

# **EXHIBIT D**

PLAINTIFF'S  
Exhibit No. 15  
M. HAYES  
10-16-13

07/11/2012 08:39 15104647089

BART POLICE

PAGE 04

Arrest <input checked="" type="checkbox"/>	<b>BART Police Department</b> 800 Madison Street, PO Box 12688 Oakland, CA 94604-2688 <b>CR-1</b>			CASE# 1109-1047
Crime <input type="checkbox"/>				PAGE 1
Non-Criminal <input type="checkbox"/>				
OFFENSE(S) 369 IPC; Trespass/Railroad Property; Misd.		OFFENSE(S) CODE		
DATE, TIME AND DAY OF OCCURRENCE 09/08/11 17:44 Thursday	DATE AND TIME REPORTED 09/08/11 17:44	MORE CHARGES YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	SEIZED/LOAN VALUE \$ 0.00	
LOCATION OF OCCURRENCE 899 Market St, San Francisco	LOCATION ADDR	TYPE OF LOCATION	SEAT 40	SECT OF 4
<b>PERSONS</b>				
CODE V 1 of 2	NAME - LAST, FIRST, MIDDLE, SUFFIX California, State of	ADDRESS 1	PHONE 1	
OCCUPATION	RACE SEX AGE DOB	ADDRESS 2	PHONE 2	
DL	STATE SSN INJURIES	ADDRESS 3	PHONE 3	
CODE V 2 of 2	NAME - LAST, FIRST, MIDDLE, SUFFIX BART DISTRICT	ADDRESS 1 300 Lakeside Av, Oakland, CA 94612	PHONE 1	OTHER (510) 464-6000
OCCUPATION	RACE SEX AGE DOB	ADDRESS 2	PHONE 2	
DL	STATE SSN INJURIES	ADDRESS 3	PHONE 3	
CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1	
OCCUPATION	RACE SEX AGE DOB	ADDRESS 2	PHONE 2	
DL	STATE SSN INJURIES	ADDRESS 3	PHONE 3	
<b>CASE SUMMARY / VEHICLE INFORMATION</b>				
SUMMARY Arrestee Morse failed to leave a protest area after a lawful dispersal order was given. Morse was arrested for trespassing on railroad property.				
VEHICLE USED IN CRIME YES <input type="checkbox"/> NO <input type="checkbox"/> UNK <input type="checkbox"/>	OF	LICENSE (NO. AND STATE)	YEAR MAKE MODEL BODY TYPE COLOR VIN	WEIGHT VEHICLES YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
TOWER/PORT YES <input type="checkbox"/> NO <input type="checkbox"/>	DAMAGE NAME AND PHONE	REGISTERED OWNER	REG ADDRESS	
<b>SUSPECTS / ARRESTEES</b>				
CODE A 1 of 1	NAME - LAST, FIRST, MIDDLE, SUFFIX Morse, David	RESIDENCE	UNKNOWN	
RACE SEX HT WT HAIR EYE JOB DOB	ADDRESS 2	PHONE 2		
OCCUPATION	ADDRESS 3	PHONE 3		
SCARS / MARKS / TATTOOS YES <input type="checkbox"/> NO <input type="checkbox"/>	AKA's	ARRESTEE DISPOSITION 3-Misdemeanor	RELEASE LOCATION San Fran CJ9	ARREST DATE / TIME 09/08/2011 / 17:35
DL	STATE CA	ARRESTED YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>	BOOKING #	WARRANT YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
CHARGES 369 IPC (1)			CITATION # 2871259	CIF
CODE	NAME - LAST, FIRST, MIDDLE, SUFFIX	ADDRESS 1	PHONE 1	
RACE SEX HT WT HAIR EYE AGE DOB	ADDRESS 2	PHONE 2		
OCCUPATION	ADDRESS 3	PHONE 3		
SCARS / MARKS / TATTOOS YES <input type="checkbox"/> NO <input type="checkbox"/>	AKA's	ARRESTEE DISPOSITION	RELEASE LOCATION	ARREST DATE / TIME
DL	STATE	ARRESTED YES <input type="checkbox"/> NO <input type="checkbox"/>	BOOKING #	WARRANT YES <input type="checkbox"/> NO <input type="checkbox"/>
<b>CONTROLLED DOCUMENT DUPLICATION OR REISSUANCE CONTROLLED BY LAW</b>				
<b>ADMINISTRATION</b>				
VICTIM CARRIES APPLICATION YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>	FOLLOWUP YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	COPIES TO PAT <input type="checkbox"/> DET <input type="checkbox"/> DA <input type="checkbox"/> COURT <input type="checkbox"/>	PREPARED BY MUNIZ, RINKIN	DATE 7-10-12
BY OFFICER S. Coduti 060851	DATE/TIME 09/09/11 13:37	APPROVED BY Edgardo Alvarez 58957	BART Police Department <b>CONFIDENTIAL</b>	
OFFICER	ASSIGNED TO		DATE APPROVED 09/10/11	STATUS Closed

CR-1 Coduti/060851 Entered by: Shane Coduti

APDC (Rev. 06/16/06) Print Date: 07/11/2012

B.A.R.T.D.-000001

07/11/2012 06:39 15104647089

BART POLICE

PAGE 05

Arrest <input checked="" type="checkbox"/>		CASE # 1109-1047	
Crime <input type="checkbox"/>		PAGE 1 OF 1	
Non-Criminal <input type="checkbox"/>		<b>Case MO</b>	
OFFENSE(S) 369 IPC; Trespass:Railroad Property; Misd.		OFFENSE(S) cont'd.	
DATE, TIME AND DAY OF OCCURENCE 09/08/11 17:44 Thursday		DATE AND TIME REPORTED 09/08/11 17:44	
LOCATION OF OCCURENCE 199 Market St, San Francisco	LOCATION NAME	TYPE OF LOCATION	BEAT 40 SECTOR 4
<b>MO DATA</b>			
<u>Trespassing</u> Structure			
<b>CONTROLLED DOCUMENT</b>			
<b>ADMINISTRATION</b>			
FOLLOW-UP YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	COPIES TO <input type="checkbox"/> PAT <input type="checkbox"/> DET <input type="checkbox"/> DA <input type="checkbox"/> COURT <input type="checkbox"/>	INDEXED TO: <u>15104647089 / 1109-1047 / 09/08/11</u> BY: <u>Shane Coduti</u> DATE: <u>7-10-12</u>	
BY OFFICER S. Coduti 060651	INITIALS 09/09/2011 13:37	APPROVED BY Edgardo Alvarez 56957	BART Police Department <b>CONFIDENTIAL</b> DATE RECOVERED 09/10/11
OFFICER	ASSIGNED TO		CARE STATUS Closed

07/11/2012 09:39 15104647689

BART POLICE

PAGE 06

Arrest <input checked="" type="checkbox"/>	<b>BART Police Department</b> 800 Madison Street, PO Box 12688 Oakland, CA 94604-2688 <b>Person Profile</b>	CASE #
Crime <input type="checkbox"/>		1109-1047
Non-Criminal <input type="checkbox"/>		PAGE 1 OF 1

OFFENSE(S): 369 IPC; Trespass:Railroad Property; Misd.	OFFENSE(S) CONT
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DATE, TIME AND DAY OF OCCURENCE 09/08/11 17:44 Thursday	DATE AND TIME REPORTED 09/08/11 17:44
LOCATION OF OCCURENCE 899 Market St, San Francisco	LOCATION NAME
TYPE OF LOCATION	BEAT 40
	SECTOR 4

**PERSONS**

CODE A	1 OF 1	NAME - LAST, FIRST, MIDDLE, SUFFIX Morse, David	DOB [REDACTED]	This report contains Person Profile information only. Please refer to the primary report(s) for additional information.
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**APPEARANCE INFORMATION**

<b>Appearance</b> Calm	<b>Build</b> Medium
<b>BART Individual Type</b> Facility Occupant Trespasser	<b>Complexion</b> Light/Fair
	<b>Demeanor</b> Calm

**RESUME**

CODE V	1 OF 2	NAME - LAST, FIRST, MIDDLE, SUFFIX California, State of	DOB	This report contains Person Profile information only. Please refer to the primary report(s) for additional information.
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**APPEARANCE INFORMATION**

BART Individual Type  
Not a BART Individual

CODE V	2 OF 2	NAME - LAST, FIRST, MIDDLE, SUFFIX BART DISTRICT, Business	DOB	This report contains Person Profile information only. Please refer to the primary report(s) for additional information.
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**CONTROLLED DOCUMENT**  
 DUPLICATION OR REISSUANCE  
 CONTROLLED BY LAW  
 Approved by: *Tina Glenn, Administrative Administrator*

BY OFFICER S. Coduti 060651	DATE/TIME 09/09/11 13:37	APPROVED BY Edgardo Alvarez 55957	BART Police Department <b>CONFIDENTIAL</b>	DATE APPROVED 09/10/11
OFFICER	REPORT	APPROVED TO	STATUS	Closed

07/11/2012 08:39 15104647089

BART POLICE

PAGE 07

Arrest <input checked="" type="checkbox"/> Crime <input type="checkbox"/> Non-Criminal <input type="checkbox"/>	<b>BART Police Department</b> 800 Madison Street, PO Box 12688 Oakland, CA 94604-2688 <b>Narrative Report</b>		CASE # <b>1109-1047</b> Page 1 of 1
OFFENSE(S) <b>3691 PC; Trespass:Railroad Property; Misd.</b>	OFFENSE(S) CONT.		
DATE, TIME AND DAY OF OCCURRENCE <b>09/08/11 17:44 Thursday</b>	DATE AND TIME REPORTED <b>09/08/11 17:44</b>		
LOCATION OF OCCURRENCE <b>899 Market St, San Francisco</b>	LOCATION NAME	TYPE OF LOCATION	BEAT <b>4D</b>
SECTOR <b>4</b>			

**NARRATIVE**

On 9/8/11 at approximately 1730 hours, I was assigned to an arrest team at the Powell Street BART Station. This was in response to an unauthorized protest at the Powell Street BART Station (Case#1109-1019). I was standing in the free area near the fare gates when I heard a dispersal order given to the protestors. The protestors were standing in between the fare gates and the ticket machines. After a couple minutes BART Police Officers moved in and surrounded the remaining protestors that did not comply with the lawful dispersal order. Deputy Chief Hartwig #C4 approached me and said he wanted me to start arresting protestors that were not complying with the dispersal order. Deputy Chief Hartwig pointed at a man, later identified as Arrestee Morse, who was standing in group of protestors near the edge of the circle. Deputy Chief ordered me to arrest Morse for trespassing on railroad property. (3691 P.C.)

I walked up to Morse and told him he was under arrest. I placed Morse in handcuffs, double locked them, and checked them for proper fit. I escorted Morse back to the Powell Street BART Police Facility. Morse's handcuffs were removed and replaced with zip ties. Morse was later taken to County Jail 1 in San Francisco where he was cited and released on 3691 P.C., Trespassing on railroad property.

**CONTROLLED DOCUMENT**  
 DUPLICATION OR REISSUANCE  
 CONTROLLED BY LAW

ADMINISTRATION			
OFFICER <b>S. Coduti 060651</b>	DATE/TIME <b>09/09/2011 13:37</b>	APPROVED BY By <u>Edgardo Alvarez 56957</u> Date <u>09/10/11</u>	STATUS APPROVED
OFFICE	REPORT	ASSIGNED TO	CASE STATUS <b>Closed</b>

07/11/2012 09:39 15104647899

BART POLICE

PAGE 08

**BART POLICE DEPARTMENT**

**NOTICE TO APPEAR**  Traffic  MISDEMEANOR **BP-2871259**

DATE OF VIOLATION **4-8-11** TIME **3:35**  DAY  NIGHT  **WPTS**  **1102-1017**

NAME (Print, Last, First, Middle Initial) **DAVID B MORSE**  OWNED BY RESPONSIBILITY (Veh. Code, § 40341)

ADDRESS

CITY **OAKLAND** STATE **CA**  JUVENILE (PHONE NO.)

DRIVER'S ID NO. **1880** CL/30  COMMERCIAL  ASE **WHITE**

SEX **M** HAIR **BRO** EYES **BRO** HEIGHT **5'11"** WEIGHT **180** BLOOD TYPE **A**

VEH. LIC. NO. OF VIN **1880** STATE **CA** REG. TAG NO. **1880**

8.  COMMERCIAL VEHICLE (Veh. Code, § 45210.5)

9.  HAZARDOUS MATERIAL (Veh. Code, § 262)

10.  SAME AS DRIVER

11.  SAME AS DRIVER

12.  CONNECTABLE VIOLATION (VEN. CODE, § 4021)  Rolling Record (See reverse)  Misbehavior or Infraction (Code)

13.  **3691 PC INTERFERING WITH** **M** **1**

14.  **ROAD ROAD OPERATIONS** **N** **1**

15.

16.

17.  SPEED APPROX. **15** M.P.H. OVER **SAFE**  CONTRIBUTION **ESTIMATED**

18. LOCATION OF VIOLATIONS **POWELL STREET EAST SF** CITY/COUNTY OF OCCURRENCE **SF SF**

19.  COMMENTS (Weather, Road & Traffic Conditions)  ACCIDENT

20.  I declare that the penalty of perjury under the laws of the State of California is hereby invoked.

21. **9:10 AM S. CARROLL #227**

22. **9:10 AM** **S. CARROLL #227**

23.  WITNESS **[Redacted]**  SEE BELOW.

24. **10-11-11** TIME **08:50**  AM  PM

25.  FOLLOW THE INSTRUCTIONS ON THE REVERSE

26. WHERE:  Richard Superior St. 100 37th St., Room 16A, Richmond, CA 94805 (510) 774-3171

Richard Hill of Jellison 5840 Power Factor Parkway, Fremont, CA 94556 (510) 785-0300

Hayward Capital St. 22405 Smelter Street Hayward, CA 94541 (510) 874-8300

225 Cent St., #127, Marinwood, CA 94022 (415) 944-5424

(510) 874-3171

(510) 874-3171

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(510) 874-3171

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SPEED METER CALIBRATION			AS	AC	IN	OP	RE
DATE	TIME	LOCATION	AS	AC	IN	OP	RE
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CONTROLLED DOCUMENT  
 DUPLICATION OR REISSUANCE  
 CONTROLLED BY LAW  
 Released to **John Danka** Administrators  
 By **DAVID MORSE** Date **7-10-12**  
 BART Police Department  
 CONFIDENTIAL

3691

# **EXHIBIT E**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

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DAVID MORSE,

Plaintiff,

vs.

No. C12-5289 JSC

SAN FRANCISCO BAY AREA RAPID  
TRANSIT DISTRICT (BART); and BART  
Deputy Police Chief DAN HARTWIG,  
sued in his official and  
individual capacities,

Defendants.

