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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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10 PAIGE A. NORBY, dba TOMBSTONE )  
RANGE RIDERS, et al., )

11

Plaintiffs, )

No. CIV 07-232-TUC-CKJ

12

vs. )

**ORDER**

13

CITY OF TOMBSTONE, et al., )

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Defendants. )

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Pending before the Court are the Motions in Limine (Doc. 312), the Motion  
17 Requesting the Court Order Plaintiffs to Post a Cost Bond (Doc. 313), Motion to Withdraw  
18 Jury Demand and Request Bench Trial (Doc. 314), Defendant's Objections to Plaintiffs'  
19 Proposed Joint Pretrial Statement (Doc. 317), Plaintiffs' Joint Motion for Leave to File  
20 Supplemental to Plaintiffs Joint Opposition to Defendant's Motion Requesting Cost Bond  
21 (Doc. 318), Plaintiffs' Motion for Leave to Exceed Page Limitations Imposed by the Rules  
22 for this Court and the Federal Rules of Civil Procedure (Doc. 320), Plaintiffs' Joint Objection  
23 to Defendant's Exhibits (Doc. 323), Motion to Strike Improper References to Confidential  
24 Settlement Discussions and Documents and Plaintiffs' Response to Motion to Post a Cost  
25 Bond (Doc. 325), Plaintiffs' Motion for Order to Show Cause (Doc. 331), and Motion for  
26 Leave to File Supplemental to Plaintiff's Motion for Show Cause (Doc. 334).

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1 *Plaintiffs' Joint Motion for Leave to File Supplemental to Plaintiffs Joint Opposition to*  
2 *Defendant's Motion Requesting Cost Bond, Plaintiffs' Motion for Leave to Exceed Page*  
3 *Limitations Imposed by the Rules for this Court and the Federal Rules of Civil Procedure,*  
*and Motion to Strike Improper References to Confidential Settlement Discussions and*  
4 *Documents and Plaintiffs' Response to Motion to Post a Cost Bond*

4 Plaintiffs assert that documents were inadvertently omitted from their opposition to  
5 the Motion Requesting Cost Bond filed by Defendant Merlin Jay Smith ("Smith"). The  
6 Court will permit Plaintiffs to supplement their response. Additionally, the Court will permit  
7 Plaintiffs to exceed the page limitations as to their Response to the Motion Requesting Cost  
8 Bond. The Court will direct the Clerk of the Court to file the documents (Docs. 319 and  
9 321).

10 Additionally, Smith requests that details of confidential settlement discussions be  
11 stricken from Plaintiffs' responses. The Court finds it appropriate to grant this request.  
12 Further, included within his reply, Smith requests this Court to admonish Plaintiffs to refrain  
13 from filing further briefs which "stray" from the specific issues remaining in this case. The  
14 Court recognizes, however, the parties disagree regarding issues in this case (e.g., relevance  
15 of other conduct). The Court declines to grant this request.

16  
17 *Motion in Limine #1*

18 Smith asserts that any evidence not related to the Fourth Amendment incidents should  
19 be precluded. Plaintiffs argue, however, that other evidence is relevant to show Smith's state  
20 of mind and damages suffered by Plaintiffs. "Evidence is relevant if: (a) it has any tendency  
21 to make a fact more or less probable than it would be without the evidence; and (b) the fact  
22 is of consequence in determining the action." Fed.R.Evid. 401. However, "[t]he court may  
23 exclude relevant evidence if its probative value is substantially outweighed by a danger of  
24 one or more of the following: unfair prejudice, confusing the issues, misleading the jury,  
25 undue delay, wasting time, or needlessly presenting cumulative evidence." Fed.R.Evid. 403.

26 It appears that Smith will be seeking to establish that Plaintiff Paige Norby Weik  
27 ("Norby Weik") consented to the seizure of the document during the May 19, 2006, incident  
28 and that Smith was simply engaging in horseplay during the May 24, 2006, incident.

