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12  
13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA

15 LOCAL 10, INTERNATIONAL LONGSHORE ) **File No. C -03-2962 TEH (JL)**  
16 AND WAREHOUSE UNION, et al., )  
17 Plaintiffs, ) **DEFENDANT CITY OF OAKLAND'S**  
18 vs. ) **NOTICE OF MOTION AND MOTION FOR**  
19 CITY OF OAKLAND; et al., ) **SUMMARY JUDGMENT AGAINST**  
20 Defendants. ) **PLAINTIFF LOCAL 10, INTERNATIONAL**  
 ) **LONGSHORE AND WAREHOUSE UNION**

21 ) Date: November 28, 2005  
 ) Time: 10:00 a.m.  
 ) Dept: Courtroom 12, 19<sup>th</sup> Floor

22 Honorable Thelton E. Henderson  
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**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I. INTRODUCTION .....1

II. STATEMENT OF FACTS .....2

    A. FACTS REGARDING COLLECTION OF INFORMATION ABOUT  
        ILWU ACTIVITIES .....3

    B. FACTS REGARDING DEFENDANTS’ ACTIONS DIRECTED AT  
        LOCAL 10 MEMBERS.....3

        1. Longshoremen Plaintiffs At East SSA Gate .....3

        2. Jack Heyman’s Arrest .....6

III. LEGAL ARGUMENT .....7

    A. REQUIREMENTS FOR SUMMARY JUDGMENT.....7

    B. THERE IS A COMPLETE FAILURE OF PROOF TO SUPPORT  
        LOCAL 10’S ALLEGATIONS OF INJJRY .....7

    C. PLAINTIFF LOCAL 10 IS UNABLE TO DEMONSTRATE STANDING  
        TO BRING CLAIMS ON ITS OWN BEHALF.....9

        1. Local 10 Has No Standing To Bring Federal Claims .....9

        2. Local 10 Has No Standing To Bring Claims Under the  
            California Civil Code.....10

        3. Local 10 Has No Standing To Bring State Tort Claims .....10

    D. LOCAL 10 DOES NOT HAVE REPRESENTATIVE STANDING TO  
        BRING THE CLAIMS ALLEGED IN THE THIRD AMENDED  
        COMPLAINT .....11

        1. Local 10 Does Not Have Representative Standing To Bring §  
            1983 Claims .....11

        2. Local 10 Does Not Have Representational Standing To Bring  
            Civil Code Claim .....12

        3. Local 10 Does Not Have Standing To Bring Tort Claims On  
            Behalf Of Its Members.....12

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

E. LOCAL 10 HAS FAILED TO COMPLY WITH THE CALIFORNIA GOVERNMENT TORT CLAIMS ACT .....12

F. LOCAL 10’S STATE CONSTITUTIONAL CLAIMS SHOULD BE DISMISSED AS THEY ARE NOT SUPPORTED BY EVIDENCE AND THEY DO NOT SUPPORT A CAUSE OF ACTION FOR DAMAGES.....13

1. No Evidence Supports Local 10’s Allegation of State Constitutional Violations .....14

2. State Constitutional Claims Do Not Provide For Recovery of Money Damages .....14

IV. CONCLUSION.....15

**TABLE OF AUTHORITIES**

**State Cases**

*Barbara A. v. John G.*  
 (1983) 145 Cal.App.3d 369 .....11

*Bonner v. City of Santa Ana*  
 (1996) 45 Cal.App.4<sup>th</sup> 1465 .....15

*Bradley v. Medical Board*  
 (1997) 56 Cal. App. 4<sup>th</sup> 445 .....15

*City of Newport Beach v. Sasse*  
 (1970) 9 Cal.App.3d 803 .....12

*Cummings v. Fire Ins. Exchange*  
 (1988) 202 Cal.App.3d 1407 .....12

*Davidson v. City of Westminster*  
 (1982) 32 Cal.3d 197 .....11

*Fall River Joint Unified School Dist. v. Superior Court*  
 (1988) 206 Cal.App.3d 431 .....14

*Gatto v. County of Sonoma*  
 98 Cal. App. 4<sup>th</sup> 744, 764 (2002) .....14

*Hernandez v. McClanahan*  
 996 F. Supp. 975 (9<sup>th</sup> Cir. 1998) .....14

*Javor v. Taggart*  
 (2002) 98 Cal.App.4<sup>th</sup>, 795 .....15

*Katzberg v. Regents*  
 (2002) 29 Cal.4<sup>th</sup> 300 .....15, 16

*Loury v. Standard Oil Co.*  
 (1944) 63 Cal.App.2d 1 .....12

*Midpeninsula Citizens for Fair Housing v. Westwood Investors.*  
 (1990) 221 Cal.App.3d 1377 .....11

*Onick v. Long*  
 (1957) 154 Cal.App.2d 381 .....12

*Pacific Tel. & Tel. Co. v. County of Riverside*  
 (1980) 106 Cal.App.3d 183, 188 .....14

*Rotary Club of Duarte v. Board of Directors*  
 (1986) 178 Cal.App.3d 1035 .....11

*United States v. State of California,*  
 655 F.2d 914, 918. (9<sup>th</sup> Cir. 1980) .....14

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**State Statutes**

California Civil Code Section 52.1 .....13  
 Civ. Code, § 51.7 .....11, 13  
 Civ. Code, § 52.1 .....11, 13, 14  
 Gov’t Code Section 950.2.....14  
 Government Code Section 945.4 .....14  
 Government Tort Claims Act.....2, 3, 13