\_\_\_\_\_ /

DEPOSITION OF BENSON H. FAIROW

(Pages 1 to 71, inclusive)

Taken before SANDRA M. LEE

CSR No. 9971

October 16, 2013



Aiken Welch Court Reporters  
One Kaiser Plaza, Suite 505  
Oakland, California 94612  
(510) 451-1580/(877) 451-1580  
Fax: (510) 451-3797  
www.aikenwelch.com



1 A. I do not believe so.

2 Q. So prior to today, that was the only time you  
3 saw Mr. Morse in person?

4 A. I had seen him at some protests, some of the No  
5 Justice No BART protests. Which ones, I can't recall.  
6 I believe that's it. There may have been other times I  
7 don't specifically recall.

8 Q. Approximately how many times did you see Mr.  
9 Morse at a protest?

10 A. Two, three.

11 Q. What were these protests about?

12 A. Protests against -- well, there were kind of a  
13 combination of protests. Initially they began as  
14 protests against the officer involved in the shooting of  
15 Charles Hill that occurred on the 3rd of July. Later  
16 on, it became -- Anonymous became involved, and they  
17 became all BART protests. I don't recall which ones,  
18 but sometimes they merged together and those would have  
19 been the occasions.

20 Q. These protests were approximately during the  
21 summer and fall of 2011?

22 A. Yes.

23 Q. When you observed Mr. Morse at these protests,  
24 what was he doing?

25 A. I don't recall. Sometimes in the crowd. That

1 would probably be the only time I would have seen him,  
2 because during the protest I wasn't physically there.  
3 It would have been through close-circuit TV.

4 Q. Did you have audio with that CCTV?

5 A. No.

6 Q. Were you able to recognize that Mr. Morse was  
7 carrying a photo camera?

8 A. I've seen him with a camera before.

9 MR. ALLEN: Can I interrupt for a second?

10 Go off the record.

11 (Discussion off the record.)

12 BY MR. SIEGEL:

13 Q. When you were at the BART board meeting in  
14 which you observed Mr. Morse, did he speak at that  
15 meeting?

16 A. Yes.

17 Q. What do you recall him speaking about?

18 A. It was something about the -- I don't recall.  
19 It was somehow related to the protest or the way things  
20 were being handled at BART regarding the  
21 officer-involved shooting. Something to that effect,  
22 but I don't specifically recall.

23 Q. Did Mr. Morse speak at an appropriate time on  
24 the agenda?

25 A. I would have to go back and look, but I believe

1 it was during public comment.

2 Q. He wasn't shouting out; he was speaking when it  
3 was his turn?

4 A. In turn. I'm sorry. I shouldn't speak at the  
5 same time. In turn.

6 Q. At what point did you become aware Mr. Morse is  
7 a journalist?

8 A. I believe at that time when I saw him at the  
9 board meeting.

10 Q. What do you know about Mr. Morse's journalism?

11 A. I believe he writes for Indybay on-line.  
12 That's about the extent of it.

13 Q. Have you read any of his articles?

14 A. I have.

15 Q. Approximately how many?

16 A. I don't recall. Any that had to do with the  
17 protest.

18 Q. How long have you been with BART?

19 A. Since March 21st, 2011.

20 Q. You weren't here when Oscar Grant was killed?

21 A. No.

22 Q. Where did you work previously?

23 A. The Oakland Police Department.

24 Q. How long were you OPD?

25 A. Since March of 1990.

1 qualify you as a commander?

2 A. You're considered a commander in Oakland when  
3 you're a lieutenant or above. As a lieutenant and  
4 captain, I was a commander.

5 Q. For how long have you held such high-ranking  
6 positions?

7 A. I do not specifically recall when I was  
8 promoted to lieutenant. I believe it was sometime in  
9 2001.

10 Q. Do you recall that the City of Oakland was sued  
11 for its mass demonstration or crowd control policies?

12 A. I do.

13 Q. Do you know that there's a consent degree of a  
14 certain sort that now regulates Oakland crowd control  
15 policy?

16 A. I don't have specific knowledge of it. I  
17 believe I may have read something of it in the press.

18 Q. What topics did David Morse write about in your  
19 experience?

20 A. Again, I don't specifically recall, but they  
21 were usually about how the BART Police Department was  
22 handling -- at least the ones I read, I'm sure he wrote  
23 other articles not related to the BART police, but they  
24 were usually about how the BART police were handling  
25 something, the officer-involved shooting or the

1 protests.

2 Q. How would you characterize the tone of his  
3 articles?

4 A. Generally negative towards the police.

5 Q. Do you feel that criticism was warranted?

6 MR. ALLEN: Objection; argumentative.

7 You can answer.

8 THE WITNESS: I don't generally engage in those  
9 types of things. It's my job to allow them to happen.

10 BY MR. SIEGEL:

11 Q. To allow what to happen?

12 A. If somebody has an opinion they want to express  
13 about the police negative or positive, that's their  
14 right.

15 Q. How did you come across Mr. Morse's articles?

16 A. I looked them up on-line.

17 Q. Through a Google search, for example?

18 A. Initially perhaps. At some point, I bookmarked  
19 Indybay.

20 Q. When do you think you started following his  
21 articles in that way?

22 A. More likely than not, it would have been late  
23 July, early August of 2011.

24 Q. So in the context of these No Justice No BART  
25 or Op BART protests?

1 Q. Do you recall ordering any arrests that  
2 day?

3 A. I do not.

4 Q. You produced a summary e-mail of the events of  
5 September 8th.

6 Do you remember that?

7 A. Not specifically.

8 MR. SIEGEL: I'd like to introduce Exhibit 1 to  
9 this deposition.

10 MR. ALLEN: I might want to make a suggestion.  
11 If you want to make this exhibit next in order for all  
12 of the depositions, then you have a continuity to them.  
13 Otherwise we'll be crossing back and forth when you make  
14 reference to the earlier one.

15 MR. SIEGEL: Let's call this Exhibit 14.

16 MR. ALLEN: Just for the record, what we're  
17 doing is beginning with the depositions that have --  
18 Mr. Siegel's depositions of BART and parties related to  
19 BART, he will be using his deposition exhibits in  
20 seriatim from the first depo beginning with Deputy Chief  
21 Hartwig.

22 MR. SIEGEL: Could we go off the record?

23 (Discussion off the record.)

24 (Plaintiff's Exhibit 14 marked for  
25 identification.)

1 BY MR. SIEGEL:

2 Q. Do you see the document in front of you?

3 A. I do.

4 Q. Do you recognize it?

5 A. It appears to be an e-mail I sent to Marcia  
6 deVaughn and Chief Rainey.

7 Q. Who is Marcia?

8 A. I don't know her exact title. It's like  
9 assistant general manager. She's the chief's boss.

10 Q. Is this a report of BART PD's activities during  
11 the September 8th, 2011, protest?

12 A. I need to review it real quick if that's okay.

13 Yes. It appears to be an e-mail report I sent  
14 to Marcia deVaughn.

15 Q. How did you create this report?

16 A. I would have typed it up.

17 Q. What information did you rely upon?

18 A. I don't specifically recall, but it would have  
19 been my experience from the night before. I don't know  
20 that I had any documents at that point to review. It  
21 might have been just information I received by phone or  
22 a report when dealing with specific numbers, people  
23 detained or arrested.

24 Q. Is it fair to say that you included reliable  
25 information in your report?

1           A. It was as reliable as I would have been able to  
2 give at that time.

3           Q. This was a report that you gave to the chief?

4           A. He was cc'd in it. I may have been in an  
5 acting capacity at the time this was written, because  
6 that's usually the only time I would be sending a report  
7 directly to Marcia deVaughn.

8           Q. Did you ever update this report?

9           A. I don't recall.

10          Q. Ordinarily if you made a report and learned  
11 information that contradicted the report, would you  
12 create an update?

13          A. I might. Probably wouldn't have caused an  
14 update to go to Marcia deVaughn, though. When you're  
15 acting chief, you report to that person during the time  
16 span that you're actually acting. So if something were  
17 to come up -- and I don't recall that anything did, but  
18 if something were to, I would give it to the chief and  
19 let him tell her if he felt it was important for her to  
20 know.

21          Q. What is Marcia's status within BART?

22          A. She's -- I might have said acting assistant  
23 general manager.

24          Q. Is that who the chief of police reports to?

25          A. Yes.



1 Q. In this e-mail document, you write that the  
2 protest began around 5:00 p.m.

3 Is that your recollection?

4 A. I don't have an independent recollection of it.  
5 That would have been my recollection at the time.

6 Q. You write several warnings were given to  
7 individuals in the group to not block the gates.

8 What did you base that statement upon? I'm  
9 looking at the second paragraph of your e-mail. Second  
10 large paragraph.

11 A. I see it. I don't specifically recall.  
12 Probably reports from people in the field.

13 Q. At the bottom of this page and the beginning of  
14 the next, you write, "The station was closed at this  
15 point and officers began to sort through the group of  
16 detainees, releasing bonified members of the press and  
17 taking those protesters participating in blocking gates  
18 into custody."

19 A. Yes.

20 Q. What did you mean by "releasing bonified  
21 members of the press"?

22 A. Generally speaking, like, members of the press  
23 with press credentials, that had been issued press  
24 credentials. In today's world, there's a lot of  
25 bloggers and a lot of people that report on things and

1 aren't necessarily considered bona fide press. It was  
2 basically that.

3 Q. Are you familiar with the BART policy regarding  
4 media?

5 A. Not off the top of my head.

6 MR. SIEGEL: Let's try Exhibit 15, please.

7 (Plaintiff's Exhibit 15 marked for  
8 identification.)

9 BY MR. SIEGEL:

10 Q. Have you reviewed this policy previously?

11 A. Not recently.

12 Q. I'd like to direct your attention to the second  
13 page of this document under the heading of "Media  
14 Access." Under item (a), it states, "The media  
15 representative shall produce valid press credentials  
16 that shall be prominently displayed at all times while  
17 in areas otherwise closed to the public."

18 Do you know what valid press credentials is?

19 A. I would consider those to be credentials issued  
20 by the police department. I know Oakland does. I know  
21 San Francisco does.

22 Q. Are you aware that a journalist does not have  
23 to have such credentials in order to practice  
24 journalism?

25 A. I think that's a common-sense approach to it,

1 yes.

2 Q. When you wrote -- when you refer to "bonified  
3 members of the press," were you referring to David Morse  
4 as a non-bona fide member of the press?

5 A. Apparently I was in that e-mail.

6 Q. And why did you consider Mr. David Morse not to  
7 be bona fide?

8 A. I don't specifically recall. I think what I  
9 was referring to -- I don't have independent  
10 recollection.

11 Q. Do you know whether Mr. Morse had press  
12 credentials that day?

13 A. I don't believe he did, but I don't recall.

14 Q. Is it true that other self-proclaimed  
15 journalists were primarily detained on that day?

16 A. I don't specifically recall. I do recall there  
17 were some journalism students. I would probably lump  
18 them into that category. They were released.

19 Q. And were they bona fide members of the press?

20 A. Not with press credentials, no.

21 Q. They weren't included in your statement of  
22 "releasing bonified members of the press"; is that fair  
23 to say?

24 MR. ALLEN: I'm going to object it's vague,  
25 it's argumentative, calls for speculation.

1 provides a limited amount of information to me when I'm  
2 sitting there remotely in Oakland.

3 Q. Is it fair to say when you wrote this report,  
4 you were not necessarily relying on direct knowledge?

5 A. That's true.

6 Q. You were relying on what other people told you?

7 A. True.

8 Q. I have caught up with my earlier question. I'd  
9 like you to look at Exhibit 1, which has already been  
10 introduced which your counsel has a copy of. From my  
11 understanding of what BART has told me, this is the  
12 tactical team and crowd control policy.

13 Do you recognize this policy?

14 A. Yes.

15 Q. I'd like to direct your attention to 459.7,  
16 which is on the page numbered 411 by the policy number  
17 or 19356 by the Bates stamp. It's entitled "The Media &  
18 Public Information."

19 A. 459.7?

20 Q. Yes.

21 A. Got it.

22 Q. Would you please read the first two sentences  
23 of the second paragraph of that section?

24 A. "Those with a right to cover photograph  
25 demonstrations are not limited to representatives of

1 major newspapers, radio or television stations. Persons  
2 who represent small newspapers or magazines,  
3 free-lancers and other citizens are also entitled to  
4 take notes or photographs."

5 Q. Is it fair to say that the second sentence of  
6 that paragraph covers non-bona fide members of the  
7 press?

8 A. Absolutely.

9 Q. Whether you're bona fide or not, you have the  
10 right to report on protests occurring on BART  
11 facilities?

12 A. As long as you don't break the law, yes.

13 Q. I'd like to direct your attention to the fourth  
14 paragraph of that same section. It states, "Officer  
15 should recognize media credentials issued by police  
16 agencies or the media representative's employer as valid  
17 identification."

18 Does that refresh your recollection about what  
19 proper credentials would be?

20 A. It does.

21 Q. So if the credentials are issued by the media  
22 organization, that's sufficient; is that correct?

23 A. Yes.

24 Q. Do you have any independent knowledge of how  
25 David Morse might have blocked fare gates?

1 command staff. It would be with our operations  
2 counterparts within the BART system, those who patrol  
3 the trains and the stations, that type of thing.

4 Q. Do you recall at one of those meetings a "Be On  
5 the Look Out" document was distributed?

6 A. No.

7 Q. I'd like to direct your attention to -- I  
8 thought we had it here -- Exhibit 4.

9 A. Got it.

10 Q. Do you recall this document?

11 A. I do.

12 Q. What is it?

13 A. It's pictures of Christopher Cantor and Mr.  
14 Morse. At that point, we had identified Mr. Cantor. We  
15 didn't know Mr. Morse's actual name. He was identified  
16 by his moniker, Dave Id.

17 Q. Is this a BOLO?

18 A. No. It's a document that was handed out to  
19 officers who were out there that day. Again, as you  
20 recall earlier, I mentioned that if Mr. Morse showed up,  
21 it was highly likely that that's where the protest would  
22 be, So actually if either one of them showed up. What  
23 this was created for was to allow field personnel to  
24 know what both of them looked like and to advise us when  
25 they showed up so we knew whether we would have the

1 resources in the right place or not.

2 Q. How is this distinguishable from a BOLO?

3 A. BOLOs usually have some kind of action  
4 requested, either arrest, identify, missing people if  
5 it's a missing person, a BOL for a missing person. I'm  
6 sure there's a couple I'm missing. But this was solely  
7 to provide field personnel with an idea what these two  
8 individuals looked like.

9 Q. Did you use a mugshot of Christopher Cantor in  
10 this BOLO?

11 A. I would be guessing, but it appears as though  
12 the one on the left -- upper left-hand corner is a  
13 mugshot. It could be a driver's license, though.

14 Q. Why was the PFN included?

15 A. Because he had been arrested before.

16 Q. How did that help to identify him?

17 A. I didn't need to identify him. He had already  
18 been identified.

19 Q. I'm saying: This document was issued to help  
20 people visually identify Cantor and Dave Id; is that  
21 correct?