1 Evidence regarding tension between Plaintiffs and Smith is relevant to these inquiries.  
2 However, the interests of Fed.R.Evid. 403 warrant the limitation of the presentation of such  
3 evidence. The Court will discuss the parameters of such evidence with the parties during a  
4 pre-trial hearing.

5  
6 *Motion in Limine #2*

7 Smith also requests that hearsay statements made by Plaintiff David Weik ('Weik')  
8 be precluded. Plaintiffs argue that these statements are direct evidence of the incidents.  
9 However, testimony by Plaintiff Weik can provide such evidence. See Fed.R.Evid. 801(c).  
10 Statements made by Weik to others is not subject to a hearsay exception when offered by  
11 Plaintiffs. See *United States v. Fernandez*, 839 F.2d 639, 640 (9th Cir. 1988) (per curiam)  
12 ("It seems obvious defense counsel wished to place [the defendant's] statement to [the  
13 officer] before the jury without subjecting [the defendant] to cross-examination, precisely  
14 what the hearsay rule forbids."). The Court will grant the request.

15  
16 *Motion in Limine #3*

17 Smith seeks to preclude character evidence. Character evidence is not normally  
18 admissible in civil rights cases. *Gates v. Rivera*, 993 F.2d 697, 700 (9th Cir. 1993).  
19 However, if such evidence is used solely for impeachment, it may be proper. See e.g.,  
20 *TanTan v. City & County of San Francisco*, C 08-1564 MEJ, 2010 WL 726985, at \*2-3  
21 (N.D.Cal.2010) (excluding evidence and argument related to complaints, investigations, or  
22 allegations of misconduct against the defendant officers, except if used solely for purposes  
23 of impeachment).

24 Smith uses the example of questioning Smith about how many times he shot someone  
25 during his law enforcement career. Plaintiffs' response asserts that it shows why Plaintiff  
26 Weik was afraid of Smith, but it does not state when Plaintiff Weik learned of the  
27 information. See generally *United States v. Lynch*, 437 F.3d 902 (9th Cir. 2006). Plaintiffs  
28 have not asserted that they knew about this conduct at the time of the incidents or that they

1 modified their conduct because of such knowledge. The Court will grant this request, but  
2 may permit its use for impeachment purposes, subject to argument to the Court during trial.

3  
4 *Motion in Limine #4*

5 Smith requests that any newspaper articles be precluded based on relevancy grounds.  
6 Fed.R.Evid. 402 and 403. Such items being hearsay, the Court will grant the request. *Logan*  
7 *v. City of Pullman*, 392 F.Supp.2d 1246, 1253 (E.D. Wash. 2005) (newspaper articles are  
8 hearsay and are inadmissible unless they fall within an exception).

9 Smith also requests that City Council minutes be precluded as irrelevant. Plaintiffs  
10 assert the minutes are relevant to show the basis for the threats made by Smith. The Court  
11 will defer ruling on this issue until the relevance of other conduct as discussed with the  
12 Motion in Limine #1 is determined.

13  
14 *Motion in Limine #5*

15 Smith asserts that any statement by the Arizona Peace Officer Standards and Training  
16 ("POST") Board regarding Smith's use of his badge prior to certification is not admissible  
17 because it is not relevant and is hearsay. Plaintiffs assert such evidence is relevant to show  
18 that Smith was not acting under color of law and goes to the credibility and veracity of  
19 Smith. The Court will hear argument on this issue at the pre-trial hearing.

20  
21 *Motion in Limine # 6*

22 Smiths assert evidence that Smith would wear a side-arm while picking up the mail  
23 from the post office is not relevant. Plaintiffs argue that it shows a consistent trait -  
24 disregarding rule of law. *See* 39 C.F.R. § 232.1(l) ("Notwithstanding the provisions of any  
25 other law, rule or regulation, no person while on postal property may carry firearms, other  
26 dangerous or deadly weapons, or explosives, either openly or concealed, or store the same  
27 on postal property, except for official purposes."). Plaintiffs also assert that this evidence  
28 goes to the credibility and veracity of Smith. The Court will hear argument on this issue at

1 the pre-trial hearing.

