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17  
18 UNITED STATES DISTRICT COURT  
19 NORTHERN DISTRICT OF CALIFORNIA

20  
21 LONG HAUL, INC., et al.,  
22 Plaintiffs,  
23 v.  
24 U.S.A., et al.,  
25 Defendants.

Case No. 3:09-cv-0168 JSW  
**DEFENDANTS' NOTICES OF MOTION  
AND MOTIONS FOR SUMMARY  
JUDGMENT; JOINT MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF AND IN  
OPPOSITION TO PLAINTIFFS' MOTION  
FOR SUMMARY JUDGMENT**

[F.R.C.P. Rule 56]

Date: April 8, 2011  
Time: 9:00 a.m.  
Dept.: 11

Judge: Jeffrey S. White

1 TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that at 9:00 a.m. on April 8, 2011, or as soon thereafter as the  
3 matter may be heard in Courtroom 11 on the 19th Floor of the United States District Court for the  
4 Northern District of California, 450 Golden Gate Avenue, San Francisco, Defendants Mitchell  
5 Celaya, Karen Alberts, William Kasiske, Wade Macadam and Timothy J. Zuniga (collectively, “the  
6 University Defendants”) will, and hereby do each move for summary judgment in their favor on all  
7 claims asserted against each of them by Plaintiffs Long Haul and East Bay Prisoner Support,  
8 respectively.

9 PLEASE TAKE FURTHER NOTICE that on the date and time set forth above, Defendants  
10 United States of America, Mike Hart, and Lisa Shaffer (collectively, “the Federal Defendants”) will,  
11 and hereby do each move for summary judgment in their favor on all claims asserted against each of  
12 them by Plaintiffs Long Haul and East Bay Prisoner Support, respectively.

13 The respective Motions of the University Defendants and the Federal Defendants are based  
14 on these Notices of Motion, the Joint Memorandum of Points and Authorities in support of these  
15 Motions, the Declarations of William Kasiske, Karen Alberts, Timothy Zuniga, Lisa Shaffer, Mike  
16 Hart, Wade MacAdam, and Sara Ellis in support of these Motions, all papers and records on file with  
17 the Clerk or which may be submitted prior to or at the time of the hearing, and any further evidence  
18 and argument which may be offered.

19 Dated: February 14, 2011

SCHIFF HARDIN LLP

20 By: /s/ William J. Carroll

21 William J. Carroll

22 Attorneys for Defendants

23 MITCHELL CELAYA, KAREN ALBERTS,  
WILLIAM KASISKE, WADE MACADAM and  
TIMOTHY J. ZUNIGA

24 Dated: February 14, 2011

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25 By: /s/ Jonathan U. Lee

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1 **I. INTRODUCTION**

2 Responding to an escalating campaign of harassment and intimidation aimed at University  
3 of California faculty engaged in animal research, the University of California Police Department  
4 (“UCPD”) formed a special unit, the Animal Rights Working Group (“ARWG”). The ARWG  
5 was responsible for investigating the growing number of targeted home demonstrations,  
6 vandalism, threats, and intimidation aimed at UC Berkeley researchers and their families. The  
7 need for this unit was underscored by fire-bombings and other violent attacks directed at  
8 University personnel at UCLA and UC Santa Cruz. During the spring of 2008, the ARWG  
9 investigated a series of increasingly intimidating and threatening emails sent to UC Berkeley  
10 researchers, including, for example, one which referred to the UCLA attacks and warned the  
11 researcher to “quit torturing animals or you’re next to receive that and MUCH worse you fucking  
12 murderous scum.” Another demanded the researcher to publicly announce the end of her animal  
13 research, “or I will fuck your life up.”

14 On three separate occasions, the UCPD traced these emails to an IP address located at  
15 3124 Shattuck in Berkeley, the location of Long Haul. Officers were aware that Long Haul was a  
16 meeting place and resource for radical activists, including animal rights activists. With probable  
17 cause to believe they would find evidence identifying the perpetrator of the emailed threats,  
18 UCPD obtained a court-approved warrant to search the Long Haul premises, and pursuant to that  
19 warrant seized computers and other electronic storage devices found at that location. The warrant  
20 was supported by probable cause, was reasonably specific, and the ensuing search was properly  
21 executed. Defendants conducted a targeted, limited search of the seized computers and promptly  
22 returned all property to Long Haul. Defendants were not compelled to forego a warrant by the  
23 Privacy Protection Act (“PPA”), because they suspected a person affiliated with Long Haul was  
24 complicit, and because they were unaware of any publishing activity covered by the PPA, in any  
25 event.

26 Plaintiffs cannot prove any violation of their constitutional or statutory rights. Even more  
27 fundamentally, Plaintiffs’ attempt to impose personal liability on the individual defendants is  
28 barred as a threshold matter by defendants’ qualified immunity and by the statutory good faith

1 defense furnished under the PPA. Plaintiffs have not and cannot demonstrate defendants'  
 2 violation of any “clearly established” Fourth Amendment rights, nor can they prove that under the  
 3 PPA defendants lacked a reasonable, good faith belief in the lawfulness of their conduct. On  
 4 these grounds and others, the University Defendants and the Federal Defendants are each entitled  
 5 to summary judgment in their favor.

## 6 **II. STATEMENT OF FACTS**

### 7 **A. Animal Rights Activists Directed Harassing and Threatening Activities Against** 8 **UCB Researchers.**

9 From late 2007 through 2008, animal rights activists directed a number of actions against  
 10 University of California, Berkeley (“UCB”) researchers designed to harass, threaten, and intimidate  
 11 the researchers and their families. Dec. of William Kasiske (“Kas. Dec.”) ¶4. To respond to the  
 12 increasing concern for faculty safety, the UCPD created an “Animal Rights Working Group”  
 13 (“ARWG”), comprised of UCPD officers and members of other law enforcement agencies, that  
 14 collected information on animal rights activist activities, shared information between agencies, and  
 15 dedicated a group of UCPD officers to investigate complaints of unlawful conduct directed against  
 16 UCB animal researchers. *Id.* at ¶5. Defendants Kasiske, Alberts, Zuniga, Shaffer, and Hart were  
 17 members of ARWG. *Id.* Defendant MacAdam was not. Dec. of Wade MacAdam (“Mac. Dec.”) ¶3.  
 18 Defendants Kasiske, Alberts, and Zuniga participated in the investigation of animal rights activist  
 19 activities that were the subject of the search warrant at issue in this litigation. Kas. Dec. ¶4; Dec. of  
 20 Karen Alberts (“Alb. Dec.”) ¶4; Dec. of Timothy Zuniga (“Zun. Dec.”) ¶5.

21 Beginning in late 2007 and continuing through 2008, animal rights activists conducted  
 22 numerous home demonstrations at researchers’ residences. Kas. Dec. ¶6. These demonstrations  
 23 included chalking the researchers’ driveways and sidewalks with offensive messages and placing  
 24 flyers laden with incendiary comments where neighbors would find them. *Id.* During these  
 25 demonstrations, animal rights activists chanted slogans meant to frighten and intimidate the  
 26 researchers, such as “For the animals, we will fight. We know where you sleep at night.” *Id.* They  
 27 vandalized researchers’ homes during certain demonstrations. *Id.* As part of its investigation,  
 28 ARWG monitored these home demonstrations, at times followed the demonstrators from

1 researchers' residences, and searched the internet to find information regarding planned  
2 demonstrations. Kas. Dec. ¶6.

3 A group identified as Stop Cal Vivisection claimed responsibility for various home  
4 demonstrations, stating they were taking a radical stand against animal research conducted by UCB  
5 researchers. *Id.* at ¶¶7-12, Ex. A-D. Stop Cal Vivisection maintained websites which disseminated  
6 personal information regarding UCB researchers, listing the researchers' names, home addresses,  
7 telephone numbers, and displaying graphic pictures seeking to portray the inhumane treatment of  
8 animals. *Id.* at ¶7, Ex. A. Throughout 2008, there was a growing concern – fed by a series of violent  
9 attacks on other UC campuses – that the safety of UCB researchers and their families were  
10 increasingly at risk. *Id.* at ¶9. These attacks included two fire bombings in Santa Cruz on August 2,  
11 2008, one aimed at a UC Santa Cruz researcher (while he was home with his family), and a second  
12 which burned a vehicle belonging to another UC Santa Cruz researcher. *Id.*

13 Given Stop Cal Vivisection's role in targeting the homes of UCB researchers, the ARWG  
14 recognized the possibility that that group and/or certain of its members were involved in the unlawful  
15 harassment of UCB researchers. *Id.* at ¶8. The ARWG sought to collect additional information  
16 regarding the group and its activities. *Id.* Despite the anonymity of its websites, UCPD was able to  
17 identify individuals who were actively involved in Stop Cal Vivisection, based in part on the  
18 attendance at home demonstrations. *Id.* Several of these individuals were also identified as taking  
19 part in the violent campaign of harassment and intimidation underway against UC faculty engaged in  
20 animal research at other campuses. *Id.*

21 In March, May and June of 2008, various UCB researchers received a series of threatening  
22 and intimidating emails referencing their alleged use of animals in research. *Id.* at ¶34. These emails  
23 culminated in a series of messages sent to a UCB researcher in June, 2008 which featured threats of  
24 bodily harm aimed at the researcher. *Id.* This escalating series of threatening emails constituted the  
25 basis for the search warrant at issue in this case. *Id.*

26 **B. Detective Kasiske Traced The Harassing and Threatening Emails Back to Long**  
27 **Haul.**

28 In March of 2008, several UCB researchers forwarded anonymous, harassing emails they

1 had received to Detective Kasiske for investigation. Kas. Dec. ¶35 and Ex. G. The sender(s) of these  
 2 emails used false names to create email accounts and send the messages. Kas. Dec. ¶¶35 and 36,  
 3 Ex. G. Kasiske determined the messages originated from the same IP address (208.106.103.213). *Id.*  
 4 He then obtained a court order requiring the service provider, Sonic.net, to identify the name of the  
 5 subscriber for the IP address 208.106.103.213. *Id.* On March 21, 2008, the provider identified the  
 6 subscriber as “Jessy Palmer,” at 3124 Shattuck Avenue in Berkeley. *Id.* See also Declaration of Sara  
 7 Ellis (“Ellis Dec.”) ¶5, Ex. A (8/4/10 Depo. of Jesse Palmer (“Palmer I”) at 137:6-140:2). Kasiske  
 8 identified this as the Long Haul Infoshop, a place where animal rights activists were known to hold  
 9 meetings. Kas. Dec. ¶¶35 and 36, Ex. G.

10 In May of 2008, two other UCB researchers forwarded additional harassing emails to  
 11 Kasiske, who determined they were sent from the same Long Haul IP address as the March, 2008  
 12 emails. *Id.* at ¶38 and Ex. H. In June of 2008, a researcher who had been one of the targets of the  
 13 earlier emails received additional emails that were significantly more graphic and threatening. Kas.  
 14 Dec. ¶39, Ex. I and ¶40. These June, 2008 emails called the researcher a “waste of life,” referred to  
 15 the attacks at UCLA, and asserted that “you’re next to receive that and MUCH worse you fucking  
 16 murderous scum.” *Id.* The emails stated that the sender(s) knew where the researcher worked, lived,  
 17 shopped, her credit card number, and even what Netflix movies the researcher ordered. *Id.* After  
 18 obtaining these emails, Kasiske obtained a court order requiring Google to disclose the IP address  
 19 from which these emails originated. *Id.* at ¶41, Ex. J. Google responded, disclosing the same IP  
 20 address as the one used to send the March and May emails. *Id.* at ¶42, Ex. K. Kasiske obtained a  
 21 court order which required Sonic.net to identify the current subscriber for this IP address. *Id.* at ¶43,  
 22 Ex. L. On July 24, 2008, the subscriber was again identified as “Jessy Palmer,” at 3124 Shattuck  
 23 Avenue, Berkeley, CA. *Id.* at ¶44, Ex. M. See also *Palmer I*, 140:4-143:2, 146:17-23.

