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12  
13 **UNITED STATES DISTRICT COURT FOR THE**  
14 **NORTHERN DISTRICT OF CALIFORNIA**  
15

16 DAVID MORSE,

17 Plaintiff,

18 vs.

19 SAN FRANCISCO BAY AREA RAPID  
20 TRANSIT DISTRICT (BART); and BART  
21 Deputy Police Chief DAN HARTWIG, sued  
22 in his official and individual capacities,

23 Defendants.

) Case No. C12-5289 JSC (DMR)

) **MEMORANDUM OF POINTS AND**  
) **AUTHORITIES IN OPPOSITION TO**  
) **MOTION FOR SUMMARY**  
) **JUDGMENT/ADJUDICATION**

) Hearing: February 6, 2014

) Time: 9:00 a.m.

) Court: F, 15th Floor

) Judge: Hon. Jacqueline Scott Corley

) Case Filed: October 12, 2012

) Trial Date: March 31, 2014

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## I. INTRODUCTION

1 On September 8, 2011, BART Deputy Police Chief Dan Hartwig selected David  
2 Morse for arrest during a political protest at the Powell Street BART Station, a  
3 culminating act in BART's response to a series of escalating, embarrassing  
4 demonstrations. Morse is a well-known journalist who had exposed widespread  
5 misconduct within the BART police force. As Morse's Indybay online postings  
6 successively described the BART police killings of Oscar Grant and Charles Hill, the  
7 shutdown of cell phone service in BART facilities, and the public furor around BART in  
8 general, BART police commanders commissioned an intelligence officer to profile  
9 Morse, publish his photograph, and prepare officers to make his arrest. At the  
10 September 8, 2011, demonstration itself, Morse continued his usual journalistic  
11 activities, only to find himself singled out for arrest, handcuffed, held in a police  
12 substation, and ultimately transported to San Francisco County Jail.

13 Defendants Hartwig and BART have filed for summary judgment, but Morse's  
14 evidence establishes triable issues of fact, and he is entitled to his day in court.

15 In regards to Morse's claim for violations of his Fourth Amendment right to be  
16 free from arbitrary arrest, Morse produces evidence that BART failed to possess  
17 probable cause for his arrest, and that any reasonable officer would have seen that  
18 Morse was conducting himself as a journalist on the day in question. Defendant Hartwig  
19 testified that he ordered Morse's arrest because Morse failed to respond to a dispersal  
20 order issued by Lieutenant Steven Coontz. Hartwig's testimony is directly contradicted  
21 by Coontz, however, who denies giving any dispersal orders. Furthermore, Morse  
22 conducted himself appropriately as a journalist, and BART consented to the presence of  
23 journalists during the protest. Although other journalists acted in an identical fashion to  
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1 Morse during the protest, Hartwig permitted the other journalists to escape arrest.

2 Because Morse creates a triable issue as to probable cause, the motion should be denied  
3 as to both Morse's 4th Amendment claim and his common law claim for false arrest.

4 Furthermore, in regards to Morse's claim for retaliation in violation of his First  
5 Amendment rights, Morse produces ample evidence that he was uniquely targeted by  
6 BART police commanders in advance of the protest question. The police chief, deputy  
7 chief, and numerous other officers admitted to following Morse's publications through  
8 the Indybay website. These same commanders then—at a time of rising embarrassment  
9 for their organization—decided to plan for Morse's arrest. To justify the arrest,  
10 defendant Hartwig has given inconsistent explanations. These facts permit an inference  
11 of retaliation. Summary judgment should be denied.  
12

## 14 II. STATEMENT OF FACTS

### 15 A. Following the Death of Oscar Grant on January 1, 2009, Morse 16 Published Numerous Articles about BART Police Misconduct

17 David Morse is a veteran journalist, with a particular focus on photojournalism.  
18 Through the Indybay media collective, he has reported on political protests in the Bay  
19 Area and beyond since May 2004. (Morse Dec. ¶¶ 2-5.)  
20

21 On January 1, 2009, a BART police officer shot and killed Oscar Grant III at the  
22 Fruitvale BART Station in Oakland. The event was captured on videotape. Many  
23 members of the Bay Area community were outraged, and mass demonstrations ensued.  
24 David Morse became intensely involved in documenting the public response, publishing  
25 numerous articles about demonstrations, court dates, and local and state legislative  
26 hearings. (Morse Dec. ¶¶ 7-27.) Morse's work was often critical of the BART police force,  
27  
28



1 but his tone did not diminish his reach. His documentation of the Oscar Grant  
2 movement was licensed to numerous local and national media agencies. (*Id.* at ¶ 6.)

3 **B. BART PD Suffered Heavy Criticism in Summer 2011, Following**  
4 **the Death of Charles Hill and a Cell Phone Shutdown**

5 On July 3, 2011, a BART police officer shot and killed Charles Hill. In response to  
6 the shooting, BART facilities were hit by a new round of protests by various community  
7 groups, including “No Justice No BART.” (Morse Dec. ¶¶ 20-21.) Morse worked to  
8 document the protests and the BART response. He publicized facts concerning the  
9 killing of Hill, including facts that indicated the shooting was unjustified. (*Id.* at ¶ 22.)

10 Then, when BART police turned off cell phone service at an August 2011 protest,  
11 “many members of the media and the Bay Area were critical of BART police,” as Deputy  
12 Chief Hartwig testified. Siegel Dec., Ex. A., at 59. The online activist group “Anonymous”  
13 became involved to protest the cell phone shutdown. At that point, the protests about  
14 Charles Hill’s killing, and the protests about the cell phone shutdown “merged together”  
15 into a broader, anti-BART protest. Siegel Dec., Ex E, at 7.

