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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

SRI LOUISE COLES, et al.

Plaintiffs

vs.

CITY OF OAKLAND, a municipal entity, et al.

Defendants.

) File No. C -03-2961 TEH (JL)
)
) **DEFENDANTS' MOTION FOR SUMMARY**
) **JUDGMENT OR, IN THE ALTERNATIVE,**
) **SUMMARY ADJUDICATION AGAINST**
) **INDIVIDUAL PLAINTIFFS**
)
) Date: December 12, 2005
) Time: 10:00 a.m.
) Location: Courtroom 12, 19th Floor
)
) 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 plaintiffs' Fourth Amendment claims (except as to the arrest of plaintiff Leslie Parkinson); and 2) on all claims asserted by the plaintiffs against the individual defendants on qualified immunity grounds. 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, and Sergeant Gary Tolleson, 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. Defendants also incorporate by reference as though fully set forth herein the points and authorities, evidence and declarations filed in support of the motion for summary judgment in the Local 10 case.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF ISSUES

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

1. 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.

2. The claims against the individual defendants in their individual capacity, based on defendants' entitlement to qualified immunity, given that the declaration of an unlawful assembly and use of less lethal projectiles did not violate plaintiffs' constitutional rights, the law was not clearly established, and the officers' conduct was objectively reasonable.

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1 **II. FACTS**

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

4 In 2000 and thereafter OPD confronted a growing and violent urban phenomenon known as
 5 “sideshows” and a new era of street demonstrations protesting the federal government’s foreign and
 6 economic policies. Responding to these trends, OPD began revising its crowd control policies and
 7 training, consulting with police departments in Seattle and San Diego, among others, regarding the
 8 new concept of a “Mobile Field Force” (“MFF”), a rapid, organized and disciplined crowd event
 9 response using motorized mobile response teams. MFF had the flexibility to control or disperse
 10 unruly crowds and/or apprehend multiple offenders simultaneously. Each MFF included officers
 11 working in skirmish lines equipped with batons to disperse crowds and separate arrest teams.¹ But
 12 traditional skirmish line baton dispersal tactics had disadvantages. Officers had to physically
 13 confront demonstrators, and hand to hand pushing and jabbing with batons resulted in physical
 14 confrontations over the batons and occasional police misuse of the baton during the “heat of battle.”
 15 Prolonged pushing with batons also physically tired officers, further increasing the risk of injury to
 16 officers or demonstrators. OPD was therefore interested in new impact weapon technology for
 17 dispersal that also had the advantage of creating distance between officers and protesters thereby
 18 minimizing the above problems.²

19 OPD had been successfully using specially trained SWAT team members equipped with less
 20 lethal impact weapons, primarily 12-gauge and .37 mm “bean bags” and wooden dowels in non-
 21 crowd control situation. These weapons were classified as impact weapons similar to batons with
 22 similar rules of engagement and the same prohibited strike areas. The manufacturers of less lethal
 23 impact weapons had also recommended to OPD that these weapons were appropriate for managing or
 24 dispersing crowds and would result in minimal physical injuries when discharged at the
 25 recommended distances. OPD’s K-3 Use of Force Policy specifically included “bean-bags” as an
 26 impact weapon and allowed for its use in crowd control situations as an option to traditional baton

27
 28 ¹ Declaration of Gary Tolleson.

² *Ibid.*

1 dispersal techniques.³

2 The California Commission on Peace Officer Standards and Training ("POST") also
3 recommended less lethal munitions as a use of force option during crowd events in its March 2003
4 Crowd Management and Civil Disobedience Guidelines. POST defined less lethal as "[s]pecialty
5 impact ammunitions, hand-delivered or propelled from launching devices, designed to immobilize,
6 incapacitate or stun a human being, citing Penal Code section 12601[c]." The Contra Costa County
7 and Alameda County Sheriff's offices also have adopted the Mobile Field Force concept, using
8 various types of "less lethal" equipment such as "12 gauge bean bags", OC spray, "pepper balls,"
9 Tasers and in one case, dogs.⁴

10 OPD created written planning guides for training officers on the evolving MFF concept and
11 provided extensive training in 2002 and early 2003 on MFF tactics, including the use of less lethal
12 impact weapons to disperse crowds. Only specially trained tactical officers were allowed to use less
13 lethal impact weapons and they were to be organized into small groups ("tango teams") under the
14 direct supervision of a sergeant. The decision on when to use less lethal for dispersal purposes was
15 delegated to the chief of police or his assigned incident commander.⁵

16 In 2003 OPD utilized the MFF and less lethal munitions extensively to manage and disperse
17 crowds following the Oakland Raiders AFC championship game and the Super Bowl Game in
18 January 2003. Crowd sizes ranged from 300-1,000 persons and problems included blockage of
19 streets and sidewalks, firebombing of vehicles, and looting of commercial stores and attacks on the
20 police and firefighters. Although OPD was criticized for not being more aggressive in its tactics, the
21 department concluded that the MFF system and use of less lethal impact weapons were both
22 reasonable and effective crowd control and dispersal tactics. The ability of officers to "standoff"
23 while dispersing crowds with less lethal impact weapons further enhanced officer safety.⁶

24 **B. OPD Plans for the Protest**

25 The protestors did not apply for a permit⁷ prior to the demonstration and did not meet with

26 ³ *bid.*; Exhibit A to Tolleson Dec., Defense Technology product information and specifications.

27 ⁴ *Ibid*; Exhibit B to Tolleson Dec., POST Crowd Management and Civil Disobedience Guidelines.

28 ⁵ Tolleson Dec.

⁶ *Ibid.*

⁷ 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

1 OPD to establish liaisons and identify potential problems that might arise, particularly in light of the
 2 fact that there were no public sidewalks, public parks, or other open public space in the immediate
 3 area suitable for a legal demonstration. Thus, the protestors could only congregate on private
 4 property leased by the shipping lines, APL and SSA, or on the only public roadway accessing the
 5 Port, Middle Harbor Road. The protestors were not willing to engage in non-violent civil
 6 disobedience, that is, to submit to lawful arrest as a means of political protest. Rather, protest
 7 organizers specifically stated their goal was to shut down the Port.⁸

8 By locating the "picket lines" directly in front of the APL and SSA Main Gates, and/or on the
 9 public roadway, the demonstrators would stop all truck and other vehicular traffic from circulating
 10 through the Port. Blockading the Main Gates and the single public roadway accessing the Port would
 11 cause Port truck traffic to back up and potentially gridlock the Bay Bridge approaches and freeway
 12 system, presenting a clear and present danger to the Bay Bridge transportation system and a serious
 13 public safety hazard.⁹ Accordingly, the OPD developed an Operations Plan ("Ops Plan") that
 14 anticipated the potential safety hazard by designating a specific protest area while ensuring continued
 15 truck traffic circulation through the rest of the Port.