24 **C. Long Haul Provided Support and Resources to Animal Rights Activists.**

25 Long Haul had previously come to the attention of the ARWG. *Id.* at ¶¶20-24, Exs. E and F;  
 26 Alb. Dec. ¶¶16-19; Zun. Dec. ¶¶17-21, Ex. A. As part of their investigation into harassment of UCB  
 27 researchers, the UCPD officers monitored animal rights activists during home demonstrations. Alb.  
 28 Dec. ¶16. On at least three occasions, UCPD officers followed participants in the home

1 demonstrations back to Long Haul. Kas. Dec. ¶¶21-22, Ex. E; Alb. Dec. ¶¶17-18; Zun. Dec. ¶¶18-  
 2 19. In addition, UCPD officers learned that Long Haul had hosted an event featuring a well-known  
 3 animal rights activist, Peter Young, in January 2008. Kas. Dec. ¶23, Ex. F, EBPS's Response to Def.  
 4 USA's RFA #22-23 (Ellis Dec. ¶3, Ex. B); Long Haul's Response to Def. USA's RFA #25-26 (Ellis  
 5 Dec. ¶4, Ex. C). The event followed the recent release of Young from prison, where he had served a  
 6 sentence for crimes relating to his animal rights activities. *Id.*

7 UCPD officers also learned that Stop Cal Vivisection held a fundraiser at Long Haul in April  
 8 of 2008. Zun. Dec. ¶21, Ex. A; Kas. Dec. ¶24; Alb. Dec. ¶20; *Palmer I*, 182:6-15. The fundraiser  
 9 was held to defray the legal fees of its members who were facing criminal prosecution for their  
 10 alleged attacks on UC Santa Cruz researchers engaged in animal research.<sup>1</sup> Zun. Dec. ¶21, Ex. A;  
 11 Kas. Dec. ¶24; Alb. Dec. ¶20. UCPD officers conducted surveillance of the Long Haul fund-raiser  
 12 in order to obtain additional information regarding Stop Cal Vivisection's membership. Zun. Dec.  
 13 ¶21; Kas. Dec. ¶24; Alb. Dec. ¶20.

#### 14 **D. Kasiske's Application For A Search Warrant.**

15 As a result of their investigations, Kasiske and other members of the ARWG believed that the  
 16 emails under investigation had originated from Long Haul. Zun. Dec. ¶23; Kas. Dec. ¶45; Alb. Dec.  
 17 ¶26. They believed the emails were sent from Long Haul either by a patron using one of Long  
 18 Haul's public access computers, or a person affiliated with Long Haul. *Id.* In either case, Kasiske  
 19 and others suspected that, in view of Long Haul's ties with Stop Cal Vivisection and other animal  
 20 rights extremists, a person or persons affiliated with Long Haul was complicit in the campaign of  
 21 email intimidation that had originated there. Zun. Dec. ¶24; Kas. Dec. ¶¶46-47; Alb. Dec. ¶¶27-28.  
 22 After conferring with Sgt. Alberts, Kasiske decided to apply for a warrant to search the Long Haul  
 23 premises. Kas. Dec. ¶48.

#### 24 **1. The Statement of Probable Cause.**

25 Kasiske prepared a search warrant application for all of the computers and electronic storage

26  
 27 <sup>1</sup> Defendants have since learned that Long Haul provided Stop Cal Vivisection with a \$50  
 28 grant as a result of this fundraiser. *See* Ellis Dec. ¶5, Ex. D (attachment to Long Haul's 2008  
 taxes); *Palmer I*, 159:20-162:4. EBPS's Response to Def. USA's RFA #19 (Ellis Dec. ¶3 Ex. B);  
 Long Haul's Response to Def. USA's RFA #24 (Ellis Dec. ¶4, Ex. C).

1 devices located at Long Haul, as well as logs or other documents that would identify computer users  
 2 at Long Haul. Kas. Dec. ¶49. Prior to applying for the warrant, Kasiske reviewed Long Haul's  
 3 website in order to confirm its current street address and to acquaint himself with the physical  
 4 structure of the building. *Id.* In his review of the website, there was no information leading Kasiske  
 5 to believe there were any other tenants within the premises.<sup>2</sup> *Id.*

6 On August 26, 2008, Kasiske provided the search warrant, with his affidavit and Statement of  
 7 Probable Cause to Judge Judith Ford. Kas. Dec. ¶¶59-60. The Statement of Probable Cause  
 8 included the following facts in support of the warrant application:

- 9 • An overview of the ongoing harassment of UC researchers by animal rights activists. Kas.  
 10 Dec. ¶¶50, 52 and Ex. N (Statement of Probable Cause).
- 11 • A description of the emails and other harassment occurring from September, 2007 through  
 12 March, 2008 against UCB researchers, and steps taken to trace the origin of those emails to  
 13 the IP address located at 3124 Shattuck in Berkeley, which Kasiske recognized as Long  
 14 Haul's address. *Id.*
- 15 • A description of the June, 2008 emails including threats of bodily harm, which were again  
 16 traced back to the IP address located at 3124 Shattuck (Long Haul). *Id.*
- 17 • The fact that Long Haul was a resource and meeting place for radical activists, including  
 18 animal rights activists. *Id.*

19 The Statement of Probable Cause also referred to the broader context of harassment and  
 20 intimidation of researchers at UCB and other UC campuses. *Id.* at ¶¶50, 53 and Ex. N. Kasiske  
 21 noted that for several months animal rights extremists had targeted many researchers, and that UCPD  
 22 had received "multiple reports of vandalism and noisy demonstrations that have taken place at the  
 23 private residences of the researchers" and of harassing email messages and phone calls. *Id.* He  
 24 noted the concerns arising out of fire bombings and other attacks that occurred against animal  
 25 researchers at UCLA and Santa Cruz. *Id.*

26 \_\_\_\_\_  
 27 <sup>2</sup> The photograph appearing on the website did not reflect any signage to indicate that any  
 28 organization other than Long Haul was housed in the building. Kas. Dec. ¶49. *See also*,  
 Declaration of Jesse Palmer submitted in support of Plaintiff's motion ¶11, Ex. 1 (printout of  
 Long Haul's website as Plaintiffs claim it existed on August 27, 2008).



1 The Statement of Probable Cause included an “Opinions and Conclusions” section, in which  
2 Kasiske:

- 3 • Asserted that seizure of the computers was necessary because information on the computers  
4 was likely to assist in identifying the sender(s) of the subject emails, and because, due to the  
5 complexity of searching the computers, the search would have to be conducted off-site.  
6 Kas. Dec. ¶¶50, 55 and Ex. N.
- 7 • Furnished a basis for seizure of additional materials (e.g. logs and sign-in sheets) which  
8 could identify users of certain computers known to be available for public use at Long Haul.  
9 *Id.* Kasiske noted that establishments offering public computer access often have a system  
10 for patrons to sign in to use the computers, and stated that such information would aid in  
11 identifying the suspect(s) who sent the threatening emails. *Id.*
- 12 • Noted that a search of the computers at Long Haul could reveal information the suspect(s)  
13 stored on the computers, websites the suspect(s) accessed, or other information that would  
14 aid in identifying the suspect(s). Kas. Dec. ¶¶50, 53 and Ex. N.

15 Judge Ford reviewed the warrant, the accompanying affidavit, the search warrant exhibits,  
16 and the Statement of Probable Cause prepared by Kasiske before authorizing the search of the Long  
17 Haul’s premises. Kas. Dec. ¶59.

## 18 2. The Terms of the Search Warrant.

19 The warrant identified the “places to be searched” as “The premises, structures, rooms,  
20 receptacles, outbuildings, associated storage areas, and safes situated at: The Long Haul Infoshop,  
21 3124 Shattuck Avenue, Berkeley, CA. This is a single-story brick building on the west side of  
22 Shattuck Avenue. It has a red sign above the door that reads, “Long Haul Infoshop.” *Id.* at ¶¶60, 61  
23 and Ex. O.

24 The warrant identified the “property to be seized” as:

25 Any written, typed, or electronically stored documents, papers, notebooks,  
26 or logs containing names or other identifying information of patrons who  
27 used the computers at the Long Haul Infoshop. All electronic data  
28 processing and storage devices, computers and computer systems including,  
but not limited to, central processing units, external hard drives, CDs,  
DVDs, diskettes, memory cards, PDAs, and USB flash drives. Search of all

1 of the above items is for files, data, images, software, operating systems,  
 2 deleted files, altered files, system configurations, drive and disk  
 3 configurations, date and time, and unallocated and slack space, for evidence.

4 Kas. Dec. ¶¶60, 62 and Ex. O. Kasiske described the items to be seized as precisely as he could,  
 5 given the nature of the computer equipment and the ability to store evidence of the threatening email  
 6 messages in a variety of ways. *Id.* at ¶63.

7 The warrant incorporated the facts contained in the Statement of Probable Cause as facts to  
 8 support the issuance of the warrant. *Id.* at ¶64. Kasiske intended that the Statement of Probable  
 9 Cause support the seizure of all computers and electronic storage devices located at Long Haul. *Id.*  
 10 He did not limit the items to be seized pursuant to the warrant or the Statement of Probable Cause to  
 11 solely the public access computers. *Id.* Instead, he made specific mention of these computers to  
 12 establish probable cause to search for any logs, sign in sheets, or other documents that would identify  
 13 the users of the public access computers during the time periods when the researcher received the  
 14 threatening emails. *Id.* at ¶64.

15 **E. The Warrant Team Executed the Search Warrant.**

16 **1. Assembling the Team and the Briefing Meeting.**

17 On the morning of August 27, 2008, Kasiske gathered the warrant team together at UCPD.  
 18 *Id.* at ¶68, Ex. P. The members of the team were Kasiske, Alberts, Zuniga, MacAdam, Lisa Shaffer,  
 19 and Mike Hart. *Id.* at ¶70. Lisa Shaffer was at the time a Special Agent of the FBI, assigned to its  
 20 Joint Terrorism Task Force (“JTTF”) and working on animal rights issues and cases for the FBI.  
 21 Dec. of Lisa Shaffer (“Shaf. Dec.”) ¶¶3-4. Mike Hart was at the time an Alameda County Sheriff’s  
 22 employee, deputized to work on the FBI’s JTTF and working on animal rights issues and cases for  
 23 the FBI. Dec. of Mike Hart (“Hart Dec.”) ¶2. UCPD requested the assistance of Shaffer and Hart as  
 24 members of the ARWG.<sup>3</sup> Kas. Dec. ¶70. Kasiske briefed the team before leaving to execute the  
 25 warrant. *Id.* at ¶71. During this briefing, Kasiske explained where the team was going and reviewed  
 26 the terms of the warrant with them. *Id.*; Alb. Dec. ¶36; Zun. Dec. ¶36; Mac. Dec. ¶¶6-9, Shaf. Dec.

