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NORTHERN DISTRICT OF CALIFORNIA

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Attorneys for Defendants

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3
4 HEADWATERS FOREST DEFENSE, et al.,

5 Plaintiffs,

6 vs.

7 COUNTY OF HUMBOLDT, et al.,

8 Defendants.

Case No.: C97-3989-SI

JOINT PRE-TRIAL
CONFERENCE
STATEMENT

DATE: March 29, 2005
TIME: 3:30 p.m.
Judge ILLSTON

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12 Pursuant to Civil L. R. 16-9 and the Case Management Order of this Court, the
13 parties respectfully submit the following Joint Pre-Trial Conference Statement.

14 ~~(1) The Action~~

15 (A) Substance of Action.

16 *According to Plaintiffs:*

17 The claims to be decided: In this case, eight individual plaintiffs are suing the
18 County of Humboldt, the City of Eureka and Dennis Lewis and Gary Philp for using a
19 chemical weapon against plaintiffs during three protests against the logging of ancient
20 forests within a month in 1997. Defendants used cotton swabs or Q-tips to apply pepper
21 spray to the eyes and faces of the plaintiffs, who had locked their arms together inside
22 metal pipes and remained motionless when defendants placed them under arrest and
23 ordered them to unlock. Defendants then repeated the application of pepper spray with
24 saturated Q-tips or with a close spray to the eye. Plaintiffs claim that up to the time of
25 these incidents, defendants routinely used a different method, a mechanical grinder, to
26 harmlessly separate locked-together protesters. After applying pepper spray at the first

1 two incidents here, defendants used a grinder to separate the plaintiffs. Plaintiffs seek
2 money damages for pain, suffering, injuries, trauma and emotional distress, and
3 attorneys' fees, costs and interest as provided by law.

4 ***According to Defendants:***

5 By this action, plaintiffs seek recovery of damages and including attorneys' fees,
6 based upon alleged violation of their Constitutional rights by individually named and
7 entity defendants, under 42 U.S.C. § 1983. Plaintiffs contend that they were subjected to
8 the use of excessive force by application of pepper spray during the course of arrests by
9 the various defendants. Each entity defendant maintains that its use of force policy is
10 constitutionally sound. Defendants further maintain that the force used was reasonable
11 under the circumstances and not violative of any federally protected right of plaintiffs.
12 Alternatively, the individually named policymaker defendants maintain that each is
13 entitled to qualified immunity.

14 **(B) Relief Prayed.**

15 Plaintiffs' Statement of Relief Prayed: Each plaintiff seeks damages for pain,
16 suffering, injuries, trauma, mental anguish, and lasting emotional distress. The evidence
17 to be offered concerning the amount of these damages will be the testimony of all
18 plaintiffs. Plaintiffs also seek attorneys' fees, costs and interest as provided by law.

19 **2. The Factual Basis of the Action.**

20 **(A) Undisputed Facts.**

21 (1) That at all relevant times, Humboldt County law enforcement
22 personnel were acting within the course and scope of their authority as members of the
23 Humboldt County Sheriff's Department;

24 (2) That at all pertinent times, members of the Eureka Police
25 Department were acting within the course and scope of their authority as officers of the
26 Eureka Police Department;

1 (3) That at all pertinent times, law enforcement personnel of the
2 Humboldt County Sheriff's Department were acting pursuant to the use of force policy of
3 that department;

4 (4) That at all pertinent times, officers of the Eureka Police Department
5 were acting pursuant to the use of force policy of that department.

6 ***Plaintiffs*** also submit the following statement of certain additional matters, which
7 is ***not*** adopted by defendants as a statement of undisputed facts:

8 (1) Defendants applied pepper spray, a chemical weapon, at close range
9 to the eyes each of eight plaintiffs who locked arms inside metal pipes known as "Black
10 Bears" and were arrested for misdemeanors such as trespassing, during three separate
11 protests (collectively, the "Pepper Spray Incidents"):

