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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 MEMORANDUM IN SUPPORT OF 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

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INTRODUCTION

Having lost twice in the Court of Appeals and at trial, Defendants now attempt to recast the outcome of the case in their favor. Defendants claim that this case started when Plaintiffs "chose to break the law." [Defendants' Opposition Brief ("Def. Opp. Brief") at 1:6.] However, this case started, not when Plaintiffs chose to express their views on environmental destruction through civil disobedience, but when Defendants abused their specially granted law enforcement power. This case began when Defendants violated the Bill of Rights by using pepper spray against Plaintiffs, who were nonviolent and posed no threat to the officers, themselves or others. The Ninth Circuit made this finding, which was punctuated by the jury verdict. Plaintiffs fought for and achieved vindication of every peaceful protestor's Fourth Amendment right to be free from excessive police force. This is not a "mouse." [Def. Opp Brief at 1:1.] Because Plaintiffs succeeded on many different fronts, they are eligible for reasonable attorney's fees, which is consistent with Congress' intent to provide an incentive to plaintiffs and their attorneys to litigate important civil rights cases.

ARGUMENT

I. PLAINTIFFS ACHIEVED THROUGH THIS LITIGATION AN "OVERALL SUCCESS" THAT GOES WELL BEYOND THE NOMINAL DAMAGES AWARD

To determine whether a civil rights plaintiff who was awarded nominal damages is entitled to attorney's fees under 42 U.S.C. §1988, the standard in this circuit is clear: "If a district court chooses to award fees after a judgment for only nominal damages, it must point to some way in which the litigation succeeded, *in addition* to obtaining a judgment for nominal damage." Wilcox v. City of Reno, 42 F.3d 550, 555 (9th Cir. 1994) (emphasis in original). The litigation must have achieved an "overall success" that went "well beyond the one dollar verdict." Id. at 557. Thus, according to the Ninth Circuit, the focus of analysis is not on the nominal damages award but on what else the litigation achieved. In their opposition brief, Defendants obsess over nominal damages but miss the point. Plaintiffs are entitled to attorney's fees because they achieved a multitude of successes in addition to their monetary award.

A plaintiff's "overall success" is partially, not exhaustively, defined by several factors enumerated in various cases. Justice O'Connor in Farrar v. Hobby, 506 U.S. 103 (1992), set forth her "relevant indicia of success." Id. at 122 (O'Connor, J., concurring). The Wilcox court suggested

"tangible results – *such as* sparking a change in policy or establishing a finding of fact with potential collateral estoppel effects – such results will, in *combination* with an enforceable judgment for a nominal sum, support an award of fees." 42 F.3d at 555 (emphasis added).[1]

While these are factors that a district court may and should consider in determining a plaintiff's "overall success," these factors are not dispositive or exhaustive. The Tenth Circuit held that the O'Connor factors should not be rigidly applied:

> No one factor is necessarily controlling; nor should all three factors necessarily be given equal weight. The bottom line is that all three factors should be given due consideration but ultimately it is within the *discretion* of the magistrate judge (or the district court) to determine what constitutes a reasonable fee given the particular circumstances.

Barber v. T.D. Williamson, Inc., 254 F.3d 1223, 1233 (10th Cir. 2001) (emphasis added). The Eighth Circuit stated that the O'Connor "factors do not dictate an award of attorney's fees. The district court retains its discretion and specifically considered *all of the relevant factors* of this case in making the fee determination." Milton v. City of Des Moines, 47 F.3d 944, 946-47 (8th Cir. 1995) (emphasis added). Thus the district court analyzes the totality of the circumstances. The district court has the discretion to consider any and all facts to determine whether a plaintiff has achieved an "overall success" that justifies an award of attorney's fees. "This allocation of decisionmaking authority makes sense. The district court is in the best position to ascribe a reasonable value to the lawyering it has witnessed and the results that lawyering has achieved." Wilcox, 42 F.3d at 555.

Defendants wrongly claim [Def. Opp. Brief at 10:24, 15:10] that Justice O'Connor's three factors have not been explicitly adopted by the Ninth Circuit. See Hashimoto v. Dalton, 118 F.3d 671, 678 (9th Cir. 1997); Morales v. City of San Rafael, 96 F.3d 359, 363 (9th Cir. 1997). Regardless, these factors are not exclusive. Whether the analysis focuses on Justice O'Connor's factors, other factors discussed by other courts, or a case's unique set of facts, the ultimate question is the same: did the case achieve something beyond the nominal damages award – did any good come of the case from a big-picture perspective – such that attorney's fees are warranted? Plaintiffs

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[1]The Wilcox court also discussed other factors indicative of an "overall success" justifying attorney's fees in that case: the fact that police misconduct was brought to light because of the lawsuit, the disciplining of the police officer, the change in the use of force policy, and the jury's finding that the police policy was unconstitutional, which benefited "the City and its residents by preventing the police department from reverting to its old policy or a similar policy some time in the future." Id. at 556-57.

in this case have achieved an "overall success" justifying an award of attorney's fees. This outcome is the same regardless of how the analysis is structured.

