

EXHIBIT J

**pages 1, 46-49 only of EXHIBIT 24
to the Deposition of Michael Hayes**

PLAINTIFF'S
Exhibit No. 4
M. HAYES
10-16-13

- INTERVIEW -

1
2 Kwon: This is a recorded interview. The date of this interview is May the
3 24th, 2012. The time is approximately 0830 hours. My name is
4 Sergeant Kwon. I'm here interviewing Lieutenant Mike Hayes who
5 is represented by his attorney Mr. Justin Buffington from the law
6 firm of Rains, Lucia, and Stern. This is -- uh -- uh -- an -- an
7 administrative investigation regards to an allegation of misconduct,
8 specifically conduct unbecoming an officer, discourtesy and
9 discrimination against Lieutenant Hayes. And this centers around
10 an incident that occurred -- uh -- back on September the 8th, 2011
11 -- uh -- at approximately 1800 hours at the Powell Street BART
12 station. Uh -- Lieutenant, I have here your Lybarger
13 admonishment. Were you able to review this form with your
14 attorney?
15 Hayes: Yes, I was.
16 Kwon: Okay. Do you have any questions about this form?
17 Hayes: No, I don't.
18 Kwon: Okay. Uh -- from what I understand, back in September, around
19 September there were a string of protests. Do you recall -- uh --
20 those protests going on around that time?
21 Hayes: I remember the string of protests, yes.
22 Kwon: Okay. And -- uh -- do you recall working any of those protests?
23 Hayes: I worked several of those --
24 Kwon: Okay.
25 Hayes: -- protests.
26 Kwon: And -- uh -- do you recall this specific incident in question?
27 Hayes: I do because I reviewed the roster from that day.
28 Kwon: Okay.

1 Hayes: -- and Jacobson's.

2 Kwon: Okay. And did you --

3 Hayes: Jacobson's I approved. Lucas's I did, but I sent the email saying
4 there needs to be a supplement on this case to document the
5 observations. And then when -- uh -- because Lucas's was a cite
6 and release case, we could write a supplement on that and it
7 wouldn't be as detrimental as Coduti's case where it's an actual
8 arrest, we needed a supplement written that evening and
9 unfortunately -- uh -- Deputy Chief Hartwig wasn't here at that time.

10 Kwon: Okay. Or did you ever in -- uh -- request Deputy Chief Hartwig or
11 voice your concerns that he should write a supplement as well?

12 Hayes: Hmm, I don't think I did it directly to Deputy Chief Hartwig that
13 evening. Uh -- I believe I discussed that with -- uh -- uh --
14 Lieutenant Kaneely (phonetic) at the same time that I discussed
15 the -- uh -- my concerns with -- uh -- Brian Lucas's case as far as
16 individuals were being cited or arrested and -- uh -- the reports
17 themselves did not have the observations of the violation in the
18 body of the narrative.

19 Kwon: Okay. And what was Lieutenant Kan -- Kaneely's response to -- uh
20 -- what you -- what you talked to him -- (overlapping) --

21 Hayes: Um -- I -- I have an email back and I -- I don't remember his exact
22 response, but it was an understanding that -- uh -- my
23 interpretation of that was it would be discussed because these
24 were going to happen again in the future and that we needed to --
25 uh -- get these documented properly.

26 Kwon: Okay. And -- uh -- just for clarification -- uh -- both Lucas and
27 Officer Coduti, they had similar issues in the report; is that correct?

28 Hayes: Correct.

1 Kwon: Okay. And was there a difference between Officer Coduti -- uh
2 --finally -- I mean what prompted Officer Coduti to finally put in the
3 elements of the crime?
4 Hayes: Uh -- I don't know if he ever did put in the elements of the crime --
5 uh -- just based on the report that I saw that night.
6 Kwon: Uh-huh.
7 Hayes: Uh -- I don't know if -- because I never saw that report past that
8 evening. I -- I haven't looked at the report since so I -- I don't know
9 how to answer that.
10 Kwon: Was it -- was there a difference between the concerns between
11 Officer Coduti and Officer Lucas as far as -- uh -- uh -- why they
12 didn't put the elements? Was -- was there a difference between
13 why they did not? I know you stated that Officer Lucas -- uh --
14 voice concerns that he did not witness those violations; is that
15 correct?
16 Hayes: That is correct.
17 Kwon: And what about Officer Coduti? Is there -- is there -- did have a
18 similar response or was it different?
19 Hayes: I believe it was a similar response that he did not directly observe
20 the violations, but, again, because the -- the violations -- um --
21 because this individual was in the immediate area where the
22 violations were occurring, that this individual -- uh -- was
23 participating in the protest and in the protest itself was blocking the
24 gates.
25 Kwon: Okay. I'm going to back up here.
26 Hayes: Okay.
27 Kwon: For clarification again, now, so -- uh -- what you're saying is that
28 Officer Coduti's reasoning was that he agreed that this person was

1 part of the protest but he did not specifically see this particular
2 person; is that correct? Or -- I'm -- I'm just trying to get a clear --
3 clear picture if he just did not believe there was probable cause at
4 -- at all to arrest these people.

5 Hayes: No.

6 Kwon: Or is it because he did not recall this specific person's exact
7 actions while they were in the crowd of people.

8 Hayes: That he did not observe his exact participation in the circle or in --
9 in the movement -- (overlapping) -- whatever it was, but this
10 individual was involved -- uh -- and when I say as a group, the
11 group's actions were a violation of 369. As a group, the group was
12 blocking --

13 Kwon: Okay.

14 Hayes: -- the gate.

15 Kwon: And did Officer Coduti -- uh -- relate to you that he felt the group
16 was in violation of -- 369? Did he --

17 Hayes: Yes.

18 Kwon: -- seem agreeable with that or was he --

19 Hayes: Yes.

20 Kwon: -- disagreeable?

21 Hayes: No, no, no. As -- as a group he felt that he group was in violation --
22 (overlapping) --

23 Kwon: And --

24 Hayes: -- 369.

25 Kwon: -- conversely, similar to Officer Lucas (inaudible) --

26 Hayes: Yes.

27 Kwon: -- was it on the same lines?

28 Hayes: Along the same lines, even though he didn't see that individual

1 actions but the individual was partaking in the group movement or
2 the group action, and as a group, the group was violating
3 PC 369(i).

4 Kwon: Okay.

5 Hayes: Okay. Does that --

6 Kwon: Thank you. Yes.

7 Hayes: Does that clarify -- okay.

8 Kwon: Yes. Okay. Uh -- any -- anything else that you feel is important to
9 know?

10 Hayes: No. No. I'm -- I'm -- I'm done.

11 Kwon: Mr. Buffington.

12 Buffington: I think the horse is dead and beaten.

13 Kwon: Okay. Anything else, Mr. Buffington?

14 Buffington: No.

15 Kwon: Okay. If there's nothing else, then that will be -- uh -- that'll
16 conclude our interview. The time now is approximately 0926
17 hours. (Recording Ends)

18 **- INTERVIEW CONCLUDED -**

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EXHIBIT K

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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 KEN DAM

(Pages 1 to 43, inclusive)

Taken before SANDRA M. LEE

CSR No. 9971

October 16, 2013



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1 on the bottom "Not to be released to the general public
2 or media."

3 Q. How would you -- after you create a document
4 like this, how would you distribute it?

5 A. Via e-mail.

6 Q. Who would you send it to?

7 A. I would send it to law enforcement personnel.

8 Q. Do you have a list of all the BART PD, for
9 example?

10 A. I don't have a list personally, but I do send
11 it to law enforcement personnel. Yeah, BART police.

12 Q. If you would also look at Exhibit 4, it's in
13 the other stack and if you would keep that document in
14 front of you.

