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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BETTY LOU HESTON and ROBERT H. HESTON, individually, and MISTY KASTNER, as the personal representative of ROBERT C. HESTON, deceased,

Plaintiffs,

v.

CITY OF SALINAS, SALINAS POLICE DEPARTMENT, MICHAEL DOMINICI, JAMES GODWIN, LEK LIVINGSTON, JUAN RUIZ and TASER INTERNATIONAL, INC.,

Defendants.

Case No. C 05-03658 JW

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT TASER'S MOTION FOR A NEW TRIAL; DECLARATION OF PETER M. WILLIAMSON IN SUPPORT THEREOF

Trial:

Date Commenced: May 13, 2008

Date of Verdict: June 6, 2008

Post-Trial Telephonic Conference:

September 17, 2008 at 9:00 a.m.

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1. INTRODUCTION

After four weeks of hotly contested trial, the Court gave thorough instructions. Following extended deliberations, the jury returned a general verdict with special questions against defendant TASER International, Inc., (TASER) for negligently failing to warn about the risks of its product, the M26 ECD. The jury awarded compensatory damages of $21,000.00 to the estate of Robert C. Heston, and $1,000,000.00 to his parents, Robert H. Heston and Betty Lou Heston, for their wrongful death damages. The jury apportioned fault 85 % to the decedent and 15% to TASER. Finally, the jury assessed punitive damages of $5,200,000.00 against TASER.

TASER now moves for a new trial on myriad grounds, which can be grouped into the following six categories: 1) The jury verdict should be ignored because it was contrary to the weight of the evidence and inconsistent; 2) Plaintiff's "experts" were not qualified, yet the Court erroneously permitted them to testify; 3) The Court's instructions to the jury were erroneous and prejudicial; 4) The Court erroneously allowed plaintiff's counsel to commit prejudicial misconduct; 5) The Court erroneously allowed misconduct by the jury; and 6) The Court prepared an erroneous verdict form.

None of the arguments has merit. The verdict is amply supported by the record. The new trial motion, along with the supplemental motion for JMOL, should be denied, the jury verdict affirmed, and judgment entered in favor of plaintiffs and against TASER.

2. STANDARD OF REVIEW

A motion for a new trial brought pursuant to FRCP Rule 59 may be granted if, in the Court's view, the verdict is against the clear weight of the evidence. Molski v. M.J. Cable, Inc., 481 F. 3d 724, 729 (9th Cir. 2007). A trial judge may set aside a verdict only where "the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in a miscarriage of justice." (Carr v. Wal-Mart Stores, Inc., 312 F. 3d 667, 670 (5th Cir. 2002))

No definitive language exists to help explain the meaning of "clear weight of the evidence." Arguably, the verdict should be set aside only where the trial court "is left with

the definite and firm conviction that a mistake has been committed by the jury." (Landes Const. Co., Inc., v. Royal Bank of Canada, 883 F.2d 1365, 1371-72) (9th Cir. 1987)) (emphasis added).

The jury made no such mistake here. The jury had ample grounds to hold TASER responsible for consciously disregarding the lives and safety of people like Mr. Heston who are subjected to ECD exposures, all to increase its sales and financial bottom line.

3. TASER IS NOT ENTITLED TO A NEW TRIAL BECAUSE THE CLEAR WEIGHT OF THE EVIDENCE SUPPORTED THE JURY'S VERDICT.

Plaintiffs produced substantial evidence to support the jury's verdict. They established that the theory of metabolic acidosis causing cardiac arrests was well known to the medical and scientific community for many years prior to this incident. In this regard, plaintiffs introduced evidence of a review of the physiological effects of the Sticky Shocker and other ECD's which was conducted at Penn State University in 1999. In that review, a panel of scientists led by Dr. Raymond M. Fish considered the possibility that electrical insults from ECDs could result in metabolic acidosis. The Penn State review, admitted into evidence as Plaintiff's Exhibit No. 151a, contained the following statement:

> "deaths following Tasers use may be due to acidosis. Acidosis may have caused cardiac dysrhythmias or failure in the presence of illicit drugs that are usually present in persons being Tasered. Deaths following Tasers use may be related to the ability of these devices to cause increased muscle activity and decreased breathing."

The concept of metabolic acidosis causing cardiac arrest was further supported by the testimony of Dr. Mark Myers, the only board certified electro-physiologist to testify at trial. Dr. Myers explained to the jury how TASER ECDs cause metabolic acidosis. First, he explained that severe muscle contractions produce lactic acid. Second, he described what happens to a human being when lactic acid levels in the blood increase too rapidly without an ability to compensate or blow-off the acid through respiration. And, finally, Dr. Myers described how severe metabolic acidosis lowers pH to such a dangerous level that

it can trigger a cardiac arrest. Dr. Myer's testimony was supported by several significant pieces of evidence.

First, TASER's own CEO, Patrick Smith, testified that TASER ECDs cause severe muscle contractions. In fact, the very purpose of the TASER is to cause muscle contractions to such an extent that a subject is completely incapacitated. TASER's own use videos were shown to the jury during the testimony of Officer Fairbanks, without objection, to illustrate the severe muscle contractions that result from TASER discharges. Second, Mr. Smith further conceded that severe muscle contractions do produce a build-up of lactic acid in the blood. Plaintiffs produced peer-reviewed research which established statistically significant elevations in lactate in the blood in human subjects after only one 5-second discharge. The results of this research correlated with similar peer-reviewed research studies of swine introduced into evidence by plaintiffs. These comparative studies proved that the physiological effects of TASER discharges on humans are nearly identical to swine. Plaintiffs also introduced research conducted by Dr. James Jauchem on behalf of the U.S. Air Force which showed dangerous elevations in lactate in swine after repeated TASER discharges, significantly less than the number Mr. Heston was subjected immediately prior to his cardiac arrest. Third, Dr. Myers testified that the emergency room records of Natividad Medical Center indicated that Mr. Heston's pH was measured at 6.8 shortly after his admission – far below the life-threatening level of 7.0 – further evidence that he was suffering from severe metabolic acidosis.

Finally, Dr. Myers' expertise in cardiology and electro-physiology was more than sufficient to inform the jury as to Mr. Heston's cause of death. His testimony was clearly supported by the overwhelming medical and scientific evidence presented to the jury.

