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**ATTACHMENT B**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JUAN LUCERO, JR.,  
Plaintiff,

v.

JOHN ETTARE, et al.,  
Defendants.

Case No. 15-cv-02654-KAW

**PROPOSED JURY INSTRUCTIONS**

United States District Court  
Northern District of California

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**PRELIMINARY INSTRUCTIONS**

**INSTRUCTION NO. 1: DUTY OF JURY**

Members of the jury: You are now the jury in this case. It is my duty to instruct you on the law.

These instructions are preliminary instructions to help you understand the principles that apply to civil trials and to help you understand the evidence as you listen to it. You will be allowed to keep this set of instructions to refer to throughout the trial. These instructions are not to be taken home and must remain in the jury room when you leave in the evenings. At the end of the trial, these instructions will be collected and I will give you a final set of instructions. It is the final set of instructions that will govern your deliberations.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

Please do not read into these instructions or anything I may say or do that I have an opinion regarding the evidence or what your verdict should be.

Authority: Ninth Circuit Model Civil Jury Instructions, No. 1.2

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**INSTRUCTION NO. 2: CLAIMS AND DEFENSES**

To help you follow the evidence, I will give you a brief summary of the positions of the parties:

The plaintiff claims that defendant Officer John Ettare detained and arrested plaintiff for public intoxication without probable cause. The plaintiff also claims that Officer Ettare used excessive force during the arrest. The plaintiff further claims that defendants Officer John Ettare and Kyle Howe used excessive force while in jail. The plaintiff has the burden of proving each of these claims by a preponderance of the evidence.

The defendants deny each of these claims.

Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 1.5

Notes: Jointly submitted

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**INSTRUCTION NO. 3: TWO OR MORE PARTIES - DIFFERENT LEGAL RIGHTS**

You should decide the case as to each defendant separately. Unless otherwise stated, such as in the instructions pertaining only to Officer Ettare, the instructions apply to all parties.

Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 1.8

Notes: Jointly submitted.

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**INSTRUCTION NO. 4: BURDEN OF PROOF**

When a party has the burden of proof on any claim by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 1.6

Notes: Jointly submitted.

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**INSTRUCTION NO. 5: BURDEN OF PROOF (IF NECESSARY)**

Those of you who have sat on criminal cases will have heard of "proof beyond a reasonable doubt." The standard of proof in a criminal case is a stricter standard, requiring more proof than a preponderance of evidence. The reasonable doubt standard does not apply to a civil case and you should put that standard out of your mind.

Authority: 3 Fed. Jury Prac. & Instr. § 104:03 (6th ed.)

Notes: Only to be given if the jury includes individuals who have served on a criminal trial.

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**INSTRUCTION NO. 6: WHAT IS EVIDENCE**

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness;
2. the exhibits that are admitted into evidence;
3. any facts to which the lawyers have agreed; and
4. any facts that I may instruct you to accept as proved.

Authority: Ninth Circuit Model Civil Jury Instructions, No. 1.9

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**INSTRUCTION NO. 7: WHAT IS NOT EVIDENCE**

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they say in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.
2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court’s ruling on it.
3. Testimony that is excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition some evidence was received only for a limited purpose; when I have instructed you to consider certain evidence only for a limited purpose, you must do so and you may not consider that evidence for any other purpose.
4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Authority: Ninth Circuit Model Civil Jury Instructions, No. 1.10

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**INSTRUCTION NO. 8: DIRECT AND CIRCUMSTANTIAL EVIDENCE**

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Authority: Ninth Circuit Model Civil Jury Instructions, No. 1.12

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**INSTRUCTION NO. 9: RULING ON OBJECTIONS**

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore that evidence. That means when you are deciding the case, you must not consider the stricken evidence for any purpose.