22 A. Yes.

23 Q. So why is the PFN included?

24 A. I don't have specific knowledge of why. I can  
25 think of a variety of reasons, one being if we did come

1 in contact with them and they were taken into custody  
2 again, it would speed the process. We wouldn't have to  
3 do a record-check to know what his PFN is.

4 Q. So in certain ways this document is  
5 anticipating the arrest of Cantor?

6 MR. ALLEN: Objection. It's argumentative,  
7 calls for speculation.

8 THE WITNESS: No. Not at all.

9 BY MR. SIEGEL:

10 Q. Is it fair to say this document stigmatizes  
11 Cantor?

12 MR. ALLEN: Objection; argumentative.

13 THE WITNESS: No. It's for police use only.

14 BY MR. SIEGEL:

15 Q. There aren't any specific instructions on how  
16 to use this document on the document, are there?

17 A. No.

18 Q. It doesn't say use this document to identify  
19 these two people, does it?

20 A. No.

21 Q. How often does BART create a BOLO, an official  
22 BOLO?

23 A. Once or twice a week.

24 Q. And how often -- let me take that back.

25 Does BART create BOLOs for protests?



1 A. Not unless someone is wanted.

2 Q. What would you call this document?

3 A. I don't know that I would give it a label. I  
4 don't know.

5 Q. Have you ever created something like this  
6 before?

7 A. Not that I recall.

8 Q. Since this document was created, have you  
9 created another like it?

10 A. No. There hasn't been a need.

11 Q. What was the need for September 8th to create  
12 this document?

13 A. We knew that if either Mr. Cantor or Mr. Morse  
14 appeared on a day when there was a protest scheduled to  
15 occur that it was more likely than not that the protest  
16 would occur where they showed up. So having early  
17 intelligence that they were present was helpful in  
18 determining where we were going to send resources. As I  
19 recall, this particular day there was some confusion as  
20 to whether they would actually be at Powell or another  
21 station. It's difficult for us as a law enforcement  
22 agency to mobilize enough resources to cover every  
23 contingency. We try to cover them as best we can and  
24 try to minimize surprises whenever possible. In this  
25 case, it was going to be to our advantage to know where

1 either Mr. Cantor or Mr. Morse showed up because we  
2 would be able to put our resources in that location and  
3 not play catchup by having to move to another station we  
4 weren't aware of.

5 Q. Did you work with Officer Dam in preparing this  
6 document?

7 A. I don't know that I worked with him. I knew he  
8 was preparing it.

9 Q. Did you order him to prepare it?

10 A. I may have.

11 Q. If you had to do it over again, would you  
12 prepare this document in the same manner?

13 A. Yes.

14 Q. Other than this document, did you highlight  
15 David Morse in any other way in advance of the protest?

16 A. Not that I recall other than maybe at briefings  
17 talking about if either one of them were seen, they need  
18 to alert us as soon as they were seen.

19 Q. Were you hoping to arrest Mr. Morse?

20 A. Not necessarily. I was hoping the protest  
21 would be just that, a protest, that there wouldn't be  
22 any law-breaking.

23 Q. Were you hoping to learn his true name?

24 A. I don't know that I gave that any consideration  
25 at the time. He hadn't committed any criminal acts, so

1 I really wouldn't be interested in that.

2 Q. Who is Christopher Vogan?

3 A. That's one of our officers.

4 Q. What is his title?

5 A. Just an officer.

6 Q. Do you remember working with him with regards  
7 to the protest in question?

8 A. I may have.

9 Q. What role would he play in the protest?

10 A. He and another officer -- I don't have specific  
11 recall to this protest. He and another officer at that  
12 time had assignments that were undercover type of  
13 assignments, so I know I used them on occasion to do  
14 undercover work. Basically surveillance.

15 Q. Do you remember if any undercover officer was  
16 used on September 8th?

17 A. I don't specifically recall, but I may have.

18 Q. Did you utilize any confidential informants  
19 that day?

20 A. I do not believe so.

21 Q. Would there be a record of such a thing?

22 A. If -- if the information that a confidential  
23 informant gave were to be used in that person's arrest,  
24 I would assume there would be some kind of record. I  
25 don't have any recall of confidential informants being

1 contain every possible action or thought, it would be  
2 much thicker and take a long time to read through.

3 MR. SIEGEL: Take a break.

4 (Recess taken.)

5 BY MR. SIEGEL:

6 Q. Other than September 8th, 2011, during your  
7 tenure as a BART commander, have you utilized 369i to  
8 make arrests?

9 A. Not personally. But during other -- I believe  
10 during other protests that followed. I'd have to check.

11 Q. You don't know for sure?

12 A. No, I don't.

13 Q. Do you know why 369i was used on the protest in  
14 question?

15 A. Not specifically because I didn't witness it.  
16 I believe it was because they were blocking the fare  
17 gates.

18 Q. I'd like to show you an exhibit we looked at  
19 yesterday. It's Exhibit 10.

20 A. Okay.

21 Q. What is this document?

22 A. This is an event record printed from our CAD  
23 system or Alliance. I believe it's called the Alliance  
24 Reporting System.

25 Q. Do you know how this record is created

1 specifically?

2 A. It is based off of dispatchers in our dispatch  
3 center.

4 Q. Is it reliable in terms of the times?

5 A. To the extent that what is typed is typed at  
6 that time.

7 Q. Is there a process to review an event record  
8 for accuracy?

9 A. Not that I'm aware of, but communications  
10 doesn't come under my area of responsibility.

11 Q. On the first two pages of this record, do you  
12 see yourself referenced through some of the entries?

13 A. Yes.

14 Q. You're C2?

15 A. I am.

16 Q. On the first page, the last entry refers to C2.  
17 Can you decipher what that means?

18 A. Not a hundred percent.

19 Q. What's your best guess?

20 A. There's a male at one end of the station, black  
21 and white checkered jacket, so that's a clothing  
22 description, jumping and interfering with train traffic.

23 Q. A few lines above that, do you see where it  
24 says "S56"?

25 A. Yes.

1 Q. Seems to state "Secondary subject Dave Id is in  
2 paid area."

3 A. Yes.

4 Q. What does "secondary subject" mean?

5 A. Probably have to ask S56. That would be the  
6 supervisor at the time. Perhaps he's the second person  
7 on the list of photos.

8 Q. So the B0L0 made Mr. Morse a subject; is that  
9 fair to say?

10 MR. ALLEN: Objection. That mischaracterizes  
11 the testimony of Deputy Chief Fairow as to what that  
12 document is. You're characterizing it as a B0L0 and he  
13 did not.

14 BY MR. SIEGEL:

15 Q. With that caveat, did the document lead to  
16 David Morse being characterized as a subject?

17 A. It may have. He's the second person on that  
18 document.

19 Q. And right below S56, it says, "226: subject is  
20 by entrance to police office."

21 Do you see that?

22 A. I see that.

23 Q. Do you think that refers to Christopher Cantor?

24 A. I don't know. Doesn't say.

25 Q. How were you participating in the protest

1 Q. Do you remember taking any efforts to obtain  
2 video footage of BART meetings regarding Mr. Morse?

3 A. It would appear based on this that -- which is  
4 what I would normally do -- I asked Tom Smith to pull  
5 the footage. They're the ones with control over that.  
6 He says he's checking on it.

7 Q. Do you know for what purpose the footage was  
8 pulled?

9 A. I could only speculate based on what the chief  
10 wrote to me.

11 MR. SIEGEL: I'd like to mark Exhibit 19,  
12 please.

13 (Plaintiff's Exhibit 19 marked for  
14 identification.)

15 BY MR. SIEGEL:

16 Q. Is this an e-mail message you sent to Ken Dam?

17 A. Yes.

18 Q. Did you tell Officer Dam to create the  
19 BOLO-like flier that we've discussed earlier?

20 MR. ALLEN: Objection; mischaracterization of  
21 the question, the form of the question.

22 BY MR. SIEGEL:

23 Q. Did you direct Officer Dam to create Exhibit 4?

24 A. Yes.

25 Q. How were you able to recognize David Morse in

1 the picture?

2 A. I'd seen him before. I'm not sure exactly  
3 where. Perhaps this e-mail gives me a clue. I'd seen  
4 him in board meetings.

5 Q. Directing your attention to the second page of  
6 this document, the top paragraph, it states, "Dave Id  
7 hasn't been identified yet. He's the Indybay 'reporter'  
8 who collaborates with Cantor."

9 Did you write that?

10 A. Yes.

11 Q. What did you mean David Morse collaborates with  
12 Christopher Cantor?

13 A. Because he had been with Cantor and engaged in  
14 conversations and appeared to be participatory in the  
15 activity that was going on.

16 Q. Prior to September 8th?

17 A. Yes.

18 Q. What do you mean by "participatory"?

19 A. Just most reporters will report on what they  
20 see, observe, report what happens in the interviews.  
21 They aren't usually engaged in a personal exchange or  
22 writing and leading at the same time with their  
23 subjects. It's based on observation.

24 Q. Based on the style of reporting, essentially?

25 MR. ALLEN: Objection; calls for speculation.



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REPORTER'S CERTIFICATE

I, SANDRA M. LEE, a Shorthand Reporter, State of California, do hereby certify:

That BENSON H. FAIROW, in the foregoing deposition named, was present and by me sworn as a witness in the above-entitled action at the time and place therein specified;

That said deposition was taken before me at said time and place, and was taken down in shorthand by me, a Certified Shorthand Reporter of the State of California, and was thereafter transcribed into typewriting, and that the foregoing transcript constitutes a full, true and correct report of said deposition and of the proceedings that took place;


That before completion of the proceedings, review of the transcript was not requested.

IN WITNESS WHEREOF, I have hereunder subscribed my hand this 1st day of November, 2013.

\_\_\_\_\_  
SANDRA M. LEE, CSR NO. 9971  
State of California

# **EXHIBIT F**

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	<b>BART POLICE DEPARTMENT</b>
	<b>KENTON W. RAINEY, CHIEF OF POLICE</b>
	<b>OPERATIONS ORDER NO. 11-18</b>
<b>DATE OF ISSUE: 9/8/11</b>	

**Tactical/SWAT/CAP Team Deployment – 09/08/11**

**INCIDENT COMMANDER:** Deputy Chief Benson H. Fairrow (C2)  
**Operations Chief:** Deputy Chief Daniel Hartwig (C4)  
**Planning Section Chief:** Lieutenant Aaron Ledford (L16)  
**Logistics Section Chief:** Deputy Chief Janeith Glenn-Davis (C3)  
**Fiscal Section Chief:** Supervisor Matt Cromer

**DEPARTMENT CORE VALUES**

**SERVICE** – Placing Service above Self, we work in partnership with the community, serving with pride, courage and compassion.

**ACCOUNTABILITY** – We take ownership of our duties, remaining answerable to the public and accountable to the laws, polices and procedures that govern and guide us.

**PROFESSIONALISM** – We are committed to conduct and performance reflective of the highest standard of personal and organizational excellence.

**INTEGRITY** – We inspire trust and carry ourselves in a manner that demonstrates the highest levels of honesty, ethics and moral conduct.

**DIVERSITY** – We acknowledge and embrace the diversity in the communities we serve and strive to ensure diversity is reflected in all levels of our organization.

Law Enforcement Sensitive – Do Not Distribute

PLAINTIFF'S  
Exhibit No. 2  
D. HARTWIG  
10-15-13

## CONFIDENTIAL

**SITUATION:** "No Justice, No BART" NJNB held a press conference on 09/05/11, during which they announced their intention to force BART to allow people to ride for free during the evening commute on Thursday, 09/08/11, beginning at 1630 hours, at Powell Street Station. NJNB stated that patron fare dollars should not be used to support the BART Police Department and they want BART to "throw open" the fare gates. They stated they would allow people to enter and leave the station, but they intend to flood the station with enough protesters that BART will simply open the gates and allow patrons to enter without charge. NJNB indicated they would move the protest action to other stations if the police attempted to intervene. Protest organizers also stated on various internet postings that there will be roles for people on the platforms, as well as above ground, that they will maintain a presence at multiple BART stations, and that this action will be very different than previous NJNB protests.

Recently, NJNB organizer Christopher Cantor (aka: Kristof) was interviewed on KPFA radio. During this interview, Cantor stated the protest would be held at the Embarcadero Station and railed at main-stream media for focusing on inconvenienced BART patrons.

**MISSION:** It is the mission of the BART Police Department to provide for the safety and security of BART's customers and maintain a heightened vigilance against terrorism during crowd events system-wide. A rapid, tactical response to calls, judicious enforcement of applicable laws, and sound crowd-management practices will be used to safeguard the public and minimize service disruptions. This department's policy (Policy 459) regarding crowd management and crowd control is to apply the appropriate level of direction and control to protect life, property, system facilities and maintain public peace and order and to uphold the constitutional rights of free speech and assembly. This should be accomplished using the minimal amount of physical control and authority required to address crowd management and crowd control issues.

**EXECUTION:** There will be a mandatory call-out for the Tactical Team, CAP Team and SWAT Team for Thursday, 09/08/11. Only those members on annual vacation or other non-discretionary leave will be excused from this call-out. Tactical, CAP and SWAT personnel will muster at 1330 hours in the MTC Auditorium for briefing. (Tactical Team supervisors will meet in the MTC Auditorium at 1230 hours.) After briefing, SWAT personnel will be transported from the MTC parking lot to San Francisco in vans driven by BART police CSOs (R. Nagata, K. Potter and D. Puktianie).

**"B" platoon patrol officers, with the exception of those officers who normally report to Powell Street Station, will report to work one hour early and will be deployed as directed to assist with crowd control/crowd management at the downtown San Francisco stations. All "A" platoon officers will be held over until the conclusion of the protest. All personnel are to report for duty with their helmets and standard batons. "A" platoon officers will maintain the beats they worked during day shift. Oncoming "B" platoon officers will deploy as directed to San Francisco as soon as they are in service to assist with crowd management at the downtown stations, as assigned. Zone 1, "B" platoon personnel should concentrate their patrol efforts and provide a visible presence at West Oakland, 12<sup>th</sup> and 19<sup>th</sup> Streets. If necessary, all Zone 1 personnel may be sent to downtown San Francisco stations as reinforcements.**

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In that event, Zone 1 priority calls at West Oakland, 12<sup>th</sup> Street, 19<sup>th</sup> Street, MacArthur, and Rockridge Stations would be handled by Zone 2 personnel. Zone 1 priority calls at Lake Merritt, Fruitvale, and Coliseum Stations would be handled by Zone 3 personnel.

Depending on the movement of the crowd, the Tactical, CAP and SWAT teams may be re-deployed to other stations to effectively manage the event.

Personnel available for this protest event are as follows:

**Tactical Team:**

- 1 Lieutenant
- 7 Sergeants
- 20 Officers

**SWAT Team:**

- 2 Sergeants
- 8 Operators

**CAP Team:**

- 6 Officers
- 3 VIPR's

**Patrol/Admin:**

- 5 Sergeants
- 14 Officers

**Total Strength for Event:**

- 1 Lieutenant
- 14 Sergeants
- 48 Officers

Persons will be allowed to peacefully protest on the station concourses, outside the paid area, as long as they do not attempt to disrupt BART service, create a safety hazard for patrons or commit other unlawful acts.

