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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs, **PLAINTIFFS' POST-TRIAL MOTIONS**

vs.

COUNTY OF HUMBOLDT, et al.,)
) Date: November 11, 2004
Defendants.) Time: 9:30 a.m. **??**
) Judge ILLSTON

Now come the plaintiffs after trial, and mistrial, and move for Judgments against the four defendants, and other relief, as follows:

SUMMARY JUDGMENT

Plaintiffs aver there are no material facts left in dispute, and the law as previously articulated and indicated by the Court of Appeals entitles them to judgment per R.56, F.R.Civ P. as to defendants' liability for the use of excessive force against plaintiffs and each of them.

Defendants' Responsibility

The defense since Day One has affirmed that the swabbing and close spray tactics used against plaintiffs were used pursuant to official policy of the County and City. Similarly, both individual defendants embraced their personal responsibility as commanders and supervisors — within the rules articulated in caselaw, as stated in Jury Instruction No.19 — without qualification. Prescinding from the issue of punitive damages, it cannot be gainsaid that, if the force used was excessive, all four defendants are liable for it, by their own affirmative admissions. Testimony of Philp, 9/16-20/04; testimony of Lewis (9/20/04); Instruction No.17.

The Need for the Use of Force

Also established beyond dispute is the fact that no lockboxes ever defeated the intention of defendants and their various henchmen on various occasions to arrest protesters, and that — again by their own unqualified admissions — officers had managed to physically defeat the lockboxes on as many as 300 occasions, without mishap, before the events in question occurred. Likewise, uncontradicted evidence showed that the practice, and the success rate, have continued apace in the seven years since.[1] This record of unqualified success reduced the professed concern of defendants' employees about a possible "catastrophic injury" from the grinder to the purely and completely speculative. Defendants' minions' copious and earnest professions of fear of accident, where they managed to avoid accidents 100% of the time, is no substitute for evidence showing there was any untoward risk of accident.[2]

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[1] The one essentially insignificant exception to the record of success with the grinder, according to the grinder guru, Dostaal — in addition to his well-rehearsed story of a recent close call— was with the cut finger sustained by an oddball, non-cooperating protester who supposedly had a "secondary" device supposedly attached to his finger, inside the pipe; these incidents both occurred long after the events at issue, as Dostaal testified. Testimony of Dep. Dostaal, 9/20/04.

[2] The evidence of the grinder itself was 100% contrary to defendants' fear-mongering. The configuration of the motor housing next to the wheel prevents any penetration beyond about a quarter of an inch past the surface being cut; the woven plastic composition of the wheel itself, together with testing at far higher speeds than are reached in regular use, precludes any sudden, unpredictable shattering of the wheel, etc.

Indeed, the purported "nightmare" of the Special Service deputies, given the proven physical features of the grinder and its wheel, and of the "black bears" (right-angle boxes), was exposed in the evidence as utterly fanciful, and of a far-fetched piece with the purported fear of fire, or mob action by the other demonstrators outside; i.e., pure police *buncombe*.[3] These dire conjurations, in the face of the record of 2-300 uneventful grindouts, cannot rationally be counted as evidence of any real risk at all, let alone a danger so grave as to justify recourse to the torture alternative. That these phony dangers formed a rational basis for recourse to police torture is a base and preposterous pretense on the part of the defense, regardless of how many fear-benighted "security moms" can be persuaded to embrace it.

"Torture"

We continue to experience misgivings around use of the term "torture" for what was done to the plaintiffs here, not because it isn't essentially true, but because the brutality and wantonness of it are somewhat circumscribed in comparison to the horrors most people probably think of as torture — now dreadfully including the unspeakable images shoved down our guilty collective American throats by our own rogue government, in the depravities gathered under the newly infamous name Abu Ghraib. But, torture remains defined in, e.g., the Oxford American Dictionary (Oxford Press, 1980), as "the infliction of severe pain as a punishment or means of coercion", and plaintiffs feel themselves compelled to stay focused on the reality that defendants definitely 'crossed the line' — from pain compliance to pain coercion, as it were, specifically directed at non-violent protesters — because the introduction of 'pain-based coercion' in any