Authority: Ninth Circuit Model Civil Jury Instructions, No. 1.13

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**INSTRUCTION NO. 10: CREDIBILITY OF WITNESSES**

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness’s memory;
3. the witness’s manner while testifying;
4. the witness’s interest in the outcome of the case, if any;
5. the witness’s bias or prejudice, if any;
6. whether other evidence contradicted the witness’s testimony;
7. the reasonableness of the witness’s testimony in light of all the evidence; and
8. any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

Authority: Ninth Circuit Model Civil Jury Instructions, No. 1.14

**INSTRUCTION NO. 11: CONDUCT OF THE JURY**

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone or electronic means, via email, text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, or any other forms of social media. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, the media or press, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case, and how long you expect the trial to last. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and report the contact to the court.

Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch or listen to any news or media accounts or commentary about the case or anything to do with it[,although I have no information that there will be news reports about this case]; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to

1 learn about the case on your own. Do not visit or view any place discussed in this  
2 case, and do not use Internet programs or other devices to search for or view any  
3 place discussed during the trial. Also, do not do any research about this case, the  
4 law, or the people involved—including the parties, the witnesses or the lawyers—  
5 until you have been excused as jurors. If you happen to read or hear anything  
6 touching on this case in the media, turn away and report it to me as soon as  
7 possible.

8 These rules protect each party’s right to have this case decided only on evidence  
9 that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the  
10 accuracy of their testimony is tested through the trial process. If you do any research or  
11 investigation outside the courtroom, or gain any information through improper communications,  
12 then your verdict may be influenced by inaccurate, incomplete or misleading information that has  
13 not been tested by the trial process. Each of the parties is entitled to a fair trial by an impartial  
14 jury, and if you decide the case based on information not presented in court, you will have denied  
15 the parties a fair trial. Remember, you have taken an oath to follow the rules, and it is very  
16 important that you follow these rules.

17 A juror who violates these restrictions jeopardizes the fairness of these proceedings. If any  
18 juror is exposed to any outside information, please notify the court immediately.

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Authority: Ninth Circuit Model Civil Jury Instructions, No. 1.15

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**INSTRUCTION NO. 10: PUBLICITY DURING TRIAL**

If there is any news media account or commentary about the case or anything to do with it, you must ignore it. You must not read, watch or listen to any news media account or commentary about the case or anything to do with it. The case must be decided by you solely and exclusively on the evidence that will be received in the case and on my instructions as to the law that applies. If any juror is exposed to any outside information, please notify me immediately.

Authority: Ninth Circuit Model Civil Jury Instructions, No. 1.16

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**INSTRUCTION NO. 11: NO TRANSCRIPT AVAILABLE TO JURY**

I urge you to pay close attention to the trial testimony as it is given. During deliberations you will not have a transcript of the trial testimony.

Authority: Ninth Circuit Model Civil Jury Instructions, No. 1.17

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**INSTRUCTION NO. 12: TAKING NOTES**

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you go to the jury room to decide the case. Do not let notetaking distract you. When you leave, your notes should be left in the jury room. No one will read your notes.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of other jurors.

Authority: Ninth Circuit Model Civil Jury Instructions, No. 1.18

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**INSTRUCTION NO. 13: OUTLINE OF TRIAL**

Trials proceed in the following way: First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

Plaintiff will then present evidence, and counsel for Defendants may cross-examine. Then Defendants may present evidence, and counsel for Plaintiff may cross-examine.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 1.21

Notes: Jointly submitted.

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**DURING THE TRIAL**

**INSTRUCTION NO. 16: BENCH CONFERENCES AND RECESSES**

From time to time during the trial, it will be necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury was present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

Of course, we will do what we could to keep the number and length of these conferences to a minimum. I do not always grant an attorney’s request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

Authority: Ninth Circuit Model Civil Jury Instructions, No. 1.20

Notes: To be given at first bench conference or recess.

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**INSTRUCTION NO. 17: EVIDENCE FOR LIMITED PURPOSE (IF NECESSARY)**

Some evidence may be admitted only for a limited purpose.

When I instruct you that an item of evidence has been admitted only for a limited purpose, you must consider it only for that limited purpose and not for any other purpose.

[The testimony [you are about to hear] may be considered only for the limited purpose of [describe purpose] and not for any other purpose.]

Authority: Ninth Circuit Model Civil Jury Instructions, No. 1.11

Notes: To be given if necessary.

