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8 **UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

9 SRI LOUISE COLES, RON SMITH, JENNIFER
10 HANSEN, DAVE TELLES, SCOTT BOHNING,
and LINDSAY PARKINSON, individually,
11 Plaintiffs,
12 vs.
13 CITY OF OAKLAND, et al.,
14 Defendants.

) **No. C 03-2961 TEH (JL)**
)
) Hon. Thelton E. Henderson
)
) **COLES PLAINTIFFS' NOTICE**
) **AND MOTION FOR PARTIAL**
) **SUMMARY JUDGMENT;**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES**
)
)
) Hearing Date: December 12, 2005
) Time: 10:00 a.m.
) Hon: Thelton E. Henderson
)
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1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on December 12, 2005, at 10:00 a.m., Plaintiffs Sri Louise
3 Coles, Jennifer Hansen, Dave Telles, and Scott Bohning, by and through their attorneys, will move
4 this Court, located at 450 Golden Gate Avenue, San Francisco, CA 94102, for partial summary
5 judgment pursuant to FRCivP 56. Specifically, these Plaintiffs will seek partial summary judgment
6 as follows:
7

- 8 1. A finding, as a matter of law, that the Oakland police used excessive force against
9 each of them when they were shot by “less-lethal” projectiles at the Port of Oakland
10 on April 7, 2003;
11 2. A finding of liability against Defendants City of Oakland, Chief Word, DC Haw,
and Captain Yee as to these Plaintiffs’ claims under the Fourth Amendment and
Cal. Civil Code § 52.1.

12 This motion is based on the Memorandum of Points and Authorities that follows, the
13 declarations of Michael J. Haddad and Julia Sherwin filed in support of the Motion, all documents
14 and records filed in the case, and on such further written and/or oral argument and evidence as may
15 be submitted.
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MEMORANDUM OF POINTS AND AUTHORITIES

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25 A. By Intentionally Shooting with Less-Lethal Projectiles, Without Warning,
 26 Non-Threatening, Dispersing Plaintiffs, Defendants Violated Plaintiffs’ Fourth
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1 **I. INTRODUCTION**

2 Plaintiffs Sri Louise Coles, Ron Smith, Jennifer Hansen, and Scott Bohning each went to the
 3 Port of Oakland on April 7, 2003, to peacefully attend an anti-war demonstration. Instead, they
 4 were struck by “less-lethal” projectiles fired at them by the Oakland Police. These Plaintiffs now
 5 move for partial summary judgment against Defendants. Plaintiffs seek a finding as a matter of law
 6 that they were subjected to excessive force when Defendants shot them with such projectiles, and a
 7 finding of liability against Defendants Chief of Police Richard Word, Deputy Chief of Police
 8 Patrick Haw, Captain Rod Yee, and the City of Oakland, for their direct orders and involvement in
 9 the decision to shoot “less-lethal” projectiles into a crowd of people exercising their First
 10 Amendment rights.
 11

12 Although the incident at the Port of Oakland on April 7, 2003, involved hundreds of
 13 demonstrators, media, police, and others, and involved hundreds of uses of force by Oakland police
 14 at many locations throughout the Port that morning, this motion is limited to four peaceful Plaintiffs
 15 who were hit by police projectiles fired at them at essentially two locations.¹ Moreover, this motion
 16 focuses on these discrete uses of force under the Fourth Amendment and California Civil Code §
 17 52.1 only. Plaintiffs’ remaining claims are not at issue here.
 18

19 **II. STATEMENT OF FACTS**

20 **Physical Layout of the Port of Oakland.** A map of the Port is attached as Exhibit A.²
 21 The shipping company gates are designated on the map by numbers: 2 (East APL gate), 3 (West
 22 APL gate), 4 (East SSA gate) and 5 (West SSA gate). Point # 5 is also the intersection of Middle
 23 Harbor Road (MHR) and Maritime Street. Immediately North of that intersection, Maritime Street
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25
 26 ¹ Other police conduct and violations of rights experienced by these Plaintiffs, such as interference with free
 27 speech, motorcycle strikes, or baton jabs at other locations, will not be addressed in this motion.

28 ² All exhibits referenced herein are attached to the Declaration of Michael J. Haddad in support of this
 motion, with the exception of Exhibit U, a videotape attached to the Declaration of Julia Sherwin.

1 is enclosed on both sides by high fences, “a very contained area,” as described by Oakland Deputy
2 Police Chief Patrick Haw, which leads up to point # 6, Seventh Street. Ex. B, Haw, 187.

3 **“Less-Lethal” Munitions.** The two types of “less-lethal” projectiles were
4 “deployed,”³ i.e., fired, at the Port of Oakland on April 7, 2003, are “12-gauge, drag-stabilized
5 bean bag rounds” and “37 mm wooden dowels.” Ex. C, photos. The drag-stabilized bean bags are
6 actually lead birdshot, wrapped in a cloth bag, and fired from a normal 12-gauge shotgun. Ex. D,
7 Tolleson, 253, 258-259. The “bean bags” travel at 280 feet per second according to their
8 manufacturer’s specifications, or 191 miles per hour.⁴ Ex. E. A “less-lethal” bean bag can kill a
9 person if it strikes a person’s head, neck, or other vital areas. Ex. D, Tolleson, 17-18, 53; Ex. F,
10 Tracey, 45-46. Chief Word agrees it would be a use of deadly force to intentionally deploy a bean
11 bag at a person’s head. Ex. G, Word, 151.

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14 The 37 mm wooden dowels are fired from a large 37 mm gun, and come out five at a time.
15 Ex. E. Like the bean bag, the wooden dowels travel at 191 miles per hour. Id. However, wooden
16 dowels are supposed to be “skip-fired” off the ground three meters in front of the target. Ex. D,
17 Tolleson, 262-263, 364-365. Once the wooden dowels hit the ground, it is impossible to control
18 their movement. Id. They can splinter and bounce any which way. Id. On April 7, 2003, the 37
19 mm wooden dowels were skip-fired into the crowd generally, rather than in front of any particular
20 person, in order to disperse the crowd. Ex. D, Tolleson, 361. Officer Steinberger, an officer who
21 deployed the 37 mm wooden dowels during the incident, knew he could only target a person’s head
22 if deadly force was justified. Ex. H, Steinberger, 85-88. Officer Steinberger also knew that those
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26 ³ To “deploy” a “Less-Lethal” projectile means to fire a round from a gun. Ex. F, Captain Tracey, 193.

27 ⁴ Sgt. Gary Tolleson, the senior munitions instructor and one of the most knowledgeable OPD officers
28 concerning this type of munition, has *incorrectly* trained OPD officers that 280 feet per second is equal to 85
miles per hour – like a “hardball” thrown by a college pitcher. Ex. D, Tolleson, 19, 55, 210-211, 257.
Actually, 280 feet per second is equal to 191 miles per hour.

1 wooden dowels are prone to skip higher than intended, and have the potential to strike a person in
2 the head, even if not aimed there. Id.

3 Stinger grenades⁵ were also thrown by hand at various locations. These frightening, yet
4 relatively harmless, munitions are not at issue in this motion.

