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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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| LOCAL 10, INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, et al.,<br><br>Plaintiffs,<br>vs.<br><br>CITY OF OAKLAND; et al.,<br><br>Defendants. | File No. C -03-2962 TEH (JL)<br><br>**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION AGAINST INDIVIDUAL PLAINTIFFS**<br><br>Date: December 5, 2005<br>Time: 10:00 a.m.<br>Location: Courtroom 12, 19th Floor<br><br>Hon. Thelton E. Henderson |

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**NOTICE OF MOTION FOR SUMMARY JUDGMENT**

PLEASE TAKE NOTICE THAT defendants will move the court at the time and place specified above, for summary judgment or, in the alternative summary adjudication: 1) on the Local 10 individual[1] plaintiffs' First Amendment claims (1st and 5th causes of action) and their informational privacy claim (9th cause of action) in the Third Amended Complaint; 2) on the Local 10 longshoremen plaintiffs' Fourth Amendment claims (2nd cause of action); and 3) on all claims asserted by the longshoremen plaintiffs against the individual defendants on qualified immunity grounds, except for the state and federal false arrest claims asserted by Mr. Heyman and the excessive force claims made by Mr. Heyman against the officers involved in his arrest.

This motion is made upon the grounds that no material dispute exists as to the above claims, and plaintiffs cannot establish one or more essential elements of said claims. This motion is also made upon the grounds that the individual defendants are entitled to qualified immunity on the federal claims and discretionary immunity pursuant to California Government Code § 820.2 on the state law claims, and that no material factual dispute exists as to these issues.

This motion is based upon this notice of motion and motion, the declarations of Gregory M. Fox, Deputy Chief Howard Jordan, Captain Rod Yee, Lieutenant Ed Tracey, Lt. Dave Kozicki, Sergeant Gary Tolleson, Julia Kurzrock (Ret.) and Alexander Jason as well as the complete records contained in the court's file in this matter, and such further evidence, whether documentary or oral, as may be presented at the time of the noticed hearing.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. STATEMENT OF ISSUES**

Defendants move this Court for summary judgment on the following issues:

1. The First Amendment claims, based on the fact that the longshoremen were not at the Port that day to engage in protest, and there is no evidence that they were targeted by OPD due to their

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[1] Of the original 53 plaintiffs in this action, all but eight have settled their claims. Of the eight remaining plaintiffs, seven are individuals, and one – Local 10 – is an association. This motion is brought against the seven individual plaintiffs, referred to herein in two distinct sets: plaintiff Jack Heyman, an ILWU business agent who was arrested; and longshoremen plaintiffs Chapman, Clay, Evans, Kepo'o, Massey and Moore, all of whom allege being struck with less lethal at the East SSA gate.

membership in the ILWU.

2. The informational privacy claim, because there is no evidence that OPD collected intelligence on the plaintiffs in violation of their privacy rights.

3. The Fourth Amendment claims, based on the fact that there is no evidence plaintiffs were arrested, subjected to an investigatory stop, or otherwise seized within the meaning of the Fourth Amendment since they were hit by less lethal after refusing to disperse, and their freedom of movement was not restricted.

4. The claims against the individual defendants in their individual capacity, based on defendants' entitlement to qualified immunity, given that the use of less lethal projectiles did not violate plaintiffs' constitutional rights, there was no clearly established law that less lethal projectiles could not be used for crowd control or that to do so constituted a seizure, and the officers' conduct was objectively reasonable.

## II. FACTS

### A. OPD Adoption of the Mobile Field Force Concept and Less Lethal Impact Weapons, Prior Experience with Less Lethal

In 2000 and thereafter OPD confronted a growing and violent urban phenomenon known as "sideshows" and a new era of street demonstrations protesting the federal government's foreign and economic policies. Responding to these trends, OPD began revising its crowd control policies and training. OPD consulted with police departments in Seattle and San Diego, among others, regarding the new concept of a "Mobile Field Force" ("MFF"), a rapid, organized and disciplined crowd event response using motorized mobile response teams. MFF had the flexibility to control or disperse unruly crowds and/or apprehend multiple offenders simultaneously. Each MFF team is commanded by a lieutenant, comprised 30-40 officers and an appropriate number of sergeants. A team included officers working in skirmish lines equipped with batons to disperse crowds and separate arrest teams.[2]

But traditional skirmish line baton dispersal tactics had disadvantages. Officers had to close the distance until they were physically confronting demonstrators. Hand to hand pushing and jabbing

[2] Declaration of Gary Tolleson.

with batons resulted in physical confrontations over the batons and occasional police misuse of the baton during the "heat of battle." Prolonged pushing with batons also physically tired officers, further increasing the risk of injury to officers or demonstrators. OPD was therefore interested in new impact weapon technology for dispersal that also had the advantage of creating distance between officers and protesters thereby minimizing the above problems.[3]

OPD had been successfully using specially trained SWAT team members equipped with less lethal impact weapons, primarily 12-gauge and .37 mm "bean bags" and wooden dowels to handle high risk entries and barricaded subject incidents. OPD also had used trained patrol officers deploying 12-gauge "bean bags" to manage mentally disturbed persons in crisis, allowing officer to stay at some distance from dangerous or threatening persons. OPD classified less lethal munitions as impact weapons similar to batons with similar rules of engagement and the same prohibited strike areas. Like batons, less lethal munitions presented a serious risk of injury or even death if misapplied by the officer. But when correctly applied less lethal was believed to present the same lower level risk of minor injuries comparable to batons. Thus, OPD's K-3 Use of Force Policy specifically included "bean-bags" as an impact weapon and allowed for its use in crowd control situations as an option to traditional baton dispersal techniques. Giving officers "stand off distance" or creating "standoff distance" allowed officers time to react to threats, multiple persons resistance, surprise advanced fighting skills by suspects, weapons and offensive materials, such as bags of urine/blood, etc. concealed by suspects.[4]

The manufacturers of less lethal impact weapons had also recommended to OPD that these were appropriate for managing or dispersing crowds. The manufacturers stated that drag stabilized 12-gauge bean-bags, .37 mm wood dowels and stinger (rubber pellets) grenades would result in minimal physical injuries when discharged at distances recommended by the manufacturer.[5]

The California Commission on Peace Officer Standards and Training ("POST") also recommended less lethal munitions as a use of force option during crowd events in its March 2003 Crowd Management and Civil Disobedience Guidelines. POST defined less lethal as "[S]pecialty

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[3] *Ibid.*
[4] *Ibid.*

impact ammunitions, hand-delivered or propelled from launching devices, designed to immobilize, incapacitate or stun a human being, citing Penal Code section 12601[c]." In addition to POST recommendations and manufacturer recommendations for the use of less lethal munitions for crowd control, the Contra Costa County and Alameda County Sheriff's offices have adapted the Mobile Field Force concept, using various types of "less lethal" equipment such as "12 gauge bean bags", OC spray, "pepper balls," Tasers and in one case, dogs.[6]

