J. Tony Serra #32639
506 Broadway
San Francisco, CA 94133
415-986-5591 / FAX 421-1331

Dennis Cunningham #112910
Robert Bloom
Ben T. Rosenfeld
3163 Mission Street
San Francisco, CA 94110
415-285-8091 / FAX 285-8092

William M. Simpich #106672
1736 Franklin Street
Oakland, CA 94612
510-444-0226 / FAX 444-1704

Brendan Cummings #193952
BOX 493
54870 Pine Crest Ave.
Idyllwild, CA 92549
909-659-6053 / FAX 659-2484

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HEADWATERS FOREST DEFENSE, et al. No. C-97-3989-VRW

Plaintiffs, **PLAINTIFFS' TRIAL BRIEF**

vs.

COUNTY OF HUMBOLDT, et al.,)
) Trial Date: May 12, 2003
Defendants.) Judge WALKER
)

Factual Background.

This case arises from the actions of police officers at the direction of the two individual defendants and pursuant to the official policy of Humboldt County and the City of Eureka, in using repeated, violently painful, wholly unorthodox and unprecedented swabbed-on applications of pepper spray base ointment, and spray itself at close range, to the eyes and faces of several young, non-violent protesters—who never resisted, and remained in the complete and unchallenged physical control of the police at all times—in prolonged and agonizing attempts to break their will to continue with sit-ins, in which they had fastened themselves together in human chains by means of metal lockboxes covering their forearms, and refused to release themselves when ordered to do so by the police. The sit-ins were part of an intense campaign by the Earth First! movement and various allied groupings in Humboldt County, in the Fall of 1997, protesting clear-cutting and other destructive corporate logging practices on the California north coast, the continued heedless "harvesting" of one- to two thousand-year-old redwood trees in the region, and a then-pending sell-out deal in the U.S. Congress for the supposed preservation of the Headwaters Forest, which actually promised a lingering doom for that last great forest stand of ancient redwoods still in private hands.

The protesters fashioned their lockboxes from large metal pipes, with metal rods fixed inside, to which they could fasten spring latches, or 'carabiners', fixed to short chains which they first bolted around their wrists. Since their hands were secure inside the pipes, officers — on those occasions when they could not persuade the protesters to release voluntarily — had to cut open the pipes to reach the latches and release them; the delay thus occasioned worked symbolically to delay 'liquidation logging' operations or related activities for the short span of time needed to cut the people loose and take them to jail. The lockboxes, sometimes called "black bears", had been used in this fashion in the region for several years, and police had developed a familiar methodology for opening them, with hard-edged, steel-cutting electric wheels, called 'grinders', and they could normally disengage the protesters from the boxes in just a few minutes.

The grinders were routinely used to end literally dozens of sit-ins, in offices, roads and forest locations, without mishap. By the Summer of 1997, however, there had been a series of increasingly effective and visible demonstrations aimed at saving Headwaters from the sellout and the axe, and a corresponding sharp rise in public attention to the issue. These protests began with a rally of eight or ten thousand people, at Pacific Lumber Company headquarters in Scotia, California, in September, 1996. There, to the embarrassment of these defendants, more than a thousand people stepped across the property line to be arrested, and kept coming, until there were too many for the Sheriff's Department and allied agencies to accommodate. Thereafter, the protest activities continued through the year, leading to another huge turnout at Stafford, on Sept. 14, 1997, and included a number of actions where black bears had been used to good effect.

In response, defendants Philp and Lewis developed the idea of smearing pepper spray ointment around the eyes of protesters who would refuse police orders to release themselves from the black bears, and then refusing to wash the substance away, as a means of forcing them to unlock, to seek relief from the pain. To the knowledge of both parties, this had never been done before; but, with the controversy over the Headwaters sell-out at a high pitch, the defendants ordered it done on three occasions in quick succession after the Stafford rally: in the outer lobby of the PL headquarters in Scotia, on Sept. 25, 1997; at a logging site at Bear Creek, way out in the woods, on Oct. 6, 1997; and in the reception area of the local office of then-Congressman Frank Riggs, in Eureka, on October 16, 1997. Each time, as shown on videotape, officers acting on defendants' orders held back the heads of protesters sitting on the floor or the ground, and, sometimes forcing open the eyes with their fingers, used Q-tips to smear the liquid ointment along the crack of the eyes and on the skin of the eyelids and eye sockets, whence it sometimes also ran down the face and into the nose and mouth.