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[3] A kindred falsehood is the claim that pepper spray is "harmless", as asserted by the company rep, DuBay and other defense witnesses. Plaintiffs testified cogently and without contradiction that very substantial injuries came to them from the police assaults at issue herein, the emotional and psychological harm — and in some cases, malign physical effects — from which continue to be felt by a majority of them to this day. Our psychiatrist juror, Dr. Feigenbaum, observed that several plaintiffs appeared to exhibit and/or describe symptoms of post-traumatic stress disorder in their testimony, and plaintiffs are seeking leave of the Court to introduce expert testimony on this aspect of their injuries in any subsequent trial. See below.

degree to the police "toolbox" is to be resisted in all possible ways — especially when applied to protesters.[4]

Moreover, anything that was lacking in the severity of the pain inflicted here was much made up for in the very torturous way the deeds were done: the rough grabbing of heads, yanking of hair, twisting of necks, spreading of eyelids, yelling, cajoling, threatening, spraying water when the spray made the pain worse; those are the modes of torturers. Similarly, the peremptory, assaultive onsets, especially at Bear Creek and Riggs, are obviously a hallmark of a police intention to strike the deepest fear, break the strongest will; that's what torture is about, at any level, and why it leaves scars — as were shown here — long after the physical pain subsides. The intentions and ends that torture facilitates are the essence of police state, and every impulse towards rationalizing 'pain coercion' — any crossing of the line — must be fought to the last ditch by anyone who hopes to preserve any modicum of democratic self-rule, in any country.

The *Graham v. Connor* Prohibition

Nomenclature aside, the main point here is that the Court, now, from its own consideration of the germane evidence it just heard, has a ready basis on which to confirm that the facts are as they were so emphatically if provisionally characterized by the Court of Appeals. To recall it, the Court held as follows:

> The Fourth Amendment permits law enforcement officers to use only such force to effect an arrest as is "objectively reasonable" under the circumstances. Graham v. Connor, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (citations omitted). "[T]he essence of the Graham objective reasonableness analysis" is that " '[*t]he 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, 120 F.3d 965, 976 (9th Cir.1997) (quoting Alexander v. City and County of San Francisco, 29 F.3d 1355, 1367 (9th

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[4] In the Geneva Conventions, the "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", enacted 6/26/87 and ratified by the United States on 10/21/94, torture is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as...punishing him (sic)...or intimidating or coercing him or a third person,...when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official..." The Convention can be found at www.unhchr.ch/html/menu3/b/h_cat39.htm.

Cir.1994)) (emphasis in original). The facts reflect that:

(1) *the pepper spray was unnecessary to subdue, remove, or arrest the protestors*; (2) the officers could safely and quickly remove the protestors, while in "black bears," from protest sites; and (3) the *officers could remove the "black bears" with electric grinders in a matter of minutes and without causing pain or injury to the protestors.*

Defendants asserted at trial that the protestors' use of "black bears" constituted " 'active' resistance to arrest,' " meriting the use of force. The Eureka Police Department defines "active resistance" as occurring when the "subject is attempting to interfere with the officer's actions by inflicting pain or physical injury to the officer without the use of a weapon or object." 240 F.3d at 1202-3. Characterizing the protestors' activities as "active resistance" is contrary to the facts of the case, viewing them, as we must, in the light most favorable to the protestors: *the protestors were sitting peacefully, were easily moved by the police, and did not threaten or harm the officers. In sum, it would be clear to a reasonable officer that it was excessive to use pepper spray against the nonviolent protestors under these circumstances.*[5]

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[5] *Headwaters II*, 276 F.3d 1125, 1129-30 (9th Cir. 2001) (Emphasis added) The Court went on to say that:

Defendants' repeated use of pepper spray was also clearly unreasonable. As we recently concluded, the use of pepper spray "may be reasonable as a general policy to bring an arrestee under control, *but in a situation in which an arrestee surrenders and is rendered helpless, any reasonable officer would know that a continued use of the weapon or a refusal without cause to alleviate its harmful effects constitutes excessive force*." LaLonde v. County of Riverside, 204 F.3d 947, 961 (9th Cir.2000) (emphasis supplied). *Because the officers had control over the protestors 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 protestors 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. Lewis and Philp "authorized full spray blasts of [pepper spray], not just Q-tip applications," despite the fact that the manufacturer's label on the canisters of pepper spray defendants used " 'expressly discouraged' spraying [pepper spray] from distances of less than three feet." 240 F.3d at 1195, 1208.