15 Do you recognize this document?

16 A. Yes, I do.

17 Q. What is it?

18 A. It's an informational bulletin that I produced.

19 Q. Is it true that Deputy Chief Fairrow asked you
20 to produce it?

21 A. Yes.

22 Q. Have you ever produced a "Be On the Look Out"
23 document, a BOLO?

24 A. I have produced that.

25 Q. Is it the same format as this?

1 A. I was not in his presence while the protest was
2 happening. I'm actually in my office. My office is
3 actually separate from dispatch where they have the
4 close circuit.

5 Q. You didn't enter what they call the command
6 room?

7 A. DC Fairow is at the command post. I don't know
8 exactly where he was that day. I'm in my office, and
9 I'm monitoring things in my office.

10 Q. Before DC Fairow asked you to produce this
11 document, had you ever heard about Dave Id?

12 A. I have not.

13 Q. Had you heard of Christopher Cantor?

14 A. Yes, I have.

15 Q. In what context?

16 A. Well, I believe he's been arrested before
17 for -- for 369i at protests, causing disturbances.

18 Q. Do you know he was arrested under 369i?

19 A. I believe so. That's the common Penal Code
20 that we use, so I believe so.

21 Q. Might it also have been 409?

22 A. You know, to be honest with you, I'm not sure
23 which Penal Code they used.

24 Q. How did you go about acquiring these images?

25 A. The images are on websites. But for

1 Christopher Cantor, this one could have been on CRIMS.
2 Alameda County, they have people that have been arrested
3 before database.

4 Q. So the picture in the top left of this flier is
5 a mugshot?

6 A. I can't say for sure, honestly. I'm not sure.

7 Q. What types of pictures would be in the CRIMS
8 database?

9 A. It would be mugshots.

10 Q. And you think you got it from there?

11 A. I can't be positive, to be honest with you.

12 Q. How did you find the picture of Dave Id?

13 A. I found that picture on Indybay, I believe.

14 Q. Did you capture an image from the video?

15 A. Going back, it appears that, yeah.

16 Q. When did DC Fairrow give you the assignment of
17 creating this document?

18 A. Sometime during that day before the protest.

19 Q. It was the same day?

20 A. I believe so.

21 Q. Have you ever created a flier like this for a
22 protest before?

23 A. I don't recall.

24 Q. How about since you created this one; have you
25 created another one like it for any protest?

1 Q. How many people are at a briefing?

2 A. This would be a rough estimate. This is a
3 guess. Because you have the CAP team, the tactical
4 team, you have officers coming in that were called in.
5 So roughly between 30 to 60 maybe.

6 Q. You made dozens of copies pretty much?

7 A. Right.

8 Q. Do you recall what you said as you described
9 this document?

10 A. No. I don't recall.

11 Q. Was somebody leading the briefing?

12 A. Yes. There was somebody else. The command
13 staff was leading the briefing.

14 Q. Who led the briefing that day?

15 A. I don't recall. It could be -- it could have
16 been the deputy chief. It could have been one of the
17 lieutenants. It could be -- it changed depending on who
18 was there.

19 MR. SIEGEL: I'd like to mark this as Exhibit
20 21.

21 (Plaintiff's Exhibit 21 marked for
22 identification.)

23 BY MR. SIEGEL:

24 Q. After you review this document, if you could
25 tell me whether you recognize this message.

1 A. Uh-huh.

2 MR. ALLEN: You have to reply audibly.

3 THE WITNESS: Yes.

4 BY MR. SIEGEL:

5 Q. Is this when you distributed Exhibit 4 to other
6 BART police?

7 A. Yes.

8 Q. How did you select the names to add to the cc
9 column of this e-mail?

10 A. They're members of the tactical team, people
11 that work in the protest.

12 Q. Do you think you added them one by one to the
13 e-mail, or do you have a group that you select that adds
14 multiple names?

15 A. This looks like I added a group. This looks
16 like I added all the command staff. This one looks like
17 I included the command chief, lieutenants and sergeants
18 at the time.

19 Q. And all of those ranks are included within
20 command staff?

21 A. Yes -- well, command staff is primarily deputy
22 chiefs, lieutenants. But for something like this, I
23 would probably put down sergeants as well. This is what
24 I have in my address book, which is groups, so command
25 and then I have sergeants.

1 MR. SIEGEL: Off the record for a second.

2 (Discussion off the record.)

3 BY MR. SIEGEL:

4 Q. Do you recall that after you created -- let me
5 back up.

6 Do you notice that Exhibit 21 mentions it has
7 two attachments to the e-mail?

8 A. Yes.

9 Q. To the best of your recollection, are those
10 attachments represented by Exhibits 4 and 16?

11 A. Yes.

12 Q. Do you recall that at a certain point DC Fairrow
13 asked you to produce updated versions of this document?

14 A. Yes. I believe so. In fact, it's just this
15 one right here, I believe.

16 Q. You're referring to Exhibit 16?

17 A. Yes. It's just whoever was additionally
18 arrested. He wanted me to update this.

19 Q. And do you recall if you did that?

20 A. I honestly don't recall, because -- you have
21 all the e-mails we gave. I don't recall.

22 Q. Do you recall adding Mr. Morse to such a
23 document?

24 A. Again, I don't recall, but you do have all the
25 e-mails.

1 Q. You don't know that; you assume that, right?

2 MR. ALLEN: We're in a delicate area here.

3 Part of that is attorney-client privilege, but you could
4 say you assume.

5 THE WITNESS: I assume.

6 MR. ALLEN: You don't know one way or the other
7 if he has them or not.

8 THE WITNESS: That's correct. I don't know.

9 BY MR. SIEGEL:

10 Q. How was Exhibit 4 explained to the other BART
11 police staff?

12 A. As I recall, it was only for informational
13 purposes only, and it was when -- that day we didn't
14 know where the protest was going to be, what station.
15 Again, for public safety and to run smoothly, we wanted
16 to know where the protest was going to be. The way I
17 recall, it was being explained generally if they're
18 there, the demonstration tended to come to those
19 stations.

20 Q. Were Cantor and Dave Id identified as subjects?

21 A. Correct. Subjects.

22 Q. Were they identified as potential wrongdoers?

23 A. I don't recall exactly that verbiage.

24 Q. Was it inferred in any way that these two
25 individuals were likely to commit criminal activities?

1 A. About the protest. The day of September 8th
2 was the topic.

3 Q. Did you ever get to see the transcript of your
4 Internal Affairs interview?

5 A. I've only seen little bits.

6 Q. What little bits did you see?

7 A. The one about the radio. That's all I
8 remember. What else? I know they referred to the
9 radio. I didn't look at much of it, to be honest with
10 you.

11 Q. Do you remember telling IA that Christopher
12 Cantor was a known instigator?

13 A. I might have. I might have.

14 Q. Do you remember telling IA that Cantor was an
15 inciter of what would be the soon riots?

16 A. I might have said that.

17 Q. Do you remember why you might have said that?

18 MR. ALLEN: Objection; calls for speculation.

19 MR. SIEGEL: Sure. Let's just cut to the
20 chase.

21 Exhibit 22, please.

22 (Plaintiff's Exhibit 22 marked for
23 identification.)

24 BY MR. SIEGEL:

25 Q. I can represent to you that this is a

1 transcript that was provided to me by BART, what appears
2 to be a record of your IA interview.

3 You've not seen this complete document before;
4 is that correct?

5 A. Correct. I have not.

6 Q. I'd like to direct your attention first to page
7 2.

8 A. Okay.

9 Q. I believe during the IA interview you were
10 interviewed by Sergeant Kwon; is that your recollection?

11 A. Yes.

12 Q. In the middle of this page beginning at line
13 13, Kwon asks you a question that ends with why these
14 two people were placed on the BOLD, and your answer --
15 it's apparent on the document here, but it refers to
16 Cantor having a history of being a visual leader for the
17 protest, a known instigator, inciter of what would soon
18 be riots.