For clarity in communicating with outside agencies, the entrances to the downtown San Francisco Stations have been numbered. Beginning at the east end of the stations, the entrances are numbered 1-8. The odd numbers are located on the north side of Market Street and the even numbers on the south side. See attached area maps (Appendix A) for further information.

Deputy Chief Hartwig is designated as the Operations Chief and will initially be responsible for all event-related activities at Powell Street Station. Lieutenant Wong is designated as the Deputy Operations Chief and will function as an Operations Chief if there is a need to divide resources. The SWAT Team may be deployed to other stations as needed, at the direction of the Operations Chief or Incident Commander.

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In the event the Incident Commander moves personnel from one section to another, the tactical supervisor in charge of that team will report to the Operations Chief as soon as possible after arrival.

The Tactical Team will be the primary crowd control/crowd management force for this deployment. **Downtown San Francisco stations will not be closed in advance of the planned protest. Civic Center and Powell Street Stations may be closed if protesters there attempt to disrupt BART service, create a safety hazard or commit other unlawful acts on the platform. Every effort will be made to keep these stations open.**

Montgomery and Embarcadero Stations will remain open unless circumstances dictate that they be closed. The Tactical Team will initially deploy to Powell Street Station. If the Incident Commander determines that Powell Street Station should be closed, the Tactical Team will re-deploy to Montgomery and/or Embarcadero as needed. Patrol officers will be assigned to Civic Center, Montgomery and Embarcadero Stations in order to provide security and a visible uniformed presence. Patrol personnel will be assigned to Powell Street Station to provide security for any arrestees and to assist with the booking and transport process. The patrol teams assisting with the protest will deploy as directed on the attached roster (Appendix B). These patrol teams will be responsible for maintaining situational awareness of activity in their assigned stations. All officers will provide a highly visible uniformed presence on the platform to discourage illegal behavior.

If police personnel need to be re-deployed, a minimum of one sergeant and four officers should remain within the downtown stations while those stations are open.

**The Department will take a "zero tolerance" approach to disruptive, unsafe and unlawful activity occurring on the platform or concourse during this planned protest. Station destination signs and PA systems will warn against deliberate attempts to disrupt revenue service. Officers will be assigned to intervene as soon as possible, making immediate arrests without prior warning of protesters who block train doors, climb atop trains or otherwise delay revenue service, or block fare gates to prevent patron access to the system. Protesters will not be permitted to use amplified sound systems, display signs or banners, or march while on the platform level of any station, as these activities are inherently unsafe on crowded train platforms. Protesters who unfurl banners, or who begin chanting or marching on the platform will be warned, then arrested if they do not desist. Protesters do not have the permission of the BART District to conduct such activities in the paid areas of the BART system and such conduct, if allowed to continue, would interfere with, interrupt or hinder the safe and efficient operation of the system. Such conduct is a violation of 369i PC.**

Tactical Team supervisors will coordinate the arrest of any protester in violation of the law as quickly as possible. If necessary, the station will be closed to revenue service and trains will run through the station. Tactical Team officers will work in squads of 4-6 officers to keep order. Squads #1 and #2 will be arrest teams. Squads #3 and #4 will

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be cover teams. The Tactical Team will ideally operate as a single crowd-control force. If it becomes necessary to divide the Tactical Team to respond to two separate incidents, Squads #1 and #3 will form one team, and Squads #2 and #4 will form the other. Officers should be mindful that patrons uninvolved in the protest activity may also be present on the platform. Personnel should make investigative detentions and contacts to maintain a high profile and document persons suspected of preparing to engage in illegal activity.

In the event that protest activity appears likely at other stations, the Incident Commander may re-deploy officers to new locations. If station closures are required, the lead car of a revenue train will be reserved for the transportation of police personnel to other stations.

SWAT Team members will deploy in two teams and will act as a Rapid Reaction Force and reserve crowd-control force. The SWAT Team will initially be deployed to Embarcadero Station. On order, the SWAT Team will provide additional arrest teams, assist in evacuating patrons from stations and will be prepared to deploy quickly to other stations if needed to provide crowd control. A SWAT officer will be assigned to escort the vans in a marked police vehicle.

Three 15-passenger vans will be available to transport SWAT/Tactical Team or other personnel in the event that train service is unavailable, or officers are needed at locations away from the BART system. CSO's will be assigned as drivers for these vehicles and will remain with the vans for security. The parking lot of the Federal Reserve Bank is available for secured vehicle parking. The Federal Reserve Bank is located at Mission/Main Streets. An alternate staging location is the San Francisco Transition Structure.

Patrol personnel will deploy to downtown stations, as detailed on the personnel assignments list in this order. **The sergeants accompanying patrol teams not assigned to the same station as an Operations Section Chief will be designated as the tactical supervisor for that station and will report to the Incident Commander.**

The Incident Commander will be located at the Incident Command Post and will be responsible for the movement of personnel and coordination with the Transportation/Operations Departments regarding the closure of stations and the movement of trains.

**Surgical Arrest Plan:** Based on NJNB's announced protest plan, they will likely gather at the primary end of the Powell Street Station concourse, in front of the agent's booth. The group may attempt to block or impede access to the ticket vending machines or the fare gates. Tactical Team squads will be present on the concourse, in close proximity to the primary protest group. If the group does not block access and does not engage in illegal behavior, officers will simply monitor the protest. If isolated individuals begin to engage in unlawful behavior, a supervisor will identify those to be arrested and an arrest squad will move in, protected by a cover squad, to make the arrests. Those arrested

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should be moved away from the area as soon as possible and secured out of public view to be identified and processed for booking. If multiple protesters engage in unlawful behavior, the mass arrest plan will go into effect. All arrests should be coordinated and at the direction of a supervisor. Individual officers should not enter crowded trains or crowds of protesters to make arrests.

**Mass Arrest Plan:** If the crowd becomes unruly due to arrests taking place, or is engaging in group unlawful actions, the following will occur: both Tactical Team supervisors and Operations/Transportation personnel will begin to warn protesters that they are subject to arrest if they block vendors or fare gates. If the protest group fails to move away from these areas, the Tactical Team commander will order the team to encircle the primary protest group and initiate an investigative detention. The Westfield Mall entrance will be closed and the Hallidie Plaza exit from the station may be restricted or closed. Operations personnel will direct patrons to the secondary end of the station to enter and exit the system. Once the group is encircled and the situation stabilizes, a supervisor will identify those individuals who are to be arrested. The CAP Team and patrol officers will be assigned to replace Tactical Team officers in the circle. Tactical Team officers will then begin to make arrests from the encircled group. The arrestees should be moved away from the scene as quickly as possible and taken to the temporary holding area where they will be secured until they are transported to County Jail #1. An SFPD mobile-field force will move into the station. SFPD officers may assist in containing the protest group while arrests are being made. The station will not be closed unless the tactical situation presents a safety hazard.

The CAP Team may be assigned as "markers" to observe the crowd and locate individual protesters violating 369i PC. The markers must work alongside the videographers, so that video footage can be obtained documenting the criminal activity. The markers will identify the violators to arrest teams, who will take them into custody. Each marker will subsequently complete reports documenting those observations resulting in arrests. Three Federal Air Marshals (FAMS) will work with the CAP team to assist with security. The FAMS will not take enforcement action on state or local criminal violations, unless exigent circumstances exist.

SFPD will provide assistance on the concourse and/or platform, if the crowd size requires it. While BPD personnel mark and arrest suspects, SFPD can be requested to move or secure arrestees, or form a skirmish line to prevent wayside incursions or prisoner escape.

As soon as practicable after criminal offenders begin to be removed from the protest area, those not committing crimes, such as regular patrons and the media, can be escorted away from the operations area. Patrons should be allowed to exit the stations, while media may be directed to a media staging area designated by the Operations Chief. All persons detained should be identified and documented by F.I. card.



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### Temporary Detention Areas:

**Embarcadero Station:** In the alcove adjacent to the Fire Command Post. Officers will be assigned to fixed posts to block access to the hallway in front of the command post while prisoners are present.

**Montgomery Station:** The Sansome/Sutter hallway will be used. The roll-down gate leading to the street will be closed and officers will be assigned to block access from the office building and from the secondary end of the station while prisoners are present.

**Powell Street Station:** The police office will be used. If the holding cell becomes too full, the hallway and squad room may be utilized. If the number of arrests dictate, the Yerba Buena tunnel may also be used.

**Civic Center Station:** The police office will be used, along with the adjoining conference room.

Prisoners will be escorted to the concourse level of the station for processing. **Arrestees will be photographed with the arresting officer** and field arrest cards completed. Sufficient Tactical Team and/or patrol officers will be assigned to provide prisoner security while arrestees await transport to jail. In the event that Tactical Team officers are insufficient to provide prisoner security, patrol officers will be moved from other stations to provide additional security. Detective Ravi Sincerney #224 will be assigned as the booking coordinator. If she is unavailable, a Tactical Team officer will be assigned as the booking coordinator. The booking coordinator is responsible for ensuring that the SFPD Field Arrest card is properly completed with all necessary information to document a misdemeanor arrest in San Francisco, that the proper booking photograph has been taken, that the appropriate charges are listed on the booking card, that the arresting officer is clearly identified and that there is sufficient probable cause for each charge listed. Once this has been completed, the arresting officer will return to the protest area for further assignment and patrol officers will be assigned to conduct prisoner transports.

The San Francisco Sheriff's Department (SFSD) will provide prisoner transportation as necessary. Requests for SFSD transportation are to be made through Deputy Chief Glenn-Davis, who will be in the SFPD command post.

SFPD will respond to protest related issues occurring in their jurisdiction. SFPD officers will stage at Fulton and Larkin Streets, along with their mobile command post. SFPD officers may be requested to provide assistance inside the downtown stations upon request from the Incident Commander.

BPD may be responsible for the transportation and booking of some arrestees resulting from this event. In addition to the patrol vehicles assigned to Zone 4, caged vehicles will be staged in San Francisco to provide additional prisoner transport capability. If necessary, one or more of the 15-passenger vans may be used for prisoner transportation. If the number of arrestees warrants it, the San Francisco Sheriff's

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Department will be contacted and they will set up a booking area in the jail sally-port. **BPD officers will be responsible for processing prisoners and issuing citations at the jail if the sally-port is used for processing.**

BART Operations/Transportation Departments will provide uniformed personnel to staff the downtown San Francisco stations during this event. These personnel will be identified by bright green safety vests, which will display the employee's identification card in a pocket on the left breast. These Operations/Transportation personnel will coordinate the dispatching of revenue trains and will monitor the concourse and platform for safety concerns. Teams of employees will also ride trains in the downtown corridor in order to monitor any suspicious or unsafe activity on board trains. They will relay any safety issues to the BART police on-scene Tactical supervisor, who will determine if the situation warrants police action. Operations/Transportation personnel should **not** become involved in physically confronting protesters.

**ADMINISTRATION and EQUIPMENT:** Tactical Team and SWAT personnel shall deploy in full tactical uniform and equipment, including helmets, gas masks and long batons. At least two grenadiers will be assigned to the event, equipped with both impact and crowd control chemical agents.

The use of chemical agents as a crowd control tool must be authorized by an Operations Chief or the Incident Commander. Any use of crowd control chemical agents should be coordinated with SFPD to avoid exposing allied agencies to chemical agents without warning. The use of chemical agents inside BART stations or on trains is inherently hazardous to patrons, officers and protesters alike and should be avoided if possible.

All uses of force by sworn officers are governed by the department's use of force policies (300, 304, 308 & 309) and applicable federal and state laws. Nothing about a crowd control situation eliminates or changes any of the constraints or policies governing the use of lethal or less-lethal force. Officers must be able to provide clear, detailed, articulable facts that would reasonably justify any use of force against a particular individual. Uses of force during a crowd control situation shall be treated as any other use of force and reported using the normal reporting procedures. Officers are required to provide appropriate first aid following any use of force. The Incident Commander will direct a supervisor to prepare a master Supervisor's Use of Force Report to document any uses of control holds or takedowns used to take protesters into custody. If significant force, other than control holds or takedowns are used against a person, a supervisor will be assigned to complete a separate use of force report.

Overtime for this detail will use work order NYD09 – 9/8/11 Protest.

Sergeant Kreitzer will ensure that sufficient SFSD property envelopes and field arrest cards are available to properly document mass arrests if this becomes necessary. She will provide a mobile-booking kit to the booking coordinator.

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Two Tactical Team officers will be designated as team videographers. These officers should document protest activity on the platform and also any dispersal orders, arrests or other enforcement action taken by Tactical Team officers during the event. An officer will also be assigned to take photos of all arrestees, with the arresting officer, before the arrestee is transported to jail.

Bolt cutters are located at Embarcadero (System Service Room), Powell and Civic Center (police offices). If protesters employ lockdown devices that are beyond the capability of bolt cutters to remove, the BART "cut-crew" will respond to remove the devices. If the cut-crew is unavailable or is unable to safely remove the lockdown devices, the San Francisco Fire Department will be requested to respond and remove the devices.

Officer M. Lee #182 is designated as the Scribe for the Incident Commander. This officer is responsible for maintaining detailed notes as to the timeline of events and for documenting decisions that are made relative to policing the protest. This officer will be responsible for writing a police report at the conclusion of the event to memorialize what occurred with the event as a whole. The Scribe should remain with the Incident Commander at all times during the event.

Plainclothes-duty officers will not be utilized during this protest event.

In the event of a medical emergency, the request should be made through BART PD Dispatch via radio. The San Francisco Fire Department is the primary responding agency for medical emergencies. A paramedic is stationed on the Embarcadero platform during the evening commute.

The nearest trauma centers that service the downtown San Francisco Area are:

San Francisco General Hospital, 1001 Potrero Street, (415) 206-8111

St. Francis Hospital, 900 Hyde Street (at Bush), (415) 353-6000

### **COMMUNICATIONS and CONTROL:**

The BART Incident Commander for this event is Deputy Chief Fairrow. The Incident Command Center for this event will be located in the BART Operations Control Center, Lake Merritt Station, Oakland.

The Operations Chief will be Deputy Chief Hartwig. His Deputy Operations Chief is Lieutenant Wong. Deputy Chief Hartwig is primarily responsible for the Powell Street Station. The location of his command post will be at that station. As needed, the Operations Chief may divide his team for deployment to another location.

Deputy Chief Glenn-Davis is the Logistics Chief and also liaison to SFPD. She will be located in the SFPD Command Post, at Larkin & Hyde Streets.

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PIO requests should be made through DC Fairow, who will relay them to the Media Department representative in the OCC.

The BART Police Watch Commander will be responsible for coordinating the movements of patrol personnel not directly involved in the protest, working in conjunction with the Incident Commander.