OPD created written planning guides for training officers on the evolving MFF concept. Extensive training was provided in 2002 and early 2003 on MFF tactics including the use of less lethal impact weapons to disperse crowds. Only specially trained tactical officers were allowed to use less lethal impact weapons and they were to be organized into small groups ("tango teams") under the direct supervision of a sergeant. The decision on when to use less lethal for dispersal purposes was delegated to the chief of police or his assigned incident commander.[7]

In 2003 OPD utilized the MFF and less lethal munitions extensively to manage and disperse crowds following the Oakland Raiders AFC championship game and the Super Bowl Game in January 2003. Crowd sizes ranged from 300-1,000 persons and problems included blockage of streets and sidewalks, firebombing of vehicles, and looting of commercial stores and attacks on the police and firefighters. Although OPD was criticized for not being more aggressive in its tactics, the department concluded that the MFF system and use of less lethal impact weapons were both reasonable and effective crowd control and dispersal tactics. The ability of officers to "standoff" while dispersing crowds with less lethal impact weapons further enhanced officer safety.[8]

**B. OPD Plans for the Protest**

The protestors did not apply for a permit[9] prior to the demonstration and did not meet with OPD to establish liaisons and identify potential problems that might arise, particularly in light of the

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[5] *bid.*; Exhibit 1 to Tolleson Decl., Defense Technology product information and specifications.

[6] *Ibid*; Exhibit 2 to Tolleson Decl., POST Crowd Management and Civil Disobedience Guidelines.

[7] Tolleson Decl.

[8] *Ibid.*

[9] Oakland Municipal Ordinances ("OMO") established free speech zones in the vicinity of City Hall and the federal courts. OMO, Article I, § 12.44.020(1), § 12.44.020(2). People may take advantage of these free speech zones without obtaining a permit as long as they comply with City traffic ordinances. *Ibid*. Persons who wish to "parade" in a manner that may obstruct the normal flow of pedestrian or vehicle traffic or otherwise violate traffic laws, must

fact that there were no public sidewalks, public parks, or other open public space in the immediate area suitable for a legal demonstration. Thus, the protestors could only congregate on private property leased by the shipping lines, APL and SSA, or on the only public roadway accessing the Port, Middle Harbor Road. By locating the "picket lines" directly in front of the APL and SSA Main Gates, and/or on the public roadway, the demonstrators would stop all truck and other vehicular traffic from circulating through the Port. Blockading the Main Gates and the single public roadway accessing the Port would cause Port truck traffic to back up and potentially gridlock the Bay Bridge approaches and freeway system, presenting a clear and present danger to the Bay Bridge transportation system and a serious public safety hazard.[10] Accordingly, the OPD developed an Operations Plan that anticipated the potential safety hazard by designating a specific protest area while ensuring continued truck traffic circulation through the rest of the Port. The protestors foiled this plan, however, by arriving at the Port before dawn to block all the Port Main Gates before OPD arrived, and bringing truck and vehicle traffic coming into the Port to a virtual standstill.[11]

The Operations Plan provided that officers were not authorized to use less lethal munitions except upon approval of the Incident Commander unless immediately threatened.[12] General Order K-3, which approved the use of bean bags for crowd dispersal, also provided that bean bags could only be used "under the immediate direction of a supervisor or command office. The only OPD officers who were authorized to deploy less lethal munitions at the Port were members of the Red and Blue Tango Teams.[13] Prohibited strike areas were the same for bean bags as for hand-held impact weapons: the head, neck, throat, left armpit, groin, spine and kidneys. Permissible strike areas

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obtain a permit from the Chief of Police. OMO Art. II, §§ 12.44.060, 12.44.080. The Chief of Police must approve a parade permit unless certain specified grounds for denial of the permit are present. OMO Art. II, §§ 12.44.130, 12.44.040. The permit process requires the applicant to provide information regarding the expected size of the crowd, the route, the hours, parking plans, etc., so that the City can plan for and facilitate orderly demonstrations that do not jeopardize public safety or otherwise unduly interfere with the rights of nonparticipants to conduct business. OMO Art, II, § 12.44.110.

[10] The California Highway Patrol has reported that an average of 8,000 heavy trucks travel in and out of the Port each day with peak traffic occurring between 7:00 a.m. and 10:00 a.m., the time selected for the "picket lines." The heaviest traffic day is Monday, which was also the day of the week for the planned April 7th demonstration. Declaration of David Kozicki.

[11] *Ibid.* and Operations Plan, Exhibit 1 to Kozicki Decl.

[12] Kozicki Decl., Ex. 1, Bates-stamped page 69.

[13] Tolleson Decl., Ex. 3, Bates-stamped pages 677-678, 3111

included the buttocks, thighs, shoulder, upper arms, elbows, lower arms, lower abdomen, knees, lower legs, wrists, hands, ankles, feet and center mass.[14]

**C. Conduct of the Longshoremen**

Plaintiffs Who Were Struck by Less Lethal Projectiles

On the morning of April 7, 2003, a number of longshoremen arrived at the Port of Oakland to report to work and found Port entry gates blocked by anti-war demonstrators.[15] The Longshoremen were dressed for work in sweat shirts, tee shirts and jeans. They did not wear clothing that identified them as members of Local 10.[16] There is no allegation that these plaintiffs were seeking to exercise their First Amendment rights to protest the war at the time they were subjected to police dispersal techniques.

Pursuant to the Local 10 union contract, the longshoremen do not cross a picket line until a labor arbitrator arrives to decide whether Local 10 members should honor the picket. In light of the anti-war picketers at the job site, the longshoremen 'stood by,' awaiting an arbitrator and further instructions from union officials.[17] While some non-plaintiff longshoremen 'stood by' at different locations at the Port,[18] plaintiffs Chapman, Clay, Evans, Kepo'o, Massey and Moore, Sr., (when capitalized, "the Longshoremen" refers to longshoremen plaintiffs) gathered in the middle of Middle Harbor Road, outside the East SSA gate.[19] Several of them had parked their cars in the east-bound center turn lane of Middle Harbor Road, and as additional longshoremen arrived at the Port, they gathered near these vehicles and 'stood by', waiting to receive further instructions about attending work.[20] Protestors circled in a picket line at the East SSA gate, immediately to the south of the area

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[14] Tolleson Decl., Ex. 3, Bates-stamped pp. 2736-2737. See also p. 677.

[15] Massey Dep., 65:11–66:25 (Ex. A); Clay Dep., 25:3-21; 29:3-23 (Ex. B) Exhibit letters refer to the Exhibits attached to the Fox Declaration in Support of this motion, wherein the deposition transcripts are authenticated).

[16] Chapman Dep., 62:8–63:11 (Ex. E); Clay Dep., 43:2-21 (Ex. B); Kepo'o Dep., 82:10-15, 95:11–96:9, 119:7-19 (Ex. D); Massey Dep., 63:19–65:1, 100:21–101:10 (Ex. A); Evans Dep., 67:14-69:4 (Ex. G); Moore Dep., 61:14-25 (Ex. H).

