

1 THOMAS F. CASEY III, COUNTY COUNSEL (SBN 47562)
Michael P. Murphy, Chief Deputy (SBN 83887)
2 Miruni Soosaipillai, Deputy (SBN 160858)
Timothy Fox, Deputy (SBN 190084)
3 Hall of Justice and Records
400 County Center, 6th Floor
4 Redwood City, CA 94063
Telephone: (650) 363-4762
5 Fax: (650) 363-4034
mmurphy@co.sanmateo.ca.us

6 Attorneys for Defendant
7 COUNTY OF SAN MATEO

8
9 Brad Yamauchi
Matthew A. Siroka
MINAMI, LEW & TAMAKI, LLP
10 360 Post Street, 8th Floor
San Francisco, CA 94108
11 Telephone: (415) 788-9000
Facsimile: (415) 398-3887

12 Attorneys for Plaintiffs
13 OSCAR BRAUN, ANDREA BRAUN
AND THE OSCAR A. BRAUN TRUST
14 DATED 1996

15
16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18

19 OSCAR BRAUN, ANDREA BRAUN and the
OSCAR BRAUN TRUST DATED 1996, et al.,

20 Plaintiffs,

21 vs.

22 COUNTY OF SAN MATEO,

23 Defendant.
24
25

Case No. CV 03-03415 MJJ

**JOINT PRETRIAL CONFERENCE
STATEMENT**

Date: September 27, 2005

Time: 3:30 p.m.

Dept.: Hon. Martin J. Jenkins

Location: Courtroom 11, 19th Floor

TRIAL DATE: OCTOBER 11, 2005

26
27 Pursuant to the Court's Pretrial Order and Federal Rule of Civil Procedure 16, the parties submit
28 this Joint Pretrial Conference Statement.

1 **I. INTRODUCTION**

2 On July 23, 2003, plaintiffs Oscar Braun, Andrea Braun and the Oscar A. Braun Trust filed this
3 action for violation of civil rights under 42 U.S.C. § 1983. Plaintiffs’ First Amended Complaint for
4 Violation of Civil Rights includes claims for First Amendment, Fourteenth Amendment Equal
5 Protection, and Fourteenth Amendment Due Process violations.¹ The dispute arises out of actions taken
6 by defendant County of San Mateo in the context of a process to legalize certain structures at plaintiffs’
7 property at 1589 Higgins Canyon Road in the unincorporated Half Moon Bay area. Plaintiffs contend
8 that the County took actions in that process which were done in retaliation for Mr. Braun’s First
9 Amendment activities, which activities included criticism of the County and County officials.

10 The County contends that it did nothing more than require the Brauns to “legalize” their buildings
11 by ensuring proper code compliance and paying the fees set by ordinance and resolution.

12 The legalization process culminated in the denial of permits by the San Mateo County Board of
13 Supervisors on July 23, 2002. The Resolution by the Board of Supervisors denying the permits stated
14 that the requirements for legalization of the septic system for the affordable housing unit (an unpermitted
15 mobile home placed on the property by the Brauns for a tenant) had not been met; that the requirements
16 for legalization of the well/water source for the affordable housing unit (again, the mobile home) had not
17 been met; and that the required fees had not been paid in full for issuance of permits for (1) the
18 affordable housing unit, (2) a 720 sq. ft. addition to the main house, (3) a stable, (4) a tractor shed, (5) an
19 agricultural barn, (6) water tanks, and (7) a storage shed adjacent to the stable. The plaintiffs contend
20 that unreasonable new conditions were placed upon the granting of the permits by the Board of
21 Supervisors after the County Planning Commission had conditionally approved them.

22 Plaintiffs subsequently filed a state court action against the County in state Superior Court,
23 seeking, among other things, a declaration that the fees were improper and not required for issuance of
24 the permits for legalization of the various structures on the property. In particular, plaintiffs disputed the

25 _____
26 ¹ The Second and Third Causes of Action were dismissed by this Court pursuant to Defendants’ Motion
27 For Summary Judgment on December 21, 2004, whereas the motion was denied with respect to the First
28 Cause of Action. This Statement therefore assumes that only the First Cause of Action is operative for
trial.

1 amount and timing of the fees imposed by the Board of Supervisors, including the amount and timing of
2 “investigation fees.” Investigation fees are permit fees imposed in cases (such as plaintiffs’) where
3 construction is completed without applying for or obtaining necessary permits, and then permits are
4 sought after the fact to “legalize” completed structures. The fees are designed to compensate the County
5 for the additional work involved in investigating and resolving code violations in completed structures.