12 (a) the Scotia Protest, where four protesters [plaintiffs Spring
13 Lundberg (then a minor), Eric Samuel Neuwirth, and Jennifer Schneider] sat in a circle
14 with three others in the lobby of Pacific Lumber Company's office in Scotia, California,
15 on September 25, 1997, and Humboldt County Sheriffs' ("HCS") officers held each
16 plaintiffs' head and applied pepper spray twice to the eyes of each plaintiff using cotton
17 swabs;

18 (b) the Bear Creek Protest, where two protesters [plaintiffs Jon
19 Michael McCurdy and Noel Tendick] locked themselves to a dormant, parked Pacific
20 Lumber bulldozer in a forest at dawn on October 3, 1997, and HCS officers applied
21 pepper spray twice to the eyes of each of the two plaintiffs, first using cotton swabs, then
22 spraying the substance directly at each plaintiff's eyes from less than one foot away; and,

23 (c) the Eureka Protest where four females [plaintiffs Maya
24 Portugal (a minor), Lisa Sanderson-Fox, Jennifer Schneider and Terri Slanetz] sat in a
25 circle in the front office of a U.S. Congressman in Eureka, California, and HCS officers,
26 at the request of Eureka Police Department ("EPD"), applied pepper spray by cotton

1 swab to the eyes of each plaintiff while holding the plaintiff's head, then sprayed the
2 substance at the eyes of plaintiff Slanetz from less than a foot away.

3 (2) Defendants County of Humboldt, City of Eureka, Lewis and Philp
4 authorized and ratified the foregoing conduct by their respective officers.

5 (3) During the Pepper Spray Incidents:

6 (a) There was no struggle by any plaintiff;

7 (b) There was no attempt to flee by any plaintiff;

8 (c) There was no verbal abuse by any plaintiff; and

9 (d) There was no threat of violence by any plaintiff.

10 (4) At Scotia on September 25, 1997, the applications of pepper spray
11 did not cause plaintiffs to unlock, and two plaintiffs were separated by means of a
12 mechanical grinder which caused no injury, while the other two plaintiffs unlocked after
13 being carried out of the office.

14 ~~(5) At Bear Creek on October 3, 1997, the applications of pepper spray~~
15 ~~did not cause plaintiffs to unlock, and they were separated by means of a mechanical~~
16 ~~grinder which caused no injury.~~

17 (6) Until the September 25, 1997, Scotia protest, defendants had never
18 used pepper spray to separate locked-down protesters, and had used mechanical grinders
19 safely dozens of times to sever metal locking devices, including "Black Bears."

20 (7) Plaintiffs each suffered blinding, agonizing pain as a result of
21 defendants' use of pepper spray.

22
23 **(B) Disputed Factual Issues.**

24 *According to Plaintiffs:*

25 (1) Whether the application of pepper spray on the occasions described
26 above was consistent with accepted law enforcement practices;

1 (2) Whether reasonable alternative methods for separating the plaintiff
2 protesters existed;

3 (3) Whether plaintiffs were peaceful, passive protesters who did not
4 resist arrest;

5 (4) Whether defendants harmed plaintiffs with pepper spray by
6 inflicting pain, suffering, injuries and terror and by attempting to break their will;

7 (5) Whether the use of pepper spray on plaintiffs was justified for
8 purposes of safety;

9 (6) Whether the individual defendants' acts or omissions during the
10 Pepper Spray Incidents were those of a reasonable and prudent law enforcement officer
11 under the circumstances; and, possibly,

12 (7) One or more of the issues noted by the Court of Appeals in the
13 *Headwaters I* opinion, as invoked by Judge Walker in his Order denying summary
14 judgment after remand. (Order of March 28, 2003, p. 5; 240 F.3d at 1207.)

15 ***According to Defendants:***

16 Defendants contend that there is no dispute as to any **material** fact and that they
17 are entitled to judgment as a matter of law. Defendants submit that the material questions
18 of fact are:

19 (1) Whether plaintiffs resisted efforts of the defendant law enforcement
20 officers to effect the lawful arrests of plaintiffs; and

21 (2) Whether the force used to effect the lawful arrests of plaintiffs was
22 reasonable.

23 **Agreed statement:** The parties submit that no part of the action can be tried upon
24 an agreed statement of facts.

