

BILL LOCKYER
Attorney General

State of California
DEPARTMENT OF JUSTICE



FAX TRANSMISSION COVER SHEET

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DATE: April 21, 2005 **TIME:** _____ **NO. OF PAGES:** 17
(INCLUDING COVER SHEET)

TO:

NAME: W. Gordon Keupp
OFFICE: _____
LOCATION: _____
FAX NO: 415-285-8092 **PHONE NO:** _____

FROM:

NAME: Zackery P. Morazzini, Deputy Attorney General
OFFICE: _____
LOCATION: Sacramento
FAX NO: (916) 324-5567 **PHONE NO:** (916) 445-8226

MESSAGE/INSTRUCTIONS

Re: Lundberg v. Humbolt County - USDC ND C-97-3989 SI

Notice of motion and motion to quash subpoena served on Congressman Dan Lungren.

PLEASE DELIVER AS SOON AS POSSIBLE!
FOR ASSISTANCE WITH THIS FAX, PLEASE CALL THE SENDER

1 BILL LOCKYER, Attorney General
of the State of California
2 LOUIS R. MAURO,
Senior Assistant Attorney General
3 CHRISTOPHER E. KRUEGER,
Supervising Deputy Attorney General
4 ZACKERY P. MORAZZINI, State Bar #204237
Deputy Attorney General
5 1300 I Street, Suite 125
P.O. Box 944255
6 Sacramento, California 94244-2550
Telephone: (916) 445-8226
7 Facsimile: (916) 324-5567
8 Attorneys for Non-Party Witness
Congressman DAN LUNGREN
9

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 LUNDBERG, <i>et al</i>)	No. C-97-3989-SI
)	
13 Plaintiffs,)	NOTICE OF MOTION AND MOTION
)	FOR PROTECTIVE ORDER AND
14 v.)	ORDER QUASHING SUBPOENA
)	
15 HUMBOLT COUNTY, <i>et al.</i>)	Date: April 25, 2004
)	Time: 1:30 p.m.
16 Defendants.)	Courtroom No. 10
)	Hon. Susan Illston, Judge
17)	
18)	

19 **NOTICE OF MOTION AND MOTION**

20 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, please take notice that on
21 April 25, 2005, at 1:30 p.m., or as soon thereafter as the matter may be heard in courtroom 10 of
22 the above-captioned Court, located at 450 Golden Gate Avenue, San Francisco, California, non-
23 party witness Congressman Dan Lungren, will and hereby does move this Court, pursuant to Rule
24 45 of the Federal Rules of Civil Procedure, for a protective order and an order quashing the
25 subpoena served upon Mr. Lungren on April 20, 2005. On April 21, 2005, between
26 approximately 3:15 and 3:30 p.m., I contacted counsel for all parties in this matter and gave them
27 notice of this pending motion, and informing each that responding papers, if any there are, must

1 be filed with the Court and delivered to the Judge's chambers by no later than 5:00p.m., Friday,
2 April 22, 2005, by leaving messages either by voice mail or with staff concerning this motion.
3 This motion is based upon this notice of motion and motion, the points and authorities submitted
4 in support thereof, the declaration of Erin Donnett, the files and records in this matter, the oral
5 argument to be presented to the Court, and such other and further matters as may be relevant to
6 this motion.

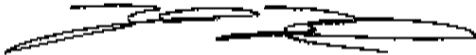
7 This motion is made on the grounds that, (1) Mr. Lungren, in his capacity as a United
8 States Congressman as well as in his former capacity as Attorney General of the State of
9 California, is not properly subject to this subpoena as Plaintiff's counsel has failed to demonstrate
10 the existence of exceptional circumstances necessary to overcome the general rule that high
11 ranking government officials are not subject to witness subpoenas; (2) the subpoena is invalid
12 because witness fees were not tendered simultaneously with the subpoena as mandated by Rule
13 45(b)(1); (3) the subpoena was not personally served upon Mr. Lungren as mandated by Rule
14 45(b)(1); and (4) the subpoena was not served within a reasonable time for Mr. Lungren to
15 respond as mandated by Rule 45(c)(3)(A)(i).

16
17 Respectfully submitted,

18
19 BILL LOCKYER
Attorney General of the State of California

20 LOUIS MAURO
Senior Assistant Attorney General

21 CHRISTOPHER E. KRUEGER
Supervising Deputy Attorney General

22
23
24 
25 ZACKERY P. MORAZZINI
Deputy Attorney General
Attorneys for Non-Party Witness
26 Congressman DAN LUNGREN
27

II.