19 Do you wish to change the testimony you gave to
20 IA?

21 A. No. That's what I said at the time.

22 Q. And on what basis did you describe Cantor as an
23 instigator or inciter of riots; what information did you
24 rely upon when making that statement?

25 A. Previous arrest history.

1 Q. So other officers informed you of his previous
2 acts?

3 A. There was also -- yes. Other officers have
4 informed me. There was also an incident. I believe it
5 was the board of directors were -- paint was thrown at
6 one of the board of directors, and Cantor was visibly
7 present.

8 Q. He was visibly present at that time?

9 A. At that time.

10 Q. Do you have any information that would
11 suggest that David Morse was an instigator or inciter of
12 riots?

13 A. No.

14 Q. I'd like to direct your attention to the next
15 page, page 3, beginning at about line 11. Here you
16 mention that Dave Id was scouting the area -- actually,
17 I should probably back up.

18 Beginning at the last line of page 28 -- I'm
19 sorry -- page 2, line 28, leading onto the next page,
20 you state that Deputy Chief Benson Fairow gave you the
21 information that you were relying upon.

22 Do you see that?

23 A. Uh-huh.

24 Q. "Yes"?

25 A. Yes.

1 MR. ALLEN: You have to say "yes."

2 THE WITNESS: Yes.

3 BY MR. SIEGEL:

4 Q. Is that true?

5 A. Yes.

6 Q. Then I believe it is DC Fairow who mentioned,
7 quote, unquote, "Dave Id was scouting the area," as it
8 says on line 11.

9 A. Yes.

10 Q. What does that mean, "Dave Id was scouting the
11 area"?

12 MR. ALLEN: Objection; calls for speculation.

13 BY MR. SIEGEL:

14 Q. What did you mean when you relayed that
15 information to IA?

16 A. I just was -- relayed that. Again, as Intel
17 officer, I just take what was given and I take it for
18 what it is, face value, what I was told.

19 Q. You don't do any fact-checking?

20 MR. ALLEN: Objection; argumentative.

21 BY MR. SIEGEL:

22 Q. Is that correct?

23 MR. ALLEN: Mischaracterizes his testimony. Is
24 that a question? If it's a question, it's vague and
25 overbroad.

1 BY MR. SIEGEL:

2 Q. The next line of this same section, it states,
3 quote, "posing quote/unquote as a -- a possible
4 reporter."

5 This is also something that DC Fairow related
6 to you?

7 A. I believe so.

8 Q. Did you learn from anybody else that Dave Id or
9 David Morse was reporting as a reporter?

10 A. Not that I -- I don't know. I don't believe
11 so.

12 Q. I'd like to direct your attention to page 15 of
13 this transcript. Actually, your testimony on page 15 is
14 prompted by a question that begins on page 14, line 28.
15 And I'll read it without some of the in-between
16 punctuation.

17 Sergeant Kwon stated, "At any of
18 these protests or these events, did you
19 ever hear someone stating on radio
20 something to the effect that Krystoff
21 a.k.a. Christopher Cantor and his
22 quote/unquote sidekick were to be
23 arrested first? Did you ever hear that
24 on the radio? Does that ring any bells
25 or jog your memory?"

1 And your answer at line 9 is, "I
2 know they were to be watched closely
3 because they were the leaders of the
4 group, according to the Intel we got."
5 So is that statement true?

6 MR. ALLEN: Which statement?

7 BY MR. SIEGEL:

8 Q. That "they were the leaders of the group,
9 according to the Intel that we got."

10 A. I believed that at the time. That was the
11 Intel that I got.

12 Q. You received Intel that Dave Id was a leader of
13 the protest group?

14 A. Well, "leaders" meaning that if they were
15 there, that was possibly where the protest was going to
16 occur.

17 Q. Did you mean "leader" in any other way other
18 than that they were going to be at the protest?

19 A. No.

20 Q. Did you have any information that my client was
21 directing other protesters in any way?

22 A. No. Not that I recall.

23 Q. Looking at page 17, halfway down starting at
24 line 14, you described Christopher Cantor as very vocal,
25 and later you say, "he speaks in front of several

1 Q. Did you have any information that Dave Id
2 engaged in marching?

3 A. I don't believe so.

4 Q. On page 18 at line 7, you appear to state that
5 Christopher Vogan also provided you with Intel regarding
6 Cantor and Mr. Morse.

7 Is that true?

8 A. Yes.

9 Q. What did Christopher Vogan tell you about those
10 two individuals?

11 A. Well, at that time I was just following
12 directions.

13 MR. ALLEN: That's not the question. Listen to
14 the question.

15 Can you repeat the question, please?

16 (Record read.)

17 THE WITNESS: You know, I don't recall exactly
18 what he told me, but he might have, in essence, said the
19 same thing that Deputy Chief Fairrow said. When one is
20 at the protest, one or both are at that particular
21 location, that's where the demonstration could possibly
22 occur.

23 BY MR. SIEGEL:

24 Q. And who is Christopher Vogan?

25 A. He was an officer at the time.

1 Q. Was he working as an undercover officer?

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

3 BY MR. SIEGEL:

4 Q. During the summer and fall of 2011, was he
5 working as an undercover officer?

6 MR. ALLEN: Objection. That invades the safety
7 rights of public transit people using BART and gets into
8 tactical and safety issues involving BART. I'm not
9 going to let him answer the question.

10 BY MR. SIEGEL:

11 Q. Do you know if Christopher Vogan was working
12 undercover on September 8th?

13 A. I don't -- you know, no. I don't believe so.

14 MR. ALLEN: Do you know or don't you know?
15 That's the question.

16 THE WITNESS: I don't know. Actually, I don't
17 know.

18 BY MR. SIEGEL:

19 Q. Prior to the actual protest on September 8th,
20 did you anticipate that David Morse would be arrested?

21 A. No.

22 Q. Would you look at page 12 of this transcript?

23 A. (Witness complying.)

24 Q. Beginning at line 24, Sergeant Kwon asked you
25 "what was the order?" And his question -- well, let's

1 back up. At line 17, Kwon states, "During these
2 briefings, was it ever implied in any way that
3 Christopher Cantor and/or particularly Mr. Dave Id --
4 was the impression ever given they were to be arrested
5 on-site?"

6 And you state no.

7 Then later Kwon asked "What was the order?"
8 You state, "the order was we have to see what they're
9 doing, if they're inciting a riot or acting in a
10 criminal manner, they were to be arrested?"

11 Does this refresh your recollection that there
12 was discussion of arresting David Morse prior to the
13 protest?

14 MR. ALLEN: I'm going to object to the form of
15 your question. You're suggesting by that question he
16 has changed his answer. Your previous question was
17 whether there were discussions to arrest him, not
18 whether there were discussions whether they would be
19 arrested and for what reasons. I'm objecting to the
20 form of your question and mischaracterizes his testimony
21 by the form of your question.

22 MR. SIEGEL: Let's try again.

23 BY MR. SIEGEL:

24 Q. On September 8th, was there specific discussion
25 of David Morse and Christopher Cantor?

1 A. Specific?

2 Q. During the briefing or at any time prior to the
3 protest itself, did you discuss with other BART police
4 officers Cantor and Morse?

5 MR. ALLEN: Objection; asked and answered.

6 Go ahead.

7 THE WITNESS: Again, was I the one presenting?

8 MR. ALLEN: No. That's not his question.

9 THE WITNESS: I don't understand the question.

10 MR. SIEGEL: Maybe read it to see if it's a
11 good one.

12 (Record read.)

13 MR. ALLEN: Listen to the question. There's no
14 trick to it. If there was, I'd pose an objection.
15 There's no trick to his question.

16 (Record read.)

17 THE WITNESS: During the briefing, did I
18 discuss? I may have.

19 BY MR. SIEGEL:

20 Q. You don't recall specifically?

21 A. I don't recall specifically.

22 Q. Was there discussion that if Morse or Cantor
23 were inciting a riot or acting in a criminal manner,
24 they were to be arrested?