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**PRIOR TO DELIBERATIONS**

**INSTRUCTION NO. 18: STIPULATIONS OF FACT (IF NECESSARY)**

The parties have agreed to certain facts that will be read to you. You must therefore treat these facts as having been proved.

Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 2.2

Notes: Jointly submitted. To be given if necessary.

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**INSTRUCTION NO. 19: DEPOSITION IN LIEU OF LIVE TESTIMONY (IF NECESSARY)**

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded.

The deposition of plaintiff Juan Lucero was taken on February 12, 2014.

You should consider deposition testimony, presented to you in court in lieu of live testimony, insofar as possible, in the same way as if the witness had been present to testify. Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.

Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 2.4

Notes: Jointly submitted. To be given if necessary.

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**INSTRUCTION NO. 20: IMPEACHMENT EVIDENCE—WITNESS (IF NECESSARY)**

The evidence that a witness lied under oath on a prior occasion, may be considered, along with all other evidence, in deciding whether or not to believe the witness and how much weight to give to the testimony of the witness and for no other purpose.

Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 2.9

Notes: Jointly submitted. To be given if necessary.

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**INSTRUCTION NO. 21: USE OF INTERROGATORIES (IF NECESSARY)**

Evidence was presented to you in the form of answers of one of the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath, before the actual trial, in response to questions that were submitted in writing under established court procedures. You should consider the answers, insofar as possible, in the same way as if they were made from the witness stand.

Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 2.11

Notes: Jointly submitted. To be given if necessary.

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**INSTRUCTION NO. 22: EXPERT OPINION**

You have heard testimony from Dr. Barry Gustin, who testified to opinions and the reasons for his opinions. This opinion testimony is allowed, because of the education or experience of this witness.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness’s education and experience, the reasons given for the opinion, and all the other evidence in the case.

Authority: Ninth Circuit Model Civil Jury Instructions, No. 2.13

Notes: Jointly submitted.

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**INSTRUCTION NO. 23: DUTY TO DELIBERATE**

Before you begin your deliberations, elect one member of the jury as your presiding juror. The presiding juror will preside over the deliberations and serve as the spokesperson for the jury in court.

You shall diligently strive to reach agreement with all of the other jurors if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to their views.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not be unwilling to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 3.1

1 **INSTRUCTION NO. 24: CONSIDERATION OF EVIDENCE—CONDUCT OF THE JURY**

2 Because you must base your verdict only on the evidence received in the case and on these  
3 instructions, I remind you that you must not be exposed to any other information about the case or  
4 to the issues it involves. Except for discussing the case with your fellow jurors during your  
5 deliberations:

6 Do not communicate with anyone in any way and do not let anyone else  
7 communicate with you in any way about the merits of the case or anything to do  
8 with it. This includes discussing the case in person, in writing, by phone or  
9 electronic means, via email, via text messaging, or any Internet chat room, blog,  
10 website or application, including but not limited to Facebook, YouTube, Twitter,  
11 Instagram, LinkedIn, Snapchat, or any other forms of social media. This applies to  
12 communicating with your family members, your employer, the media or press, and  
13 the people involved in the trial. If you are asked or approached in any way about  
14 your jury service or anything about this case, you must respond that you have been  
15 ordered not to discuss the matter and to report the contact to the court.

16 Do not read, watch, or listen to any news or media accounts or commentary  
17 about the case or anything to do with it; do not do any research, such as consulting  
18 dictionaries, searching the Internet, or using other reference materials; and do not  
19 make any investigation or in any other way try to learn about the case on your own.  
20 Do not visit or view any place discussed in this case, and do not use Internet  
21 programs or other devices to search for or view any place discussed during the trial.  
22 Also, do not do any research about this case, the law, or the people involved—  
23 including the parties, the witnesses or the lawyers—until you have been excused as  
24 jurors. If you happen to read or hear anything touching on this case in the media,  
25 turn away and report it to me as soon as possible.