5 **Plaintiffs.** Plaintiffs Sri Louise Coles, Scott Bohning, and Jennifer Hansen, each went to the
6 Port of Oakland on that morning to participate peacefully and lawfully in a demonstration against
7 the Iraq War and shipping companies' war profiteering. Ex. I, Coles, 60-64; Ex. J, Bohning, 28-29;
8 Ex. K, Hansen, 16, 20-21. None of them intended to engage in any civil disobedience or violate the
9 law. Id. Plaintiff Ron Smith went to the demonstration as an independent journalist to document
10 the event. Ex. L, Smith, 36-40, 44-45.

11
12 Defendants inappropriately applied deadly force to Sri Louise Coles (shooting her in the
13 face), Ron Smith (shooting him in the hand that held his video camera to his face), and Scott
14 Bohning (shooting him in the face). Defendants further applied excessive force to Scott Bohning
15 (shooting him in the back and his right hand at the same time he was shot in the face) and Jennifer
16 Hansen (shooting her in the back of her right upper arm). All of these Plaintiffs were shot as they
17 were "dispersing," as will be more fully described below.

18
19 **Defendants.** The decision to fire "less-lethal" projectiles into the crowd was made at the
20 highest levels of the Oakland Police Department (OPD). Deputy Chief ("DC") Patrick Haw and
21 Captain Rod Yee were both listed by the OPD as "Incident Commander" for this incident. Ex. N.
22 Both DC Haw and Captain Yee were present at the Port during all uses of "less-lethal" munitions.
23 Captain Yee recommended that "less-lethal" projectiles be fired into the crowd, and DC Haw made
24 the final decision to order their "deployment." Ex. O, Yee, 114-116; Ex. B, Haw, 152-155; Ex. G,
25

26
27 ⁵ The "Stinger Grenades" were thrown above the crowd, and with a loud explosion from a "firecracker"
28 inside, would emit smoke and small rubber pellets. Ex. F, Tracey, 233-234; Ex. D, Tolleson, 276-279.
Stinger grenades cannot cause the types of injuries sustained by Plaintiffs herein. Id.

1 Word, 89-90. Police Chief Richard Word authorized the use of “less-lethal” munitions for crowd
2 dispersal in advance of this event, and personally delegated his authority to order their deployment
3 at the event to the Incident Commanders. Ex. G, Word, 24-25, 32. Chief Word was the police
4 department’s “highest policy-making officer,” and the person “ultimately responsible for all
5 policies, procedures, and training” of the OPD. Id. at 25.
6

7 The decision to deploy, or fire, “less-lethal” projectiles at the crowd was passed down
8 through lieutenants to Sergeants Edward Tracey⁶ and Gary Tolleson, the leaders of the “Red” and
9 “Blue” “Tango Teams,” respectively. Ex. F, Tracey, 202-203. The “Tango Teams” consisted of 7-
10 8 officers who actually fired the “Less-Lethal” projectiles at people in the crowd. The “Red” team
11 included Officers Del Rosario, Gutierrez, Gonzalez, and Holmgren, who fired drag-stabilized bean
12 bags into the crowd in the vicinity of point #4. Ex. F, Tracey, 167. One or more of those four
13 “Red” team shooters fired the beanbags that struck Plaintiffs Sri Louise Coles and Ron Smith, on
14 MHR just west of point #4 (East SSA gate). The “Blue” team included Officers Worden, Uu,
15 Steinberger, Doolittle, Saunders, Sgt. Campbell, and Sgt. Tolleson, who fired either drag-stabilized
16 bean bags or 37 mm wood projectiles into the crowd, striking Plaintiffs Scott Bohning and Jennifer
17 Hansen on Maritime Street, just North of point #5. Ex. D, Tolleson, 297-299, 303-305.
18

19 The Red and Blue teams never fired projectiles at the same location where the other team
20 fired projectiles. At point #4, only the Red team only fired projectiles, and only fired drag-
21 stabilized bean bags. Ex. F, Tracey, 206-211. At point #5 and north on Maritime Street, only the
22 Blue team fired projectiles; however in that area, the Blue team fired both bean bags and wooden
23 dowels. Ex. D, Tolleson, 303-305; Ex. F, Tracey, 210-211.
24

25 Although individual officers pulled the triggers, Chief Word explained, “To my knowledge,
26 no officer made an individual decision to deploy force without first being given the okay. They’re
27

28 ⁶ Sgt. Tracey is now an acting Captain.

1 directed to do so by a command officer.” Ex. G, Word, 153. Ultimately, all officers involved were
 2 exonerated from use of force complaints due to the department’s conclusion that all “less-lethal”
 3 uses of force on April 7, 2003, were ordered by command officers and “consistent with department
 4 policy and training.” Ex. P, Internal Affairs memos.

5 **Dispersal Orders.** Captain Yee gave all the dispersal orders to the crowd at various
 6 locations at the Port of Oakland on April 7, 2003. Ex. O, Yee, 120-123. Captain Yee gave all of
 7 the dispersal orders from a printed card.⁷ Id. The police never told the crowd where to disperse to
 8 or how far to disperse in the Port of Oakland which encompasses several square miles. Id. The
 9 Defendants admit that none of the dispersal orders given at the Port that day “specifically
 10 identif[ied] the boundries of the area police were ordering people to leave,” nor did they “specify
 11 how far people were expected to disperse.” Ex. Q, Admissions nos. 22 and 23.

12 **Background.** Given the focus of this motion, it is not necessary to recount in detail the full
 13 chronology of events. However, it is helpful to understand the physical layout of the Port and some
 14 of the major events that happened before these Plaintiffs were shot.

15 At point #3, the West APL gate, at a little after 7:00 am, Captain Yee read the dispersal
 16 order twice to a crowd of approximately 250-350 people.⁸ Ex. O, Yee, 110-125; Ex. B, Haw, 99-
 17 101. That gate was cleared, without the use of munitions, by a police line moving toward the
 18 crowd. Ex. B, Haw, 101. The crowd moved away from that gate, and into MHR. Ex. B, Haw, 129.

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 24 ⁷ That card from which Captain Yee read all of the dispersal orders states: **Dispersal Order.** “I am
 25 (Rank/Name) of the Oakland Police Department. I hereby declare this to be an unlawful assembly and, in
 26 the name of the People of the State of California command all those assembled at (give specific location) to
 27 immediately disperse. If you do not do so, you will be arrested.” Ex. R. At the West APL gate, video
 28 footage exchanged between the parties shows that Captain Yee ordered the crowd to disperse from that
 specific gate, “1579 Middle Harbor Road.” Captain Yee does not know whether he gave the “specific
 location” every time he read the dispersal order Ex. O, Yee, 120.

⁸ Previously, two attempts were made to give a dispersal order from a helicopter, but everyone agrees that
 order was not audible.

1 Next, the police line stopped across Middle Harbor Road. Id. The police intended to
2 disperse the crowd west on MHR. Id. Even though the crowd had already dispersed from the West
3 APL gate, and although no additional dispersal order was given, the police expected the crowd to
4 keep moving west, as Deputy Chief Haw explained:

5 Q: Now, at any time during these dispersal orders, were demonstrators told
6 where to go?

7 A: No. They were told to leave. I mean, the options were apparent. There was
8 one option. They had to go west.

9 Q: Okay. They had to go west?

10 A: It was apparent, because we were to the east of them and we weren't – they
11 weren't going to disperse through us.