Despite the intense pain, the protesters remained steadfast the first two times, even when the smearing of ointment was followed up with full spray blasts directly in their faces from close range. At the Riggs office, two teenage women relented at the point of being swabbed; two who

did not were swabbed, and the officers then sprayed one of them, plaintiff Terri Slanetz, directly in the face, whereupon her partner unlocked, freeing Ms. Slanetz also, and the two were duly taken away to jail.

Procedural History.

Plaintiffs brought suit. Injunctive relief was denied. The Court granted summary judgment to the underling officers who carried out the swabbing, finding they were entitled to qualified immunity. At trial, a further award of immunity was made to the supervisors, Lewis and Philp, at the close of plaintiffs' case. The jury hung on the liability of Humboldt County and the City of Eureka by way of official policy, and the Court ordered a new trial. Thereafter, however, the Court vacated the trial date and dismissed the claims against the two entities, reversing itself to hold that no reasonable jury could find that the swabbing etc. shown at trial violated the Fourth Amendment.

In throwing the case out, this Court said it had concluded — despite its several prior rulings just to the contrary — "that plaintiffs' claims are legally untenable". The Court held that, "The uncontroverted evidence presented at trial unequivocally supports the conclusion that the officers acted reasonably in using OC (pepper spray) as a pain compliance technique in arresting plaintiffs," 1998 WL 754575, *1, *4, and made the following findings:

+ The severity of the intrusion on the arrestees' personal integrity was "minimal".

+ The officers had "a strong and legitimate interest in quickly removing" the trespassing plaintiffs, because their companions rallying outside the sit-in premises were engaged in "organized, premeditated lawlessness".

+ Plaintiffs "failed to present any evidence that the officers had a viable alternative means for effecting arrest."

+ The use of grinders to release protesters from lockboxes exposed plaintiffs to a "significant" threat of serious injury.

+ The use of pepper spray by swabbing on the eyes and face or by full spray blasts to the

face at close range was a legitimate 'pain compliance' technique.

These factual determinations not only involved wholesale improper weighing of the evidence, as the Court of Appeals found, but all of them were false. The smeared and close-sprayed pepper spray caused searing, excruciating pain — which testifying officers were carefully schooled always to refer to as "discomfort" — which was further enhanced by the officers' refusal to rinse the protesters' faces. The people on the outside were committing no crime, there was no evidence they caused any problem for the police, and the officers all testified that they had no effect on the decision — which had been made well before the day of the event in any case — to use pepper spray.

Likewise, there was ample evidence about means previously used to free the protesters from the lockboxes, primarily the so-called "Makita grinder", a power saw with a metal-cutting blade which had been used "hundreds" of times to cut open the boxes, without anyone being hurt even a little bit (and no fires were started, either). Finally, as the higher court said, the 'immediate and searing pain' created by the swabbing and spraying "could not be moderated by the officers at their discretion or terminated by them the moment the protesters complied with their demands," and this "uncontrollable" nature of the pain distinguished the pepper spray expedient from a pain compliance technique. *Headwaters I*, 240 F.3d at p.___.

Finding that this Court had failed its obligation to assess the evidence in the light most favorable to plaintiffs, and incorrectly applied the Supreme Court test for excessive force established in *Graham v. Conner*, the Court of Appeals reversed the dismissal of the municipal entities as a matter of law and the grant of qualified immunity to defendants Lewis and Philp. *Headwaters I*, 240 F.3d 1185 (9th Cir. 2001). On certiorari, the U.S. Supreme Court vacated this decision, with instructions to reconsider it in the light of *Saucier v. Katz* 533 U.S. 194 (2001). On remand, the Ninth Circuit reaffirmed its decision and re-ordered the new trial, which is now before us. In its new decision, viewing the evidence in the light most favorable to plaintiffs, of

course, the Court made the following statements, *seriatim*:

+ [I]t would be clear to a reasonable officer that using pepper spray against the protesters was excessive under the circumstances.

+ The facts reflect that... the pepper spray was unnecessary to subdue, remove, or arrest the protesters (citing *Graham v. Conner*).