[17] TAC ¶ 34; Clay Dep., 17:9–18:8 (Ex. B); Massey Dep., 67:7–68:24 (Ex. A); Moore Dep., 39:21-40:5 (Ex. H).

[18] Heyman Dep., 96:6-23 (Ex. C); Kepo'o Dep., 103:7–104:13 (Ex. D); Massey Dep., 80:21–81:23 (Ex. A)

[19] Chapman Dep., 21:7–23:7 (Ex. E); Clay Dep., 32:11-16; 34:8-14 (Ex. B); Kepo'o Dep., 105:18–106:19, 115:20–116:13 (Ex. D); Massey Dep., 65:2-5 (Ex. A); Moore Dep., 38:7–39:4 (Ex. H).

[20] Massey Dep., 69:17–71:6 (Ex. A); Chapman Dep., 22:13-23:9 (Ex. E); Kepo'o Dep., 106:11 – 108:20, (Ex. D); Moore Dep., 39:21-40:5 (Ex. H).

on Middle Harbor Road where the Longshoremen stood waiting.[21]

After 'standing by' at that location for more than thirty minutes, Plaintiffs observed another group of demonstrators approaching their location, moving west on Middle Harbor Road from the direction of the West APL gate.[22] Plaintiff Massey, who also works as a corrections officer for the California Department of Corrections[23], testified that he observed an OPD skirmish line forming behind the crowd, and then moving the crowd toward where the Longshoremen were located.[24] Plaintiff Kepo'o testified that this large crowd of protestors eventually reached them, were "milling" in the area where the Longshoremen were standing, and that while the police line was still some distance from the protestors and Longshoremen, he heard the police announce that the protestors should disperse.[25] After the crowd of protestors moved to the location of the Longshoremen, a skirmish line of OPD motorcycles arrived and stood across the street from the Longshoremen's position.[26] Several of the Longshoremen heard a dispersal order given, but since they were not involved in the protest, they believed the order should not apply to them. Accordingly, they did not disperse when police approached.[27] After the Longshoremen were struck with less lethal projectiles, as described *infra*, the police skirmish line passed them by, and the Longshoremen went about their business, by checking in with their co-workers, reporting to work, going home and/or seeking medical help.[28]

Defendants are not aware of any facts which support the allegation that OPD gathered intelligence about Local 10's anti-war and associational activities in an "overbroad, unnecessary and unjustified" manner prior to the demonstration. OPD's Port protest Incident Commander, Captain Rod Yee, testified that he was not aware that OPD engaged in any gathering of intelligence or

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[21] Kepo'o Dep., 105:18 -106:5, (Ex. D)

[22] Chapman Dep., 34:2-14, (Ex. E); Kepo'o Dep., 116:2–119:22; 143:17–144:17 (Ex. D); Massey Dep., 82:2 – 83:18, (Ex. A); Moore Dep., 41:15-23 (Ex. H).

[23] Massey Dep., 12:2-13 (Ex. A)

[24] Massey Dep., 76:4 – 78:16; 82:2 – 83:18, (Ex. A)

[25] Kepo'o Dep., 119:20-22; 143:17 – 145:8, (Ex. D); See also, Massey Dep., 82:2–83:18, (Ex. A); Jason Dec., Ex. A; Fox Dec., ¶ 10.

[26] Clay Dep.,34:8 – 38:21, (Ex. B);

[27] Kepo'o Dep., 144:18-145:8, 146:19–147:14, (Ex. D); Massey Dep., 79:19–80:4, 83:19 -23, (Ex. A); Chapman Dep., 39:11–23, 44:4-7, (Ex. E); Clay Dep., 37:1-12 (Ex. B);

information about *any* activities of Local 10 or its members prior to the April 7, 2003 Port protest. Capt. Yee did not instruct anyone at OPD to research or otherwise investigate Local 10, and he has no information that anyone at OPD ever undertook such an investigation or research.[29] To defendants' knowledge, discovery has not revealed any facts supportive of this allegation, and there is no evidence that OPD gathered any evidence against any of the individual Longshoremen.

The Plaintiff Who Was Arrested

The remaining Longshoreman, Jack Heyman, was not struck with less lethal projectiles. On the day of the demonstration, he was acting as a business agent for Local 10.[30] Mr. Heyman arrived early at the Port, introduced himself to Capt. Yee while at the East APL gate, observed that OPD deployed less lethal munitions to disperse the protestors west of the West APL gate, and was advised that longshoremen had been injured near the East SSA gate.[31] After discussing the situation with other union officials at the East SSA gate, Mr. Heyman began to drive his car through a number of OPD Mobile Field Force vehicles and toward the back of the skirmish line assembled near the intersection of Middle Harbor Road and Maritime Street.[32]

As Mr. Heyman's vehicle approached the rear of the police motorcycle skirmish line, Sgt. Julia Kurzrock, who was about one and one/half lanes away, instructed Mr. Heyman to stop his car.[33] Mr. Heyman identified himself as a union official and indicated that he needed to get through the police line, and he recalls Sgt. Kurzrock responding "I don't care. Park your car."[34] Although there is a factual dispute about whether Mr. Heyman complied with this order,[35] Mr. Heyman testified that during the entire time of his arrest, he did not recall any police officer make any reference to his union membership, nor did any police officer use any derogatory language, epithets or obscenities to

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[28] Chapman Dep. 67:2-10; 69:2-16; 75:11-76:17; 84:4-13; (Ex. E); Clay Dep. 54:17 – 56:15; 67:5-18; 70:16 – 71:3; (Ex. B); Evans Dep. 63:5 – 64:25; 69:5 – 71:1; 72:15-20; Kepo'o Dep. 165:2-24; 169:18 – 170:11; (Ex. D); Massey Dep. 90:4 – 92:15; 93:22 – 94:23; 28:8 - 29:21; (Ex. A); Moore Dep. 76:4 – 78-9; 80:2-15; 87:9 – 88:4 (Ex. H)

[29] Yee Decl., ¶ 2

[30] Heyman Dep. 92:1-17; 95:17-23, (Exhibit C)

[31] Heyman Dep. 95:6 – 96:4; 112:21 – 114:16; 119:22 – 120:17, (Exhibit C)

[32] Heyman Dep., 123:10–130:13 (Ex. C); Jason Dec., Ex. B, Fox Dec. ¶ 11.

[33] Heyman Dep., 130:14-17 (Ex. C); Kurzrock Dep., 38:17–40:25 (Ex. F).

[34] Heyman Dep., 133:5–134:18 (Ex. C). See also, Kurzrock Dep., 38:17–41:22 (Ex. F).