25 A. There might have.

1 Q. Do you remember that?

2 A. Do I recall that for sure? I'm not a hundred
3 percent sure.

4 Q. How sure are you?

5 A. It goes on to anybody commits a criminal act,
6 they are to be arrested. Every week we had a briefing
7 on protests, and so it was mentioned that if people
8 commit criminal acts, they're to be arrested following
9 policies and procedures.

10 Q. Sure.

11 But was that comment made specifically in
12 connection with Cantor or Morse?

13 A. You know, I don't -- I don't -- I don't recall.

14 MR. ALLEN: Could I take a one-minute break
15 with my client?

16 MR. SIEGEL: That's fine.

17 (Recess taken.)

18 BY MR. SIEGEL:

19 Q. Officer Dam, if you could look at page 10
20 starting at line 20, if you could read from there and
21 read through all the way to the end of page 12. Take a
22 minute. I really want to get clear on a few things.

23 A. Okay.

24 MR. ALLEN: I'm going to ask him to read from
25 that page, line 11, to get context for the question.

1 MR. SIEGEL: Sounds good.

2 MR. ALLEN: While he's reading that, off the
3 record.

4 (Discussion off the record.)

5 BY MR. SIEGEL:

6 Q. Officer, did you read that section I asked you
7 to read?

8 A. From 10 to page 12, correct?

9 Q. Yes.

10 A. Yes.

11 Q. Correct if I'm wrong, on these pages Sergeant
12 Kwon was asking you specifically about what discussion
13 there was of Cantor and Morse; is that correct?

14 A. Uh-huh -- yes.

15 Q. Then on page 11 at line 24 -- actually we'll go
16 to the question at line 20. Sergeant Kwon states, "was
17 there ever any discussion during that briefing in
18 regards to who was to be arrested first during these
19 protests, or are there any game plan or strategies, or
20 thoughts about that?"

21 And you respond, "I don't know about arrested
22 first, but we did say that if they break the law, they
23 will be arrested?"

24 In your statement, "they," does it refer to
25 Morse and Cantor?

1 A. Yes.

2 Q. Does this refresh your recollection that there
3 was specific discussion of Morse and Cantor prior to the
4 protest in regards to making arrests?

5 A. It refreshes my memory.

6 Q. On the following page, page 12, the question
7 from Kwon beginning at line 17 states, "during these
8 briefings, was it ever implied in any way that
9 Christopher Cantor and/or particularly Mr. Dave Id --
10 was the impression ever given that they were to be
11 arrested on sight?

12 You say, "No."

13 Kwon asks, "What was the order?"

14 You state, "the order was we have to see what
15 they're doing, again, if they're inciting a riot or
16 acting in a criminal manner, they were to be arrested."

17 The "they" in your statement is referring to
18 Morse and Cantor; is that correct?

19 A. Yes.

20 Q. Officer, do you conduct surveillance?

21 A. I personally do not.

22 Q. Do you supervise any officers who conduct
23 surveillance?

24 A. I'm not a supervisor.

25 MR. ALLEN: That's not the question. The

1 A. Not a hundred percent.

2 MR. SIEGEL: Could we take one minute off the
3 record. I think we're close. We'll be right back.

4 (Recess taken.)

5 MR. SIEGEL: I'd like to introduce the next
6 exhibit in order.

7 (Plaintiff's Exhibit 23 marked for
8 identification.)

9 BY MR. SIEGEL:

10 Q. Officer Dam, please take a minute to review
11 this document, and after you do so, tell me if you
12 recognize it.

13 A. Yes. I recognize this.

14 Q. Is this a document that you prepared?

15 A. Yes. An e-mail.

16 Q. How did you prepare this document?

17 A. This is a quick informational blurb for the
18 command staff basically of what's going on. And I just
19 take sections from either what SFPD has given me, social
20 media network. It's just, like, for informational
21 purposes.

22 Q. Do you see the section where it states "Crowd
23 Numbers"?

24 A. Yes.

25 Q. And the second sentence of that section states,

1 "Indybay reporter Dave Id is at primary Powell near the
2 entrance to the police office."

3 A. Yes.

4 Q. You wrote that?

5 A. Yes.

6 Q. Why did you mention Dave Id?

7 A. Again, our report was that if we see Dave Id or
8 Christopher Cantor, there's a possibility the
9 demonstration could possibly be there.

10 Q. Essentially based on the same information that
11 you produced, Exhibit 4, you also decided to include
12 Dave Id in your update?

13 A. Right. This update, I just listen on the
14 police radio, and I pretty much repeat what was there.
15 Possibly went on the radio and it said 50-plus
16 demonstrations at Powell Street.

17 Q. You may have gathered that information from
18 another officer on the radio?

19 A. Correct.

20 Q. If you could look at Exhibit 17, please.

21 A. (Witness complying.)

22 Q. I believe there is an e-mail from DC Fairow to
23 yourself.

24 After reviewing it, if you could tell me if you
25 remember this document. Actually, the first page is

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REPORTER'S CERTIFICATE

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

That KEN DAM, 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 L

EXHIBIT 21
to the Deposition of Ken Dam

From: Ken Dam

To: Benson Fairrow, Daniel Hartwig

Cc: Frank Lucarelli, William Schultz, Horace Alkire, John Conneely, Matthew Cromer, Justin Morgan, Kevin Franklin, Tyrone Forte, Aaron Ledford, Jason DeVera, Gary Hesson, Kenton Rainey, Daniel Hartwig, Marlon Dixon, Gilbert Lopez Jr, Steven Coontz, Benson Fairrow, Janeith Glenn-Davis, Eugene Wong, Keith Justice, Keith Smith, David Chlebowski, Alan Fueng, David Chlebowski, Eugene Wong, Forrest Tietz, Gerald Dominguez, John Austin, Keith Smith, Lance Haight, Mark Macaulay, Marlon Dixon, Paul Garcia, Steven Coontz, Terence McCarty, Timothy Pashoian, Seth Jamel, Randall Gregson, Keith Justice, Nathan Weissich, Jason Ledford, Paul Kwon, John Sandoval, Michael Hayes, Gilbert Lopez Jr, Edgardo Alvarez, Aaron Togonon, Thomas Smith Jr, Karen Kreitzer, David Salas, Rodney Barrera, Anisa McNack, Michael Rawski, Brando Cruz, Tracy Gurecki, Michael Maes, Joel Enriquez

Bcc:

Subject: Updated Protestors list and Photos of Cantor and Id.

Date: 9/8/2011 11:59:33 AM

Attachment N1: Protestors photos.pdf

Attachment N2: Cantor and Id.pdf

LAW ENFORCEMENT SENSITIVE

WARNING: This communication with its contents may contain confidential and/or legally privileged information. It is solely for the use of the intended recipient(s). Unauthorized interception, review, use or disclosure is prohibited and may violate applicable laws including the Electronic Communications Privacy Act. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.

Ken Dam 163
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Fax (510) 464-7013

PLAINTIFF'S
Exhibit No. 21
K. DAM
10-16-13
Page 1734

**Pages 1-3, 10-12, and 15 only of
EXHIBIT 22
to the Deposition of Ken Dam**

PLAINTIFF'S
Exhibit No. 22
K. DAM
10-16-13

- INTERVIEW -

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Kwon: Okay. The date of this interview is May the 24th, 2012. The time is approximately 1450 hours. My name is Sergeant Kwon with the Internal Affairs Unit, and I am here at the Lake Merritt Police Facility fa -- small conference room speaking to witnesses Officer Ken Dam. Uh -- Officer Dam is our crime analyst with -- uh -- the BART Police Department, and -- um -- Ken -- um -- just pref -- I'd like to preface the interview by stating that you're just a witness only. Uh -- if at any point it appears that you may be subject to any type of disciplinary issue -- uh -- you'll be afforded your Peace Officer Bill -- Bill of Rights. Okay?