16 The expressed intent of the planned response to the protest was: 1) to allow the peaceful and
 17 orderly expression of free speech and lawful assembly rights; 2) to prevent any non-authorized
 18 occupation of any area with the Port of Oakland; 3) to prevent any disruption of business at APL; 4)
 19 to prevent the intimidation of employees and visitors to the Port; 5) to prevent the disruption of
 20 surrounding businesses and city streets; 6) to prevent illegal/criminal behavior; 6) to arrest violators;

21 without obtaining a permit as long as they comply with City traffic ordinances. *Ibid.* Persons who wish to "parade" in
 22 a manner that may obstruct the normal flow of pedestrian or vehicle traffic or otherwise violate traffic laws, must
 23 obtain a permit from the Chief of Police. OMO Art. II, §§ 12.44.060, 12.44.080, 12.44.130, 12.44.040. The permit
 24 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.

⁸ Fox Dec., Ex. N.

⁹ The California Highway Patrol has reported that an average of 8,000 heavy trucks travel in and out of the Port
 25 each day with peak traffic occurring between 7:00 a.m. and 10:00 a.m., the time selected for the "picket lines." The
 26 heaviest traffic day is Monday, which was also the day of the week for the planned April 7th demonstration. Declaration
 27 of David Kozicki. There are only two ways to enter and leave the Port area: the southern entrance into the Port is along
 Middle Harbor Road, and the northern entrance is along 7th Street. Middle Harbor Road and 7th Street meet at the west
 28 end of the Port, and Middle Harbor continues east, creating a large semi-circular route through the Port. Maritime Street
 travels between Middle Harbor and 7th, creating a shorter route between the north and south entrances. To the right and

and 7) to disperse riotous crowds in a safe direction. The Ops Plan also provided that “protesters will be allowed to lawfully gather” at the East APL Gate (1395 Middle Harbor Road), which would allow the protest to proceed but which would not shut down truck traffic into the Port. The Plan presented different activity scenarios with related police responses that ranged from “peaceful grouping” with “police monitoring” to “unlawful conduct/overt act” resulting in “issuance of a dispersal order with deployment of arrest teams to the problem area and arrest made with transportation to the appropriate facility.”¹⁰ Officers were not authorized to use less lethal munitions except upon approval of the Incident Commander unless immediately threatened.¹¹ The only OPD officers authorized to deploy less lethal munitions at the Port were members of the Red and Blue Tango Teams.¹²

Thus, the Ops Plan showed that OPD was ready, willing and able to allow the protest to proceed so long as it was conducted in a lawful manner. The protestors foiled this plan, however, by arriving at the Port before dawn to block all the Port Main Gates before OPD arrived and, ultimately, bringing truck and vehicle traffic coming into the Port to a virtual standstill.¹³

C. Plaintiffs Injured at East SSA Gate

1. Sri Louise Coles

Ms. Coles arrived at the Port at approximately 5:30 a.m. She then rode in a school bus to the East APL gate. At this gate, Ms. Coles participated in a picket line which temporarily blocked a Tyson Chicken truck from entering the West APL gate. She states that she was aware that the picket line was blocking the truck from entering the driveway and that police were attempting to bring the truck through the crowd. Nevertheless, she states that she linked arms with other protestors directly in front of the truck and that she was pushed by police and jabbed by a police baton. Ms. Coles states that the baton jab knocked the wind out of her, but she didn’t feel at the time that she needed medical attention.¹⁴ After spending some time at the West APL gate, Ms. Coles moved to the East SSA Gate.

left of both Maritime and Middle Harbor are ship-loading areas and rail road yards, and both roads are lined with high fencing along most of their length. Fox Dec., Ex. K, map.

¹⁰ Kozicki Dec., Ex. A, Operations Plan

¹¹ Kozicki Dec., Ex. A, Bates-stamped page 69.

¹² Tolleson Dec., Ex. C, Bates-stamped pages 677-678, 3111

¹³ *Ibid.* and Operations Plan, Exhibit A to Kozicki Dec.

¹⁴ Coles Dep. 66:11-13; 68:20-25; 69:5-18; 71:14-73:18; 74:17 – 75:11; 79:5 – 83:14; 86:6-11; Fox Dec. Exhibit A. (Hereinafter, all deposition references are to the Exhibit in the Fox declaration where that testimony is

1 When she first arrived at East SSA, she was not aware of any police presence, and did not see police
 2 for another 30 to 45 minutes. During this time, she heard grenades, and understood from other
 3 protestors that police were using non-dangerous rubber bbs on protestors.¹⁵ Ms. Coles continued to
 4 walk in a circle in a picket line located in the driveway and roadway at the East SSA gate, and then
 5 observed a line of police approaching on motorcycles. A large crowd had gathered at her location,
 6 and after she heard the police give a dispersal order, the picket line broke up and people moved into
 7 the street. At that point, Ms. Coles also moved into the street.¹⁶ Soon thereafter, she heard a grenade
 8 explode and rather than leave the area with the other protestors, she hid behind a car parked in the
 9 middle of the street. An officer told her to leave. She stepped from behind the car just as the motor
 10 officers approached the area, and claims she was then pushed by a motorcycle. She again tried to
 11 hide behind a parked car instead of dispersing, and she was again told by an officer to leave. Instead
 12 of leaving the area, Ms. Coles then crossed the street and stepped up onto the curb at the railroad
 13 tracks. At that point she was struck by a projectile at her left jaw line, as she turned to face toward
 14 the north.¹⁷

15 After being struck by the projectile, Ms. Coles then approached a friend, and they began to
 16 walk north on Middle Harbor Road to seek medical assistance. She was stopped by people who took
 17 her photograph, and then she was taken by car to the hospital. After being hit, Ms. Coles was aware
 18 that the police stayed in the same general location, behind her, as she left the area to seek help. Ms.
 19 Coles was then driven to the hospital.¹⁸ She was diagnosed at Summit Medical Center emergency
 20 room as having suffered “acute assault with contusions/abrasions to the left jaw and left neck.”¹⁹
 21 Photographs of Ms. Coles taken approximately three days after the April 7, 2003 demonstration are
 22 attached to the Fox Declaration as Exhibit F.

23 2. Ron Smith:

24 Mr. Smith arrived at the West Oakland BART station at about 6:15. He was taken by shuttle

25 authenticated.) Although Ms. Coles seems to imply in her deposition that the Tyson truck entered at East APL,
 26 see Kozicki Dec. at ¶ 5 where Lt. Kozicki indicates this occurred at West APL.

