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3 IN THE UNITED STATES DISTRICT COURT  
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
5

6 DEARMAND E., et al.,

No. C 08-1709 SI

7 Plaintiffs,

**FINAL PRETRIAL SCHEDULING  
ORDER**

8 v.

9 CITY OF ANTIOCH, et al.,

10 Defendants.  
\_\_\_\_\_ /

11 On November 5, 2009, the Court held a final pretrial conference in the above captioned matter,  
12 which is set for jury trial beginning November 16, 2009. All parties were represented by counsel. The  
13 following matters were resolved:  
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15 1. **Number of jurors and challenges:** There shall be a jury of 8 members. Each side shall  
16 have up to four peremptory challenges.

17 2. **Voir dire:** The court will conduct general voir dire, and counsel for each side shall have  
18 up to 20 minutes total to question the panel. The jury will be selected on Thursday, November 12, 2009  
19 at 9:30 a.m., but the trial will commence on Monday, November 16, 2009.

20 3. **Jury instructions:** Counsel have submitted joint proposed jury instructions. Their final  
21 submission shall be filed in hard copy and also submitted to the court on disk, suitable for reading by  
22 WordPerfect 13 (windows) on or before November 16, 2009.

23 4. **Trial exhibits:** No later than November 13, 2009, the parties shall submit their trial  
24 exhibits, in binders with numbered tabs separating and identifying each exhibit. The court shall be  
25 provided with three sets (for the court, the file and the witness) and each side shall provide one set for  
26 the other side. To the extent that original documents are to be used as exhibits in the case, they should  
27 be included in the set of exhibits for the court.  
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1           5.       **Bifurcation:** Defendants have moved to bifurcate trial of the individual liability claims  
2 from the *Monell*-related claims, and liability claims from compensatory damage claims, and  
3 compensatory damage claims from punitive damage claims, resulting in four potential mini-trials before  
4 the same jury. The motion is DENIED, with the exception of punitive damages. As to liability, the  
5 *Monell*-related evidence will overlap in substantial part with other liability evidence and will have to  
6 be presented in any event. While the Second Cause of Action against the City depends on the outcome  
7 of the § 1983 claims against the individual officers in the First Cause of Action, some claims against  
8 the City are not so dependent (e.g., Fifth, Sixth and Sixteenth Causes of Action). Thus the proposed  
9 bifurcation could cause duplication of testimony and delay. Any potential prejudice to the individual  
10 officers can be controlled by appropriate limiting instructions. The Court will bifurcate trial of the  
11 question of punitive damages if requested.

12           6.       **Timing of trial:** The parties originally estimated that the trial will take from 8 to 12 trial  
13 days including jury selection. Jury selection will be completed in advance of trial, and the Court finds  
14 that 9 additional days should be ample to complete the trial. Based on this estimate, each side shall have  
15 30 minutes for opening statements; each side shall have 20 hours total for presentation of evidence,  
16 which includes direct and cross-examination and presentation of all exhibits; and each side shall have  
17 up to 60 minutes for closing argument.

18           7.       **Trial schedule:** Jury trials are generally conducted Monday through Thursday; jury  
19 trials are generally not conducted on Fridays, although deliberating juries are free to deliberate on  
20 Fridays. The trial day runs from 8:30 a.m. until 3:30 p.m., with a 15 minute break at 10:00 a.m., a 45  
21 minute break at 12:00 noon and a 15 minute break at 2:00 p.m., all times approximate. Because of the  
22 Thanksgiving holiday, the court is closed on November 26 and 27, 2009.

23           8.       **Motions in limine:** The parties filed numerous motions in limine, as follows:  
24                   **Plaintiffs' motion No. 1: to admit prior judicial and administrative agency findings**  
25 **re: expulsions and plaintiffs' request for judicial notice:** Plaintiffs seek to inform the jury that  
26 plaintiffs' expulsions were reversed; this request is GRANTED and, to this extent, the administrative  
27 and judicial findings about the expulsions will be judicially noticed. The parties are ordered to draft a  
28 neutral stipulation or instruction which will inform the jury of this fact. Since plaintiffs have settled

1 their claims against the school district, the validity of the expulsion proceedings will not be relitigated  
2 in this action. Admissibility of testimony about specific actions taken by individual defendants or  
3 witnesses will be addressed as the evidence is presented at trial.

