As he explained in his declaration, he has been in law enforcement for over 20 years and is currently the Safety and Security Director of Lafayette, Indiana. [¶2] He explained that he "had to handle large political and civil protest demonstrations as a supervisor on the scene as well as the head commander in central command," and that he has faced situations similar to this case "where non-violent protestors were requested to be removed from private property." [¶2] He is a nationally-recognized trainer and consultant in police use of force and OC (oleoresin capsicum or pepper spray). [¶3] His job is to also inform his students about issues and cases that will assist them in protecting themselves and their agencies from civil liability. As an offer of proof, Mr. Danaher's curriculum vitae is attached as **Exhibit B** to the **Declaration of Mark P. Harris.** (It was mistakenly not attached to his declaration as intended by ¶4.) It is not necessary that Mr. Danaher have some special familiarity with California law enforcement or P.O.S.T. guidelines.

[1]Nevertheless, "[a] request for attorney's fees should not result in a second major litigation," Hensley v. Eckerhart, 461 U.S. 424, 437 (1983), and so "some informality of proof is appropriate," U.S. v. 88.88 Acres of Land, 907 F.2d 106, 108 (9th Cir. 1990) (citation omitted).

Defendants also argue that Paragraph 5 of Mr. Danaher's declaration is irrelevant because the Supreme Court in Farrar v. Hobby, 506 U.S. 103 (1992), "made no suggestion that 'the degree of success obtained' for purposes of an attorney fee award may be established through the opinions of a third party consultant." [Def. Evid. Obj. at 1:10-13.] Mr. Danaher's declaration was submitted to assist the Court in determining the effect this case has had on the greater law enforcement community and on someone who trains other police officers across the country in use of force and pepper spray. His opinion is uniquely helpful to this Court in determining the influence this case has had on civil rights and police practices throughout the United States.

Defendants also argue that Mr. Danaher's statement that the "Ninth Circuit decision and the jury verdict in this case now establish clearly how officers and their departments should act" is "pure speculation" and "a legal conclusion that invades the exclusive province of this court." [Def. Evid. Obj. at 1:13-16.] However, Mr. Danaher provided an opinion on the meaning and significance of this case from a law enforcement perspective. This case, including the Ninth Circuit opinions (which weighed in on the merits) and the jury verdict, reinforced what Mr. Danaher concluded early on: that pepper spray should only be used as a defensive tool, and that its use against nonviolent protestors who "pose no threat to officers or public safety" is improper and constitutes excessive force. [¶5]

II. DECLARATION OF PETER A. REEDY

Defendants claim that Mr. Reedy "has previously been disqualified from providing opinions in this case." [Def. Evid. Obj. at 1:28.] This is a mischaracterization of the facts. Mr. Reedy was *not* disqualified as a use of force, pepper spray or general law enforcement expert. Rather, District Court Judge Vaughn Walker, in an order issued prior to the first trial, ruled that use of force experts would not be helpful to the jury and so precluded from testifying Mr. Reedy *as well as* the defense expert. [Declaration of Mark P. Harris ¶4.]

Defendants argue that Mr. Reedy does not have "the expertise to provide any competent opinion on any material issue" and that he needs familiarity with "P.O.S.T. Training Guidelines." [Def. Evid. Obj. at 2:1-6.] Mr. Reedy is competent to provide expert opinions in this case consistent with Federal Rule of Evidence 702. As he explained in his declaration, he worked in law enforcement for 25 years and has continued his training and experience while in retirement,

especially related to current "policies, procedure and practice with respect to use of force in connection with chemical agents, bean bags, tasers and general use of force." [¶¶1-5] As an offer of proof, Mr. Reedy's curriculum vitae is attached as **Exhibit A** to the **Declaration of Mark P. Harris.** It is not necessary that Mr. Reedy have some special familiarity with P.O.S.T. guidelines.

Defendants argue that aspects of Mr. Reedy's declaration are "pure speculation" and overly broad, lack foundation, and constitute an "impermissible legal conclusion." [Def. Evid. Obj. at 2:7-20.] However, similar to Mr. Danaher's declaration, Mr. Reedy testified based on his membership in and knowledge of the law enforcement community, and provided an opinion on the meaning and significance of this case from a law enforcement perspective. Furthermore, "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility." Hangarter v. Provident Life and Accident Ins. Co., 373 F.3d 998, 1017 n.14 (9th Cir. 2004) (citation omitted).

III. DECLARATION OF SOPHIA S. COPE AND ATTACHED EXHIBITS

Exhibit B: Defendants argue that this March 31, 2005, Eureka-Times Standard article is inadmissible hearsay and irrelevant. [Def. Evid. Obj. at 3:1-2.]