16 **C. After Reading Morse’s Articles, BART Commanders Initiated**  
17 **Surveillance and Discussed How Morse Might be Arrested**

18 Various BART police officers read Morse’s publications, including Chief Kenton  
19 Rainey, Deputy Chief Benson Fairow, Hartwig, and other commanders and officers.  
20 Siegel Dec., Ex. B, at 43; Siegel Dec., Ex. E, at 9; Siegel Dec., Ex. G, at 18-19; Siegel Dec.,  
21 Ex. N, at 8. The commanders discussed these articles amongst themselves. *Id.* at 43, 66.  
22 Fairow testified that even though Morse’s journalism was “generally negative towards  
23 the police,” he nevertheless read “any” article Morse wrote concerning the ongoing  
24 protests. Siegel Dec., Ex. E, at 14. Officer Schlegel considered Morse’s pieces to be “a  
25 good form of information gathering as to what events were coming up and what people  
26  
27  
28

1 felt about what was going on.” Siegel Dec., Ex. N, at 8. Hartwig set up a “Google Alert”  
2 that sent him articles that Morse had written. *Id.* at 145-146; Siegel Dec., Ex. B(13).

3 Yet prior to the September 8, 2011, protest, Fairow ordered intelligence officer  
4 Ken Dam to prepare an informational flyer that identified a leader of the No Justice, No  
5 BART movement, Christopher Cantor, along with Mr. Morse. Siegel Dec., Ex. B(4);  
6 Siegel Dec., Ex. E, at 39-41:3; Siegel Dec., Ex. J, at 12.

8 The flyer identified Cantor by a mugshot and a prisoner locator number. Siegel  
9 Dec., Ex. E, at 40-41; Siegel Dec., Ex. K, at 14-15. Fairow stated that the prison  
10 information would be useful because, “if we did come in contact with them and they  
11 were taken into custody again<sup>1</sup> [*sic*], it would speed the process.” *Id.* The document did  
12 not contain instructions on how it could be used. *Id.* at 41. When asked if he was hoping  
13 to arrest David Morse, Fairow testified, “Not necessarily.” *Id.* at 43.

15 Lieutenant Hayes later testified that it was the first time in his decades of  
16 experience as a law enforcement officer that he had seen a journalist identified in a flyer  
17 such as the one that Fairow and Dam created. Siegel Dec., Ex. I, at 17-18.

19 Dam sent the informational flyer to BART command staff and to sergeants who  
20 would be working the protest. Siegel Dec., Ex K, at 17-19; Siegel Dec., Ex. L.

21 Chief Rainey was aware of the surveillance of Morse. Siegel Dec., Ex. M, at 16.

22 At a briefing on September 8, 2011, for BART officers who would be policing the  
23 protest, the commanders discussed two individuals of interest: Christopher Cantor (aka  
24 “Krystof”) and David Morse. Siegel Dec., Ex. C, at 26-27. Commanders distributed the  
25

26  
27 <sup>1</sup> Up until September 8, 2011, David Morse did not have any negative interaction with  
28 BART police. He had not been arrested and was not suspected of criminal conduct.  
Siegel Dec., Ex. A, at 42; Siegel Dec., Ex. E, at 43-44; Siegel Dec., Ex. M, at 18.

1 flyer that showed Cantor and Morse. Siegel Dec., Ex. C, at 28. The two were identified as  
2 “subjects.” Siegel Dec., Ex. K, at 20. In fact, commanders specifically discussed how  
3 Morse and Cantor might be subject to arrest. As Dam testified, “the order was we have  
4 to see what they’re doing . . . if they’re inciting a riot or acting in a criminal manner, they  
5 were to be arrested.” Siegel Dec., Ex. K, at 36; Siegel Dec., Ex. L, at 10-12.

7 BART utilized undercover police officers to monitor David Morse during the  
8 September 8, 2011, protest. Siegel Dec., Ex. E, at 44; Siegel Dec., Ex. K, at 30.

9 During the protest, Officer Dam sent out multiple “Intel Updates” that described  
10 the location and conduct of Morse. Siegel Dec., Ex. K, at 40-41; Siegel Dec., Ex. L(23).

12 **D. The BART Commanders’ Focus on Morse Led Multiple Officers  
13 to Assume that Morse was a “Leader” of the Protests**

14 When Fairow wrote to Dam regarding his surveillance of Morse, he identified  
15 Morse as “the Indybay ‘reporter’ who collaborates with Cantor.” *Id.* at 68. Fairow also  
16 referred to Morse as a “scout” on behalf of the protestors, and claimed that Morse was  
17 “posing” as a possible reporter. Siegel Dec., Ex K, at 24-25, 27; Siegel Dec, Ex. L, at 2-3.  
18 Based on the information he received from Fairow, Dam assumed that Morse was a  
19 “leader” of the protests. Siegel Dec., Ex. J, at 27-28; Siegel Dec., Ex. L, at 15.

21 In reality, Cantor was widely known as a protest leader, but Morse did not have  
22 that reputation. Siegel Dec., Ex. N, at 13.

23 During the protest on September 8, 2011, BART officers referred to Morse as a  
24 “subject” or “secondary subject.” Siegel Dec, Ex. E, at 54-55. Fairow later admitted that  
25 Dam’s informational flyer may have led to officers characterizing Morse as a “subject”  
26 because “he’s the second person on that document.” *Id.* at 55; Siegel Dec., Ex. B(4).

1 Later, when BART police prepared to make arrests, Coontz passed along the  
 2 message that Morse should be among the first arrested, referring to Morse as the  
 3 “sidekick” of Mr. Cantor. Coontz testified that the BART officers would know that Morse  
 4 was the “sidekick” he was referring to, because “everybody understood the two were very  
 5 close together and that they were working together.” Siegel Dec., Ex. G, at 60.  
 6

#### 7 **E. Hartwig Ordered Coduti to Arrest Morse**

8 On September 8, 2011, BART police permitted the protest to continue for  
 9 approximately fifteen minutes. (Morse Dec. ¶¶ 29-41.) Then, at defendant Hartwig’s  
 10 direction, a line of police encircled the main group of protestors, thus detaining several  
 11 dozen individuals. Officer Shane Coduti, who was eventually assigned to write the police  
 12 report concerning Morse, described the events leading up to Morse’s arrest as follows:  
 13

14 Q: Do you remember what led to the encirclement?

15 A: Again, I remember a lot of screaming, a bunch of people yelling “Don’t  
 16 block the fare gates. You’ll be arrested.” I heard that numerous times.  
 17 Then someone gave an order; the crowd was encircled. That’s all I  
 18 remember.