For whatever tactical reason, TASER chose not to call an electro-physiologist to counter Dr. Meyers' testimony even though it had designated two - Dr. Richard Luceri and Dr. Raymond Ideker - in its Rule 26 Expert Disclosures. TASER's decision not to call Dr. Luceri or Dr. Ideker allowed Dr. Myers' testimony – the most crucial in the case – to go unchallenged. TASER's reason for not calling these witnesses is that they would have

supported rather than undercut plaintiffs' cause-of-death theory.

Dr. Jeffrey Ho, TASER's medical expert (an emergency room physician and paid TASER consultant), testified that Mr. Heston's cardiac arrest resulted from metabolic acidosis.

The clear weight of the evidence, which essentially went unchallenged by TASER, established that metabolic acidosis caused Mr. Heston's cardiac arrest. Thus, the jury was left to decide what caused the metabolic acidosis in Mr. Heston's case. The evidence established that he was subjected to as many as 25 five-second ECD discharges over a 74-second period. Although TASER and the Salinas defendants suggested that Mr. Heston did not actually receive electrical current from all these discharges, neither introduced expert testimony on this issue nor produced physical evidence to establish that the ECDs failed to deliver electrical current. It is clear, based on the weight of the evidence, that the jury reasonably concluded that the TASER ECDs caused a sudden, dangerous metabolic acidosis which, in turn, resulted in Mr. Heston's cardiac arrest.

The jury was asked to consider whether TASER knew or should have known about the risks posed by metabolic acidosis in the context of prolonged duration ECD applications and, if so, whether it warned potential users of this danger. (Note – a more detailed discussion of the jury's verdict and its consistency is set forth below.) Once again, the evidence established that as early as 1999, in the published Penn State review conducted by Dr. Fish and his colleagues, the possibility that ECDs could cause metabolic acidosis to such an extent that it could result in cardiac arrest was known in the scientific community. The review recommended that further research be conducted on this issue. TASER, through the testimony of its CEO, Patrick Smith admitted that no such research was conducted by TASER. When Mr. Smith learned the results of the Jauchem experiments, which confirmed the effect of repeated TASER ECD discharges on blood acid levels, he testified that his company immediately published a warning concerning this risk. The warning was allegedly sent to TASER purchasers, including the Salinas Police Department, in January, 2005, but was not received by Salinas, according to the testimony of Sgt.

Michael Groves, and was not transmitted to the officers who shocked Mr. Heston.

This warning was introduced by plaintiffs as Exhibit 148:

> The application of the TASER is a physically stressful event. Although there is no predetermined limit to the number of cycles that can be administered to the subject, officers should only apply the number of cycles reasonably necessary to allow them to safely approach and restrain the subject. Especially when dealing with persons in a health crisis such as excited delirium, it is advisable to minimize the physical and psychological stress to the subject to the greatest degree possible.
>
> Further, TASER applications directly across the chest may cause sufficient muscle contractions to impair normal breathing patterns. While this is not a significant concern for short (5 sec) exposure, it may be a more relevant concern for extended duration applications. Accordingly, prolonged applications should be avoided where practicable.

Although the warning cautions against prolonged TASER applications under certain circumstances, it is also contradictory and misleading by its inclusion of the statement that "there is no predetermined limit to the number of cycles that can be administered to the subject." More importantly, the words "metabolic acidosis" do not even appear in this warning. By TASER's own admission, this is the only warning it issued concerning the risks of prolonged TASER discharges prior to Mr. Heston's death. Thus, the jury heard evidence that no warning was ever issued by TASER regarding the risks of metabolic acidosis caused by prolonged TASER discharges even though this possibility was recognized in the scientific community prior to the initial manufacture and marketing of the Model M26 ECD, and known to TASER prior to Mr. Heston's demise.

Based on the clear weight of the evidence, the jury came to the obvious and inescapable conclusion that TASER failed to adequately warn that TASER ECDs were dangerous or likely to be dangerous because repeated or prolonged ECD exposures potentially cause metabolic acidosis to such a degree that it poses a risk of cardiac arrest.

The reason, the jury obviously surmised, was that such warnings would adversely affect sales by contradicting TASER's exaggerated claims of safety and its principle marketing slogan, "Saving lives every day."

Apart from the conclusory statements made in its moving papers, TASER has offered no evidence to establish that the jury's verdict is against the clear weight of the evidence or is based upon evidence which is false, or that the verdict will result in a miscarriage of justice, or that a mistake has been committed by the jury. For these reasons, TASER's Motion for a New Trial should be denied.

a. Plaintiffs' witnesses were well-qualified to provide expert testimony concerning Robert C. Heston's cause of death.

TASER contends that the Court erred when it overruled its objections to the testimony of Dr. Myers and Dr. Terri Haddix. The admissibility of an expert witness' testimony is governed by Fed. R. Evid. 702, which states as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The Ninth Circuit has stressed that "care must be taken to assure that a proffered witness truly qualifies as an expert, and that such testimony meets the requirements of Rule 702" because such status allows the witness "to testify based on hearsay information, and to couch his observations as generalized 'opinions' rather than as first-hand knowledge." (Jinro Am., Inc. v. Secure Inv., Inc., 266 F.3d 993, 1004 (9th Cir. 2001)).

As the "gatekeeper" under Rule 702, the Court reviewed the proposed expert testimony to insure that it rested on reliable foundation and was relevant to the issues before the trier of fact. (See Daubert v Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579

(1993) (scientific testimony); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (non-scientific testimony)). An expert may only be precluded from testifying at trial on the ground that the witness lacks "specialized" knowledge on the particular subject or that the expert opinion is not based on scientific, technical, or other specialized knowledge.

As previously discussed, Dr. Myers is a cardiologist and Board Certified electro-physiologist who is eminently qualified to offer expert opinions concerning metabolic acidosis (a phenomenon well-documented in the medical literature and known to all physicians for many years), its inverse relationship to pH, and the manner in which a sudden drop in pH affects the electrical output of the heart. See, e.g., Hicks, et al., Metabolic Acidosis in Restraint-Associated Cardiac Arrest: a Case Series (1999).

The opinions expressed by Dr. Myers were based, not only on his specialized knowledge, background and experience, but also on peer-reviewed scientific research concerning the psychological effects of TASER electrical discharges. These include Jauchem, et al., Acidosis, Lactate, Electrolytes, Muscle Enzymes, and Other Factors in the Blood of Sus Scrofa Following Repeated TASER Applications (2005), and Dennis, et al., Acute Effects of TASER X26 Discharges in a Swine Model (2007).