To the extent that a nominal damages award is a factor in determining a civil rights plaintiff's entitlement to attorney's fees, Justice O'Connor in Farrar suggested that the weight of the nominal damages factor can tip in a plaintiff's direction if there is not a "substantial difference" between the amount of damages sought by the plaintiff and the amount awarded. 506 U.S. at 121 (O'Connor, J., concurring). Other courts have declined to always consider a nominal damages award as a strike against a plaintiff. When it is clear that the plaintiff was not entirely concerned with money and did not seek a specific or enormous amount of compensatory damages, the difference between the amounts of damages sought and awarded becomes less relevant.

For example, the court in Richard v. City of Harahan, 6 F.Supp.2d 565, 576 (E.D.La. 1998), held that the plaintiff was entitled to attorney's fees under §1988, noting that "[t]he petition specifically sought an award of compensatory damages, but it did not specify an amount. The pre-trial order did not mention damages." The court in Lucas v. Guyton, 901 F.Supp. 1047, 1053-54 (D.S.C. 1995), granted attorney's fees despite a ten-cent damages award, stating "this court does not believe that the monetary amount alone should be determinative of the degree of success – especially in light of the fact that Plaintiff's trial strategy did not include a high demand for monetary damages . . . Recovering large sums of money was not the *theme nor the trial strategy* of this case. Plaintiff's Complaint simply requested compensatory or nominal damages 'in an appropriate amount.'" (Emphasis added.)

Similarly, Plaintiffs' theme and trial strategy throughout this case has been to focus on its principle. [Lundberg Decl. (filed June 30, 2005) ¶3.] Plaintiffs were more concerned about vindicating the Fourth Amendment right of every individual to be free from excessive police force. Plaintiffs sought (and achieved) a legal ruling that Defendants' use of pepper spray against nonviolent demonstrators violated this important individual right. Plaintiffs were not driven by a desire to secure an enormous damages award for themselves. This is evidenced, in part, by Plaintiffs' request in their complaints for non-specific "compensatory damages according to proof," and Plaintiffs' settlement attempts, where they reasonably sought compensation for their attorneys'

hard work but were willing to forgo any money for themselves. [See Lundberg Decl. (filed June 30, 2005) ¶3 & Exh. A; Cope Decl. (filed June 30, 2005) ¶2 & Exh. A.] Thus the fact that Plaintiffs received nominal damages cannot and should not outweigh all the other successes this case achieved.

Defendants castigate Plaintiffs' attorneys for mentioning money in closing arguments, as if to show that greed was Plaintiffs' true motivation. [Def. Opp. Brief at 5:17-21; 6:9-12, 23-25; 9:5-19.] But Plaintiffs' counsel never directly asked the jury for a specific, single amount of money. Additionally, Defendants ignore that civil cases are by their nature related to money. The American legal system dictates that a jury can only "fix" a civil wrong by awarding monetary compensation.[2] Plaintiffs' true motivation is not diminished because their attorneys referenced numbers to help guide the jurors in their decision.[3] The mention of money does not negate the real reason why Plaintiffs filed this lawsuit in the first place: its principle. Plaintiffs were bound by the nature of their civil case and so reasonably mentioned money, yet they never wavered from their premise that securing a legal finding that Defendants had acted unconstitutionally was more important than any damages they might have received.[4] Thus Plaintiffs are entitled to attorney's fees because their "primary goal" was not to recover damages for themselves, but to act as "private attorneys general." Joseph Bean, Note, Felling the Farrar Forest: Determining Whether Federal Courts Will Award §1988 Attorney's Fees to a Prevailing Civil Rights Plaintiff Who Only Recovers Nominal Damages,

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[2]Plaintiffs' counsel Dennis Cunningham stated in his closing argument during the third trial, when mentioning money, "That's how our system works, for better or for worse." [Declaration of Nancy K. Delaney ¶5 & Exh. D, 25:12-13.]