15 Coles Dep. 86:12-22; 90:2-92:22 (Ex. A)

16 Coles Dep. 93:11 – 94:25; 98:2-10; 101:3 – 104:23 (Ex. A)

17 Coles Dep. 105:17 – 106:13; 109:1-15; 111:8-20; 112:10 –113:11; 115:9-22; 119:19-23 (Ex. A)

18 Coles Dep. 124:11- 125: -24; 126:16 – 127:13 (Ex. A)

19 Fox Dec., Ex. E

bus to 7th Street and Maritime, and then walked south on Maritime Street. As he neared the intersection of Maritime and Middle Harbor Road, he saw demonstrators near the East SSA gate and a line of motorcycle police beyond the demonstrators. Mr. Smith had joined the main group of protestors near East SSA when he heard grenades exploding. He saw some people leave in response to the grenades, but saw others walking back and forth.²⁰ He remained in the area of East SSA for some minutes – less than 30 – and observed the police line moving forward towards his position and he heard the sound of weapons being fired. At that point, Mr. Smith was struck in the hand with a projectile.²¹ After being struck, Mr. Smith moved away from police, traveling north on Middle Harbor Road and then Maritime. Mr. Smith had no further contact with police as he moved to the intersection of Maritime and 7th Streets.²² He received an ice pack from an ambulance worker, had a medic look at his hand at the BART station, and then drove himself to Alta Bates emergency where he received treatment for his broken finger.²³

D. Plaintiffs Injured on Maritime Street

1. Scott Bohning:

Mr. Bohning took BART to the Oakland Port, arriving at about 7:45 a.m. After arriving at the Port, he got a ride to the intersection of 7th and Maritime Streets. He then began to walk southeast on Maritime Street toward the intersection of Maritime Street and Middle Harbor Road.²⁴ He first observed police when he was approximately one and one-half blocks north of the Maritime/Middle Harbor intersection. Mr. Bohning observed that the police were stationary, and that approximately 200 to 300 people were standing or milling around between himself and the line of police near where the railroad tracks cross Maritime Street.²⁵

When he reached a point approximately one block from the intersection, he heard a loud bang and saw people walking and running toward him. He walked a bit closer to the intersection, but then turned around and joined the people walking north on Maritime.²⁶ Mr. Bohning then walked north on

²⁰ Smith Dep. 54:11-22; 57:3-58:25; 61:1 - 63:20 – 64:12; 77:3 – 79:4 (Ex. B)

²¹ Smith Dep. 82:13 – 83:15; 84:7-20; 90:22-24; 96:11- 98:8; 101:3-13; 102:22-24 (Ex. B)

²² Smith Dep. 123:11 – 24; 127:14 - 128:16; 134:15-25; 135:16-24 (Ex. B)

²³ Smith Dep. 136:1-7; 139:20 - 140:1; 142:23 – 143:14; 155:2 – 156:18 (Ex. B)

²⁴ Bohning Dep. 31:6-18; 32:5-33:13; 34:3-9 (Ex. C)

²⁵ Bohning Dep. 36:25 –37:7; 37:24 – 38:10; 39:16 – 40:10 (Ex. C)

²⁶ Bohning Dep. 40:11-25; 45:16 –46:19 (Ex. C)

Maritime, occasionally looking over his shoulder to see what police were doing. He heard a second 'bang' as he was leaving with the others. At one point as he walked up Maritime toward 7th Street, just as he turned to his left to look at the police, Mr. Bohning was struck in five places with projectiles: his nose, his right pinkie, and three places on his back.²⁷ After he was struck, he continued walking away from police, stopping occasionally for medical treatment. He reached 7th Street approximately one half hour after being struck by projectiles. The protestors gathered at 7th Street mutually agreed to walk to downtown Oakland, and Mr. Bohning joined the group walking to the Federal Building.²⁸ After spending some time at the Federal Building with the protestors, Mr. Bohning decided to leave to get medical treatment, and he then traveled to Alta Bates and was seen in the emergency room where his wounds were cleaned and he was given new Band-Aids.²⁹

2. Jennifer Hanson

Ms. Hanson took BART to the West Oakland station. She then got a ride with a car pool over to the East APL gate, arriving about 7:00 a.m. After a few minutes, she walked to the West APL gate, joined friends in a picket line for about 15 or 20 minutes and then moved to the side of the street in response to a dispersal order. After watching events for some time, Ms. Hanson saw police motorcycles approaching, so she moved west on Middle Harbor Road away from police. Shortly thereafter, Ms. Hanson observed police firing on the crowd.³⁰ She continued west until, about 45 minutes to an hour after she'd first arrived, she reached the intersection of Middle Harbor Road and Maritime, where she stopped to look for friends. After a few minutes, Ms. Hanson observed police moving closer again, saw some people moving up Maritime and others moving up Middle Harbor, and she began to walk up Maritime Street. Shortly after doing so, the police fired at the crowd again.³¹ She was in the middle of the crowd when she was hit in the back of her upper right arm with a projectile.³² After being hit, Ms. Hanson continued to walk up Maritime, stopping occasionally to speak with others, until she left the Port area. Police continued to follow at some distance behind the crowd. Ms. Hanson walked to the BART station and found a ride back to San

²⁷ Bohning Dep. 50:1-15; 54:19- 55:1; 56:21 – 57:16; 58:5-11; 60:19 – 61:1; 63:20 – 64:8 (Ex. C)

²⁸ Bohning Dep. 71:13-25; 88:5 – 89:3; 94:6-12; 99:6-23 (Ex. C)

²⁹ Bohning Dep. 111:16 - 115:15 (Ex. C)

³⁰ Hanson Dep. 15:1-6; 16:18 - 17:5; 17:12-24; 20:5-21:7; 37:14 - 38:20 (Ex. D)

³¹ Hanson Dep. 43:23 - 44:11; 52:10-21; 54:15-20; 56:25 – 57:25 (Ex. D)

³² Hanson Dep. 43:23 - 44:11; 52:10-21; 54:15-20; 56:25 – 57:25 (Ex. D)

1 Francisco. She self-treated with an ice pack for two days.³³

2 3 **E. Defendants' Response**

4 **1. East APL:** Consistent with the Ops Plan, OPD did not engage in any dispersal orders or
5 use of force when it encountered demonstrators at this Gate.