TASER, through its own CEO, admitted that TASER discharges cause severe muscle contractions and that these contractions cause the muscle to produce lactic acid. These facts were never in dispute. TASER's quibbles about Dr. Myers' supposed lack of expertise, and his simple misunderstanding (promptly corrected and irrelevant to his opinions) with respect to one aspect of TASER electrical output, were paraded in front of the jury repeatedly. These went to the weight rather than the admissibility of the expert testimony. Dr. Myers' background and experience as a cardiologist with specific expertise in electro-physiology – the electrical functioning of the heart – was more than sufficient, under Daubert, to permit him to offer his expert opinion that metabolic acidosis caused Mr. Heston's heart to stop.

Dr. Terri Haddix, a board certified forensic pathologist, was the only truly independent expert to testify during the trial. TASER repeatedly and incorrectly claims that

Dr. Haddix was designated as plaintiffs' "retained" expert. She was not. As the medical examiner who performed the autopsy on Mr. Heston's body on behalf of the Monterey County Sheriff-Coroner, she was designated by stipulation as a non-retained "percipient" doctor (under other circumstances, she would have been described as a "treating" physician). Dr. Haddix testified that she has performed over 2,500 autopsies during her career. Although she, admittedly, had little experience dealing with TASER deaths – there have been less than 400 throughout the United States in the last decade – she was, nonetheless, eminently qualified to testify regarding her autopsy findings, including the TASER burn marks which she independently analyzed microscopically.

Dr. Haddix did not simply conduct an autopsy in this case. She investigated to determine the state of the scientific research concerning the physiological effects of TASER discharges. She was unable to find any published research on this subject since no peer-reviewed scientific studies had been published in February 2005. She contacted various colleagues about TASER electrical output and burn marks and went so far as to contact TASER itself to gain insight into how TASER ECDs operated. She also requested information regarding the TASER dataport downloads and corresponded with a representative of TASER in an effort to understand the implications of the data. In sum, Dr. Haddix made an exhaustive effort to understand every aspect of the TASER device, going far beyond what medical examiners typically do in such situations.

The expert opinions ultimately offered by Dr. Haddix dealt with the observations and conclusions she drew from her autopsy findings, from an analysis of Mr. Heston's blood, and from medical examinations of his heart and brain. Her opinion that Mr. Heston's cardiac arrest occurred simultaneously with the final TASER discharge was supported by testimony that it was exactly then that the officers observed Heston's head turn blue, and that this tight temporal relationship suggested that Mr. Heston suffered metabolic consequences that may have caused him to develop a fatal heart arrhythmia.

Contrary to TASER's assertion, Dr. Haddix' ultimate opinion regarding Mr. Heston's cause of death need not have been predicated on her knowledge of TASER

components, usage or electrical output. As a board certified forensic pathologist, Dr. Haddix was eminently qualified to offer her opinions as to Mr. Heston's cause of death.

TASER's challenge of Drs. Myers and Haddix on Daubert grounds simply has no merit. The Court was correct to allow the testimony.

b. The court's instructions and corresponding jury verdict form comport with California products liability law and properly apprised the jury of the claims and defenses raised by the parties.

TASER next makes a number of arguments concerning the propriety of the Court's closing jury instructions. It contends that some instructions were inadequate and others were erroneous, thereby resulting in prejudice to TASER justifying a new trial.

Jury instructions are designed to clarify issues for the jury and to educate the jurors about what factors are probative on those issues. Generally, jury instructions should be: 1) relevant, 2) an accurate statement of the law, 3) as brief and concise as possible, 4) understandable to the average juror; and 5) not repetitive. The basic requirement is that the proposed instructions fairly and adequately cover the issues presented, correctly state the applicable law, and not be misleading. (Gulliford v. Pierce County 136 F.3d 1345, 1348 (9th Cir. 1998)).

1) Instructions re: plaintiff's failure to warn claim

In the instant case, the jury instructions given by the Court were completely consistent with California products liability law, and, specifically, plaintiffs' Fourth Claim – Negligence by Manufacturer in Failing to Warn. The elements of plaintiffs' claim are set out in CACI 1222:

1. That TASER manufactured the model M26;
2. That TASER knew or reasonably should have known that the model M26 was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner;
3. That TASER knew or reasonably should have known that users would not realize the danger;

4. That TASER failed to adequately warn of the danger;

5. That a reasonable manufacturer under the same or similar circumstances would have warned of the danger;

6. That Robert Heston was harmed; and

7. That TASER's failure to warn was a substantial factor in causing Robert Heston's harm.

(See Putensen v. Clay Adams, Inc., 12 Cal. App.3d 1062, 1076-77(1970); Anderson v. Owens-Corning Fiberglass Corp., 53 Cal. 3d 987, 1002 (1991)).

The Court gave the following instruction, which both comports with California products liability law and mirrors CACI 1222:

In order to recover under the Fourth Claim, Plaintiffs must prove the following by a preponderance of the evidence:

1. TASER International was the manufacturer of Taser ECDs which are devices capable of delivering electric shocks to a person against whom they are deployed;

2. At the time TASER International manufactured and sold Taser ECDs, a reasonably prudent manufacturer of an electronic control device knew or reasonably should have known that the M-26 ECD was dangerous or likely to be dangerous because prolonged exposure to electric shock from the device potentially causes acidosis to a degree which poses a risk of cardiac arrest in a person against whom the device is deployed;

3. A reasonably prudent manufacturer of an ECD would have warned purchasers of this risk;

4. TASER International failed to adequately warn purchasers about this risk;

5. On February 19, 2005, while using the product in a manner reasonably foreseeable by TASER International, members of the

Salinas Police Department used a prolonged deployment of Taser ECDs against Robert C. Heston;

6. The failure by TASER International to warn the Salinas Police Officers of the risks of prolonged deployment was a substantial factor in causing the officers to use a prolonged deployment against Robert C. Heston;

7. As a consequence of the prolonged deployment either one or both of the following injuries occurred: (a) prior to his death, Robert C. Heston suffered acidosis to a degree which caused him to have a cardiac arrest; and (b) separately, Plaintiffs Betty Lou Heston and Robert H. Heston, the parents of Robert C. Heston, suffered harm because, as a consequence of the cardiac arrest, Robert C. Heston died.

It is clear and apparent from reading the aforementioned instruction that each and every element of plaintiffs' claim, set forth in CACI 1222, was included in the actual instruction given by the court. While the Court modified the instruction to fit the facts of the case, the substantive law remained intact. Although not obligated to do so, trial courts may modify proposed instructions to make them applicable to the case and therefore more comprehensible to the jury. (Reno-West Coast Distrib. Co., Inc. v. Mead Corp. 613 F. 2d 722, 726 (9th Cir. 1979)). That is what the Court did here.