27 \_\_\_\_\_  
 28 <sup>3</sup> Plaintiffs’ motion exaggerates the assistance of Shaffer and Hart provided by misstating  
 their deposition testimony and discovery responses. Shaf. Dec. ¶¶29-35; Hart Dec. ¶¶13-16.

¶10; Hart Dec. ¶6. He described how the team would gain entry to the building and the scope of the warrant. *Id.* Kasiske gave an overview of the investigation, describing the timing and content of the threatening emails and how he had traced them back to Long Haul. Kas. Dec. ¶71. During the briefing meeting, the search warrant and the Statement of Probable Cause were available for team members to review. Kas. Dec. ¶71; Alb. Dec. ¶37; Zun. Dec. ¶37; Mac. Dec. ¶10; Shaf. Dec. ¶¶10-12; Hart Dec. ¶6.

## 2. Entering The Premises And Initial Inspection.

When the warrant team arrived at Long Haul, they found the front door locked and it appeared that Long Haul was not open for business. Kas. Dec. ¶¶77, 78 and Ex. Q. They observed there was a single entrance at the front of the building.<sup>4</sup> *Id.* Members of the warrant team spoke with someone who worked in the building next to Long Haul who allowed the team to come through that building and enter Long Haul through an unlocked back entrance. *Id.* at ¶¶80, 81.

After gaining entry, the warrant team conducted a protective sweep of the premises. *Id.* at ¶83. MacAdam videotaped the entry into the building and the condition of the premises prior to the search. Mac. Dec. ¶20. The team observed a large ground floor that contained in the west end (opposite the Shattuck street entrance) a bathroom, a small kitchen area, and an area with tables and chairs. Kas. Dec. ¶85; Alb. Dec. ¶48; Zun. Dec. ¶42; Mac. Dec. ¶21. The walls were covered with posters and signs addressing various causes and events. Kas. Dec. ¶¶85, 121 and 22, Exs. Z and AA; Alb. Dec. ¶48; Zun. Dec. ¶42; Mac. Dec. ¶21. Along the south wall of the main floor were magazines, papers, and books. Kas. Dec. ¶85; Alb. Dec. ¶48; Zun. Dec. ¶42; Mac. Dec. ¶21. There was a small hallway leading to the front area of the building with three locked doors. Kas. Dec. ¶¶85 and 126, Ex. EE; Alb. Dec. ¶48; Zun. Dec. ¶42; Mac. Dec. ¶21. The front (east) of the building contained the Shattuck street entrance, a counter, and shelving displaying magazines and periodicals. *Id.* Behind the counter were locked cabinets. *Id.* There were additional, varied posters and signs on the open wall spaces in the front of the building. *Id.*

There were two loft areas visible from the ground floor with staircases leading to them. Kas.

<sup>4</sup> The team did not observe any signs on the front of the building indicating the presence of any tenant other than Long Haul, nor were there multiple mailboxes suggesting multiple tenants. Kas. Dec. ¶78; Alb. Dec. ¶43; Zun. Dec. ¶38; Mac. Dec. ¶18.

1 Dec. ¶86; Alb. Dec. ¶49; Zun. Dec. ¶43; Mac. Dec. ¶22. The western loft had a room that housed  
 2 computers with a sign on the door that read, “Internet Room.” *Id.* The eastern loft area had a couch  
 3 and long table and a room with a locked door. Kas. Dec. ¶¶86 and 122, Ex. AA; Alb. Dec. ¶49; Zun.  
 4 Dec. ¶43; Mac. Dec. ¶22. The walls in the loft area were filled with more posters and signs. *Id.*

### 5 **3. The Search Of The Premises.**

6 After the team secured the premises, they began to search for items identified in the warrant.  
 7 MacAdam and Zuniga removed the locks on each of the four locked doors within the premises,  
 8 videotaping the process. Zun. Dec. ¶45; Mac. Dec. ¶24.

9 Kasiske focused on the search for computers and electronic storage devices. Kas. Dec. ¶91.  
 10 He searched the entire premises, locating eleven computers in the western loft room, two computers  
 11 in the eastern loft room, and one computer in a room located along the ground floor hallway. *Id.* He  
 12 coordinated the removal of these computers to a staging area on the ground floor, and then to waiting  
 13 police vehicles. *Id.* at ¶109.

14 In addition to searching for and seizing the computers, the warrant team searched the  
 15 premises for the other items identified in the warrant, including electronic storage devices and  
 16 documents containing information identifying patrons who used the Long Haul computers. Alb.  
 17 Dec. ¶¶54-57; Zun. Dec. ¶¶46, 57, 59, 60.

#### 18 **a. The Ground Floor.**

19 Alberts initially focused on searching the front room, which included locked cabinets.<sup>5</sup> Alb.  
 20 Dec. ¶54. MacAdam removed the locks to the cabinet and Alberts searched these areas and the rest  
 21 of the front room. *Id.* at ¶¶54-55; Mac. Dec. ¶24. Alberts did not locate any items which the warrant  
 22 identified for seizure. Alb. Dec. ¶57.

23  
 24 <sup>5</sup> A small crowd had gathered in front of the building and Alberts went outside to speak  
 25 with some of them. Alb. Dec. ¶58. Alberts and MacAdam allowed Kathryn Miller, a woman  
 26 who claimed to work at Long Haul, to come inside and unlock the cabinets behind the front  
 27 counter. Alb. Dec. ¶58; Mac. Dec. ¶29; Ellis Dec. ¶8, Ex. G (11/10/10 Depo. of Kathryn Miller  
 28 (“Miller”) at 69:17-72:5, 72:17-73:12). When Miller insisted that she read the warrant before  
 providing keys to the warrant team, Alberts and MacAdam asked her to leave. *Id.* Miller came  
 into the building a second time, but again refused to assist in unlocking the cabinets without first  
 seeing the search warrant and again was asked to leave. Alb. Dec. ¶59; *Miller*, 69:17-72:5,  
 72:17-73:12.

1 Along the narrow hallway connecting the front and back spaces on the ground floor were  
 2 three small locked rooms. Kas. Dec. ¶85 and ¶77, Ex. Q. The team entered and searched each room.  
 3 *Id.* at ¶77, Ex. Q. The westernmost room had a cardboard sign on the door, bearing the handwritten  
 4 words “East Bay Prisoner Support.” Kas. Dec. ¶98; Alb. Dec. ¶70; Ellis Dec. ¶9, Ex. H (9/22/10  
 5 Depo. of Patrick Lyons (“*Lyons*”) at 54:23-55:6). None of the warrant team participants knew  
 6 whether the handwritten sign referred to a slogan, a movement, an organization, or had some other  
 7 meaning. Kas. Dec. ¶98; Alb. Dec. ¶70. None of the warrant team knew what “East Bay Prisoner  
 8 Support” was. Kas. Dec. ¶30; Alb. Dec. ¶33; Zun. Dec. ¶32; Mac. Dec. ¶13, Shaf. Dec. ¶27. There  
 9 was no apparent indication that East Bay Prisoner Support was a distinct organization and was  
 10 paying rent to Long Haul for its use of this tiny room. Kas. Dec. ¶99; Alb. Dec. ¶71; Zun. Dec. ¶53;  
 11 Mac. Dec. ¶27. The warrant team believed that this room, like the other rooms along the hallway,  
 12 was used by Long Haul as office and/or storage space. *Id.* There was no apparent indication that the  
 13 room was being used for any publishing activities. *Id.*; Shaffer Dec. ¶¶19, 34-35.

14 Entering this room, Shaffer encountered a pile of paperwork on the floor, a table, and a copy  
 15 machine. Kas. Dec. ¶¶127 and 128, Exh. FF and GG; Ellis Dec. ¶6, Ex. E (7/28/10 Depo. of Lisa  
 16 Shaffer (“*Shaffer*”) at 62:22-63:2). Shaffer looked at two envelopes to determine whether there were  
 17 any responsive documents. *Shaffer*, 64:21-65:11; Shaffer Dec. ¶¶19, 34-35. The sole items seized  
 18 from this room were a computer, flash drive, and miscellaneous CDs. Kas. Dec. ¶95, 100-101 and  
 19 Ex. R .

20 **b. *The Loft Areas.***

21 Following removal of the computers, Zuniga and Alberts searched the room in the eastern  
 22 loft area. Alb. Dec. ¶¶60-66; Zuniga Dec. ¶¶55-60. The small room had no sign on the door and  
 23 was cluttered with boxes, papers and files. Kas. Dec. ¶123, Ex. BB; Alb. Dec. ¶63; Zuniga Dec. ¶57.  
 24 The room appeared to include storage space for old publications, which is what the warrant team  
 25 expected to see in a place self-described as a “lending library.” *Id.* After a brief look, Alberts left the  
 26 room and assisted in the search elsewhere. Alb. Dec. ¶67. Zuniga searched the room for items listed  
 27 in the warrant, including a brief search of a file cabinet located just inside the door. Zuniga Dec. ¶57.  
 28 The cabinet was an unorganized jumble of documents and miscellaneous items. *Id.* While searching

1 through it, Zuniga came across some photographs which he briefly perused and noticed that one of  
 2 them appeared to contain evidence of criminal activity at a protest in Seattle. *Id.* At that point,  
 3 Zuniga consulted Shaffer because she had previously been assigned to the FBI's office in Seattle.  
 4 Zuniga Dec. ¶57. She came into the room, looked at the photographs, and handed them back to  
 5 Zuniga. *Id.*; Shaffer Dec. ¶¶15, 33. Believing the photographs to be irrelevant to his search, Zuniga  
 6 placed them off to the side and finished searching the room. Zuniga Dec. ¶57.

7 Neither Kasiske, Zuniga, Alberts, nor any other member of the warrant team was aware that  
 8 the eastern loft room was used in the publication of Slingshot. Kas. Dec. ¶106; Alb. Dec. ¶64;  
 9 Zuniga Dec. ¶60; Shaffer Dec. ¶26; Hart Dec. ¶15. There was no apparent indication that this room  
 10 was being used for any publishing activities. Kas. Dec. ¶¶106, 124 and 125, Exs. CC and DD; Alb.  
 11 Dec. ¶64; Zuniga Dec. ¶60. The sole items seized from this room were the two computers removed  
 12 by Kasiske and some electronic storage devices. Kas. Dec. ¶95, Ex. R.

13 The warrant team located a number of electronic storage devices in the western loft room,  
 14 including eleven computers, a portable flash drive, and various compact discs. Kas. Dec. ¶¶92-95,  
 15 Ex. R. These items were seized and inventoried by Kasiske. *Id.*

16 Members of the team assembled the seized items in a back room on the ground floor and  
 17 inventoried them prior to their removal. Kas. Dec. ¶109. Once the team finished searching the  
 18 premises, MacAdam took a final video to document the condition of the premises at the conclusion  
 19 of the search. Mac. Dec. ¶33. The team took the computers and other electronic storage devices out  
 20 of the premises through the back door to their cars. Kas. Dec. ¶109. After the computers were  
 21 loaded into the cars, MacAdam, Shaffer, and Hart had no further involvement with the execution of  
 22 the warrant or the investigation into the threatening emails. *Id.*; Shaffer Dec. ¶25; Hart Dec. ¶10.  
 23 Zuniga's involvement ended with his role in returning Plaintiffs' property back to them. Zuniga Dec.  
 24 ¶63.