Dam: Uh-huh. Understand.

Kwon: Um -- a -- and the reason why I'm talking to you is in regards to -- um -- I'm specifically investigating an incident that occurred on September the 8th, 2011. Um -- during that time there were -- I don't know if you were aware -- um -- a string of protests. Do you -- do you recall that? The --

Dam: Yes.

Kwon: -- time era where we had a string of protests?

Dam: Yes.

Kwon: Um -- and -- and I believe it was the No Justice No BART Movement -- um --

Dam: Correct.

Kwon: -- a -- and -- um -- and -- uh -- I had corresponded with you for the record -- uh -- last -- a couple days ago in regards to any -- uh -- BOLOs that were issued or dissem -- disse -- that you created that were diss -- disseminated -- um -- at -- uh -- some of these briefings. And you sent me two -- uh -- two links -- um -- one of

1 which was -- um -- BART Police and the -- the heading says BART
2 PD Protests 7/7/2011 to 8/29/2011, and it's about -- um -- 7-page
3 document. Um -- conversely, you also -- uh -- sent me ano -- a -- a
4 single-sheet -- um -- BOLO -- uh -- that says BART PD Protest, and
5 on the top -- uh -- there's -- uh -- uh -- two pictures of the same
6 individual identified as Christopher Cantor (phonetic), and below
7 Christopher Cantor's picture are two photographs of a subject who
8 -- um -- identifies himself as Dave Id, and next to Dave Id it says
9 unknown true name. Um -- and at the very bottom right-hand
10 corner it says Prepared by Crime Analyst Officer K. Dam 163. Uh --
11 -- so did you create this?

12 Dam: Yes, I did.

13 Kwon: Okay. And could you kind of tell me -- um -- how this particular
14 document came about as far as -- uh -- what -- why the -- why
15 these two people specifically were -- um -- were placed on this
16 BOLO.

17 Dam: Well -- um -- as far as the first subject -- uh -- Christopher Cantor --
18 um -- we have a history of him -- uh -- leading -- um -- and being a
19 visual leader for the protests -- um -- and -- uh -- he appeared in
20 several of the protests -- um -- and was a known instigator and
21 incitor of -- of -- uh -- of what would soon be riots --

22 Kwon: Okay.

23 Dam: -- and -- uh -- very vocal, and -- um -- and -- uh -- was known to be
24 the leader -- um -- basically --

25 Kwon: Okay.

26 Dam: -- of the group.

27 Kwon: All right. And how about the individual below that?

28 Dam: Well -- um -- I was -- uh -- actually -- uh -- given -- uh -- this

1 information -- um -- uh -- by the field -- uh -- troops, actually Deputy
2 Chief -- uh -- uh -- Benson Fairrow -- uh -- was working the protest,
3 and he observed -- um -- Dave Id --

4 Kwon: Uh-huh.

5 Dam: -- um -- and he had mentioned to him that -- uh -- he had
6 mentioned to me that -- um -- uh -- every time -- uh -- that there
7 was a protest, he had noticed that -- uh -- Dave Id would -- um --
8 surveil the area, and then when there was an area where there
9 were -- uh -- no or f -- uh -- no police officers or few police officers --
10 uh -- the protestors would end up in that location, and -- um -- in his
11 -- uh -- mind, he felt that -- um -- Dave Id was scouting the area --
12 um -- and -- uh -- posing quote/unquote as a -- a possible reporter;
13 however, was scouting the area -- um -- for -- uh -- Christopher
14 Cantor and -- um -- the rest of the group -- um -- to cause -- uh --
15 to -- to -- to look for problems basically.

16 Kwon: Okay.

17 Dam: And -- um -- therefore, he said, hey -- um -- could you -- uh -- let the
18 people know -- um -- and he wanted me to create this bulletin so if
19 the officers -- uh -- ha -- like see any of them bu -- either -- uh --
20 Christopher Cantor or Dave Id that a big group could show up, and
21 so we had to be prepared. And at the time they were going from
22 BART station to BART station --

23 Kwon: Uh-huh.

24 Dam: -- in a group, and they were trying to select areas where there was
25 very little police presence so they can -- uh -- create the most
26 amount of -- uh -- uh -- basically -- uh -- criminal acts of -- uh --
27 delaying the trains, of delaying -- uh -- uh -- patrons from -- uh --
28 entering the fare -- uh -- fare gates lawfully and -- um -- um -- so ...

1 mean

2 Kwon: Do you --

3 Dam: -- nothing --

4 Kwon: -- specifically recall him saying that?

5 Dam: Uh -- I don't specifically recall him saying that. Uh --

6 Kwon: Okay.

7 Dam: -- I did -- uh -- give him the photos and -- uh -- I -- I wasn't sure if

8 that was actually Dave Id until --

9 Kwon: Uh-huh.

10 Dam: -- um -- he had looked at the photos and confirmed it.

11 Kwon: Okay. So in -- uh -- the -- what -- uh -- Deputy Chief Fairrow was

12 telling you -- um -- did he give you more of an impression that Dave

13 Id usually conducted himself as a reporter -- uh -- solely a reporter

14 during these -- uh -- incidents?

15 Dam: Right. Na --

16 Kwon: Or was it a combination of protestor/reporter? Or was it just a

17 protestor, or somebody who was assisting --

18 Dam: Well --

19 Kwon: -- the protest?

20 Dam: I -- I would say that -- uh -- he felt it was a -- it was a combination,

21 where he would go to areas -- um -- again if -- um -- there's not a

22 lot going on, then, you know, sh -- him showing up and -- and kind

23 of looking around, and -- and -- and -- and him seeing him on the

24 camera, and then all of a sudden, you know, a group shows up --

25 Kwon: Uh-huh.

26 Dam: -- um -- uh -- really peaked his interest and -- and -- uh -- there

27 wasn't anything to report there. It was just -- um -- uh -- there was

28 really nothing going on until -- until afterwards.

1 Kwon: And -- uh -- you might have answered this already, but was this
2 information -- uh -- do you remember this being this spe -- specific
3 thing that you're telling me now -- uh -- was it discussed during
4 briefing?
5 Dam: Yes, it was.
6 Kwon: Spes -- and it was.
7 Dam: Uh --
8 Kwon: Okay.
9 Dam: Uh-huh.
10 Kwon: Did you know if it was specifically brought up during briefing on
11 September the 8th, 2011?
12 Dam: Uh -- you know, I believe it was, and you know -- um -- going back
13 to -- uh -- knowing that he was a reporter and doing both -- uh --
14 type of thing -- um -- it -- it was -- I believe it was mentioned -- uh --
15 during the -- the briefing -- um -- that -- um -- you know, he -- we
16 believe that he's -- does both, you know, he's -- he's reporting but is
17 also a part of scouting the area, and -- uh --
18 Kwon: And that was brought up during the briefing you're saying.
19 Dam: Right, right.
20 Kwon: Okay. Okay. Um -- was there ever any discussion during that
21 briefing in regards to -- um -- um -- who was to be arrested first
22 during these protests, or there any game plan or strategies, or
23 thoughts about that?
24 Dam: Um -- I don't know about arrested first, but we did say that if they
25 break the law, they will be arrested.
26 Kwon: Okay.
27 Dam: So --
28 Kwon: (Inaudible) --

1 Dam: -- that -- that was discussed.

2 Kwon: Okay. Well did they say that, hey -- um -- we shall give a dispersal
3 order first, or was it kind of like if they break the law, they're going
4 to be arrested?