**Federal Cases**

*Allee v. Medrano*  
 (1974) 416 U.S. 802.....10  
*Baker v. Carr*  
 (1962) 369 U.S. 186.....10  
*Celotex v. Catret*  
 (1986) 477 U.S. 317.....8  
*Director, Office of Workers Comp. Programs v Greenwich Collieries*  
 (1994) 512 U.S. 267.....9  
*Linda R.S. v. Richard D.*  
 (1973) 410 U.S. 614.....10  
*Lujan v. Defenders of Wildlife*  
 (1992) 504 U.S. 555.....13  
*Masson v. New Yorker Magazine, Inc.*  
 (1991) 501 U.S. 496.....8  
*Matsushita Elec. Indus. Co. v. Zenith Radio*  
 (1986) 475 U.S. 574.....8  
*McLaughlin v. Tilendis*  
 (7th Cir. 1968) 398 F.2d 287 .....10  
*NAACP v. Alabama*  
 (1958) 357 U.S. 449.....12  
*National Treasury Employees Union v. King*  
 (1992) 798 F.Supp. 780 .....10  
*Rose v. City of Los Angeles*  
 (1993) 814. F. Supp 878 .....13

1 *Smith v. Arkansas State Highway Employees*  
 (1979) 441 U.S. 463.....10

2

3 *T.W. Electric Serv. v. Pacific Electrical Contractors*  
 (9<sup>th</sup> Cir. 1997) 809 F.2d 626 .....8

4 *Warth v. Seldin*  
 (1975) 422 U.S. 490.....10, 12

5

6 **Federal Statutes**

7 42 U.S.C. § 1983.....10, 11, 12

8 Fed, Rules Civ.Proc., rule 56(c).....8

9 **Constitutions**

10 Article III of the United States Constitution .....10

11 Cal. Const., art. I, § 1 .....15, 16

12 Cal. Const., art. I, § 2 .....14

13 Cal. Const., art. I, § 3 .....14

14 Cal. Const., art. I, § 7 .....15

15 Cal. Const., art. I, § 7(A).....15

16 Cal., Const., art. I, § 13 .....15, 16

17 U.S. Const., 14th Amend. ....10

18 U.S. Const., 1<sup>st</sup> Amend. ....10

19 **Other Authorities**

20 Merriam-Webster's Dictionary of Law (1996) .....12

21

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1                                   **NOTICE OF MOTION FOR SUMMARY JUDGMENT**

2                 PLEASE TAKE NOTICE THAT defendants, CITY OF OAKLAND and all OPD officer  
3 defendants, will move the court at the time and place specified above, for summary judgment against  
4 plaintiff LOCAL 10, INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, on all  
5 causes of action in the Third Amended Complaint.

6                 This motion is based on Defendants’ contention that: 1) There is a complete lack of proof that  
7 defendants gathered intelligence about Local 10 in an unlawful manner; 2) There is a complete lack  
8 of proof that defendants took any action against any plaintiff because of hostility, animus and  
9 discrimination against Local 10 or its members; 3) Local 10 lacks standing to bring suit on either its  
10 own behalf or in its representational capacity; 4) Local 10 failed to comply with the California Tort  
11 Claims Act; and 5) Local 10’s claims under the California Constitution are not supported by evidence  
12 and provide no basis for recovery.

13                 The motion will be made based upon this notice of motion and motion, the declarations of  
14 Gregory M. Fox, Deputy Chief Howard Jordan, Captain Rod Yee, Lieutenant Ed Tracey, Sergeant  
15 Julia Kurzrock (Ret.), Elida Paredes and Alexander Jason, as well as the records contained in the  
16 court’s file in this matter, and such further evidence, whether documentary or oral, as may be  
17 presented at the time of the noticed hearing.

18   **I.         INTRODUCTION**

19                 This action arises from the interaction of Oakland Police and the plaintiffs during an anti-Iraq  
20 war demonstration which occurred at the Port of Oakland on April 7, 2003. Plaintiff LOCAL 10,  
21 INTERNATIONAL LONGSHORE AND WAREHOUSE UNION (Local 10) has joined in all fifteen  
22 causes of action in the Third Amended Complaint (TAC), suing “on its own behalf and in its  
23 representative capacity on behalf of its officers and members . . . .” (TAC ¶ 5). All of Local 10’s  
24 claims are based on two allegations in the TAC: first, that OPD gathered intelligence about Local  
25 10’s anti-war and associational activities in a manner that was “overbroad, unnecessary and  
26 unjustified by an legitimate law enforcement purpose” (TAC ¶ 30), and, second, that OPD  
27 “deliberately singled out and aimed their weapons and otherwise directed force at and engaged in the  
28 other conduct described herein against plaintiff Local 10 and its officers and members because of

1 hostility, animus and discrimination against the ILWU as an organization and against members and  
2 officers affiliated with the ILWU.” (TAC ¶ 48).

3 Defendants move for summary judgment against plaintiff Local 10 on all causes of action  
4 because: 1) There is a complete lack of proof that defendants gathered intelligence about Local 10 in  
5 an unlawful manner; 2) There is a complete lack of proof that defendants took any action against any  
6 plaintiff because of hostility, animus and discrimination against the ILWU or its members; 3) Local  
7 10 lacks standing to bring suit on either its own behalf or in its representational capacity; 4) Local 10  
8 failed to comply with the California Tort Claims Act; and 5) Local 10’s claims under the California  
9 Constitution are not supported by evidence and provide no basis for recovery.

## 10 II. STATEMENT OF FACTS

11 Defendants present the facts pertinent to Local 10’s two allegations of actionable wrongdoing  
12 by defendants: first, regarding defendants’ collection of information about Local 10’s activities, and  
13 second, regarding the alleged targeting of Local 10 members by defendants due to animus and  
14 hostility toward Local 10. Facts regarding the Local 10 member-plaintiffs who were subjected to the  
15 putatively wrongful acts of defendants are presented in connection with the only two events at the  
16 Port demonstration which involved Local 10 members. The first event concerns defendants’ use of  
17 less lethal munitions at the East SSA gate.<sup>1</sup> At that location, Local 10 member-longshoremen-  
18 plaintiffs Allen Chapman, Christopher Clay, Ernest Evans, Billy Kepo’o, Lawrence Massey and  
19 Byron Moore, Jr., (hereinafter referred to collectively as longshoremen plaintiffs) all allege that they  
20 were struck by less lethal projectiles while waiting to enter the Port to report to work.<sup>2</sup> The second  
21 event involves the only remaining Local 10 member-plaintiff; the Local 10 business agent, Jack  
22 Heyman. Mr. Heyman does not allege any injury from less lethal munitions. Rather, he alleges that  
23 he was wrongfully arrested with excessive force near the West SSA gate.