12 Q: Okay. So you wanted them to go west?

13 A: That was our intention, yes sir.

14 Q: And it was obvious to you but it wasn't directly communicated to them; is
15 that a fair statement?

16 A: That's a fair statement, yes.

17 Ex. B, Haw, 138.

18 At approximately 7:38 am, the police used "less lethal" force against the crowd assembled in
19 MHR west of point #3, including stinger grenades and drag stabilized bean bags. Ex. O, Yee, 104-
20 105, 134-135. According to Captain Yee, "Everybody in MHR at that point was in violation of the
21 dispersal order," and subject to being shot with bean bags. Id. at 135.

22 On April 7, 2003, the police generally drove the crowd in a westerly direction on Middle
23 Harbor Road from point #3 (the West APL gate), then following that road after it bends, north
24 through points #4 and #5, and continuing north on Maritime Street to point #6. This was not
25 accomplished in one continuous movement, for the crowd, or new and existing members of the
26 crowd, would leave one gate and appear in the driveway of the next gate only to be told again to
27 "disperse" – presumably from the new gate.
28

1 At point # 4, several minutes after police fired bean bags near the West APL gate, Captain
2 Yee again read dispersal orders to a crowd of 200-250 people demonstrating in front of the East
3 SSA gate. Ex. O, Yee, 150-155, 162. Captain Yee believes that at this gate, he also told the crowd
4 to “move west.” Ex. O, Yee, 159-160. Unfortunately, Captain Yee got mixed up in his directions.
5 At this gate, “west” was the direction that would take one into the gate, not up Maritime Street as
6 Captain Yee apparently intended. Ex. A, Map. Moreover, in his own mind, Captain Yee says he
7 thought that compliance with his dispersal order required the crowd to go all the way to the West
8 Oakland BART Station, however, he never so instructed the crowd. Id. Without telling anyone,
9 Captain Yee expected the crowd to disperse, on foot, 1.48 miles to the BART Station. Ex. S,
10 Mapquest directions/map.
11

12 In response to this vague and confusing dispersal order, some members of the crowd moved
13 away from that gate and went into MHR. Ex. O, Yee, 163. Plaintiff Sri Louise Coles was one of
14 those people who attempted to heed the dispersal order, left the East SSA gate, and moved into the
15 street. Ex. I, Coles, 100-102. At approximately 8:02 am, Red team leader Sgt. Tracey was given
16 the order to deploy stinger grenades and bean bags against members of the crowd at the East SSA
17 gate and in MHR in front of that gate. Ex. F, Tracey, 201-203. The police line moved north on
18 MHR, firing beanbags from several locations as they went. Ex. F, Tracey, 227-230.
19

20 Some police officers have claimed that at various times and locations, some members of the
21 crowd threw rocks or other things toward the police. Although Sgt. Tracey was at the front of the
22 police line, he did not witness anything being thrown toward the police in the area of point #4. Ex.
23 F, Tracey, 200-201. Neither did Captain Yee. Ex. O, 164. Neither did DC Haw. Ex. B, Haw, 260-
24 261. Lt. Dave Kozicki, who led the motorcycle contingent of the police skirmish line and was
25 present at point #4, never saw anything thrown toward the police until the police got to point #6,
26 Seventh Street. Ex. T, Kozicki, 158, 253.
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1 **Sri Louise Coles.** Video shows that as the line of police motorcycles and officers on foot
2 advanced down MHR, police began throwing more stinger grenades over the crowd. The grenades
3 exploded with loud bangs. Plaintiff Sri Louise Coles and her friend Susan Maxwell took cover in
4 front of a red conversion van parked along the road. A police officer made them leave, but just as
5 they stepped out, police motorcycles drove up fast, revving their engines, and one motorcycle struck
6 Ms. Coles.⁹ Ms. Coles and her friend took cover in front of a blue parked car. This time, an officer
7 came up and forcefully pushed Ms. Coles from her position of safety, throwing her directly into the
8 path of the oncoming police line. Ms. Coles immediately ran northeast, away from the approaching
9 police line and towards the eastern edge of MHR. She was dispersing. As she neared the gravel
10 shoulder, she turned to her right to say something to a woman holding a camera. Then, as she was
11 in the process of turning again to the right to continue north, she was shot in the face. The bean bag
12 hit her on the left side of her face – the side that was exposed to the police line, mid-turn. Ex. U,
13 VIDEO¹⁰; Ex. V, Coles Interrog. no. 1; Ex. I, Coles, 105-119. This was also witnessed by Miles
14 Montalbano, who filmed video of Ms. Coles just before she was struck, and who was shot by the
15 same officer who shot Ms. Coles. Ex. W, Montalbano, 157-181.

18 DC Haw can also be seen in the video of Ms. Coles, standing just behind the police skirmish
19 line. He has red hair and he was not wearing any head protection. Ex. U, VIDEO; Ex. Y, Sgt.
20 Wallace, 83-84; Captain Yee was also there with DC Haw. Ex. O, Yee, 150-158. Ms. Coles was
21 shot right in front of DC Haw and Captain Yee.

23 **Ron Smith.** Independent journalist Ron Smith brought both a still camera and a video
24 camera to the Port. Ex. L, Smith, 79. Mr. Smith wore multiple press passes prominently displayed
25 from a lanyard around his neck. Ex. L, Smith, 40, 44-45, 98-99; Ex. M, press passes.

27 ⁹ Defendants admit this motorcycle hit in their Answer. Ex. X, Third Am. Complaint and Answer, ¶ 19 (a).

28 ¹⁰ This exhibit is attached to the Declaration of Julia Sherwin in support of this motion.

1 Within seconds of when Ms. Coles was shot in the face, Plaintiff Ron Smith was shot in his
2 left hand as he was using that hand to hold his video camera to his face. Mr. Smith's video of that
3 moment confirms that in the seconds before he was shot, he was backing away from the police line,
4 dispersing, as he was filming the police. He was at least at least four to six car lengths in front of
5 the police line when he was shot.¹¹ Ex. U, VIDEO; Ex. L, Smith, 96-102. Mr. Smith's video
6 camera actually captured the projectile that struck him. The slow motion version shows a light
7 colored trail as the bean bag went from an officer in the police line to Mr. Smith's hand holding the
8 lens of the video camera. Ex. U, VIDEO.

10 Sgt. Tracey's Red team eventually stopped, and was relieved by Sgt. Tolleson's Blue team
11 at point #5. Ex. D, Tolleson, 303-305. The police set up a new skirmish line at the intersection of
12 MHR and Maritime Street, then began advancing on the crowd in Maritime Street, under the
13 supervision of DC Haw and Captain Yee. Ex. D, Tolleson, 303-305, 319-320, 325. The crowd was
14 approximately 100 feet north of the police, with many in the crowd walking away from the police.
15 Ex. D, Tolleson, 333-334. The police threw stinger grenades, and opened fire with bean bags – and
16 for the first time – wooden dowels. Id. The police shot these projectiles at several locations on
17 Maritime Street as they followed the crowd, at a brisk pace, north towards Seventh Street. Ex. D,
18 Tolleson, 303-304, 312, 340-343.