The Tactical Team Commander and supervisors will be located at Powell Street Station with the Tactical Team.

Patrol Team sergeants will be assigned as station Tactical Supervisors for Montgomery and Civic Center Stations. These sergeants will function as the on-scene tactical supervisors, under the direction of the Incident Commander or appropriate Operations Chief.

**All BART Police radio traffic related to this protest event (Tactical, CAP and SWAT Teams and patrol units in San Francisco) will be conducted on the Service channel (channel 1) unless otherwise directed.** Officers should disable the "scan" function on their radio at the start of the deployment. At least one dispatcher will be assigned to staff the service channel for the duration of the deployment. Tactical personnel shall use their badge numbers preceded by "Tac" as their call signs, e.g. Tac 111. Tactical Team sergeants will use their normal call signs. Patrol personnel not involved in the protest will use the Dispatch channel (channel 2). A roll-call will be performed to confirm that every unit assigned to the event has switched to the Service channel. If possible, the squad/team leader will advise that all officers are present and on the correct channel to avoid extended radio traffic. Dispatchers working the Service channel will advise units working the event of any major incidents occurring elsewhere in the District that might have an effect on the tactical incident.

In the event that radio communications fail for some reason, all officers will immediately switch to the following channel: **Talk Group 2 (radio display reads S2 SMA) and put their channel selector knob on Channel 10 (radio display reads BPD \*TA)**. This channel does not use the radio repeater system and is therefore limited to line-of-sight communications. However, it should allow radio communication between officers working inside the same station, as well as short distances outside the station. In the event of communications failure, the Mission and Execution paragraphs of this order will remain in effect, with individual Tactical Sergeants taking responsibility for safe deployment within their stations. Cell phone communications should be attempted with the Operations Chief when possible, to provide a status update and receive instructions.

The radio patch that used to allow direct radio traffic between SFPD and our department is no longer in effect. As a result, SFPD officers will likely be unable to communicate effectively with their dispatch center once they enter the underground portion of the BART station. The primary means of communication with SFPD and SFSD personnel inside the BART stations is telephone or face-to-face. When SFPD units are deployed inside BART stations to assist us, a BART officer **shall** be assigned as a communications liaison.

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Radio protocol for the protest is as follows: A dispatcher will be on the Service channel beginning at 1500 hours and will create an "INFO" event once the teams arrive downtown. If arrests are made, a separate case number will be created and will include the arrest time, the charge, and officer-case assignment. There should be a note in the new arrest case referring to the main-incident event number. A lead dispatcher will be assigned to the Dispatch channel. The lead dispatcher will **not** be monitoring the Service channel, so protest updates need to go through the Service channel only. If asked on the main channel, the lead dispatcher will advise units to switch to the Service channel for any information/requests regarding the event. Once in service, "B" platoon units assisting in San Francisco need to switch to Service as well. Supervisor Gary Hesson will be the contact person when dispatch information is needed by phone, at extension 7094. He will be monitoring both the Service and Dispatch channels.

Intelligence indicates protesters may be monitoring police radio traffic in near real-time. All personnel should minimize radio traffic to the extent possible. Supervisors should communicate for their teams, except in emergency. All personnel should be aware that police radio traffic is not secure and that all transmissions they make may possibly be monitored by those attempting to disrupt service or commit crimes within the system.

Each team will be loaded in **ALLIANCE** as squads. EX: **SQUAD1, SQUAD2, ETC.** Each Squad / Team Sgt will be doing the radio communications for their team and will be using squad and then the number(s). ***This includes teams assigned to the event from other zones.*** The TAC team will be loaded as squads as well individual badge numbers. The two SWAT teams will be loaded as **TEAM1** and **TEAM2** as well as by badge. The CAP team will use their normal "X" call signs. If the VIPR team is on duty, they will be loaded individually as V1, V2, ETC. Their information will be proved to the Dispatch Supervisor after the TAC team briefing.

- **TAC, SWAT, CAP and patrol teams from other zones assigned to the incident will use the SERVICE channel exclusively:**  
A dedicated dispatcher will be assigned to this channel to monitor traffic, log information and handle requests from units in the field for this specific incident.
- Once squads switch to the designated channel, a roll-call will be performed to confirm EVERY involved team member, including beat units assigned to the event, tactical sergeants and lieutenants are on the correct channel. If possible, the sergeant or designated team leader will advise that all officers are present and on the correct channel to avoid extended radio traffic.
- Once the squad(s) switch to the designated channel, they will no longer be scanning and will not hear main dispatch traffic, including traffic from Command Staff. The dispatcher(s) working the Service channel will advise the squads of any major incidents that are going on over the main channel that could have an affect on the tactical incident. The dispatchers not on the main channel will not be

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able to hear all traffic on the designated Service channel. If incident updates are needed via the radio, the Service channel and not the main channel is to be used.



San Francisco County requires that copies of misdemeanor in-custody (arrestees that are physically booked into CJ #1, rather than being cited by BPD officers) reports are faxed to the OR Project and the SFPD Inspectors Bureau. Each case requires an Outside Agency Case Number (OACN), which must be written on the Field Arrest Card at the time of booking. The OACN can be obtained by calling SFPD Field Operations, at (415) 553-1071.

OR Project Fax – (415) 552-2202

SFPD Inspector Fax – (415) 553-9876

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## Personnel Assignments


<b>INCIDENT COMMANDER:</b>	Deputy Chief B. Farrow #02 
<b>PLANNING SECTION CHIEF:</b> Deputy Incident Commander BART PD Watch Commander	Lieutenant A. Ledford #16 



Incident Command Post: BART Operations Control Center  
800 Madison Street, Oakland  
(510) 464-7230

Scribe: Officer M. Lee #182

Intelligence Unit: Officer K. Dam #163  


<b>OPERATIONS SECTION CHIEF:</b>	Deputy Chief D. Hartwig #C4 
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Deputy Operations Chief: Lieutenant E. Wong  


<b>LOGISTICS SECTION CHIEF:</b> SFPD Liaison	Deputy Chief J. Glenn Davis (03) 
<b>FINANCE SECTION CHIEF:</b>	Matt Cromer 

Tactical Team Operations Sergeant: Sergeant S. Coontz #S57  


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SWAT Operations Sergeant: Sergeant T. Pashoian #S51



CAP Team OIC: Officer D. McCormick #137



Tactical Team – Powell Street Station

Commander Lt. J. Conneely #L23

Operations Sergeant S. Coontz #S57

Squad #1 Sergeant M. Macaulay #S40  
(Arrests) Sergeant G. Dominguez #S22  
C. Shipley #109  
K. Forehand #167  
E. Jenkins #181  
R. Martinez #205  
B. Lucas #212

Squad #2 Sergeant T. Smith #S34  
(Arrests) Sergeant K. Kreitzer #S52  
R. Haney #110  
L. Bush #111  
S. Reiss #157  
E. Schlegel #190  
S. Christ #208

Squad #3 Sergeant S. Jamel #S56  
(Cover) C. Perea #123 (video)  
A. McNack #151  
M. Manzano #186  
E. Knudtson #197

Squad #4 Sergeant T. Gurecki #S25  
(Cover) M. Pon #108 (video)  
J. Power #169  
Y. Joseph #196  
P. Rodriguez #200  
C. Valdehueza #201



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### SWAT Team (Embarcadero Station - Rapid Reaction Force)

Team #1      Sergeant T. Pashoian #S51  
                 E. Poindexter #147  
                 L. Vallejo #140  
                 J. Vuong #166  
                 J. Enriquez #50

Team #2      Sergeant J. Ledford #S37  
                 G. Washington #150  
                 B. Cruz #24  
                 P. Lennan #170  
                 D. Boutain #191

### CAP Team/"Markers"- Powell Street

OIC D. McCormick #137  
H. Abdoun #223  
R. Jacobson #226  
S. Coduti #227  
R. Larson #228  
E. Toscano #195  
FAM C. Herren  
FAM M. Reinhardt  
FAM R. Salaz

### Patrol Personnel

Patrol Team #1-      Sergeant A. Fueng S47  
Powell Street      Sergeant N. Weissich S35  
Station:              G. Narcisse #220  
                         D. Bussey #240  
                         D. Greene #243  
                         M. Kalagayan #217  
                         A. Rudy #256  
                         A. Rincon #229

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Patrol Team #2 – Sergeant J. Austin S44  
Montgomery Street Sergeant J. Sandoval S41  
Station: D. Jorgensen #121  
I. Navarro #202  
F. Guanzon #187  
J. Tyler #128

Patrol Team #3 – Sergeant M. Hayes S21  
Civic Center L. Scanlan #105  
Station: L. Shean #122  
A. Dachauer #114  
W. Woo #130

### CSO Drivers:

R. Nagata (Van)  
K. Potter (Van)  
D. Puktanie (Van)  
J. Garcia (DC Glenn-Davis)  
C. Raine (DC Hartwig)

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### Event Timeline

Time	Event
1230	Tac Team supervisors meeting in MTC Auditorium
1330	Briefing for Tac, SWAT & CAP Teams in MTC Auditorium
1355	"B" Platoon personnel report for duty at PPS
1415	"B" Platoon personnel report for duty at LMA
1430-1445	"B" Platoon personnel report for duty in Zones 2, 3 & 4
1500	All designated "B" Platoon personnel report to assigned SF Stations
1515	All "A" Platoon personnel held-over until conclusion of protest
1500	Tac, SWAT and CAP teams in position in SF
1630	Protest begins
1930	Protest concludes
2030	"A" Platoon personnel released and "B" Platoon personnel assume beats

### Criminal Codes Related to Protest Activities

Code	Description
148(a)(1) PC	Resist, Obstruct or Delay Officer (M)
148(b) PC	Remove Weapon Other than Firearm (M)
185 PC	Wearing a mask or disguise during the commission of a crime (M)
243(b) PC	Battery on Peace Officer (M)
243.3 PC	Battery on BART Employee (M)
369i PC	Trespass/Interfere with Railroad (M)
409 PC	Failure to Disperse from Unlawful Assembly (M)
587(2) PC	Place Obstruction on Rails/Track (F)
594.2(a) PC	Possession of Vandalism Tools (M)
594.4 (a) PC	Vandalism by Caustic Chemical (M/F)
640(d)(1) PC	Willfully Disturb Others in System (M)
640(d)(2) PC	Carry Explosive, Acid or Flammable Liquid in System (M)
640(d)(4) PC	Willfully Block Free Movement of Others (M)
640(d)(5) PC	Tamper/Remove/Destroy System Facility or Vehicle (M)
640.5(a)(1) PC	Graffiti on Public Transit (I)

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Contact Numbers

Civic Center Police Office: (510) 464-7635

Powell Street Sgt's Office: (415) 678-4012

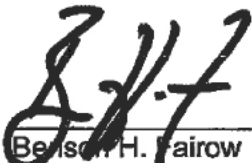
BART PD Dispatch: (510) 464-7000  
(877) 679-7000 (toll free)

BART Ops. Control Center: (510) 464-4152

San Francisco PD: Southern Station (415) 553-1373  
Tenderloin Station (415) 345-7300  
Mission Station (415) 558-5400  
Bayview Station (415) 671-2300  
Field Operations (415) 553-1418

San Francisco SD: Captain Matt Freeman (415) [REDACTED]  
Sergeant Michael Kim (415) [REDACTED]

Oakland PD West W/C: (510) 773-1344  
Oakland PD East W/C: (510) 773-2756  
Alameda County SO W/C: (510) 667-3601

  
Benson H. Fairrow  
Deputy Chief of Police  
Operations Division

BHF:sc

Attachments:

Maps of Downtown SF Area  
Protest Deployment Roster  
Protest Situation History

# **EXHIBIT G**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

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DAVID MORSE,

Plaintiff,

vs.

No. C12-5289 JSC

SAN FRANCISCO BAY AREA RAPID  
TRANSIT DISTRICT (BART); and BART  
Deputy Police Chief DAN HARTWIG,  
sued in his official and  
individual capacities,

Defendants.

\_\_\_\_\_ /

DEPOSITION OF STEVEN COONTZ

(Pages 1 to 82, inclusive)

Taken before SANDRA M. LEE

CSR No. 9971

December 2, 2013



Aiken Welch Court Reporters  
One Kaiser Plaza, Suite 505  
Oakland, California 94612  
(510) 451-1580/(877) 451-1580  
Fax: (510) 451-3797  
www.aikenwelch.com

1 When?

2 BY MR. SATTERLUND:

3 Q. If you have anything --

4 A. I don't have anything to add, no.

5 Q. You don't remember seeing him, for example,  
6 taking photographs?

7 A. Not particularly, no. I can't say that he  
8 wasn't, but I don't recall specifically that he was.

9 Q. And were you aware of any of the media that  
10 Mr. Morse was uploading to the internet about this  
11 protest campaign?

12 A. I saw -- had seen articles on Indybay, or  
13 pieces, whatever you want to call them, that he had  
14 written.

15 Q. What sorts of --

16 A. They were under the name of Dave Id. I didn't  
17 know who Dave Id was particularly.

18 Q. And are you aware of other personnel at BART PD  
19 following the work of Dave Id in any way?

20 A. Not specifically, no. They may have been. I  
21 don't know.

22 Q. Did you have any conversations with fellow  
23 officers about Dave Id or his work?

24 A. Not specifically, no. I mean, my -- my  
25 interest in the articles was primarily as a means of

1 predicting when the next protest might occur, that sort  
2 of thing. It wasn't situational awareness of what was  
3 going on.

4 Q. Did you have any sense of Dave Id's position or  
5 opinion or attitude towards the protests?

6 A. Towards the protest?

7 Q. Uh-huh.

8 A. The pieces that I saw in Indybay were certainly  
9 pro the protest message. They supported it. They  
10 seemed to be editorializing in favor of the protest  
11 groups that were there.

12 Q. Was there any other content that you observed  
13 in addition to editorialization, other print or other  
14 sorts of media?

15 MR. ALLEN: Objection; vague.

16 THE WITNESS: I don't really understand what  
17 your question is. Other sorts of media? What do you  
18 mean?

19 BY MR. SATTERLUND:

20 Q. Were there photos or video or audio?

21 A. There were photos under some of the Indybay  
22 stories. I don't know specifically that they were  
23 attached to his. There were a number of articles  
24 written by different people regarding the effects of  
25 2011 and our department. I couldn't attach one, whether



1 there was a video or a photo with one person's. I don't  
2 know who they were attached to or not. I know they were  
3 there, but I don't know what story they were attached  
4 to.

5 Q. You said you don't recall any conversations you  
6 had with other officers indicating whether they were  
7 following this material as well?

8 A. Not particularly, no.

9 Q. Was Dave Id discussed in your presence at any  
10 time prior to the September 8th protest?

11 A. I don't know. May have been. I don't know  
12 specifically.

13 Q. Do you recall him coming up at any meetings or  
14 briefings that might have occurred?

15 A. Again, I couldn't say specifically when. I  
16 know he was discussed, but I don't know -- I couldn't  
17 tell you when exactly that occurred.