5 Dam: Oh, no. Uh -- it was to follow the procedures. They were -- they
6 were first to be given the dispersal order -- uh -- and -- um -- to be
7 given the dispersal order -- uh -- the -- to follow the directives, and
8 then -- um -- if the -- the dispersal order was not heeded, then they
9 were -- they were to arrest. So, yeah, that's -- that's always been
10 part of the -- I mean there was a -- a policy written out -- um -- and --
11 -- uh -- I recall --

12 Kwon: Okay.

13 Dam: -- them going to the policies.

14 Kwon: Okay. Um -- this policy you're talking about, are you referring to
15 actual Lexipol policy, or was this kind of like an operations order?

16 Dam: It's an operational order.

17 Kwon: Okay. Uh -- now during these -- um -- um -- briefings -- uh -- was it
18 ever implied in any way that -- uh -- Christopher Cantor and/or --
19 particularly Mr. Dave Id -- uh -- was it -- uh -- was the impression
20 ever given that they were to be arrested on sight?

21 Dam: No.

22 Kwon: Okay.

23 Dam: No.

24 Kwon: Okay. What was the order?

25 Dam: Uh -- the order was we have to see what they're doing --

26 Kwon: Uh-huh.

27 Dam: -- again, if they're -- uh -- inciting a riot or creating a -- or acting --
28 uh -- in a criminal manner, they were to be arrested.

1 telephone that -- uh -- a San Francisco -- um -- their team -- uh --
2 command center post --
3 Kwon: Uh-huh.
4 Dam: -- um -- uh -- when they're available, they contact me, and then --
5 um -- I -- I'm online -- uh -- looking at the information. Uh -- once I
6 get that information, I'll -- uh -- send out the information -- uh -- and
7 -- uh -- or radio -- or telephone it into the command staff so they're
8 aware of situation realtime.
9 Kwon: Now on this particular -- um -- protest -- um -- do you specifically
10 recall working LEO that day?
11 Dam: You know, I'd ha -- I'd ha -- really honestly have to check my
12 records. Uh -- I may have, and I -- and looking at this -- uh -- I -- I --
13 I probably have worked it, but I just do have to look at my records.
14 There were --
15 Kwon: Okay.
16 Dam: -- qu -- I mean there were quite a few protests going on, like --
17 Kwon: Sure.
18 Dam: -- every third day, so.
19 Kwon: Now -- now -- um -- let me just ask you --
20 Dam: Uh-huh.
21 Kwon: -- what you recall, you know -- uh -- based on your recollection,
22 okay?
23 Dam: Okay.
24 Kwon: And you said that you monitor the police radios. Is --
25 Dam: Yes.
26 Kwon: -- that including BART Police radios?
27 Dam: Yes, that's correct.
28 Kwon: Um -- at any of these protests or these events -- uh -- did you ever

EXHIBIT 23
to the Deposition of Ken Dam

From: Ken Dam

To: Frank Lucarelli, William Schultz, Horace Alkire, John Conneely, Matthew Cromer, Justin Morgan, Kevin Franklin, Tyrone Forte, Aaron Ledford, Jason DeVera, Gary Hesson, Kenton Rainey, Daniel Hartwig, Marlon Dixon, Gilbert Lopez Jr, Steven Coontz, Benson Fairrow, Janeith Glenn-Davis, Eugene Wong, Keith Justice, Keith Smith, David Chlebowski

Cc: Eamonn Casey, scott.gaines@sfgov.org, tadao.yamaguchi@sfgov.org, Francis.Feliciano@sfgov.org, Sherry.Hicks@sfgov.org

Bcc:

Subject: Tactical 9-8-11 Deployment- Intel Update 5:

Date: 9/8/2011 5:08:40 PM

Tactical 9-8-11 Deployment- Intel Update:

Crowd Numbers: Large crowd chanting 50 + Demonstrators at Powell St (To be determined and continue to monitor). Indybay reporter Dave Id is at primary Powell near the entrance to the police office. About 50 Media.

Location: Start Location Protesters will demonstrate at Powell St. (4:30 PM)
Another Possible location is Embarcadero BART.
"No Justice No BART" group.

Changes: -

-W/M blk short hair, wearing a black checkered jacket, wearing army nap sack jumping up and down delaying train. Officers will do a well fare check. Lead car Millbrae bound from Powell St BART.

-SFPD Reporting 50 Protestors

- Powell Street Secondary end fare gates will close down at 1415 hours.

Tactics / MO: Protestors: Christopher Cantor has called for a mass fare evasion

day. Protestors may facilitate a mass fare evasion

SFPD VCC- 1Y31 and Bus Number 2 97 5th and Market Street
-4M101 97 at Powell Street Station currently 40 protestors

Social Network / Media: Protestors listening to police scanners. News - Reporting unspecified Terrorist Threat. Credible but unconfirmed. Elevated terror treat level.

estimarlqk Mihail Matikov

#nofare #OpBART Bart police is taping as well
5 minutes ago Favorite Retweet Reply

ChrisAstro Chris Calubaquib

As always RT @abc7newsBayArea: Reporter @BloomTV says right now the scene at Powell Street BART is more reporters and police than protesters

Ken Dam 163

Crime Analyst Officer

BART Police Department

800 Madison Street, PO Box 12688

Oakland, CA 94604-2688

(877) 679-7000, ext. [REDACTED]

Office (510) 464-[REDACTED]

Fax (510) 464-7013

PLAINTIFF'S
Exhibit No. 23
K. DAM
10-16-13

EXHIBIT M

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

---o0o---

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 KENTON W. RAINEY

(Pages 1 to 52, inclusive)

Taken before SANDRA M. LEE

CSR No. 9971

November 6, 2013



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Fax: (510) 451-3797
www.aikenwelch.com

1 They ask very pointed questions based on background and
2 experience. But I've never seen them get up and
3 actually give testimony.

4 Q. The difference is that he was describing his
5 first-person experiences?

6 A. Giving his first-person experiences, getting up
7 and going to the mic. I had never seen that.

8 Q. Are you familiar with editorials?

9 A. Yes.

10 Q. Isn't an editorial a similar thing in that it's
11 a journalist giving an opinion?

12 A. Absolutely. I've seen editorials in newspapers
13 and magazines, but, again, I've never seen a journalist
14 or member of an editorial board actually come to a body
15 and give that editorial to a political body or oversight
16 body. I've never seen that.

17 Q. Are you aware that before the September 8th,
18 2011, protest, that is the subject of this lawsuit that
19 BART police officers identified David Morse as somebody
20 to focus on for police officers?

21 A. To focus on?

22 Q. Yes.

23 A. What do you mean?

24 Q. Are you aware that his picture was distributed
25 among BART police officers?

1 A. Yes.

2 Q. Are you aware that an intelligence officer was
3 assigned to investigate his identity?

4 A. Yes.

5 Q. When did you become aware that David Morse was
6 being investigated in this manner?

7 A. It's not so much he was being investigated. We
8 had had numerous protests disrupting service,
9 jeopardizing public safety in our downtown San Francisco
10 stations. It was very, very burdensome for us because
11 we never knew where these individuals were going to show
12 up. But based on our experience with some of the
13 interactions, two individuals in particular, when one
14 showed up or the other showed up, that's where things
15 would occur. So through intelligence, we were trying to
16 get out to our personnel "If you see one or two of these
17 guys, make sure you call the OCC. Let the incident
18 commander know where these individuals are because
19 there's probably a good chance that's where the
20 disruption is going to occur."

21 Q. What is the OCC?

22 A. Operations communications center.

23 Q. In your experience, have you ever identified a
24 journalist in this manner previously as someone that
25 would indicate where a protest would occur?

1 Q. They were involved in policing some of these
2 protests?

3 A. I don't know. I don't know. I know they do
4 come out and patrol with our personnel sometimes. I
5 don't recall if they actually came out and worked the
6 protest. I don't know.