6 **2. West APL:** Even though the first contingent of OPD officers arrived at the next Gate
7 when it was still dark outside, they found the Gate blocked by a group of protestors and saw that
8 truck traffic was backing up. After approximately an hour, Deputy Chief Haw and Captain Yee
9 decided that it was necessary to disperse the large crowd to re-open the Main Gate and public
10 roadway to truck traffic. Capt. Yee, therefore, broadcast two dispersal orders to the crowd, and
11 people willing to stop blocking traffic were allowed to walk both east through the police lines and
12 west. Only after people remained beyond the announced time limits did the skirmish line attempt to
13 move them by pushing with batons. When officers attempted to move the protestors with direct
14 physical force, however, they were kicked, pushed and hit with protest signs. The officers had to
15 physically push and jab protestors with batons just to get a single truck (a Tyson Chicken truck)
16 through the West APL Gate.³⁴

17 Consequently, the officers had to withdraw and wait for additional officers to arrive. In the
18 meantime, the crowd increased dramatically as hundreds of additional demonstrators arrived, and
19 truck and vehicle traffic coming into the Port was brought to a virtual standstill. A large heavy can
20 was positioned in the roadway, loaded with wood and set afire. Demonstrators began climbing onto
21 the trucks that were blocked on the roadway and some threw objects at the police. In an effort to
22 avoid further physical confrontations between the crowd and the skirmish line, Deputy Chief Haw
23 decided to disperse the crowd with less lethal projectiles. Bean bags and stinger grenades were
24 briefly deployed, and the crowd immediately moved west, away from the area. OPD stopped all uses
25 of force and then moved forward, securing that area of the roadway now cleared of demonstrators.
26 All of the trucks that had been blocked moved forward.³⁵ None of the plaintiffs complain that they

27 ³³ Hanson Dep. 58:1 - 59:2; 60:17 - 61:7; 69:12 - 70:17 (Ex. D)

28 ³⁴ Yee Dec.

³⁵ Kozicki Dec.

were injured by less lethal projectiles at the West APL Gate. Plaintiff Coles alleges she was jabbed by an unknown officer with a baton at this location. The Tango Teams were not present at the West APL Gate at the time the officers pushed and jabbed the protestors with batons to clear a path for the Tyson Chicken truck.³⁶

3. East SSA: As soon as OPD stopped pushing the crowd west, the demonstrators re-assembled at the next truck gate and once again blocked the entrance to the Gate and all truck traffic on Middle Harbor Road in front of the Gate. After observing the crowd at the East SSA Gate for 10-15 minutes, Capt. Yee broadcast two dispersal orders, approximately two minutes apart, from the public address system of an OPD vehicle. Some people left the area but a large crowd remained positioned across Middle Harbor Road. Even when the line of motorcycle-mounted officers moved up in close proximity to the crowd they still refused to move, once again raising the issue of a physical confrontation between the officers and members of the crowd.³⁷

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, and Tango Team officers were instructed to target only aggressive or non-compliant protestors. Only the Red Tango Team was present at the East SSA Gate when less lethal was deployed there.³⁸ It was only when Tango Team members fired their less lethal impact weapons that people left the area and stopped blocking traffic at the SSA East Gate.³⁹

With the approval of Deputy Chief Haw, Lt. Kozicki also instructed the motorcycle officers to use the motorcycle BUMP technique to disperse individuals in accordance with the Special Order issued in January 2003 that permitted this dispersal technique. No officer was authorized to use the BUMP except on the command of the command staff, as relayed to the officers by me, and no officer used the BUMP except on proper command. Plaintiff Coles alleges she was bumped by the motorcycle of Defendant Nichelini and that she was struck in the face by a less lethal projectile fired by Defendant Delrosario at this location. Plaintiff Smith alleges he was struck in the left hand with a

³⁶ Kozicki Dec.

³⁷ Kozicki Dec.

³⁸ Yee Dec.; Tracey Dec. 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. Tracey Dec.

³⁹ Kozicki Dec.

1 projectile, fired by an unknown officer at this site

2 **4. West SSA:** Officers attempted a mass simultaneous arrest of protestors blocking this
 3 Gate, but protestors generally ran away rather than submit to arrest. At both the West SSA Gate
 4 (where Middle Harbor and Maritime intersected) and then at Maritime and 7th Street the crowd re-
 5 assembled and blocked traffic. The skirmish line would approach the crowd and stop. The crowd
 6 would refuse to leave. A dispersal order would be broadcast by use of a PA to the crowd by Captain
 7 Yee. The crowd would still refuse to leave. The skirmish line would again approach the crowd,
 8 which would not move until less lethal impact weapons were used.⁴⁰ None of the Coles plaintiffs
 9 contend they were injured at the West SSA Gate.

10 **5. Maritime:** Lt. Kozicki's MFF was assigned to continue to disperse the crowd up Maritime
 11 between the West SSA Gate and the intersection of 7th and Maritime. On three occasions, the line
 12 stopped in order to allow demonstrators an opportunity to leave, but each time the protestors
 13 regrouped and blocked Maritime Street. Members of the crowd continued to throw objects at the
 14 officers. On one occasion a "Kryptonite" bicycle lock and steel cable weighing approximately four
 15 pounds was thrown at the knees of Officer R. Race, and a large rock was thrown at the line of motor
 16 officers. Lt. Kozicki then requested and received permission from Captain Yee to have Tango Team
 17 officers deploy .37 mm wooden dowel projectiles. He reinforced the manufacturers' instructions with
 18 Sergeant Tolleson that the rounds be "skipped" off the ground, and every round he saw deployed was
 19 skipped off the pavement.⁴¹

20 The demonstrators ultimately reassembled at 7th and Maritime, blocking that intersection.
 21 After dispersal orders failed to disperse the crowd, the Red Tango Team was ordered to discharge
 22 less lethal projectiles. None of the plaintiffs have any complaints about the use of force at 7th and
 23 Maritime. When the protesters announced they were going to leave the Port and march on City Hall,
 24 OPD motorcycle officers facilitated the march through city streets by providing traffic control as the
 25 protest no longer presented a clear and present danger to the Bay Bridge transportation system.⁴²

26 Chief Word was not present at the Port that day. Deputy Chief Haw and Capt. Yee were the

27 ⁴⁰ Kozicki Dec.

28 ⁴¹ Kozicki Dec.

⁴² Kozicki Dec.

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.⁴³ 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.⁴⁴ 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.⁴⁵

III. ARGUMENT

A. FOURTH AMENDMENT SEIZURE: Plaintiffs Were Not “Seized” Under the Fourth Amendment

The Fourth Amendment protects against unreasonable searches and seizures. The TAC alleges that defendants used unreasonable force against plaintiffs by firing less lethal projectiles at plaintiffs, by bumping some plaintiffs with motorcycles and by striking one plaintiff with a baton; that each of these uses of force caused a government termination of freedom of movement through means intentionally applied; and that each use of force constituted a seizure. (TAC ¶¶ 18, 19, 20). Plaintiffs further allege that these acts by defendants violated plaintiffs’ rights to be free from unreasonable seizures under the Fourth Amendment. (TAC, ¶ 39 – first cause of action). However, the undisputed facts show that plaintiffs Coles, Smith, Bohning and Hansen were not seized. Ms. Coles was jabbed by a baton while she attempted to block a truck from entering the West APL gate. At East SSA, Ms. Coles claims she was bumped by a motorcycle. In her report to her emergency room doctor, Ms. Coles does not report any injury from or otherwise mention either incident⁴⁶. At East SSA, after lingering in the area despite having heard a dispersal order, and having been directed to leave, she was struck in the left jaw and neck by a projectile. There is no evidence that police made any attempt to arrest Ms. Coles or to otherwise stop her from leaving the Port after either the

⁴³ Declaration of Rod Yee.