+ Characterizing the protesters' activities as "active resistance" is contrary to the facts of the case.

+ Defendants' repeated use of pepper spray was also clearly unreasonable.

+ [A] continued use of the weapon or a refusal without cause to alleviate its harmful effects constitutes excessive force.

+ Because the officers had control over the protesters it would have been clear to any reasonable officer that it was unnecessary to use pepper spray to bring them under control, and even less necessary to repeatedly use pepper spray against the protesters when they refused to release from the "black bears."

+ It also would have been clear to any reasonable officer that the manner in which the officers used the pepper spray was unreasonable. (Defendants) Lewis and Philp authorized full spray blasts..., not just Q-tip applications," despite the fact that the manufacturer's label on the canisters... "'expressly discouraged' spraying... from distances of less than three feet."

+ [I]t would have been clear to any reasonable officer that defendants' refusal to wash out the protesters' eyes with water constituted excessive force under the circumstances. * * * * Spraying the protesters with pepper spray and then allowing them to suffer without providing them with water is clearly excessive under the circumstances.

** ** ** **

More recently, plaintiffs moved for summary judgment on grounds that, given these

pronouncements by the higher court, the evidence taken in the light most favorable to *defendants* still left no doubt that the force defendants caused to be used against plaintiffs was unnecessary, and therefore excessive. The Court denied the motion, observing that the questions it had foreclosed in its own Order were certified by the Court of Appeals as disputed, but it has said and done nothing more to remove the clear indication of overwhelming bias against plaintiffs, and categorical pre-judgment of all outstanding factual and legal disputes, created by its 1998 Orders. On the contrary: after seeing the first trial aborted by a hung jury picked in neutral territory, the Court has ordered the new trial moved directly into the 'Timber Wars' battleground at Eureka, where the community has been heatedly divided around the underlying forest protection/forest destruction and police/protester issues for many years. Since it is impossible to interpret this action as other than a reflection of the Court's determination to see the plaintiffs' attempt to redress defendants' gratuitous and vindictive actions against them defeated, in keeping with the bias on display in its Order squashing the case, plaintiffs have submitted a motion to recuse the Judge — and another for return of the trial to the original neutral forum.

PLAINTIFFS' CLAIMS

1. The evidence shows the use of force by County and City officers on the occasions in question was unnecessary — not to mention punitive, cruel *and* ineffective — and it was therefore excessive, and unconstitutional, as a matter of law.

> "[W]here there is no need for force, any force used is constitutionally unreasonable."
>
> — *Headwaters I*

"The Fourth Amendment permits law enforcement officers to use only such force to effect and arrest as is 'objectively reasonable' under the circumstances. *Graham v. Conner*, 490 U.S. 386, 397, 109 S.Ct 1865, (1989)(citations omitted). 'The essence of the Graham reasonableness analysis' is that '"the force which was applied must be balanced against the need for that force: it is the need for force which is at the heart of the Graham factors."' *Liston v. County of Riverside*, 1220 F.3d 965, 976 (th Cir. 1997) (quoting *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994). *Headwaters Forest defense v. County fo*

Humboldt, et al. ("Headwaters II"), 276 F.3d 1125, 1130-31 (9th Cir. 2002).

The need for force is at the heart of the matter, as everyone knows, and, as the Court re-affirmed in the earlier opinion, quoted above, where there is no need, no force is allowed; by the same token, where there is a *slight* need — as for the grinder — only slight force is allowed. See *Headwaters Forest Defense v. County of Humboldt et al., ("Headwaters I")*, 240 F.3d 1175, 12?? (9th Cir. 2001). See also, *Chew v. Gates*, 27 F.3d 1432, 1440-44, (9th Cir. 1994); *Fontana v. Haskins*, 262 F.3d 871, 880 (9th Cir. 2001); *P.B. v. Koch*, 96 F.3d 1298, 1304 (9th Cir. 1996), cited in *Headwaters I*.