6 The County filed a cross-complaint for code enforcement relating to the permit violations detailed
7 above. The state court action was set for trial in July 2004, but was settled in late June 2004.

8 Plaintiffs continued to pursue this action in federal court, alleging that the County’s handling of
9 this matter violated their civil rights.

10 **II. STATEMENT OF ISSUES**

11 **A. PLAINTIFFS’ LEGAL ISSUES**

12 1. Was retaliation for First Amendment activities a substantial or motivating factor in the
13 County Board of Supervisors’ actions with respect to the Brauns’ permit applications?

14 2. If the answer to 1 is “yes,” has the County met its burden to prove that regardless of any
15 improper motive, the County would have taken the same course of action?

16 3. If the answer to 2 is “no,” what is the amount of damages due to plaintiff?

17 4. Are there other County officials whose actions towards the Brauns can incur municipal
18 liability in a section 1983 case?

19 5. If the answer to 4 is “yes,” was retaliation for First Amendment activities a substantial or
20 motivating factor in those officials’ actions?

21 6. If the answer to 5 is “yes,” has the County met its burden to prove that regardless of any
22 improper motive, the County would have taken the same course of action?

23 7. If the answer to 6 is “no,” what is the amount of damages due to plaintiff?

24 **B. DEFENDANT’S LEGAL ISSUES**

25 1. Is the Board of Supervisors the “final policymaker”, under a 42 U.S.C.A. section 1983
26 analysis, for matters related to the proceedings with regard to plaintiffs’ property at 1589 Higgins
27 Canyon Road, unincorporated San Mateo County?

28 2. Do actions by the Board of Supervisors require a majority vote of their members to constitute

1 action by the “final policymaker” for purposes of analysis under 42 U.S.C.A. section 1983?

2 3. Did the County of San Mateo violate plaintiffs’ First Amendment rights of free expression by
3 retaliating against them for their prior exercise of such rights during the process of considering and acting
4 on permits to legalize unpermitted construction on plaintiffs’ property at 1589 Higgins Canyon Road,
5 unincorporated San Mateo County?

6 a. Was plaintiffs’ speech “public speech” protected by the First Amendment?

7 b. If the answer to issue 3(a) is yes, did the “final policymaker” know of plaintiffs’ First
8 Amendment speech?

9 c. If the answer to issue 3(b) is yes, was plaintiffs’ speech a substantial or motivating
10 factor in the decision by the “final policymaker”?

11 d. If the answer to issue 3(c) is yes, would the “final policymaker” have made the same
12 decision regardless of plaintiffs’ First Amendment speech?

13
14 **III. PLAINTIFF’S POSITION**

15 **Summary of Legal Contentions**

16 Section 1983 of Title 42 of the U.S. Code, enacted by Congress pursuant to § 5 of the Fourteenth
17 Amendment, creates an action for damages and injunctive relief against local governmental bodies,
18 including counties, who deprive a plaintiff of rights, privileges, or immunities secured by the
19 constitution. Section 1983 incorporates the Fourteenth Amendment, which incorporates the Bill of
20 Rights and applies them to the states. Constitutional violations actionable through Section 1983 include
21 violations of the Fourteenth Amendment standing alone, such as procedural due process or equal
22 protection, or violations of the Bill of Rights. First Amendment provisions for Freedom of Speech,
23 Freedom of the Press and Freedom to Petition are among the rights applicable to the states through the
24 Fourteenth Amendment.

25 The Brauns contend that the County, and most particularly its Board of Supervisors, retaliated
26 against them for exercising their First Amendment right to free speech. Specifically, the Brauns contend
27 that the County Board of Supervisors took a series of unusual and unnecessary measures in addressing an
28 appeal of the Planning Commission’s approval of permits to legalize certain structures on their property,

1 which culminated the denial of the permits. The Board rejected the staff and the Planning Commission's
2 advice and began a series postponements rather than approving the permit applications.

3 The County contends that it did nothing more than require the Brauns to "legalize" their buildings
4 by ensuring proper code compliance and paying the fees set by ordinance and resolution. However, the
5 County has acknowledged that it has taken unprecedented actions in requiring the advance payment of
6 fees, and has even admitted that it charged unauthorized fees.

7 The Brauns have been outspoken critics of the County of San Mateo and various local no-growth
8 environmental groups aligned with the County's political leaders for many years. The Brauns contend
9 that the County retaliated against the Brauns to punish them for the vocal political opposition.