19 Q: Then after the encirclement, you became involved; is that correct?

20 A: That’s correct.

21 Q: What happened?

22 A: At that point, I was standing still at my location by the hallway. Deputy  
 23 Chief Hartwig approached me, and he pointed at David Morse and he said,  
 24 “Go arrest him.” I said, “Okay, sir.”

25 Q: And prior to that order, had you been observing David Morse?

26 A: I had seen him as part of the crowd, yes.

27 Q: Had you been paying special attention to him?

28 A: No. (Siegel Dec., Ex. C, at 37.)

Lieutenant Coontz confirmed that Hartwig gave the order to arrest Morse. Siegel  
 Dec., Ex. G, at 53-54, 58-59. After receiving the order, Coontz called via police radio for  
 officers to “arrest Krystof and his sidekick first.” *Id.* at 55-58; Siegel Dec., Ex. H.

At the time of his arrest, Morse was holding two cameras and was displaying a  
 press pass. Siegel Dec. ¶¶ 16-21 and Exhs. O, P, and Q (BART station closed circuit

1 television footage (CCTV) showing Morse's conduct during the protest). He was not  
2 acting as a protestor; rather, he was working as a journalist. Morse Dec. ¶¶ 29-44.

3 Coduti roughly pulled Morse from the crowd and placed handcuffs tightly around  
4 Morse's wrists. Coduti took Morse to a small office within a BART police substation at  
5 the Powell Street station. He asked Morse if he was "Dave Id." "Dave Id" is the nom de  
6 plume that David Morse has used as a journalist at Indybay.org. *Id.* at ¶¶ 49-52.

8 Morse was forced to spend several hours in custody. BART police transferred him  
9 from the Powell Street substation to San Francisco County Jail at 850 Bryant Street.  
10 There, Morse was presented with a citation and given back his property. *Id.* at ¶¶ 53-59.

#### 12 **F. Hartwig Personally Released Every Other Journalist**

13 Other than Morse, BART did not arrest any other journalist on September 8,  
14 2011. Siegel Dec., Ex. M, at 43-44. Numerous media were within the protest group.  
15 Many of these media stayed close to Christopher Cantor, one of the protest leaders.  
16 Siegel Dec., Ex. A, at 84-86; Siegel Dec., Ex. B(8); Siegel Dec. ¶¶ 16-21, Exhs. O, P, Q.

18 Officer Schlegel witnessed Hartwig releasing journalists from the encirclement.  
19 Hartwig simply asked journalists to step forward and present their credentials, and then  
20 they were released. Siegel Dec., Ex. N, at 22.

#### 22 **G. After the Protest, BART Commanders Justified the Arrest By Claiming Morse Was Not a Legitimate Journalist**

23 Hartwig told media after the September 8, 2011, protest, that "legitimate  
24 members of the media were identified and released." Siegel Dec., Ex. A, at 132.

26 Hartwig's statement regarding "legitimate" media was echoed by Deputy Chief  
27 Fairrow, who wrote, after the protest on September 8, 2011, that BART officers had  
28 "sort[ed] through the group of detainees, releasing bonified [*sic*] members of the press

1 and taking those protesters participating in blocking gates into custody.” Siegel Dec., Ex.  
2 E, at 22; Siegel Dec., Ex. F(13).

3 **H. BART Commanders Sought Morse’s Prosecution, but the**  
4 **District Attorney Dismissed All Charges**

5 After Morse’s arrest, Chief Rainey contacted the San Francisco District Attorney  
6 and expressed his desire that he be prosecuted for “illegal behavior as far as disrupting  
7 our operations and threatening public safety.” Siegel Dec., Ex. M, at 40-41.

8 The District Attorney dismissed all charges against Morse. Morse Dec. ¶ 62.

9 **I. BART PD Violated Multiple Policies as they Policed the Protest**

10 **a. Failure to permit protest in the “free area.”**

11 Prior to September 8, 2011, BART announced that protestors could demonstrate,  
12 march, or protest in the free area of the BART stations, so long as they did not block  
13 access or the operations of the transit system. Siegel Dec., Ex. N, at 14. Hartwig admits  
14 that Morse was in the “free area” at the time of his arrest. Siegel Dec., Ex. A, at 33-34.

15 **b. Failure to provide a safe staging area for media.**

16 BART policy requires that at political protests BART police should designate a  
17 safe staging area for media. Hartwig first testified that, “There is always an area that’s  
18 deemed safe and designated for the media.” When asked again, he admitted there was  
19 not a specific staging area for the media on September 8, 2011. Siegel Dec, Ex. A, 11-12.