20 **Jennifer Hansen.** Plaintiff Jennifer Hansen had been at point #3, the West APL gate, when
21 the police first cleared that gate. Ms. Hansen left the West APL gate as she understood the police
22 order and went to the north side of MHR. She dispersed west, then north as MHR turned north, all
23 the while with the line of police at her back, intermittently firing bean bags and throwing stinger
24 grenades into the crowd. Ms. Hansen made it to point #5, where she stood and rested for 5-10
25 minutes, trying to figure out what to do. The police line re-formed at point #5 (this time, with Sgt.
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27 _____
28 ¹¹ The same red conversion van is apparent in video of both Ms. Coles and Mr. Smith. Ex. U, VIDEO.

1 Tolleson's Blue team supplying the "Less-Lethal" force). Ms. Hansen did not hear any police
2 announcement at that location. She started walking north up Maritime Street, and the police line
3 started following the crowd again. Then the police started shooting again. Ms. Hansen was struck
4 by a police projectile in the back of her right arm as she was dispersing away from the police, going
5 north on Maritime Street, with tall fences enclosing each side of that street. She estimates that she
6 was approximately one-half block north of point #5 when she was shot. Ex. Z, Hansen
7 Interrogatory Response No. 1; Ex. K, Hansen, 19-69.
8

9 **Scott Bohning.** Plaintiff Scott Bohning arrived late at the West Oakland BART Station. A
10 car pool dropped him off at point #6, Seventh and Maritime Streets, and he began walking south on
11 Maritime to where he thought the demonstration was taking place. From approximately 1 ½ blocks
12 before point #5, he could see some people, including police, in the distance. At about one block
13 before point #5, he heard a loud bang, and saw people moving around at point #5. Mr. Bohning
14 continued walking no more than 20 yards when he encountered many people moving north, away
15 from point #5. He paused for several seconds. He still did not know what was happening. Then,
16 he turned around, and began walking back towards point #6 on the far right side of the enclosed
17 roadway with the rest of the crowd. The police line of motorcycles and officers was behind him, as
18 he was dispersing north on Maritime Street. About halfway between points #5 and #6, Mr. Bohning
19 "heard a bang and turned around to see where the police were an instant before I was hit in several
20 places on my body and face." Ex. AA, Bohning Interrog answer no. 1; Ex. J, Bohning, 32-65. Mr.
21 Bohning was shot once on his nose, three times on his back, and once on his right hand, all within
22 about a second. Ex. J, Bohning, 60-61, 78. Mr. Bohning was walking north, about 40-50 feet in
23 front of the police line when he was shot. Ex. J, Bohning, 63.
24
25

26 **Plaintiffs Were Seized.** As described above, the police terminated Plaintiffs' freedom of
27 movement through means intentionally applied. Plaintiffs Coles, Smith, Hansen, and Bohning were
28

1 each dispersing in the direction the police were forcing them to go before they were shot. Plaintiff
2 Sri Louise Coles was actually physically thrown out into the roadway and into the line of fire by a
3 police officer just before she was shot. Ex. U, VIDEO; Ex. V, Coles interrog answer no. 1; Ex. I,
4 Coles, 105-119. Plaintiff Ron Smith was backing away from the police line, the only way he could
5 go, as that line advanced and fired at him. Plaintiffs Jennifer Hansen and Scott Bohning were
6 forced to go north on Maritime Street, “a very contained area” (Ex. B, Haw, p. 187) fenced in on
7 both sides, with the police spread across the roadway to their south, following them, and shooting
8 projectiles at their backs. Even after Mr. Bohning was hit with five projectiles, he tried to stop
9 twice to receive medical treatment from a medic, but was forced to keep moving north by the line of
10 police firing more projectiles. Ex. J, Bohning, 73-76.

12 Additionally, each of these Plaintiffs has signed similarly worded interrogatory answers
13 explaining why they were not “free to leave” the Port as Defendants had requested them to admit.

14 A representative interrogatory answer is as follows:

16 I was not always “free to leave” the Port, because I was briefly stopped from
17 leaving the Port by a police projectile striking me in my face after a police officer
18 pulled me for a second time from a position of safety, and as I was dispersing away
19 from the police line. Also, I was not “free to leave” in whatever direction, speed, or
20 manner that I might have chosen, because the police were forcing me and others to
21 leave before I was ready to leave, and forcing us to move in a single direction, in
22 great haste, while shooting at us with dangerous projectiles and threatening us with
23 motorcycles. The Oakland police took away my freedom of movement by taking
24 action to forcefully funnel me and others down a long narrow path through the Port
25 of Oakland. I was forced to submit to police authority by following the only route
26 left open to me by police after I was physically pulled by an officer from a position
27 of safety behind a parked car and thrown out into the line of fire.

28 Ex. BB, Coles Interrog answer no. 20 (RFA No. 7). *See also*, Ex. BB, Smith Interrog answer no. 20
(RFA No. 7), Hansen Interrog answer no. 18 (RFA No. 7), and Bohning Interrog answer no. 18
(RFA No. 7).

From Captain Yee’s point of view, the skirmish line, motorcycles, and officers with helmets,
not to mention the “less-lethal” gunfire, were enough to make a reasonable person disperse all the

1 way up MHR, Maritime Street, and Seventh Street, from the East SSA gate to the West Oakland
2 BART Station – a distance of almost 1 ½ miles. Ex. O, Yee, 160.

3 As DC Haw summed it up, “the options were apparent. There was one option. They had to
4 go west. ... It was apparent, because we were to the east of them and we weren’t – they weren’t
5 going to disperse through us.” Ex. B, Haw, 138.

6
7 **Plaintiffs Were Intentionally Struck by Police Projectiles.** Defendants have admitted the
8 following in their Answer to the *Coles* Third Amended Complaint:

9 “An officer shot a projectile at Plaintiff Ron Smith, striking him in his left hand as he
10 was using that hand to hold a camera to his face to film this demonstration and the
Oakland police response to it;”

11 “An officer shot a projectile at Plaintiff Jennifer Hansen, striking her in the back of
12 her right, upper arm;”

13 “Plaintiff Scott Bohning was struck multiple times by projectiles fired by the police,
including on his nose, hand, and three times on his back.”

14 Ex. X, Third Am. Complaint and Answer, ¶ 19(c), (d), and (f). Additionally, the trail of the
15 projectile from the police to Ron Smith’s video camera is clearly visible on the slow motion version
16 of his video taken at that time. Ex. U, VIDEO.

17 Photographs of each Plaintiff’s impact injuries are at Exhibit CC.

18 Plaintiff Sri Louise Coles was struck in the face by a bean bag. At point #4, where she was
19 shot, the Red team deployed bean bags and not wooden dowels. Ex. F, Tracey, 206-211. Ms. Coles
20 felt a strong impact to the left side of her face, from a projectile that came from the left – the
21 direction of the police. Ex. I, Coles, 120-122. From the video, it is apparent that police were
22 shooting beanbags in Ms. Coles’ direction at that moment. In fact, the officer who shot her can be
23 seen pointing a 12 gauge shotgun in her direction. Ex. U, VIDEO. Videographer Miles
24 Montalbano witnessed the officer aim and shoot Ms. Coles just before that same officer shot Mr.
25 Montalbano. Ex. W, Montalbano, 157-181.
26
27
28

1 Later that day, Chief Word was on KTVU News when he reviewed a picture of Ms. Coles'
2 wound. Chief Word then admitted: "We've had some of our, uh, weapons folks look at this and
3 they say this is consistent with a bean bag strike, the bean bag round." Ex. U, VIDEO. Senior
4 munitions instructor Sgt. Tolleson also has reviewed photos of Ms. Coles' wound, and he believes
5 Ms. Coles was struck by a bean bag. Ex. D, Tolleson, 52-53. Defendants have no evidence that she
6 was struck by anything else.¹²
7

8 Defendants admit that "each drag stabilized 'bean bag' projectile" and "each 37 mm wooden
9 baton round" "fired by Oakland police officers at the Port of Oakland on April 7, 2003 was
10 intentionally deployed." Ex. Q, Admissions nos. 18 and 19.