Finally, it would have been clear to any reasonable officer that defendants' refusal to wash out the protestors' eyes with water constituted excessive force under the circumstances. As we noted in LaLonde--when determining that the law had been *1131 clearly established by a date that is prior to the time the pepper spray was used on the protestors--*"any reasonable officer would know that ... a refusal without cause to alleviate [pepper spray's] harmful effects constitutes excessive force." LaLonde, 204 F.3d at 961. In two of the protests, officers threatened that they would not provide the protestors with water to wash out their eyes until they released themselves from the "black bears*," and in one of the protests, the officers did not provide the protestors with

The essential facts needed to form a basis for Judgment as a Matter of Law under the rule have been stipulated, admitted or conceded by defendants. Indeed, taken in the Light Most Favorable to defendants, the facts are the same as when taken in plaintiffs' Best Light, as the Court of Appeals was clearly aware: they are not disputed or disputable, on this record. Thus, it can be taken as established, within the meaning of Rule 56, that:

+ plaintiffs were under the complete and unchallenged control of the police on all three of the occasions in question, and posed no threat and offered no resistance to the arresting officers at any time;

+ defendants at the time had a perfect record of success with alternative means of effecting the arrest of "locked down" protesters: not just grinding, but negotiation, waiting out, and carrying out, with no force required, were all shown to be effective at different times, and grinding was always effective as a last resort; and,

+ *therefore*, no force was needed 'to subdue, remove or arrest' plaintiffs in these incidents, in the Court's wordz;

If no force was needed, no force was reasonable, to paraphrase the Court again.[6] *Ergo,* the force that was used was unreasonable, as a matter of law, and plaintiffs are entitled to judgment against the four defendants on the issue of liability for the use of excessive force.[6]

> water for over twenty minutes. *Spraying the protestors with pepper spray and then allowing them to suffer without providing them water is clearly excessive under the circumstances.* Id., 276 F.3d at 1130-1131 (Emphasis added).

[6] In *Headwaters I* the Court also said, "Because the protesters' conduct posed no danger to themselves or others, a reasonable fact finder (such as this Court, at this moment – Ed.) could conclude that using pepper spray to effect their arrests bore 'No reasonable relation to the need' for force," citing *P.B. v. Koch*, 96 F.3d 1298,1304 (9th Cir. 1996). The Court previously cited *Koch* for the unqualified proposition that, "[W]here there is no need for force, any force used is constitutionally unreasonable." (Cite omitted). 240 F.3d at 1199.

[6] It should be noted also that the Court said in *Headwaters I* that defendants' tactics did not qualify as proper pain compliance, because of "the uncontrollable nature of the pain caused by pepper spray," 240 F.3d at 1200; it noted that it had recently held that pepper spray could be classed as a dangerous weapon, "'capable of inflicting death or serious bodily injury'", in the context of a criminal case. Id., n.7. Crucially, the Court also flatly stated that, "The fact

INJUNCTION

By the same token as all of the above — which is no token, but a solid, categorical judicial pronouncement against the entirety of the position taken by the defense in this case — the plaintiffs submit to the Court that undisputed facts, or facts that, in a slightly different context, the Court can and should now find, based on the evidence it just heard, also supply an ample basis for an Injunction against the defendants. The same — on the authority of *Headwaters II, Liston, Alexander, LaLonde,* and *P.B v. Koch,* as well as *Graham* — would bar unequivocally the type of use of pepper spray shown in the evidence, on the grounds stated by the Court of Appeals: Where it is not needed to 'subdue, remove or arrest', and reasonable and proven alternative means of completing the arrests without force are ready at hand, such force cannot be used against non-violent persons who are under control and not physically resisting. Et cetera, et cetera.[7]

Accordingly, plaintiffs now wish to bring on the claim for Injunction raised in Count Two of their First Amended Complaint. Injunctive relief is warranted in light of the affirmation by Sheriff Philp in the trial that he still considers the daubing and close spray tactics reasonable and lawful, and available to his officers faced with lockdown situations. Thus it appears defendants may resume use of the daubing tactic at any time.