20 **c. Failure to communicate with protest leaders.**

21 BART Policy is to contact protest organizers in advance of the protest whenever  
22 possible. Hartwig made no attempt to meet with Cantor or Morse, even though both  
23 were discussed as “leaders.” Siegel Dec., Ex. A, at 31-32. When pressed about his failure  
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1 to attempt communication with protest leaders, Hartwig justified his decision, stating,  
2 “I never recognized Mr. Cantor as the organizer or planner.” Siegel Dec., Ex. A, 91

3 **d. Failure to provide dispersal orders.**

4 BART policy states that, “the only proper basis for a multiple simultaneous arrest  
5 of all the individuals at a demonstration is failure to disperse.” Hartwig admitted that  
6 this policy was not followed on September 8, 2011. In explanation for why the policy was  
7 not followed, he testified, “the crowd that was encircled failed to disperse after the  
8 dispersal announcement was made.” Siegel Dec., Ex. A, at 14-15. Hartwig also testified  
9 that he believed that a proper dispersal order was given. *Id.* at 138.  
10

11 Officer Schlegel described a proper dispersal order. Siegel Dec., Ex. N, at 19-20.  
12 He told Internal Affairs that he did not hear any such formal order. *Id.* at 21. Schlegel,  
13 who policed many of the BART protests during the summer and fall of 2011, testified  
14 that the September 8, 2011, protest was unique, in terms of BART utilizing the tactic of  
15 encircling dozens of protestors. Siegel Dec., Ex. N, at 11.  
16

17 Lieutenant Coontz, who Hartwig identified as the one who gave up to three  
18 “dispersal orders,” only remembers telling those present that, “it was unlawful to block  
19 the fare gates, to block access to the system, and that if they did so or continued to do so,  
20 they’d be subject to arrest.” Siegel Dec., Ex. G, at 51-52. Coontz did not describe these  
21 announcements as “dispersal orders,” however. He only considered his messages to be  
22 “advisements as to what the possible consequences were.” *Id.* at 53.  
23

24 **e. Failure to cite and release.**

25 Morse was arrested for an infraction of Penal Code 369i. Siegel Dec., Ex. C, at 53;  
26 Siegel Dec., Ex. D. Ordinarily, a person arrested for an infraction would be cited and  
27 released, but BART PD refused to do so. Siegel Dec., Ex. C, at 53.  
28



1                   **f. Failure to treat all journalists equally.**

2           BART policies require that BART police provide alternative journalists with the  
3 same access to report on events in BART facilities as would be accorded to a mainstream  
4 journalist. Siegel Dec., Ex. A, at 38-39. When BART commanders sought to justify  
5 Morse’s arrest, however, they repeatedly referred to the fact that he was not a  
6 “mainstream” or “legitimate” journalist.  
7

8                   **g. Failure to file a supplemental report.**

9           Hartwig admits that Coduti relied upon him in arresting Morse. Siegel Dec., Ex.  
10 A, at 7-8. Ordinarily, an officer who witnesses conduct that forms the basis of probable  
11 cause should submit a report. Siegel Dec., Ex. C, at 10. But Hartwig refused to file a  
12 supplemental report. Siegel Dec., Ex. A, at 26.  
13

14                   **J. Hartwig Gave Inconsistent Testimony**

15                   **a. Hartwig arrested Morse for failure to disperse.**

16           Hartwig testified that Morse was arrested for failure to disperse. Hartwig claimed  
17 that Morse and the other protestors were given the opportunity to disperse before the  
18 police encircled them. Siegel Dec., Ex. A, at 23-24. Hartwig testified that he detained the  
19 entire mass of protestors, including journalists, because “I’d come to the determination  
20 that the people that were within the circle had made a willful choice to stay and we had  
21 run our course.” *Id.* at 71. But Hartwig admitted that he subsequently determined that  
22 some people should be released. The only people released were journalists. *Id.* at 72.  
23  
24

25                   **b. Hartwig released only “mainline” journalists.**

26           Hartwig admitted that San Francisco Chronicle reporter Vivian Ho was in the  
27 same group as Morse, but was not arrested. *Id.* He states that, “There was dispersal  
28 notices read, and the majority of . . . people at that time dispersed. I believe Vivian Ho



1 did not.” *Id.* at 37. When asked at his deposition to distinguish the conduct of Vivian Ho  
2 from the conduct of Morse, Hartwig stated, “she was a mainline journalist.” *Id.* at 38.  
3 Hartwig’s deposition testimony was consistent with his statement to media after the  
4 September 8, 2011, protest, when he declared, “legitimate members of the media were  
5 identified and released.” *Id.* at 132.  
6

7 Deputy Chief Fairow made nearly identical comments as Hartwig, also on  
8 September 8, 2011. Siegel Dec., Ex. E, at 23, 24. Years later, Chief Rainey would  
9 continue to state that Morse was “supposedly” a journalist. Siegel Dec., Ex. M, at 41-42.  
10

11 **c. Morse was arrested for associating with a protest leader.**

12 Hartwig also testified that Morse was distinguishable from Vivian Ho, because he  
13 “interacted” with Christopher Cantor, a leader of the September 8, 2011 protest. *Id.* at  
14 39. He testified that Morse committed an actionable crime because he was “stand[ing]  
15 side by side with Mr. Cantor in the encircled group.” *Id.* at 42.  
16

17 **d. Morse was arrested for marching, blocking fare gates.**

18 Hartwig’s also testified that he “witnessed David Morse being an active  
19 participant of the protest at the Powell Street BART station, which included marching in  
20 a circular fashion around the ticket vendors, blocking the fare gates, impeding the flow  
21 of patrons entering and exiting the BART station.” *Id.* at 46. Pressed for detail, Hartwig  
22 asserted that Morse “blocked fare gates and blocked patrons,” and that Morse did this  
23 “[e]ither in front of the fare gates [or] in front of the patrons.” *Id.* at 47. Then Hartwig  
24 admitted that he could not remember a specific instance of Morse standing in front of  
25 the fare gates. *Id.* at 47-48.  
26  
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1                   **e. Morse “blocked fare gates” by failing to disperse.**

2           Hartwig claimed that “every person” that blocked fare gates was arrested. Siegel  
3 Dec., Ex. A, at 49. But as his deposition testimony makes clear, his only evidence that  
4 anyone blocked fare gates was that they disregarded the alleged dispersal orders:  
5

6                   Q: How did you determine whether someone was intentionally or  
unintentionally blocking the fare gates?

7                   A: I relied upon multiple dispersal notices to disperse from the area. If you  
8 failed to do so, you were subject to arrest. Siegel Dec., Ex. A, at 36.