[3]In the first trial, Plaintiffs' counsel Macon Cowles deferred to the jury and did not press the issue of damages: "It's entirely up to you. It's within your hands to do what you feel is right, and I'm not going to invade that province, that job that you have to do." [Transcript attached to Defendants' Response to Ex Parte Motion to Extend Time to File Petition for Attorneys' Fee, Costs and Expenses, lines 23-25.] In the second trial, Plaintiffs' counsel Bob Bloom, after telling the jury what Humboldt County's annual budget was, stated, "I'm suggesting to the jury that as a guide . . . I'm suggesting that one thing they might want to consider." [Declaration of Nancy K. Delaney ¶4 & Exh. C, 24:24, 25:2.] After objection from Defendants' counsel, the Court stated, "I think that's right, Mr. Bloom." [Id. at 25:6.] Plaintiffs' counsel continued: "Use your best judgment, whatever guides you." [Id. at 25:7-8.]

[4]In trying to negate the relevance of Plaintiffs' focus on the principle of this case rather than any potential monetary award, Defendants cite Texas State Teachers Association v. Garland School District, 489 U.S. 782, 791 (1989). However, that case dealt with the issue of whether a plaintiff was a "prevailing party," not whether a plaintiff, as a prevailing party, was entitled to attorney's fees.

33 U. Mem. L. Rev. 573, 594 (2003).

In summary, the legal standard that this Court must use to determine Plaintiffs' entitlement to attorney's fees under §1988 is clear: the litigation's "overall success." This Court must determine what good came out of this case *overall* and whether such positive results go well beyond the nominal damages award , thereby justifying an award of attorney's fees. Plaintiffs' "overall success" is indeed significant, which is illustrated in the following ways.[5]

II. THE JURY FOUND THAT DEFENDANTS VIOLATED PLAINTIFFS' FOURTH AMENDMENT RIGHT TO BE FREE FROM EXCESSIVE POLICE FORCE, THUS CONTRIBUTING TO PLAINTIFFS' "OVERALL SUCCESS"

The jury returned a verdict in Plaintiffs' favor and declared that Defendants had acted unconstitutionally in violation of the Fourth Amendment. [Special Verdict (April 28, 2005) ¶1.] The Special Verdict states that Defendants' application of *pepper spray* to Plaintiffs, in effecting Plaintiffs' arrests during any of the three incidents at issue in this case, constituted excessive force as defined in the jury instructions. The "Excessive Force Defined" jury instruction directed the jurors to consider the totality of the circumstances, including the four Graham v. Connor[6] factors: 1) the severity of Plaintiffs' crimes; 2) whether Plaintiffs posed a safety threat to the officers, themselves, or others; 3) whether Plaintiffs were actively resisting detention or attempting to escape; 4) and any other exigent circumstances. The obvious and inescapable interpretation of the verdict is that the use of pepper spray against peaceful demonstrators – who were nonviolent and posed no threat to the officers, themselves or others, and who were guilty of no more than simple trespass – is unconstitutional under the Fourth Amendment.

This significant legal finding can hardly be considered "an unspecified finding of excessive force" that "carries no discernable meaning," or a "'moral satisfaction' without legal consequence."

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[5]Defendants argue that the only measure of success should be the effects of the *verdict* (i.e. what has happened in the last three months). [Def. Opp. Brief at 19:19-22.] This conclusion is preposterous and Defendants provide no authority for this assertion. The standard is what successes resulted from the entire *litigation*. Plaintiffs filed a complaint on October 30, 1997, and a multitude of positive effects have followed since, brought about by Plaintiffs courage and determination to bring to light inexcusable constitutional violations. Wilcox supports this: "during the course of the litigation" (i.e. *before* the verdict), the city disciplined the officer and changed its use of force policy. 42 F.3d at 556.

[6]490 U.S. 386 (1989).

[Def. Opp. Brief at 19:15, 14:26, 8:18-19.] Nor can this be, as Defendants audaciously claim, "a vindication of the position of the defense." [Id. at 4:8-9.] Defendants tried to push back the line of reasonable force against peaceful protestors, and Plaintiffs brought the line back to where it should be.

Once again, Defendants obsessively focus on the nominal damages award, arguing that it indicates that Plaintiffs suffered no injury. [Def. Opp. Brief at 1:20-21, 4:6, 7:8-10; 16:23, 19:16, 23:17, 25:5.] This is Defendants' attempt to direct the Court away from the relevant legal standard: "If a district court chooses to award fees after a judgment for only nominal damages, it must point to some way in which the litigation succeeded, *in addition* to obtaining a judgment for nominal damage." Wilcox, 42 F.3d at 555 (emphasis in original). Thus what the nominal damages award might or might not mean is simply not relevant to the determination of whether Plaintiffs may be awarded attorney's fees. Other positive effects of this case must be considered, while the nominal damages award is taken at face value as establishing Plaintiffs' status as prevailing parties, and is otherwise set aside.