18 Q. Understood.

19 What was the nature or subject of this  
20 discussion that you do recall?

21 A. Just that the sense was, as I said, he seemed  
22 to be an active organizer of the group that seemed to be  
23 behind most of the protests that we should be alert for.

24 Q. Are you aware of the basis of that opinion on  
25 the part of the people who told you that?

1           A. No. I mean, I could speak for myself. I  
2 formed that impression based on what I'd seen. I don't  
3 know what they based their impressions on.

4           Q. You don't recall when you had that conversation  
5 with other officers?

6           A. No. Not specifically.

7           Q. Do you know for certain whether you had formed  
8 your own belief before or after this belief was  
9 expressed in this meeting you recall?

10          A. I couldn't say whether it was before or after.  
11 I could say I formed my impression fairly early on when  
12 the protests began in I believe it was July.

13          Q. Let's move to the September 8th protest more  
14 specifically.

15                 Were you involved in any of the planning for  
16 BART PD's response to that?

17          A. To some extent, yes. We had formed sort of an  
18 operational plan for the protest when they began in  
19 July. They were so frequent we basically modified the  
20 plan slightly for each successive event that occurred.

21          Q. Can you give me a sort of overview of that  
22 plan?

23          A. Well, as I recall -- it's been some time -- we  
24 were not certain where the protests were going to occur,  
25 what stations that were going to be selected by the

1 on what we thought was going to occur, then we would. I  
2 couldn't tell you what changes were made for each  
3 protest.

4 Q. You've said you don't remember when you got  
5 involved in planning for the September 8th protest, but  
6 you say you were involved in that specific round of  
7 planning.

8 What were you doing?

9 A. Well, my recollection is it was -- my role was  
10 more of a logistics and operational type of assistance  
11 rather than planning. It wasn't -- I guess I'm not  
12 finding the right words to describe it. I was more of  
13 an assistant to the lieutenant and people who were  
14 charged to move the logistics and organize things so it  
15 functioned as smoothly as possible.

16 Q. Let's look at the plan for the protest. This  
17 has been previously produced and marked as Exhibit 2.

18 MR. ALLEN: The court reporter needs you to  
19 look at the official exhibit.

20 BY MR. SATTERLUND:

21 Q. Did you yourself read this plan before the  
22 protest?

23 A. I'm sure I did.

24 Q. What typically is done with an operations order  
25 like this; how did it get rolled out?

1           A. Our practice is generally that the hard copy or  
2 photocopy order would be distributed to the supervisors.  
3 Sometimes there's copies enough for the officers, but  
4 generally speaking not. The order is then gone over in  
5 a verbal briefing with the people who are going to be  
6 participating in whatever the operation is going to be  
7 for that day.

8           Q. Do you know who generated this specific order?

9           A. No, I don't. Deputy Chief Fairow signed it --  
10 actually, I don't know who signed it. I don't know who  
11 generated it.

12           Q. Who typically would be in charge of both  
13 drafting and issuing a report like this?

14           A. Well, as I said, my understanding was that the  
15 basic order would just change for each succeeding  
16 demonstration. This is probably an amalgamation of the  
17 orders that had gone before with any adjustments that  
18 the person -- the commander felt were necessary, which  
19 is Deputy Chief Fairow. That would be published with  
20 their signature on it.

21           Q. And do you know what role that order assigned  
22 to you specifically for this specific --

23           A. I'd have to look, if that's all right.

24           Q. Please.

25           A. There's usually a schedule or roster attached.

1 MR. ALLEN: Page 13.

2 BY MR. SATTERLUND:

3 Q. Looks like you're on the bottom of the page.

4 A. I was the operation sergeant for the tactical  
5 team.

6 Q. I see next to your name S57.

7 A. Yeah.

8 Q. What was -- was that a call number?

9 A. That was my badge number. For sergeants and  
10 lieutenants, their badge number is their call sign in  
11 the department.

12 Q. So that would be consistent throughout?

13 A. Yes.

14 Q. And was your specific position also consistent,  
15 or did you get moved to any other duty at any point  
16 during this?

17 A. I couldn't -- I don't recall exactly. I may  
18 have been doing different duties on different events.  
19 It could have been. I don't remember specifically.

20 Q. If this says for September 8th you're tactical  
21 operations sergeant, does that mean that you would be  
22 reliably in that role throughout?

23 A. For that day, yes.

24 Q. We've sort of chipped at this before.

25 What is the duty specifically of a tactical

1 Q. And is there any room for interpretation as to  
2 what --

3 MR. ALLEN: Vague, overbroad, calls for  
4 speculation.

5 BY MR. SATTERLUND:

6 Q. What I'm trying to get at is: How obstructed  
7 do the fare gates need to be before they're blocked?

8 A. If people cannot access the system to get on  
9 the trains, then it's blocked. If they can't safely get  
10 by whoever or whatever is in the way, then they  
11 effectively prevent access to the system.

12 Q. What about in the instance of a dense crowd; if  
13 it is possible to navigate through albeit slowly and  
14 with some bumping into people, are the fare gates still  
15 blocked?

16 A. That would be something I would have to see and  
17 make a determination based on what I see as to whether  
18 the patrons can realistically access the system.

19 Q. So would the crowd have to be more difficult to  
20 get through than the sort of 5:15 p.m. weekday rush hour  
21 to constitute a blocked fare gate?

22 MR. ALLEN: For purposes of 369i, or are you  
23 just asking his opinion as to whether or not a blocked  
24 fare gate is just a congested area in front of the fare  
25 gates with patrons coming and going?

1 MR. SATTERLUND: Right. With regard to  
2 blocking fare gates as this order is discussing it.

3 MR. ALLEN: That's vague, calls for  
4 speculation. This order is designed for that person who  
5 had the intent to block the fare gates to create a  
6 disturbance and/or otherwise interfere with the  
7 operation of the train system, which is different from  
8 someone just simply having a rush hour congestion in  
9 front of fare gates.

10 BY MR. SATTERLUND:

11 Q. Let me get that from you, if I may.

12 A. Well, the evening commute, having to stand in  
13 line to get through the fare gates beyond other people  
14 who are doing the same thing is not the same as not  
15 being able to get to the fare gates because people are  
16 deliberately standing in the way impeding your access to  
17 the gates. That's the distinction in my mind.

18 MR. ALLEN: And, Mr. Sutherland, just so we're  
19 clear on the record, because I always like my records to  
20 be clean and not an inference of I'm trying to coach my  
21 witnesses, you're referring to the fifth paragraph. You  
22 jumped down from the first sentence which states "The  
23 department will take a zero tolerance approach to  
24 disruptive, unsafe and unlawful activity occurring on  
25 the platform or concourse during this planned protest,"

1 down to the fifth or sixth sentence and then asked him  
2 to opine on what a blocked fare gate was. I just wanted  
3 to make sure that we were discussing it in the same  
4 context of unlawful activity, which was the precedent --  
5 the precedence to your question.

6 MR. SATTERLUND: Okay. The record is  
7 clarified.

8 BY MR. SATTERLUND:

9 Q. So what it seems to be getting at, and correct  
10 me if I'm wrong, are you saying there's an intent  
11 requirement?

12 A. I think -- yeah. I think that's fair. The  
13 intent, I believe, behind this paragraph in the order  
14 was that we were not going to be allowing people to  
15 block the gates, people intending to block the gates for  
16 whatever purpose and they're restricting people from  
17 using the transit system.

18 Q. Does that intent have to be specific to each  
19 person in order for them to be arrestable?

20 MR. ALLEN: Objection; calls for a legal  
21 conclusion.

22 BY MR. SATTERLUND:

23 Q. In order for you to conclude you had the  
24 authority to arrest somebody, would you have had to  
25 believe that they personally intended to be preventing



1 others from entering the BART system?

2 A. I think under 369i of the Penal Code, yeah,  
3 there's an element of being a willful act to impede the  
4 services of the system.

5 Q. If hypothetically there was somebody caught up  
6 in the crowd while trying to get through to use the  
7 system, would it be fair to say you would not think that  
8 that person was guilty of blocking the fare gates?

9 A. If it did not appear that they intended to be  
10 there and they weren't intending to block the fare  
11 gates, then, no, I would not think they were breaking  
12 the law.

13 Q. How would you have gone about determining in a  
14 large crowd of people who intended to be blocking the  
15 fare gates?

16 MR. ALLEN: Objection; vague and overbroad.  
17 It's also an improper hypothetical and assumes facts not  
18 in evidence.

19 BY MR. SATTERLUND:

20 Q. You can answer.

21 A. How would I go about -- can you restate your  
22 question? I don't think I really understood it.

23 Q. What evidence would lead you to conclude that a  
24 given person in a crowd of people intended to be  
25 blocking the fare gate?

1 BY MR. SATTERLUND:

2 Q. Can you give me an idea of the frequency with  
3 which you noticed Mr. Morse?

4 MR. ALLEN: Objection; vague as to time,  
5 overbroad.

6 THE WITNESS: If you're asking me while they're  
7 marching around, I suppose I would have seen him every  
8 time they came around. I don't know how many times that  
9 was. I wasn't specifically looking for him, but I would  
10 have captured him in my field of view.

11 BY MR. SATTERLUND:

12 Q. Was he chanting?

13 MR. ALLEN: Objection; vague as to time.

14 THE WITNESS: If you're asking me was he  
15 chanting during that particular protest at that  
16 particular time, I don't know.

17 BY MR. SATTERLUND:

18 Q. During this phase while people are circling the  
19 ticket machines, you don't have any specific  
20 recollection of seeing Morse chanting?

21 A. Specifically, no, I don't.

22 Q. Roughly how long would you say people were  
23 circling the kiosk?

24 A. Again, I have no -- I couldn't tell you an  
25 exact time. It went on for some minutes, very slowly

1           A. Well, there was a group of -- large group of  
2 people that were in a mass, and then there were people  
3 that were trying to make their way around the outskirts  
4 of the group to get by or do whatever business they had  
5 to do.

6           Q. Where were the media that were covering the  
7 group?

8           A. Some were on the outskirts. Some were filming  
9 it from a distance. Some were, I'm assuming, talking to  
10 people, interviewing, taking recordings, et cetera. It  
11 just depended on what media person you're talking about.

12          Q. When you say "inside," you mean inside the  
13 group?

14          A. I'm sure they were, some of them, yes.

15          Q. And during this phase, were you still inside  
16 the paid area of the concourse?

17          A. I don't recall where -- I moved around because  
18 I was making announcements to the crowd that if they  
19 blocked the fare gates they were subject to arrest. I  
20 moved to different locations for everyone in the group  
21 to be able to hear my announcements so everybody would  
22 have the information they needed. I moved to various  
23 locations so my announcements would be heard by  
24 everybody.

25          Q. What specifically did you announce?

1           A. I don't recall the exact verbiage. Essentially  
2 I was telling them that it was unlawful to block the  
3 fare gates, to block access to the system, and that if  
4 they did so or continued to do so, they'd be subject to  
5 arrest.

6           Q. Did you receive during this phase any orders,  
7 instruction or information from the chain of command?

8           A. While I was doing that, no, other than to  
9 continue what I was doing. I was moving around the  
10 outskirts because I couldn't really get through the  
11 group so everybody could hear what I was saying.

12          Q. Were these the only fare gates into the  
13 station?

14          A. No. There's a secondary set down roughly a  
15 block away at the other end of the station.

16          Q. Were there any obstructions that you could see  
17 around the secondary set of fare gates?

18          A. Not that I recall, no.

19          Q. Where did you observe people going who tried to  
20 get into the system and could not?

21          A. They would walk away. I don't know where they  
22 went. I don't know. It's difficult to tell where they  
23 went. I wasn't focusing on the people that weren't  
24 creating a problem.

25          Q. When you were making these announcements, what

1 force did those announcements have?

2 MR. ALLEN: Objection; calls for speculation.

3 THE WITNESS: Are you talking about the volume  
4 of them or what impact did they have on the people who  
5 heard them? Because I couldn't speak to them.

6 BY MR. SATTERLUND:

7 Q. What impact did you intend them to have on the  
8 people?

9 A. My intent was that everyone who was there would  
10 understand that if they broke the law that they would be  
11 subject to arrest, and that if they were blocking  
12 ingress and egress from the system that they were  
13 breaking the law and that they were subject to arrest so  
14 no one would be surprised if they were to be arrested  
15 and give people the opportunity to make a choice.

16 Q. Would it be fair to say these were on the order  
17 of instructions or admonitions rather than orders?

18 A. They were advisements as to what the possible  
19 consequences were of them continuing or if they moved on  
20 to do other illegal acts.

21 Q. How did the crowd respond; did they react in  
22 any way to your instruction?

23 A. Not that I recall, no. I got no specific  
24 response from anyone that I remember.

25 Q. What happened next?

1           A. Well, again, I don't know what the timeline is,  
2 but at some point, the group appeared to be stationary  
3 and unwilling to move. A decision was made that they  
4 had violated 369i of the Penal Code and we were going to  
5 make a mass arrest.

6           Q. When you say "a decision was made," who made  
7 the decision?

8           A. I don't know. I assume -- I believe it was  
9 Deputy Chief Hartwig who then passed his instructions to  
10 Lieutenant Conneely and to me and the other sergeants  
11 who were there.

12          Q. What makes you assume that?

13          A. Because he was in charge at the scene and would  
14 have been the one to logically make that decision.

15          Q. What specific form did the instruction you  
16 received take?

17          A. It was -- I don't recall if he told me directly  
18 or Lieutenant Conneely told me, but I was told that the  
19 group that was the core protest group was going to be  
20 encircled and arrested or detained at least.

21          Q. And how was that put into effect; how were  
22 officers arrayed to accomplish this?

23          A. Officers were instructed to form a circle  
24 around the group that was in front of the gates and not  
25 allow anyone to enter or leave. They were being

1 detained for violation of 369i of the Penal Code. The  
2 officers stayed in a circle around them, and we then  
3 went with our mass arrest plan, which was to remove  
4 individuals from the group, either arrest them or  
5 whatever we were going to do with them depending on what  
6 they had done.

7 Q. Did you give any specific instructions as to  
8 how this was to be carried out?

9 A. I believe my recollection is I helped place  
10 some of the officers in the circle, and then I assisted  
11 with some of the logistics as far as who the arrest team  
12 officers were going to be, but I didn't specifically, to  
13 the best of my knowledge, tell anybody to go get any  
14 particular individual or make a particular arrest of a  
15 person. My role at that point became more of a  
16 logistics and liaison role once the arrests started.

17 Q. Would you have given any specific instructions  
18 to arrest any specific person?

19 MR. ALLEN: Would he have or did he?

20 BY MR. SATTERLUND:

21 Q. Did you?

22 A. I don't believe I did, no.

23 Q. I'm going to play you an audio file that we  
24 received from the defendants. The Bates numbering has  
25 just rearranged, so I will be in touch with you as soon

1 as we figure out where it is in the record.

2 (Whereupon, an audio file was played.)