[35] Sgt. Kurzrock testified that she repeatedly told Mr. Heyman to stop his car, and that he would be arrested if he failed to do so, but he continued to drive slowly forward until she reached in and turned off his engine. She then arrested

Mr. Heyman.[36] Sgt. Kurzrock testified that her reason for arresting Mr. Heyman was because he failed to follow Sgt. Kurzrock's lawful order to stop his car, and that Mr. Heyman's membership in Local 10 did not play any role in her decision to arrest him.[37]

**D. Defendants' Conduct**

None of the 37 named OPD defendants is specifically linked in the complaint with the injury incurred by any plaintiff. Chief Word was not present at the Port that day. Deputy Chief Haw and Capt. Yee were the two highest-ranking command officers at the scene, Capt. Yee being the on-scene Incident Commander. Lieutenant Poulson was the East Sector Commander, Lt. Jordan was the West Sector Commander and Lt. Kozicki was the Mobile Field Force Commander. Sgt. Tracey was in charge of the Red Tango Team, and Sgt. Tolleson was in charge of the Blue Tango Team.[38] The two Tango Teams were comprised of the following defendants: **Red Tango Team:** Lt. (then Sgt.) Ed Tracey, Oerlemans, Delrosario, Gonzales, Holmgren, Gutierrez, Romans and Knight. **Blue Tango Team:** Sgt. Gary Tolleson, Campbell, Moore, Doolittle, Steinberger, Uu, Worden, Saunders and Fukuda.[39]

Capt. Yee observed that a crowd was blocking the entrance to the East SSA Gate and blocking traffic on Middle Harbor Road in front of the Gate. (The site of the Gate and street in front of the Gate are collectively referred to as the East SSA Gate.) He gave two dispersal orders, approximately two minutes apart, from the public address system of an OPD vehicle. The Longshoremen were among the crowd assembled in the roadway outside the East SSA gate, but Capt. Yee was not aware they were longshoremen as he observed nothing that would have identified them as such. Nor did Lt. Tracey recognize any of the people congregated at the East SSA Gate as longshoremen.[40]

Prior to the decision to deploy less lethal at the East SSA Gate, the police had encountered a group of protestors blocking the West APL Gate when they first arrived at that location. Truck traffic was backing up, and when officers attempted to move the protestors with direct physical force, they

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him. Kurzrock Dep., 42:22- 48:13, 58:7–59:18 (Ex. F). Mr. Heyman testified that he stopped his vehicle when instructed to do so. Heyman Dep., 134:19-35:19 (Ex. C).

[36] Heyman Dep., 147:12-24 (Ex. C).

[37] Kurzrock Decl., ¶ 3.

[38] Declaration of Rod Yee.

[39] Tolleson Decl.; Declaration of Tracey.

were kicked, pushed and hit with protest signs. The contingent of officers had to physically push and jab protestors with batons just to get a single truck through the West APL Gate. The officers had to withdraw and wait for additional officers to arrive. In the meantime, the crowd increased dramatically as hundreds of additional demonstrators arrived, and truck and vehicle traffic coming into the Port was brought to a virtual standstill.[41] After additional officers arrived, less lethal munitions had been briefly deployed just west of the West APL gate, and that tactic had successfully dispersed demonstrators who remained non-responsive to alternative dispersal tactics.[42]

After two dispersal orders and the approach of the police skirmish line failed to disperse the crowd assembled at the East SSA gate, Capt. Yee authorized the Red Tango Team to use less lethal munitions to attempt to disperse the crowd. The Tango Team officers were instructed to target only aggressive or non-compliant protestors.[43] Plaintiff Moore testified that if he had been standing to the side with another group of longshoremen, rather than in the middle of the street, he probably would not have been shot.[44] Several Longshoremen testified that they did not know if they had been targeted by OPD due to their affiliation with Local 10.[45] Mr. Clay testified that an OPD officer he spoke with after being fired upon expressed surprise and regret when informed that OPD had fired upon longshoremen.[46] Mr. Massey testified that he had observed OPD assisting another group of longshoremen to enter the Port once protestors had been cleared from the East SSA gate.[47]

Only the Red Tango Team was present at the East SSA Gate when less lethal was deployed there. No Blue Tango Team member used any less lethal munitions at the East SSA Gate. No wooden dowels were fired at the East SSA Gate; rather bean bags were fired and stinger grenades were tossed. [48] Plaintiff Kepo'o was struck in the hand, Chapman was struck in the back, thigh and side, Clay was struck on the hamstring and back of his shoulder, Evans was struck in the back,

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[40] Yee Decl.; Tracey Decl.
[41] Kozicki Decl.
[42] Yee Decl.
[43] Yee Decl.; Tracey Decl.
[44] Moore Dep. ¶ 39:10-20
[45] Clay Dep., 55:12-23, (Ex. B); Massey Dep., 91:9–92:13 (Ex. A)
[46] Clay Dep., 59:3–60:19 (Ex. B)
[47] Massey Dep. 80:21 – 81:23, (Ex. A)
[48] Yee Decl.; Tolleson Decl.; Tracey Dec.

Massey was hit in the back and buttocks and Moore, Sr. was hit in the back of his shoulder. (TAC, ¶¶ 51-52 55, 57-58.)

Red Tango Team member Romans never fired less lethal projectiles at any location, and Officer Knight fired projectiles only at the intersection of 7th and Maritime.[49] Sgt. Hogenmiller was stationed at the command post located in the railway yard across from the East APL Gate on April 7, 2003, and had nothing to do with ordering the use of less lethal munitions.[50] Other than the Red Tango Team officers who deployed less lethal at the East SSA Gate (Tracey, Oerlemans, Gutierrez, Gonzalez, Holmgren and Delrosario), no other defendant was involved in the use of any force against plaintiffs, except for the officers who arrested Jack Heyman (Kurzrock and Mack).

## III. STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is proper where the evidence shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Proc. 56. The moving party's burden under Rule 56 is met simply by "`showing' -- i.e., pointing out to the District Court -- that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party shows the absence of a genuine dispute of material fact, the burden shifts to the nonmoving party to produce evidence which would support a jury verdict in his favor. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 256-257 (1986). To meet this burden, the nonmovant cannot rely on the pleadings but must show by affidavits, depositions, answers to interrogatories or by admissions that a genuine issue of material fact exists. *Celotex, supra*, 477 U.S. at 324. The nonmoving party's failure of proof on an essential element of its claim renders all other facts immaterial. *Id.* at 322-323.

While facts and inferences must be construed in favor of the nonmoving party, the record must be sufficient for the fact-finder to conclude the inference offered by the nonmovant is more likely than not true. A scintilla of evidence will not suffice. *Scott v. Henrich*, 978 F.2d 481, 484 (9th Cir. 1992). The more implausible the claim or defense asserted by the nonmoving party, the more persuasive its evidence must be to avoid summary judgment. *Jackson v. Bank of Hawaii*, 902 F.2d

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[49] Tracey Decl.

[50] Tracey Decl.; Tolleson Decl.; Yee Decl.

1385, 1389 (9th Cir. 1990). If any evidence produced against a defendants' motion is "merely colorable" or "not significantly probative," the motion must be granted. *Id.* at 249; *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1288 (9th Cir. 1987).