7 Q. Prior to the protest in question, did you have
8 any information that David Morse had violated any laws?

9 A. No.

10 Q. Did you consider him to be a protester prior to
11 the event in question?

12 A. No.

13 Q. Did you authorize the production of an
14 informational flier that had David Morse's picture on
15 it?

16 A. Do you have something that I can look at? It
17 sounds like you're referring to something in particular.

18 Q. Sure. I believe it's Exhibit 4 in your stack.

19 A. This is 1.

20 Q. Here's 4.

21 A. Okay.

22 Q. Have you seen Exhibit 4 before?

23 A. Yes.

24 Q. Did you authorize the production of this
25 document?

1 A. About him, no.

2 Q. Do you recall directing any of your officers to
3 contact the District Attorney with regards to
4 prosecution of David Morse?

5 MR. ALLEN: I'd like to clarify something.
6 Would you look at the bottom of page 31? Is that the
7 contact you're referring to?

8 I don't want him misstating testimony when he
9 has a document in front of him that George Gascon got
10 cc'd on.

11 MR. SIEGEL: That's not what I'm referring to.
12 BY MR. SIEGEL:

13 Q. Do you recall asking any of your officers to
14 contact the District Attorney to encourage the DA to
15 press charges against David Morse?

16 A. Specifically against him, I don't recall that.
17 Did I contact them regarding prosecuting individuals who
18 were engaged in what I considered illegal behavior as
19 far as disrupting our operations and threatening public
20 safety? Yes. I wanted these individuals -- anybody we
21 ultimately arrested prosecuted, yes.

22 Q. So you did make that contact?

23 MR. ALLEN: But not to a specific person.

24 THE WITNESS: Definitely not to a specific
25 person.

1 BY MR. SIEGEL:

2 Q. Did you contact the DA directly?

3 A. No. Not to a specific person. Went through my
4 personnel.

5 Q. Who did you use to contact the DA?

6 A. It went through my criminal investigation
7 sergeant, Tom Smith.

8 Q. Do you know if any criminal proceedings went
9 forward against any of the arrestees that day?

10 A. I don't recall what exactly transpired. We
11 definitely would have filed cases. I don't know what
12 the ultimate outcome was.

13 MR. ALLEN: Take a break? A good spot?

14 MR. SIEGEL: Let's do it. Could we take ten?

15 MR. ALLEN: Sure.

16 (Recess taken from 10:17 a.m. to 10:29 a.m.)

17 BY MR. SIEGEL:

18 Q. Chief, I'd like to refer back to Exhibit 31,
19 please, which is the response to the journalists'
20 concern.

21 A. Okay.

22 Q. At the end of this letter, you remark that
23 you'd be happy to meet with Rebecca Bowe and Jeffrey
24 King in regards to their issues.

25 Did that meeting ever occur?

1 Q. Is it your belief that David Morse did not have
2 a press credential displayed during the protest in
3 question?

4 A. No. That's not my point. Again, as I said, I
5 worked 35 years in law enforcement, three different
6 states, three different jurisdictions and California.
7 Most people have their press credentials. I'm just
8 putting that out there. I wasn't there. I don't know
9 what he had, what he did there.

10 Q. What were you responding to with this sentence?

11 A. What I just said. It helps to have your -- if
12 there's any confusion or anything like that, it helps
13 law enforcement to have -- if you have press credentials
14 displayed. Like, if we had -- when different things
15 happen and if I just showed up to a law enforcement
16 event, if I don't put something out that readily
17 identifies me as a law enforcement official, I would be
18 shooed away or wouldn't be allowed to get involved. I
19 have to identify myself.

20 Q. Do you know if journalists were arrested on
21 September 8th who did not display press credentials?

22 A. The only person that I know that was arrested
23 on September 8th supposedly as a journalist was your
24 client.

25 Q. You say "supposedly," but you acknowledge he's

1 a journalist?

2 A. Yes.

3 Q. Did you ever recover video evidence of David
4 Morse speaking at a BART board of directors meeting?

5 A. I didn't, no.

6 MR. ALLEN: If there is, we will produce it.

7 MR. SIEGEL: Okay.

8 MR. ALLEN: I'll supplement our Rule 26. You
9 did not ask for the document. We'll supplement it as a
10 Rule 26. We're looking for it now as well.

11 MR. SIEGEL: Thank you, Dale.

12 BY MR. SIEGEL:

13 Q. Did you speak with anyone at the UC Police
14 Department in regards to a previous prosecution of David
15 Morse?

16 A. I know I had some interactions with their
17 former chief of police.

18 Q. Did you recover any evidence from UC police?

19 A. Any evidence?

20 Q. Yes.

21 A. No.

22 Q. Did you recover --

23 MR. ALLEN: Objection; vague and overbroad.
24 Evidence as to what? To this incident or something
25 else? So we're clear. I want to make sure.

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REPORTER'S CERTIFICATE

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

That KENTON W. RAINEY, 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 19th day of November 2013.

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

EXHIBIT N

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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 EDWARD SCHLEGEL

(Pages 1 to 23, inclusive)

Taken before SANDRA M. LEE

CSR No. 9971

November 6, 2013



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1 Morse writes articles under the name Dave Id?

2 A. I do.

3 Q. When did you learn that David Id was writing
4 articles about BART police?

5 A. I had seen articles on the Indybay website and
6 I've seen his name on the byline. I came to recognize
7 seeing names, but I don't recall who wrote what article
8 about what. I know I've seen his name on the website.

9 Q. Why did you go to the website?

10 A. There was a lot being written about all the
11 issues with BART PD. It was a good form of information
12 gathering as to what events were coming up and what
13 people felt about what was going on.

14 Q. To the best of your recollection, at how many
15 of these protests in 2011 in terms of -- let me back
16 that up.

17 Do you recall the killing of Charles Hill?

18 A. Yes.

19 Q. Do you understand that one series of protests
20 started after that killing?

21 A. Well, I know -- there were protests, like I
22 said, the whole period of time starting January 1st of
23 2009 until just recently. There were different issues
24 that reenergized those protests. Sometimes they were
25 stated to be about one thing or another, but I saw the

1 same core group appearing with the same banners with the
2 same chants. I don't know ultimately what their
3 motivation was for any of the particular protests. I
4 know as new issues came up, they added that to their
5 list of grievances.

6 Q. Do you recall the use of the term "No Justice
7 No BART"?

8 A. I've heard that.

9 Q. That was used to describe some of the protests
10 after the Charles Hill death.

11 A. That chant I heard a lot starting January of
12 2009 straight through -- through the Charles Hill
13 protest up until the last one I went to.

14 Q. In your mind, are you able to isolate the 2011
15 protest as a distinct series of events as compared to
16 the earlier 2009, 2010 events?

17 A. I'm not sure. How do you mean?

18 Q. Do they all mix together in your head, or do
19 you have recollection of those protests in 2011?

20 A. Again, there were a series in 2011, and I was
21 at most of them, if not all of them. There was one or
22 two centered at Civic Center, one at Powell. There was
23 some that roved the area. So I have recollection of a
24 lot of different instances, but I don't remember every
25 briefing before every one or taking the train ride from

1 Oakland to the protest. I remember arrests that I made,
2 other notable events, but I can't say that I remember
3 every one of those events from beginning to end.

4 Q. Sure.

5 Do you recall how many arrests were made in
6 2011?

7 MR. ALLEN: Objection; vague.

8 BY MR. SIEGEL:

9 Q. I guess what I mean is: At how many different
10 protests were people arrested? Were arrests made at
11 every protest?

12 A. No.

13 Q. It is my understanding at the protest that is
14 the subject of this lawsuit, approximately 30 people
15 were detained in an encirclement.

16 Were you there when that occurred?

17 A. Yes.

18 Q. At any protest prior to that, had a large
19 number of people been encircled in that fashion?

20 A. I don't believe so.

21 Q. This protest is unique in terms of that tactic;
22 is that right?

23 A. Yes.

24 Q. Prior to the protest in question, were there
25 ever more than ten people arrested? 2011 is what I'm

1 focusing on.