3 BY MR. SATTERLUND:

4 Q. Do you recognize either of those two voices?

5 A. Yeah. That's me and one of the dispatchers.

6 Q. So --

7 MR. ALLEN: Are you going to play any more on  
8 that audio file, or is that the exhibit?

9 MR. SATTERLUND: That's the exhibit.

10 MR. ALLEN: Do you have the CD you want to pop  
11 out?

12 MR. SATTERLUND: It's in the other room.

13 MR. ALLEN: Let me take a stab at a  
14 stipulation.

15 I will stipulate that the audio file that has  
16 just been played and identified by Lieutenant Coontz  
17 as his voice regarding words to the effect that  
18 Krystoff and his sidekick would be arrested is an  
19 audio file produced by defendants under a request  
20 for production of documents. Recently the Bates  
21 stamping on these documents was reorganized, and I  
22 will stipulate that rather than have the need to  
23 mark and produce it as an exhibit for this deposition,  
24 that, in fact, it's a document in the form of that  
25 audio file that's in our possession, has been produced



1 to plaintiffs. Thus there shouldn't be any dispute at  
2 trial over its use.

3 Are you satisfied with that?

4 (Discussion off the record.)

5 MR. ALLEN: What I suggest, then, if you want  
6 that exact language, you're going to need to burn a  
7 copy of that so we can attach it as an exhibit if  
8 my stipulation isn't good enough at this point in  
9 time.

10 MR. SATTERLUND: It's just in case we wind up  
11 needing the language before trial and before  
12 moving exhibits into the record.

13 MR. ALLEN: Obviously if you need the language  
14 in that transmission to oppose our summary judgment  
15 motion, I'm not objecting to the use of it. He has  
16 identified his voice. What we don't have, because we  
17 don't have an exhibit specific at this point in time, is  
18 the exact portion you played. So I think to be on the  
19 safe side, would you burn a copy of that and we'll  
20 attach it as an exhibit to the record?

21 MR. SATTERLUND: Sounds good. We have copies  
22 here, so I can bring it back here.

23 MR. ALLEN: Is it just going to be that one  
24 isolated portion?

25 MR. SATTERLUND: Yes.

1                   (Plaintiff's Exhibit 35 marked for  
2                   identification.)

3 BY MR. SATTERLUND:

4                   Q. Do you recall now having issued that  
5 instruction?

6                   A. I did. I passed it on. It wasn't my -- I  
7 didn't originate that. I was told -- my recollection --  
8 we had a circle of officers around a group of people.  
9 We had to start somewhere, and that was where we  
10 started.

11                  Q. So to whom were you issuing that order?

12                  A. To everybody on the radio who heard it  
13 essentially. That was the plan of how we were going to  
14 begin removing people from that group as individuals as  
15 opposed to the group and process them.

16                  Q. You said you didn't originate that.

17                               Who did?

18                  A. To the best of my recollection, Chief Hartwig  
19 made the decision on who was going to be first to be  
20 removed from the circle.

21                  Q. Was Chief Hartwig present at the scene?

22                  A. Yes.

23                  Q. He passed that instruction along to you over  
24 the radio?

25                               MR. ALLEN: I'm going to object; calls for

1 speculation. It's been asked and answered.

2 THE WITNESS: My recollection is that it was  
3 verbal instruction. I don't know if it was directly to  
4 me or through Lieutenant Conneely to me, but that was  
5 the plan.

6 BY MR. SATTERLUND:

7 Q. What did you understand to be the reason for  
8 starting with who were identified as Krystoff and his  
9 sidekick?

10 A. Because Cantor and, as I said, my impression  
11 was, Mr. Morse, although I didn't know his name at the  
12 time, were the organizers of the group. And my  
13 understanding was the hope was by removing the  
14 organizers of the group, we would remove the potential  
15 for violence or any further agitation as people were  
16 removed from the circle.

17 Q. You've told me everything that you know that  
18 formed the basis for your impression that Mr. Morse was  
19 one of the organizers?

20 A. My personal impression, yes.

21 Q. I'm sorry.

22 Who ordered the encirclement in the first  
23 place?

24 A. As I said, I believe it was Deputy Chief  
25 Hartwig who made the decision that we were going to make

1 a mass arrest and that our standard practice would be to  
2 encircle the crowd and detain them and then remove them  
3 individually for the processing and investigation,  
4 whatever needed to be done.

5 Q. Was it your understanding that all the officers  
6 who heard your order would understand what was meant by  
7 "Krystoff's sidekick"?

8 A. It was a term that I used. I think everybody  
9 understood the two were very close together and that  
10 they were working together and that everyone there would  
11 have understood what I meant, yes.

12 Q. Had that specific term been used before in  
13 connection with Mr. Morse?

14 A. I don't know.

15 Q. So can you think of a specific reason why you  
16 would have believed everyone would understand who  
17 Morse -- who Krystoff's sidekick was?

18 A. As I said, my impression was they were working  
19 together. I believe the impressions of the other  
20 officers were they were working together. The term  
21 "sidekick" is a brevity term to be used on the radio  
22 that people would understand that the person with Cantor  
23 was -- who was with him was his, quote, "sidekick" and  
24 that they were the first two to be removed from the  
25 circle.

1 Q. Can you give me the definition of the brevity  
2 term "sidekick"?

3 A. No particular definition. It's just a term  
4 that came to me at the time to describe the person who  
5 was with Cantor. I think people there understood what I  
6 meant. That was my only intent behind using that term,  
7 was it was a quick description that I think everybody  
8 there would probably understand.

9 Q. After the group was encircled -- first of all,  
10 what happened outside of the encirclement; what was the  
11 conduct of the rest of the protest at that time after  
12 the encirclement was solidified?

13 A. Well, the encirclement contained, to my belief,  
14 the people who were involved in the protest. The people  
15 who were outside were either media or people that  
16 happened to be passing by or patrons who were trying to  
17 get around or uninvolved in the protest itself.

18 Q. There were no significant developments in the  
19 conduct of what was going on outside the circle while  
20 you were processing?

21 MR. ALLEN: Objection; vague and overbroad.

22 THE WITNESS: If you're asking me if there were  
23 other people who attempted to get involved or were  
24 creating a disturbance as we were processing, yes, there  
25 were. We closed the station down because there was a

1 number of angry people who were yelling and screaming  
2 and creating a disturbance. It was decided to close the  
3 station so we could safely process people. The people  
4 who were moved out of the station remained in Hallidie  
5 Plaza. You could see through the roll-up gates what was  
6 going on, and they continued to yell and scream from  
7 outside and photograph whatever.

8 BY MR. SATTERLUND:

9 Q. When you say "it was decided," who made that  
10 decision?

11 A. Again, I believe it was Deputy Chief Hartwig.  
12 He may have collaborated with some of the transportation  
13 supervisors who were there at the time, because it  
14 became an issue as to whether the station could safely  
15 remain open or not. I don't know if that occurred or  
16 not.

17 Q. How was the closure of the station effected?

18 A. I began making announcements over the megaphone  
19 that the station was closed and that trains would not be  
20 stopping and that everyone who was in the station had to  
21 leave. To the best of my knowledge, the station agent  
22 also used the PA system in the booth to make similar  
23 announcements because we also had to clear people off  
24 the platforms and the other parts of the station so that  
25 we could roll down the gates and truly close the

1 station, which takes a little bit of time.

2 Q. What was the -- what was the force or effect of  
3 those announcements; were those also in the way of being  
4 information or instructions?

5 A. Well, they were instructions. Some people  
6 began to leave of their own accord once they realized  
7 the station was closing and the trains weren't going to  
8 stop. There was some people who didn't want to leave,  
9 and they had to be told the station was now closed and  
10 they no longer had the right to be there.

11 Q. At that stage, were there formal dispersal  
12 orders issued?

13 A. No. I never issued a formal dispersal order.  
14 They were told that the station was closed and that they  
15 would have to leave. It was not a dispersal order under  
16 the law. It was just an advisement that the station was  
17 closed. It was no longer open for business.

18 Q. So no dispersal orders were issued throughout  
19 the entire day?

20 A. No. Not by me.

21 Q. So we have the circle. The entire crowd is  
22 eventually cleared out of the station.

23 During that time, is the circle actively being  
24 processed, or do they stay there until everybody is  
25 gone?

1           A. The circle of officers around the group  
2 remained in place. People that were inside the group  
3 were moved individually. They were identified. If they  
4 were subject to arrest, they were arrested. If they  
5 were not, then they were released under 849b of the  
6 Penal Code, and then they were escorted out one of the  
7 exits so they could go about their business.

8           Q. Who was making that determination?

9           A. The determination as to whether someone would  
10 be arrested or not?

11          Q. Yes.

12          A. If an officer had seen a person actively  
13 involved in the 369i violation of blocking the gates,  
14 then they were arrested and taken into the office to be  
15 processed. If they were not -- there were a number of  
16 media people that were involved -- that became involved.  
17 Inside the circle, there was, I believe, a patron who  
18 just happened to be involved, gotten encircled. Once  
19 that was established, they were released as soon as they  
20 could be done so.

21          Q. How did you determine who was media?

22          A. I don't -- I didn't determine any of it. My  
23 sense of -- my recollection of what was done was people  
24 who had a press pass issued by the San Francisco or  
25 Oakland Police Departments, anyone with an ID from, you



1 know, TV, radio, whatever station, those were taken at  
2 face value. And they were -- as long as they hadn't  
3 been doing anything otherwise illegal, they were  
4 released.

5 Q. You said earlier that there were some  
6 journalists within the group who were blocking the fare  
7 gates.

8 A. Yes.

9 Q. Is it fair to characterize your testimony as  
10 saying that it was the group as a whole that was  
11 blocking the fare gates?

12 A. Yeah. I mean, there were people -- there were  
13 protesters and media that were there that got encircled.  
14 Chief Hartwig at one point made several announcements to  
15 the group that was inside the arrest circle that anyone  
16 who was media should come forward, identify themselves  
17 and they would be released from the circle. Several  
18 took advantage of that.

19 Q. To the best of your understanding, why were the  
20 journalists being released?

21 A. Because they had been covering the story and  
22 were not involved in the actual protest. They had not  
23 committed any violations of the law. They were allowed  
24 to leave.

25 Q. Even those who had been while covering the

1 story incidentally in front of the fare gates?

2 A. I assume yes -- yes.

3 Q. Were all of the people released as journalists  
4 displaying press credentials?

5 A. I wasn't involved in that process. I can only  
6 assume they had some sort of credential that identified  
7 them as media.

8 Q. Did you make any observations of Mr. Morse  
9 during the processing of the arrestees?

10 A. Not that I recall, no. He and Mr. Cantor were  
11 moved from the circle early on. I stayed outside, so I  
12 didn't have any contact, to my recollection, after that.

13 MR. SATTERLUND: Let's go through this now so I  
14 can clear up any -- if you could mark that as Exhibit  
15 36.

16 (Plaintiff's Exhibit 36 marked for  
17 identification.)

18 BY MR. SATTERLUND:

19 Q. Have you seen this document before?

20 A. No.

21 Q. Could you take a minute to look over the first  
22 page and see if you can tell me what it is.

23 A. It appears to be a transcript of my Internal  
24 Affairs interview with our IA investigator.

25 Q. When was that interview conducted?

REPORTER'S CERTIFICATE

I, SANDRA M. LEE, a Shorthand Reporter, State of California, do hereby certify:

That STEVEN COONTZ, in the foregoing deposition named, was present and by me sworn as a witness in the above-entitled action at the time and place therein specified;

That said deposition was taken before me at said time and place, and was taken down in shorthand by me, a Certified Shorthand Reporter of the State of California, and was thereafter transcribed into typewriting, and that the foregoing transcript constitutes a full, true and correct report of said deposition and of the proceedings that took place;

That before completion of the proceedings, review of the transcript was not requested.

IN WITNESS WHEREOF, I have hereunder subscribed my hand this 20th day of December, 2013.

\_\_\_\_\_  
SANDRA M. LEE, CSR NO. 9971  
State of California

# **EXHIBIT H**

# **EXHIBIT I**

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UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

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DAVID MORSE,

Plaintiff,

vs.

No. C12-5289 JSC

SAN FRANCISCO BAY AREA RAPID  
TRANSIT DISTRICT (BART); and BART  
Deputy Police Chief DAN HARTWIG,  
sued in his official and  
individual capacities,

Defendants.

---

DEPOSITION OF MICHAEL D. HAYES

(Pages 1 to 39, inclusive)

Taken before SANDRA M. LEE

CSR No. 9971

October 16, 2013



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1 Q. During that interview, IA asked you about David  
2 Morse as well; is that correct?

3 A. You know, it's been a year since then. I'm not  
4 a hundred percent positive.

5 Q. When a police officer is asked to speak with  
6 IA, what are the expectations of that police officer?

7 A. Same as today. You will tell the truth.

8 Q. There's nobody swearing you to tell the truth;  
9 is that correct?

10 A. You're ordered to tell the truth.

11 Q. By the IA officer?

12 A. By the Internal Affairs officer, yes.

13 MR. SIEGEL: I'd like to introduce the next  
14 exhibit in order.

15 (Plaintiff's Exhibit 24 marked for  
16 identification.)

17 BY MR. SIEGEL:

18 Q. This is a pretty thick document.

19 Have you ever seen this before, this document?

20 MR. ALLEN: Do you have a copy for me?

21 MR. SIEGEL: Good idea. Sorry.

22 THE WITNESS: Generally as the officer that was  
23 interviewed, you don't see this documentation. After  
24 when I was interviewed, I was never allowed access to  
25 this.

1 was involved in unlawful activity?

2 A. It just says that he's an Indybay reporter  
3 based on this document.

4 Q. Is it unusual to identify a reporter in a  
5 document like this?

6 MR. ALLEN: Objection; calls for speculation,  
7 lacks foundation.

8 BY MR. SIEGEL:

9 Q. In your experience.

10 MR. ALLEN: Calls for speculation.

11 BY MR. SIEGEL:

12 Q. You can answer.

13 MR. ALLEN: You can answer a question unless I  
14 tell you not to. I object for the record.

15 THE WITNESS: Answer the question?

16 MR. ALLEN: Please. You want the question read  
17 back?

18 THE WITNESS: Yes, please.

19 (Record read.)

20 BY MR. SIEGEL:

21 Q. Referring to Exhibit 4.

22 A. This is the first time in my experience that  
23 I've seen this.

24 Q. This is the first time you've seen a journalist  
25 identified like this?



1 A. In my history.

2 Q. I'd like to direct your attention to page 31 of  
3 the transcript. Read this page to yourself, and I'll  
4 have a few questions.

5 A. Okay.

6 Q. Is it true that Office Coduti asked you to look  
7 at his report regarding the arrest of David Morse?

8 A. It's true.

9 Q. And it's true that he asked you to improve his  
10 in-custody report?

11 A. You said improve or approve?

12 Q. Improve.

13 A. "Improve" would not be the correct term. He  
14 asked me to approve.

15 Q. I'm working from lines 5, 6 and 7. Here it  
16 states, "Officer Coduti asked me to look at his report  
17 and to improve his in-custody report, and that's how I  
18 know that he arrested Dave Id."