- This article is admissible under Federal Rule of Evidence 803(1) as a present sense impression of the reporter.
- This article is admissible under Rule 807 because it has circumstantial guarantees of trustworthiness.
- Ms. Lundberg's quote, "The reason we filed this lawsuit was to protect the rights of everyone," is admissible under Rule 803(3) as proof of Ms. Lundberg's then-existing state of mind.
- This article corroborates Ms. Lundberg's declaration and is relevant to show that Plaintiffs engaged in fundraising activities and that their express focus was the principle of this case and not money.

Exhibit C: Defendants argue that this April 23, 2005, Eureka Reporter article is inadmissible hearsay and irrelevant. [Def. Evid. Obj. at 3:3-4.]

- This article is admissible under Federal Rule of Evidence 803(1) as a present sense impression of the reporter.

- This article is admissible under Rule 807 because it has circumstantial guarantees of trustworthiness.
- Ms. Lundberg's statement, "We've never been in it for the money," is admissible under Rule 803(3) as proof of Ms. Lundberg's then-existing state of mind.
- This article corroborates Ms. Lundberg's declaration and is relevant to show that Plaintiffs express focus was the principle of this case and not money.

Exhibit D: Defendants argue that this November 17, 1997, written by former California Attorney General Dan Lungren arguing that it is inadmissible hearsay. [Def. Evid. Obj. at 3:5.]

- This letter is admissible non-hearsay because it was not offered to prove the truth of its contents. See Fed. R. Evid. 801(c). Rather, it was offered to show that state Senator Mike Thompson and former Attorney General Dan Lungren were aware of and corresponded about this case.
- If this letter is considered hearsay, it is an admissible business record under Rule 803(6), and a public record under Rules 803(8)(C) and 1005.
- This letter is admissible under Rule 807 because it has circumstantial guarantees of trustworthiness.

Paragraph 7: Defendants argue that Ms. Cope's testimony of her correspondence with the California Office of Administrative Law about P.O.S.T.'s proposed regulation 1081(a)(35) is inadmissible hearsay, lacks foundation, and is impermissible speculation. [Def. Evid. Obj. at 3:6-8.]

- This information is admissible under Federal Rule of Evidence 807 because it has circumstantial guarantees of trustworthiness. Ms. Cope testified under penalty of perjury and the California Office of Administrative Law is the state agency that directly manages the regulation-making process.
- Attached as **Exhibit L** to the **Supplemental Declaration of Sophia S. Cope** is a true and correct copy of electronic mail correspondence Ms. Cope had with a Reference Attorney at the California Office of Administrative Law on June 15-16, 2005.

Exhibit I: Defendants argue that this November 26, 1998, North Coast Journal article is inadmissible hearsay and irrelevant. [Def. Evid. Obj. at 3:9-10.]

- This article is admissible under Federal Rule of Evidence 803(1) as a present sense impression of the reporter.
- Brendan Cummings' quote is admissible under Rule 803(3) as proof of his then-existing state of mind.
- This article is admissible under Rule 807 because it has circumstantial guarantees of trustworthiness.
- This article is relevant to show that controversy surrounded P.O.S.T.'s initial November 1998 Crowd Management and Civil Disobedience Guidelines.

Exhibit T: Defendants argue that this May 3, 2005, Eureka Times-Standard article and April 28, 2005, Bay City News Wire article are inadmissible hearsay and irrelevant. [Def. Evid. Obj. at 3:11-13.]

- These articles are admissible under Federal Rule of Evidence 803(1) as present sense impressions of the reporters.
- These articles are admissible under Rule 807 because they have circumstantial guarantees of trustworthiness.
- Statements by Humboldt County Sheriff Gary Philp are not hearsay under Rule 801(d)(2) because they are admissions by a party-opponent.

Exhibit U: Defendants argue that this July/August 2003 Police Marksman article is inadmissible hearsay, contains legal conclusions and lacks foundation. [Def. Evid. Obj. at 3:14-16.]

- This article is admissible non-hearsay because it was not offered to prove the truth of its contents. See Fed. R. Evid. 801(c). Rather, it was offered to show that the national law enforcement community was aware of and understood the significance of this case – that this article exists and that its contents were communicated to a national audience.
- If this article is considered hearsay, it is admissible under Rule 803(3) as proof of the author's then-existing state of mind. The author was giving his interpretation and

opinion of this case.

- This article is admissible under Rule 807 because it has circumstantial guarantees of trustworthiness.