11 Although Defendants clearly shot these Plaintiffs, Defendants claim that they are unable to
12 identify any specific officer who shot Plaintiffs Coles, Smith, Hansen, or Bohning with less-lethal
13 projectiles. Ex. FF, Defs' Interrog. Answer nos. 4, 5, 6, 7.
14

15 **No Warning.** Defendants admit that "Oakland police did not give any warning at the Port
16 of Oakland on April 7, 2003 that those individuals deemed by police to be in violation of a dispersal
17 order could be subject to 'less lethal' force by police, including being struck by drag-stabilized
18 "bean bag" projectiles fired from 12 gauge shotguns." Ex. Q, Admission no. 20. Similarly,
19

20
21 ¹² While the Defendant Officer Chris Del Rosario denies shooting Ms. Coles in the face, the evidence is
22 overwhelming that he is her shooter. Witness Miles Montalbano testified that the officer who shot Sri Louise
23 Coles and Mr. Montalbano was shorter in stature, had a mustache, and was darker skinned, not African-
24 American but may have been Latino. Ex. W, Montalbano, 176. Defendant Officer Chris Del Rosario is five
25 feet six inches tall. Officer Del Rosario was the only Red Tango Team member using a 12-gauge shotgun
26 [and therefore shooting bean bag rounds] who had a mustache. Ex. F, Tracey, 208-209; Ex. DD, Del
27 Rosario, 116. KTVU News footage shows Defendant Del Rosario with a mustache, bare hands, and
28 ammunition in his gun strap on April 7, 2003, and his supervisor, Edward Tracey, identified the person in
that footage as Defendant Del Rosario. Ex. U; Ex. F, Tracey, 231-232. Defendant Tracey reviewed the
video of Ms. Coles' shooter, and testified about the shooter, "There's a strong possibility, yes, it's Del
Rosario. Yes, sir." Ex. F, Tracey, 225. On the afternoon of April 7, 2003, Defendant Del Rosario went to
court and told the sister of a criminal defendant that he "had to shoot a lot of people today" at the Port of
Oakland, and sarcastically said he "shot this one bitch in the forehead and her titties popped out." Ex. EE,
Jovan Johnson Decl. ¶ 7. Defendant Del Rosario now denies shooting any women, but admits that any
reasonable officer would know not to target the head. Ex. DD, Del Rosario, 113-114.

1 Defendants admit that no warning was given before shooting people with wooden dowels either.
2 Ex. Q, Admission no. 21.

3 DC Haw was asked why the police did not give a warning that less-lethal force could be
4 used against the crowd if they failed to disperse. He answered: “There’s no requirement to do that.
5 It’s not part of the dispersal order that we use.” Ex. B, Haw, 216.

6 Clearly warnings were feasible. If police could give dispersal orders, police could tell the
7 crowd that failure to disperse (to a specific location, along clear routes) could result in “less-lethal”
8 force being used, including the use of drag-stabilized beanbags and wooden dowels. DC Haw
9 agrees, “We potentially could have attempted to do it, yes.” Ex. B, Haw, 219.

10 Defendants’ Use of Force policy required a warning, “if practical,” before deploying a bean
11 bag round at a person. Ex. GG, G.O. K-3 (III. J. 5). As to why he did not give any warnings on
12 April 7, 2003, Captain Yee simply states, “I didn’t even think about it.” Ex. O, Yee, 123.

13 **No Justification to Shoot these Plaintiffs.** Both bean bags and 37 mm wooden dowels can
14 be lethal, especially if they strike a person’s head or other vital area. Ex. D, Tolleson, 17-18, 53;
15 Ex. F, Tracey, 45-46. DC Haw agrees, “[S]erious injuries can certainly result from the deployment
16 of less-lethal weapons.” Ex. B, Haw, 166.

17 Defendants’ own Use of Force policy, G.O. K-3, under which all Defendants were trained,
18 stated: “The flexible baton [bean bag round] may be utilized only when lower levels of force have
19 been exhausted, are ineffective, or are inappropriate during attempts to control or subdue violent or
20 combative persons and the use of lethal force can be forestalled.” Ex. GG, G.O. K-3 (III. J. 3).

21 Even Defendants’ written policy did not allow the use of bean bag rounds merely for crowd
22 dispersal. Deputy Chief Howard Jordan confirms, members of the OPD were *only allowed* to
23

1 deploy bean bags in conformance with the K-3 Use of Force policy which specifically defined the
2 limited circumstances for their use. Ex. , Jordan, 84-85.¹³

3 Defendants admit “Defendants have no evidence or testimony that Plaintiff [Sri Louise
4 Coles, Ron Smith, Jennifer Hansen, and Scott Bohning] ever personally engaged in violence or
5 threatened violence at the Port of Oakland on April 7, 2003.” Ex. Q, Admissions nos. 2, 5, 8 and 11.
6

7 Defendants also admit “Defendants have no evidence or testimony that any of Plaintiffs
8 [Coles, Smith, Hansen, and Bohing] ... ever threw, or attempted to throw, any rock or other item at
9 anyone at the Port of Oakland on April 7, 2003.” Ex. Q, Admission no.16.

10 Defendants also admit that “Defendants have no evidence or testimony that Plaintiff [Ron
11 Smith, Jennifer Hansen, and Scott Bohning] ever personally posed a threat to anyone at the Port of
12 Oakland on April 7, 2003.” Ex. Q, Admissions nos. 4, 7 and 10. Although Defendants refused to
13 admit this request as to Ms. Coles, Defendants were unable to identify any evidence in their
14 corresponding interrogatory answer to support a claim that Ms. Coles ever posed a threat to anyone
15 near the East SSA gate, the general area of MHR where she was shot. Ex. FF Defs’ Interrog..
16 answer no. 1 (RFA 1). The video footage makes clear that she was either taking cover or trying to
17 run to safety the entire time, and posed no threat to anyone. Ex. U.
18

19 All of these four Plaintiffs were dispersing when they were shot. Defendants admit that it
20 would be a use of excessive force to shoot with a “less-lethal” projectile a person who is dispersing.
21 Ex. O, Yee, 149-150; Ex. B, Haw, 165; Any reasonable officer would know that. *Id.*, at Ex. O.
22

23 It is also clear that Ms. Coles, Mr. Smith, and Mr. Bohning should not have been shot in the
24 face. Chief Word agrees it is “strictly forbidden” to fire a bean bag at a person’s head, because “to
25 do so would constitute deadly force.” Ex. G, Word, 151; Ex. HH, Jordan, 99-100; Ex. F, Tracey,
26

27 ¹³ “[T]raining materials are relevant not only to whether the force employed in this case was objectively
28 unreasonable, ... but also to whether reasonable officers would have been on *notice* that the force employed
was objectively unreasonable.” *Drummond v. City of Anaheim*, 343 F.3d 1052, 1062 (9th Cir. 2003)
(emphasis in original).