Therefore, plaintiffs (and others) are threatened with irreparable harm, for which there is no adequate remedy at law, unless defendants are enjoined.[8] But if it is felt that the

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that the *defendants were increasingly frustrated* by the protesters – who had developed techniques such as lock-down devices to prolong nonviolent protests – is *irrelevant* under *Graham (v. Connor).* 240 F.3d at 1203. (Emphasis added.)

[7] Again, "[W]here there is no need for force, any force used is constitutionally unreasonable. See, *P.B. v. Koch,* 96 F.3d 1298,1303-04 & n.4 9th Cir. 1996)." 240 F.3d at 119?. That is the baseline principle that should guide this Court at this point in the case.

[8] Plaintiffs realize there are procedural requirements that must be met in addressing the merits of a claim for preliminary and/or permanent relief, and we recall that Judge Walker denied a motion for preliminary injunction at the beginning of the case; however, the

circumstances do not sufficiently threaten immediate harm, plaintiffs are still entitled to declaratory relief, making clear that the practice is outlawed and not to be tolerated. See below.

DECLARATORY JUDGMENT

Further relief is also needed, in light of the unholy alliance defendants managed to make, and exploit to maximum advantage in the trial, with the P.O.S.T. Commission — whereby they were able to co-opt the evident authority P.O.S.T. grants in its Guidelines, or is said to grant, and appears to grant, for the illicit, torturous use of pepper spray to coerce non-violent protesters — in aid of their pretense of legitimizing the practice the Court of Appeals has so distinctively and emphatically condemned. Given defendants' crucial reliance on the *ex post facto* purported authorization of pepper spray torture by P.O.S.T., plaintiffs seek a further judgment at this time, pursuant to 28 U.S.Code 2201, declaring that, in particular, the language of Item #10 of the current P.O.S.T. "Crowd Management and Civil Disobedience Guidelines" cannot legitimately be construed to authorize or approve the (unjustified, unconstitutional) pepper spray use at issue in this case. We seek leave from the Court to implead the P.O.S.T. Commission herein at this time, as a matter of permissive joinder under Rule 20, F.R.Civ P., so that, at a minimum, the judgment reaches and binds P.O.S.T. as well as the defendants, and obviates both the purported approval of the tactic articulated in the Guidelines, and the fraudulent evidentiary use of the new Guideline by defendants in a new trial.

Additionally, whether or not defendants' evidence of the after-acquired P.O.S.T. imprimatur survives this challenge, but especially in case it does, or could, in any form, plaintiffs wish to introduce evidence, in any new trial, from experts in police practice — to confute the authoritative police contention that the pepper spray expedient against passive resistance is permissible — and from medical (and psychological) and 'weaponry' experts, to rebut the assertion that pepper spray is harmless

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circumstances now in force do not appear to bar the needed remedial action if the Court will consider it.

Joinder

Rule 20 provides that a party can be joined as a defendant in an action if plaintiff asserts a right to relief against it arising from "the same transaction or occurrence or series of transactions or occurrences", so long as there is a question of fact or law common to all defendants; a single common question will suffice. *Mesa Computer Utilities, Inc. v. Western Union Computer Utilities, Inc.* 67 FRD 634 (D.C.De. 1975). The main common question here is whether the police are allowed under the law to use this torture technique on nonviolent protesters, when other non-pain and injury-causing means are ready at hand; obviously this implicates both whether P.O.S.T. can be allowed to say or suggest in any way to its constituency that such use is permissible, and whether these defendants can again by sharp practice invoke the *ex post facto* changed P.O.S.T. Guideline in this Court, as proof the vile transgression is reasonable. This applies whether or not it can be shown there was collusion between defendants and P.O.S.T. personnel in changing the Guideline. Obviously if the collusion question is included, the common questions proliferate...