## IV. ARGUMENT

### A. FIRST AMENDMENT: No Speech Rights Were Implicated and No Associational Rights Were Violated

The First Amendment provides protection of both actual speech and expressive conduct. *Virginia v. Black* , 538 U.A. 343, 358 (2003). Persons who partake in a demonstration to protest the actions of the government are exercising the First Amendment rights and are clearly entitled to protection from police activities designed to interfere with such expression. *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986); *Sloman v. Tadlock*, 21 F.3d 1462 (9th Cir. 1994). Nonetheless, observing a protest (as opposed to participating in the protest) is not inherently expressive[51]. As stated by the Supreme Court in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n. 5 (1984):

> Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive. In the absence of a showing that such a rule is necessary to protect vital First Amendment interests, we decline to deviate from the general rule that one seeking relief bears the burden of demonstrating that he is entitled to it.

Neither the Longshoremen's complaint nor the facts show that these plaintiffs were involved in speech or other expressive activity ordinarily protected by the free expression provision of the First Amendment. They were simply "standing by" waiting to see whether the arbitrator would tell them to go to work that day or honor the demonstrators' picket line. Their own testimony that they believed the dispersal order did not apply to them since they were not involved in the protest makes this abundantly clear.

The only First Amendment right implicated by the TAC is the claim that OPD targeted plaintiffs because of their membership in the ILWU, but the facts do not support this claim. The

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[51] For informational purposes only, see, *Russ v. Jordan*, 1992 U.S. Dist. LEXIS 19484 [Opinion by the Honorable Marilyn Hall Patel].

undisputed facts show that when the longshoremen were struck by less lethal projectiles, the demonstrators were milling about in the same area, the longshoremen were not dressed in a way that would distinguish them from protesters, the police did not understand that they were longshoremen rather than demonstrators and plaintiffs heard the dispersal orders but did not disperse.

If the evidence showed that OPD had targeted plaintiffs out of hostility toward the ILWU, plaintiffs would have a valid freedom of association claim. See *Greminger v. Seaborne*, 584 F.2d 275, 278 (8th Cir. 1978) – freedom of association includes union membership. In this case, however, there is no evidence that any defendant targeted any longshoreman plaintiff due to hostility toward the ILWU. The incontrovertible evidence is that the longshoremen were targeted because they appeared to the police to be protesters who were not dispersing. In construing California's unlawful assembly law, California courts have made it clear that remaining at the scene of an unlawful assembly makes one a guilty participant. *In re Wagner*, 119 Cal.App.3d 90, 103-104 (1981). It was not up to the longshoremen to decide that the dispersal order they heard did not apply to them. It was not a violation of their First Amendment right of freedom of association for the police to target them since they appeared to be non-dispersing protestors.

**B. INFORMATIONAL PRIVACY: Plaintiffs' Informational Privacy Rights (9th Cause of Action) Were not Violated**

Plaintiffs' Ninth Claim for Relief is described as a claim for violation of plaintiffs' "right to informational privacy under article I, section 1 of the California Constitution." (TAC ¶ 124.) Presumably, this count refers to allegations that OPD gathered intelligence on the union prior to the demonstration. *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 35: interests "precluding the dissemination or misuse of sensitive and confidential information [are referred to as] 'informational privacy'". "Whether a legally recognized privacy interest is present in a given case is a question of law to be decided by the court." *Id.* at 40.

There is no factual support for plaintiffs' informational privacy claim. OPD's Port protest Incident Commander, Captain Rod Yee, testified that he was not aware that OPD engaged in any gathering of intelligence or information about *any* activities of Local 10 or its members prior to the April 7, 2003 Port protest. Capt. Yee did not instruct anyone at OPD to research or otherwise

investigate Local 10, and he has no information that anyone at OPD ever undertook such an investigation or research.

To state a claim for a constitutional violation of privacy, plaintiffs must show that: (1) they had a reasonable expectation of privacy, under the circumstances, in the information allegedly obtained by OPD; (2) that defendants invaded their privacy in allegedly obtaining the information; (3) that defendants' conduct was a serious invasion of their privacy; (4) that they were harmed; and (5) that defendants' conduct was a substantial factor in causing them harm. Judicial Council of California Civil Jury Instructions ("CACI") 1806.

Plaintiffs herein cannot show that defendants invaded their privacy even if OPD had obtained an internal newsletter or email messages about union support for antiwar protests since they cannot show they had a reasonable expectation of privacy in such information or that obtaining this information was a serious invasion of privacy. Moreover, the governmental interests supporting the challenged conduct must be weighed against the alleged intrusion of privacy. See, e.g., *Loder v. Municipal Court*, 17 Cal.3d 859, 864-877 (1976). Although the OPD Incident Commander did not instruct anyone to investigate Local 10 prior to the demonstration and not aware of any intelligence gathering on the ILWU, it would not have been unreasonable for the OPD, in preparing for the demonstration, to have ascertained whether they should anticipate that ILWU employees reporting to work might swell the ranks of the demonstrators.

**C. FOURTH AMENDMENT SEIZURE: The Longshoremen Plaintiffs Were Not "Seized" Under the Fourth Amendment**

The Fourth Amendment protects against unreasonable searches and seizures. The TAC alleges that defendants fired upon the Longshoremen with less lethal projectiles without justification or reasonable cause, (TAC ¶¶ 50 - 52, 55, 57, 58) and that these acts by defendants violated plaintiffs' rights to be free from unreasonable seizures under the Fourth and Fourteenth Amendment. (TAC, ¶110 – second cause of action). However, the undisputed facts show that the Longshoremen were not seized. Prior to being hit by less lethal munitions, the longshoremen plaintiffs were prevented from entering their workplace by protestor activity and by their own union contract which required them to honor the picket line. Police did not control their movements in any way. These plaintiffs heard the

police dispersal order and were free to move to other areas of the Port, but they did not disperse. After being struck by projectiles, they identified themselves as longshoremen, and police passed them by. These plaintiffs then reported to work, checked on their fellows and left the Port without further contact with police. There is no evidence that police controlled their movements in any way, or that a reasonable person in their position would have understood that they were not free to leave.

These facts do not constitute a seizure under the Fourth Amendment. Although force was used by the police, not every claim of excessive force by government actors falls within the ambit of the Fourth Amendment. Where no search and seizure is involved, the proper framework for excessive force claims is under the Fourteenth Amendment's substantive due process clause. *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). In *Ingraham v. Wright*, 430 U.S. 651, 674 (1977), the Supreme Court addressed constitutional protections of personal security in the context of a due process claim by students subjected to corporal punishment at school. The Court noted that:

> The right of personal security is also protected by the Fourth Amendment, which was made applicable to the States through the Fourteenth because its protection was viewed as "implicit in 'the concept of ordered liberty'... enshrined in the history and the basic constitutional documents of English-speaking peoples." [Citation] It has been said of the Fourth Amendment that its "overriding function... is to protect personal privacy and dignity against unwarranted intrusion by the State." [Citation] But the principal concern of that Amendment's prohibition against unreasonable searches and seizures is with intrusions on privacy in the course of criminal investigations. [Citation].