TASER's primary objection focuses on the second element of the instruction that "the M26 ECD was dangerous or likely to be dangerous because prolonged exposure to electric shock from the device potentially causes acidosis to a degree which poses a risk of cardiac arrest in a person against whom the device is deployed." This element of the claim required that the jury find that TASER "knew or reasonably should have known that the M26 was dangerous or likely to be dangerous." The thrust of this instruction was not altered by the court's inclusion of plaintiff's cause of death theory – metabolic acidosis. The instruction given by the court simply added language identifying the danger and made it clear that the jury had to first find that a danger "existed" or "likely existed" before it

could find that TASER failed to warn about it. TASER was not prejudiced by this instruction, which served simply to focus the jury's attention where it belonged.

TASER's objection to this instruction incorrectly places the emphasis on the words "poses a risk" and "potentially causes". The real focus of this instruction is on the knowledge of the danger – that TASER "knew" or "reasonably should have known" that the M26 ECD was dangerous or likely dangerous. Regardless, the plaintiffs proved, by the clear weight of the evidence, that TASER "knew" or "reasonably should have known" of the dangers associated with use of its ECDs. Plaintiffs offered in evidence the Penn State review from 1999 which raised the concern that TASER ECD's could cause metabolic acidosis to an extent that it could result in cardiac arrest. The Penn State review was included in TASER's research compendium. TASER's CEO, Patrick Smith, testified he was aware of the Jauchem test results by November 2004, three months before Robert Heston's death. In light of this evidence, the jury reasonably concluded that TASER knew or reasonably should have known the M26 ECD was dangerous or likely to be dangerous at the time of Mr. Heston's death.

Indeed, plaintiffs rested their entire case on their metabolic acidosis theory, something that should have been obvious to anyone who listed to the evidence. Had the jury rejected the claim that TASER's ECDs caused Robert Heston to suffer severe metabolic acidosis which resulted in his cardiac arrest, they clearly would have found in TASER's favor on the failure to warn claim. The court's instructions on this point were neither inadequate nor erroneous. Likewise, TASER suffered no prejudice due to the Court's instruction. TASER's Motion for a New Trial on this ground should be denied.

2) Instructions re: "Substantial factor"

TASER also raises an objection to the court's instructions and the corresponding questions on the verdict form including questions Nos. 15, 18 and 19. TASER claims the court committed prejudicial error by failing and/or incorrectly instructing the jury on the "substantial factor" test and then including erroneous questions on the verdict form. TASER correctly points out that plaintiffs were required to prove that the defendant's

failure to warn was a substantial factor in causing plaintiff's harm (CACI 1222).

As noted above, the court did instruct the jury regarding the "substantial factor" test. Its instructions on the failure to warn claim included the following two instructions:

> 6. The failure by TASER International to warn the Salinas Police Officers of the risks of prolonged deployment was a substantial factor in causing the officers to use a prolonged deployment against Robert C. Heston.
>
> 7. As a consequence of the prolonged deployment either one or both of the following injuries occurred: (a) prior to his death, Robert C. Heston suffered acidosis to a degree which caused him to have a cardiac arrest; and (b) separately, Plaintiffs Betty Lou Heston and Robert H. Heston, the parents of Robert C. Heston, suffered harm because, as a consequence of the cardiac arrest, Robert C. Heston died.

TASER claims that the Court failed to give a proper instruction on "substantial causation" "because it omits the direct line of causation between TASER's failure to warn and the decedent's injuries." (TASER's New Trial Memorandum at 16:27-28). But, TASER's argument is misguided because the instructions must be read together and viewed in their entirety. As TASER correctly points out, all the Court did was take one instruction and divided it into two. When viewed in their entirety, the aforementioned instructions required the jury to find, albeit in two steps, a direct line of causation between the failure to warn and decedent's death. First, the jury had to decide that the failure to warn was a substantial factor in the officers' prolonged deployment of their TASERs against Robert Heston, and second to find that as a consequence of the prolonged deployment, Mr. Heston suffered metabolic acidosis to a degree that caused him to suffer a cardiac arrest.

The aforementioned instructions mirrored the Verdict form, which also separated the issue into three Questions, Nos. 15, 18 and 19. Once again, the language of the "substantial factor" test was included in Question No. 15. Once again, the simple division

of the question into three parts still required the jury to first find that TASER's failure to warn of the risks of its device was a substantial factor in causing the prolonged deployment of the ECDs by the Salinas police officers. Only after it answered this question in the affirmative would it then proceed to the next question on the Verdict form – whether Mr. Heston's death was a consequence of the prolonged deployment.

Once again, the court's instructions on this point, when considered in their entirety, were neither inadequate nor erroneous. The Verdict form submitted to the jury mirrored the Court's instructions. TASER's Motion for a New Trial on this ground should be denied.

3) Instructions re: "clear and convincing" and "conscious disregard"

TASER next argues that it was prejudiced by the Court's failure to include the "clear and convincing" standard of proof in Question No. 21 of the Jury Verdict form. It also claims prejudice by the Court's failure to include in Question No. 21 the requirement that the jury find that TASER's conduct was in "conscious disregard" of Mr. Heston's rights.

TASER's arguments simply have no merit. TASER fails to cite any legal authority for the proposition that every single issue must be addressed explicitly in a verdict form. TASER admits that the "clear and convincing" and "conscious disregard" language was contained in the Court's instructions to the jury. The jury instructions and verdict form are required to be read as a whole, one supporting the other. So long as the jury was properly instructed on the law of the case (which TASER admits it was), it was not necessary for the verdict form to contain the "clear and convincing" and "conscious disregard" language.

TASER's Motion for a New Trial on this ground should be denied.

4) Supplemental jury instruction re: sufficient warnings

TASER claims that the Court committed prejudicial error by failing to give a supplemental instruction on the sufficiency of warnings. It proposed the following instruction which was rejected by the court:

"There can be no liability for failure to warn where the instructions or

warnings sufficiently alert the user to the possibility of danger."

Instead, the Court gave the following instruction, which covered the identical subject matter:

"Plaintiffs must prove . . . 4. TASER International failed to adequately warn purchasers about this risk."

The Court was correct in its decision to reject TASER's proposed instruction because it was simply not supported by the evidence. Throughout its moving papers, TASER consistently refers to a warning being given to users of its ECDs about the risks posed by its operation. However, TASER failed to introduce any evidence that it warned users of its ECDs of the risk that prolonged duration discharges from its devices could cause metabolic acidosis to the extent that it would result in cardiac arrest. In the absence of a warning having been given, there is no merit to the suggestion that the Court erred in failing to instruct the jury on the sufficiency of a warning.