10 Specifically, the Brauns allege that the County Board of Supervisors has engaged in the following
11 retaliatory acts, including, but not limited to:

- 12 • Rejecting the ruling and advice of their own Planning Commission and County Counsel
13 by adding additional, onerous conditions to the Braun's permit approval.
- 14 • Charging planning and building permit fees before any investigation had been conducted
15 to determine what the actual fees should be.
- 16 • Enlarging the County's inquiry into the Braun's property to involve inspections to look
17 for violations which bore no relationship to existing issues, and contrary to the advice of
18 counsel.
- 19 • Issuing a Notice of Violation in February 2002 against the Brauns falsely alleging that the
20 water storage tanks had previously been cited, when in fact the tanks had been previously
21 approved by the County.
- 22 • Denying the Braun's permit applications, and issuing an Order of Abatement directing the
23 Brauns to tear down structures on their property, including their legal water storage tanks,
24 which Order indicated that the Brauns would have no further opportunity to legalize said
25 structures.

26 The Brauns intend to submit evidence at trial to substantiate their claims that these acts were done
27 in retaliation for protected First Amendment activities. The evidence will fall under the following broad
28 categories:

- Evidence of close proximity in time between the Brauns' political speech and the
County's various punitive activities against them.

- 1 • Evidence suggesting that those who opposed the Brauns' permit applications were
2 motivated by a desire to retaliate against the Brauns for protected speech, and that the
3 County was politically aligned with these opponents, and adopted their retaliatory
4 motivation in its handling of the permit applications.
- 5 • Evidence that the County's purported legitimate reasons for treating the Brauns in the
6 manner that they did are false and/or pretextual.
- 7 • Evidence that members of the County's Board of Supervisors had openly and publicly
8 censured and criticized Mr. Braun, and expressed personal animosity toward him, shortly
9 prior to the Board's rulings regarding the Braun's permit applications.
- 10 • Evidence of a financial relationship, in the form of campaign contributions, between
11 Lenore Roberts, the Braun's opponent in the permit process, and members of the Board of
12 Supervisors.
- 13 • Evidence that the County has admitted under oath that it took measures against the Brauns
14 that were unprecedented in the County's history.
- 15 • Evidence that the Brauns ultimately offered to comply with any and all conditions
16 imposed by the County.
- 17 • Evidence that the Brauns' water tanks were previously permitted, replaced at the County's
18 behest and yet were included in the Abatement Order.

Statement of Damages

19 The Brauns contend that the County's activities, and most especially their recording of two
20 Notices of Violation and a Notice of Abatement without opportunity to cure, which have clouded the title
21 of the property, have diminished the value of the property over time, and have made it essentially
22 impossible to sell the property while the market was stronger. The Brauns also contend that as a result of
23 the County's actions, they have lost a contract with Sprint to permit the leasing of space for relay towers
24 on their property, which would have resulted in substantial revenues to the Brauns over a period of
25 several years. Finally, the Brauns are seeking general damages for violation of their civil rights.

26 The Brauns damages include the following items:

- 27 1. Diminution in the value of their property.
- 28 2. Lost revenue opportunities.
3. Costs and expenses associated reappraisal and refinancing of the property.
4. Costs and expenses associated with the Brauns' prosecution of a writ of administrative

1 mandamus to overturn the County’s actions.

2 5. Emotional distress.

3 **Summary of Facts and Certain Key Pieces of Evidence**

4 Plaintiffs Oscar Braun and Andrea Braun (collectively “the Brauns”) are citizens of the State of
5 California, residing at 1589 Higgins Canyon Road in the unincorporated Half Moon Bay area of San
6 Mateo County, California (hereinafter the “Property”). At all times relevant to this action, the Brauns
7 have been the beneficial owners of the Property.

8 Defendant County of San Mateo (the “County”) is a local public entity, located within the
9 jurisdiction of the United States District Court, Northern District of California. The County administers
10 and controls the process for issuance of planning, development, horse stable, affordable housing, envi-
11 ronmental health and building permits in the unincorporated areas of the County of San Mateo.