1 45. Chief Word adds, “I can see no reason to intentionally shoot her [Ms. Coles] in the head.” Ex.
2 G, Word, 187.

3 Finally, at his recent deposition, Sgt. (now, Captain) Tracey, leader of the Red team that shot
4 Ron Smith, candidly assessed whether it was appropriate for his team to shoot Mr. Smith:

5 Q: If a person were at least 50 feet or as much as 100 feet in front of the
6 skirmish line, wearing press passes, backing up while filming the skirmish
7 line, is that the type of person that should have been targeted for Less-
8 Lethal?¹⁴

9 A: No, sir.

10 Q: Why is that?

11 A: You said a couple of key things there. 50 to 100 feet. Backing up. Obvious
12 identification, press. Camera. *That’s a no-brainer.*

13 Q: Any one of those things should have made it clear to an officer deploying
14 Less-Lethal that that is a person who should not be targeted. Is that correct?

15 A: Yes.

16 Ex. F, Tracey, 255-256 (emphasis added).

17 **III. STANDARD OF REVIEW**

18 Summary judgment is appropriate when there is no genuine dispute as to material facts and
19 the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Toscano v. Prof’l
20 Golfers Ass’n, 258 F.3d 978, 982 (9th Cir. 2001). Material facts are those that may affect the
21 outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S.
22 Ct. 2505 (1986). A dispute as to a material fact is “genuine” if there is sufficient evidence for a
23 reasonable jury to return a verdict for the nonmoving party. Id. The court may not weigh the
24 evidence and must view the evidence in the light most favorable to the nonmoving party. Id. at 255.
25
26
27

28 ¹⁴ These facts are all undisputed. Ex. U, VIDEO; Ex. L, Smith, 96-102; Ex. M, press passes.

1 A party seeking summary judgment bears the initial burden of informing the court of the
2 basis for its motion, and of identifying those portions of the pleadings and discovery responses that
3 demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317,
4 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Where the moving party will have the burden of
5 proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than
6 for the moving party. Id. at 322-23. However, on an issue for which its opponent will have the
7 burden of proof at trial, the moving party can prevail merely by “pointing out to the District Court .
8 . . . that there is an absence of evidence to support the nonmoving party's case.” Id. at 325. If the
9 moving party meets its initial burden, the opposing party must then “set forth specific facts showing
10 that there is a genuine issue for trial” in order to defeat the motion. Fed. R. Civ. P. 56(e); Anderson,
11 477 U.S. at 250.

12 **IV. ARGUMENT**

13 **A. By Intentionally Shooting with Less-Lethal Projectiles, Without Warning, Non-** 14 **Threatening, Dispersing Plaintiffs, Defendants Violated Plaintiffs’ Fourth Amendment** 15 **Rights to Be Free from Excessive Force.**

16 This Court has determined that under these circumstances, Defendants’ use of “less-lethal”
17 force must be evaluated under the Fourth Amendment. Dkt. No. 57, Order Denying Defendants’
18 Motion to Dismiss. Under the Fourth Amendment, police may use only such force as is objectively
19 reasonable under *all* the circumstances. Alexander v. City and County of San Francisco, 29 F.3d
20 1355, 1366 (9th Cir. 1994), cert. den., 513 U.S. 1083 (1995), citing Graham v. Connor, 490 U.S.
21 386, 397 (1989) (emphasis in original).

22 The “reasonableness” of a particular use of force must be judged from the perspective of a
23 reasonable officer on the scene. Id. “Nevertheless, the reasonableness inquiry is an objective one:
24 the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and
25 circumstances confronting them, without regard to their underlying intent or motivation.” Id., citing
26
27
28

1 Graham, 490 U.S. at 395. “The essence of the Graham objective reasonableness analysis is that the
2 *force* which was applied must be balanced against the *need* for that force: it is *the need for force*
3 which is at the *heart* of the Graham factors.” Headwaters Forest Defense v. County of Humboldt,
4 (Headwaters II) 276 F.3d 1125, 1130 (9th Cir. 2002) (emphasis in original).

5 “Force, [even if] less than deadly, is not to be deployed lightly. To put it in terms of the test
6 we apply: the degree of force used by the police is permissible only when a strong government
7 interest *compels* the employment of such force.” Drummond v. City of Anaheim, 343 F.3d 1052,
8 1057 (9th Cir. 2003) (emphasis in original), citing, Deorle v. Rutherford, 272 F.3d 1272, 1280 (9th
9 Cir. 2001) and Headwaters II, 276 F.3d at 1130.

10 Factors to consider include, among others, “the severity of the crime at issue, whether the
11 suspect poses an immediate threat to the safety of the officers or others, and whether he is actively
12 resisting arrest or attempting to evade arrest by flight.” Ting v. U.S., 927 F.2d 1504, 1510 (9th Cir.
13 1991), citing Graham v. Connor, *supra*. An *en banc* panel of the Ninth Circuit recently declared
14 which factor is “the most important single element of the three specified factors: whether the
15 suspect poses an immediate threat to the safety of the officers or others.” Smith v. City of Hemet,
16 394 F.3d 689, 702 (9th Cir. 2005) (*en banc*).

17 The Ninth Circuit also resolved that less intrusive alternatives, as a part of the “totality of the
18 circumstances,” must be considered when assessing the reasonableness of a particular use of force.
19 Smith v. City of Hemet, 394 F.3d at 701 (“In some cases, for example, the availability of alternative
20 methods of capturing or subduing a suspect may be a factor to consider.”).

21 With regard to deadly force, “There can be no question that apprehension by the use of
22 deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.”
23 Reed v. Hoy, 891 F.2d 1421, 1426 (9th Cir. 1989), *cert. denied*, 501 U.S. 1250 (1991), citing
24
25
26
27
28

1 Tennessee v. Garner, 471 U.S. 1, 7 (1985).¹⁵ “[S]uch force may not be used unless it is necessary
 2 to prevent the escape and the officer has probable cause¹⁶ to believe that the suspect poses a
 3 significant threat of death or serious physical injury to the officer or others.” Garner, 471 U.S. at 3.
 4 “Moreover, whenever practicable, a warning must be given before deadly force is employed.”
 5 Harris v. Roderick, 126 F.3d 1189, 1201 (9th Cir. 1997), cert. den. 522 U.S. 1115 (1998).

6
 7 The Ninth Circuit has expressed concern with “less-lethal” weapons such as bean bags:

8 We have previously emphasized our concern with the unconstrained use of
 9 similar less-than-lethal devices in situations where no warning is given. See Deorle
 10 v. Rutherford, 272 F.3d 1272, 1285 (9th Cir. 2001) (discussing “cloth-cased round”)
 11 (“less than deadly force that may lead to serious injury may be used only when a
 12 strong governmental interest warrants its use, and in such circumstances should be
 13 preceded by a warning, if feasible”); cf. Headwaters Forest Defense Council v.
 14 County of Humboldt, 240 F.3d 1185, 1200-1201 (9th Cir. 2001) (discussing use of
 15 pepper spray).