5) Supplemental Jury Instruction re: foreseeable dangers

TASER also claims that the Court committed prejudicial error by failing to give a supplemental instruction on foreseeable dangers. It proposed the following instruction which was rejected by the court:

"The duty to warn does not include the duty to warn of known dangers foreseeable or readily known by the user."

This argument has no application to the facts of this case. Acidosis and cardiac arrest are not common knowledge. Each police officer who used a TASER ECD during this incident testified that no training was ever provided to him that his use of the M26 could result in an acidosis induced cardiac arrest. Further, it would be unlikely, if not impossible, for any police department to be aware of the current state of research in the scientific and medical community regarding the physiological affects of ECDs on humans. Instead, customers such as the Salinas Police Department reasonably relied on TASER to keep them abreast of such research. TASER never warned its customers the potential risks of metabolic acidosis prior to Robert Heston's death. In fact, it did just the opposite – it

assured users that its ECDs were non-lethal and could not cause serious bodily injury – "Saving lives every day."

Since it was not supported by the evidence, the Court's failure to give TASER's supplement instruction on "foreseeable dangers" was not error.

Although TASER argues that the court's refusal to give each and every one of its requested instructions was prejudicial and, therefore, grounds for a new trial, it has not provided any evidence of any prejudice, misstatement of the law or an erroneous instruction given that would require the court to grant their request for a new trial. Since the instructions given by the court more than adequately covered the law and all claims and defenses raised by the parties, all of TASER's arguments regarding inadequate, misleading or erroneous jury instructions must fail.

But, even if some of the jury instructions given by the Court were either inadequate or erroneous, TASER was required to make specific objections to preserve its right to raise this issue at a later time. A party cannot object to jury instructions by using plain error as the basis of raising the issue for the first time in a motion for new trial when it did not make a timely objection to the instructions pursuant to Rule 51(c). (See: Voohries-Larson v. Cessna Aircraft Co., 241 F.3d 707, 713 (9th Cir. 2001)).

F. R. C. P. Rule 51 provides that "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." In Palmer v. Hoffman, 318 U.S. 109, 119 (1943), the Supreme Court stated that "objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error." The purpose of Rule 51, and the requirement of specificity in the objection, is to "bring possible errors to light while there is still time to correct them without entailing the cost, delay and expenditure of judicial resources occasioned by retrials." (See Bertrand v. Southern Pac. Co., 282 F.2d 569, 572 (9th Cir. 1960)). TASER's objections were not legally sufficient to protect its right to raise this issue in a Motion for New Trial.

c. No misconduct was committed by Plaintiffs' Counsel.

TASER contends that an animation and training video shown to the jury during plaintiff's closing argument amounted to prejudicial misconduct.

The Court has discretion to allow counsel to use visual aids in closing argument – e.g., diagrams, charts, graphs, etc. – if they illustrate matters already in evidence. Murphy v. National R.R. Passenger Corp. 547 F.2d 816, 818 (4th Cir. 1977). Such visual aids should not go into the jury room or remain before the jury after the conclusion of counsel's argument. Id. That was the procedure followed.

The demonstrative animation used by plaintiff's counsel relied exclusively on evidence that was already before the jury. First, the animation showed the number of TASER discharges recorded on the dataports. This evidence was introduced through Sgt. Michael Groves of the Salinas Police Department. Second, the animation contained excerpts of the 911 call placed by witness, Clifford Satree, which was also admitted into evidence. Third it showed the duration of the TASER discharges, again framed by the play-by-play description provided by Mr. Satree during his 911 call. Fourth, the animation depicted the names of the officers that entered the Heston living room at the time Mr. Heston was subjected to the TASER discharges. Each of those officers testified. Fifth, the animation included the distinctive clicking sound made by TASER ECDs while they are being discharged. (Throughout the trial, jurors repeatedly heard the sound of the TASER during the playing of various training videos.) And, sixth, the animation depicted the moment in time when Mr. Heston was observed to be in cardiac arrest. This was based on the testimony of various officers involved in the restraint of Mr. Heston that they observed his head turn blue either immediately before or seconds after the completion of Officer Godwin's final ECD discharge.

In sum, everything contained in the animation was supported by evidence adduced at trial. Plaintiffs' counsel did not "testify" during this portion of his closing argument but, rather, simply commented on the evidence, through the animation. He was legally entitled to do this.

TASER also claims that plaintiffs' counsel committed misconduct during his closing argument when he played a particular TASER training video to illustrate a subject's severe muscle contractions as a result of one 5-second discharge from two TASER ECDs. TASER claims the showing of this video was highly prejudicial because "it had not been admitted into evidence." TASER's recollection of what evidence was admitted during the trial is clearly flawed. The video in question was shown to the jury without objection during the direct examination of Officer Fairbanks. In fact, Officer Fairbanks was asked specifically whether the muscle contractions shown in the video mirrored his own experience being tased, and he answered in the affirmative. The video was admitted into evidence, without objection, as plaintiffs' Exhibit 110 – TASER's Training Ver. 8.

But, even more disturbing is the fact that TASER's fails to recall that its counsel played the very same video for the jury during its case in chief. TASER suffered no prejudice by the showing of the subject video and, to claim otherwise, is simply disingenuous at best and intentionally misleading at worst.

d. The jury did not conduct an improper experiment

TASER contends that it should be granted a new trial because the Court allowed the jury to commit misconduct by test firing the M26 defendants' introduced into evidence during jury deliberations. TASER argues that 1) it was prejudiced by the so-called "secret" experiment, and 2) the jury obtained or used evidence which had not been introduced at trial.

Defendants offered, and the Court admitted into evidence, a fully functional TASER M26 along with a battery back. The jury did not conduct an "experiment" merely by putting the two components together – a task that required no special skill or experience.

In Konkel v. Bob Evans Farm Inc., 165 F.3d 275, 282 (4th Cir. 1999) (citing United States v. Beach, 296 F.2d 153, 158 (4th Cir.1961)), the Court of Appeals held that jury experiments that are nothing more than critical examinations of exhibits are not inappropriate. The jury in that case performed an experiment using a coffee pot and carafe, which were both admitted exhibits, and a cup, which had not been admitted into evidence.