At a minimum, even if — especially if — they are not allowed to read the Court of Appeals decision to the Jury, plaintiffs are entitled to an action within the case which would negate the illicit false impression, created and sought to be created by defendants with the P.O.S.T. evidence, that there is legal and high police authority for the 'pain coercion' practice.

The question of whether P.O.S.T. is sufficiently connected to the "series" of occurrences and transactions in this case depends on whether there is 'some connection or logical relationship' between the events in question. *Hanley v. First Investors Corp.*, 151 FRD 76 (E.D. Texas 1993) Leaving the notion of collusion aside, defendants have deeply implicated POST and its changed Guidelines in the issues and evidence in this case, as part of the series of transactions and occurrences' by which defendants — and Sheriff Philp in particular — sought before and after the incidents in question to generate or fabricate legitimacy for this onerous practice.

Obviously the Court has *pro tanto* jurisdiction of this matter to the extent needed to assure proper disposition of the evidence, in contemplation of a new trial. Requiring a separate

action to be brought against P.O.S.T., and then resolved in the Court of Appeals would greatly burden the plaintiffs and offend judicial economy. Any possible complications for the defense must subserve the plaintiffs' entitlement and the Court's need. See, e.g., *State of Ohio ex rel. Fisher v. Louis Trauth Dairy, Inc.*, 856 F.Supp 1229 (S.D.Ohio 1994).

EXPERT EVIDENCE

Plaintiffs suffered serious evidentiary blows in the trial just concluded, which they will have a strong need to counter with expert evidence in a subsequent trial, notwithstanding previous rulings (by a judge removed for the appearance of bias) which limited them in this regard before now. As noted, particularly, to the extent we may remain needful of meeting any claim by defendants that the California POST Commission purports to authorize 'pain coercion' by pepper spray against non-resisting protesters engaged in civil disobedience, we will need to present countervailing authority to the effect that the practice is wrong, and shouldn't be permitted. Likewise, we will need substantial scientific-medical-psychological expertise to refute the heinous canard that pepper spray causes only "transitory discomfort" as opposed to serious and possibly permanent damage to 'non-pain-resistant' subjects.[9]

Likewise, where an issue emerged and developed or failed to develop with respect to the legitimacy of the plaintiffs' tactics, in resorting to the 'black bear' lockdowns in the attempt to slow down the clear-cutting and call attention to official collusion with the corporate timber behemoth, we want to call a witness or witnesses with "specialized knowledge" —within the meaning of R.702, F.R.E,— of the 'historical facts' forming the background of social and

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[9] Plaintiffs learned only too late, from interested observers during the trial, that there is a substantial distinction to be made, in assessing the potential danger of pepper spray use, between the effects the substance is designed to create on violent, combative subjects — whose blood is up, and full of adrenaline, etc.— and someone who is passive, and thus not "pain-resistant". This distinction — obviously ignored by Sheriff Philp in his "research" — indicates just one possible area to be explored in this regard; and we are not unmindful of the possibility that the same inquiry will modify on the merits of the present claim for injunctive relief...

political conflict, strategy and tactics in the “Timber Wars”, over issues of clear-cutting and “liquidation logging”, watershed, streambed, fishery and habitat preservation, and protection of the sacred groves of ancient redwoods, which forms the ‘context’ for the police misconduct claims at issue in this case. Finally, at the risk of gilding the lily, it was suggested in conversations with jurors that some authority — such as from a DuBay-type witness associated with a tool company — might help the Jury to understand that the grinder is a safe, reasonable means, as experience showed, of ending lockdown sit-ins.

Plaintiffs can see no reason why the parties should be barred from developing new or different evidence in the hiatus before a new trial. State court practice specifically permits it:

> "In the typical case, when a new trial is required, the nature and scope of the issues will have been affected, requiring substantial investigation of new points or issues that were not adequately addressed in the original proceedings. The parties are afforded a trial de novo, along with " 'the right to introduce any evidence on the issue involved, not only the evidence introduced at the prior trial *but also any additional and new evidence*.' " (*Guzman v. Superior Court*, *supra*, 19 Cal.4th at p. 708.) Reopening discovery may serve to clarify facts and eliminate gaps in the evidence that resulted in the need for a new trial in the first place."