*Id.* at 674, emphasis added. Because the use of force against students did not occur in the context of a criminal investigation, the Supreme Court held that corporal punishment in schools does not fall within the scope of the Fourth Amendment. *Id.*

Similarly, the longshoremen plaintiffs were not subjected to force in the context of a criminal investigation. There is no evidence that police restricted the longshoremen plaintiffs' freedom of movement in any way, or otherwise exerted control so that the longshoremen felt they were not free to leave. On the contrary, the facts demonstrate only that police sought to *disperse* the longshoremen plaintiffs when they were perceived to be non-dispersing protestors. Once these plaintiffs were identified as longshoremen, police made no further effort to disperse them, and they enjoyed complete freedom of movement.

Defendants are aware of this Court's Order of April 27, 2005, denying defendants' motion to dismiss on this same Fourth Amendment issue. In that Order, this Court indicated that plaintiffs' allegations that plaintiffs were left with only a single path to leave, and that defendants continued to use force even after plaintiffs left the protest area, were sufficient to plead that defendants acted to intentionally terminate plaintiffs' freedom of movement so as to implicate the protections of the Fourth Amendment. But these allegations are not supported by the facts as to the Longshoremen. The Longshoremen who stood in the middle of Middle Harbor Road could have simply moved to the side, or they could have moved to stand with the longshoremen waiting to the east of the East SSA gate[52], and thereby would not have been subjected to force. There is no indication that their freedom of movement was terminated by defendants. Nor were they subjected to force once they were identified as longshoremen. As there is no evidence that these plaintiffs were in any way 'seized', their Fourth Amendment claim must fail.

**D. QUALIFIED IMMUNITY: Defendants Are Entitled to Qualified Immunity as the Law Was not Clearly Established that Less Lethal Could not Be Used or that their use Constituted a Seizure, and Defendants' Actions Were Objectively Reasonable**

**1. The Defendants Who Did Not Fire or Authorize the Use of Less Lethal Projectiles Are Entitled to Qualified Immunity**

There is no respondeat superior or vicarious liability under 42 USC § 1983. *Monell v. Department of Social Services*, 436 U.S. 658, 692 (1978); *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). A person deprives another of a constitutional right under § 1983 only if he "does an affirmative act, participates in another's affirmative acts", or fails to perform a legally required duty which "causes the deprivation of which [the plaintiff complains]." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988), quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). The Supreme Court has counseled the lower courts that before addressing immunity issues, they should first "determine whether the plaintiff has alleged a deprivation of a constitutional right at all." *County of Sacramento v. Lewis, supra*, 523 U.S. at 842, n. 5.

"The inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional

[52] Moore Dep. 39:10-20 (Ex. H); Massey Dep. 80:21 – 81:23 (Ex. A).

deprivation." *Leer v. Murphy, supra*, 844 F.2d at 633. The § 1983 plaintiff cannot discharge his or her obligation to prove the individual liability of each defendant by lumping all defendants together and charging the "collective guilt" of all defendants as an undifferentiated group. See *id.* at 633-634. Nor can a plaintiff state a § 1983 claim by asserting the rights of others. *San Pedro Hotel Co. v. City of Los Angeles*, 159 F.3d 470, 479 (9th Cir. 1998); *Moreland v. Las Vegas Metro. Police Dept.*, 159 F.3d 365, 369 (9th Cir. 1998). Thus, in order to prevail on their § 1983 cause of action, the plaintiffs in the case at bar must prove both culpable conduct against each of them by each defendant, and that each defendant's wrongful conduct was the actual and proximate cause of the deprivation of their constitutional rights. See *Leer v. Murphy, supra*, 844 F.2d at 634.

In *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996), the Ninth Circuit rejected a "team effort" theory of liability under § 1983. In that case, approximately 60 officers from various law enforcement agencies executed a valid search warrant on plaintiff's home, forcibly entering the residence using a "flashbang" devices. The trial court held that officers who did not enter the home or participate in the search were entitled to qualified immunity, and that ruling was not challenged on appeal. *Id.* at 293. As to the remaining defendants, the trial court gave a "team effort" instruction, which the Ninth Circuit subsequently held was improper. The Ninth Circuit required "integral participation" by each officer as a predicate to liability, explaining that:

> The underlying problem with a "team effort" theory is that it is an improper alternative grounds [sic] for liability. It removes individual liability as the issue and allows a jury to find a defendant liable on the ground that even if the defendant had no role in the unlawful conduct, he would nonetheless be guilty if the conduct was the result of a "team effort." … In essence, the "team effort" standard allows the jury to lump all the defendants together, rather than require it to base each individual's liability on his own conduct. *Id.* at 295.

Force was used against the Longshoremen only by the Red Tango Team, excluding Romans and Knight, who did not use force at all at the East SSA Gate. Those defendants who did not use less lethal at all against the Longshoremen and who were not involved in the decision to use less lethal at the East SSA Gate cannot be considered integral participants in the action to disperse the Longshoremen, and to hold them liable under these circumstances would be to adopt the disapproved "team effort" standard. Accordingly, the members of the Blue Tango Team (Tolleson, Campbell, Moore, Doolittle, Steinberger, Uu, Worden, Saunders and Fukuda), who were not present at the East

SSA Gate when less lethal was used, are entitled to qualified immunity. Similarly, defendants Randall, Chan Orozco, Belluso, Huppert, Scott, Kelly, Souza, Muschi, Johnson and Karsaboom, who were not Tango Team members or commanding officers and never deployed less lethal force are entitled to qualified immunity as are Red Tango Team members Romans and Knight, neither of whom fired less lethal projectiles at the East SSA Gate. Finally, defendants Kurzrock and Mack were not Tango Team members and, accordingly, did not use less lethal at all. They are implicated only in the arrest of plaintiff Heyman and are entitled to qualified immunity as to all other plaintiffs.

**2. The Officers Who Fired Less Lethal at the East SSA Gate and the Command Staff Are Entitled to Qualified Immunity as the Law Was Not Clearly Established that the Use of Less Lethal Was a Seizure or that Less Lethal Could Not Be Used for Crowd Control and Because the Conduct Was Objectively Reasonable**

In determining whether a defendant is entitled to qualified immunity, the threshold question is whether the evidence shows that the defendant committed an act that deprived the plaintiff of some right, privilege, or immunity protected by the U.S. Constitution or the laws of the United States. *Leer v. Murphy, supra*, 844 F.2d at 632-633. If so, the courts then ask whether the constitutional right allegedly violated was "clearly established." If it was not, the defendant is immune. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The plaintiff bears the burden of showing "that the particular facts of his case support a claim of clearly established right." *Backlund v. Barnhart*, 778 F.2d 1386, 1389 (9th Cir. 1985).