25 **F. Defendant Kasiske Promptly Returned Plaintiffs' Property And Properly**  
 26 **Limited The Scope Of The Search.**

27 **1. The Prompt Return of Plaintiffs' Property.**

28 On September 18, 2008, Kasiske requested a court order to authorize the release of all

1 property seized during the search. Kas. Dec. ¶113. After the order was signed later that day, Kasiske  
 2 called Seth Chazin, an attorney representing Long Haul. *Id.*; EBPS's Response to Def. USA's RFA  
 3 #6 (Ellis Dec. ¶3, Ex. B); Long Haul's Response to Def. USA's RFA #10 (Ellis Dec. ¶4, Ex. C). On  
 4 September 19, 2008, six computers from the western loft room and two computers from the eastern  
 5 loft room were retrieved by a representative of Long Haul.<sup>6</sup> Kas. Dec. ¶113 and Ex. S.

6 On September 23, 2008, UCPD finished copying the remaining computer hard drives. *Id.* at  
 7 ¶114. Kasiske notified Mr Chazin that there was more property to retrieve. *Id.* On September 30,  
 8 2008, Kasiske released the remaining property to a Long Haul representative. *Id.* and Ex. T.

## 9 2. The Search of the Computers.

10 Kasiske initially requested the Silicon Valley Regional Computer Forensics Laboratory (the  
 11 "SVRCF Lab") to accept all computers seized during the search and conduct a forensic examination.  
 12 Kas. Dec. ¶115. The SVRCF Lab stated that it could accept only a limited number of computers  
 13 based on workload considerations. *Id.* Kasiske sent the SVRCF Lab the six computers seized from  
 14 the western loft area. *Id.* at ¶¶115-116, Exs. U and V. The remaining computer hard drives and other  
 15 storage media were copied by UCPD personnel. *Id.* at 120. The SVRCF Lab returned the six  
 16 computers to UCPD after the hard drives were imaged. Alb. Dec. ¶78. The computers taken from  
 17 the eastern loft room and the first floor hallway room were never searched. Kas. Dec. ¶120.

18 Kasiske provided the SVRCF Lab a list of search terms to use for the search of the six  
 19 western loft computers. *Id.* at ¶¶116-117, Ex. V. This list included the names and contact  
 20 information for the victims, names and contact information for suspects who had been identified in  
 21 previous animal rights cases; and terms used by suspects who had previously targeted researchers  
 22 ("vivisection", etc.). *Id.* The search terms submitted by UCPD and utilized by the SVRCF Lab were  
 23 limited in scope and calculated to locate material relating to the investigation into the threatening  
 24 emails. *Id.*

25 In October and November 2008, the SVRCF Lab sent two reports to Kasiske regarding its  
 26 search of the six computers. *Id.* at ¶118, Exs. W and X. One report referred to a CD that identified

27 \_\_\_\_\_  
 28 <sup>6</sup> The person who retrieved this Long Haul property was Chloe Watlington, one of the  
 three members of EBPS. Kas. Dec. ¶113, Ex. S; *Lyons*, 16:6-13.

1 files containing Kasiske's search terms. Kas. Dec. at ¶118, Exs. W and X. Kasiske reviewed these  
 2 files and concluded they were not relevant to the investigation. *Id.* at ¶119, Ex. Y.

### 3 **III. ARGUMENT**

#### 4 **A. Defendants Are Entitled To Summary Judgment On Plaintiffs' Second Cause Of** 5 **Action Alleging Violation Of The Fourth Amendment.**

##### 6 **1. Defendants Did Not Violate The Fourth Amendment.**

##### 7 **a. *The Search Warrant Was Supported By Probable Cause.***

8 Probable cause is a "flexible, common-sense standard," requiring that the facts available to  
 9 the officer would "warrant a man of reasonable caution" in the belief that incriminating evidence is  
 10 involved. *Texas v. Brown*, 460 U.S. 730, 742 (1983). It does not require that the belief be correct or  
 11 more likely true than false. *U.S. v. Gourde*, 440 F.3d 1065, 1073 (9th Cir. 2006). The probable cause  
 12 standard, in the context of a search warrant, requires an affidavit that establishes "a fair probability  
 13 that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462  
 14 U.S. 213, 238 (1983). This standard is readily met here.

15 The Statement of Probable Cause sets forth in explicit detail the basis for the belief that  
 16 incriminating evidence could be found at Long Haul, including the fact that anonymous animal  
 17 rights activist(s) had sent threatening emails to UCB researchers from the IP address located at Long  
 18 Haul in March, May, and June 2008. Kas. Dec. ¶¶50, 52-53, Ex. N. *See, e.g., U.S. v. Perez*, 484 F.3d  
 19 735, 740 (5th Cir. 2007) (IP address gave rise to probable cause to search physical address associated  
 20 with IP address in child pornography investigation); *U.S. v. Harrison*, 566 F.3d 1254 (10th Cir.  
 21 2009); *U.S. v. Carter*, 549 F.Supp.2d 1257, 1261 (D. Nev. 2008). Indeed, Plaintiffs apparently  
 22 concede the existence of probable cause for issuance of a warrant, and instead base their Fourth  
 23 Amendment challenge on the scope of the warrant. (Pltffs' MPA at pp. 10-16.)

##### 24 **b. *The Search Warrant Was Not Unconstitutionally Overbroad.***

25 The Fourth Amendment specifies only two matters that must be "particularly describ[ed]" in  
 26 the warrant: "the place to be searched" and "the persons or things to be seized." *Dalia v. U.S.*, 441  
 27 U.S. 238, 255 (1979). "Nothing in the language of the Constitution or in this Court's decisions  
 28 interpreting that language suggests that, in addition to the [requirements set forth in the text], search



1 warrants also must include a specification of the precise manner in which they are to be executed.”  
 2 *Dalia*, 441 U.S. at 257; *U.S. v. Mann*, 389 F.3d 869, 877 (9th Cir. 2004) (“While a search warrant  
 3 must describe items to be seized with particularity sufficient to prevent a general, exploratory  
 4 rummaging in a person’s belongings, it need only be reasonably specific, rather than elaborately  
 5 detailed.”).

6 The Ninth Circuit has identified the following factors for use in determining whether a  
 7 warrant is sufficiently particular: (1) whether probable cause exists to seize all items of a particular  
 8 type described in the warrant; (2) whether the warrant sets out objective standards by which  
 9 executing officers can differentiate items subject to seizure from those which are not; and (3)  
 10 whether the government was able to describe the items more particularly in light of the information  
 11 available to it at the time the warrant was issued. *U.S. v. Adjani*, 452 F.3d 1140, 1148 (9th Cir. 2006).  
 12 Each of these factors supports the validity of the warrant here.

13 (1) Computers and Electronic Storage Devices.

14 Defying the “common sense standard” that prevails in assessing probable cause, Plaintiffs  
 15 argue that Defendants should have limited their search only to those computers that were open to  
 16 public use in Long Haul’s western loft “Internet room.” To do so would have ignored material and  
 17 significant evidence, resulting in a partial, possibly ineffectual search that could have compromised  
 18 the entire investigation.<sup>7</sup> The March, May, and June 2008 emails had all originated from the same IP  
 19 address, physically located at the Long Haul.<sup>8</sup> Kas. Dec. ¶¶36, 38, 42, 50, 52, and Ex. N. Nothing in  
 20 the information available to Kasiske enabled him to differentiate among the computers located at the

21 \_\_\_\_\_  
 22 <sup>7</sup> Plaintiffs’ overbreadth argument relies on inapposite case law. In *Millender v. Los*  
 23 *Angeles*, 620 F.3d 1016 (9th Cir. 2010), for example, the officers obtained a warrant to seize all  
 24 firearms at the subject location, as well as evidence of gang activity, even though the victim  
 provided a specific description of a particular firearm used by the suspect. Here, by contrast,  
 officers did not know which computer inside Long Haul was used to threaten UCB faculty and  
 staff.

25 <sup>8</sup> As discussed further below, based on information developed through the ARWG’s  
 26 investigations, including Long Haul’s support of and sympathy for animal rights activists,  
 27 Kasiske reasonably believed that a person affiliated with Long Haul could have been complicit in  
 28 the crime under investigation. Kas. Dec. ¶¶45-47. It would have made no sense for him to limit  
 the search only to the “public-access” computers, and exclude other computers to which a person  
 affiliated with Long Haul would have had access and which may have contained incriminating  
 evidence.

1 Long Haul address. Kas. Dec. ¶¶45, 47. Lacking any reasonable basis to eliminate any computers  
 2 as potential repositories of incriminating evidence, Kasiske sought and received a warrant which by  
 3 its terms authorized the search and seizure of “all computers” at Long Haul. *Id.* at ¶¶60, 63, 64 and  
 4 Ex. O. Probable cause for the seizure of “all computers” at Long Haul was plainly established  
 5 through the detailed discussion set forth in the Statement. *Adjani*, 452 F.3d at 1140; *see also U.S. v.*  
 6 *Krupa*, --- F.3d ---, 2011 WL 353212 \*3 (9th Cir. February 7, 2011) (search of 13 computer towers  
 7 and 2 laptops was supported by probable cause where defendant had control of all computers); *U.S.*  
 8 *v. Hay*, 231 F.3d 630, 637 (9th Cir. 2000) (probable cause supported search and seizure of entire  
 9 computer system). Judge Ford concluded as much in issuing the warrant covering “all computers  
 10 and computer systems,” a conclusion that is entitled to “great deference.” *Gates*, 462 U.S. at 236;  
 11 *U.S. v. Seybold*, 726 F.2d 502, 503 (9th Cir. 1984).

12 In arguing that seizure of “all computers” was overbroad, Plaintiffs point to the “Opinions  
 13 and Conclusions” section of the Statement of Probable Cause, which notes that establishments with  
 14 public access computers typically maintain logs or sign-in sheets identifying the public users. Kas.  
 15 Dec. ¶¶50 and 55, Ex. N. In raising this point, Kasiske sought to broaden – not narrow – the scope  
 16 of the warrant, by describing the need to search for such logs or sign-in sheets *in addition to* the  
 17 search for and seizure of all computers. *Id.* at ¶56. Plaintiffs’ argument thus disregards the bulk of  
 18 the factual discussion included in Kasiske’s Statement, and ignores the plain language of the warrant  
 19 itself, which makes it abundantly clear that Kasiske intended to have “all computers and computer  
 20 systems” seized. *Id.* at ¶¶50, 60, 64, Ex. O and N.<sup>9</sup>

21 The warrant’s language authorizing seizure of all “electronic storage devices,” including  
 22 external hard drives, CD’s, DVD’s, memory cards, USB flash drives, etc., was also sufficiently  
 23 particular and supported by probable cause. Due to the ease with which such information can be  
 24

25 <sup>9</sup> Plaintiffs’ suggestion to the contrary notwithstanding, there is no requirement for a  
 26 warrant authorizing seizure of computers to include a search protocol addressing the examination  
 27 of the computer’s contents. *U.S. v. Grubbs*, 547 U.S. 90, 98 (2006); *U.S. v. Brooks*, 427 F.3d  
 28 1246, 1251 (10th Cir. 2005) (“... this court has never required warrants to contain a particularized  
 computer search strategy.”) Nor is a search protocol required to comply with a search warrant.  
*U.S. v. Khanani*, 502 F.3d 1281, 1290-91 (11th Cir. 2007); *U.S. v. Cartier*, 543 F.3d 442, 447-48  
 (8th Cir. 2008).