24 All deposition citations refer to the deponent and the exhibit number where that deposition  
25

26 <sup>1</sup> SSA refers to Stevedoring Services of America. A map of the Oakland Port is attached to the Fox Dec. at Ex. 1, and  
27 the locations referred to herein are clearly indicated on that map.

28 <sup>2</sup> Longshoremen plaintiffs Silas Dunn, Willie Hamlin and David Loville also allege receiving injuries from less lethal  
projectiles at this location, however, these three plaintiffs have settled their claims against defendants.



1 testimony has been authenticated in the Declaration of Gregory M. Fox filed in support of this  
2 motion.

3 A. FACTS REGARDING COLLECTION OF INFORMATION ABOUT ILWU ACTIVITIES

4 Defendants are not aware of any facts which support Local 10's allegation that OPD gathered  
5 intelligence about Local 10's anti-war and associational activities in a manner that was overbroad,  
6 unnecessary and unjustified. OPD's Port protest Incident Commander, Captain Rod Yee, testifies  
7 that he is not aware that OPD engaged in any gathering of intelligence or information about *any*  
8 activities of Local 10 or its members prior to the April 7, 2003 Port protest. Capt. Yee states he did  
9 not instruct anyone at OPD to research or otherwise investigate Local 10, and he has no information  
10 that anyone at OPD ever undertook such an investigation or research.<sup>3</sup> To defendants' knowledge,  
11 discovery has not revealed any facts supportive of this allegation by Local 10.

12 B. FACTS REGARDING DEFENDANTS' ACTIONS DIRECTED AT LOCAL 10 MEMBERS

13 1. Longshoremen Plaintiffs At East SSA Gate

14 On the morning of April 7, 2003, a number of longshoremen arrived at the Port to report to  
15 work and found Port entry gates blocked by anti-war demonstrators.<sup>4</sup> Pursuant to the Local 10 union  
16 contract, the longshoremen do not cross a picket line until a labor arbitrator arrives to decide if Local  
17 10 members should or should not honor the picket. In light of the anti-war picketers at the job site,  
18 the longshoremen 'stood by', awaiting an arbitrator and further instructions from union officials.<sup>5</sup>  
19 While some non-plaintiff longshoremen 'stood by' at different locations at the Port,<sup>6</sup> the  
20 Longshoremen plaintiffs gathered in the middle of Middle Harbor Road, outside the East SSA gate.<sup>7</sup>  
21 Several of these Longshoremen plaintiffs had parked their cars in the east bound center divider lane  
22 of Middle Harbor Road, and as additional longshoremen arrived at the Port, they gathered near these

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23  
24 <sup>3</sup> Yee Decl., ¶ 2

25 <sup>4</sup> Massey Dep. 65:11 – 66:25 (Exhibit A); Clay Dep. 25:3-21; 29:3-23 (Exhibit B)

26 <sup>5</sup> TAC ¶ 34; Clay Dep. 17:9 – 18:8, (Exhibit B); Massey Dep. 67:7 – 68:24, (Exhibit A); Moore Dep. 39:21-40:5  
(Exhibit H).

27 <sup>6</sup> Heyman Dep.96:6-23, (Exhibit C); Kepo'o Dep. 103:7 – 104:13, (Exhibit D); Massey Dep. 80:21 – 81:23, (Exhibit A)

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

1 vehicles and ‘stood by’, waiting to receive further instructions about attending work.<sup>8</sup> Protestors  
 2 circled in a picket line at the East SSA gate, immediately to the south of the area on Middle Harbor  
 3 Road where the Longshoremen plaintiffs stood waiting.<sup>9</sup>

4 After ‘standing by’ at that location for more than thirty minutes, the Longshoremen plaintiffs  
 5 observed that another group of demonstrators was approaching their location, moving westerly on  
 6 Middle Harbor Road from the direction of the West APL gate.<sup>10</sup> Plaintiff Massey, who also works  
 7 as a corrections officer for the California Department of Corrections<sup>11</sup>, testified that he observed an  
 8 OPD skirmish line forming behind the crowd, and then moving the crowd toward where the  
 9 Longshoremen plaintiffs were located.<sup>12</sup> Plaintiff Kepo’o testified that this large crowd of protestors  
 10 eventually reached and were “milling” in the area where the Longshoremen plaintiffs were standing,  
 11 and that while the police line was still some distance from the protestors and Longshoremen  
 12 plaintiffs, Mr. Kepo’o heard the police announce that the protestors should disperse.<sup>13</sup>

13 After the crowd of protestors moved to the location of the Longshoremen plaintiffs, a  
 14 skirmish line of OPD motorcycles arrived and stood across the street from the Longshoremen  
 15 plaintiffs’ position.<sup>14</sup> Several of the Longshoremen plaintiffs heard a dispersal order given, which  
 16 they understood to apply only to the protestors, and not to the longshoremen waiting to go to work.  
 17 Therefore, the Longshoremen plaintiffs did not disperse when police approached.<sup>15</sup>

18 The Longshoremen plaintiffs were dressed for work in sweat shirts, tee shirts and jeans. They

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19  
 20 <sup>8</sup> Massey Dep. 69:17 – 71:6, (Exhibit A); Chapman Dep., 22:13-23:9, (Exhibit E); Kepo’o Dep.106:11 – 108:20,  
 (Exhibit D); Moore Dep. 39:21-40:5 (Exhibit H).

21 <sup>9</sup> Kepo’o Dep. 105:18 - 106:5, (Exhibit D)

22 <sup>10</sup> Chapman Dep. 34:2-14, (Exhibit E); Kepo’o Dep. 116:2 – 119:22; 143:17 – 144:17, (Exhibit D); Massey Dep., 82:2 –  
 83:18, (Exhibit A); Moore Dep., 41:15-23 (Exhibit H).