9                   **f. Morse was arrested for “creating a worse situation.”**

10           Prior to this litigation, Hartwig gave sworn testimony to Internal Affairs, as part  
11 of an investigation initiated in response to a complaint that Morse filed with BART  
12 concerning his unlawful arrest on September 8, 2011. In the IA interview, Hartwig was  
13 asked directly what “separated” Morse from the other journalists who had been detained  
14 by BART. Hartwig responded: “[M]y concern was the presence of Mr. Cantor and Mr. Id  
15 in the circle was creating a worse situation and . . . they needed to be removed  
16 immediately from the circle.” Siegel Dec., Ex. B(9), at 20.  
17

18           Hartwig also told Internal Affairs that Morse had been marching at “the front of  
19 the line” of protestors. Siegel Dec., Ex. A, at 109; Siegel Dec., Ex. B(9) at 21-22. In his  
20 deposition, Hartwig briefly abandoned this allegation, instead testifying that “Whether  
21 there was affront of the line or back of the line or middle of the line, it was more circular,  
22 but what I witnessed was violations of 369i.” Siegel Dec., Ex. A, at 109. Then, finally,  
23 after consulting with counsel off the record, Hartwig re-asserted that Morse had  
24 marched at the front of the line. *Id.* at 111-115.  
25  
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1                   **K. Hartwig’s Testimony Was Contradicted by Other BART Officers**

2                   **a. Coduti: Hartwig ordered Morse’s arrest.**

3                   Hartwig testified that Officer Coduti made the probable cause determination with  
4 respect to David Morse. Siegel Dec., Ex. A, at 7-8. Hartwig denied that he chose Morse  
5 for arrest. *Id.* at 26-27, 141-143. Hartwig also denied that Coduti asked him to testify at  
6 Morse’s criminal trial regarding the probable cause for Morse’s arrest. *Id.* at 27-28.

7                   Coduti testified that Hartwig ordered the arrest. In fact, when Morse was facing  
8 criminal prosecution for alleged violation of Penal Code 369i, Coduti wrote to Hartwig,  
9 “I wanted to see if you could come to court so you could explain what you saw to the  
10 judge, to make this violation stick.” Siegel Dec., Ex. A, at 141; Siegel Dec., Ex. B(11).

11                   **b. Coduti and Coontz: Morse was not chanting or marching.**

12                   Hartwig testified that Morse was chanting and marching. But Coduti did not see  
13 David Morse chanting or marching on September 8, 2011. Siegel Dec., Ex. C, at 39.  
14 Lieutenant Coontz did not see Morse chanting, either. Siegel Dec., Ex. G, at 48.

15                   Coduti told Internal Affairs that Morse “was taking pictures of protestors” and  
16 was in the larger group that was allegedly blocking the fare gates. Siegel Dec., Ex. C, at  
17 41-43. IA specifically asked Coduti if he thought Morse was “an agitator,” and Coduti  
18 responded: “I don’t know – this is my only interaction with him. I just know that he was  
19 taking pictures. He was, you know, getting in there and taking pictures of the other  
20 people that were in charge of this demonstration.” *Id.* at 43.

21                   Coduti testified that there was not any conduct by David Morse that  
22 distinguished him from anyone else in the protest crowd. *Id.* at 55.  
23  
24  
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26  
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1                   **c. Coontz: “I never issued a formal dispersal order.”**

2                   During the protest, Coontz gave announcements, over a megaphone, advising  
3 customers and protestors to leave the Powell Street Station. He directly contradicted  
4 Hartwig’s claim that he had given dispersal orders, however. Siegel Dec., Ex. G, at 63.  
5

6                   Q:     At that stage, were there formal dispersal orders issued?

7                   A:     No. **I never issued a formal dispersal order.** They were told  
8 that the station was closed and they would have to leave. It was not  
9 a dispersal order under the law. It was just an advisement that the  
10 station was closed. Siegel Dec., Ex. G, at 63 (emphasis added).

11                   **d. Hayes: the police report failed to show probable cause.**

12                   Lieutenant Hayes was assigned to review Coduti’s police report. Hayes reviewed  
13 the police report and found that it lacked a sufficient description of probable cause.  
14 Siegel Dec., Ex. I, at 22-26. Hayes refused to approve the report.

15                   Hayes described in detail how the report was lacking. For example, the report  
16 failed to show the details of any “dispersal order” that was given prior to Morse’s arrest,  
17 and it failed to demonstrate how close to the fare gates Morse stood. *Id.* at 23-25. Hayes  
18 concluded that Coduti “did not observe [Morse’s] exact participation” in the protest.  
19 Instead, Coduti had expressed that the entire group was in violation of the law, and  
20 therefore Morse could be arrested. *Id.* at 35-38; Siegel Dec., Ex. J, at 46-49. Hayes  
21 recommended that Hartwig write a supplemental report. *Id.* at 29-30. Coduti was  
22 uncomfortable asking the Deputy Chief for a report, however. Siegel Dec., Ex. C, at 56.  
23

24                   **e. Coontz and Schlegel: journalists who “blocked fare gates”  
25 were released when they displayed a press pass.**

26                   Hartwig claimed that an individual probable cause determination was made as to  
27 each journalist who was encircled by BART police. Siegel Dec., Ex. A, at 72.  
28

1 Coontz testified that, after BART police encircled the main group of protestors,  
2 defendant Hartwig invited journalists to “come forward, identify themselves and they  
3 would be released from the circle.” Siegel Dec., Ex. G, at 65. Multiple journalists were  
4 then released, even if they had been “incidentally in front of the fare gates” while  
5 covering the story. *Id.* at 65-66.

7 Schlegel testified that he observed how journalists were released. The only factor  
8 considered was whether or not a journalist could provide press credentials. If the  
9 individual had press credentials, they were released. Siegel Dec., Ex. N, at 22.