Here there was no need for more force than that represented by the grinder. The defendants' minions had complete physical control of the plaintiffs, and the knowledge, means and ability to reduce them to custody handily and take them off to jail, throughout the time of each arrest operation; all plaintiffs were fully submissive to that control throughout as well. Neither did the plaintiffs defy, denounce or disrespect the officers who tormented them, despite the malicious and oppressive nature — and inherent sadism — of the police activity. The defendants' Department had vast experience with lockdown sit-ins before these events, and had removed demonstrators from black bears quite readily, using grinders, on "hundreds" of occasions. As shown in the video evidence, the grinder technique was simple, quick and completely effective, causing no pain and no appreciable risk of harm — defendants gravely-intoned, broken-record litany of supposed fears of possible injury notwithstanding.

Defendants knew the swabbing of spray ointment in and around the plaintiffs' eyes would cause great pain, and that the pain could not be readily ended — as it can be when so-called compliance holds are used. Cf. *Forrester v. City of San Diego*, 25 F.3d 809 (9th Cir. 1994). They knew they would encounter no 'active' resistance from the plaintiffs — no fighting back or threats, no attempt to flee, etc. — and they knew they could easily and harmlessly extricate protesters from lockboxes, using the grinder, in a relative trice.

As the Court of Appeals made clear in both opinions herein, defendants knew or should

have known there was no reasonable basis for the decision to use the pepper rather than the grinder, and that the pain and injury they would inflict would be unnecessary, excessive, and unconstitutional; but they went ahead, not once but several times, using repeated swabbings and full spray blasts to the face from inches away, withholding the rinsing that would have begun to relieve the pain, and relentlessly, remorselessly, demanding that their victims submit. That's the very essence of torture; which can never be justified under Our Constitution. Can it?

II. The plaintiffs' 'passive resistance' — despite all semantic manipulations — did not provide lawful justification for the use of force and infliction of great pain on these unresisting subjects, because such force was not necessary to 'subdue, remove and arrest' the plaintiffs when they refused police orders to release themselves from the lockboxes.

The plaintiffs' 'passive resistance' in refusing to obey the police order to release from the boxes and submit to custody— made in the teeth of defendants' clear understanding that such refusal was the whole reason plaintiffs were there in the first place, as part of the long history of just such encounters between the two sides — can not, as a matter of law, serve as justification for deliberately inflicting terrible pain on plaintiffs to no good end. The usual measures needed to "subdue, remove and arrest" the members of the sit-in were fully available, as always — and as shown in the outcome two of three times and at later times: You cut them loose with the grinder, take them to jail, and punish them only by due process of law. Defendants acted to accomplish the punishment on the spot.

The decision to use pepper spray rather than the grinder was a gross escalation by the Sheriff, essayed in the midst of an intense, aggravated phase in a long-running struggle between Earth First! and the forest protection movement it was leading, on the one side, and an unholy alliance of the Sheriff with the timber company, on the other. The decision to use a measure designed to succeed by breaking the activists' will to continue their "resistance", via intense torment, rather than simply ending it in the normal way, was clearly intended to punish and retaliate against them, and thereby generally intimidate and deter the movement from using the lockbox tactic in the future. That is not a legitimate law enforcement purpose, but, rather, it is

illicit coercion, intimidation, summary punishment and prior restraint, all rolled into one. Law Enforcement is not entitled to presume future disobedient conduct any more than they can summarily punish it in the present. See, e.g., *Collins v. Jordan*, 110 F.3d 1363, 1371-72 (9th Cir. 1997) ("The generally accepted way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs, rather than to prevent the First Amendment activity from occurring in order to obviate the possible unlawful conduct.")

Defendants have attempted to rationalize their torment of plaintiffs by recasting their training nomenclature, and apparently persuading the POST Commission to do the same, after the fact, apparently with the notion that they can justify, and legalize, the pepper spray torture with semantics, by classifying plaintiffs' conduct after the fact as "active" resistance — and eliminating the concept of passive resistance altogether by calling it an "oxymoron". But this did not change the requirement that 'the force used must be balanced with the need for that force', under *Graham*, and a major *Graham* factor is whether the subject on whom force is used is actively resisting. Clearly, there are no semantic manipulations which will change the fact that the grinders worked fine, and the swabbing and close spraying of the noxious pepper substance in plaintiffs eyes and faces was altogether unnecessary.

This Court said in its 1998 Order there was "no evidence" of a viable alternative for removing plaintiffs from the boxes so they could be arrested; as noted, this not only mis-states the facts, it embraces the defendants' entire fabricated rationale for the torture approach, and endorses the bogus, fear-mongering testimony supposedly supporting it. Simply because the cops conjure up the specter of a possible accident, and mouth it as a rationale for using force which was actually intended as punishment and intimidation, does not change the true nature of what was done, or the law which makes it wrong. That is clear as daylight.