4 **Plaintiffs’ motion No. 2: to exclude testimony by defendants’ non-retained experts:**

5 Defendants have designated various of their employee/witnesses as “non-retained experts.” Plaintiffs  
6 seek to exclude their testimony for violation of F.R.Civ.P. 26(a), since they did not provide reports.  
7 This motion is DENIED, without prejudice to specific objections to specific questions at trial.

8 **Plaintiffs’ motion No. 3: to exclude lay witnesses disclosed by defendants:** Plaintiffs

9 object to testimony by witnesses disclosed by defendants in their second supplemental disclosure on  
10 May 18, 2009. This motion is DENIED. Plaintiffs also object to testimony by Lt. R. Kelley because  
11 she was not previously disclosed as a witness, and they have not had an opportunity to depose her. This  
12 motion is GRANTED unless Lt. Kelley is made available for deposition before trial.

13 **Plaintiffs’ motion No. 4: to exclude evidence of plaintiff Michaels’ prior detentions**

14 **and arrests by the Antioch Police Department:** DENIED, without prejudice to specific objections  
15 to specific questions at time of trial. Further, the Court will give appropriate limiting instructions should  
16 they be requested.

17 **Defendants’ motion No. 1: to exclude evidence of personnel related issues of the**

18 **individual defendants:** The motion seeks to exclude all information about the individual defendants’  
19 prior “personnel issues” gleaned from records of citizen complaints, internal investigations and/or  
20 potential disciplinary records. As such it is overbroad and DENIED. However, it is ORDERED that  
21 no such “personnel issues” shall be discussed in the jury’s presence (through opening statements or  
22 witness questioning) unless the offering party makes an offer of proof to the Court out of the presence  
23 of the jury and receives permission from the Court to proceed.

24 **Defendants’ motion No. 2: to exclude all evidence concerning the school district,**

25 **its settlement, plaintiffs’ expulsions, and communications with Lynn Nerland:** This motion is  
26 overbroad and is DENIED. As discussed in Plaintiffs’ motion No. 1, the jury may be informed that the  
27 plaintiffs were expelled and that the expulsions were reversed. They jury may also be informed that  
28 plaintiffs settled their claims with the school district; the parties are ordered to draft a neutral stipulation

1 or instruction which will inform the jury of this fact. Communications with Lynn Nerland will be  
2 allowed consistent with the Court's prior Order (Docket 78). California Civil Code § 47(b) is  
3 inapplicable in federal § 1983 claims.

4 **Defendants' motion No. 3: to exclude evidence of other incidents between the**  
5 **Antioch Police Department and plaintiffs or other juveniles:** This motion is overbroad and is  
6 DENIED, without prejudice to specific objections to specific questions at trial. If requested, appropriate  
7 limiting instructions will be given.


8 **Defendants' motion No. 4: to exclude evidence involving the prosecution of**  
9 **plaintiffs and/or other juveniles involved in the Gas City incident:** Plaintiffs seek to introduce  
10 evidence that the defendants referred plaintiffs for further prosecution eight months after the Gas City  
11 incident, in retaliation for plaintiffs' having filed claims/complaints about the incident. Defendants  
12 move to exclude all such evidence, based on absolute immunity, relevance and undue prejudice. The  
13 motion is DENIED. There is no absolute immunity when a police officer also functions as a  
14 complaining witness. *Harris v. Roderick*, 126 F.3d 1189, 1199 (9th Cir. 1997), and the evidence may  
15 be relevant. If requested, appropriate limiting instructions will be given.

16 **Defendants' motion No. 5: to exclude testimony of expert Walser:** DENIED.  
17 Objections go to weight of testimony and may be explored through cross-examination.

18 9. **Further Settlement Conference:** The parties are ordered to report to the chambers of  
19 Magistrate Judge James Larson to attend a **settlement conference at 2:00 p.m. on Thursday,**  
20 **November 12, 2009,** immediately after jury selection.

21  
22 **IT IS SO ORDERED.**

23 Dated: November 7, 2009

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26 SUSAN ILLSTON  
27 United States District Judge  
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