25 **Stipulations:** The parties will address stipulations as to authenticity of exhibits
26 following receipt of the respective exhibits.

1 **3. Disputed Legal Issues.**

2 **(A) Points of Law.**

3 *According to Plaintiffs:*

4 (1) The acts and omissions of defendants Lewis and Philp in connection
5 with the Pepper Spray Incidents caused the use of excessive force against plaintiffs in
6 violation of their right against unreasonable seizure under the Fourth and Fourteenth
7 Amendments to the United States Constitution and 42 U.S.C. § 1983. *Graham v.*
8 *Connor*, 490 U.S. 386, 396 (1989); *Alexander v. City and County of San Francisco*, 29
9 F.3d 1355, 1367 (9th Cir. 1994); *Adams v. Metiva*, 31 F.3d 375 (6th Cir. 1994); *Pierce v.*
10 *Multnomah County of Oregon*, 78 F.3d 1032, 1040 (9th Cir. 1996); *Liston v. County of*
11 *Riverside*, 120 F.3d 965, 976 (9th Cir. 1997); *LaLonde v. County of Riverside*, 204 F.3d
12 947 (9th Cir. 2000); *Headwaters Forest Defense et al., v. County of Humboldt et al.*, 240
13 F.3d 1185 (9th Cir. 2001) (*Headwaters I*); *Headwaters Forest Defense et al., v. County*
14 *of Humboldt et al.*, ___ F.3d ___ (9th Cir. 2002) (2002 US App LEXIS 455)
15 (*Headwaters II*).

16 (2) The County of Humboldt and City of Eureka are liable for the acts of
17 their officers and the policy decisions of their supervisory personnel that were carried out
18 during the Pepper Spray Incidents. *Monell v. Dept. of Social Services*, 436 U.S. 658, 691
19 (1978); *Hammer v. Gross*, 932 F.2d 842 (9th Cir. 1991).

20 (3) Defendants' supervisory personnel (Sheriff Lewis and Chief Deputy
21 Philp) are liable for authorizing and implementing a policy so deficient that the policy
22 itself is a repudiation of Constitutional rights and is the moving force of the
23 Constitutional violations. *MacKinney v. Nielsen*, 69 F.3d 1002, 1008 (9th Cir. 1995).

24 (4) Plaintiffs' injuries entitle them to recover compensatory damages
25 pursuant to 42 U.S.C. § 1983. *P. B. v. Koch*, 96 F.3d 1298, 1304 (9th Cir. 1996);
26 *Williams v. Benjamin*, 77 F.3d 756, 763 (4th Cir. 1996); *McDonald v. Haskins*, 966 F.2d

1 292 (7th Cir. 1992); *Winston v. Lee*, 470 U.S. 753, 760 (1985); *Hammer v. Gross*, 932
2 F.2d 842 (9th Cir. 1991).

3 (5) Qualified Immunity. So that the record is clear, plaintiffs are of the
4 view that there is no remaining issue --- and no cognizable defense, in the circumstances
5 --- of qualified immunity in this case, since the matter was thoroughly considered, and
6 laid to rest, by the Court of Appeals. See, *Headwaters II*, *passim*.

7 ***According to Defendants:***

8 Defendants have set forth extensive legal authority in the memoranda of points
9 and authorities filed in connection with dispositive motions by all parties. Defendants
10 submit that the force used was reasonable under the circumstances as prescribed in
11 *Graham v. Connor*, 490 U.S. 386, 396 (1989), and in this Circuit by *Forrester v. City of*
12 *San Diego*, 25 F.3d 809 (9th Cir. 1994). The entity defendants maintain that their
13 respective policies with respect to use of force as applicable to this case are
14 constitutionally sound. The individual policy maker defendants maintain that, should it
15 be determined that excessive force was used, their acts were still objectively reasonable
16 and not contrary to clearly established law, entitling these individual defendants to
17 qualified immunity. *Saucier v. Katz*, 533 U.S. 194 (2001).

18 **(B) Proposed Conclusions of Law.**

19 Not applicable.

20 **(4) Trial Preparation.**

21 **(A) Witnesses to be Called.**

22 The parties' respective witness statements are either filed
23 and served or remain with the Court from the previous trial. The parties each reserve the
24 right to object thereto. The parties are continuing to meet and confer concerning
25 objections and will submit any unresolved objections to the Court.