ARGUMENT**A. The Subpoena is Invalid for Failing to Include Witness Fees.**

Rule 45(b)(1) specifically mandates that witness fees be tendered with the service of a subpoena: "Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law." It is established in the Ninth Circuit that failure to comply with this provision renders the subpoena invalid. "Therefore, we hold the plain meaning of Rule 45(c)² requires simultaneous tendering of witness fees and the reasonably estimated milage allowed by law with service of the subpoena." *CF & I Steel Corp. v. Mitsui & Co., Inc.*, 713 F.2d 494, 496 (9th Cir. 1985). Failure to tender the required fees renders the subpoena invalid. *Ibid.*; see also *Tedder v. Odel*, 890 F.2d 210, 211-12 [in forma pauperis status does not exempt party from requirement that witness fees be tendered with subpoena].

In the instant case, Plaintiff's counsel failed to tender witness fees with the subpoena. (See Dec. Erin Donnett, filed concurrently herewith.³) Therefore, the subpoena is invalid and Mr. Lungren respectfully requests that this Court grant this motion to quash the subpoena.

B. The Subpoena is Invalid Because it Was Not Personally Served.

Although the Ninth Circuit does not appear to have addressed the issue, other federal courts have held that the plain language of Rule 45(b)(1) requires that a subpoena be personally served on the recipient, and substitute service is not sufficient. This view is also adopted by the California Practice Guide, Federal Civil Procedure Before Trial: "No substitute service: In any event, the FRCP 4(e)(2) substituted service provisions (leaving copy of complaint at dwelling or serving authorized agent) do not apply to subpoenas . . . because Rule 45(a) requires delivery 'to

² Since renumbered to subdivision (b) in substantially the same language.

³ A signed copy of the declaration of Erin Donnett will be faxed to the Court on April 22, 2005, as a signature cannot not be obtained before then.

1 the person' being served." California Practice Guide: Federal Civil Procedure Before Trial, Ch.
2 11, Part IV, sec. F [emphasis in original]; citing *Doe v. Hersemann*, 155 FRD 630, 630 (N.D. Ind.
3 1994); see also *F. T. C. v. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1312-
4 13 (D.C. Cir. 1980) (in dicta) ["By contrast, Federal Rule 45(c), governing subpoena service, does
5 not permit any form of mail service, nor does it allow service of the subpoena merely by delivery
6 to a witness' dwelling place."]

7 Other federal courts have also adopted such a service requirement. "Both the Moore and
8 the Wright & Miller treatises state, without elaboration, that Rule 45 requires a subpoena to be
9 served by personally delivering a copy to the person named therein. Neither commentator
10 discusses alternative means of service. . . . Nowhere in Rule 45 is the Court given discretion to
11 permit alternate service in troublesome cases. . . . [T]he Court has no discretion to permit
12 alternative service when a party has difficulty effecting service." *In re Smith*, 126 F.R.D. 461,
13 462 (E.D. N.Y. 1989).

14 In the instant case, the subpoena was served by an individual who left a copy of the
15 subpoena at Congressman Lungren's office with his assistant Erin Donnett. (See Dec. Erin
16 Donnett, filed concurrently herewith.) Personal service was not affected. Because the subpoena
17 was not properly served, it is invalid. Therefore, Mr. Lungren respectfully requests that this Court
18 grant this motion to quash the subpoena.

19 **C. Because the Subpoena Was Served A Mere Three Court Days Prior to**
20 **the Commanded Appearance and Thus Fails to Allow Reasonable**
Time for Compliance, This Motion Should Be Granted.

21 Rule 45(c)(3)(A) provides, "On timely motion, the court by which a subpoena was issued
22 shall quash or modify the subpoena if it (i) fails to allow reasonable time for compliance." In the
23 instant case, Plaintiff's counsel served the subpoena on Wednesday, April 20, 2005, which
24 commands Mr. Lungren's personal appearance to testify on Monday, April 25, 2005. Mr.
25 Lungren is a United States Congressman whose work imposes innumerable time constraints and
26 duties to the public he serves, and often requires out-of-state travel. Under such circumstances,
27 service of the subpoena a mere three court days prior to the demanded appearance does not allow

1 Mr. Lungren a reasonable time to comply therewith. Therefore, Mr. Lungren respectfully
2 requests that this Court grant this motion to quash the subpoena.