1 transferred from the computer's hard drive to an external storage device, it was necessary to include  
2 such storage devices within the scope of a search for electronic information that exists (or at one time  
3 existed) in the computer's hard drive. Kas. Dec. ¶67. The inclusion of such external storage devices  
4 does not render an otherwise proper search "overbroad." See, e.g., *U.S. v. Hay*, 231 F.3d 630, 637  
5 (9th Cir. 2000) (warrant was sufficiently particular in requesting seizure of entire computer system  
6 because agents had no idea where pornographic images would be stored); *U.S. v. Lacy*, 119 F.3d 742,  
7 746-47 (9th Cir. 1997) (same); *U.S. v. Wong*, 334 F.3d 831, 837-38 (9th Cir. 2003) (probable cause  
8 supported warrant to search the computers, their components, and disks to "obtain data as it relates to  
9 this case"). Given that Kasiske did not know where the threatening emails or other electronic  
10 evidence linking an individual with the threatening emails would be stored, the description in the  
11 warrant was as particular as he reasonably could make it. *Adjani*, 452 F.3d at 1148-49; *Hay*, 231  
12 F.3d at 637; *Lacy*, 119 F.3d at 746-747 (this type of generic classification is acceptable "when a more  
13 precise description is not possible").

## 14 2. Documents Identifying Computer Users

15 The warrant was also sufficiently particular with regard to documents identifying users of the  
16 public-access computers. Plaintiffs argue this description was overbroad in that it did not explicitly  
17 limit the documents to the dates during which the researcher received the threatening emails. (Pltffs'  
18 MPA at pp. 12-13.) This argument ignores the context furnished by the Statement of Probable Cause  
19 and by Kasiske's pre-search briefing, which specified the time frame during which the emails were  
20 sent. Kas. Dec. ¶¶50, 71 and Ex. N; Alb. Dec. ¶36; Zun. Dec. ¶36; Mac. Dec. ¶6, ; Shaf. Dec. ¶¶10-  
21 12; Hart Dec. ¶6. The warrant team was thus aware of the relevant time frame and was able to limit  
22 the scope of its search accordingly. See *Wong*, 334 F.3d at 837-38 (the specificity of the items listed  
23 in the warrant combined with the language directing officers to "obtain data as it relates to this case"  
24 from the computers is sufficiently specific to focus the officer's search); *Hay*, 231 F.3d at 636-38 (the  
25 warrant was not overbroad where the attachment specifically mentioned the crime of child  
26 pornography and the preface to the warrant limited the scope of the search to evidence of criminal  
27  
28

1 activity).<sup>10</sup> Moreover, Plaintiffs' focus on the lack of an explicit date range in the warrant limiting  
 2 documents to be seized is nothing more than a red herring. Defendants indisputably were authorized  
 3 to search for and seize documents identifying individuals who used the computers from March  
 4 through June, 2008. The scope of their search would not have been any different, had this explicit  
 5 limitation appeared on the face of the warrant. Plaintiffs have not and cannot identify any place  
 6 searched by Defendants that reasonably could not have contained documents falling within this  
 7 Spring, 2008 time frame.<sup>11</sup> Moreover, they cannot point to any documents outside of that time frame  
 8 that were seized by the warrant team. That is because the warrant team *did not seize any documents*  
 9 *at all*. Kas. Dec. ¶77, Ex. Q and ¶95, Ex. R. That fact demonstrates that the language of the warrant  
 10 was not overbroad or unable to provide direction to Defendants in conducting their search. Because  
 11 no documents were seized, Plaintiffs cannot demonstrate any injury directly attributable to this  
 12 aspect of the search.<sup>12</sup>

13 **a. The Warrant Was Properly Executed.**

14 (1) The Search Was Limited to the Areas Described in the Warrant.

15 Officers properly searched the entire Long Haul premises pursuant to the facially valid  
 16 warrant. Plaintiffs argue that certain locked rooms within Long Haul should have been deemed as  
 17 outside the scope of the search, in particular the locked room on the ground floor hallway bearing a  
 18 handwritten sign saying "East Bay Prisoner Support." Defendants' search of this room was justified

19 \_\_\_\_\_  
 20 <sup>10</sup> Unlike the cases cited by Plaintiffs, the warrant here did not authorize the search or  
 21 seizure of all of Plaintiffs' business records or documents. *See U.S. v. Washington*, 797 F.2d  
 1461, 1472 (9th Cir. 1986); *U.S. v. Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982). Rather, it focused  
 22 the search on a limited class of documents, those which would identify the users of the public  
 23 computers.

24 <sup>11</sup> Plaintiffs' argument addressing Zuniga's view of photographs located in the eastern  
 25 loft file cabinet as evidence that the warrant was not sufficiently particular, (Pltffs' MPA at pp.  
 26 15) misapprehends both the facts and the law. Zuniga came across these photographs "in plain  
 27 view" while conducting a lawful search of the file cabinet for documents described in the warrant.  
 28 *U.S. v. Ewain*, 88 F.3d 689, 693 (9th Cir. 1996) (finding evidence of postal theft while legally  
 searching for evidence of methamphetamines was authorized by plain view doctrine); *U.S. v.*  
*Jackson*, 131 F.3d 1105, 1108 (4<sup>th</sup> Cir. 1997). The photographs which Zuniga encountered fell  
 within this "plain view" exception. His brief inspection of the photos with Shaffer did not violate  
 the Fourth Amendment. Zuniga Dec. ¶¶57-58; Shaffer Dec. ¶¶15, 33, 35.

<sup>12</sup> In order to recover compensatory damages the §1983 plaintiff must prove not only that  
 the search was unlawful, but that it caused him actual, compensable injury. *Heck v. Humphrey*,  
 512 U.S. 477, 487 fn. 7 (1994).

1 in the first instance because the officers had no way of knowing whether it contained the computer or  
 2 computers from which the threatening emails had originated. Second, there was nothing which  
 3 placed Defendants on notice that “East Bay Prisoner Support” was an organization, that it  
 4 “occupied” the room, that it paid rent on it, or that it had any independent Fourth Amendment rights  
 5 which could have impacted the ongoing search.

6 A warrant is valid when it authorizes the search of a street address – even one with several  
 7 dwellings within it – if the [party] is in control of the whole premises, if the dwellings are occupied  
 8 in common, or if the entire property is suspect. *U.S. v. Whitten*, 706 F.2d 1000, 1008 (9th Cir. 1983);  
 9 *U.S. v. Alexander*, 761 F.2d 1294, 1301 (9th Cir. 1985). The validity of a warrant is judged on the  
 10 basis of the information available at the time the warrant issued. *See Maryland v. Garrison*, 480 U.S.  
 11 79, 85 (1987).<sup>13</sup> There is no evidence in the record that any Defendant was aware there were tenants  
 12 located within the Long Haul premises at the time of the warrant application.<sup>14</sup> Kas. Dec. ¶16; Alb.  
 13 Dec. ¶12; Zun. Dec. ¶11; Mac. Dec. ¶11; Shaf. Dec. ¶¶26-27; Hart Dec. ¶11. Nothing on Long  
 14 Haul’s website indicated that they rented space in the building to tenants. Kas. Dec. ¶16-17; Alb.  
 15 Dec. ¶12; Zun. Dec. ¶13. The warrant should be upheld on that basis alone. *See U.S. v. Whitney*,  
 16 633 F.2d 902, 908 (9th Cir. 1980); *U.S. v. Ofshe*, 817 F.2d 1508, 1514 (11th Cir. 1987) (search of  
 17 multi-unit building upheld where warrant authorized search of a single business. Officers had no

18 \_\_\_\_\_  
 19 <sup>13</sup> In *Garrison*, the police obtained a warrant for a floor of a three-level residential  
 20 building, under the mistaken belief that the floor designated in the warrant contained only one  
 21 apartment—that of a suspect named McWebb. *Id.* at 81. The police relied on an informant, an  
 22 exterior examination of the building, and an inquiry of a utility company when making this  
 23 determination. *Id.* As it turned out, there were two apartments, one of which belonged to  
 24 Garrison and which contained drugs that the police discovered during their search. *Id.* Analyzing  
 the validity of the warrant, the Supreme Court stated that if the officers knew or should have  
 known that there were two separate dwellings on the third floor, the warrant would not authorize  
 the search of the whole floor (as it would not be particularized). *Id.* at 85. However, the Supreme  
 Court found that the police investigation had produced a reasonable belief that there was only one  
 tenant. *Id.* at 86, n. 10. The Supreme Court thus concluded that the warrant was valid based on  
 the information that the officers disclosed and had a duty to disclose to the magistrate. *Id.* at 86.

25 <sup>14</sup> Plaintiffs erroneously point to the existence of locks on the four doors within the  
 26 building as evidence of multiple tenants. In fact, there could have been any number of reasons for  
 27 locking interior doors, including the presence of confidential information or valuable property.  
 Defendants encountered locked cabinets behind the front counter, which were apparently locked  
 for reasons having nothing to do with multiple tenants, as well as the locked door to the office in  
 the eastern loft used by Slingshot, who was not a tenant. Alb. Dec. ¶¶48, 54-5; Ellis Dec ¶2, Ex. A  
 28 (*Palmer I*, 25:8-17).

1 reason to know that the premises were subdivided into separate offices.).

2 Moreover, once the officers entered the Long Haul premises and began to search, there was  
3 no indication that multiple tenants used the space within the building.<sup>15</sup> Kas. Dec. ¶88; Alb. Dec.  
4 ¶51-52; Zun. Dec. ¶44; Mac. Dec. ¶23. Factors that indicate a separate residence include separate  
5 access from the outside, separate doorbells, and separate mailboxes. *See U.S. v. Ayers*, 924 F.2d  
6 1468, 1480 (9th Cir. 1991); *U.S. v. Hinds*, 856 F.2d 438, 441-42 (1<sup>st</sup> Cir. 1988). Here, EBPS shared  
7 the same entrance as Long Haul. Kas. Dec. ¶78. There was no separate doorbell or mailbox on the  
8 outside of the building. *Id.* at ¶88. There was no sign on the outside of the building indicating that  
9 EBPS had an office within. *Id.* at ¶¶78, 79. The outside of the building was locked when the officers  
10 entered as were all of the rooms on the inside of the building. *Id.* at ¶¶78, 85, 86. The only potential  
11 indication that one of the rooms inside belonged to EBPS was a removable, handwritten, cardboard  
12 sign tacked on the door to the room. *Id.* at ¶98. This factor alone cannot suffice to place the officers  
13 on notice that the Long Haul premises contained a separate tenant, especially in the context of other  
14 posters and signs throughout the premises. *See U.S. v. White*, 416 F.3d 634, 639-40 (7th Cir. 2005)  
15 (lacking information about the text, size, and permanence of barbershop sign in window of single  
16 family residence, court could not find that sign put officers on notice of separate business in  
17 premises). Under the circumstances, the officers reasonably could not have known whether “East  
18 Bay Prisoner Support” was a cause, a “project,” a slogan, or something else. There is no basis for  
19 imputing knowledge to them that it was a tenant that could even arguably claim Fourth Amendment  
20 rights independent of Long Haul.

21 (2) The Search Was of Reasonable Duration And Thoroughness.