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(B) Exhibits, Schedules and Summaries.

The parties' respective exhibit lists are served and either filed and served or remain with the Court from the previous trial. Defendants have informed plaintiffs' counsel that an Exhibit X-3 has been added to defendants' list (Makita instructions.) The parties each reserve the right to object thereto. The parties are continuing to meet and confer concerning objections and will submit any unresolved objections to the Court.

(C) Trial.

Trial is currently scheduled for April 11, 2005. As specified in the Court's Case Management Order, the parties' respective proposed jury instructions are filed and served or remain with the Court from the last trial. Special verdict forms are filed or will be filed and served. The parties each reserve the right to object thereto. After receipt thereof, the parties will meet and confer concerning objections and will submit any unresolved objections to the Court.

(D) Estimate of Trial Time.

By Plaintiffs as to Plaintiffs' case:

Plaintiffs estimate that the presentation of their case, including cross examination of all witnesses in plaintiffs' case in chief, will take no more than four court days. The individual defendants and certain other officers will be called in plaintiffs' case in chief.

By Defendants as to Defendants' case:

Assuming plaintiffs call the individually named defendants and other involved officers in their case in chief, it is anticipated that defendants will require no more than three court days to conclude their case.

(E) Use of Discovery Responses.

Neither party expects to introduce any discovery responses, unless for recollection or impeachment, except that defendants reserve the right to read from the deposition or

1 prior testimony of Molly Burton who was a party plaintiff at the time such testimony was
2 given.

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5 **(F) Further Discovery or Motions.**

6 The parties' motions in limine are filed and served concurrently herewith in
7 accordance with the Court's Case Management Order.

8 **(5) Trial Alternatives and Options.**

9 **(A) Settlement Discussion.**

10 Plaintiffs made a written settlement offer by letter dated January 31, 2003.
11 Defendants responded with a counter offer by letter dated February 3, 2003. No further
12 settlement discussions occurred.

13 **(B) Consent to Trial Before a Magistrate Judge.**

14 The parties do not consent to trial before a magistrate judge.

15 **(C) Amendments, Dismissals.**

16 The Second, Third and Fourth causes of action have been dismissed, with
17 prejudice. Defendants Held, Craddock, Gainey, Reynolds, Buihner, Lawson, Metaxas,
18 Kirkpatrick, Ciarabellini, Sylvia, Millsap, Honsal and Manos, and plaintiff Molly Burton,
19 have been dismissed.

20 **(D) Bifurcation, Separate Trial of Issues.**

21 Bifurcation is not feasible or desired.

22 **(6) Miscellaneous.**

23 None.

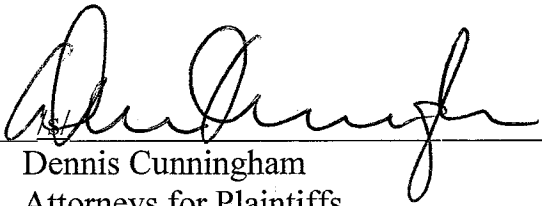
24 Respectfully submitted,

25 DATED: March 18, 2005

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DENNIS CUNNINGHAM
ROBERT BLOOM
J. TONY SERRA
WILLIAM M. SIMPICH

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By: 
Dennis Cunningham
Attorneys for Plaintiffs

DATED: March 18, 2005. MITCHELL, BRISSO, DELANEY & VRIEZE

By: /s/
Nancy K. Delaney
William F. Mitchell
Attorneys for Defendants

SO ORDERED this ____ day of _____, 2005.

Hon. SUSAN ILLSTON
United States District Court Judge

No. 0625 P. 12

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DATED: March 18, 2005.

MITCHELL, BRISSO, DELANEY & VRIEZE

By: *Nancy K. Delaney*
Nancy K. Delaney
William F. Mitchell
Attorneys for Defendants

SO ORDERED this ____ day of _____, 2005.

Hon. SUSAN ILLSTON
United States District Court Judge

Mar 16, 2005 11:01 AM

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