III. Defendants have confirmed their responsibility for the unconstitutional actions of the officers, by dint of the admitted role of defendants Lewis and Philp as commanders and supervisors, and the official policy of Humboldt County and the City of Eureka sanctioning this wrongful use of force.

The police actions against plaintiffs were taken under color of law, at the explicit direction and with the review and approval of defendants Lewis and Philp, as the top supervisors and commanders of the officers who actually applied the wrongful force, and as policy-makers for the County, so they have caused and helped cause violation of the Fourth Amendment in each case. A supervisor is liable under § 1983 if s/he "does an affirmative act, participates in another's affirmative acts, or omits to perform an act which [s/]he is legally required to do," causing constitutional injury. *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978). A supervisor is liable for "his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation...; or for conduct that showed a reckless or callous indifference to the rights of others.' " *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir.1997). A supervisor can be liable in his individual capacity if "he set in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known would cause others to inflict the constitutional injury." *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991).

The two command defendants have admitted and affirmed their responsibility, as we saw in the recent summary judgment exhibits. By the same token, there is no dispute as to the adoption by Humboldt County and the City of Eureka, through the Sheriff's Department and the Eureka P.D., of a policy of using swabbed pepper spray, etc. — in the described fashion, which is or isn't excessive force — to break lockbox sit-ins. Defendants have stipulated that the

officers' actions in each case were taken pursuant to the Use of Force policies of the County and City, respectively.

Plaintiffs assume the individual defendants do not and will not contest their responsibility as supervisors, nor the entity defendants theirs, as sources of the effective policy, for any liability found to flow from the coercive swabbing program. They obviously stand behind it, reject the contrary pronouncement by the Court of Appeals, and seek vindication — and future license, no mistaking it — by way of a Jury verdict; so defendants win on the single issue of excessive force *vel non*, or go down with the ship...

IV. The evidence will support a finding of malice and oppression in the active involvement of defendants Philp and Lewis in violating plaintiffs' rights, sufficient to support awards of punitive damages against both.

Under the rules of law discussed above, the defendants' policy decision to abandon the grinders in favor of the torturous use of pepper spray, was a decision to knowingly employ excessive force against the plaintiffs, in circumstances where there was a completely efficacious, completely harmless alternative readily available; that is to say the decision was completely unjustified, and had no legitimate law enforcement purpose behind it — notwithstanding this Court's prior contrary determinations of law and fact. The Easy Way had been used dozens of times before, perhaps a hundred or more times, without any problem. The pretense of fear and danger of injury — where none had occurred in years of using the grinders — must be understood as standard-issue police buncombe, of the type that invariably issues Vesuvially in the wake of vindictive police (mis-)conduct.

Similarly, while defendants purported to introduce the swabbing, etc. as a method of so-called "pain compliance", all involved knew or should have known it did not qualify as such a method. Pain compliance crucially requires an immediate ability to increase and decrease the pain being administered, in response to the actions of the subject whose compliance is sought.

Repeated pepper swabbing, instead, is about breaking the will with sustained physical torment, and sowing fear; something quite different, and inherently oppressive.

When done without excuse, as it was here, where a quick, efficient and pain-free alternative was ready at hand — and particularly where it was done in harmony with the punitive and retaliatory interests of a corporate private party, with whom the Sheriff was institutionally and personally intricately aligned for years, in order to punish and retaliate against plaintiffs' earnest civil disobedience, and intimidate them and others from using lockboxes in future protests — it was unconscionable and plainly malicious.

The oppressiveness of the swabbing measures themselves, and the malice reflected in the defendants' illicit motives for using them, form a strong basis for awarding punitive damages against the individual defendants, Lewis and Philp, in this case.

Respectfully submitted,

DATED: April 14, 2003

Dennis Cunningham
Attorney for plaintiffs

CERTIFICATE

I certify that I served the within **Trial Brief** on defendants by FAX and mailing a copy to Nancy Delaney etal, at the office of the Mitchell law firm in Eureka, CA April 14, 2003.

Dennis Cunningham