10 **f. Coduti and Dam: Hartwig participated in targeting Morse.**

11  
12 At a pre-protest meeting at BART headquarters on September 8, 2011, Officer  
13 Dam passed out the flyer showing Cantor and Morse, and officers discussed how Morse  
14 might be legally arrested. Siegel Dec., Ex. K, at 36; Siegel Dec., Ex. L, at 10-12.

15 Hartwig denied being present at the meeting. Siegel Dec., Ex. A, at 57. He also  
16 denied seeing the information flyer that pictured Morse and Cantor. *Id.* at 64, 65.

17  
18 But Officer Dam remembered seeing Hartwig at the same meeting. Siegel Dec.,  
19 Ex. K, at 17. Coduti also remembered that Hartwig was there. Siegel Dec., Ex. C, at 20.

20 **L. Hartwig’s Testimony is Contradicted by Official BART Records**

21 Hartwig testified that Lieutenant Coontz gave as many as three dispersal orders.  
22 Siegel Dec., Ex. A, at 12-14. Hartwig claims that these dispersal orders were given before  
23 the order was given to arrest David Morse.

24  
25 The CAD timeline contradicted this. Siegel Dec., Ex. A, at 75-77; Ex. B(5).  
26 According to the CAD timeline, only one dispersal order was given, and this was given at  
27 5:26 p.m., several minutes after BART PD had encircled Morse and the larger group of  
28 protestors and journalists. *Id.*

1 Hartwig explained that, pursuant to BART custom and practice, a CAD report is  
2 prepared by the communications director by reviewing the audio tapes during a police  
3 action. Hartwig testified that recorded timeline oft the CAD record was unreliable,  
4 particularly in regard to the reported time of 5:26 p.m. as being the time that a dispersal  
5 order was given. Siegel Dec., Ex. A, at 25, 93-94. But then he testified that the way to  
6 verify the CAD is to review the original audio records. Ex. A., at 77.

8 The original audio records were produced by BART during discovery. They  
9 substantiate the CAD log, and discredit Hartwig’s account. Siegel Dec. ¶ 22 and Ex. R  
10 (audio file revealing that an officer announced, via CAD, that the “dispersal order” had  
11 been given at 5:26 p.m.).

13 Hartwig did not make written records during the September 8, 2011. In order to  
14 keep track of the time notations, Hartwig stated, “I relied upon the CAD system.” *Id.* at  
15 101. By CAD system, Hartwig meant: “The audio files along with the interpretation that  
16 turns into an actual document.” *Id.* at 102.

### 19 III. STANDARD OF REVIEW

20 Summary judgment is appropriate only “if the pleadings, depositions, answers to  
21 interrogatories, and admissions on file, together with the affidavits, if any, show that  
22 there is no genuine dispute of material fact and that the moving party is entitled to a  
23 judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party has the burden of  
24 establishing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*,  
25 477 U.S. 317, 323 (1986). Defendants here have not carried that burden.  
26  
27  
28

1 **IV. ARGUMENT**

2 **A. Morse Establishes his Fourth Amendment Claim By Showing (1)**  
 3 **BART Consented to His Presence and (2) Hartwig Arrested Him**  
 4 **Despite the Absence of Probable Cause**

5 **1. Consent is a perfect defense to trespass.**

6 “It is well established that an arrest without probable cause violates the Fourth  
 7 Amendment and gives rise to a claim for damages under § 1983.” *Blomquist v. Town of*  
 8 *Marana*, 501 Fed.Appx. 657, 659 (9th Cir. 2012). Morse can prove his claim by showing  
 9 that there was no probable cause for Hartwig to arrest him under Penal Code § 369i, a  
 10 statute that prohibits “trespass on railroad or transit-related property.” Cal. Pen. § 369i.  
 11

12 Consent is a perfect defense to a trespassing claim, since “lack of consent is an  
 13 element of the wrong.” *Civic Western Corp. v. Zila Industries*, 66 Cal.App.3d 1, 16 (App.  
 14 2 Dist. 1977). “If words or conduct are reasonably understood by another to be intended  
 15 as consent, they constitute apparent consent and are effective as consent in fact.” Rest.  
 16 2d Torts § 892(2). Penal Code § 369i, like other trespassing statutes, possesses a consent  
 17 exception. *Cf.* Cal. Pen. §§ 369i(a) (restricting offenses to those who enter “without  
 18 permission”), 602(m) (prohibiting occupation “without the consent of the owner”).<sup>2</sup>  
 19

20 **2. BART consented to the presence of journalists—including**  
 21 **Morse—during the protest in question.**

22 Here, Morse establishes a triable issue of fact as to consent. He shows that, prior  
 23 to the protest in question, BART told protestors that First Amendment activity would be  
 24  
 25  
 26

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27 <sup>2</sup> Defendants argue that “[t]here was no case authority as of September 2011 specifying  
 28 the proper (or improper) grounds for a 369i arrest.” (Dkt. 54 at 24, 25.) This argument  
 ignores the plain language of the law. Penal Code § 369i is a trespass statute.

1 permitted in the “free area” of BART stations, and that the September 8, 2011, protest  
2 took place in the “free area” of the Powell Street Station.

3 Morse shows that, by virtue of BART’s published policies, media are entitled to  
4 cover public demonstrations, and that BART PD are expected to provide a safe area in  
5 which media can document such protests. Morse also shows that, on September 8, 2011,  
6 BART failed to provide a safe area for media.

7  
8 Morse shows that, even though media were trapped by the encirclement of BART  
9 officers, every journalist except for Morse was permitted to leave without facing arrest,  
10 simply by presenting a press pass. Morse was carrying a press pass that day.

11  
12 Morse also demonstrates that, from the point of view of several on-scene officers,  
13 his conduct that day was indistinguishable from other journalists. Morse further  
14 corroborates this fact through BART’s closed circuit television (CCTV) footage, which  
15 shows Morse documenting the protest in the same manner as various other journalists.

16  
17 Hartwig admitted that dispersal orders were needed before any of the protestors  
18 could be arrested for protesting. And Coontz, who Hartwig claimed gave three dispersal  
19 orders, testified that he gave no such order.