Assuming that the meaning of the nominal damages award is somehow relevant, it does not necessarily mean that a plaintiff suffered no injury. Rather, it can mean that the plaintiff suffered no compensable injury. Farrar, 506 U.S. at 115. [Def. Opp. Brief at 7:8-9, 14:21-22.] In the present case, the jury – for whatever reason – decided not to award Plaintiffs compensatory damages.[7] However, in finding that Defendants were guilty of excessive force, the jury had to find that Plaintiffs suffered *some* harm – such that the pain suffered by Plaintiffs at the hands of Defendants resulted in a more than "minimal" bodily intrusion. This outweighed any alleged law enforcement interests, thereby warranting the finding that Defendants violated the Fourth Amendment. See Headwaters I, 240 F.3d 1185, 1198-1200 (9th Cir. 2001).

Furthermore, an award of nominal damages does not make a constitutional violation any less serious, or indicate that it cannot and should not be litigated. A finding of excessive force is

[7]It is generally unwise to speculate about why a jury decided the way it did. However, some evidence suggests that the jurors compromised and declined to award Plaintiffs money because they broke the law by trespassing – not necessarily because they did not prove compensable injury. [Supplemental Declaration of Sophia S. Cope ("Suppl. Cope Decl.") ¶2 & Exh. A.]

completely permissible even if only supportable by nominal damages. Id. at 1199; see also Wilks v. Reyes, 5 F.3d 412, 416 (9th Cir. 1993); Lewis v. Downs, 774 F.2d 711, 714 (6th Cir. 1985). Multiple courts have noted the importance of vindicating Fourth Amendment rights. See Milton, 47 F.3d at 946; Richard, 6 F.Supp.2d at 576; Oliver v. U.S., 466 U.S. 170, 186 (1984) (Marshall, J., dissenting) ("The Fourth Amendment, like the other central provisions of the Bill of Rights that loom large in our modern jurisprudence, was designed . . . to identify a fundamental human liberty that should be shielded forever from government intrusion"). Thus, assuming the jury concluded that Plaintiffs suffered no compensable injury, the jury *did* find that Defendants nevertheless acted *wrongly*.

Finally, Defendants obsess over the fact that Plaintiffs did not prevail on all their claims. [Def. Opp. Brief at 2; 3:3-7; 12:6-11, 16:10-14.] But as Plaintiffs pointed out in the opening brief at footnote 7, this is of little significance. See Stivers v. Pierce, 71 F.3d 732, 753 (9th Cir. 1995) ("While the plaintiffs did not obtain all the relief sought, they did obtain 'tangible results' [citing Wilcox] and are therefore entitled to fees"). What Plaintiffs did prevail on was the very important Fourth Amendment claim of excessive police force against the most culpable defendants: the public entities and supervisors who authorized the use of pepper spray.[8]

III. THE NINTH CIRCUIT ADDRESSED THE MERITS OF THIS CASE IN RULING ON SIGNIFICANT PROCEDURAL ISSUES, THUS CONTRIBUTING TO PLAINTIFFS' "OVERALL SUCCESS"

Defendants argue that the Ninth Circuit Headwaters opinions did not create "precedent on the merits." [Def. Opp. Brief at 3:18, 17:27.] Of course the merits were not directly before the court because the appeal was related to the procedural issues of the directed verdict and qualified immunity. Plaintiffs acknowledged in the opening brief at footnote 9 that the Ninth Circuit made the following distinction in Headwaters I: "We are not asked to decide whether the use of pepper spray in this case constituted excessive force or not. We are only to decide whether the district court erred in directing a verdict for the defendants in light of the evidence in the record." 240 F.3d at 1200 n.8. The court had to be clear about what its technical role was on appeal. But the court wasted

[8]Defendants oddly claim that these were the *least* culpable defendants. [Def. Opp. Brief at 16:13-14.]

no time in weighing in on the merits of the case, in both Headwaters opinions, as part of their procedural analyses – because the merits were *inextricably* tied to the procedural issues.