22 Plaintiffs complain that Defendants’ search for documents was overbroad, in that they

23  
24 <sup>15</sup> Plaintiffs seem to want to have their cake and eat it, too, when it comes to  
25 characterizing the office used by Slingshot. Plaintiffs refer to this space as a “private office,”  
26 suggesting Slingshot had Fourth Amendment privacy rights of its own. (Pltffs’ MPA at pp. 16-  
27 17). However, the facts disclosed in discovery demonstrate that Slingshot was part and parcel of  
28 Long Haul. Ellis Dec. ¶2, Ex. A (*Palmer I*, 29:8-30:3, 75:17-78:20). The office used by Slingshot  
was not a “private office.” *Id.* at 78:17-20; Ellis Dec. ¶7, Ex F (9/22/10 Depo. of Max Harris  
 (“*Harris*”) at 35:14-38:14. Furthermore, if Slingshot is a separate entity from Long Haul, Long  
Haul has no standing to bring either the Fourth Amendment or PPA claims on behalf of  
Slingshot.

1 viewed lending logs, lists of volunteers, prisoner mail, and photographs while conducting their  
2 search of the premises. (Pltffs' MPA at p. 18.) The search was reasonable. Officers are entitled and  
3 expected to examine an object in order to determine whether or not it is one they are authorized to  
4 seize. *See U.S. v. Slocum*, 708 F.2d 587, 604 (11th Cir. 1983). This is especially true for searches of  
5 documents, which often require examination before any determination can be made as to whether  
6 they fall within the scope of a warrant. Thus, "innocuous records must be examined to determine  
7 whether they fall into the category of those papers covered by the search warrant." *U.S. v. Kufrovich*,  
8 997 F.Supp. 246, 264 (D. Conn. 1997); citing *Andresen v. Maryland*, 427 U.S. 463, 482 n. 1 (1976).  
9 Although care must be taken to minimize the intrusion, records searches require that many, and often  
10 all, documents in the targeted location be searched because "few people keep documents of their  
11 criminal transactions in a folder marked 'crime records.'" *U.S. v. Hunter*, 13 F.Supp.2d 574, 582 (D.  
12 Vt. 1998) (internal quotation marks omitted). Agents authorized by a warrant to search a location for  
13 documents containing specific information are entitled to examine all files located at the site for the  
14 specified information. *See U.S. v. Heldt*, 668 F.2d 1238, 1267 (D.C. Cir 1981). Defendants' search  
15 here readily falls within these parameters.

16 (3) The Seized Computers Were Properly Searched And Promptly  
17 Returned.

18 In the Statement of Probable Cause, Kasiske expressly sought authorization to remove the  
19 computers and electronic storage devices off-site for forensic review. Kas. Dec. ¶¶50, 55, 64 and Ex.  
20 N. Given the difficulty of segregating computer files containing evidence of the crime, he was  
21 justified in doing so. *See U.S. v. Hay*, 231 F.3d 630, 637 (9th Cir. 2000) (removing entire computer  
22 system off-site justified by time, expertise, and controlled environment required for proper analysis);  
23 *U.S. v. Tamura*, 694 F.2d 591, 596 (9th Cir. 1982).

24 UCPD imaged all hard drives and returned to Plaintiffs all seized computers and storage  
25 devices within six weeks of the execution of the search warrant. Kas. Dec. ¶¶113 and 114. Given  
26 the care and expertise required for the computer search and the workload of the SVRCF Lab, this  
27 time frame was reasonable. *Id.* at ¶114.

28 Furthermore, because the search terms submitted by the UCPD and utilized by the SVRCF

1 Lab to search the six public access computers were targeted and calculated to locate material relating  
 2 to the investigation (Kas. Dec. ¶¶116-117, Ex. V), this limited search did not violate the Fourth  
 3 Amendment. *See U.S. v. King*, 693 F.Supp.2d 1200, 1229 (D. Hawaii 2010) (officers limited search  
 4 of computer and peripheral devices to that which would produce evidence of defendant’s alleged  
 5 crimes); *Adjani*, 452 F.3d at 1150 (“The government should not be required to trust the suspect’s  
 6 self-labeling when executing a warrant.”). Plaintiffs have no evidence to the contrary.

7 **3. Defendants Are Entitled To Qualified Immunity With Regard To**  
 8 **Plaintiffs’ Fourth Amendment Claims.**

9 **a. *Plaintiffs Cannot Establish That Defendants, Or Any Of Them,***  
 10 ***Violated Their “Clearly Established” Fourth Amendment Rights***  
 11 ***Under The Specific Circumstances Alleged Here.***

12 As established above, Plaintiffs cannot prove that Defendants violated their Fourth  
 13 Amendment rights, as alleged. As a practical matter, however, this Court need not reach that  
 14 question, because it is abundantly clear that Plaintiffs cannot meet the more demanding standard –  
 15 arising out of Defendants’ assertion of qualified immunity – requiring Plaintiffs to prove that  
 16 Defendants violated “clearly established” Fourth Amendment rights under the circumstances  
 17 presented here.

18 “The doctrine of qualified immunity protects government officials from liability for civil  
 19 damages insofar as their conduct does not violate clearly established statutory or constitutional  
 20 rights of which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S. 223, ---,  
 21 129 S. Ct. 808, 815 (2009) (internal quotation marks and citation omitted). “The protection of  
 22 qualified immunity applies regardless of whether the government official’s error ‘is a mistake of  
 23 law, a mistake of fact, or a mistake based on mixed questions of law and fact.’” *Id.* (citation  
 24 omitted). Qualified immunity protects government officials from their exercise of poor judgment,  
 25 and fails to protect only those who are “plainly incompetent or those who knowingly violate the  
 26 law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

27 In order to resolve a public official’s claims of qualified immunity, a court must determine  
 28 whether the right at issue was “clearly established” at the time of defendant’s alleged misconduct.  
*Saucier v. Katz*, 533 U.S. 194, 202 (2001). “The relevant, dispositive inquiry in determining



1 whether a right is clearly established is whether it would be clear to a reasonable officer that his  
2 conduct was unlawful in the situation he confronted.” *Saucier*, 533 U.S. at 202. In other words,  
3 “[i]f the law did not put the officer on notice that his conduct would be clearly unlawful,  
4 summary judgment based on qualified immunity is appropriate.” *Id.*; see also *Devereaux v.*  
5 *Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (to overcome qualified immunity, plaintiff must  
6 demonstrate the rights he asserts “were already delineated with sufficient clarity to make a  
7 reasonable [public official] in the defendant’s circumstances aware that what he was doing  
8 violated the right.”)

9 In order to overcome Defendants’ assertion of qualified immunity here, Plaintiffs would  
10 have to demonstrate, at a minimum, that it was “clearly established” under existing case law at  
11 the time that (1) the search warrant was unconstitutionally overbroad on its face; (2) their search  
12 of the Long Haul premises should not have included the locked westernmost room on the ground  
13 floor; and (3) there was no probable cause to search for or seize computers and storage devices  
14 other than the public access computers and storage devices in the western loft area. Plaintiffs have  
15 not and cannot cite case law existing at the time of the search “clearly establishing” any violation  
16 of Plaintiffs’ Fourth Amendment rights under the circumstances presented here.<sup>16</sup>

17 In the Fourth Amendment context, qualified immunity extends to officers obtaining a  
18 warrant where they have a reasonable belief that their application is supported by probable cause;  
19 and to officers executing the warrant, where they reasonably rely upon the warrant in conducting  
20 the search. The Supreme Court has recognized that it is inevitable that law enforcement officials  
21 will in some cases reasonably but mistakenly conclude that probable cause is present. “[I]n such  
22 cases those officials ... should not be held personally liable.” *Rodis v. City and County of San*  
23 *Francisco*, 558 F.3d 964, 970-71 (9th Cir. 2009) (internal citations and quotation marks omitted;  
24 alterations in original). Officers lose their shield of qualified immunity “[o]nly where the warrant  
25 application is so lacking in indicia of probable cause as to render official belief in its existence  
26

27 <sup>16</sup> Qualified immunity must be determined, not only with reference to existing “established  
28 law,” but also with reference to “the information [the defendants] possessed.” *Baker v. Racansky*,  
887 F.2d 183, 187 (9th Cir. 1989) (internal quotations omitted).

1 unreasonable.” *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986) (citing *U.S. v. Leon*, 468 U.S. 897,  
2 923 (1984)). The inquiry is “whether a reasonably well-trained officer in [defendant’s] position  
3 would have known that his affidavit failed to establish probable cause and that he should not have  
4 applied for the warrant.” *Malley*, 475 U.S. at 345. There is no basis for reaching any such  
5 conclusion with regard to Kasiske’s and Alberts’ actions here. See *Johnson v. Walton*, 558 F.3d  
6 1106, 1111 (9th Cir. 2009) (finding officer’s belief reasonable that she had probable cause to  
7 apply for search warrant and granting her qualified immunity); *KRL v. Estate of Moore*, 512 F.3d  
8 1184, 1190 (9th Cir. 2008). Further, the additional members of the warrant team are entitled to  
9 qualified immunity because their reliance on the warrant was objectively reasonable. *Marks v.*  
10 *Clarke*, 102 F.3d 1012, 1028-30 (9th Cir. 1996) (citing *Leon*, 468 U.S. at 920-21); *Barlow v.*  
11 *Ground*, 943 F.2d 1132, 1139 (9th Cir. 1991) (“A police officer generally has qualified immunity  
12 for conducting an unconstitutional search if he is acting on the basis of a facially valid warrant.”);  
13 see also *Maryland v. Garrison*, 480 U.S. 79, 88 (1987) (officer’s reasonable failure to appreciate  
14 that a facially valid warrant was overbroad when conducting a search created no Fourth  
15 Amendment violation). Zuniga and MacAdam, reasonably relied upon the facially valid warrant,  
16 and are entitled to immunity. Zun. Dec. ¶¶35, 37, 62; Mac. Dec. ¶¶4, 10, 35. Similarly, Shaffer  
17 and Hart’s assistance was minimal and they had a reasonable basis for their belief that their  
18 participation did not violate the Fourth Amendment. Shaffer Dec. ¶¶4-27; Hart Dec. ¶¶3-11. For  
19 example, neither Shaffer nor Hart searched or seized any documents or computers, but both  
20 assisted in the carrying out of seized items. Shaf. Dec. ¶¶13-20; Hart Dec. ¶¶7-10.

21 As for the execution of the warrant, including the search of the westernmost room on the  
22 ground floor and the seizure and subsequent search of computers other than those in the western  
23 loft area, Plaintiffs cannot carry their burden of showing Defendants’ search of the premises  
24 breached a clearly established Fourth Amendment right. In fact, Ninth Circuit precedent  
25 permitted the search of the entire premises under the well-established rule applicable when the  
26 entire property was suspect or under the control of the suspects. *U.S. v. Gilman*, 684 F.2d 616,  
27 618 (9th Cir. 1982); *U.S. v. Whitten*, 706 F.2d 1000, 1008 (9th Cir. 1983); *U.S. v. Alexander*, 761  
28 F.2d 1294, 1301 (9th Cir. 1985).

1           Therefore, the motion should be granted on qualified immunity grounds as to each of the  
2 Individual Defendants.