The jury read the directions off the packet of detergent that was an exhibit and found that the liquid solution swallowed by the plaintiff was twelve times stronger than it was supposed to be. The court concluded that the jury's experiment did not constitute jury misconduct.

The basis of the decision was that the jury simply examined the coffee pot, carafe, and packet of detergent that were admitted into evidence and applied the testimony to the testing. Since the jury simply applied the testimony concerning the size of the plaintiff's mug, the jury's experiment did not place it in possession of evidence not previously presented at trial. This is analogous to what the Court allowed the jury in this case to do. It took evidence already introduced by TASER itself and matched that evidence to the sound the TASER ECD and to the testimony of the police officers.

The defendants claim that "TASER only allowed its devices to be submitted to the jury with the understanding they were inoperable." (TASER's New Trial Memorandum at 13:1-2). It should be noted that at no time prior to the jury requesting the 8 AA batteries, did any party or counsel advise the Court of any intention to render the ECD inoperable. In fact, defense counsel were asked in open court whether they had advised anyone of the fact that the AA batteries were inoperable and they all admitted they had not.

TASER further claims it was not given the opportunity to provide guidance to the jury about the operation of its ECD nor permitted to cross-exam or rebut any information about the operation of the ECD and the test results. TASER had ample opportunity during the course of the trial to explain the ECD's operational details, and in fact did so. Similarly, TASER claims that the jury was intimidated or somehow psychologically affected because of the test firing, and that these emotional reactions to the TASER caused prejudice. This contention is pure speculation and has no merit. TASER offers no evidence of any kind in this regard, nor any law to support such a wild claim.

Finally, the jury's stated purpose in test firing the ECD was to "hear" the sound it made. It is illogical to think that this inquiry was relevant to the plaintiff's failure to warn claim against TASER since the sound of the TASER would have nothing to do with such

a claim. More likely, the jury's reason for wanting to hear the sound of the TASER was directed towards the conduct of the individual police officer defendants. It is reasonable to conclude that once the jury heard the sound of the TASER, it was then able to resolve conflicts in the trial testimony relating to the officers' actions during their encounter with Robert Heston and, specifically, the extent to which the ECDs were actually discharging electricity during the critical 74-second period.

TASER has demonstrated neither impropriety nor prejudice as a result of the Court's allowing the jury to test fire the ECD. Its Motion for a New Trial on this ground should be denied.

e. The jury's findings are supported by the evidence and are consistent and completely reconcilable

TASER contends that it is entitled to a new trial on the ground that the "Special" Verdict rendered by the jury was inconsistent. According to TASER, if the jury's verdicts are "ineluctably inconsistent," the trial court must order a new trial. (TASER's New Trial Memorandum at 20:14-15. TASER's Motion for a New Trial on this ground lacks merit for two reasons: 1) the verdict itself is not only consistent but directly reflects the case presented by plaintiffs, and 2) TASER waived its right to contest any inconsistency verdict by failing to object prior to the jury being discharged.

When a jury's verdict answers are inconsistent, the judge has a duty under the Seventh Amendment to "harmonize" or "reconcile" them whenever possible. The trial "court asks, not whether the [inconsistent] verdict necessarily makes sense under any reading, but whether it can be read in light of . . . evidence to make sense." (White v. Ford Motor Co. 312 F3d 998, 1005 (9th Cir.2002).

1) The Jury's Answers to Questions 13 and 16 are Not Inconsistent

TASER's specific challenge to the Verdict relies on the jury's responses to Questions 13 and 16 on the Verdict form. TASER claims the responses to these two questions are inconsistent because the questions are the essentially the same but were answered differently.

> [W]hen confronted by seemingly inconsistent answers to the interrogatories of a special verdict, a court has a duty under the seventh amendment to harmonize those answers, if such be possible under a fair reading of them. A court is also obligated to try to reconcile the jury's findings by exegesis, if necessary. Only in the case of fatal inconsistency may the court remand for a new trial.

Floyd v. Laws, 929 F.2d 1390, 1396 (9th Cir. 1991) (citing; Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108 (1963) (citations omitted).

A closer reading of the two questions, in light of the evidence presented in this case, establishes that they are not the same and, indeed, required very different evidence to sustain.

Question 13 reads:

> Do you find that, at the time TASER International manufactured and sold TASER ECDs, a reasonably prudent manufacturer of an electronic control device knew or reasonably should have known that the TASER ECD was dangerous or likely to be dangerous because prolonged exposure to electric shock from the device potentially causes acidosis to a degree which poses a risk of cardiac arrest in a person against whom the device is deployed?

(emphasis added).

Question 16 reads:

> Do you find that at the time TASER International manufactured and sold TASER ECDs to the Salinas Police Department, TASER International knew or it was knowable by the use of available scientific knowledge, that prolonged exposure to shocks from TASER ECDs potentially causes acidosis to a degree which poses a substantial danger, namely of causing a person against whom the device is deployed to have a cardiac arrest?

(emphasis added).

The distinction between these two questions is obvious. Question No. 13 deals with

the negligence aspect of a products liability failure to warn claim. The verdict response to this question was "yes" – a decision based on the clear weight of the evidence

"Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about." (Anderson v. Owens-Corning Fiberglass Corp., supra, 53 Cal. 3d at1002)

Clearly, the jury concluded, based on the evidence, that acidosis was a theoretical risk from prolonged ECD exposure, and that a reasonably prudent manufacturer before marketing its new, higher powered ECD, should have tested for the possibility that it might cause metabolic acidosis to such an extent that the acidosis could result in cardiac arrest. Had TASER done such testing, the company then might have warned about this risk.

Question No. 16 added another component to the plaintiffs' failure-to-warn claim. Question 16 required plaintiffs to prove that a reasonably prudent manufacturer knew, or it was knowable by the use of available scientific knowledge, of a particular risk associated with the use of its product. "Available scientific knowledge" means the defendant did not adequately warn of a potential risk, side effect, or allergic reaction that was "knowable in light of the generally recognized and prevailing best scientific and medical knowledge available." (Carlin v. Superior Court, 13 Cal.4th 1104, 1112 (1996) (emphasis added))

The jury answered Question No. 16 "No" because it had already decided that TASER unreasonably failed to perform the relevant testing for acidosis, and, therefore, "the best scientific and medical knowledge available" did not exist on this critical issue. In other words, the jury reasonably answered Question No. 16 "No" because the danger was not "known" or "knowable" in the sense that one could research medical publications and determine the effects of prolonged TASER discharges on blood acid. Answering Question No. 16 "Yes" would have contradicted the jury's finding on TASER's unreasonable disregard for the acidosis risk.