2 MR. ALLEN: Thank you.

3 THE WITNESS: I don't believe there were that
4 many arrests at any other protest, but probably not as
5 many as 11 or 12. What did you say, as many as 30?

6 BY MR. SIEGEL:

7 Q. I'm saying more than ten.

8 A. Probably not. I know there was one protest at
9 Civic Center where we had a few arrests. I don't know
10 if it added up to ten or not.

11 Q. Do you recall if any protests occurred after
12 the protest in question?

13 A. I don't recall.

14 Q. Do you recall that this was the final protest
15 in a series?

16 A. No. I just don't recall if that was the last
17 one I went to or not.

18 MR. ALLEN: Just so we clear, he's only
19 entitled to what you can remember, not to what you guess
20 or speculate on. You're doing fine with that. Just so
21 you're clear on that concept.

22 BY MR. SIEGEL:

23 Q. In front of you are the exhibits so far in this
24 case from the prior depositions. I'm going to ask you
25 to look at what is Exhibit 4.

1 A. This top sheet here?

2 Q. Yes, please.

3 Officer, have you seen this document before?

4 A. I believe I have.

5 Q. When do you recall seeing it?

6 A. Before one of the protests I was at in 2011.

7 Q. What is this document?

8 A. This is an informational flier relating to Mr.
9 Cantor and Mr. Morse, although he's identified here as
10 Dave Id.

11 Q. What does that document tell you?

12 A. It puts names with the faces.

13 Q. Do you recognize Mr. Cantor?

14 A. Yes, I do.

15 Q. And what do you know him from?

16 A. Various protests. Most of the ones in question
17 in San Francisco and earlier from 2009 all the way
18 through.

19 Q. How would you characterize his participation in
20 those protests?

21 A. He was -- I don't know what the correct term
22 would be -- organizer or leader of the group. He
23 usually had a megaphone. He was usually leading the
24 chants. He was the one that -- he was the one that led
25 the protests or the demonstrations.

1 Q. He was a very prominent figure?

2 A. Yes.

3 Q. Perhaps notorious among BART police officers?

4 MR. ALLEN: Objection; argumentative.

5 THE WITNESS: He was known.

6 BY MR. SIEGEL:

7 Q. Did you have a particular feeling about Mr.
8 Cantor one way or the other?

9 MR. ALLEN: Particular fearing?

10 MR. SIEGEL: Feeling.

11 THE WITNESS: He was the leader of the group
12 with their protest. I kept an eye on him, because while
13 generally most of the protesters were happy to walk
14 their picket line and shout the slogans, he would try to
15 push through lines and see how far he could go with or
16 without getting arrested. He was one to keep an eye on
17 because he would walk a fine line between expressing
18 himself constitutionally and violating the law. As to
19 his point of view, he's welcome to it.

20 BY MR. SIEGEL:

21 Q. Did you know Dave Id as he was known in that
22 flier as a similar protest leader?

23 A. I didn't know him as a leader of the protest.

24 Q. Did you know him at all?

25 A. Again, I recognize the name.

1 Q. You hadn't seen him at previous protests?

2 A. I may have. I just recognize Mr. Cantor. And
3 there was another gentleman that was with him a lot that
4 I haven't seen lately. That was the prime people I
5 recognize.

6 Q. Do you recall that prior to this protest that
7 BART designated a free speech zone?

8 MR. ALLEN: Objection; vague as to time and
9 place.

10 BY MR. SIEGEL:

11 Q. BART designated that on September 8th, 2011,
12 there would be a free speech zone?

13 MR. ALLEN: You're asking him if he knew that?

14 BY MR. SIEGEL:

15 Q. Do you recall?

16 A. I don't -- what do I know? I know that the
17 protesters were told "You can't march on the platforms
18 and in the paid area, that you're welcome to
19 demonstrate, march, protest in the free area as long as
20 you don't block access." I don't recall how that
21 information came to me, but I know that was, if you want
22 to call it that, the free speech zone. They were told
23 that they're welcome to do that anywhere in the free
24 area as long as it didn't block access or the operations
25 of the transit system.

1 they circled around in between this area here, which is
2 between the fair gates and the ticket machines. Then
3 they got closer and closer to the fair gates and just
4 became a blocked group of people blocking the gates.

5 Q. Did a particular commander order this line of
6 officers?

7 A. I don't recall who ordered that.

8 Q. Who were you reporting to that day?

9 A. My sergeant was Sergeant Kreitzer. She was
10 sergeant on my arrest team, although later on, things
11 became a little more chaotic and I was actually
12 receiving direction from Officer Dominguez.

13 Q. Do you recall after that line formed, a circle
14 was created around the block of protesters?

15 A. Yes.

16 Q. Were you part of that circle?

17 A. Yes.

18 Q. Do you recall if a formal dispersal order was
19 given before that circle was created?

20 MR. ALLEN: I'm going to object; vague.

21 BY MR. SIEGEL:

22 Q. Let's back up.

23 Do you know what a formal dispersal order is?

24 A. Yes.

25 Q. What is a formal dispersal order?

1 A. In a riot or riot situation under Penal Code
2 409, I believe, a representative of the agency will give
3 an announcement "This is an unlawful assembly. You have
4 X amount of time to disperse. Here are your available
5 means of exit. Then you'll be subject to arrest."
6 That's given usually, if possible, by some kind of PA.

7 Q. Is it correct that during this protest that
8 kind of order was not given?

9 A. I don't recall if it was given. I didn't hear
10 it if it was, which isn't unusual.

11 Q. Which is not unusual?

12 A. No. Because some of these protests when
13 dispersal orders have been given, the crowd rises to
14 shout it down either because they don't want to hear it
15 or so that they can claim they didn't hear it.

16 Q. Do you recall that happening during this
17 protest?

18 A. I don't recall. There was a lot of noise. I
19 did not hear a dispersal order.

20 MR. SIEGEL: I'd like to introduce Exhibit 34.
21 (Plaintiff's Exhibit 34 marked for
22 identification.)

23 BY MR. SIEGEL:

24 Q. Officer Schlegel, I'll represent to you this is
25 a transcript of the interview you gave with IA in

1 regards to the complaints of Hannah Brown. I'd like to
2 cut to the chase and direct your attention to page 24
3 and if you would read to yourself line 10 through line
4 17.

5 A. Okay.

6 Q. So is it true that you told IA that you did not
7 hear a formal dispersal order?

8 A. I said I don't remember any such as a formal
9 dispersal order for lawful assembly.

10 Q. You did hear other announcements?

11 A. Yes.

12 Q. Sitting here today, do you have any new
13 recollection of a formal dispersal order?

14 A. No. The answer I gave you before was almost
15 word for word what I answered it two years ago.

16 Q. That's impressive.

17 During the protest in question, you arrested
18 Miss Brown?

19 A. Yes.

20 Q. Did you arrest anybody else?

21 A. No.

22 Q. Did you observe any members of the media being
23 detained by officers?

24 A. Yes.

25 Q. Did you observe any officers subsequently

1 releasing members of the media?

2 A. I believe so.

3 Q. What did you observe in that regard?

4 A. I saw Deputy Chief or Commander -- I don't
5 remember what the title was at the time -- Hartwig. He
6 was asking members of the media to come towards him.
7 Then he was checking their credentials. He asked some
8 other officers assisting. There may even have been a
9 San Francisco officer or sergeant there. What procedure
10 they used, I don't know, but they were checking
11 credentials and then inviting members out of the line to
12 leave the station.

13 MR. SIEGEL: I have nothing further.

14 Do you have any cross?

15 MR. ALLEN: No.

16 (Whereupon, the deposition was concluded at
17 11:45 a.m.)

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REPORTER'S CERTIFICATE

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

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State of California