23 <sup>11</sup> Massey Dep., 12:2-13 (Exhibit A)

24 <sup>12</sup> Massey Dep., 76:4 – 78:16; 82:2 – 83:18, (Exhibit A)

25 <sup>13</sup> Kepo’o Dep. 119:20-22; 143:17 – 145:8, (Exhibit D); See also, Massey Dep. 82:2 – 83:18, (Exhibit A); Jason Dec.  
 Exhibit A; Fox Dec., ¶ 10.

26 <sup>14</sup> Clay Dep.34:8 – 38:21, (Exhibit B);

27 <sup>15</sup> Kepo’o Dep. 144:18 - 145:8; 146:19 – 147:14, (Exhibit D); Massey Dep. 79:19 – 80:4; 83:19 -23, (Exhibit A);  
 28 Chapman Dep. 39:11–23; 44:4-7, (Exhibit E); Clay Dep. 37:1-12, (Exhibit B);

1 did not wear clothing that identified them as members of Local 10.<sup>16</sup> When Incident Commander  
 2 Captain Rod Yee observed the crowd gathered at the East SSA gate, he did not recognize or  
 3 otherwise identify any member of the crowd as being a member of Local 10.<sup>17</sup> OPD command staff  
 4 Lieutenant Howard Jordan and Sergeant Ed Tracey were also present at the East SSA gate and had  
 5 time to observe the crowd of protestors prior to the deployment of less lethal at that location. Neither  
 6 Lt. Jordan nor Sgt. Tracey recognized any member of the crowd assembled at the East SSA gate as  
 7 being members of Local 10.<sup>18</sup> After two dispersal orders, and after the approach of the police  
 8 skirmish line failed to disperse the crowd assembled at the East SSA gate, Capt. Yee made the  
 9 decision to use less lethal munitions to attempt to disperse the crowd. Less lethal munitions had been  
 10 briefly deployed approximately thirty minutes earlier, just west of the West APL gate, and that tactic  
 11 had successfully dispersed demonstrators who remained non-responsive to less intrusive dispersal  
 12 tactics.<sup>19</sup> The only OPD officers who were authorized to deploy less lethal munitions at the Port were  
 13 members of the Red and Blue Tango Teams. Only the Red Tango Team was present at the East SSA  
 14 gate when less lethal was deployed there. When Capt. Yee authorized the Tango Team to deploy less  
 15 lethal at the East SSA gate, the Tango Team officers were instructed to target only aggressive or non-  
 16 dispersing protestors. Longshoremen plaintiffs at the East SSA gate were targeted with less lethal  
 17 projectiles because they appeared to be protestors who were not dispersing.<sup>20</sup>

18 Several Longshoremen plaintiffs testified that they did not know if they had been targeted by  
 19 OPD due to their affiliation with Local 10.<sup>21</sup> Plaintiff Clay testified that an OPD officer he spoke  
 20 with after being fired upon expressed surprise and regret when informed that OPD had fired upon  
 21 longshoremen.<sup>22</sup> Plaintiff Massey testified that he had observed OPD assisting another group of

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

25 <sup>17</sup> Yee Dec., ¶ 3

26 <sup>18</sup> Jordan Dec. ¶ 3; Tracey Dec. ¶ 2.

27 <sup>19</sup> Yee Dec., ¶ 3

28 <sup>20</sup> Yee Dec. ¶ 3, Jordan Dec. ¶ 3, Tracey Dec. ¶ 2

<sup>21</sup> Clay Dep. 55:12-23, (Exhibit B); Massey Dep. 91:9 – 92:13 (Exhibit A)

<sup>22</sup> Clay Dep. 59:3 – 60:19, (Exhibit B)

1 longshoremen to enter the Port once protestors had been cleared from the East SSA gate.<sup>23</sup>

## 2 2. Jack Heyman's Arrest

3 Plaintiff Jack Heyman is a member of Local 10, and on the day of the Port protest he was  
 4 acting as a business agent for Local 10.<sup>24</sup> Over the course of the early morning, Mr. Heyman arrived  
 5 early at the Port, introduced himself to Capt. Yee while at the East APL gate, observed that OPD  
 6 deployed less lethal munitions to disperse the protestors west of the West APL gate, and was advised  
 7 that longshoremen had been injured near the East SSA gate.<sup>25</sup> After discussing the situation with  
 8 other union officials at the East SSA gate, Mr. Heyman endeavored to travel toward another SSA  
 9 gate to alert the longshoremen waiting there about what had occurred at the East SSA gate. To  
 10 accomplish this, Mr. Heyman drove his car slowly through a number of parked OPD vehicles and  
 11 toward the police skirmish line that was assembled at the West SSA gate, at the intersection of  
 12 Middle Harbor Road and Maritime Street.<sup>26</sup> As Mr. Heyman's vehicle approached the rear of the  
 13 police motorcycle skirmish line, Sgt. Julia Kurzrock, who was about one and one-half lanes away,  
 14 instructed Mr. Heyman to stop his car.<sup>27</sup> Mr. Heyman identified himself as a union official and  
 15 indicated that he needed to get through the police line, and he recalls Sgt. Kurzrock responding "I  
 16 don't care. Park your car."<sup>28</sup> There is a factual dispute regarding whether Mr. Heyman obeyed Sgt.  
 17 Kurzrock's directive to stop and park his car. Sgt. Kurzrock testified that she repeatedly told Mr.  
 18 Heyman to stop his car, and that he would be arrested if he failed to do so, but he continued to drive  
 19 slowly forward until she reached in and turned off his engine. She then arrested him.<sup>29</sup> Mr. Heyman  
 20 testified that he stopped his vehicle when instructed to do so.<sup>30</sup> However, Mr. Heyman testified that  
 21 during the entire time of his arrest, he did not recall any police officer make any reference to his  
 22 union membership, nor did any police officer use any derogatory language, epithets or obscenities to

23 \_\_\_\_\_  
 24 <sup>23</sup> Massey Dep. 80:21 – 81:23, (Exhibit A)