3 **D. Because Extraordinary Circumstances Have Not Been Presented**
4 **Justifying the Involuntary Testimony of Mr. Lungren, This Motion**
5 **Should Be Granted.**

6 As set forth by the United States Supreme Court, it is the general rule that top government
7 officials should not, absent extraordinary circumstances, be called to give testimony. *United*
8 *States v. Morgan*, 313 U.S. 409, 422 (1941); accord *Detoy v. City and County of San Francisco*,
9 196 F.R.D. 362, 369 (N.D. Cal. 2000); *Simplex Time Recorder Co. v. Secretary of Labor*, 766
10 F.2d 575, 586 (D.C. Cir. 1985); *Kyle Engineering Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir.
11 1979); *Federal Deposit Ins. Corp. v. 11,950 Acres, More or Less, Located in Cameron County,*
12 *Texas*, 58 F.3d 1055, 1060 (5th Cir. 1995). As the Northern District Court itself has recognized in
13 explaining the general rule, “Because ‘[h]igh ranking governmental officials have greater duties
14 and time constraints than other witnesses . . . [they] should not, absent extraordinary
15 circumstances, be called to testify regarding their reasons for taking official actions.’ If other
16 persons can provide the information sought, discovery will not be permitted against such an
17 official. . . . Extraordinary circumstances must exist before the involuntary deposition of high
18 government officials are permitted.” *Detoy, supra*, 196 F.R.D. at 369 [internal citations omitted].
19 In ruling on a motion to quash such a subpoena, the court must consider the high-ranking status
20 of the official, the potential burden to be imposed upon them, and the substantive reasons for
21 taking the testimony. *See Federal Deposit Ins. Corp., supra*, 58 F.3d at 1060. “The reason for
22 requiring exigency before allowing the testimony of high officials is obvious. High ranking
23 government officials have greater duties and time constraints than other witnesses.” *In re United*
24 *States*, 985 F.2d 510, 512 (11th Cir.) [per curiam].

25 Even where permitted, a top government official can be called to testify only upon a
26 showing that the information to be gained from such testimony is not available through any other
27 source. *Church of Scientology v. I.R.S.*, 138 F.R.D. 9, 12 (D. Mass. 1990) [citing authority]. This
rule is the same in California state courts. *See generally, Westly v. Superior Court*,

1 125 Cal. App. 4th 907, 910-12 (2004) [California Attorney General not subject to deposition
2 absent compelling reasons]; *Nagle v. Superior Court*, 28 Cal.App.4th 1465, 1467-68 (1994)
3 [absent "compelling reasons," it is "contrary to the public interest" to subject high ranking
4 government officials to depositions]; *California State Board of Pharmacy v. Superior Court*, 78
5 Cal. App. 3d 641, 645-46 (1978) ["It is patently in the public interest that [top governmental
6 officials] be not unnecessarily hampered or distracted in the important duties cast upon [them] by
7 law."].

8 In the instant case, Plaintiff's counsel has fallen well short of establishing that
9 "exceptional circumstances" exist to compel the testimony of Congressman Lungren, a high
10 ranking governmental official. Plaintiff's counsel's sole justification appears to be that a
11 document he wishes to introduce at trial has been excluded as hearsay. Such is not an exceptional
12 circumstance.

13 Plaintiff's counsel appears to seek testimony from Mr. Lungren regarding statements
14 allegedly made in correspondence allegedly written eight years ago. And even as to the
15 correspondence at issue, Plaintiff's counsel has not shown that the information to be obtained
16 through the testimony is not available through any other source. *Church of Scientology, supra*,
17 138 F.R.D. at 12. Indeed, the correspondence itself discloses that the information sought would
18 likely be available through other sources: the person most knowledgeable at the Commission on
19 Peace Officer Standards and Training, and other law enforcement agencies. The passage quoted
20 by Plaintiff's counsel states, "As to the acceptance of this practice within the California Law
21 enforcement community, I could find no other examples where *other agencies* had applied OC at
22 a range closer than three feet. . . . *POST* is unaware of any agencies who applied OC in a manner
23 similar to the Humbolt County incident" This statement goes to the practices of *other*
24 *agencies* and the knowledge of *POST*. Testimony regarding the practices of other agencies must
25 be sought from those agencies, not from the former Attorney General. Nothing in the
26 correspondence represents information solely within the personal knowledge of the former
27 Attorney General.