20 Because Morse has presented evidence that BART consented to the presence of  
21 journalists at the protest, and because Morse has established an issue of fact as to  
22 whether BART gave fair notice to journalists that their presence was unlawful prior to  
23 subjecting him to arrest, summary judgment should be denied.

### 24 25 **3. Morse did not block fare gates.**

26 Defendants argue that probable cause existed to arrest Morse because Hartwig  
27 “observed Plaintiff walk with the crowd in the protest and block the fare gates and block  
28 patrons.” (Dkt. 54 at 17.) This account is contradicted by the evidence, however.



1 Hartwig himself states that he determined that Morse “blocked fare gates”  
2 because Morse failed to heed “multiple dispersal orders.” Siegel Dec., Ex. A, at 36.  
3 Morse denies hearing dispersal orders, however, and his time-stamped photographs  
4 corroborate that no dispersal order was issued until after he was trapped by a circle of  
5 BART PD officers. Morse Dec. ¶¶ 40-46. Furthermore, Coontz—the person identified by  
6 Hartwig as giving the dispersal orders—denies that he gave them. Because Hartwig’s  
7 purported probable cause regarding “blocking fare gates” comes down to the issue of  
8 dispersal orders, and because there are discrepancies in the evidence as to whether any  
9 such orders were given, summary judgment should be denied.  
10  
11

12 **4. Factual disputes are intertwined with the issue of qualified**  
13 **immunity, and preclude summary judgment.**

14 Qualified immunity may not be granted if disputed factual issues relating to the  
15 existence of probable cause are intertwined with the qualified immunity inquiry. *Perez-*  
16 *Morciglio v. Las Vegas Metropolitan Police Dept.*, 820 F.Supp.2d 1111, 1122 (D. Nev.  
17 2011). Furthermore, qualified immunity may not be invoked by those who knowingly  
18 violate the law. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986). In making the qualified  
19 immunity determination, the Court views the facts alleged in the light most favorable to  
20 the party asserting the injury. *Sorrels v. McKee*, 290 F.3d 965, 696 (9th Cir. 2002).  
21

22 To defeat qualified immunity, Morse must show that defendants violated a  
23 constitutional right, and that this right was clearly established. *See Saucier v. Katz*, 533  
24 U.S. 194, 201 (2001). The inquiry is “whether it would be clear to a reasonable officer  
25 that his conduct was unlawful in the situation he confronted.” *Id.* at 202.  
26

27 Here, defendant Hartwig testified that he only intended to arrest someone who  
28 knowingly blocked fare gates during the protest. Siegel Dec., Ex. A, at 22-23. Lieutenant

1 Coontz agreed that, in order for BART police to arrest somebody, they would have to  
2 “willful[ly] act to impede the services of the system.” Siegel Dec., Ex. G, at 31-32. Any  
3 reasonable police officer would know that, in order to arrest an individual at a BART  
4 station for the crime of “trespass on transit-related property” under Penal Code 369i,  
5 the individual would need to be intentionally interfering with the fare gates.  
6

7 Hartwig testified that he arrested Morse because he blocked fare gates. He  
8 testified that he knew Morse had blocked fare gates because Morse failed to disperse  
9 following dispersal orders. Hartwig admitted that BART PD needed to give proper  
10 dispersal orders before arresting anyone for failure to disperse. Hartwig pointed to  
11 Coontz as the person that gave the dispersal orders. Siegel Dec., Ex. A, at 12-13.  
12

13 Yet, Coontz denied that he gave any dispersal orders. Because there are diverging  
14 accounts as to the issue of dispersal orders, it is reasonable for a jury to find that  
15 Hartwig’s credibility is at issue, and thus infer that he intentionally violated Morse’s  
16 constitutional rights. Because there is a triable issue of fact as to whether Hartwig  
17 knowingly arrested Morse in violation of the law, qualified immunity should be denied.  
18

19 **B. Morse Establishes his First Amendment Claim through**  
20 **Evidence of Inconsistent Justifications, Deviations from Policy,**  
21 **Motive to Retaliate, and Lack of Probable Cause**

22 **1. Retaliation may be proved by circumstantial evidence.**

23 Retaliatory motive is a question of fact, and can be inferred from a number of  
24 signs, including a history of conflict between the parties, unjustifiably and uncommonly  
25 harsh treatment, and defendants’ past statements. *Beck v. City of Upland*, 527 F.3d 853,  
26 868 (9th Cir. 2008). A § 1983 First Amendment plaintiff may also present a party’s  
27 misrepresentations and its failure to follow standard procedures as evidence of  
28

1 retaliatory animus. *See Allen v. Iranon*, 283 F.3d 1070 (9th Cir. 2002) 283 F.3d 1070  
2 (looking at a § 1983 First Amendment retaliation claim in the employment context).

3 The Supreme Court describes a “principle of evidence law that the factfinder is  
4 entitled to consider a party’s dishonesty about a material fact as affirmative evidence of  
5 guilt.” *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 174 (2000).

7 Additionally, in cases involving retaliatory police action, “Demonstrating that  
8 there was no probable cause for the underlying criminal charge will tend to reinforce the  
9 retaliation evidence and show that retaliation was the but-for basis for instigating the  
10 prosecution.” *Hartman v. Moore* (2006) 547 U.S. 250, 261. “[A] retaliatory motive on  
11 the part of an official urging prosecution combined with an absence of probable cause  
12 supporting the prosecutor’s decision to go forward are reasonable grounds to suspend  
13 the presumption of regularity behind the charging decision.” *Id.* at 265.