25 <sup>24</sup> Heyman Dep. 92:1-17; 95:17-23, (Exhibit C)

26 <sup>25</sup> Heyman Dep. 95:6 – 96:4; 112:21 – 114:16; 119:22 – 120:17, (Exhibit C)

27 <sup>26</sup> Heyman Dep. 123:10 – 130:13, (Exhibit C); Jason Dec., Exhibit B, Fox Dec. ¶ 11

28 <sup>27</sup> Heyman Dep. 130:14-17, (Exhibit C); Kurzrock Dep.38:17 – 40:25, (Exhibit F)

29 <sup>28</sup> Heyman Dep. 133:5 – 134:18, (Exhibit C); See also, Kurzrock Dep. 38:17 – 41:22, (Exhibit F)

30 <sup>29</sup> Kurzrock Dep. 42:22 - 48:13; 58:7 – 59:18, (Exhibit F)

<sup>30</sup> Heyman Dep. 134:19 – 135:19 (Exhibit C)

1 Mr. Heyman.<sup>31</sup>

2 Sgt. Kurzrock testifies that her reason for arresting Mr. Heyman was because he failed to  
3 follow Sgt. Kurzrock's lawful order to stop his car, and that Mr. Heyman's membership in Local 10  
4 did not play any role in her decision to arrest Mr. Heyman.<sup>32</sup>

### 5 III. LEGAL ARGUMENT

#### 6 A. REQUIREMENTS FOR SUMMARY JUDGMENT

7 FRCP Rule 56(c) provides that summary judgment is proper when there are no genuine issues  
8 as to any material fact. The purpose of summary judgment is to "isolate and dispose of factually  
9 unsupported claims or defenses." *Celotex v. Catret*, (1986) 477 U.S. 317, 323-324. Defendants must  
10 first meet their burden to demonstrate, by deposition testimony, affidavits, and other admissible  
11 evidence, the absence of a genuine issue of material fact. If defendants meet this burden, this Court  
12 must then determine "whether the specific facts set forth by the non-movant, coupled with undisputed  
13 background or contextual facts, are such that a rational or reasonable jury might return a verdict in its  
14 favor based on that evidence." *T.W. Electric Serv. v. Pacific Electrical Contractors* (9<sup>th</sup> Cir. 1997)  
15 809 F.2d 626. "Where the record taken as a whole could not lead a rational trier of fact to find for the  
16 non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio*  
17 (1986) 475 U.S. 574, 587. In reviewing the evidence presented by the parties, the Court must draw  
18 all reasonable inferences in favor of the non-moving party. *Masson v. New Yorker Magazine, Inc.*  
19 (1991) 501 U.S. 496, 520.

#### 20 B. THERE IS A COMPLETE FAILURE OF PROOF TO SUPPORT LOCAL 10'S ALLEGATION 21 OF INJURY

22 Initially, defendants argue that, as outlined in the statement of facts reviewed above, there is  
23 no evidence to support Local 10's allegation that it has been deprived of any constitutional rights or  
24 has been subject to any torts. Local 10 alleges putatively illegal action on the part of defendants for  
25 1) collecting information about Local 10 in a manner that was unlawful, and 2) deliberately targeting  
26 Local 10 members with uses of force or arrest because of hostility, animus and discrimination against

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27 <sup>31</sup> Heyman Dep. 147:12-24, (Exhibit C)

28 <sup>32</sup> Kurzrock Decl., ¶ 3

1 Local 10. Local 10 is unable to present any evidence to support either of these allegations.

2 There is no evidence that defendants undertook any unlawful investigation of Local 10.

3 The only Local 10 members subjected to police use of force or arrest at the Port protest are  
4 the longshoremen present at the East SSA gate, and Jack Heyman, who was arrested near the West  
5 SSA gate. The longshoremen plaintiffs who were injured at the East SSA gate admit that they stood  
6 amid a large crowd of protestors, wore nothing to identify or otherwise distinguish themselves from  
7 protestors, and failed to disperse following police dispersal orders. Unless there is evidence that  
8 police *knew* them to be Local 10 members when they were fired upon, there is no proof of any  
9 animus, hostility of discrimination on the part of defendants toward members of Local 10. There is  
10 no such evidence, and Local 10's claims of constitutional injury based on intentional targeting of  
11 longshoremen at the East SSA gate must fail.

12 Mr. Heyman admits that he was arrested while attempting to drive through a police line that  
13 was actively involved in crowd control operations. This admitted actions just prior to his arrest – an  
14 unauthorized person attempting to drive through a police line during an active police engagement –  
15 placed him in a situation antagonistic to police regardless of his union affiliation. The fact of his  
16 membership in Local 10 at the time of this arrest does not evidence unconstitutional animus, hostility  
17 or discrimination by defendants against Local 10 any more than the fact that he was over 60 at the  
18 time of his arrest evidences age discrimination on the part of defendants. Plaintiff must proffer  
19 sufficient evidence to allow a reasonable jury to infer that discrimination against Local 10 members  
20 was a motivating factor in Mr. Heyman's arrest, but there is no such evidence in this action.

21 Defendants argue that there is a complete lack of proof to support either of Local 10's  
22 allegations of wrongdoing on the part of defendants. Local 10 has the burden of coming forward  
23 with evidence to support its claims, *Director, Office of Workers Comp. Programs v Greenwich*  
24 *Collieries* (1994) 512 U.S. 267, 273, but Local 10 has failed to produce any evidence of any  
25 constitutional injury to Local 10 or its members because of their union membership. Therefore,  
26 Local 10 cannot prevail on any of its causes of action and defendants are entitled to summary  
27 judgment on all causes of action.