26 These rules protect each party’s right to have this case decided only on evidence  
27 that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the  
28 accuracy of their testimony is tested through the trial process. If you do any research or

1 investigation outside the courtroom, or gain any information through improper communications,  
2 then your verdict may be influenced by inaccurate, incomplete or misleading information that has  
3 not been tested by the trial process. Each of the parties is entitled to a fair trial by an impartial  
4 jury, and if you decide the case based on information not presented in court, you will have denied  
5 the parties a fair trial. Remember, you have taken an oath to follow the rules, and it is very  
6 important that you follow these rules.

7 A juror who violates these restrictions jeopardizes the fairness of these proceedings. If any  
8 juror is exposed to any outside information, please notify the court immediately.

9  
10 Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 3.2

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**INSTRUCTION NO. 25: COMMUNICATION WITH COURT**

If it becomes necessary during your deliberations to communicate with me, you may send a note through the courtroom deputy, signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing. I will not communicate with any member of the jury on anything concerning the case except in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including the court—how the jury stands, whether in terms of vote count or otherwise, until after you have reached a unanimous verdict or have been discharged.

Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 3.3

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**INSTRUCTION NO. 26: RETURN OF VERDICT**

A verdict form has been prepared for you. After you have reached unanimous agreement on a verdict, your presiding juror should complete the verdict form according to your deliberations, sign and date it, and advise the courtroom deputy that you are ready to return to the courtroom.

Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 3.5

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**JURY INSTRUCTION NO. 27: SECTION 1983 CLAIM—INTRODUCTORY  
INSTRUCTION**

The plaintiff brings his claim under the federal statute, 42 U.S.C. § 1983, which provides that any person or persons who, under color of law, deprives another of any rights, privileges, or immunities secured by the Constitution or laws of the United States shall be liable to the injured party.

Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 9.1

Notes: Jointly submitted.

1           **JURY INSTRUCTION NO. 28: SECTION 1983 CLAIM AGAINST DEFENDANTS IN**  
2                           **INDIVIDUAL CAPACITY – ELEMENTS AND BURDEN OF PROOF**

3           In order to prevail on his § 1983 claim against the defendants Officer John Ettare and CSO  
4 Kyle Howe, the plaintiff Juan Lucero must prove each of the following elements by a  
5 preponderance of the evidence:

- 6           1. the defendant acted under color of state law; and
- 7           2. the act of the defendant deprived the plaintiff of his particular rights under the United  
8           States Constitution as explained in later instructions.

9           A person acts “under color of state law” when the person acts or purports to act in the  
10 performance of official duties under any state, county, or municipal law, ordinance, or regulation.

11           As to the first element, the parties agree that defendants Officer John Ettare and CSO Kyle  
12 Howe acted in the performance of their official duties, and therefore, they acted under color of  
13 state law.

14           As to the second element, only if you find that the plaintiff has proved all the elements he  
15 is required to prove under Jury Instructions 9.19 and 9.23, as to a defendant, your verdict should  
16 be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any one or more of these  
17 elements, your verdict should be for the defendant.

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19   Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 9.3

20   Notes: Jointly submitted.  
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**JURY INSTRUCTION NO. 29: CAUSATION**

In order to establish that the acts of defendants Officer John Ettare and Kyle Howe deprived the plaintiff Juan Lucero of his particular rights under the United States Constitution as explained in later instructions, the plaintiff must prove by a preponderance of the evidence that the acts were so closely related to the deprivation of the plaintiff's rights as to be the moving force that caused the ultimate injury.

Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 9.8

Notes: Jointly submitted.

1           **JURY INSTRUCTION NO. 30: PARTICULAR RIGHTS—FOURTH AMENDMENT -**  
2           **UNREASONABLE SEIZURE OF PERSON—PROBABLE CAUSE ARREST**

3           In general, a seizure of a person by arrest without a warrant is reasonable if the arresting  
4 officer had probable cause to believe the plaintiff has committed or was committing a crime.

5           In order to prove the seizure in this case was unreasonable, the plaintiff must prove by a  
6 preponderance of the evidence that he was arrested without probable cause.

7           “Probable cause” exists when, under all of the circumstances known to the officer at the  
8 time, an objectively reasonable police officer would conclude there is a fair probability that the  
9 plaintiff has committed or was committing a crime.