The court found that a jury could "clearly" and "easily" return a verdict for Plaintiffs. Id. The court later stated much more straightforwardly that sheriffs Lewis and Philp "violated the protestors' Fourth Amendment right to be free from excessive force," and that it would be *clear to a reasonable officer* that it constituted excessive force to use pepper spray against the protestors because of their nonviolent nature; that it constituted excessive force to repeatedly use pepper spray against the protestors; that it constituted excessive force to apply the pepper spray not only with Q-tips but also with full spray blasts inches from the face; and that it constituted excessive force to refuse to wash out the protestors' eyes with water. Headwaters II, 276 F.3d 1125, 1129-31 (9th Cir. 2002). Thus the precedential force of these published Ninth Circuit opinions with regard to the merits of the case is undeniable. And, as discussed above, the jury verdict only bolstered these findings.

Defendants also erroneously claim that the Headwaters I *directed verdict* ruling was thrown out by the Supreme Court. [Def. Opp. Brief at 3:16-17.] Instead, only the Headwaters I ruling on *qualified immunity* was vacated and remanded in light of new case law.[9] The Headwaters II court made a point of clarifying that the "Supreme Court's remand does not require us to reconsider our decision to reverse the district court's entry of judgment [directed verdict] in favor of Humboldt County, the City of Eureka, and their respective police departments." Headwaters II, 276 F.3d at 1127 n.2.[10]

Regarding the Headwaters II ruling itself, Defendants argue that "the denial of qualified immunity cannot establish 'precedent' because this determination depends on the existence of precedent, i.e., *pre-existing law*, for the requisite finding that the rights allegedly violated were 'clearly established.'" [Def. Opp. Brief at 18:17-19 (emphasis in original).] While the general

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[9]Saucier v. Katz, 533 U.S. 194 (2001).

[10]Defendants' citation [Def. Opp. Brief at 18:1-8] to Jackson v. City of Bremerton, 268 F.3d 646, 652 n.3, supports this: the opinion, referencing pages 1206-09 of Headwaters I, states that the Ninth Circuit's §1983 analysis "was specifically rejected by the Supreme Court in Saucier." Pages 1206-09 of Headwaters I contain the court's *qualified immunity* analysis.

standards for determining qualified immunity in an excessive force claim might have come from "pre-existing law," Headwaters II made clear that future officers in a similar fact situation will not be eligible for qualified immunity if they are involved with the use of pepper spray against peaceful protestors. The precedential effect of this procedural ruling is equally undeniable.[11]

IV. THE CALIFORNIA LEGISLATURE PASSED PENAL CODE §13514.5, THUS CONTRIBUTING TO PLAINTIFFS' "OVERALL SUCCESS"

Defendants argue that the filing of this lawsuit had little or no bearing on the passage of S.B. 1844, which created Penal Code §13514.5. [Def. Opp. Brief at 20:5-16.] This is contrary to the bill's legislative history. The Assembly Committee on Public Safety's Bill Analysis (June 9, 1998) states, "Several incidents involving law enforcement and civil disobedience protests by Earth First and other environmental activists made news last fall. The first three of these incidents took place in Humboldt County and resulted in *lawsuits* filed by the protestors . . . for excessive force." (Emphasis added.) Defendants are correct that Plaintiffs obtained the videotapes through criminal discovery. But Plaintiffs released the videotapes to the media the same day (October 30, 1997) the civil complaint was filed as part of their overall civil litigation strategy. [Declaration of Mark P. Harris ¶3.] And these tapes received wide-spread media coverage. [Lundberg Decl. (filed June 30, 2005) ¶4.] Plaintiffs had the wisdom and foresight to know that the public would and should care about such abuses of police power. And reason dictates that the California Legislature likely would not have known about the incidents or cared enough to act had Plaintiffs not filed a constitutionally-based lawsuit in federal court, and not made the videotapes public. Thus this case clearly prompted the passage of Penal Code §13514.5.

Defendants argue that the statute does not specifically reference the use of pepper spray as a pain compliance technique. [Def. Opp. Brief at 20:17-18.] Of course it does not. The purpose of Penal Code §13514.5 was broader: to fill a law enforcement training gap with respect to the use of force (among other issues) against protestors engaging in civil disobedience; pepper spray is a form of force and was used against the peaceful demonstrators in this case. The legislative history,

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[11]Defendants fail to address the Ninth Circuit's other significant procedural admonition that in a high-stakes civil rights case where excessive police force is the issue, a district court should not direct a verdict for the defendants following a hung jury. Headwaters I, 240 F.3d at 1197.

however, does mention pepper spray. The Assembly's Bill Analysis (June 9, 1998) states that the P.O.S.T. (California Commission on Peace Officer Standards and Training) curriculum in use at that time was deficient because it was "mainly concerned with situations clearly hostile and [did] not specifically address the use of chemical agents in instances of *non-violent* civil disobedience." (Emphasis added.) Thus the Legislature clearly contemplated that the new P.O.S.T. training required by Penal Code §13514.5 would address the use of pepper spray against peaceful protestors.