3                           **4.       Plaintiffs Lack Any Basis For Asserting Their Fourth Amendment**  
4                           **Claims Against Defendants In Their Official Capacities.**

5           Plaintiffs' claims against the individual University Defendants in their official capacities are  
6 limited to claims for prospective injunctive relief. *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d  
7 836, 840 (9th Cir. 1997) (“[T]he Eleventh Amendment allows only prospective injunctive relief to  
8 prevent an ongoing violation of federal law.”). Because a suit against an official in his or her official  
9 capacity is a suit against the state, a practice, policy or procedure of the state must be at issue in a  
10 claim for official capacity injunctive relief. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). Plaintiffs have  
11 not and cannot identify any practice or policy of the UCPD which resulted in the claimed violation  
12 of the Fourth Amendment. Further, Plaintiffs cannot demonstrate any continuing or imminent  
13 constitutional violation which could support any claim for prospective injunctive relief.  
14 Accordingly, Plaintiffs' official capacity claims against the University Defendants are barred by the  
15 Eleventh Amendment.

16           Plaintiffs' claims for injunctive relief are also defective because, as established above, they  
17 are unable to prove any violation of their Fourth Amendment rights. In addition, in order to obtain  
18 injunctive relief, Plaintiffs must demonstrate “the basic requisites of the issuance of equitable relief  
19 in these circumstances – the likelihood of substantial and immediate irreparable injury, and the  
20 inadequacy of remedies at law.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-03 (1983); *Stanley v.*  
21 *University of Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994). Plaintiffs must demonstrate  
22 that a “credible threat” exists that they will again be subject to the specific injury for which they seek  
23 injunctive relief. *Kolender v. Lawson*, 461 U.S. 352, 355 n.3 (1983). A reasonable showing of a  
24 “sufficient likelihood” that the plaintiff will be injured again is necessary. *Lyons*, 461 U.S. at 108,  
25 111. The “mere physical or theoretical possibility” of a challenged action again affecting the plaintiff  
26 is not sufficient. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). Here, neither EBPS nor Long Haul can  
27 demonstrate any probability they will be injured again based on an improper search and seizure of  
28 their property. Plaintiffs do not qualify for injunctive relief because they are unable to show that the

1 practices to which they object are likely to be repeated *as to them*. *Sample v. Johnson*, 771 F.2d  
 2 1335, 1339 (9th Cir. 1985). Finally, Plaintiffs have failed to demonstrate they lack an adequate  
 3 remedy at law for the return of the copies of the seized computers which remain in custody.  
 4 California law provides adequate remedies for the return of any seized property, including a motion  
 5 under Cal. Penal Code §1536. *See City of West Covina v. Perkins*, 525 U.S. 234, 240-41 (1999).

6 **B. Defendants Are Entitled To Summary Judgment On Plaintiffs' Third Cause Of**  
 7 **Action For Violation Of The Privacy Protection Act.**

8 Subject to certain exceptions, the Privacy Protection Act ("PPA") makes the search or seizure  
 9 of certain materials unlawful if: (a) the materials are "work product materials" prepared, produced,  
 10 authored, or created "in anticipation of communicating such materials to the public," 42 U.S.C.  
 11 §2000aa-7(b)(1); (b) the materials include "mental impressions, conclusions, or theories" of its  
 12 creator, §2000aa-7(b)(3); and (c) the materials are possessed for the purpose of communicating the  
 13 material to the public by a person "reasonably believed to have a purpose to disseminate to the  
 14 public" some form of "public communication," §§2000aa-7(b)(3), 2000aa(a). Alternatively, the PPA  
 15 applies when the materials are: (a) "documentary materials" that contain "information," §2000aa-  
 16 7(a), and (b) the materials are possessed by a person "in connection with a purpose to disseminate to  
 17 the public" some form of "public communication." §§2000aa(b), 2000aa-7(a).

18 Here, Plaintiffs have no claim under the PPA, because Defendants lacked any knowledge or  
 19 belief that either of them was engaged in publishing activities at the Long Haul premises. Second,  
 20 even if Defendants knew of such activities, there would still be no liability under the PPA, because  
 21 their conduct falls within multiple exceptions set forth in the statute. Third, each of the individual  
 22 University Defendants have an additional defense, based on their reasonable, good faith belief in the  
 23 lawfulness of their actions.

24 **1. Defendants Lacked Any Knowledge Or Belief That Plaintiffs Engaged In**  
 25 **Publishing Activities At The Shattuck Street Premises.**

26 The PPA prohibits searches and seizures only of those protected materials in the possession  
 27 of a person reasonably believed to be engaged in publishing activities. *See* 42 U.S.C. §2000aa(a).  
 28 At most, certain Defendants reasonably believed that, as an "infoshop," Long Haul was engaged in

1 the lending, sale, or distribution of books, ‘zines, or newspapers. Kas. Dec. ¶97; Alb. Dec. ¶56.  
 2 They did not believe that Long Haul was engaged in the production or publishing of any such  
 3 materials. Kas. Dec. ¶89; Alb. Dec. ¶53; Zun. Dec. ¶49; Mac. Dec. ¶32. Specifically, Defendants  
 4 lacked any knowledge or belief that the computers seized from the eastern loft office were used in  
 5 publishing Slingshot, or in any other publishing activity. Kas. Dec. ¶106; Alb. Dec. ¶64; Zun. Dec.  
 6 ¶55; Mac. Dec. ¶26.

7 Plaintiffs cite various “facts” seeking to demonstrate that Defendants had the requisite  
 8 knowledge of publishing activities. They also cite additional facts, which, they contend, Defendants  
 9 “could have” known about, had they investigated further.<sup>17</sup> These latter facts are irrelevant to the  
 10 assessment of PPA liability.<sup>18</sup> Defendants were unaware of any publishing activities at Long Haul.  
 11 Kas. Dec. ¶89; Alb. Dec. ¶53; Zun. Dec. ¶49; Mac. Dec. ¶32, Shaf. Dec. ¶¶26-27; Hart Dec. ¶¶11.  
 12 Their belief that no publishing was taking place was objectively reasonable in light of the facts they  
 13 knew at the time. Accordingly, they cannot be liable for violating the PPA. *See Teichberg v. Smith*,  
 14 734 F.Supp.2d 744, --- (D. Minn. 2010) (Where no officers testified to knowledge that plaintiff was a  
 15 journalist, no violation of the PPA occurred because the officers did not knowingly seize  
 16 documentary evidence in the possession of one with a purpose to disseminate it to the public);  
 17 *Whalen v. Langfellow*, 731 F.Supp.2d 868, 885 (D. Minn. 2010).

18 **a. *Slingshot.***

19 Plaintiffs are unable to cite facts demonstrating that Defendants were aware (or should have  
 20 been aware, in light of the facts known at the time) of Long Haul’s publication of Slingshot from  
 21 3124 Shattuck.

22 Text in Slingshot newspapers: Plaintiffs inaccurately assert that every issue of Slingshot

24 <sup>17</sup> For example, Plaintiffs suggest Defendants “could have searched for EBPS on the  
 25 Internet and would have found the group’s Myspace page.” (Pltffs’MPA at p. 21.)

26 <sup>18</sup> The PPA does not impose an obligation on law enforcement officials to undertake an  
 27 investigation into whether or not PPA-protected materials might be present at a proposed search  
 28 location. Rather, the statute simply creates an objective standard for determining whether, *in light*  
*of the facts known to the officer at the time*, the officer “reasonably believed” the person  
 possessing the materials was engaged in publishing activities. *Steve Jackson Games, Inc. v. U.S.*  
*Secret Service*, 816 F.Supp. 432, 440 (W.D. Tex. 1993).

1 since 1994 “says that it is published from that Shattuck Avenue address.”<sup>19</sup> Even if this were true, it  
 2 is irrelevant, since no Defendant recalls ever reading such a statement, nor do they recall reading the  
 3 actual statement which is the apparent basis for Plaintiffs’ characterization. Kas. Dec. ¶28; Alb. Dec.  
 4 ¶32; Zun. Dec. ¶27; Mac. Dec. ¶15.

5 Text on Long Haul website: Plaintiffs point to text and a link appearing at the bottom of one  
 6 of the site’s multiple pages, indicating that Slingshot was among the “individual collectives at the  
 7 Long Haul.” This statement says nothing about publication of Slingshot at 3124 Shattuck.  
 8 Moreover, no Defendant recalls reviewing this statement. Kas. Dec. ¶28; Alb. Dec. ¶32; Zun. Dec.  
 9 ¶27; Mac. Dec. ¶15. Kasiske, Zuniga, and Alberts each reviewed portions of the Long Haul site, but  
 10 none recall viewing the page containing the link to Slingshot. Kas. Dec. ¶26-29; Alb. Dec. ¶13; Zun.  
 11 Dec. ¶14.

12 Slingshot “banner” above the eastern loft space: The “banner” was among dozens of signs  
 13 and posters that blanketed the interior wall spaces at Long Haul. Kas. Dec. ¶¶84 and 122, Ex. AA;  
 14 Alb. Dec. ¶50; Zun. Dec. ¶47; Mac. Dec. ¶25. None of the Defendants noticed this particular  
 15 “banner” at the time of the raid. Kas. Dec. ¶104; Alb. Dec. ¶50; Zun. Dec. ¶47; Mac. Dec. ¶25.  
 16 Moreover, there was nothing about the banner signifying that Slingshot was based in the eastern loft  
 17 room, or that it engaged in publishing activities there.

18 Issues of Slingshot in news rack in front room: Plaintiffs contend there were a number of  
 19 issues of Slingshot in the front room news rack.<sup>20</sup> Even if true, this would be entirely consistent with  
 20 Defendants’ understanding that Long Haul was an “infoshop” that sold and distributed newspapers  
 21 and zines. Kas. Dec. ¶14; Alb. Dec. ¶9; Zun. Dec. ¶10; Mac. Dec. ¶12. It did nothing to alert  
 22 Defendants to any on-site publication of Slingshot. Kas. Dec. ¶106; Alb. Dec. ¶64; Zun. Dec. ¶60;  
 23 Mac. Dec. ¶26.

24 <sup>19</sup> Plaintiffs have refrained from putting any of these issues into evidence. In fact, the  
 25 Autumn, 2008 issue of Slingshot includes text stating “Slingshot Newspaper” in bold large type,  
 26 next line: “Sponsored by Long Haul”: next line “3124 Shattuck Avenue, Berkeley, CA 94705.”  
 27 Ellis Dec. ¶10, Ex. I. Far from “saying it is published” from the Shattuck address, this can  
 28 reasonably be read as simply stating that Slingshot’s “sponsor,” Long Haul, is located at the  
 Shattuck address.

<sup>20</sup> Defendants object to Ex. 16 (photo of news rack) to the Palmer Dec. as lacking  
 foundation. The photo was taken many days after the August 27, 2008 search. Ellis Dec. ¶11.

1 Slingshot's webpage: No Defendant recalls ever viewing this webpage, with the exception of  
 2 Zuniga. Kas. Dec. ¶26; Alb. Dec. ¶32; Mac. Dec. ¶15. Zuniga testified that he saw the webpage on  
 3 or before February 19, 2008, more than six months before the search of Long Haul. Zun. Dec. ¶27.  
 4 According to Plaintiffs' evidence, the webpage stated in 2008 that Slingshot "is an all volunteer, non-  
 5 profit, tax exempt project of the Long Haul." Zuniga commented in an email to Alberts that "On  
 6 their home page they claim an affiliation with the Long Haul on 3124 Shattuck Avenue here in  
 7 Berkeley." Zun. Dec. ¶29. Zuniga does not recall seeing or taking note of anything on the page that  
 8 suggested to him that Slingshot was published from 3124 Shattuck, nor does he recall being aware of  
 9 an "affiliation" between Long Haul and Slingshot six months later, when Long Haul was searched.  
 10 *Id.* at ¶30.