10          The officer’s intent or motive is not relevant to your inquiry.

11          Under state law, it is a crime to be drunk in public. The elements of the crime are:

- 12          1.       Defendant was willfully under the influence of alcohol, drugs, or a controlled  
13               substance;
- 14          2.       When the defendant was under the influence, defendant was in a public place; and
- 15          3.       Defendant was either:
  - 16               a.     unable to exercise care for his own safety, OR
  - 17               b.     interfering with, obstructing, or preventing the free use of a street, sidewalk, or  
18               other public path.

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20          Authority: Ninth Circuit Manual of Model Civil Jury Instructions, Jury Instruction No. 9.21, and  
21          Cal. Pen. Code. §647(f), CALCRIM 2966.

22          Notes: Jointly submitted.  
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**JURY INSTRUCTION NO. 31: CRIMINAL CASE FILED**

The jury is not to consider whether the September 7, 2013 arrest resulted in criminal charges or the outcome of any criminal charges.

Notes: Stipulated to by the parties. (Joint Pretrial Statement at 5.)

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**JURY INSTRUCTION NO. 32: PARTICULAR RIGHTS—FOURTH AMENDMENT—  
UNREASONABLE SEIZURE OF PERSON—EXCESSIVE (DEADLY AND  
NONDEADLY) FORCE**

In general, a seizure of a person is unreasonable under the Fourth Amendment if a police officer uses excessive force in making an arrest. Thus, in order to prove an unreasonable seizure in this case, the plaintiff must prove by a preponderance of the evidence that the Defendant Ettore used excessive force when he arrested Plaintiff Lucero.

Under the Fourth Amendment, a police officer may only use such force as is "objectively reasonable" under all of the circumstances. You must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight. An officer's intent or motive is not relevant to your inquiry.

In determining whether the officer used excessive force in this case, consider all of the circumstances known to the officer on the scene, including:

1. the severity of the crime or other circumstances to which the officer was responding;
2. whether the plaintiff posed an immediate threat to the safety of the officer or to others;
3. whether the plaintiff was actively resisting arrest or attempting to evade arrest by flight;
4. the amount of time and any changing circumstances during which the officer had to determine the type and amount of force that appeared to be necessary; and
5. the type and amount of force used.

Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 9.23

1           **JURY INSTRUCTION NO. 33: PARTICULAR RIGHTS—FOURTH AMENDMENT—**  
2                           **UNREASONABLE SEIZURE OF PERSON—EXCESSIVE (DEADLY AND**  
3   **NONDEADLY) FORCE**

4           As previously explained, the plaintiff has the burden to prove that the acts of defendants  
5 Officer John Ettare and CSO Kyle Howe deprived the plaintiff of particular rights under the  
6 United States Constitution.

7           In this case, the plaintiff alleges the defendants deprived him of his rights under the  
8 Fourth Amendment to the Constitution when they allegedly beat him in the safety cell he was  
9 being held in pre booking. Under the Fourth Amendment, a police officer may only use such  
10 force as is “objectively reasonable” under all of the circumstances. You must judge the  
11 reasonableness of a particular use of force from the perspective of a reasonable officer on the  
12 scene and not with the 20/20 vision of hindsight. An officer’s intent or motive is not relevant to  
13 your inquiry.

14           In determining whether the officer used excessive force in this case, consider all of the  
15 circumstances known to the officer on the scene, including:

- 16           1.       The severity of the crime or other circumstances to which the officer were  
17                    responding;
- 18           2.       Whether the plaintiff posed an immediate threat to the safety of the officers or to  
19                    others;
- 20           3.       Whether the plaintiff was actively resisting arrest;
- 21           4.       The amount of time and any changing circumstances during which the officer had  
22                    to determine the type and amount of force that appeared to be necessary; and
- 23           5.       The type and amount of force used.

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25           Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 9.23

26           Notes: Jointly submitted.  
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**JURY INSTRUCTION NO. 34: EXCESSIVE FORCE WHERE NO FORCE NECESSARY**

When there is no need to use force, any force used is constitutionally unreasonable.