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CONCLUSION

For the reasons set forth above, the subpoena served on Congressman Lungren is fatally defective and invalid. Moreover, Plaintiff's counsel cannot demonstrate the exceptional circumstances that are required to order the appearance of a high government official to testify in court. Nor can Plaintiff's counsel demonstrate that the information sought could not be obtained through less intrusive means and through other sources. Therefore, this Court should issue an order quashing the subpoena to Congressman Lungren and enter a protective order prohibiting Plaintiff's counsel from serving any further subpoenas on the Congressman.

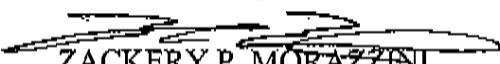
Date: April 21, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

LOUIS MAURO
Senior Assistant Attorney General

CHRISTOPHER E. KRUEGER
Supervising Deputy Attorney General


ZACKERY P. MORAZZINI
Deputy Attorney General
Attorneys for Non-Party Witness
Congressman DAN LUNGREN

DECLARATION OF SERVICE BY FACSIMILE

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Case Name: *Lundberg v. County of Humbolt, et al.*

Case No.: USDC Northern District, San Francisco Div. C-97-3989 SI

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On April 21, 2005, I served the attached **Notice of Motion and Motion for a Protective Order and Order Quashing Subpoena; Declaration of Erin Donnett** by facsimile from the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

W. Gordon Kaupp
(415) 285-8092
Counsel for Plaintiff

Nancy Delaney
(707) 444-9586
Counsel for Defendant

J. Tony Serra
(415)421-1331
Counsel for Plaintiff

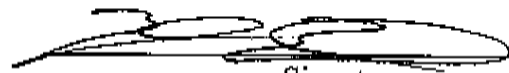
William Brag
(707)443-2747
Counsel for Defendant

William M. Simpich
(510)444-1704
Counsel for Plaintiff

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 21, 2005, at Sacramento, California.

Zackery P. Morazzini

Declarant



Signature

EXHIBIT A

SA088 (Rev. 1/94) Subpoena in a Civil Case

Issued by the
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LUNDBERG et al.

SUBPOENA IN A CIVIL CASE

V.

HUMBOLDT COUNTY et al.,

Case Number:¹ C-97-3989-SI

TO: DANIEL LUNGREN
11246 Gold Express Drive, Suite 101
Gold River, CA 95670
Phone (916) 859-9906

YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY United States District Court - Northern District of California 450 Golden Gate Ave. San Francisco, CA 94102	COURTROOM 19th Flr, Courtroom 10
	DATE AND TIME 4/25/05 at 8:30am

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
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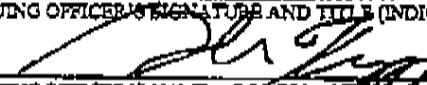
YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME
-------	---------------

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
----------	---------------

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)  Attorney for Plaintiffs	DATE 4/20/05
---	-----------------

ISSUING OFFICER'S NAME, ADDRESS AND PHONENUMBER
W. Gordon Kaupp
115 1/2 Bartlett St., San Francisco, CA (415) 285-8091

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on next page)

¹ If action is pending in district other than district of issuance, state district under case number.

1 J. TONY SERRA (#32639)
 2 506 Broadway
 3 San Francisco, CA 94133
 415-986-5591; fax: 421-1331

4 DENNIS CUNNINGHAM (#112910)
 ROBERT BLOOM
 5 BEN ROSENFELD (#203845)
 3163 Mission Street
 6 San Francisco, CA 94110
 7 415-285-8091 / fax: 285-8092

8 WILLIAM M. SIMPICH (#106672)
 1736 Franklin Street
 9 Oakland, CA 94612
 10 510-444-0226 / fax: 444-1704

11 Attorneys for Plaintiffs

12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA**

14 LUNDBERG *et al.*,

15 Plaintiffs,

16 vs.

17 COUNTY OF HUMBOLDT, *et al.*,

18 Defendants.

Case No. C-97-3989 VRW

**DECLARATION OF PLAINTIFFS'
ATTORNEY W. GORDON KAUPP**

20 I, W. GORDON KAUPP, hereby declare that:

- 21 1. I am duly licensed to practice law. I am employed in the Law Offices of Dennis
 22 Cunningham.
 23 2. This declaration is stated on information and belief unless specified otherwise.
 24 3. On April 19 during the proceedings of the above-captioned trial, defendants unexpectedly
 25 made representations before the jury implying that the former Attorney General of California,
 26 Daniel Lungren, as an ex-officio member of the state Commission on Peace Officer Standards
 27 and Training (P.O.S.T.) would have been involved in the development of the Guidelines
 28

1 regarding the use of chemical agents in civil disobedience situations promulgated by P.O.S.T. in
2 1998.