⁴⁴ Tracey Dec.; Tolleson Dec.; Yee Dec.

⁴⁵ Tolleson Dec.; Tracey Dec.

⁴⁶ See Fox Dec. Exhibit E

1 jab, the bump, or the projectile strike. On the contrary, these facts show that OPD was attempting to
 2 have Ms. Coles disperse from the Port, which she did, driving from the East SSA gate without further
 3 incident.

4 Plaintiff Ron Smith walked down Maritime, spent some time at the East SSA gate, observed
 5 police approaching, was struck with a projectile, then turned and walked out of the Port from the
 6 direction he had entered. There is no evidence that police made any attempt to arrest Mr. Smith or to
 7 otherwise stop him from leaving the Port. Again, to the contrary, the facts demonstrate that police
 8 were dispersing Mr. Smith from the Port.

9 Similarly, after spending differing amounts of time at differing Port locations, both plaintiffs
 10 Jennifer Hanson and Scott Bohning were struck with projectiles as they moved up Maritime to exit
 11 the Port. Neither was arrested or otherwise stopped by police. In fact, both Hanson and Bohning
 12 state that they understood police were attempting to clear the Port of protestors. These facts do not
 13 constitute a seizure under the Fourth Amendment.

14 **1. Use of Force Alone Does Not Implicate the Fourth Amendment**

15 Although force was used by the police at the Port, not every claim of excessive force by
 16 government actors falls within the ambit of the Fourth Amendment. The Fourth Amendment's
 17 reasonableness standard governs the analysis of use of force only where force occurs during a search
 18 or seizure. *Graham v. Conner*, (1989) 490 U.S. 386, 395. Where no search and seizure is involved,
 19 the proper framework for excessive force claims is under the Fourteenth Amendment's substantive
 20 due process clause. *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). This being the case, the
 21 fact that force was used in a given situation neither proves nor disproves that a seizure has occurred.

22 **2. Force Used to Disperse is NOT a Seizure**

23 The uncontested facts here show that the use of force against Coles, Smith, Bohning and
 24 Hansen was intended to *disperse* these plaintiffs. When force is used to move someone away, it is
 25 not ordinarily referred to as a seizure. In fact, pushing someone away is usually considered the
 26 *opposite* of seizing them. While the concept of seizure is subject to judicial interpretation, the
 27 Supreme Court has recognized the relevance of the ordinary meaning of words, *Lyng v. Northwest*
 28 *Indian Cemetery* (1988) 485 U.S. 439, 469 fnt. 4, and the dangers of stretching constitutional terms
 beyond their meaning *California v. Hodari D.* (1991) 499 U.S. 621, 627, it is not reasonable to

1 expand the meaning of seizure to encompass its opposite. *Hodari* ??

2 **3. Plaintiffs Were Always ‘Free to Leave’**

3 Plaintiffs argue that they were not “free to leave” the Port because they were “briefly stopped
4 . . . by a police projectile . . .”⁴⁷ This argument attempts to equate the use of force with being stopped,
5 and thereby ‘seized’, but, as pointed out above, the fact that force was used is not determinative of
6 whether or not a seizure has occurred. (See, for example, *Ingraham v. Wright*, (1977) 430 U.S. 651,
7 674, nt. 32, wherein the use of force – paddling of school children – did not implicate Fourth
8 Amendment protections; and *Martinez v. Nygaard*, (9th Cir. 1987) 831 F2d 822, 826, wherein a
9 worker who was momentarily grabbed then released by an immigration agent was not seized. See
10 also, *Jones v. Wellham*, (1997) 104 F.3d 620). The evidence here shows only that plaintiffs were
11 struck with projectiles, not that they were stopped or seized as a result.

12 Plaintiffs further argue they were not “‘free to leave’ in whatever direction, speed, or manner”
13 each would have chosen because of police efforts to disperse them by moving plaintiffs “in a single
14 direction” out of the Port, and that defendants thereby took away each plaintiff’s “freedom of
15 movement”.⁴⁸ This argument references this Court’s April 27, 2005 Order denying defendants’
16 motion to dismiss on the same Fourth Amendment issue, which found plaintiffs’ allegations that
17 “Defendants allegedly left Plaintiffs with only one available path by which to leave the scene and
18 applied physical force to ensure that Plaintiffs followed that path, [and] Defendants’ use of force
19 against Plaintiffs allegedly continued even after Plaintiffs left the protest area” were sufficient to
20 implicate the Fourth Amendment.”⁴⁹ Obviously there is no constitutional requirement that
21 demonstrators be free to leave a demonstration in whatever direction, speed or manner they choose.
22 If that were true, then police dispersal orders would themselves be per se unconstitutional. As this
23 Court suggested at footnote 5 of its above-referenced Order, police may constitutionally direct
24 pedestrian and vehicle traffic despite such direction partially terminating an individual’s freedom of
25 movement.⁵⁰

26 ⁴⁷ See Plaintiffs’ Responses to Requests for Admissions and Interrogatories, Fox Dec., Exhts. ____

27 ⁴⁸ *Ibid.*

28 ⁴⁹ April 27, 2005 Order Denying Motion to Dismiss, 10:24-27, Fox Dec., Ex. L

⁵⁰ See also, Argument at B.2.a. and B.2.b. and cases cited therein recognizing the government interest in maintaining order on public streets and using force to do so.

Whether the directives of police so curtail an individual's freedom of movement as to constitute a seizure is best analyzed under the seizure test described in *United States v. Mendenhall* (1980) 446 U.S. 544, 554: "a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." The facts here show not only that plaintiffs Coles, Smith, Bohning and Hansen were free to leave the Port throughout the incident, but that police *wanted* them to leave, used force for the specific purpose of *getting* them to leave the Port, and, at least as to Bohning and Hansen, plaintiffs *knew* that police dispersal tactics were aimed at making them leave. A reasonable person in these circumstances would certainly understand that they were free to go.

Plaintiffs' reliance on the fact that police left them only a "single path" to leave by is not determinative here. First, the Port was *chosen by plaintiffs* as an appropriate protest site. The Port has only two entrances, via 7th Street to the north and via Middle Harbor Road to the south. A police skirmish line necessarily moves in one direction, in this case, towards the north. While police were south of the Middle Harbor/Maritime intersection, protestors, including Ms. Coles and Mr. Smith, had two routes to exit by – north along either Middle Harbor or Maritime. When the police line moved north of the intersection and onto Maritime, there was a single exit path, not by police choice, but because of the physical layout of the Port.⁵¹ Nor does the evidence support an allegation that these plaintiffs were subjected to continuing force even after they left the Port area.