12 Oscar Braun is the president of the Half Moon Bay Coastside Foundation, aka Save Our Bay
13 (hereinafter “Save Our Bay”), and the Brauns’ residence serves as the headquarters for Save Our Bay.
14 Save Our Bay is a community-based, 501(c)(3) nonprofit, environmental-watchdog, charitable
15 corporation. Save Our Bay is a recognized member and active participant in the NOAA Water Quality
16 Protection Program aka WQPP, the RWQCB Stormwater Pollution Prevention Program aka STOPPP,
17 the California Coordinated Resource Management Planning Council aka Coastside CRMP Council, and
18 the Coastside Fire Safe Council (representing San Mateo County Coastal Zone which comprises
19 approximately 73% of County’s land area). Save Our Bay also founded the Half Moon Bay Chapter of
20 the Surfrider Foundation.

21 The Save Our Bay facility provides early detection fire alert and access to the upper levels of the
22 watershed from the West. Save Our Bay has established the California Watershed Posse, whose members
23 work with landowners and other governmental agencies to develop and implement integrated landscape
24 scale Coordinated Resource Management Plans to assure NEPA/CEQA compliance, ecosystem
25 sustainability, and effective Fire Safe landscape and watershed planning.

26 Through his work with Save Our Bay, Oscar Braun has actively sought to establish a
27 comprehensive watershed management program in San Mateo County to avert catastrophic
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1 environmental damage to the Peninsula watershed from natural and human-made causes, including
2 environmental terrorism, firestorm and drinking water contamination. In so doing, among other
3 controversial projects, and in criticizing the status quo and drawing attention to the vulnerability of
4 existing neglected and unmanaged watershed conditions in the County, Plaintiffs have taken positions
5 that are politically unpopular with the County and others.

6 Plaintiff Oscar Braun has long been outspoken on issues of public interest. In addition to being
7 the president of Save Our Bay, Oscar Braun is also the online publisher of the California Watershed
8 Posse Town Hall forum, and the co-founder of the San Mateo County rural lands farming community
9 organization, the Coastal Family Alliance.

10 Mr. Braun has utilized these forums under his First Amendment rights of freedom of speech and
11 of the press as a frequent critic of the Board of Supervisors and various County practices, policies and
12 programs, including the Devil's Slide project and the failure of the County to provide adequate services
13 to coastal residents. He is a frequent speaker before the County Board of Supervisors and other local,
14 state and federal agencies. He uses the website as a clearinghouse for news, reports and other
15 information on public issues concerning coastal San Mateo County. Mr. Braun regularly sends e-mails to
16 a list of recipients that includes local residents, government officials at the local, county, state, and
17 federal level, and members of the press.

18 Since 1991 the Brauns have lived at and owned a residence located at 1589 Higgins Canyon Road
19 in the unincorporated area of San Mateo County. In 1998, Oscar Braun filed a notice of violation with
20 State and Federal regulatory agencies against State Parks, County of San Mateo Department of Public
21 Works, Half Moon Bay Sealing & Paving (owned by Gary & Cindy Giavnonni) for dumping into local
22 streams and wetlands and operating a dumpsite without permits from the County, State and Federal
23 Agencies. The Brauns also filed a complaint with the San Mateo County Civil Grand Jury alleging that
24 the illegal landfill activities were being conducted with the full knowledge of the County of San Mateo
25 Board of Supervisors. The Giavnonnis then filed a false claim alleging that there were toxics buried
26 on the Brauns' property.

27 County inspectors determined that there were no toxics buried on the Brauns' property, but did
28 observe a stable and other structures that had been built without a permit. Following instructions from

1 County officials, the Brauns made application to legalize a mobile home on their property and designate
2 it as low-income housing; Bernie Neves, a developmentally delayed farm worker, has resided in the
3 home for over ten years. They also filed for permits required for their stable, tractor shed, agricultural
4 barn and shed.

5 In the Fall of 2000, the Half Moon Bay Fire Marshall ordered the immediate replacement of the
6 Braun's leaking 8,000 gallon water tank. The 8,000 water tank and residential water well were both
7 originally permitted and legally mandated for fire suppression and on-site septic systems in 1991. The
8 leaking tank was ordered to be removed and the residential well connected to the two existing on site
9 5,000 gallon tanks serving a second, fifty year old well on the property. The Brauns were ordered to take
10 these actions and then apply for a building permit. The Brauns complied and then added the tanks to
11 their pending Coastal Development Permit application.

12 The Brauns had entered into a lucrative agreement with Sprint PCS to lease space on their land
13 for placement for cellular phone antennae. Sprint had applied for the relevant permits and was told it
14 would have to wait until the permitting issues on the Brauns' property was resolved.