3 4. Defendants have asserted (over Plaintiffs strong, continuing objection) that Guideline #10
4 authorizes the use of chemical agents, including pepper spray on non-violent, passive protestors.
5 Such use is the central issue in the trial of this case.

6 5. Defendants have entered the 1998 P.O.S.T. Guidelines in order to demonstrate that this use
7 of pepper spray was a generally accepted practice despite the fact that the applications of pepper
8 spray in these instances were unique.

9 6. Plaintiffs seek to challenge the notion that this use of pepper spray was acceptable or
10 accepted in the law enforcement community at the time by introducing a letter from Dan
11 Lungren to State Senator Mike Thompson, dated November 17, 1997 (attached as Exhibit B). In
12 this letter, Lungren noted the following:

13 "As to the acceptance of this practice within the California law enforcement community,
14 I could find no other examples where other agencies had applied OC at a range closer
15 than three feet. The direct swabbing of OC into the eyes of an individual is neither
16 supported nor directly addressed by *the training*...

16 "POST is unaware of any agencies who applied OC in a manner similar to the Humboldt
17 County incident... Most agencies either do not apply OC in training or apply OC by
18 spraying it into the face of a trainee at a distance of more than three feet...

18 "My staff attempted to identify similar applications of OC in other states to no avail.
19 Clearly, both swabbing of OC onto the eyes of an individual and the close spraying of
20 OC are very unusual applications of OC and are *not accepted police community*
21 *practices.*" (Emphases added.)

21 7. Defendants have included a copy of P.O.S.T.'s 1998 "Crowd management and Civil
22 Disobedience Guidelines" as defendants' Exhibit JJ, and continue to develop this theme. Mr.
23

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1 Lungren's letter stating the contrary is excluded as hearsay. Therefore, at this late juncture
 2 plaintiffs are compelled to immediately subpoena Daniel Lungren to be present as a witness in
 3 this trial.

4
 5 DATED: April 20, 2005:

Respectfully Submitted,



W. GORDON KAUPP
 DENNIS CUNNINGHAM
 BEN ROSENFELD
 ROBERT BLOOM
 WILLIAM SIMPICH
 J. TONY SERRA

Attorneys for Plaintiffs

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1 BILL LOCKYER
 Attorney General of the State of California
 2 LOUIS MAURO
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 4 ZACKERY P. MORAZZINI, State Bar No. 204237
 Deputy Attorney General
 5 1300 I Street, Suite 125
 P.O. Box 944255
 6 Sacramento, CA 94244-2550
 Telephone: (916) 445-8226
 7 Fax: (916) 324-5567

8 Attorneys for Non-Party Witness
 Congressman DAN LUNGREN

9
 10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA

12
 13 LUNDBERG, *et al*
 14 Plaintiffs,
 15 v.
 16 HUMBOLT COUNTY, *et al*.
 17 Defendants.
 18
 19
 20

No. C-97-3989-SI

**DECLARATION OF ERIN
 DONNETT IN SUPPORT OF
 OPPOSITION TO PETITION**

Date: April 22, 2004
 Time: 1:30 p.m.
 Courtroom No. 10
 Hon. Susan Illston, Judge

21 I, ERIN DONNETT, declare:

22 1. I am an employee of Congressman Dan Lungren and work at his office located at
 23 11246 Gold Express Drive, Suite 101, Gold River, California.

24 2. I was working on April 20, 2005, when an individual entered the office and left a
 25 subpoena directed to Mr. Daniel Lungren at my desk, bearing the case name Lundberg v.
 26 Humbolt County. The subpoena was delivered to me and not Mr. Lungren.

27 3. No fees of any kind accompanied the subpoena, and none have been received.

28 I declare under the penalty of perjury of the laws of the State of California that the foregoing

1 is true and correct and that, if called upon to testify as a witness thereto, would do so willingly
2 and competently as to my personal knowledge. Executed this __ day of April, 2005, in
3 Sacramento County, California.

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ERIN DONNETT

DonnetDeclaration.wpd