As there is no evidence that these plaintiffs were in any way 'seized', their Fourth Amendment claim must fail.

B. QUALIFIED IMMUNITY:

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

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. *Leer v. Murphy* (9th Cir. 1988), *supra* 844 F.2d 628, 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.*,

1 159 F.3d 365, 369 (9th Cir. 1998). In *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996), the Ninth
 2 Circuit rejected a "team effort" theory of liability under § 1983 and required "integral participation"
 3 by each officer as a predicate to liability, explaining that:

4 The underlying problem with a "team effort" theory is that it is an improper alternative
 5 grounds [sic] for liability. It removes individual liability as the issue and allows a jury
 6 to find a defendant liable on the ground that even if the defendant had no role in the
 7 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.

8 Accordingly, the following defendants are entitled to qualified immunity as non-participants
 9 in the use of force against the following plaintiffs:

10 1. Ms. Coles: All defendants except for Officers Nichelini and Delrosario.⁵² Neither of
 11 the Tango Teams (Tracey, Oerlemans, Gonzales, Holmgren, Gutierrez, Romans, Knight, Tolleson,
 12 Campbell, Moore, Doolittle, Steinberger, Uu, Worden, Saunders and Fukuda) was present when Ms.
 13 Coles was allegedly jabbed by a baton at the East APL Gate. Defendants Low, Fisher and Wallace
 14 are alleged to have used force against a different plaintiff.

15 2. Mr. Smith: All members of the Blue Tango Team (Tolleson, Campbell, Moore,
 16 Doolittle, Steinberger, Uu, Worden, Saunders and Fukuda), who were not present at the East SSA
 17 Gate when less lethal was used, and Nichelini, Low, Fisher and Wallace, who are alleged to have
 18 used force against different plaintiffs.

19 3. Ms. Hanson and Mr. Bohning: All members of the Red Tango Team (Tracey,
 20 Oerlemans, Delrosario, Gonzales, Holmgren, Gutierrez, Romans and Knight), who did not use less
 21 lethal on Maritime Street, and Nichelini, Low, Fisher and Wallace, who are alleged to have used
 22 force against other plaintiffs.

23 4. Ms. Parkinson: All defendants except for Low, Fisher and Wallace, as to the claims
 24 that these officers unlawfully arrested her.

25 **2. Officers Who Fired Less Lethal or used the BUMP and the Command Staff Are**
 26 **Entitled to Qualified Immunity on First Amendment and Excessive Force Claims**

27 ⁵¹ See Port Map, Fox Dec. Ex. K

28 ⁵² Officer Nichelini is alleged to have bumped Ms. Coles with her motorcycle, and Officer Delrosario is the Red
 Tango Team officer alleged to have fired the projectile that struck her at the East SSA Gate. These defendants are
 entitled to qualified immunity on other grounds.

1 In determining whether a defendant is entitled to qualified immunity, the threshold question is
 2 whether the defendant committed an act that deprived the plaintiff of some right, privilege, or
 3 immunity protected by the U.S. Constitution or the laws of the United States. *Leer v. Murphy, supra*,
 4 844 F.2d at 632-633. If so, the courts then ask whether the constitutional right allegedly violated was
 5 "clearly established." If it was not, the defendant is immune. *Saucier v. Katz*, 533 U.S. 194, 201
 6 (2001). The plaintiff bears the burden of showing "that the particular facts of his case support a claim
 7 of clearly established right." *Backlund v. Barnhart*, 778 F.2d 1386, 1389 (9th Cir. 1985).

8 If the court decides that the defendant violated a clearly established right, it must then ask
 9 whether a reasonable officer would have believed that his conduct was clearly unlawful. "[I]f the law
 10 did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based
 11 on qualified immunity is appropriate." *Saucier, supra*, 533 U.S. at 202. "[T]o deny summary
 12 judgment any time a material issue of fact remains on the excessive force claim -- could undermine
 13 the goal of qualified immunity to 'avoid excessive disruption of government and permit the resolution
 14 of many insubstantial claims on summary judgment.' [Citation]." *Id.* at 202.

15 a. The Law Was Not Clearly Established that Defendants Could Not Declare an
 16 Unlawful Assembly and Issue Multiple Dispersal Orders

17 "'Clearly established'" for purposes of qualified immunity means that the contours of the right
 18 must be sufficiently clear that a reasonable official would understand that what he is doing violates
 19 that right." *Wilson v. Layne*, 526 U.S. 603, 614-615 (1999). While public streets often are
 20 considered public fora where the government's right to restrict free expression is limited, the Supreme
 21 Court has explained that "[p]ublicly owned or operated property does not become a 'public forum'
 22 simply because members of the public are permitted to come and go at will. *United States v. Grace*,
 23 (1983) 461 U.S. 171, 177. "We have regularly rejected the assertion that people who wish 'to
 24 propagandize protests or views have a constitutional right to do so whenever and however and
 25 wherever they please.'" *Id.* at 177-178. In *Adderley v. Florida*, (1966) 385 U.S. 39, the Court held
 26 that the arrests of civil rights protesters who blocked a nonpublic jail driveway did not violate the
 27 First Amendment where sheriff's transport vehicles and commercial vehicles servicing the jail were
 28 prevented from using the driveway. One serviceman had to wait inside the jail because the protestors
 were sitting around his truck, and the Sheriff testified that the time the protesters were there was

generally a very busy time for using the particular driveway in question. *Id.* at 46. See also, *United States v. Kokinda*, (1990) 497 U.S. 720, wherein the Supreme Court held that a sidewalk between a parking lot and the front door to a post office was not a public forum and that a ban on solicitation on such sidewalks was reasonable due to the disruption solicitation caused. *Id.*, at 728.

Of crucial importance to the strength of the government's right to restrict First Amendment expression is an assessment of the normal activities that occur at the demonstration site:

The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable. Although a silent vigil may not unduly interfere with a public library, *Brown v. Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Grayned v. City of Rockford (1972) 408 U.S. 104, 116.