16 Boyd v. Benton Co., 374 F.3d 773, 779 (9th Cir. 2004). In Boyd, the Ninth Circuit granted qualified
 17 immunity to officers who misused a “flash-bang” device that burned a plaintiff, due to the lack of
 18 clearly established law concerning that device in 1997. 374 F.3d at 784. Still, the Court held that
 19 officers did violate the plaintiff’s rights, and that the use of this potentially dangerous “less-lethal”
 20 device required “a strong governmental interest, careful consideration of alternatives and
 21 appropriate measures to reduce the risk of injury.” 374 F.3d at 779.

22 Bean bags were specifically addressed by the Ninth Circuit in Deorle. The Deorle Court
 23 noted that the “bean bag” “euphemism grossly underrates the dangerousness of this projectile. The
 24 round is not some sort of ‘hackey-sack.’ It is a projectile capable of inflicting serious injury or
 25 death, rather than some children's toy.” 272 F.3d at 1279, n. 13. Given the danger posed by this

26 _____
 27 ¹⁵ The infliction of deadly force, regardless of the purpose for the force, is in and of itself, a seizure. Reed,
 28 891 F.2d at 1426 (“We hold that the ‘seizure’ requirement was satisfied by Hoy’s shooting of Reed.”).

¹⁶ The requirement of “probable cause” means police must meet a *higher* standard to justify the use of deadly
 force than they would need for non-deadly force. See, Monroe v. City of Phoenix, 248 F.3d 851, 859-860
 (9th Cir. 2001) (“the existence or absence of probable cause lacks relevance outside the deadly force context
 described by Garner. . . . The existence of probable cause is a more specific and demanding standard than the
Graham [v. Connor] standard”), citing Brewer v. City of Napa, 210 F.3d 1093, 1097-1098 (9th Cir. 2000).

1 type of force, it “is not to be deployed lightly.” 272 F.3d at 1280. Bean bags may be deployed
2 “only when a strong governmental interest compels the employment of such force.” Id.

3 The Court explained, “A desire to resolve quickly a potentially dangerous situation is not the
4 type of governmental interest that, standing alone, justifies the use of force that may cause serious
5 injury.” 272 F.3d at 1281. Similarly, “a simple statement by an officer that he fears for his safety or
6 the safety of others is not enough; there must be objective factors to justify such a concern.” Id.

7
8 The failure to consider other less dangerous alternatives to bean bags, and the failure to give
9 a warning, “strongly supported” the Court’s conclusion that the force was excessive in that case.
10 272 F.3d at 1282. On March 16, 2001, more than two years before the incident at the Port of
11 Oakland, the Deorle Court concluded:

12 Every police officer should know that it is objectively unreasonable to shoot -- even
13 with lead shot wrapped in a cloth case -- an unarmed man who: has committed no
14 serious offense, is mentally or emotionally disturbed, has been given no warning of
15 the imminent use of such a significant degree of force, poses no risk of flight, and
16 presents no objectively reasonable threat to the safety of the officer or other
17 individuals.

18 272 F.3d at 1284.

19 The Ninth Circuit also determined that “warnings should be given, when feasible, if the use
20 of force may result in serious injury, and that the giving of a warning or the failure to do so is a
21 factor to be considered in applying the Graham balancing test.” 272 F.3d at 1284.

22 In the present case, Defendants Word, Haw, and Yee authorized the use of dangerous “bean
23 bag” and wooden dowel projectiles for the purpose of dispersing a crowd of people exercising their
24 First Amendment rights. Defendants have no evidence that any of the four Plaintiffs herein posed
25 any threat to anyone at the Port – the most important of the Graham factors. Smith v. City of
26 Hemet, 394 F.3d at 702. Defendants deny that they were trying to arrest these Plaintiffs, so
27 Plaintiffs cannot be deemed to have been “actively resisting arrest” or attempting to evade arrest.
28 None of these Plaintiffs has ever been charged with any crime stemming from anything that

1 happened that day, despite Defendants' knowledge of their presence at the Port at least since
2 Plaintiffs' Government Tort Claims were filed within days or weeks of the incident. In short,
3 Defendants have *no evidence* that it was necessary to use *any force* against Ms. Coles, Mr. Smith,
4 Ms. Hansen, and Mr. Bohning.

5
6 Moreover, Defendants admit that they never gave any warning that these Plaintiffs were
7 subject to being shot with "less-lethal" projectiles, despite the obvious feasibility of such a warning.
8 Defendants cannot meet their burden to show that a "strong governmental interest compel[led] the
9 employment of such force." Deorle, 272 F.3d at 1280.

10 In the case of Ms. Coles, Mr. Smith, and Mr. Bohning, Defendants used *deadly force* in
11 shooting each of them in the head. "[N]ot merely the quantum of force, but also how that force is
12 applied, may render it more or less likely to cause death." Drummond, 343 F.3d at 1057, n. 4.
13 Defendants, including Chief Word, admit that intentionally shooting a bean bag at a person's head
14 constitutes deadly force. Each "deployment" of a less-lethal bean bag or wooden dowel was
15 intentional. Ex. Q, Admission nos. 18 and 19. Defendants agree that there was never any
16 justification for deadly force.
17

18 Finally, each of these four Plaintiffs was dispersing when shot. Defendants have no
19 evidence to rebut this strong fact. Everyone agrees there was no justification to shoot a person who
20 was dispersing from the Port of Oakland on April 7, 2003.
21

22 The OPD's use of bean bags to strike Sri Louise Coles and Ron Smith, and use of bean bags
23 and/or wooden dowels to strike Jennifer Hansen and Scott Bohning, violated these Plaintiffs' Fourth
24 Amendment rights to be free from excessive force.

25 **B. Defendants Word, Haw, and Yee Are Liable for these Fourth Amendment Violations**
26 **as the Supervisors Who Ordered these Uses of Force.**

27 A supervisor can be liable under § 1983 if he "set in motion a series of acts by others, or
28 knowingly refused to terminate a series of acts by others . . . , which he knew or reasonably should

1 have known, would cause others to inflict the constitutional injury.” Larez v. City of Los Angeles,
2 946 F.2d 630, 646 (9th Cir. 1991). Direct involvement of a supervisor in a constitutional deprivation
3 subjects that supervisor to liability. Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir.
4 1991) (en banc). “Supervisory liability may be found in civil rights actions even if the supervisors
5 in question are not directly involved in the acts leading to the constitutional deprivation.” Motley v.
6 Parks, 383 F.3d 1058, 1067 (9th Cir. 2004).

8 Here, Defendants Word, Haw, and Yee were directly involved. As the highest policy-
9 making officer in the OPD, Chief Word authorized the use of bean bags and wooden dowels for
10 crowd dispersal at the April 7, 2003 Port of Oakland demonstration, and he personally delegated his
11 authority to order exactly when and where such force was to be used on scene. Ex. G, Word, 24-25,
12 32. Captain Yee recommended that “Less-Lethal” projectiles be fired into the crowd, and DC Haw
13 made the final decision to order their “deployment” at different locations. Ex. O, Yee, 114-116; Ex.
14 B, Haw, 152-155; Ex. G, Word, 89-90.

16 Both DC Haw and Captain Yee were close by each time “less-lethal” projectiles were
17 deployed against members of the crowd. DC Haw and Yee personally observed the use of these
18 munitions against people in the crowd, again and again. They were present and on videotape at
19 location #4, when Sri Louise Coles and Ron Smith were shot within seconds of each other. They
20 personally directed the use of these munitions at location #5 and north from there as well. Thus,
21 they have supervisory liability for the violations of rights caused by their decisions to fire bean bags
22 and wooden dowels into the crowd of people exercising their First Amendment rights.