Fairmont Ins Co. v. Superior Court (2000) 22 C.4th 245, 253. No bar is found in the federal rules, and, in circumstances where there is ample time for expert discovery to be accomplished in time for a new trial, no unfair prejudice could possibly result. So we are asking also to be permitted a reasonable period in which to designate new experts, and explore the contributions they may offer to the search for truth in this case.

CONCLUSION

Without a doubt, the frustration attendant upon our mistrial arises in major part from the substantial evidence which emerged there, showing that some irreducible portion of the population will probably always simply be ‘adamant’, in the belief that police authority is always right — regardless of its frequent ‘reckless disregard’ for fundamental rights, and the vast amounts of gratuitous suffering it causes, and always finds a way to justify — making it difficult to feature ever getting a unanimous verdict. That should not deter the Court from recognizing the clarity and force of the decisions by the Court of Appeals in this case, in light of the evidence

it has just heard. To the contrary, the very reality, and recognition, that this is such a 'visceral' issue, should encourage the Court to its own righteous action now, to uphold the *Graham* standard as articulated by the Circuit Court — and thereby enforce what is surely the Law of the Case. The procedural circumstance which kept the Court of Appeals formally restricted to a view of the evidence in plaintiffs' Best Light, must now give way to the proven facts. The impartial videotaped record of the events in question is immutable, defendants' admissions about the grinders are complete, the plaintiffs' evidence about lasting harm is uncontested.

Given the need to determine facts in order to rule on these instant claims by plaintiffs, in the hiatus before another possible trial, this Court can evaluate them in the precise quoted terms set forth in *Headwaters II*. The reviewing Court's pronouncements, applying the *Graham* rule on the need for force to the cruel and outlandish police expedient of using 'chemical agent' weaponry against non-violent protesters in civil disobedience 'lockdowns' made very clear its view that the practice is well beyond the pale established in *Graham* and in the Ninth Circuit cases invoked. Unlike the Jury, this Court is free to consider the terms and meaning of the higher court's previous actions, and work to advance its constitutional purposes in the larger ongoing contest over this unholy issue. Plaintiffs understand the contradiction arising from the lack of finality of the *Headwaters* decision(s), but remain securely confident in the strength and clarity of the underlying principle the Court invoked, and its relation to the evidence in this case. What isn't bridged from *Headwaters II* to the present moment by the double Best Light truth of the videotapes, is up to this Court to link together by passing judgment on the truth that was shown, so that finality may be reached.

WHEREFORE, Plaintiffs respectfully ask the Court for the following relief:

Summary Judgment in their favor against all defendants on the issue of liability for compensatory damages for all plaintiffs;

A Further Judgment entering a permanent Injunction barring defendants and their employees and police cooperators from the use of pepper spray to coerce non-violent, non-resisting lockdown protesters;

Leave to amend the Complaint to implead the POST Commission, and revise the claim

presented in #100 of the First Amended Complaint, filed 11/25/97, to seek a Declaration that the pepper spray use practiced by defendants and contemplated by the P.O.S.T. Guidelines is Unconstitutional; and leave to serve Summons & Complaint on the Commission; and then,

A Judgment declaring that the use of pepper spray to coerce non-violent, non-resisting lockdown protesters to release themselves, where other means are available, violates the Fourth Amendment, and, that POST Guidelines cannot and must not be said to lawfully authorize such use; and also,

An Order re-opening discovery for a suitable period, to allow the parties to designate experts and develop their evidence for the Next Trial; and,

Such other and further relief — including but not limited to any further action needed to implement plaintiffs' right to the equitable relief now prayed for — as may be deemed just.

Respectfully submitted,

DATED: October 8, 2004

Dennis Cunningham
William M. Simpich
Robert Bloom
Some of Plaintiffs' Attorneys

CERTIFICATE

I certify that I served the within Post-trial Motions on defendants by FAX and mailing a copy to Nancy Delaney and Wm. Mitchell at their offices in Eureka, CA on October 8, 2004.

Dennis Cunningham