Defendants also claim that "[t]he legislature could have outlawed this use of pepper spray if this was deemed appropriate." [Def. Opp. Brief at 20:19-20.] But in the Assembly's Bill Analysis (June 9, 1998), the Legislature explained that it deferred to P.O.S.T.: "In light of its mission to enhance the professionalism of California law enforcement and to provide top-quality training, P.O.S.T. is the state agency best suited to address this matter in an efficient and effective manner." Furthermore, even though the Legislature deferred to P.O.S.T., it hinted at its views on the use of pepper spray against nonviolent demonstrators (in discussing how P.O.S.T. permits local law enforcement agencies to write their own policies): "For instance . . . One agency may *not authorize* the use of certain methods of restraint while another *severely restricts* the use of chemical agents." (Emphasis added.)

V. P.O.S.T. CREATED AND CHANGED POLICY GUIDELINES AND POLICE TRAINING MATERIALS, THUS CONTRIBUTING TO PLAINTIFFS' "OVERALL SUCCESS"

Defendants argue that this case had no effect on the creation of or change in P.O.S.T. guidelines and training materials. [Def. Opp. Brief at 21-22.] Additionally, Defendants' P.O.S.T. "expert" Oliver K. Sansen states, "To my knowledge, there are no plans to change any training tactics as a result of the Humboldt County pepper spray case." [Declaration of Oliver K. Sansen at 1:16-17.]

This is curious given that P.O.S.T.'s own November 5, 1998, press release announcing the new Crowd Management and Civil Disobedience Guidelines, November 1998, states that these "*guidelines and officer training* were developed in *response* to [Penal Code §13514.5] requiring P.O.S.T. to make this information available to local law enforcement executives. The impetus for this legislation was the controversy surrounding the use of [pepper spray] on protestors by officers in Eureka last year." [Cope Decl. (filed June 30, 2005) ¶9 & Exh. G (emphasis added).] [See also

Id. at ¶12 & Exh. J, "Preface."] As discussed above, this case clearly prompted the passage of Penal Code §13514.5, which in turn led to the formation of guidelines and other training materials.[12]

Relying on Don Cameron, Defendants also claim that "P.O.S.T. had already undertaken the study and promulgation of its Civil Disobedience Training Guidelines before the statute [Penal Code §13514.5] was introduced, and before plaintiffs had filed their complaint." [Def. Opp. Brief at 20:21-23.] Not only is this contradicted by P.O.S.T.'s own documents, this is from the same man who, in his "expert" opinion, concluded that the use of pepper spray against Plaintiffs was constitutionally reasonable, even though he found unimportant the Graham v. Connor factors – factors that were given to the jury in the "Excessive Force Defined" jury instruction. [Suppl. Cope Decl. ¶3 & Exh. B, Deposition of Don Cameron, February 3, 2005, at 76:20-80:14.] To Mr. Cameron, these factors "really make[] no difference." [Id. at 78:10-14.]

While Plaintiffs would have preferred that P.O.S.T. explicitly ban the use of pepper spray against all peaceful protestors, it is significant that P.O.S.T. – prompted by the Legislature – filled a long-standing training gap with respect to law enforcement response to civil disobedience situations. Furthermore, P.O.S.T. recognizes that "only that force which is objectively reasonable may be used to arrest violators and restore order." [Cope Decl. (filed June 30, 2005) ¶12 & Exh. J, "Introduction."] Given the Legislature's apparent position on the use of pepper spray against nonviolent demonstrators *and* the two Ninth Circuit opinions *and* the jury verdict, P.O.S.T. and the law enforcement officers it trains now know that the use of pepper spray against those engaged in *peaceful* acts of civil disobedience (and the repeated application of pepper spray, the application by Q-tip and full spray blasts within inches of the face, and the refusal to wash out eyes with water) is *not* objectively reasonable under the Fourth Amendment.

VI. DEFENDANTS CHANGED THEIR POLICIES, THUS CONTRIBUTING TO PLAINTIFFS' "OVERALL SUCCESS"

Defendants argue that Eureka Police Department's *Section 308: Control Devices and*

[12]Additionally, P.O.S.T. changed *Guideline 10: Use of Nonlethal Chemical Agents* in the span of one month (November to December 1998) due to public outcry against the use of pepper spray against peaceful protestors: the "chemical agency policy consideration" in civil disobedience situations changed from "delivery methods to be utilized: direct application" to simply "application." [Id. at ¶¶10-12 & Exh. H-J.] Later in March 2003, P.O.S.T. further updated the legislatively-mandated Crowd Management and Civil Disobedience Guidelines. [Id. at ¶6 & Exh. E, ¶13 & Exh. K.]