2  
3 *Motion in Limine # 7*

4 Smith asserts evidence of his reasons for leaving his employment with the City of  
5 Tombstone are not relevant. Plaintiffs assert this evidence is relevant as to Smith's  
6 credibility and his habitual disregard of the law. The Court will hear argument on this issue  
7 at the pre-trial hearing.

8  
9 *Motion in Limine #8*

10 Smith asserts that, based on prior rulings of the Court, Plaintiffs should be precluded  
11 from presenting evidence of compensatory damages beyond nominal damages. Plaintiffs  
12 argue that they have incurred economic losses and damages and assert that they should be  
13 permitted to seek compensatory damages. On October 11, 2011, this Court ordered that  
14 expert witness testimony that was not properly disclosed and any damages for which a  
15 computation and support were not properly disclosed were precluded.<sup>1</sup> See also April 6,  
16 2012 Order. The Court will grant the request to preclude evidence of compensatory  
17 damages.

18  
19 *Motion Requesting the Court Order Plaintiffs to Post a Cost Bond*

20 Smith requests this Court to order Plaintiffs post a cost bond because Plaintiffs have  
21 not been paying litigation costs and, if they lose, Plaintiffs may assert they are unable to pay  
22 costs. Plaintiffs assert, however, that they have acted in good faith, that the defense has not  
23 been honest with the Court, and that the Court should consider their inability to post a bond.  
24 As stated by Smith, federal courts may require plaintiffs to post a bond in order to provide  
25 security for defendants who might prevail in litigation. *In Re Merrill Lynch Relocation*

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28 <sup>1</sup>The Court also advised the parties that the request for punitive and nominal could proceed.

1 *Management, Inc.*, 812 F.2d 1116, 1121 (9th Cir. 1987) (“Federal courts have inherent  
2 authority to require plaintiffs to post security for costs. A District Court typically follows the  
3 forum state’s practice, particularly when a party is a nonresident.”), *citation omitted*.

4         However, Smith has not supported this motion by providing an affidavit “showing that  
5 the plaintiff is not the owner of property within the state out of which the costs could be  
6 made by execution sale[.]” Ariz.R.Civ.P. 67(d). Additionally, although the statute provides  
7 that such a motion may be made any time before trial, Arizona courts have determined that  
8 a motion for security for costs is untimely if made after a trial court has determined any issue  
9 of law or fact. *Wright v. Sears, Roebuck & Co.*, 116 Ariz. 391, 569 P.2d 821 (1977);  
10 *Hydroculture, Inc. v. Coopers & Lybrand*, 174 Ariz. 277, 848 P.2d 856 (App. 1992). The  
11 Court having resolved issues of law and fact, denial of the motion is appropriate.<sup>2</sup>

12  
13 *Motion to Withdraw Jury Demand and Request Bench Trial*

14         Plaintiffs have withdrawn their request for a jury trial and now request this matter  
15 proceed to a bench trial. Smith, however, asserts that he also requested a jury trial, *see*  
16 Answer (Doc. 23), and he does not waive his right to a jury trial. Plaintiffs point out that, in  
17 Smith's Pretrial Statement, Smith does state a continuing invocation of his right to a jury trial.  
18 However, as Smith has not withdrawn his demand for a jury trial, *see Solis v. County of Los*  
19 *Angeles*, 514 F.3d 946 (9th Cir. 2008), the Court will deny Plaintiffs' request.

20  
21 *Smith's Objections to Plaintiffs' Proposed Joint Pretrial Statement and Plaintiffs' Joint*  
22 *Objection to Smith's Exhibits*

23         The Court will defer ruling on the parties’ objections until resolution of what evidence  
24 of other conduct will be admissible at trial. The Court will hear argument on this issue at the  
25 pre-trial hearing.

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28 <sup>2</sup>Additionally, if an order to provide security for costs is issued, such order is to be  
vacated if a plaintiff “makes strict proof of inability to give the security[.]” Ariz.R.Civ.P. 67(e).