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Plaintiffs introduced the results of three peer-reviewed independent research studies specifically measuring the physiological effects of TASER discharges on both humans and swine. The first, conducted by Dr. James Jauchem, on behalf of the U.S. Air Force, appeared in the scientific literature in November 2005, approximately eight months after Mr. Heston's death. Subsequent peer-reviewed research conducted by Drs. Vilke and Dennis, appeared in the scientific literature in 2006 and 2007. Since this scientific knowledge was not knowable to TASER at the time it manufactured and sold the ECDs due to its own negligent failure to do the research, it is easy to understand why Question No. 16 was answered in the negative.

It is clear that the answers to Questions 13 and 16 were completely consistent with one another based on the state of the evidence introduced at trial by both plaintiffs and TASER. TASER fails to appreciate the distinction between these two questions – one founded in negligence and the other in strict liability.

The Court should have no trouble reconciling the answers and therefore denying the New Trial motion.

Regardless, TASER waived its right to contest any alleged inconsistency in the verdict by failing to raise the issue before the jury was discharged. A party waives any objection to an inconsistent general verdict with special interrogatories if he or she fails to object to the inconsistency before the jury is discharged. (Williams v. KETV Television, Inc. 26 F3d 1439, 1442-1443 (8th Cir. 1994); Austin v. Paramount Parks, Inc. 195 F3d 715, 726 (4th Cir. 1999); Correia v. Fitzgerald, 354 F. 3d 47, 57 (1st Cir. 2003) ("failure to object to . . . inconsistency while . . . jury is still in the box forfeit's . . . objection").

But, it is important to emphasize that even though plaintiffs contend that by failing to object to the verdict while the jury was still impaneled, TASER waived its right to raise this issue in its Motion for New Trial, the question need not be resolved inasmuch as there is no inconsistency in the verdict.

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f. Expert testimony is not required to prove a failure to warn claim where evidence established that TASER gave no warning of any kind regarding metabolic acidosis.

TASER claims that plaintiffs' failure to call an expert witness in support of their Failure to Warn claim justifies the granting of a new trial. This claim presupposes that expert testimony on the subject was, in fact, necessary. It was not. In every case the court must be guided by the general rules governing the use of expert testimony. If the fact sought to be proved is one within the general knowledge of lay persons, expert testimony is not required. (See: Truman v. Vargas 275 Cal. App. 2d 976 (1969)).

The court in Ewing v. Northridge Hosp. Medical Center, 120 Cal. App. 4th 1289 (2004), stated that there are circumstances, even if rare, in which negligence on the part of a doctor is demonstrated by facts which can be evaluated by resorting to common knowledge. In such a situation, expert testimony is not required since enhanced scientific testimony is not essential for the determination of an obvious fact. (citing Franz v. Board of Medical Quality Assurance, 31 Cal. 3d 124, 141 (1982)).

The court in Ewing went on to say that in cases where a layperson "is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised . . . no expert testimony is required." Id at 601. This reiterates the long held view that expert opinion testimony is necessary only where the subject is sufficiently beyond common experience that the opinion of an expert would be necessary to assist the trier of fact.

Here, the undisputed evidence proved that TASER never issued a warning to its purchasers concerning the possibility that prolonged TASER discharges might cause metabolic acidosis to such an extent that the acidosis might result in cardiac arrest. TASER admitted as much in a seven-page "Training Bulletin" published on its web site within a week of the verdict. A copy is attached to as Exhibit 1.

The jury verdict found a negligent failure to warn of the specific risk of the metabolic effects of TASER device induced muscle contractions in

> exhausted, acidotic subjects such as Mr. Heston. On June 28, 2005, TASER International issued revised warnings that included language about the risks of extended, prolonged, or multiple TASER ECD applications on exhausted or otherwise compromised subjects.
>
> The Heston case occurred before those warnings were issued, hence a failure to warn case for incidents after June 28, 2005 are highly unlikely to find a failure to warn claim on this issue or any other known risk discussed in those warnings.

Exhibit 1 at 5.

As previously discussed, the only warning ever issued by TASER concerning prolonged TASER discharges was published in January 2005, approximately one month prior to Mr. Heston's death. However, this warning, buried deep in a PowerPoint presentation, never mentioned the risk of metabolic acidosis, and was not delivered to the Salinas Police Department, much less seen by the officers who shocked Mr. Heston.

In a case such as this where NO warning of any kind was ever given to its purchasers, there was no need for plaintiffs to have called an expert to testify that no warning was ever issued.

g. Where the Jury concluded that acidosis brought on by TASER discharges could cause cardiac arrest, the failure of TASER to give a warning of this potentially life-threatening risk supported an award of Punitive Damages.

The defendant incorrectly asserts that since the verdict form did not contain the "clear and convincing" or "conscious disregard" standard applicable to punitive damage awards, the verdict form was improper and a new trial should be granted.

The court should consider first whether the jury instructions were legally sufficient. The defendant concedes that "the 'clear and convincing' and 'conscious disregard' standards were included in the Court's closing instructions." (TASER's New Trial Memorandum at 17:20-21) The court did not intend, nor was it necessary, for the verdict

form to list each individual sub-issue and evidentiary burdens relevant to each claim.

The burden of proof for each claim was contained in the written jury instructions, a copy of which was given to each and every juror. The verdict form was intended to be read in conjunction with the jury instructions. TASER presents no evidence to suggest this was not done. The instructions were not misleading and taken as a whole properly informed the jury of the applicable law. Furthermore, the jury instructions submitted to the jury allowed all the parties to argue their theory of the case.

In U.S. v. Reed, 147 F. 3d 1178 (9th Cir. 1998) , the court described verdict forms as, in essence, additional instructions to the jury.

Here, the jury instructions and verdict from, taken together as a whole, more than adequately covered all the issues presented, were not misleading or erroneous, and allowed the parties to argue their theory of the case. Based on the facts presented, the jury reasonably concluded that TASER's failure to warn was wanton, malicious and in conscious disregard of Robert Heston's rights. As such, the award of punitive damages to deter TASER from engaging in similar future misconduct should stand.

h. Compensatory Damages Need Not Be Awarded in Order to Recover Punitive Damages In Favor of a Decedent's Estate

The jury was instructed as to the specific standard required to award punitive damages in a case such as this one and rendered its decision according to those instructions. Although this argument is discussed more fully in Plaintiffs' Memorandum of Law in Opposition to Defendant TASER's Renewed and Supplemental Motion for Judgment as a Matter of Law (JMOL) or Reduction in Punitive Damages, filed herewith, it should be noted that substantial punitive damages are appropriate in wrongful death cases, because proportionality is based on "harm" rather than pecuniary loss, and there is no "harm" greater than the termination of a human life. (Romo v. Ford Motor Co., 113 Cal. App. 4th 738 (2003)).