Only one semicircular route traverses the Port of Oakland, and that route normally is used not by private vehicular traffic, but by the approximately 8,000 heavy trucks that daily bring goods into and out of the Port of Oakland. Due to the limited public road access and the fact that there are only four gates by which trucks can access the APL and SSA shipping lines, blockage of the gates or the road can easily shut down the entire Port. The protestors intended to do just that, and they selected a day and time when the Port experiences the heaviest truck traffic. Moreover, there are no sidewalks or other public areas on which people may congregate other than the public street. The virtual shut-down of truck traffic through the Port, with the concomitant danger that posed to the Bay Bridge transportation system, violated numerous traffic and penal laws.⁵³

⁵³ These laws include California Vehicle Code §§ 21954, requiring pedestrians walking on a roadway to yield the right-of-way to vehicles; 21956, prohibiting pedestrians from walking on roadways outside of business or residential districts except on the left-hand edge of the roadway; 2800, making it unlawful to refuse to obey a peace officer enforcing the Vehicle Code; Penal Code §§ 370, 372 and 647c which make it a misdemeanor to obstruct the free use of property or streets; Penal Code § 602.1, which makes it unlawful to interfere with a lawful business; Penal Code § 407, which defines an unlawful assembly as "assembling together to do an unlawful act; and Penal Code §§ 409 and 416, which make it a misdemeanor to fail to disperse after a warning. The demonstrators' conduct also violated Oakland Municipal Ordinances § 12.44.010 which states that persons blocking the free passage of any street or sidewalk shall disperse when directed to do so by a police officer, and § 12.44.202, which declares that it is unlawful "to conduct, take part in or address a public meeting" held on any public property within the City except for certain "free speech zones" near City Hall, or when demonstrators obtain a permit to block City streets. A participant in a lawful assembly which becomes unlawful has an

Further, OPD determined that the protestors could be allowed to demonstrate at the East APL Gate without entirely disrupting normal Port activity, and consequently made plans to allow the demonstrators to assemble there. Thus, the protestors had an alternative avenue of expression at the Port that would not result in shutting down the Port. Oakland Municipal Ordinances also provided alternatives by establishing free speech zones near City Hall and a permit process for protestors who wished to demonstrate on City streets outside the free speech zone locations or hours.

A demonstration aimed at shutting down the Port is "basically incompatible with the normal activity" of the Port. In fact, in *International Society for Krishna Consciousness, Inc. v. Lee* (1992) 505 U.S. 672, 678, the Supreme Court concluded that airport terminals operated by the New York City Port Authority were nonpublic for a, based to a great degree on the fact that the primary purpose of airport terminals was to facilitate transportation. *Id.*, at 678, 680-683. The law was not clearly established that the First Amendment prevented the OPD from declaring the Port demonstration an unlawful assembly and issuing multiple dispersal orders⁵⁴ under these circumstances. To the contrary, the Supreme Court has emphatically upheld the right of municipalities to maintain the integrity and safety of public thoroughfares. In *Cox v. New Hampshire* (1941) 312 U.S. 569, the Court affirmed the convictions of Jehovah's Witnesses who interfered with normal sidewalk traffic in various business districts in the city by marching along the sidewalks in single file, carrying signs and handing out leaflets:

The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. One would not be

immediate duty to disassociate himself from the group; remaining at the scene of an unlawful assembly makes one a guilty participant. *In re Wagner* (1981) 119 Cal.App.3d 90, 103-104.

⁵⁴ The Ninth Circuit has not held that dispersal orders must warn protestors that force will be used if they do not disperse as plaintiffs have previously asserted. In *Deorle v. Rutherford* (9th Cir. 2001) 272 F.3d 1272, 1284, the Court stated "[w]e do not hold, however, that warnings are required whenever less than deadly force is employed. Rather, we simply determine that such warnings should be given, when feasible, if the use of force may result in serious injury, and that the giving of a warning or the failure to do so is a factor to be considered in applying the Graham balancing test." In this case, moreover, as noted above, every plaintiff was aware before they were struck, that the police were using less lethal to disperse demonstrators.

1 justified in ignoring the familiar red traffic light because he thought it his religious
2 duty to disobey the municipal command or sought by that means to direct public
3 attention to an announcement of his opinions.

4 *Id.* at 574. See also, *Colten v. Kentucky* (1972) 407 U.S. 104, 109.

5 In *Cox v. Louisiana*, 379 U.S. 536 (1965), the Court rejected the argument that those who
6 chose to express their views by marching on city streets enjoy the same First Amendment protection
7 as those who express their views through speech alone. *Id.* at 556. The Court further stated:

8 The rights of free speech and assembly, while fundamental in our democratic society,
9 still do not mean that everyone with opinions or beliefs to express may address a
10 group at any public place and at any time. The constitutional guarantee of liberty
11 implies the existence of an organized society maintaining public order, without which
12 liberty itself would be lost in the excesses of anarchy. The control of travel on the
13 streets is a clear example of governmental responsibility to insure this necessary order.
14 A restriction in that relation, designed to promote the public convenience in the
15 interest of all, and not susceptible to abuses of discriminatory application, cannot be
16 disregarded by the attempted exercise of some civil right which, in other
17 circumstances, would be entitled to protection. One would not be justified in ignoring
18 the familiar red light because this was thought to be a means of social protest. Nor
19 could one, contrary to traffic regulations, insist upon a street meeting in the middle of
20 Times Square at the rush hour as a form of freedom of speech or assembly.
21 Governmental authorities have the duty and responsibility to keep their streets open
22 and available for movement.

23 *Id.* at 554-555.

24 In *ACORN v. City of Phoenix* (9th Cir. 1986) 798 F.2d 1260, 1267, the Ninth Circuit observed
25 that while pedestrian are ordinarily entitled to use public sidewalks or public parks, the same was
26 "obviously not true of streets continually filled with pulsing vehicle traffic. Consequently, more so
27 than with sidewalks or parks, courts have recognized a greater governmental interest in regulating the
28 use of city streets. For example, cities may constitutionally prohibit parades or demonstrations upon
any public streets without a special permit from city authorities...." The Court further noted that
"[t]he orderly flow of motorized traffic is a major concern in congested urban areas, particularly
because an obstruction or delay in traffic at one point along a traffic artery results in delays and
backups far back down the roadway." *Id.* at 1268.

b. The Law Was Not Clearly Established that Defendants Could Not Use the BUMP or Less Lethal

As of April 7, 2003 (and to date) no court had held that the BUMP or less lethal munitions 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. One case, *Deorle v. Rutherford* (9th Cir. 2003) 272 F.3d 1272,⁵⁵ discussed the use of bean bags prior to April 2003, but that case that did not involve the use of such weapons for crowd control. In *Deorle*, 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.

⁵⁵ The Court in *Deorle*, at 1280, also recognized that bean bags constitute a lower level of force than deadly force. See also, *Jeffers v. Gomez*, 267 F.3d 895, 901. n.2 (9th Cir. 2001).

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

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

16 *Id.* at 807.

17 Here, the demonstrators were engaged in an unlawful protest and had essentially shut down
18 the second largest port on the West Coast, threatening the Bay Bridge transportation system and
19 creating a serious public safety hazard. As in *Alexandria Women's Health Clinic*, *Forrester* and the
20 First Amendment cases cited above, OPD was concerned about the risk of harm to others and had a
21 substantial interest in preserving the rights of other citizens to go about their business in a safe
22 manner. Further, earlier efforts to disperse the crowd through direct physical contact and dispersal
23 orders had been unsuccessful. In addition, in crowd control circumstances, the law was not clearly
24 established that the use of force to disperse demonstrators constituted a seizure and was, thus, subject
25 to the reasonableness analysis of *Graham*, rather than the "shocks the conscience" standard of *County*
26 *of Sacramento*, as discussed above.