1 *Plaintiffs' Motion for Order to Show Cause; Motion for Sanctions and Motion for Leave to*  
2 *File Supplemental to Plaintiff's Motion for Show Cause*

3 The Court will grant Plaintiffs' Motion for Leave to File Supplemental and direct the  
4 Clerk of the Court to file the document (Doc. 335).

5 Plaintiffs request Smith be sanctioned for failure to provide complete disclosure.  
6 Smith points out that many of the issues referred to by Plaintiffs have been previously  
7 addressed by the Court and request that costs be awarded to Smith in having to respond to  
8 the motion.

9 To the extent that Plaintiffs raise disclosure issues previously addressed by the Court,  
10 the Court does not find there is any basis to reconsider its previous rulings. Moreover, not  
11 only are Plaintiffs repeating some arguments previously addressed by the Court, they appear  
12 to be raising new claims as a basis for sanctions. Plaintiffs offer no reason why such a  
13 request was not raised earlier. *See* 35B CJS Fed. Civ. Proc. § 1387 (“A motion for sanctions  
14 may be required to be filed as soon as practicable after the discovery of the violation which  
15 would support the issuance of sanctions.”); *see also* Fed.R.Civ.P. 56(d) (delay of  
16 consideration of summary judgment to complete discovery issues).

17 Plaintiffs also request to be reimbursed for costs of providing disclosure to Smith.  
18 Smith asserts, and Plaintiffs do not dispute, that Plaintiffs did not provide an invoice for  
19 copying costs. Additionally, the parties do not address whether the defense was reimbursed  
20 its copying costs for disclosure of documents to Plaintiffs. The Court declines to grant this  
21 request.

22 In his response, Smith requests he be awarded fees incurred in responding to the  
23 motion. The Court declines to grant this request.

24 Accordingly, IT IS ORDERED:

25 1. Plaintiffs' Joint Motion for Leave to File Supplemental to Plaintiffs Joint  
26 Opposition to Defendant's Motion Requesting Cost Bond (Doc. 318) is GRANTED. The  
27 Clerk of the Court shall docket the lodged supplemental document (Doc. 319).  
28

1           2.       Plaintiffs' Motion for Leave to Exceed Page Limitations Imposed by the Rules  
2 for this Court and the Federal Rules of Civil Procedure (Doc. 320) is GRANTED. The Clerk  
3 of the Court shall docket the lodged Response (Doc. 321).

4           3.       Defendant's Motion to Strike Improper References to Confidential Settlement  
5 Discussions and Documents and Plaintiffs' Response to Motion to Post a Cost Bond (Doc.  
6 325) is GRANTED. Paragraphs 31, 35, and 36 of Docs. 319 and 321 are STRICKEN.

7           4.       The Motions in Limine (Doc. 312) are GRANTED IN PART AND DENIED  
8 IN PART.

9                   1.       Evidence of the prior relationship of the parties or other  
10                   conduct/incidents, including City Council meetings will be limited by  
11                   Fed.R.Evid. 401 and 403 as to be discussed with the parties.

12                   2.       Plaintiffs are precluded from presenting statements made by Plaintiff  
13                   Weik in their case in chief.

14                   3.       Plaintiffs are precluded from presenting character evidence except for  
15                   impeachment purposes. Plaintiffs shall seek permission to use the  
16                   evidence for impeachment purposes at sidebar during trial.

17                   4.       The presentation of newspaper articles is precluded as hearsay.

18                   5.       Argument regarding the admissibility of POST statements will be heard  
19                   at the pre-trial hearing.

20                   6.       Argument regarding the admissibility of evidence that Defendant would  
21                   wear his sidearm in the Post Office will be heard at the pre-  
22                   trialhearing.

23                   7.       Argument regarding the admissibility of evidence of the reason for  
24                   Defendant's leaving his employment with the City of Tombstone will  
25                   be heard at the pre-trial hearing.

26                   8.       Evidence related to compensatory damages is precluded.

27           5.       Defendant's Motion Requesting the Court Order Plaintiffs to Post a Cost Bond  
28 (Doc. 313) is DENIED.