The Romo court explained the rationale for its decision by stating that a small award could simply be written off as a part of the cost of doing business and would have no

deterrent effect. An award which affects the company's pricing or affects its competitive advantage would serve as a deterrent. More importantly, the court acknowledged the long standing axiom that it would be unacceptable public policy to establish a system in which it is less expensive for a defendant's malicious conduct to kill rather than injure a victim.

TASER fails to cite a single authority for the proposition that "since there was no proven compensatory damages [to the estate], the award of $200,000 in punitive damages also fails." (TASER's New Trial Memorandum at 25:4-5) (In fact, compensatory general damages were "proven," they just did not survive. The burial expenses did and were properly awarded to the estate.)

However, it does cite the case of County of Los Angeles v. Superior Court (Schonert) 21 Cal. 4th 292, 304 (1999) ,which holds, contrary to their argument, that "under California's survival law, an estate can recover not only the deceased plaintiff's lost wages, medical expenses, and any other pecuniary losses incurred before death, but also punitive or exemplary damages."

TASER's argument is a legal Catch-22. Punitive damages must be proportional to the compensatory damages actually recovered, but compensatory damages do not survive under California law, therefore neither do punitive damages, although both statute and case law say they do survive. Garcia v. Superior Court (County of Los Angeles), 42 Cal. App. 4th 177 (1996), specifically rejects this conundrum. Declining to follow federal law which allows for the survival of general damages in section 1983 death cases (and hence the basis for their inclusion on the Court's general verdict form), the court of appeal ruled regarding a section 1983 claim in state court "The deterrent purpose of the federal Civil Rights Act is satisfied, we believe, by the fact that Code of Civil Procedure section 377.34 expressly allows punitive damages the decedent would have been entitled to recover had he survived," noting that "though the statute does not permit the estate to recover specific damages for decedent's pain and suffering, California law permits the estate representative to seek punitive damages for violation of decedent's rights." Id. at 185.

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TASER's claim that the Estate of Robert C. Heston is not entitled to an award of punitive damages has no basis in fact nor law and should be rejected.

i. Evidence adduced at trial clearly established that TASER Manufactured and sold the ECDs used by the Salinas Police Officers during their restraint of Robert C. Heston

Finally, as sort of a throw-away line, TASER argues that plaintiffs failed to produce evidence that TASER manufactured and sold the particular ECDs used by the Salinas Police Department during this incident. At no point during the entirety of the trial or litigation did TASER's counsel ever raise this issue, and it is injudicious for them to do so now.

Ample evidence during the course of the trial established that the Salinas Police Department investigated TASER brand ECDs prior to purchasing them.

Sgt. Michael Groves, who was one of the Salinas officers assigned to investigate ECDs for the Department, testified that based on his findings and a decision of the City Council the Salinas Police Department proceeded with the purchase of a large number of TASER Model M26s (no other manufacturer produces an ECD known as a Model M26.) The M26s were purchased directly from TASER in 2004, the ECD introduced into evidence had "TASER" written on it, and the Salinas Police Department relied on the training materials provided by TASER to train its own officers how to operate the device. No objection was ever made to the introduction of this evidence.

It should also be noted that TASER's proposed Special Verdict form included the following language:

"The parties have stipulated that TASER International, Inc. ("TASER") manufactured the TASER m26 Electronic Control Device ("M26 ECD") which was used on Mr. Robert C. Heston, Jr."

The evidence clearly established that TASER manufactured and sold the M26 ECDs used during this incident as well as the approximate date that the ECDs were first delivered to the Salinas Police Department.

4. TASER'S TRIAL STRATEGY WAS INTENDED TO INSULATE THE POLICE OFFICER DEFENDANTS FROM INDIVIDUAL LIABILITY AND THIS GOAL WAS ACHIEVED.

On June 12, 2008, within days of the verdict, TASER published a seven-page "Training Bulletin" on its web site and, presumably, emailed it to customers. A copy of this bulletin is attached to as Exhibit 1. The bulletin explains TASER's trial strategy as follows:

> "TASER International worked carefully and cooperatively with the Salinas Police Department in developing a joint litigation strategy to ensure that the most important parties, the police officers involved (who were facing exorbitant personal punitive damages), were not 'scape-goated' in any way. This strategy included TASER International taking some additional risks at trial, a strategy that we believe is the right thing to do."

TASER Training and Legal Bulletin 14.0-5, Page 5, ¶ 2.

The Court should take this missive into account when deciding the new trial motion. Given TASER's decision to "fall on the sword" to protect its customer base, any new trial order should include all parties and claims, and not just plaintiffs' claims against TASER.

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5. CONCLUSION

TASER has offered no evidence to establish that the jury's verdict is against the clear weight of the evidence, is based upon evidence which is false, that the verdict will result in a miscarriage of justice, or that a mistake has been committed by the jury. For these reasons, TASER's motion for a new trial should be denied, and judgment entered on the verdict.

DATED: August 25, 2008

Respectfully submitted,

THE LAW OFFICES OF JOHN BURTON WILLIAMSON & KRAUSS

BY: /s/ PETER M. WILLIAMSON
Attorneys for Plaintiffs

DECLARATION OF PETER M. WILLIAMSON

I, PETER M. WILLIAMSON, declare:

1. That I am an attorney at law duly licensed to practice before all the Courts of the State of California and am a member of the Bar of this Court. I am co-counsel, along with John Burton, on behalf of the plaintiffs herein.

3. If duly sworn, I could and would testify to the following facts of my own personal knowledge.

4. That on June 12, 2008, TASER published a seven-page "Training Bulletin" (TASER Training and Legal Bulletin 14.0-5) on its web site which I downloaded directly therefrom. A copy of this bulletin is attached to plaintiff's Opposition to TASER's Motion for a New Trial as Exhibit "1".

5. I can further attest to the fact the excerpted portions of TASER's Training and Legal Bulletin 14.0-5 are true and correct.

I declare under penalty of perjury, pursuant to the laws of the United States, that the foregoing is true and correct.

Executed this 25th day of August, 2008 at Tarzana, California.

/s/ PETER M. WILLIAMSON
Peter M. Williamson