Techniques was not created or changed in response to this case. [Def. Opp. Brief at 12:26-13:19.] Defendants state that "plaintiffs present no evidence that this section was added in January 2005." [Id. at 13:4.] Plaintiffs can only go by the date that is printed on the document itself. [Cope Decl. (filed June 30, 2005) ¶16 & Exhs. N, O.] And Defendants conveniently fail to state precisely when this section was adopted by the Eureka Police Department.

Defendants also argue, "Neither the lawsuit nor the jury verdict had anything to do with band saws." [Def. Opp. Brief at 13:5.] This only supports Plaintiffs' position. Throughout the trial, Defendants claimed that they used pepper spray because it was a safer alternative to the Makita grinder, which Defendants claimed would spark and break when used to cut through the lock down devices. Since this lawsuit was filed, the Eureka Police Department has found and advocates a safer alternative to pepper spray: the band saw.

As for the application of oleoresin capsicum (pepper spray) liquid by gauze-pad drip (§§308.95-99) rather than a Q-tip or full spray blast to the face, this incremental change in Eureka Police Department policy is a slight improvement that occurred during the course of the litigation. However, Plaintiffs believe that this new method of application to peaceful protestors is unconstitutional in light of the recently-rendered jury verdict (and Ninth Circuit opinions), and that the Eureka Police Department's policy is, therefore, not in compliance with the law.

Finally, Defendants repeatedly state that their policies are "P.O.S.T. certified." [Def. Opp. Brief at 2:13, 3:15, 7:14, 23:7.] Defendants do not explain what this means. *Guideline 10: Use of Nonlethal Chemical Agents* in the Crowd Management and Civil Disobedience Guidelines, March 2003, states, "Use of nonlethal chemical agents during civil disobedience *may* be reasonable depending on the totality of the circumstances. Each agency should consider when, where, and how nonlethal chemical agents may be employed." [Cope Decl. (filed June 30, 2005) ¶13 & Exh. K (emphasis added).] Thus, P.O.S.T. does not authorize or encourage the use of pepper spray in every civil disobedience situation, nor does it authorize the use of pepper spray against those involved in wholly nonviolent acts of civil disobedience. Additionally, as far as Plaintiffs can tell, P.O.S.T. provides general policy guidance to its member law enforcement agencies. The "Preface" to the March 2003 Guidelines states, "*The guidelines do not constitute a policy*, nor are they intended to establish a standard for any agency." [Id. (emphasis in original).] Furthermore, as Plaintiffs

discussed in the opening brief at footnote 16, "P.O.S.T. certified" use of force does not necessarily equal "constitutionally reasonable" use of force (though Plaintiffs hope that P.O.S.T. would only make constitutional recommendations).

VII. THIS CASE CREATED A DETERRENT EFFECT THROUGHOUT THE LAW ENFORCEMENT COMMUNITY, THUS CONTRIBUTING TO PLAINTIFFS' "OVERALL SUCCESS"

It is significant when litigation produces a deterrent effect. Farrar, 506 U.S. at 122 (O'Connor, J., concurring); Morales, 96 F.3d at 364; O'Connor v. Huard, 117 F.3d 12, 18 (1st Cir. 1997); Richard, 6 F.Supp.2d at 576. There is no stronger deterrent than a jury (and Court of Appeals) finding that the use of pepper spray against peaceful protestors – who were nonviolent and posed no threat to the officers, themselves or others, and who were guilty of no more than simple trespass – violated the Fourth Amendment.

Defendants claim that punitive damages and injunctive relief are the *only* ways to deter unconstitutional conduct. [Def. Opp. Brief at 19:17-18.] Defendants do not explain why they think this is the case. Sheriff Philp stated after the verdict, "We're not going to do a practice that is just going to put us back in court." [Cope Decl. (filed June 30, 2005) ¶19 & Exh. T.] Furthermore, Defendants have not used pepper spray against peaceful or locked-down protestors – inside or outside an office building – since October 1998, around the time of the first trial. [Lundberg Decl. (filed June 30, 2005) ¶2.] [Suppl. Cope Decl. ¶¶4-6 & Exhs. C-E.]