15 On November 14, 2001, after years of delay, the Braun's PLN1999-00079 applications were
16 finally unanimously approved and granted by the County's Planning Commission. The Commissions
17 Executive Summary of Findings for PLN1999-00079 stated: "The proposed project, as conditioned,
18 complies with all applicable General Plan Policies and Local Coastal Program Policies specifically those
19 related to visual impacts. The Project is also consistent with all applicable Resource Management
20 Coastal Zone and stable regulations."

21 In December, 2001, political allies of the defendants appealed the Planning Commission's
22 approval, which then brought the Brauns' application before the Board for *de novo* review. The
23 appellants raised a host of inaccurate, untrue and irrelevant allegations, including an allegation that the
24 Brauns' home was not built according to the specifications in the planning and building permits that had
25 been issued some *eleven years earlier*. Notwithstanding appellants' claims, the staff of the
26 Environmental Services Agency recommended that the Board deny the appeal and affirm the Planning
27 Commission's decision approving the Braun's permit applications. The staff recommended approval
28 conditioned on the Brauns' paying "violation" fees, applying for building and environmental health

1 permits and insuring that the septic system for the affordable housing unit was up to current code
2 standards.

3 Despite these recommendations, the Board refused to affirm the Planning Commission’s decision.
4 Instead, the Board continued the matter and demanded that the Brauns pay building and environmental
5 health permit fees *in advance of the Brauns’ even making the application for those permits.*¹ The Board
6 further ordered the staff to issue a notice of violation, citing the Brauns for the very violations they were
7 seeking to legalize. Then, despite County Counsel’s representation that the specifications of the Brauns’
8 house relative to the 1991 permits were beyond the scope of the proceeding, and Mr. Braun’s statement
9 on the record that his residence was in compliance, the Board ordered the staff to inspect the Brauns’
10 home to determine if it complied with the previously issue permit.

11 The Brauns contend that these actions at the January meeting were taken in retaliation against the
12 Brauns for their active and vocal opposition to the many of the County’s land use policies, as well as the
13 Brauns’ whistleblowing activities which included accusing local and state agencies of violating various
14 environmental laws and as well as suing local agencies.

15 What ensued was a constantly escalating series of demands from the County, including
16 penalties and fees totaling \$45,073.24, as well as additional terms and conditions. The parties disputed a
17 number of issues including the legal status of one of the wells on the property and the amount of fees that
18 could legally be assessed. The County admitted that some of the fees were unauthorized and revised its
19 demands. Ultimately the Brauns agreed to comply with all project conditions.

20 In April 2002, Sprint cancelled its contract with the Brauns after the County told it that the
21 building code violations on the property would not be able to be resolved.

22 By the July 23, 2002, Board meeting, the Planning Department had repeatedly stated that none of
23 the projects as conditioned presented any planning issues. Indeed, the projects had previously been
24 approved by the Building and Environmental Health Departments. Moreover, in spite of the fact that the
25 Brauns had demonstrated that some of the assessed fees and penalties had no basis in law, they had

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27 ¹ The County initially told the Brauns that the fees and penalties totaled \$27,238.50.

1 agreed to accept all conditions of the permit, and pay fees they believed were unlawful. Nonetheless, at
2 the July 23, 2002 meeting, the Supervisors still denied the Brauns all of their Planning Commission-
3 approved planning permits and directed staff to issue an order to abate.

4 On August 28, 2002 the County issued an abatement order for 1589 Higgins Canyon Road which
5 included the proviso that the Brauns would be unable to reapply to legalize the structures. The abatement
6 order also included the Brauns' entire fire and septic tank water systems-effectually down zoning their
7 home and property to open space by stripping them of any rights to rebuild and disallowing repair and
8 maintenance to their previously legally permitted water and septic systems.

9 The Brauns contend that the Board's actions at the July 23, 2002 Board meeting and the
10 subsequent issuance of the abatement order were further acts of retaliation against the Brauns for the
11 First Amendment-protected activities.

12 **IV. DEFENDANT'S POSITION**

13 **A. LEGAL ISSUES**

14 Defendant contends that the decision to deny the permits was rationally based on the existence of
15 permit violations, and the dispassionate application of the Board's ordinances and resolutions setting
16 legalization fees; and that accordingly, there is no claim that presents any basis for liability against the
17 County. Defendant contends that plaintiffs cannot establish the necessary elements of their only
18 remaining cause of action, which alleges that the County violated plaintiffs' First Amendment rights of
19 free expression. Plaintiffs named only the County as a defendant, but cannot satisfy the requirements for
20 entity liability established by *Monell v. New York City Dept. of Soc. Svcs.*, 436 U.S. 658, 98 S.Ct. 2018
21 (1978), and its progeny — that a "final policymaker" must have committed or ratified a Section 1983
22 violation for the entity to be liable. There was no dispute in the summary judgment briefing that the
23 Board of Supervisors is the "final policymaker" for the County. The County contends that plaintiffs
24 cannot establish the elements necessary to prevail on the First Amendment claim under a *Monell*
25 analysis.