19 A. It should be "approve," not "improve."

20 Q. Were you asked to approve the investigative  
21 report?

22 A. Yes, I was.

23 Q. Did you approve it?

24 A. No, I did not.

25 Q. Why not?

1           A. There were certain details that I felt were  
2 lacking in his report, and based on the fact I was not  
3 there, I was not his direct supervisor and I didn't know  
4 what those details were, I did not approve the report.

5           Q. Did anybody order you to approve the report?

6           A. No.

7           Q. Why were you having the conversation with  
8 Officer Coduti?

9           A. Again, he came to me to -- because I was the  
10 sergeant on duty, he asked me to approve his report  
11 before going home.

12          Q. So at what point were you the sergeant on duty?

13          A. When I started at 1355 hours that day in Powell  
14 Street, San Francisco.

15          Q. Where was this conversation occurring?

16          A. This happened in the Powell Street office.

17          Q. If could you look at lines 13 and 14 on this  
18 page, it reads, "I know I had issues when I read the  
19 report."

20                 Do you see that statement?

21          A. Yes, I do.

22          Q. What issues did you have with the report?

23          A. Lack of detail.

24          Q. How much detail is required in an arrest report  
25 or an in-custody report?

1 BY MR. SIEGEL:

2 Q. Lieutenant, I can represent to you that this  
3 report was provided to us by BART in the course of this  
4 lawsuit. I don't know if there were earlier versions of  
5 the report that were not finalized.

6 Did you help Officer Coduti edit his report?

7 A. No.

8 Q. Did you suggest he should edit it?

9 A. As I recall from our conversation, I brought up  
10 the fact that, in my opinion, there were details missing  
11 from this report, and I did have concerns regarding  
12 those details. I wanted more specifics from him  
13 regarding the violation of 369.

14 Q. In this type of report, is the detail that  
15 you're referencing, is that provided in the narrative  
16 section?

17 A. It would be provided in the narrative section,  
18 correct.

19 Q. If you could review page 4 of this document,  
20 and I'll ask you a couple of questions.

21 A. Page 4?

22 Q. Yes, please.

23 A. You're referring to the narrative?

24 Q. Yes, please.

25 A. On this copy, it says page 7.

1 Q. The page number I'm referring to is on the  
2 bottom of the document to the right.

3 A. Got it.

4 Q. Does this report have enough detail?

5 A. For the violation of 369i?

6 Q. Yes. For a report of this nature, does it  
7 explain in adequate detail the basis for the arrest?

8 A. When you say "in adequate detail," this has  
9 very basic minimal amount of information regarding the  
10 violation of 369.

11 Q. To have a better report, what information would  
12 you like to see?

13 A. Well, there's several areas, again, if I was to  
14 approve this I would want. Referring to this, when it  
15 says, "I was standing in the free area near the fare  
16 gates." What's the distance? I don't know what the  
17 distance is. I wasn't there. I can't picture where  
18 Officer Coduti was standing.

19 "When I heard a dispersal order given to the  
20 protesters," what means or what information was that  
21 dispersal order given? Again, I don't know. I wasn't  
22 there.

23 "The protesters were standing in between the  
24 fare gates and the ticket machines." Specifically  
25 where? What was the distance from the fare gates? What

1 was the distance from the ticket machines?

2 "After a couple of minutes," again,  
3 approximately how long?

4 "BART police officers," which BART police  
5 officers?

6 "Moved in and surrounded the remaining  
7 protesters that did not comply with the lawful dispersal  
8 order." Again, remaining protesters, approximately how  
9 many protesters did they surround? How many officers  
10 were used to surround them?

11 "Deputy Chief Hartwig approached me and said he  
12 wanted me to start arresting protesters that were not  
13 complying with the dispersal order." That's pretty  
14 simple. It's basic.

15 "Deputy Chief Hartwig pointed at a man," I  
16 would like a description of the individual. Which man?  
17 Give me a basic description of who that individual was.

18 "Later identified as Arrestee Morse." I would  
19 have put his name after "Arrestee Morse," first name,  
20 last name, date of birth.

21 "Who was standing in a group of protesters,"  
22 again, how large was the group?

23 "Near the edge of the circle," what does near  
24 the edge of the circle mean? How big was the circle?  
25 Where was that circle located?

1           "Deputy Chief ordered me to arrest Morse for  
2           trespassing on railroad property." I would have asked  
3           "In detail, what was the actions of that individual that  
4           you were arresting at that time?"

5           He says, "I walked up to Morse and told him he  
6           was under arrest." For what? I would have added what  
7           he was under arrest for.

8           "I placed Morse in handcuffs, double locked  
9           them, and checked them for proper fit." That's  
10          standard. That's fine.

11          "I escorted Morse back to the Powell Street  
12          BART Police Facility. When you say "escort," what do  
13          you mean? Did you walk him? Did you transport him on a  
14          train, car? What is escort?

15          "Morse's handcuffs were removed and replaced  
16          with zip ties." Why? What was the reasoning behind it?

17          Morse was later taken to County Jail 1 in San  
18          Francisco where he was cited and released on 369i PC,  
19          trespassing on railroad property." Who cited him, who  
20          released him and what time did that occur?

21          Q. Is it fair to say that this report is in  
22          similar condition to the report you reviewed on the date  
23          in question?

24          A. I cannot testify that this report was the exact  
25          report that I reviewed that day verbatim.

1 Q. But it has similar problems to those you  
2 identified in your IA investigation?

3 A. Well, again, not problems but details. It's  
4 lacking details.

5 Q. Were you trained on how to write a report such  
6 as this?

7 A. I was trained to write reports, yes.

8 Q. What training have you received regarding  
9 report writing?

10 A. In the Alameda County Sheriff's Department,  
11 basic academy. Also through BART, a report-writing  
12 class that they had.

13 Q. Returning to the transcript, at line let's  
14 start with line 15.

15 A. On what page?

16 Q. Page 31. Sergeant Kwon asks "And what issues  
17 did you have when you read his report?"

18 You respond, "That I remember in Officer  
19 Coduti's report is that he was instructed by," and then  
20 later you say "he was instructed by Deputy Chief Hartwig  
21 to place Dave Id under arrest?"

22 MR. ALLEN: May I ask you to read the  
23 entire comment and not just a portion of it, so we have  
24 clear context?

25 MR. SIEGEL: Okay.

1 was enough details in this report for me to sign off on  
2 arrest for 369i. However, I'm not saying that the  
3 minimum amount of information is not appropriate for an  
4 arrest for 369i.

5 BY MR. SIEGEL:

6 Q. And is that what you meant when you stated "he  
7 didn't have probable cause in the arrest report"?

8 A. The details to my standard for approving the  
9 report.

10 Q. Are your standards higher than BART PD  
11 standards?

12 A. I'm BART PD, sir. I'm a supervisor. And as  
13 far as the officer writing the report, I would say my  
14 standards are higher than the officer that wrote this  
15 report as far as the detail.

16 Q. I'd like to direct your attention to page 33 of  
17 this transcript beginning at line 5. If you could read  
18 all the way down to line 26, please.

19 A. Okay.

20 Q. Did you suggest to Officer Coduti that the  
21 deputy chief write a supplement?

22 A. I did.

23 Q. What did he say?

24 A. He was reluctant, and rightfully so.

25 Q. Why do you say that?



1 A. You have to follow the chain of command.

2 Q. So it wouldn't be typical practice for a  
3 lower-ranking officer to ask a higher-ranking officer to  
4 help write a report?

5 A. It wouldn't be typical for an officer to  
6 recommend or suggest to a deputy chief that he write a  
7 supplement. No, that is correct.

8 Q. Further down between 20 and 26, you state,  
9 "I -- what I remember is -- is he was following the  
10 orders of Deputy Chief Hartwig and he felt confident  
11 that the probable cause for the arrest and the  
12 observations of the violations were made by Deputy Chief  
13 Hartwig and because Dave Id was in the immediate area  
14 where the violations were occurring that it -- that  
15 they'd had -- somehow interfered with running --"

16 Sergeant Kwon says, "Okay. So --"

17 And you say "of the railroad."

18 Did Officer Coduti communicate to you that he  
19 was basing his arrest report on the observations of  
20 Deputy Chief Hartwig?

21 A. No.

22 Q. Again, I'm looking between 21 and 23 in  
23 particular. You state, "he was following the orders of  
24 Deputy Chief Hartwig and he felt confident that the  
25 probable cause for the arrest and the observations of

1 that point. You posed the question at the end of line  
2 23 where he says "Deputy Chief Hartwig" and then you  
3 don't continue on.

4 MR. SIEGEL: I posed the follow-up question  
5 previously, and I already read the entire response.

6 MR. ALLEN: You want to reframe the question  
7 and take it out of context, that's why I'm posing it  
8 now, this objection retroactively. I'm asking you to  
9 put it in context. Or alternatively, I've made my  
10 record and you can pursue the question based on stopping  
11 in mid-sentence and asking the question.

12 BY MR. SIEGEL:

13 Q. Let's look at page 34 between lines 1 and 11.  
14 I believe this is a complete question and response.

15 Sergeant Kwon asks, "So just for clarification  
16 did he give you -- did Officer Coduti give the  
17 impression that he did feel there was probable cause or  
18 did not feel there was probable cause?"

19 Response by Hayes, "I -- I believe he did feel  
20 there was probable cause. It's just that he could --  
21 Coduti could not document what the observations were or  
22 what the violations were because he had not viewed them  
23 directly. It was my impression that Deputy Chief  
24 Hartwig had on-viewed the violations and it was a -- a  
25 general thing that -- uh -- you know, his -- he was in

1 the area, he was standing near the fare gates, he was  
2 blocking the -- the -- his participation was interfering  
3 with running the railroad, he was blocking the fare  
4 gates."

5 My question: Is it still your impression that  
6 Deputy Chief Hartwig viewed the violations that were  
7 then the basis of Officer Coduti's report?

8 A. Yes.

9 Q. And Officer Coduti did not view directly the  
10 violations?

11 MR. ALLEN: Is that a question as to his  
12 impressions, or is that asking his opinion? You're  
13 asking an opinion. It calls for speculation. I'm  
14 objecting to the form of the question.

15 Could you read the question, please?

16 (Record read.)

17 MR. ALLEN: I'll object; calls for speculation  
18 and it's been asked and answered.

19 BY MR. SIEGEL:

20 Q. Let's break this down.

21 Did you believe that Coduti could not document  
22 what the observations were or what the violations were?

23 A. Did I believe that Coduti could not document?

24 Q. (Attorney nods head.)

25 A. No. I did not believe that.

1           You can answer the question.

2           THE WITNESS: I'm sorry?

3           MR. ALLEN: You may answer the question.

4           THE WITNESS: No.

5 BY MR. SIEGEL:

6           Q. You stand by the testimony you gave to IA?

7           A. Yes.

8           MR. ALLEN: Retroactively, this is as to pages  
9 33 or 34 or the entirety of the transcript?

10          MR. SIEGEL: Actually, we probably have the  
11 time. I'd like to give you the chance to read the  
12 entire transcript.

13          If you don't mind, Counsel, could we do that  
14 off the record?

15          MR. ALLEN: That's fine.

16          (Recess taken.)

17 BY MR. SIEGEL:

18          Q. Thank you, Lieutenant, for taking the time.  
19 We've given you a pretty small window of time to read a  
20 49-page transcript. I appreciate you making the attempt  
21 to read it in a deliberate fashion.

22          After reviewing the entire transcript, do you  
23 have any modifications to the testimony you gave?

24          A. On the transcript?

25          Q. The testimony --

1 A. The Internal Affairs transcript?

2 Q. Yes.

3 A. No.

4 Q. Just like to direct your attention to the  
5 second-to-the-last page, 48, throughout this page and  
6 the following page, there's a kind of ongoing question  
7 and follow-up. Feel free to refer to this page.

8 Is it true, to the best of your recollection,  
9 that Officer Coduti felt that the group on September 8th  
10 was violating 369i?

11 A. Well, in his report, it states that "when  
12 deputy chief pointed out a man identified as Rusty Morse  
13 who was standing in a group of protesters near the edge  
14 of the circle, he ordered me to arrest Morse for  
15 trespassing on the road or property." So if Morse was  
16 standing in the middle or in the group and Deputy Chief  
17 Hartwig ordered him to arrest Morse, it would be  
18 reasonable to believe that the group was in violation of  
19 369i.

20 Q. Again, there's kind of an ongoing question and  
21 answer, but if you could look at the statement you make  
22 at line 28 of page 48 and then the first two or three  
23 lines of page 49, is it true that Officer Coduti did not  
24 see individual actions, but the individual was partaking  
25 in the group movement?

1 MR. ALLEN: I'm going to object that it  
2 mischaracterizes his testimony, it's overbroad as to the  
3 entire context of this 49-page interview. It's also  
4 been asked and answered.

5 BY MR. SIEGEL:

6 Q. Do I understand your IA statement correctly?

7 MR. ALLEN: I'm going to object that it's vague  
8 and overbroad, that question you just asked.

9 BY MR. SIEGEL:

10 Q. In the context of my previous question, am I  
11 interpreting your statement correctly, that Officer  
12 Coduti didn't see individual actions but the individual  
13 was partaking in the group movement?

14 MR. ALLEN: I'm going to object that it's  
15 vague, overbroad, calls for speculation.

16 THE WITNESS: Am I to answer that?

17 MR. ALLEN: If you understand what he's asking  
18 you.

19 THE WITNESS: I'm kind of confused. What I  
20 said is what I said here. It's based on...

21 BY MR. SIEGEL:

22 Q. In lines 28 of page 48 and 1, 2, 3 of page 49,  
23 when you use the word "individual," are you referring to  
24 David Morse?

25 A. When you say "that individual" --

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Q. Yes.

A. -- that individual's actions?

Q. Yes.

A. That's who I was referring to.

MR. SIEGEL: Thank you. I have no further questions.

Mr. Allen?

MR. ALLEN: No questions.

(Whereupon, the deposition was concluded at 4:55 p.m.)

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REPORTER'S CERTIFICATE

I, SANDRA M. LEE, a Shorthand Reporter, State of California, do hereby certify:

That MICHAEL D. HAYES, in the foregoing deposition named, was present and by me sworn as a witness in the above-entitled action at the time and place therein specified;

That said deposition was taken before me at said time and place, and was taken down in shorthand by me, a Certified Shorthand Reporter of the State of California, and was thereafter transcribed into typewriting, and that the foregoing transcript constitutes a full, true and correct report of said deposition and of the proceedings that took place;

That before completion of the proceedings, review of the transcript was not requested.

IN WITNESS WHEREOF, I have hereunder subscribed my hand this 1st day of November, 2013.

\_\_\_\_\_  
SANDRA M. LEE, CSR NO. 9971  
State of California