Additionally, articles in national publications and the declarations submitted with this motion show that this case has reverberated throughout the greater law enforcement community, and suggest that the use of pepper spray against nonviolent demonstrators is much less likely in the future. [Cope Decl. (filed June 30, 2005) ¶¶20-21 & Exhs. U, V.] [Declarations of Peter A. Reedy, Larry P. Danaher (filed June 30, 2005).]

VIII. THIS CASE INSPIRED POLITICAL MESSAGES AND EDUCATED THE PUBLIC, THUS CONTRIBUTING TO PLAINTIFFS' "OVERALL SUCCESS"

"Sending a message" can count as a success. See Choate v. County of Orange, 86 Cal.App.4th 312, 326 (2001). This case generated powerful *legal* messages by way of the Ninth Circuit opinions and jury verdict. This case also resulted in significant *political* messages (i.e. resolutions, legislation, letters) from politicians at all levels of government: the San Francisco Board

of Supervisors and Arcata City Council, state Senator Mike Thompson and Attorney General Dan Lungren, and United States Senator Diane Feinstein. [Cope Decl. (filed June 30, 2005) ¶22 & Exh. W, ¶5 & Exh. D, ¶23 & Exh. X.] [Lundberg Decl. (filed June 30, 2005) ¶3.]

Politicians *and* average citizens learned about this case and understood its significance because of Plaintiffs' efforts: filing a constitutionally-based lawsuit in federal court, and making the videotapes public as part of their civil litigation strategy. Contrary to Defendants' assertions, such messages from leaders and community members – who clearly support Plaintiffs' position – undoubtedly create a powerful deterrent effect. [See Def. Opp. Brief at 24:13.] Defendants – as publicly-funded entities and officials – would be foolish to continue with a practice that politicians and the public strongly disapprove of. Furthermore, the significance of a more educated and more aware public cannot be understated. Society as a whole is benefited when individuals better understand their constitutional rights and how their taxes are spent.

CONCLUSION

Apparently, Defendants cannot accept the fact that they lost. Not once, not twice, but *three* times: twice in the Ninth Circuit and once at trial. The jury verdict underscored what the Court of Appeals found: use of pepper spray against Plaintiffs – who were nonviolent and posed no threat to the officers, themselves or others, and who were guilty of no more than simple trespass – constituted excessive police force in violation of the Fourth Amendment. This finding not only vindicated Plaintiffs' rights, but those of all future peaceful protestors. Yet Defendants audaciously claim that "the verdict stands as a vindication of the position of the defense." [Def. Opp. Brief at 4:8-9.] Defendants also try to misdirect the Court with the irrelevant argument that the nominal damages award means that Plaintiffs were not injured.

Despite Defendants' efforts to argue the contrary, Plaintiffs are entitled to attorney's fees. Although the jury awarded nominal damages, the "overall success" of this case is overwhelming. Not only did this case result in significant legal rulings on the merits and procedural issues related to qualified immunity and directed verdicts, it also spawned state-level legislative and administrative action, changes in police policies and practices, proclamations in support of Plaintiffs from politicians at all levels of government, and public education and awareness of police use of force and constitutional rights.

Plaintiffs are therefore entitled to be justly compensated with reasonable attorney's fees under §1988 for the successes they achieved. This is consistent with Congress' intent to provide an incentive to plaintiffs and their attorneys to litigate important civil rights cases.[13]

DATED: July 20, 2005 BY: _____

Sophia S. Cope
FIRST AMENDMENT PROJECT
Fee Counsel for Plaintiffs

[13]Defendants attempt to give the Court cause for concern by speculating about the amount of attorney's fees Plaintiffs will request and stating that such fees would be "at taxpayer expense." [Def. Opp. Brief at 1:23-24, 25:8.] However, as this Court is well aware, the *amount* of attorney's fees is wholly *irrelevant* to the subject of this motion: *entitlement*. Nevertheless, Plaintiffs want to make clear that an attorney's fees award will *not* be at taxpayer expense because Defendants have liability insurance for *millions* of dollars. The County of Humboldt has "Excess Liability" coverage through the California State Association of Counties Excess Insurance Authority. It has a Self-Insured Retention (SIR) of $150,000 (which does come out of the county's budget but has undoubtedly been spent to cover attorney's fees and costs already incurred). The "EIA Pool Exposure" is $5 million. And, contrary to Defendants' counsel's claim [Suppl. Cope Decl. ¶¶11-12 & Exhs. J, K], private insurance is provided by AIG to cover "excess limits above the Pool" up to $15 million. [Suppl. Cope Decl. ¶¶7-10 & Exhs. F-I.] Plaintiffs understand that the City of Eureka participates in the Redwood Empire Municipal Insurance Fund.