28

1 C. PLAINTIFF LOCAL 10 IS UNABLE TO DEMONSTRATE STANDING TO BRING CLAIMS  
2 ON ITS OWN BEHALF

3 1. Local 10 Has No Standing To Bring Federal Claims

4 Under Article III of the United States Constitution, Local 10 must demonstrate a sufficient  
5 personal stake in the outcome of the alleged controversy to bring itself within the jurisdiction of the  
6 federal courts. *Baker v. Carr* (1962) 369 U.S. 186, 204. Local 10 must establish that Local 10 *itself*  
7 has suffered “some threatened or actual injury resulting from the putatively illegal action . . . .”  
8 *Linda R.S. v. Richard D.* (1973) 410 U.S. 614, 617. In additions to this constitutional limitation on  
9 standing, traditional “prudential” considerations regarding standing -- that a litigant must assert an  
10 injury peculiar to himself or to a distinct group of which he is a part – must be considered here.  
11 *Warth v. Seldin* (1975) 422 U.S. 490, 500-501.

12 A union may demonstrate standing to bring a claim under 42 U.S.C. section 1983 when its  
13 members are subjected to unlawful police action *because* the union is engaging in union related  
14 activities, *Allee v. Medrano* (1974) 416 U.S. 802, 819, fn. 13, because union membership is protected  
15 by the right of association under the First and Fourteenth Amendments. *McLaughlin v. Tilendis* (7th  
16 Cir. 1968) 398 F.2d 287. But a union’s First Amendment rights relate to union activities, collective  
17 bargaining and the right to organize, and the right to associate to accomplish such activities. *National*  
18 *Treasury Employees Union v. King* (1992) 798 F.Supp. 780; *Smith v. Arkansas State Highway*  
19 *Employees* (1979) 441 U.S. 463. If union activities play no role in the putatively illegal action of  
20 defendants, there can be no injury to the union. This is the situation before the Court.

21 The putatively illegal action alleged by Local 10 includes unlawfully broad investigation into  
22 Local 10 activities, unlawful targeting of longshoremen with less lethal munitions and unlawful  
23 targeting of plaintiff Jack Heyman for arrest because of his affiliation with Local 10. As  
24 demonstrated by defendants’ presentation of facts in support of this motion: 1) there is no evidence of  
25 an investigation into Local 10 activities by defendants, much less one that was unlawful; 2) there is  
26 no evidence that longshoremen who were struck by less lethal munitions at the East SSA gate were,  
27 or could be, recognized by OPD officers as longshoremen prior to their being struck, and 3) there is  
28 no evidence that plaintiff Heyman’s affiliation with Local 10 played any role in his arrest.

1 Defendants argue that because no evidence supports Local 10's allegations of constitutional  
 2 injury based on defendants' animus toward Local 10 and its members, Local 10 cannot demonstrate  
 3 standing to bring a claim under section 1983, and defendants are entitled to judgment against Local  
 4 10 on the first four causes of action in the TAC which Local 10 asserts on its own behalf.

5 2. Local 10 Has No Standing To Bring Claims Under the California Civil Code

6 A similar standing objection is made to Local 10's claims under California Civil Code  
 7 sections 51.7 and 52.1 in the TAC's tenth and eleventh causes of action. California courts have  
 8 limited standing under the Civil Code's 'personal rights' statutes to persons actually aggrieved by the  
 9 alleged injury. *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221  
 10 Cal.App.3d 1377, 1386. An organization may have standing under Civil Code sections 51 and 52 et  
 11 seq., but only where the organization has itself suffered damage. *Rotary Club of Duarte v. Board of*  
 12 *Directors* (1986) 178 Cal.App.3d 1035. Here, Local 10 cannot demonstrate that it has suffered any  
 13 damage because there is no evidence that defendants' putatively illegal action was in any way  
 14 directed at, or based on animus toward Local 10.

15 3. Local 10 Has No Standing To Bring State Tort Claims

16 Defendants contend that Local 10 has no standing to assert claims for intentional infliction of  
 17 emotional distress, assault and battery, and false arrest and imprisonment, because these torts are  
 18 intended to apply to natural persons, and not organizations of persons.

19 One who deliberately or recklessly inflicts severe emotional distress or mental suffering on  
 20 another by means of outrageous conduct will be liable in tort for intentional infliction of emotional  
 21 distress. *Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209. It is obvious that the tort of  
 22 intentional infliction of emotional distress was intended to apply only to a natural person since a non-  
 23 conscious entity such as an organization, an association or a corporation cannot experience emotional  
 24 distress or mental suffering.

25 Battery is the unconsented invasion of a person's interest in freedom from intentional,  
 26 unlawful, and harmful or offensive contact with their "person." *Barbara A. v. John G.* (1983) 145  
 27 Cal.App.3d 369, 375. Assault is the "demonstration of an unlawful intent by one person to inflict  
 28 immediate injury on the *person* of another then present." *Lourey v. Standard Oil Co.* (1944) 63



1 Cal.App.2d 1, 6-7 (*italics added*). In this context, “person means the body of a human being.  
 2 Merriam-Webster's Dictionary of Law (1996). A natural person is “a human being as distinguished  
 3 from a person (as a corporation) created by operation of law” (Merriam-Webster's Dictionary of Law  
 4 (1996)) and, therefore, has a human body, whereas an entity such as an organization, an association  
 5 or a corporation does not.

6 False imprisonment is the nonconsensual, intentional confinement of a person. *City of*  
 7 *Newport Beach v. Sasse* (1970) 9 Cal.App.3d 803, 810. The essential element of false imprisonment  
 8 is restraint of the “person.” *Onick v. Long* (1957) 154 Cal.App.2d 381, 386. Again, this tort by  
 9 definition protects a natural person from unlawful confinement. False arrest is a variant of false  
 10 imprisonment, it is just one way of committing false imprisonment pursuant to an improper arrest.  
 11 *Cummings v. Fire Ins. Exchange* (1988) 202 Cal.App.3d 1407, 1422.

12 Because these torts by definition protect the interests of a human person, Local 10 does not  
 13 have standing to assert these claims on its own behalf. Defendants are therefore entitled to summary  
 14 judgment against Local 10, suing on its own behalf, on these causes of action.