Exhibit V: Defendants argue that this April 2005 Police Chief article is inadmissible hearsay, contains legal conclusions and lacks foundation. [Def. Evid. Obj. at 3:17-19.]

- This article is admissible non-hearsay because it was not offered to prove the truth of its contents. See Fed. R. Evid. 801(c). Rather, it was offered to show that the national law enforcement community was aware of and understood the significance of this case – that this article exists and that its contents were communicated to a national audience.
- If this article is considered hearsay, it is admissible under Rule 803(3) as proof of the author's then-existing state of mind. The author was giving his interpretation and opinion of this case.
- This article is admissible under Rule 807 because it has circumstantial guarantees of trustworthiness.

Exhibit W: Defendants argue that the November 2, 1998, Agenda and Minutes of the San Francisco Board of Supervisors, downloaded from the official website, is inadmissible hearsay and irrelevant. [Def. Evid. Obj. at 3:20-22.]

- This document is admissible as a business record under Federal Rule of Evidence 803(6), and as a public record under Rules 803(8)(A) and 1005.
- This document is admissible under Rule 807 because it has circumstantial guarantees of trustworthiness.
- This document is relevant to show how local politicians viewed this case and acted in support of Plaintiffs.

Exhibit X: Defendants argue that this November 1, 1997, San Francisco Chronicle article is inadmissible hearsay and irrelevant. [Def. Evid. Obj. at 3:23-26.]

- This article is admissible under Federal Rule of Evidence 803(1) as a present sense impression of the reporters.
- This article is admissible under Rule 807 because it has circumstantial guarantees of trustworthiness.
- Senator Diane Feinstein's statement that the use of pepper spray in this case was "unwarranted and unnecessary" is admissible under Rule 803(3) as proof of her then-existing state of mind.
- This article is relevant to show how a federal-level politician responded to this case and acted in support of Plaintiffs.
- Ms. Cope's statements in Paragraph 23 about her correspondence with Senator Feinstein's office are admissible under Rule 807 because they have circumstantial guarantees of trustworthiness. Ms. Cope testified under penalty of perjury and aides to Senator Feinstein have no reason to lie.

Exhibit Y: Defendants object to these six newspaper articles arguing that they are inadmissible hearsay and irrelevant. [Def. Evid. Obj. at 3:27-28.]

- These articles are admissible non-hearsay because they were not offered to prove the truth of their contents. See Fed. R. Evid. 801(c). Rather, they were offered to show that this case received media coverage and that certain published opinions were favorable to Plaintiffs.
- If these articles are considered hearsay, they are admissible under Rule 803(3) as evidence of the speakers' then-existing state of mind.
- These articles are also admissible under Rule 807 because they have circumstantial guarantees of trustworthiness.

IV. DECLARATION OF VERNELL LUNDBERG

Paragraph 2, lines 9-16: Defendants argue that Ms. Lundberg's statements about Defendants' non-use of pepper spray are inadmissible hearsay and lack foundation. Defendants have not explained what exactly constitutes hearsay in these lines. And Ms. Lundberg made these statements based on her involvement in and personal knowledge of the Humboldt County environmental activism community. As an offer of proof, see **Exhibits C-E** attached to the **Supplemental Declaration of Sophia S. Cope.**

Paragraph 3, lines 17-23: Defendants argue that Ms. Lundberg's statements about how she and the other Plaintiffs focused on the principle of this case are irrelevant. This point is not irrelevant, as discussed in Part I of Plaintiffs' Reply Memorandum.

Paragraph 3, lines 24-10 [*sic*]: Defendants argue that these statements about Plaintiffs' injunctive and settlement attempts are inadmissible hearsay and lack foundation. Defendants have not explained what exactly constitutes hearsay in these lines. And, as a Plaintiff in this case, Ms. Lundberg is surely qualified to recount procedural aspects of this case.

Paragraph 4: Defendants argue that Ms. Lundberg's statements regarding how this case has been received by the public are irrelevant, and are inadmissible hearsay and speculation. They are relevant to show that members of the public support Plaintiffs' position, and have been educated and made aware of the important issues in this case. Ms. Lundberg made these statements based on her personal perspective and experience. Statements to Ms. Lundberg by members of the public are admissible under Rule 803(3) as evidence of their then-existing state of mind.

V. CONCLUSION

Based on the above responses to Defendants' evidentiary objections, all of Plaintiffs' evidence submitted in support of their attorney's fees entitlement motion is admissible under the Federal Rules of Evidence.

DATED: July 20, 2005 BY: _____

Sophia S. Cope
FIRST AMENDMENT PROJECT
Fee Counsel for Plaintiffs