26 Plaintiffs allege that actions taken by the County were in retaliation for their exercise of their First
27 Amendment rights of free expression. Because only the County as an entity has been named as a
28 defendant, and because the Board of Supervisors is the "final policymaker" for purposes of the claims

1 asserted, only the actions of the Board are subject to scrutiny.

2 In order to prevail on their First Amendment claim, “plaintiffs must plead and ultimately prove
3 that their conduct was protected by the First Amendment, and, second, that such conduct prompted
4 retaliatory action by the Board [of Supervisors].” *Arroyo Vista Partners v. County of Santa Barbara*, 732
5 F. Supp. 1046, 1055 (C.D. Cal. 1990) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S.
6 274, 287, 97 S.Ct. 568 (1977)). As part of a prima facie case, a plaintiff must show that the protected
7 conduct was a “substantial” or “motivating” factor in the defendant’s decision. *Mt. Healthy*, 429 U.S. at
8 287. A defendant can rebut a prima facie case by showing that it would have made the same decision
9 regardless of plaintiff’s First Amendment activity. *Mt. Healthy*, 429 U.S. at 287.

10 A plaintiff may establish retaliatory motive by producing (1) evidence that the decision-maker
11 knew of the protected speech, and (2) evidence of at least one of the following: (a) proximity in time
12 between the protected speech and the adverse decision such that a jury could infer retaliation, (b) the
13 decision-maker’s expressed opposition to the speech, or (c) false or pretextual reasons for the decision.
14 *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 751–52 (9th Cir. 2001). Thus, in order to
15 prove that retaliation was a substantial or motivating factor in the decision to deny their permits, the
16 Brauns must necessarily first establish that a majority of Board members were aware of their expressive
17 conduct. However, “mere evidence” of such awareness is not enough. *Keyser*, 265 F.3d at 751–52
18 (plaintiffs must produce more than evidence that employer knew of protected activity); *Strahan v.*
19 *Kirkland*, 287 F.3d 821, 825 (9th Cir. 2002) (evidence of knowledge of protected activity alone not
20 enough). It is defendant’s contention that plaintiffs cannot present evidence to establish any of the three
21 types of evidence necessary to establish liability of the part of defendant.

22 Plaintiffs cannot meet their burden with regard to the “proximity in time” test. According to
23 plaintiffs’ own allegations, they have been vigorously engaged in their protected First Amendment
24 activities continuously since at least 1995. Here, the totality of circumstances leads to the conclusion that
25 no “reasonable inference” of retaliation can be drawn from the timing of the Board’s action. By
26 plaintiffs’ own assertion, their robust exercise of their First Amendment rights has been ongoing for
27 many years.

28 Furthermore, Plaintiffs cannot adduce any evidence demonstrating that a majority of Board

1 members expressed opposition to plaintiffs' exercise of their First Amendment rights. Frequently,
2 governmental decisionmakers are required to make choices that will be embraced by some and decried
3 by others. In this case, there is no evidence to indicate that a majority of Board members expressed
4 opposition to plaintiffs' alleged exercise of their First Amendment rights. Plaintiffs have remote
5 evidence of only *two* members of the Board even having an opinion about Mr. Braun's past speech
6 activities. Plaintiffs are required by *Monell* to adduce evidence that three members of the Board (*i.e.*, a
7 majority, as required by *Monell*) were concerned about Mr. Braun's political activities. Accordingly,
8 plaintiffs will not be able to produce even circumstantial evidence of retaliatory motive on the part of the
9 Board acting through a majority.