Authority: *Headwaters Forest Defense v. Cty. of Humboldt*, 240 F.3d 1185, 1199 (9th Cir. 2000)  
(internal quotations omitted), *vacated on other grounds by* 534 U.S. 801 (2001).

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**JURY INSTRUCTION NO. 35: DAMAGES—PROOF**

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiff on any of his claims, you must determine the plaintiff’s damages. The plaintiff has the burden of proving damages by a preponderance of the evidence. The word “damages” means the amount of money that will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. You should consider the following:

The nature and extent of plaintiff’s injuries;

The reasonable value of necessary medical care, treatment, and services receive to the present time; and

The reasonable value of necessary medical care, treatment, and services which with reasonable probability will be required in the future;

The reasonable value of earnings lost up to the present time;

The reasonable value of earnings which with reasonable probability will be lost in the future.

Plaintiff has the burden of proving damages by a preponderance of the evidence. It is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

Authority: Ninth Circuit Manual of Model Civil Jury Instructions, Nos. 5.1 and 5.2

Notes: Jointly submitted.

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**JURY INSTRUCTION NO. 36: DAMAGES - MITIGATION**

The plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

The defendant has the burden of proving by a preponderance of the evidence:

1. that the plaintiff failed to use reasonable efforts to mitigate damages; and
2. the amount by which damages would have been mitigated.

Authority: Ninth Circuit Manual of Model Civil Jury Instructions, No. 5.3

Notes: Jointly submitted.

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**JURY INSTRUCTION NO. 37: DAMAGES ARISING IN THE FUTURE - DISCOUNT TO  
PRESENT CASH VALUE**

Any award for future economic damages must be for the present cash value of those damages.

Noneconomic damages such as pain and suffering and disability are not reduced to present cash value.

Present cash value means the sum of money needed now, which, when invested at a reasonable rate of return, will pay future damages at the times and in the amounts that you find the damages will be incurred.

The rate of return to be applied in determining present cash value should be the interest that can reasonably be expected from safe investments that can be made by a person of ordinary prudence, who has ordinary financial experience and skill.

Citation: Ninth Circuit Model Jury Instructions No. 5.4.

Notes: Jointly submitted.

1 **JURY INSTRUCTION NO. 38: PUNITIVE DAMAGES**

2 If you find for the plaintiff, you may, but are not required to, award punitive damages.  
3 The purposes of punitive damages are to punish a defendant and to deter similar acts in the future.  
4 Punitive damages may not be awarded to compensate a plaintiff.

5 The plaintiff has the burden of proving by preponderance of the evidence that punitive  
6 damages should be awarded, and, if so, the amount of any such damages.

7 You may award punitive damages only if you find that the defendant's conduct that  
8 harmed the plaintiff was malicious, oppressive or in reckless disregard of the plaintiff's rights.  
9 Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring  
10 the plaintiff. Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it  
11 reflects complete indifference to the plaintiff's safety or rights, or if the defendant acts in the face  
12 of a perceived risk that its actions will violate the plaintiff's rights under federal law. An act or  
13 omission is oppressive if the defendant injures or damages or otherwise violates the rights of the  
14 plaintiff with unnecessary harshness or severity, such as by the misuse or abuse of authority or  
15 power or by the taking advantage of some weakness or disability or misfortune of the plaintiff.

16 If you find that punitive damages are appropriate, you must use reason in setting the  
17 amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but  
18 should not reflect bias, prejudice or sympathy toward any party. In considering the amount of any  
19 punitive damages, consider the degree of reprehensibility of the defendant's conduct including  
20 whether the conduct that harmed the plaintiff was particularly reprehensible because it also caused  
21 actual harm or posed a substantial risk of harm to people who are not parties to this case. You may  
22 not, however, set the amount of any punitive damages in order to punish the defendant for harm to  
23 anyone other than the plaintiff in this case.

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25 Citation: Ninth Circuit Model Jury Instructions No. 5.5; *City of Newport v. Fact Concerts, Inc.*,  
26 453 U.S. 247, 259-71 (1981)

27 Notes: Jointly submitted.  
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