15 **2. Hartwig’s retaliatory animus can be inferred based**  
16 **upon his inconsistent testimony.**

17 As discussed above, Hartwig gave inconsistent testimony concerning several  
18 material issues, including (1) who made the decision to arrest David Morse, (2) whether  
19 Hartwig himself participated in the pre-protest efforts to target Morse for arrest, and (3)  
20 what probable cause existed for arrest. Because defendant Hartwig’s credibility is called  
21 into question by sworn testimony of BART officers, Morse’s sworn declaration, and  
22 official BART records, it is reasonable for a jury to infer his retaliatory motive.

24 **3. Hartwig’s retaliatory animus can be inferred based**  
25 **upon his departure from relevant BART policies.**

26 Hartwig also failed to abide by BART policies that are critically relevant to the  
27 protection of First Amendment rights. Specifically, Hartwig (1) failed to provide a safe  
28 staging area for media, (2) failed to issue proper dispersal orders, thus depriving Morse

1 of fair notice before facing arrest, (3) failed to treat Morse, an independent journalist, in  
2 the same fashion as mainstream journalists, and (4) failed to cite and release Morse,  
3 despite his arrest for an infraction. Additionally, BART commanders including Hartwig  
4 engaged in highly unusual conduct to perform surveillance on a known journalist, refer  
5 to the journalist as a “subject,” discuss how the journalist might be legally arrested, and  
6 then conduct the arrest in an arbitrary and unjust manner.  
7

8 Even though Hartwig may not have ordered the creation of the intelligence flyer  
9 concerning Morse, and even though Hartwig may have delegated the task of arresting  
10 Morse to a lower ranking officer, Hartwig himself can be held liable for this concerted  
11 action. *See Hartman v. Moore, supra*, 547 U.S. at 264. Coduti’s conduct can be  
12 attributed to Hartwig because Coduti was a mere “rubber stamp” for Hartwig’s order to  
13 arrest Morse. *See Hartman, supra*, 547 at 264. Fairow’s conduct also can be attributed  
14 to Hartwig because Fairow gave Hartwig full responsibility for policing the protest in  
15 question, and Hartwig in turn incorporated Fairow’s intelligence-gathering activities  
16 into his command of BART PD’s efforts to police the protest.  
17  
18

19 Because Hartwig failed to abide by policies designed to protect the First  
20 Amendment rights of journalists, and because Hartwig participated in a conspiracy to  
21 surveil Morse and ultimately seek his arrest, a jury may infer his retaliatory motive.  
22  
23

#### 24 **4. Hartwig is not entitled to qualified immunity.**

25 Qualified immunity is not appropriate, because material issues of fact exist as to  
26 whether Hartwig and the other BART commanders intentionally targeted Morse based  
27 upon his journalistic activities.  
28

1 Even if this Court finds that BART should prevail on the issue of probable cause,  
2 Morse can state a First Amendment claim. Morse's arrest occurred on September 8,  
3 2011, nearly two years after the Ninth Circuit established "a right exists to be free of  
4 police action for which retaliation is a but-for cause even if probable cause exists for that  
5 action." *Skoog v. County of Clackamas*, 469 F.3d 1221, 1235 (9th Cir. 2006).  
6

7 BART acknowledges that multiple journalists were detained subsequent to the  
8 alleged "dispersal orders," but only Morse was subject to formal arrest. If failure to  
9 comply with dispersal orders was the reason for Morse's arrest, then the other  
10 journalists detained within the kettle would have received the same punishment.  
11 Because BART did not apply the law uniformly to journalists, it cannot claim qualified  
12 immunity. *See Skoog, supra*, 469 F.3d at 1235.  
13

### 14 15 **C. Issues of Probable Cause Support the False Arrest Claim**

16 As defendants admit, Hartwig may be held liable for a false arrest claim if he  
17 failed to possess probable cause, or if he failed to act reasonably in ordering Morse's  
18 arrest. Cal. Pen. § 847(b)(1) (cited at Dkt. 54 at 26.) As argued above, Morse establishes  
19 a triable issue of fact as to the probable cause for his arrest, and presents evidence that  
20 Hartwig gave unreliable testimony. Therefore, summary judgment should be denied.  
21

### 22 **D. Punitive Damages are Supported by the Malicious Conduct of** 23 **BART Commanders to Target and Arrest a Journalist**

24 Morse is entitled to punitive damages under federal law if he shows that Hartwig  
25 acted with reckless indifference to his rights. *Smith v. Wade*, 461 U.S. 30, 56 (1983). He  
26 is entitled to punitive damages under state law if Hartwig acted with malice. Cal. Civ. §  
27 3294. Here, Morse has established that BART commanders including Hartwig engaged  
28

1 in a conspiracy to subject him to surveillance and ultimately target him for arrest. Such  
2 allegations, if proven true, would justify the imposition of punitive damages.

3 **V. EVIDENTIARY OBJECTIONS**

4 Morse objects to and moves to strike portions of the Declaration of Kenton W.  
5 Rainey (Dkt. 56) including the attached exhibit that defendants submitted in support of  
6 defendants' motion for summary judgment/adjudication. Specifically, Morse objects to  
7 paragraphs 3 and 4 of Rainey's Declaration, including the attached Exhibit A, which  
8 constitute information and documentation that were not disclosed pursuant to Rule 26  
9 disclosures or the discovery process. Because Morse was denied the opportunity to  
10 conduct reasonable discovery concerning the attached Exhibit A, he has been prejudiced  
11 by its late introduction into the case, and the evidence should be stricken.  
12  
13

14 **VI. CONCLUSION**

15 For the aforementioned reasons, Morse has established triable issues of fact as to  
16 probable cause and BART's retaliatory animus. Furthermore, Morse has introduced  
17 evidence that permits the inference that defendants acted willfully, maliciously, and  
18 with retaliatory intent. Thus, Morse is entitled to proceed with his claims, qualified  
19 immunity should not apply, and the motion for summary judgment should be denied.  
20  
21  
22

23 Dated: January 8, 2014

SIEGEL & YEE

24 By: /s/ Michael Siegel  
Michael Siegel

25  
26 Attorneys for Plaintiff  
DAVID MORSE