10 Finally, plaintiffs will be unable to present evidence of false or pretextual reasons for the
11 decision. The issues before the Board were straightforward: (1) did the structures meet all requirements
12 for issuance of the required permits, and (2) were the plaintiffs willing to pay all fees necessary to secure
13 these permits? Based on evidence presented at the hearing, and the Brauns' unwillingness to pay the fees
14 to legalize the structures, the Board denied the permits (and, in fact, had no option but to deny the
15 permits given its conclusions that the fees were owed by the Brauns). Because plaintiffs provided the
16 Board with this quite adequate non-retaliatory reason to deny legalization, evidence of retaliatory motive
17 is irrelevant. Even if retaliatory motive could be established, defendant can nevertheless prevail if it can
18 establish that the same decision would have been reached anyway. In this case, establishing that the
19 result of the Board of Supervisors hearing would have been the same regardless if plaintiffs' political
20 speech had never been made will be a simple matter. When plaintiffs *refused to pay the fees set by*
21 *ordinance and resolution*, the Board was left with no choice but to decline to issue permits. There is no
22 doubt that the decision would have been the same even without Oscar Braun's history of speech on
23 matters of public interest. By refusing to pay the fees set by ordinance, Mr. Braun made the Board's
24 decision easy, and made the Board's alleged retaliatory motives irrelevant.

25 **B. DAMAGES**

26 Defendant also contends that most of the damages claimed by plaintiffs are speculative in nature.
27 Defendant seeks to exclude speculative evidence of contract damages in its Sixth Motion in Limine,
28 which presents defendant's position in more detail. Defendant contends that, assuming a finding of

1 liability, the damages that can reasonably be claimed to arise from the specific violations of civil rights
2 the Brauns have alleged amount to a maximum of \$73,031 for loss of revenue under plaintiffs' five year
3 lease with Sprint PCS. At the very most, if the jury finds evidence that Sprint PCS would have
4 voluntarily renewed the site lease for 25 years, rather than the five for which it was contractually
5 obligated, the damages would be \$396,995. Plaintiffs will be unable to present evidence to support their
6 claims that the rent under the Sprint lease would have been multiplied by the number of additional
7 antennae or towers; that they had a cellular site lease with NexTel; or that they lost the opportunity to sell
8 their home for \$25 million.

9 Defendant also seeks, in its Ninth Motion in Limine, to exclude evidence that plaintiffs suffered
10 any kind of emotional injury or emotional distress as a result of the County's conduct in connection with
11 their permit applications, as plaintiffs have pled no emotional distress damages in their First Amended
12 Complaint, nor do they include emotional distress damages in their prayer for relief. They also failed to
13 disclose emotional distress damage as an element of their damages in their Initial Disclosures and did not
14 identify emotional distress as an element of their damages in their responses to written discovery.

15 In summary, it is defendant's position that plaintiffs have taken a dispute over the handling of
16 land use permits that belonged in state court (where an action based on the same facts was in fact filed),
17 and attempted to transform it into a federal civil rights case. While they may be dissatisfied with the
18 results of the process by which land use decisions are made in San Mateo County, plaintiffs will be
19 unable to establish any violation of their constitutional rights on the part of defendant or any evidence
20 that they suffered damages at the County's hands.

21 **V. WITNESSES**

22 All parties reserve the right to make objections to witness testimony at trial.

23
24 **A. PLAINTIFFS' WITNESSES**

- 25 1. Oscar Braun, Plaintiff
26 2. Andrea Braun, Plaintiff
27 3. Bernie Neves, farm laborer Moon Acres Ranch
28

- 1 4. Ted Hannig Esq., plaintiffs' former counsel
- 2 5. Terry Burnes, former San Mateo County Planning Administrator
- 3 7. William Cameron, San Mateo County Building Department
- 4 8. Jim Eggemeyer, San Mateo County Planning Review Manager
- 5 9. Steve Hartsell , San Mateo County Health Department Inspector Coastside
- 6 10. Paul Koenig, former San Mateo County Director of Environmental Services
- 7 11. Dean Peterson, Director San Mateo County Environmental Health Department
- 8 12. Anne Jensen, San Mateo County Solid Waste Investigator
- 9 13. Gary Warren, San Mateo County Code Enforcement
- 10 14. Laura Thompson, San Mateo County Planner
- 11 15. Kelly Pepper, Sprint PCS
- 12 16. Jim Mattison, Green Drake Engineering (Sprint)
- 13 17. Marcia Raines, Director San Mateo County Environmental Services
- 14 18. Rich Gordon, Member of the San Mateo County Board of Supervisors
- 15 19. Jerry Hill, Member of the San Mateo County Board of Supervisors
- 16 20. Mike Nevin, Member of the San Mateo County Board of Supervisors