If the court decides that the defendant violated a clearly established right, it must then ask whether a reasonable officer would have believed that his conduct was clearly unlawful. As to this inquiry, the Supreme Court has held that "if the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Saucier, supra*, 533 U.S. at 202. In other words, an officer who makes a reasonable mistake as to what the law requires under a given set of circumstances is entitled to the immunity defense. *Id.*at 205. "[T]o deny summary judgment any time a material issue of fact remains on the excessive force claim -- could undermine the goal of qualified immunity to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.' [Citation]." *Id.* at 202.

Here, under either the "shocks the conscience" standard that applies to excessive force cases that do not involve a seizure (see above), or the *Graham* reasonableness standard (*Graham v. Conner*, 490 U.S. 386 (1989)), the evidence does not show that the use of bean bags to disperse the Longshoremen, who heard and ignored a dispersal order, violated plaintiffs' constitutional rights. Bean bags presented the same low-level risk of injury as batons when correctly applied, the prohibited strike areas were the same and none of the Longshoremen were hit in a prohibited strike area. The Ninth Circuit has recognized that bean bags constitute a lower level of force than deadly force. *Deorle v. Rutherford*, 272 F.3d 1272, 1280 (9th Cir. 2001); *Jeffers v. Gomez*, 267 F.3d 895, 901. n.2 (9th Cir. 2001).

a. The Law Was Not Clearly Established that Fourth Amendment Reasonableness Standards Applied or that Less Lethal Could Not Be Used for Crowd Control

Even if a triable issue of fact existed as to whether the use of bean bags could constitute a constitutional violation under the circumstances, the law was not clearly established at the time. "'Clearly established'" for purposes of qualified immunity means that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Wilson v. Layne*, 526 U.S. 603, 614-615 (1999), internal quotations and citation omitted.

As of April 7, 2003 (and to date) no court has held that the less lethal munitions used to disperse the Longshoremen (bean bags and stinger grenades) could not be used for crowd control purposes. Nor was there a consensus of cases of persuasive authority that made it clear that their use was unlawful. Only one case had discussed the use of bean bags prior to April 2003, and that case that did not involve the use of such weapons for crowd control. In that case, *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2003), a deputy sheriff fired a less lethal beanbag round without any warning into the face of an emotionally disturbed man who had not been violent, whose dress did not allow him to secrete weapons on his body, who had generally obeyed all instructions given to him by various peace officers and who was on his own property. *Id.* at 1275. Central to the Court's

determination was an analysis of the governmental interests at stake, and the Court found that, under these circumstances, the use of a beanbag round without warning against an unarmed, emotionally disturbed, compliant man who posed no immediate threat to the officers or others was not a reasonable use of force; hence, the officer was not entitled to qualified immunity. *Id.* at 1283-1284. The diminished capacity of the plaintiff in *Deorle* was also a significant factor: "Where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining . . . the reasonableness of the force employed." *Id.*, at 1283.

The balance has been struck quite differently in crowd control situations. In *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994), San Diego police learned that Operation Rescue planned to mount several anti-abortion demonstrations in the City. Aware that Operation Rescue tactics used in other demonstrations included trespass on clinic property, physically blocking access to the clinic and preventing patients, physicians and staff from entering the clinic, the Chief adopted a policy for dispersing demonstrators through the use pain compliance, specifically the application of Nonchakus (two sticks of wood, connected at one end, used to grip the wrist) or other pain compliance and pressure point holds. The demonstrators arrested had various injuries, including bruises, a pinched nerve, and a broken wrist. *Id.* at 806-807.

The Court upheld the jury's verdict in favor of defendants, stating:

> the city clearly had a legitimate interest in quickly dispersing and removing lawbreakers with the least risk of injury to police and others. The arrestees were part of a group of more than 100 protesters operating in an organized and concerted effort to invade private property, obstruct business, and hinder law enforcement. Although many of these crimes were misdemeanors, the city's interest in preventing their widespread occurrence was significant: 'The wholesale commission of common state-law crimes creates dangers that are far from ordinary. Even in the context of political protest, persistent, organized, premeditated lawlessness menaces in a unique way the capacity of a State to maintain order and preserve the rights of its citizens.' [Quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 287 (1993) (Kennedy, J., concurring).] The city had a substantial interest in preventing the organized lawlessness conducted by the plaintiffs in this case, and the police were also justifiably concerned about the risk of injury to the medical staff, patients of the clinic, and other protesters. *Id.* at 807.

Here, the demonstrators were engaged in an unlawful protest. See Penal Code §§ 407, 647c, 370, 372 and 602(k), Vehicle Code §§ 2800, 21954, 21956 and 40000.1 and Oakland Municipal

Ordinances ("OMO") Title XII, Article I, §§12.44.020 and 12.44.010, which make it unlawful to take part in public meetings on public streets, to obstruct the "free passage of any street or sidewalk" and to fail to disperse or move when directed to do by a police officer." Notwithstanding the fact that the protestors had not obtained the required permit, OPD intended to allow the protestors to block one Main Gate and to secure the free passage of the other gates before the protestors could block them. Protestors got there first, however, and invaded private property, obstructed business, and hindered law enforcement efforts to get truck traffic moving. They had essentially shut down the Port, threatening the Bay Bridge transportation system and creating a serious public safety hazard. As in *Alexandria Women's Health Clinic* and *Forrester*, OPD was concerned about the risk of harm to others and had a substantial interest in preserving the rights of other citizens to go about their business in a safe manner. Further, earlier efforts to disperse the crowd through direct physical contact and dispersal orders had been unsuccessful.

In addition, in crowd control circumstances, the law was not clearly established that the use of force to disperse demonstrators constituted a seizure and, thus, was subject to the reasonableness analysis of *Graham*, rather than the "shocks the conscience" standard of *County of Sacramento v. Lewis*, as discussed above. The facts do not show that the decision to use bean bags constituted deliberate indifference that would shock the conscience under *Lewis* standards. Even under the *Graham* reasonableness analysis, the law did not put defendants on notice that the use of bean bags for crowd control was clearly unlawful.

A review of cases dealing with less lethal munitions, even outside the crowd control context shows there is no consensus of opinion regarding the application of qualified immunity. In *Boyd v. Benton County*, 374 F.3d 773 (9th Cir. 2004), one of the officers executing a search warrant, tossed a "flash-bang" device near the front door of a residence without looking. The device detonated, injuring the plaintiff who was sleeping near the door. *Id.* at 777-778. The Court found that the use of the device constituted excessive force because the officer knew that several people might be sleeping in the residence. *Id.* at 779. Nonetheless, because plaintiff's right with respect to such devices was not clearly established, the officers were entitled to qualified immunity. *Id.* at 782-784.

b. The Officers' Conduct Was Objectively Reasonable

The Supreme Court has made it clear that the protection provided by the qualified immunity is far-reaching. *Saucier, supra,* at 533 U.S. at 202. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). This test "allows ample room for reasonable error" by the defendant. *Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997).