24 As Chief Word stressed, “To my knowledge, no officer made an individual decision to
25 deploy force without first being given the okay. They’re directed to do so by a command officer.”
26 Ex. G, Word, 153. And, supervisory liability is supported by the exoneration of all shooters from
27 use of force complaints due to the department’s conclusion that all “less-lethal” uses of force on
28

1 April 7, 2003, were ordered by command officers and “consistent with department policy and
2 training.” Ex. P, Internal Affairs memos.

3 The fact that some officers may have shot people who should not have been shot in this
4 large, dynamic crowd, is ultimately the responsibility of Defendants Word, Haw, and Yee, for they
5 were the ones who “set in motion a series of acts by others, or knowingly refused to terminate a
6 series of acts by others . . . , which [they] knew or reasonably should have known, would cause
7 others to inflict the constitutional injury.” Larez, 946 F.2d at 646.

9 **C. Defendant City of Oakland Is Liable for the Violations of Rights Ordered or Directed
10 by its Policy-Makers.**

11 Since Chief Word, as a policy-maker for the City, ultimately authorized the use of less-lethal
12 projectiles against the crowd in this event, the City of Oakland is liable for violations of rights
13 caused by that policy decision. Gibson v. County of Washoe, 290 F.3d 1175, 1185-1187 (9th Cir.
14 2002), cert. denied, 537 U.S. 1106 (2003). *See also*, Ninth Cir. Model Civil Jury Instr. 11.12.¹⁷

15 It is not necessary for municipal liability to identify the officers who shot each of the
16 Plaintiffs where the unconstitutional conduct was ordered or directed by a policy-maker. Gibson,
17 290 F.3d at 1186, n.7.

19 **D. Defendants Word, Haw, Yee, and the City of Oakland Are Liable under California
20 Civil Code § 52.1 for their Interference, by Threats, Intimidation, or Coercion, with
21 Plaintiffs’ Constitutional Rights.**

22 Cal. Civil Code §52.1 provides a private right of action for damages against any person who
23 “interferes...,” or “attempts to interfere by threats, intimidation, or coercion,” with the exercise or
24 enjoyment of rights under California or federal law. The California Supreme Court has held that
25 section 52.1 requires “**an attempted or completed act of interference with a legal right,**
26 **accompanied by a form of coercion.**” Jones v. Kmart Corp., 17 Cal.4th 329, 334 (1998). Only

27 ¹⁷ “**11.12 – MUNICIPAL LIABILITY** – When a plaintiff is deprived of a constitutional right as a result of
28 the official policy of a city, the city is liable for damages caused by the deprivation. "Official policy" means:
... (2) a policy statement or decision that is officially made by the city's policy-making official.”

1 these express elements are necessary to sustain a claim under §52.1; although this section was
2 enacted, in part, in response to a tide of “hate crimes,” it is not limited to “hate crimes,” however
3 one might define that term. Winarto v. Toshiba Am. Elecs. Components, Inc., 274 F.3d 1276, 1289
4 (9th Cir. 2001) (§52.1 is to be interpreted broadly, and not limited to “hate crimes”).

5
6 In Venegas v. County of L. A., 32 Cal. 4th 820, 827; 11 Cal. Rptr. 3d 692 (2004), the
7 California Supreme Court allowed a claim under § 52.1 for an unreasonable seizure.

8 For all of the reasons set forth above, Defendants Word, Haw, Yee, and the City of Oakland
9 are liable under § 52.1. The only element beyond that which is already proven – that Plaintiffs’
10 rights were interfered with by “threats, intimidation, or coercion,” – is easily satisfied here where
11 Defendants actually violated their Fourth Amendment rights with violence. Winarto, 274 F.3d at
12 1289-1290 (violation of rights with violence sufficient to state a claim under § 52.1). The whole
13 undisputed course of OPD conduct here, including lines of motorcycles and police relentlessly
14 pushing Plaintiffs over great distances, driving motorcycles aggressively toward Plaintiffs, firing
15 real 12 gauge shotguns at Plaintiffs, and ultimately striking Plaintiffs with dangerous, and painful,
16 projectiles, constitutes “threats, intimidation, or coercion.”

17
18 Additionally, under state law, the City of Oakland is vicariously liable for the torts of its
19 employees, whether or not those employees are ever identified. Under Cal. Govt. Code § 815.2, a
20 “public entity is liable for injury proximately caused by an act or omission of an employee of the
21 public entity within the scope of his employment if the act or omission would ... have given rise to
22 a cause of action against that employee or his personal representative.” More to the point, the
23 official legislative committee comments to that section explain:
24

25 Under this section, it will not be necessary in every case to identify the particular
26 employee upon whose act the liability of the public entity is to be predicated. All that
27 will be necessary will be to show that some employee of the public entity tortiously
28 inflicted the injury in the scope of his employment under circumstances where he
would be personally liable.

1 Legis. Com. Com., West's Ann. Govt Code, foll. § 815.2.

2 The California Court of Appeal has instructed § 815.2 is to be applied in accordance with
 3 these legislative committee comments. Becerra v. County of Santa Cruz, 68 Cal. App. 4th 1450,
 4 1462, n. 5, 81 Cal. Rptr. 2d 165, 171, n. 5 (Cal. Ct. App. 1998) (identification of a specific
 5 employee tortfeasor is not required for vicarious liability of a municipality under § 815.2); Michael
 6 J. v. Los Angeles County Dept. of Adoptions, 201 Cal. App. 3d 859, 867, n. 2, 247 Cal. Rptr. 504,
 7 507, n. 2 (Cal. Ct. App. 1988) (same); Perez v. City of Huntington Park, 7 Cal. App. 4th 817, 820-
 8 821, 9 Cal. Rptr. 2d 258, 260 (Cal. Ct. App. 1992) (“The plaintiff may be unable to identify which
 9 employee committed the wrongful act, but this is not fatal to the employer's liability, if the evidence
 10 establishes that some employee in the scope of employment committed the wrongful act.”).

11 It is established that some Oakland police officers shot Plaintiffs Coles, Smith, Hansen, and
 12 Bohning with “less-lethal” projectiles, that such use of force was excessive, and that those violent
 13 acts satisfy the threats, intimidation, or coercion required by § 52.1. Therefore, pursuant to Gov.
 14 Code § 815.2, the City of Oakland is vicariously liable for such acts of its employees.

17 CONCLUSION AND RELIEF REQUESTED

18 For the reasons set forth herein, Plaintiffs Coles, Smith, Hansen, and Bohning respectfully
 19 request partial summary judgment as follows:

- 20 3. A finding, as a matter of law, that the Oakland police used excessive force against
- 21 each of them when they were shot by “less-lethal” projectiles at the Port of Oakland
- 22 on April 7, 2003;
- 23 4. A finding of liability against Defendants City of Oakland, Chief Word, DC Haw, and
- 24 Captain Yee as to these Plaintiffs’ claims under the Fourth Amendment and Cal.
- 25 Civil Code § 52.1.

26 Respectfully Submitted,

27 DATED: November 3, 2005

HADDAD & SHERWIN

28 /s/ _____
 MICHAEL J. HADDAD