19 **B. DEFENDANT'S WITNESSES**

- 20 1. Miroo Desai (formerly Miroo Brewer), former employee of San Mateo County Planning
- 21 and Building Division
- 22 2. Terry Burnes, San Mateo County Planning and Building Division
- 23 3. William Cameron, San Mateo County Planning and Building Division
- 24 4. Jim Eggemeyer, San Mateo County Planning and Building Division
- 25 5. Steve Hartsell, San Mateo County Environmental Health Services Division
- 26 6. Dean Peterson, San Mateo County Environmental Health Services Division
- 27 7. Anne Jensen, San Mateo County Environmental Health Services Division
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- 1 8. Gary Warren, San Mateo County Planning and Building Division
- 2 9. Margaret Hernandez, San Mateo County Planning Code Compliance
- 3 10. Mark Church, Member of the San Mateo County Board of Supervisors
- 4 11. Rose Jacobs-Gibson, Member of the San Mateo County Board of Supervisors
- 5 12. Rich Gordon, Member of the San Mateo County Board of Supervisors
- 6 13. Jerry Hill, Member of the San Mateo County Board of Supervisors
- 7 14. Mike Nevin, Member of the San Mateo County Board of Supervisors
- 8 15. Laura Thompson, former employee of San Mateo County Planning and Building Division
- 9 16. Kelly Pepper, Alaris Group (Sprint issue)
- 10 17. Jim Mattison (Sprint issue)
- 11 18. Cynthia Giovannoni, Brauns' neighbor
- 12 19. Lenore (Lennie) Roberts, Committee for Green Foothills

13
14 **VI. EXPERT WITNESSES**

15 **A. PLAINTIFFS' EXPERT WITNESSES**

16 Plaintiff does not intend to call any expert witnesses to testify at trial.

17 **B. DEFENDANT'S EXPERT WITNESSES**

18 1. **Monica Ip** will testify that, assuming a finding of liability, the plaintiffs suffered
19 damages of \$73,031 under the Sprint PCS Site Agreement, up to the fifth anniversary and expiration of
20 that lease on August 9, 2005; or a maximum of \$396,995 under that agreement if it were presumed that
21 Sprint PCS would have renewed the lease for four additional terms beyond the contractually obligated
22 five year term for the full 25 years allowed under the lease. Ms. Ip will testify that if the plaintiffs were
23 to produce an agreement with NexTel similar to the agreement with Sprint, the amount of damages
24 would be similar. Ms. Ip will also testify that, assuming a finding of liability, the plaintiffs suffered
25 damages of \$62,464 in connection with the delay in refinancing the mortgage on their property.

26 A copy of Ms. Ip's report, with a corrected Exhibit 1, and Ms. Ip's CV are attached to this
27 statement as Exhibit 1.

28 2. **Victor Reizman** will testify that the recorded notices of violation would not have

1 prevented the plaintiffs from being able to list the property for sale with a real estate broker, sell the
2 property, or obtain financing on the property; and that the value of the property would be affected only to
3 the extent of the cost to remedy the violations. A copy of Mr. Reizman's report and CV are attached to
4 this statement as Exhibit 2.

5 **VII. ADDITIONAL MATTERS TO BE ADDRESSED BY THE COURT**

6 **A. Order Establishing A Reasonable Limit On The Time Allowed For Presenting**
7 **Evidence (FRCP 16(c)(15))**

8 Given that the court has set aside 10 court days for the trial of this matter, the parties seek an
9 order limiting each side to four days for the presentation of evidence.

10 **B. Avoidance Of Unnecessary Proof And Of Cumulative Evidence (FRCP 16(c)(4))**

11 1) Defendant seeks a stipulation from plaintiffs that "The Oscar A. Braun Trust Dated
12 1996" be dismissed as a plaintiff to this action.

13 2) Defendant seeks a stipulation from plaintiffs that the Court should take judicial
14 notice of the following documents: Defendants' proposed Exhibit A (County Charter), and Exhibits G-S,
15 U and V (County Ordinances).

16 3) The parties were able to reduce significantly the number of motions in limine
17 through informal discussions.

18 Dated: September 19, 2005

19
20 /s/

21 Matthew A. Siroka
22 Minami Lew & Tamaki
23 Attorneys for Plaintiffs
24 OSCAR BRAUN, et al.

25 Dated: September 19, 2005

26 THOMAS F. CASEY III, COUNTY COUNSEL

27 By: /s/

28 Miruni Soosaipillai, Deputy
Attorneys for Defendant
COUNTY OF SAN MATEO

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