15 **D. LOCAL 10 DOES NOT HAVE REPRESENTATIVE STANDING TO BRING THE CLAIMS**  
 16 **ALLEGED IN THE THIRD AMENDED COMPLAINT**

17 **1. Local 10 Does Not Have Representative Standing To Bring § 1983 Claims**

18 Apart from Article III’s minimum standing requirements that a plaintiff present a ‘case in  
 19 controversy’ to trigger federal court jurisdiction, the Supreme Court has recognized prudential  
 20 standing requirements, which include the general rule that a plaintiff must assert her own rights and  
 21 interests, and cannot rest her claim to relief on the legal rights or interests of third parties. *Warth v.*  
 22 *Seldin, supra* at 499. The courts have recognized exceptions to this general rule, and have permitted  
 23 associations to assert the rights of its members, but only when the putatively illegal actions adversely  
 24 affect the association’s members’ associational ties. *NAACP v. Alabama* (1958) 357 U.S. 449, 458-  
 25 460.

26 The facts in this case fail to show any relationship between the alleged wrongful acts of  
 27 defendants and the fact of any plaintiffs’ membership in Local 10. Local 10 cannot meet the  
 28 requirement of representational standing that “there be a causal connection between the injury and the

1 conduct complained of – the injury has to be ‘fairly trace[able] to the challenged action of the  
 2 defendant. . . .’” *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560. Here there is no injury to  
 3 Local 10 traceable to defendants’ actions because there is no proof that defendants’ actions are in any  
 4 way connected to Local 10 membership. Defendants are therefore entitled to summary judgment  
 5 regarding Local 10’s first through fourth causes of action brought on behalf of its members.

6 **2. Local 10 Does Not Have Representational Standing To Bring Civil Code Claim**

7 As noted above at III C.2., California Civil Code §§ 51.7 and 52.1 create rights of action in  
 8 the person against whom the alleged violence and intimidation has been committed. Local 10 does  
 9 not have standing to bring a Civil Code section 51.7 action on behalf of its members. *Rose v. City of*  
 10 *Los Angeles* (1993) 814. F. Supp 878, 882-883. The court in *Rose, id.*, notes the language of CC §  
 11 52.1 implies that the statute assigns rights personal to the plaintiff, and observes there is no precedent  
 12 which allows or precludes representative standing under this section. Defendants argue that Local 10  
 13 cannot point to authority which supports Local 10’s standing to assert a Civil Code section 51.7  
 14 violation on behalf of its members. Local 10’s lack of standing to bring claims on behalf of its  
 15 members under these Civil Code sections entitles defendants to summary judgment on these causes  
 16 of action.

17 **3. Local 10 Does Not Have Standing to Bring Tort Claims on Behalf of Its Members**

18 As noted above at III C. 3, tort claims based on intentional infliction of emotional distress,  
 19 assault and battery, and false arrest and imprisonment are personal torts which require a physical  
 20 body. Defendants are not aware of any precedent which permits an association to bring intentional  
 21 personal tort claims vicariously on behalf of its members.

22 **E. LOCAL 10 HAS FAILED TO COMPLY WITH THE CALIFORNIA GOVERNMENT TORT  
 23 CLAIMS ACT**

24 Local 10 has asserted state tort claims against defendants at their twelfth (assault and  
 25 battery), thirteenth (intentional infliction of emotional distress), fourteenth (negligence) and fifteenth  
 26 (false arrest and imprisonment) causes of action. (TAC, ¶¶ 129 through 138). But in order to prevail  
 27 on these claims, Local 10 must have complied with the California Tort Claims Act (CTCA). The  
 28 same requirement of compliance with the CTCA applies to Local 10’s Tenth and Eleventh causes of  
 action for violation of California Civil Code sections 51.7 and 52.1. *Gatto v. County of Sonoma*

1 (2002) 98 Cal. App. 4<sup>th</sup> 744, 764 .

2 Government Code section 945.4 provides in relevant part that:

3 [N]o suit for money or damages may be brought against a public entity on a cause of  
4 action for which a claim is required to be presented in accordance with . . . this  
5 division until a written claim therefore has been presented to the public entity and has  
6 been acted upon by the board, or has been deemed to have been rejected by the board.

7 “Government Code section 945.4 requires, as a prerequisite to maintenance of an action  
8 against a public entity for damages arising out of an alleged tort, the timely filing of a claim, and its  
9 rejection.” *Fall River Joint Unified School Dist. v. Superior Court* (1988) 206 Cal.App.3d 431.  
10 [Emphasis added]. “Compliance with the claims statute is mandatory and failure to file a claim is  
11 fatal to the cause of action.” (*Pacific Tel. & Tel. Co. v. County of Riverside* (1980) 106 Cal.App.3d  
12 183, 188.) The Ninth Circuit has determined that compliance with the procedural requirements of the  
13 CTCA is a “substantive element of the cause of action.” *Hernandez v. McClanahan* (9<sup>th</sup> Cir. 1998)  
14 996 F. Supp. 975 ; *United States v. State of California* (9<sup>th</sup> Cir. 1980) 655 F.2d 914, 918. It is proper  
15 for federal courts to determine if a plaintiff bringing tort claims against a public entity has complied  
16 with the CTCA. *Id.* at 918-919. These same requirements are generally applicable to claims against  
17 a public employee. See, Government Code section 950.2 et seq.

18 Local 10 has failed to comply with the CTCA, in that it never filed a claim with the City of  
19 Oakland.<sup>33</sup> Because compliance with the CTCA is a prerequisite to viable tort claims against  
20 defendants, including claims under California Civil Code section 52.1, defendants are entitled to  
21 judgment on Local 10’s state tort claims as alleged in its tenth through fifteenth causes of action.