In *Act Up!/Portland v. Bagley,* (1993) 988 F2d 868, United States Marshals strip-searched protesters who were arrested for refusing to leave a federal building. Both the trial and appellate courts recognized that clearly established law prohibited the strip search of persons arrested for minor offenses unless the officer performing the search had a reasonable suspicion that the arrestee was concealing contraband. The Court of Appeal held, however, that the district court erred in denying the marshals' motion for summary judgment based on qualified immunity because it failed to consider "whether a reasonable officer in [the marshals'] position could have believed, in light of clearly established principles, that his conduct was lawful." *Id.* at 873.

While material disputes about whether the facts and circumstances constituted reasonable suspicion or what the officer or claimant did, may go to the jury, the "determination of whether those facts support an objective belief that probable cause or reasonable suspicion existed is ordinarily a question for the court. It is not in itself a factual issue that can preclude summary judgment." *Ibid.* If a reasonable officer could have believed he was justified in strip searching the arrestees, under the circumstances and law, he would be entitled to qualified immunity even if reasonable officers could disagree on this issue. *Id.* at 872.

Here, OPD created written planning guides for training officers on the evolving MFF concept and in 2002 and early 2003, it provided extensive training on the use of less lethal impact weapons to disperse crowds and OPD's K-3 use of force policy specifically authorized the use of less lethal. Only specially trained Tango Team officers were allowed to use less lethal under the direct supervision of a sergeant. The decision on when to use less lethal for crowd dispersal purposes was delegated to the chief of police or his assigned incident commander. On April 7, Red Tango Team officers used less lethal dispersal techniques only upon the command of Capt. Yee, the Incident

Commander. Under such circumstances, it must be concluded that it was reasonable for the officers to believe their conduct was lawful.

In *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), the Court held that officers implementing policy are entitled to qualified immunity where no then-existing case law clearly established that the particular policy was unconstitutional. See also, *Dodd v. City of Norwich*, 827 F.2d 1, 4 (2d Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988) wherein the Court instructed the lower court to consider whether the defendant was entitled to qualified immunity based on the fact that he was following the policy and training of the police department. As the Supreme Court explained in *Pierson v. Ray*, 386 U.S. 547, 555 (1967)[53], "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."

c. The Same Principles Apply to the Command Staff

The same principles discussed above apply to the Command Staff. Moreover, several other law enforcement departments, including Seattle, San Diego, Alameda County and Contra Costa County had adopted the MFF concept and the use of less lethal munitions for crowd control purposes. March 2003 POST guidelines also recommended the use of less lethal for crowd control as did the manufacturers of bean bags and wooden dowels. OPD had successfully used less lethal earlier in 2003 in two crowd control events. Under such circumstances, it cannot be said that no reasonable officer in Capt. Yee's or Deputy Chief Haw's position would have concluded that it was unlawful to order the Red Tango Team to use less lethal at the East SSA Gate on a limited basis against non-dispersing individuals when the neither the approach of the skirmish line nor two dispersal orders had succeeded in clearing the East SSA Gate.

As for Chief Word, he was not at the Port on April 7, and he is sued as a policy-maker for the City. (TAC, ¶ 10.) Whether or not he was a policy-maker for the City, he could not make official policy in his individual capacity. Supervisory liability will only be imposed against a supervisory

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[53] Even though the Supreme Court subsequently replaced *Pierson*'s subjective "good-faith" qualified immunity standard with an objective "reasonableness" inquiry, the principle that a peace officer who has probable cause to arrest someone under a statute that a reasonable officer could believe is constitutional, will be immune from liability even if the statute is later held to be unconstitutional. *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994).

official in his individual capacity "for his own culpable action or inaction in the training, supervision, or control of his subordinates, for his acquiescence in the constitutional deprivations of which the complaint is made, or for conduct that showed a reckless or callous indifference to the rights of others." *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (internal citations omitted). There is no evidence that would support liability against Chief Word in his individual capacity. See *Menotti v. City of Seattle*, 409 F.3d 1113, 1155 (9th Cir. 2005)

**E. STATE LAW CLAIMS: The Individual Defendants Are Entitled to Immunity Pursuant to California Government Code § 820.2**

For the same reasons set forth above, defendants are immune from liability on the state law claims pursuant to California Government Code § 820.2. In *Coming Up, Inc. v. City and County of San Francisco*, 857 F.Supp. 711, 718 (N.D.Cal 1994), the Court briefly discussed, without deciding, whether an immunity, comparable to the good faith immunity available in §1983 cases, existed for state law claims. The Court noted there were numerous cases in which police officers had been granted immunity pursuant to Gov. C. § 820.2, and it compared the language of § 820.2 to that in *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991) in which § 1983 qualified immunity protected "government officials performing discretionary functions."

Other parallels have been drawn between § 820.2 and the parameters of § 1983 liability. In *Martinez v. County of Los Angeles*, 47 Cal.App.4th 334, 349 (1996) the Court noted that the test for determining whether a homicide by a peace officer was justifiable, and thus immunized, was whether the circumstances reasonably created a fear of death or serious bodily injury to an officer or to another. It pointed to *People v. Rivera*, 8 Cal.App.4th 1000, 1007 (1992) noting that the court therein applied a Fourth Amendment "reasonableness" analysis in finding that the use of an attack dog by a police officer was justified because the officer "reasonably feared for his safety, and that of others in the area." The Court said: "The same is true of Government Code section 820.2, which provides immunity from liability to public employees for their discretionary acts." *Ibid.* (See also *Edson v. City of Anaheim*, 63 Cal.App.4th 1269 (1998) - applying federal standards to state law unreasonable force claims.) The Tort Claims Act immunities have been held to apply to the Unruh Act, Civil Code § 51 *et seq.*, in addition to other state tort actions. See *Gates v. Superior Court*, 32 Cal.App.4th 481

(1995). Thus, for the same reasons the officers would be entitled to qualified immunity under § 1983, they are entitled to the immunity provided by § 820.2 on plaintiffs' state law claims.

## V. CONCLUSION

For all of the foregoing reasons, defendants respectfully submit that they are entitled to summary judgment or, in the alternative, summary adjudication, on the First Amendment claims of the Local 10 plaintiffs, brought under 42 USC § 1983 and the California Constitution, Article I, §§ 2 and 3 and the informational privacy claim brought pursuant to the California Constitution, Article I, § 1. In addition, as there are no facts which support the longshoremen's assertion that they were 'seized' by defendants, defendants are entitled to summary judgment or, in the alternative, summary adjudication, on the Fourth Amendment claims. Finally, the defendants are entitled to qualified immunity on the § 1983 claims and discretionary immunity on the state law claims as the use of less lethal did not violate plaintiffs' constitutional rights, the law was not clearly established, and the use of less lethal was objectively reasonable under the circumstances.

Dated: October 31, 2005

BERTRAND, FOX & ELLIOT

/S/

By: _____

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