27 A review of cases dealing with less lethal munitions, even outside the crowd control context
28 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

1 not clearly established, the officers were entitled to qualified immunity. *Id.* at 782-784.

2 c. The Officers' Conduct Was Objectively Reasonable as to Both the First Amendment
 3 and Use of Force Issues

4 The Supreme Court has made it clear that qualified immunity is far-reaching. *Saucier, supra*,
 5 at 533 U.S. at 202. The immunity protects "all but the plainly incompetent or those who knowingly
 6 violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). This test "allows ample room for
 7 reasonable error" by the defendant. *Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997).
 8 See also, *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (1993). Here, OPD created written planning
 9 guides for training officers on the MFF concept and in 2002 and early 2003, it provided extensive
 10 training on the use of less lethal impact weapons to disperse crowds. Only specially trained Tango
 11 Team officers were allowed to use less lethal under the direct supervision of a sergeant. The decision
 12 on when to use less lethal for crowd dispersal purposes was delegated to the chief of police or his
 13 assigned incident commander. On April 7, Tango Team officers used less lethal dispersal techniques
 14 only upon the command of the Incident Commander. Under such circumstances, it must be
 15 concluded that it was reasonable for the officers to believe their conduct was lawful.

16 In *Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), the Court held that officers implementing
 17 policy are entitled to qualified immunity where no then-existing case law clearly established that the
 18 particular policy was unconstitutional. See also, *Dodd v. City of Norwich*, 827 F.2d 1, 4 (2d Cir.
 19 1987), *cert. denied*, 484 U.S. 1007 (1988) wherein the Court instructed the lower court to consider
 20 whether the defendant was entitled to qualified immunity based on the fact that he was following the
 21 policy and training of the police department. As the Supreme Court explained in *Pierson v. Ray*, 386
 22 U.S. 547, 555 (1967)⁵⁶, "[a] policeman's lot is not so unhappy that he must choose between being
 23 charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted
 24 in damages if he does."

24 d. The Same Principles Apply to the Command Staff

25 The same principles discussed above apply to the Command Staff. Moreover, several other
 26

27 ⁵⁶ Even though the Supreme Court subsequently replaced *Pierson's* subjective "good-faith" qualified immunity
 28 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).

1 law enforcement departments, including Seattle, San Diego, Alameda County and Contra Costa
 2 County had adopted the MFF concept and the use of less lethal munitions for crowd control purposes.
 3 March 2003 POST guidelines also recommended the use of less lethal for crowd control as did the
 4 manufacturers of bean bags and wooden dowels. OPD had successfully used less lethal earlier in
 5 2003 in two crowd control events. Under such circumstances, it cannot be said that no reasonable
 6 officer in Capt. Yee's or Deputy Chief Haw's position would have concluded that it was unlawful to
 7 order the Red Tango Team to use less lethal at the East SSA Gate on a limited basis against non-
 8 dispersing individuals when the neither the approach of the skirmish line nor two dispersal orders had
 9 succeeded in clearing the East SSA Gate.

10 As for Chief Word, he was not at the Port on April 7, and he is sued as a policy-maker for the
 11 City. (TAC, ¶ 10.) Whether or not he was a policy-maker for the City, he could not make official
 12 policy in his individual capacity. Supervisory liability will only be imposed against a supervisory
 13 official in his individual capacity "for his own culpable action or inaction in the training, supervision,
 14 or control of his subordinates, for his acquiescence in the constitutional deprivations of which the
 15 complaint is made, or for conduct that showed a reckless or callous indifference to the rights of
 16 others." *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (internal citations omitted).
 17 There is no evidence that would support liability against Chief Word in his individual capacity. See
 18 *Menotti v. City of Seattle*, 409 F.3d 1113, 1155 (9th Cir. 2005).

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

20 For the same reasons set forth above, defendants are immune from liability on the state law
 21 claims pursuant to California Government Code § 820.2.⁵⁷ In *Coming Up, Inc. v. City and County of*
 22 *San Francisco*, 857 F.Supp. 711, 718 (N.D.Cal 1994), the Court briefly discussed, without deciding,
 23 whether an immunity, comparable to the good faith immunity available in §1983 cases, existed for
 24 state law claims. The Court noted there were numerous cases in which police officers had been
 25 granted immunity pursuant to Gov. C. § 820.2, and it compared the language of § 820.2 to that in
 26 *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991) in which § 1983 qualified immunity

27 _____
 28 ⁵⁷ 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* (1995) 32 Cal.App.4th 48.

1 protected “government officials performing discretionary functions.”

2 Other parallels have been drawn between § 820.2 and the parameters of § 1983 liability. In
 3 *Martinez v. County of Los Angeles*, 47 Cal.App.4th 334, 349 (1996) the Court noted that the test for
 4 determining whether a homicide by a peace officer was justifiable, and thus immunized, was whether
 5 the circumstances reasonably created a fear of death or serious bodily injury to an officer or to
 6 another. It pointed to *People v. Rivera*, 8 Cal.App.4th 1000, 1007 (1992) noting that the court therein
 7 applied a Fourth Amendment “reasonableness” analysis in finding that the use of an attack dog by a
 8 police officer was justified because the officer “reasonably feared for his safety, and that of others in
 9 the area.” The Court said: “The same is true of Government Code section 820.2, which provides
 10 immunity from liability to public employees for their discretionary acts.” *Ibid.* (See also *Edson v.*
 11 *City of Anaheim*, 63 Cal.App.4th 1269 (1998) - applying federal standards to state law unreasonable
 12 force claims.) Accordingly, for the same reasons the officers would be entitled to qualified immunity
 13 under § 1983, they are entitled to the immunity provided by § 820.2 on plaintiffs’ state law claims.

14 IV. CONCLUSION

15 For all of the foregoing reasons, defendants respectfully submit that they are entitled to
 16 summary judgment or, in the alternative, summary adjudication, on the Fourth Amendment claims of
 17 Coles plaintiffs as there are no facts which support their claim that they were ‘seized’ by defendants.
 18 Defendants further submit they are entitled to qualified immunity on the § 1983 claims and
 19 discretionary immunity on the state law claims as the use of less lethal did not violate plaintiffs’
 20 constitutional rights, the law was not clearly established, and the use of less lethal was objectively
 21 reasonable under the circumstances.

22 Dated: November 3, 2005

BERTRAND, FOX & ELLIOT

/S/

24 By: _____

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 26 Arlene C. Helfrich
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