22 **F. LOCAL 10’S STATE CONSTITUTIONAL CLAIMS SHOULD BE DISMISSED AS THEY**  
23 **ARE NOT SUPPORTED BY EVIDENCE AND THEY DO NOT SUPPORT A CAUSE OF**  
24 **ACTION FOR DAMAGES**

25 Local 10 joins in the TAC’s fifth through ninth causes of action which assert claims under the  
26 California Constitution, specifically, violation of Local 10’s right to freedom of speech and  
27 association, and to petition the government for redress of grievances under Article I, sections 2 and 3;

1 freedom from unreasonable seizure and/or arbitrary force and/or arrest and/or imprisonment without  
 2 reasonable cause under Article 1, section 13; to not be deprived of liberty without due process under  
 3 Article 1 section 7(A); to equal protection under Article 1, section 7(A); and to informational privacy  
 4 under Article 1, section 1. To the extent that the TAC's prayer seeks declaratory relief under these  
 5 causes of action, the declaratory relief cause of action has been settled by stipulation of all parties and  
 6 order of this Court.<sup>34</sup>

7 1. No Evidence Support's Local 10's Allegation of State Constitutional Violations

8 Initially, defendants argue that, as outlined above, there is no evidence to support Local 10's  
 9 allegation that it has been deprived of any constitutional rights. There is a complete lack of proof to  
 10 demonstrate any constitutional injury to Local 10 or its members because of their union membership.  
 11 Therefore, Local 10 cannot prevail on its claims for violation of rights under the California  
 12 Constitution, on either its own behalf, or on behalf of its members, and defendants are entitled to  
 13 summary judgment on these causes of action.

14 2. State Constitutional Claims Do Not Provide For Recovery of Money Damages

15 The court in *Bonner v. City of Santa Ana* (1996) 45 Cal.App.4<sup>th</sup> 1465 observes that very few  
 16 California appellate courts have held there is a right to damages for violations of state constitutional  
 17 provisions. State court decisions instruct that there is no right to sue for monetary damages under the  
 18 due process provision of the California Constitution. *Bradley v. Medical Board* (1997) 56 Cal. App.  
 19 4<sup>th</sup> 445; *Katzberg v. Regents* (2002) 29 Cal.4<sup>th</sup> 300. Nor can plaintiffs recover money damages under  
 20 the state equal protection clause. *Javor v. Taggart* (2002) 98 Cal.App.4<sup>th</sup>, 795, 807.

21 Defendants find no state court case addressing the question of whether a violation of the state  
 22 constitution's free speech, search and seizure, and privacy provisions give rise to an action for money  
 23 damages, but the reasoning of *Bonner* and its progeny apply. The language of Article 1, sections 1, 7  
 24 and 13 do not suggest any specific method of enforcement, thus there is no indication that these  
 25 sections are 'self executing.' In addition, it is clear that plaintiff has alternative judicial remedies to  
 26 their state search and seizure claims under the federal tort claims act and state law causes of false  
 27

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28 <sup>33</sup> Paredes Dec. ¶ 2

1 imprisonment and emotional distress.

2 Neither Article 1, section 1 on which plaintiffs base their Fifth Cause of Action for  
 3 Informational Privacy nor Article 1, section 13 on which plaintiffs base their Sixth Cause of Action  
 4 for Unlawful Search and Seizure, set forth any indication that a violation of the section supports a  
 5 claim for damages. Defendants have found no case that indicates damages are recoverable for a  
 6 violation of these state Constitution provisions. Although defendants do not undertake the exhaustive  
 7 analysis suggested by *Katzberg*, defendants point to the lack of authority supporting a damage claim,  
 8 and the existence of adequate alternative remedies as a basis for this court to dismiss these causes of  
 9 action in as much as they seek damages.

#### 10 IV. CONCLUSION

11 Local 10 is unable to point to any evidence that defendants acted with animus, hostility or  
 12 discriminatory motive toward persons at the Port protest because of membership in Local 10.  
 13 Defendants stated purpose at the Port was to protect the interests of Port workers, and evidence shows  
 14 both that OPD *did* assist workers into the Port when gates were cleared of demonstrators, and that  
 15 OPD had no intention and no reason to target longshoremen for aggressive treatment. The overall  
 16 circumstances clearly show that police were attempting to clear demonstrators from the Port so that  
 17 Port business would not be interrupted. Longshoremen plaintiffs at the East SSA gate were not  
 18 identifiable as such, and Mr. Heyman was arrested because of his attempt to drive through a police  
 19 skirmish line, not his union affiliation. There is no evidence of animus toward Local 10 during  
 20 events at the Port. Nor is there any evidence that defendants acted unlawfully in gathering  
 21 intelligence about Local 10. For all of the reasons set forth herein, defendants contend that Local 10  
 22 has no claim which requires a trial by jury, and that defendants are entitled to summary judgment  
 23 against Local 10 on all causes of action in the Third Amended Complaint.

24 Dated: October 24, 2005

BERTRAND, FOX & ELLIOT

/s/

25 By: \_\_\_\_\_

26 Gregory M. Fox  
 27 Arlene C. Helfrich  
 Attorneys for Defendants

28 <sup>34</sup> See Fox Dec. ¶ 12.

**PROOF OF SERVICE**

I, Lark Berry, declare that:

1. I am employed in the County of San Francisco, California; I am over the age of eighteen years and not a party to the within cause; and my business address is 2749 Hyde Street, San Francisco, California 94109.

2. I am readily familiar with the practice of Bertrand, Fox & Elliot for the processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for processing.

3. On October 24, 2005, I served the following document(s):

**DEFENDANT CITY OF OAKLAND'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF LOCAL 10, INTERNATIONAL LONGSHORE AND WAREHOUSE UNION**

in said cause, on the following interested parties:

Rob Remar, Esq.  
Leonard Carder, LLP  
1188 Franklin Street, #201  
San Francisco, CA 94109  
Tel: 415.447.0403  
Fax: 415.771.7010  
*Attorney for ILWU Local 10*

4. Said service was performed in the following manner:

X **BY WESTERN MESSENGER SERVICE** (: I placed each such document in a sealed envelope addressed as noted above, for pick up at our offices for messenger service to be hand-delivered today to the above address, at San Francisco, California, following the above stated business practice, on this date.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed October 24, 2005, at San Francisco, California.

/s/

Lark Berry for Bertrand, Fox & Elliot