11 **b. EBPS.**

12 Plaintiffs cite no facts demonstrating Defendants were aware (or should have been aware, in  
 13 light of the facts known at the time) of EBPS engaging in any publishing activities at Long Haul at  
 14 the time of the search.

15 The sole fact Plaintiffs point to is a cryptic reference which allegedly appeared on Long  
 16 Haul's website in August 2008, which simply advertises the "East Bay Prisoner Support Night" and  
 17 briefly describes EBPS as a "prison abolitionist project formed by members of the Anarchist Black  
 18 Cross, Prison Activist Resource Center and Prison Literature Project." Palmer Dec. ¶11, Ex. 1.  
 19 There is nothing here even suggesting that EBPS maintained an office at Long Haul, and certainly  
 20 nothing suggesting EBPS published anything from Long Haul. No Defendant was aware that EBPS  
 21 maintained an office at Long Haul, that it engaged in publishing activities generally, or that it  
 22 published anything from Long Haul. Kas. Dec. ¶99; Alb. Dec. ¶71; Zun. Dec. ¶53; Mac. Dec. ¶27,  
 23 Shaf. Dec. ¶27, Hart Dec. ¶11.

24 EBPS Was Not Engaged In Publishing. More fundamentally, regardless of the state of  
 25 Defendants' knowledge, EBPS cannot assert a PPA claim, because in fact it was not engaged in any  
 26 publishing activities as defined by the PPA. EBPS is a very small, very loosely run "organization."<sup>21</sup>

27 \_\_\_\_\_  
 28 <sup>21</sup> EBPS has no formal structure or legal identity. It is comprised of three volunteers who  
 created it in January 2008. *Lyons*, 11:13-15, 16:6-13; 21:9-21, 22:5-21. It is not incorporated,

1 EBPS asserts that it engages in letter writing to individual prisoners, and that it sends out literature  
 2 (which it apparently obtains from third parties) to various individuals and groups on its mailing list.  
 3 Lyons Dec. ¶¶3, 4. Defendants are aware of no evidence that EBPS publishes any “newspaper,  
 4 book, broadcast, or other similar form of public communication.” §2000aa-7(a), (b).

5 **2. Defendants’ Conduct Falls Within The Criminal Suspect Exception**  
 6 **Created By The PPA.**

7 Even if Plaintiffs could establish Defendants knowingly seized computers containing PPA-  
 8 protected materials – which they cannot – Defendants would remain entitled to summary judgment,  
 9 because their conduct falls within the express criminal suspect exception set forth in the PPA.

10 The PPA expressly exempts from its requirements any search or seizure of protected  
 11 materials where “there is probable cause to believe that the person possessing such materials has  
 12 committed or is committing the criminal offense to which the materials relate.” §2000aa(a)(1),  
 13 2000aa(b)(1). Where applicable, this “criminal suspect exception” furnishes a complete defense to  
 14 an alleged PPA violation. *See, e.g., S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553  
 15 (6th Cir. 2007); *Berglund v. City of Maplewood*, 173 F.Supp.2d 935 (D. Minn.2001), *aff’d* 50  
 16 Fed.Appx. 805, 2002 WL 31609767, *cert.denied*, 539 U.S. 965.

17 The criminal suspect exception is clearly applicable here. Defendants had ample cause to  
 18 believe that a person affiliated with Long Haul was complicit in sending the threatening emails. *Kas.*  
 19 *Dec.* ¶¶45-47, 50, 52-55, 75 and Ex. N. Defendants had traced these emails back to the Long Haul  
 20 premises. *Id.* at ¶¶35-45, 50, 52-55 and Ex. N. They were aware from their investigation that Long  
 21 Haul was actively involved in animal rights activities in Berkeley, and that it supported animal rights  
 22 activists who were harassing UCB researchers. *Id.* at ¶¶20-24. Based on these facts, Defendants did  
 23 not view Long Haul as an “innocent third party,” but instead reasonably and prudently viewed  
 24 individuals affiliated with Long Haul as criminal suspects.<sup>22</sup> Defendants were not obliged by the

25 \_\_\_\_\_  
 26 does not file taxes, and does not have a bank account. *Id.* The group would meet at most weekly  
 and sometimes a month would go by between meetings. *Id.* at 17:2-8.

27 <sup>22</sup> Defendants recognized that others who were not affiliated with Long Haul may also  
 28 have been responsible for sending the threatening emails from the Long Haul premises, including  
 patrons of Long Haul who had access to computers in the “public access” room at Long Haul.  
*Kas. Dec.* ¶¶45-47, 75. They were not so imprudent, though, to assume that the threatening emails



1 PPA to forego a search warrant and instead serve a subpoena on individuals for whom there was  
 2 probable cause to suspect were complicit in the very crime under investigation. Under these  
 3 circumstances, the suspect exception to the PPA clearly applies. *See, e.g., DePugh v. Sutton*, 917  
 4 F.Supp. 690, 696 (W.D. Mo. 1996) (“The P.P.A. clearly allows the government to depart from the  
 5 requirements of the Act in those instances in which the person suspected of a crime is in possession  
 6 of documents related to the crime.”)<sup>23</sup>

7 The criminal suspect exception extends to seizure of computers containing PPA-protected  
 8 material commingled with evidence of a crime. *Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001). In  
 9 *Guest*, the Sixth Circuit addressed claims arising out of the seizures of two electronic bulletin board  
 10 servers suspected of housing evidence and contraband relating to obscenity, child pornography, and  
 11 other crimes. The Sixth Circuit noted that “when police execute a search warrant for documents on a  
 12 computer, it will often be difficult or impossible (particularly without the cooperation of the owner)  
 13 to separate the offending materials from other ‘innocent’ material on the computer” at the site of the  
 14 search. *Id.* at 341-42. Given these pragmatic concerns, the court refused to find PPA-liability for  
 15 incidental seizures; to construe the PPA otherwise would “prevent police in many cases from seizing  
 16 evidence located on a computer.” *Id.* at 342. Instead, the court held that “when protected materials  
 17 are commingled on a criminal suspect’s computer with criminal evidence that is unprotected by the  
 18 act, we will not find liability under the PPA for seizure of the PPA-protected materials.” *Id.* The  
 19 same is true here. *See also U.S. v. Hunter*, 13 F.Supp.2d 574, 582 (D. Vt. 1998) (concluding that  
 20 materials for weekly legal newsletter published by the defendant from his law office “relate” to the  
 21 defendant’s alleged involvement in his client’s drug crimes when the former was inadvertently seized  
 22 in a search for evidence of the latter).

23  
 24 must have been sent by an unaffiliated patron. Indeed, such an assumption would have  
 25 unreasonably ignored the possibility the emails originated from other computers on the premises  
 26 sharing the same IP address, and would have disregarded the substantial evidence linking Long  
 27 Haul with animal rights activists. Kas. Dec. ¶¶20-24, 35-45, 50, 52-55 and Ex. N.

28 <sup>23</sup> For similar reasons, Defendants’ conduct also falls within another PPA exception  
 which applies where there is reason to believe that service of a subpoena “would result in the  
 destruction, alteration, or concealment” of “documentary materials” protected under the PPA. 42  
 U.S.C.A. §2000aa(b)(3). Clearly, Defendants’ reasonable suspicions regarding complicity on the  
 part of a person or persons affiliated with Long Haul suffice to trigger this exception as well.

1                   **3. Plaintiffs' Claims Against The University Defendants Are Barred By The**  
 2                   **Good Faith Defense Available Under The PPA.**

3                   As a separate, additional, and complete defense to Plaintiffs' PPA claims, each of the  
 4 individual University Defendants is entitled to the statutory good faith defense provided by the PPA.  
 5 Under the statute, a damages action may be pursued against an individual state employee where, as  
 6 here, the state has not waived its sovereign immunity. 42 U.S.C. §2000aa-6(a)(1). However, such  
 7 claims against individual employees are subject to the PPA's "good faith defense," which provides a  
 8 complete defense to liability where the individual "had a reasonable good faith belief in the  
 9 lawfulness of his conduct." 42 U.S.C. §2000aa-6(b).

10                  The good faith defense bars Plaintiffs' claims. First, with regard to the criminal suspect  
 11 exception, even if – notwithstanding the ample facts supporting a finding of probable cause – the  
 12 court were to conclude there was insufficient probable cause to suspect a person affiliated with Long  
 13 Haul was complicit in the electronic stalking, the University Defendants would still have no PPA  
 14 liability, because they each had a good faith, reasonable belief that probable cause existed. Kas. Dec.  
 15 ¶¶50, 52, 112 and Ex. N; Alb. Dec. ¶77; Zun. Dec. ¶62; Mac. Dec. ¶35.

16                  Additionally, each University Defendant had a reasonable, good faith belief that Long Haul's  
 17 activities as an "infoshop" included lending and sale of books, zines, and newspapers, but did not  
 18 extend to any publishing activities occurring at 3124 Shattuck. Kas. Dec. ¶¶89, 97; Alb. Dec. ¶¶53,  
 19 56; Zun. Dec. ¶49; Mac. Dec. ¶32. This good faith belief furnishes a complete defense.

20                  **C. Defendants Are Entitled To Summary Judgment On Plaintiff's Fourth Cause Of**  
 21                  **Action Seeking Declaratory Relief.**

22                  Plaintiffs' complaint includes a claim for declaratory relief under 28 U.S.C. §2201, *et seq.*  
 23 Because the Court dismissed this claim against Shaffer and Hart by order dated November 30, 2009  
 24 [Dkt. 69, p. 17], Plaintiffs' claim for declaratory relief is operative against defendants Alberts,  
 25 Kasiske, MacAdam, and Zuniga only. Because Plaintiffs' claims for alleged constitutional violations  
 26 fail for the reasons described above, their declaratory relief claims also fail. *See, e.g., Carr HUML*  
 27 *Investors, LLC v. Arizona*, 2007 WL 4403981, \*18 (D. Ariz. 2007). 28 U.S.C. §2201 does not  
 28 provide Plaintiffs with an independent claim for relief against any defendant. *Dong v. Chertoff*, 513

1 F.Supp.2d 1158, 1160 (N.D. Cal. 2007) (citations omitted).

2 **IV. EVIDENTIARY OBJECTIONS**

3 Defendants object to and move to strike evidence offered in support of Plaintiffs' Motion for  
4 Summary Judgment.<sup>24</sup> Defendants further object to the portions of Plaintiffs' motion that cite to or  
5 discuss this inadmissible evidence.

6 **A. Lacks Authentication (Fed. Rule of Evid. 901) and Incomplete Document (Fed.  
7 Rule of Evid. 106)**

8 Defendants object to the following evidence on the grounds that it lacks authentication as  
9 required under Fed. Rule of Evid. 901:<sup>25</sup> (1) Zimmerman Dec. Ex. 27; (2) Palmer Dec. Ex. 1-16;  
10 and, Lyons Dec. Ex. 1-3. Defendants object to the following evidence on the grounds that Plaintiffs  
11 have produced an incomplete document: (1) Zimmerman Dec. ¶20 Ex. 19; and, (2) Zimmerman  
12 Dec. ¶26 Ex. 25. Additionally, defendants object that Exhibit 3 to the Declaration of Jesse Palmer  
13 was not attached to Plaintiffs' filing.

14 **B. Hearsay (Fed. Rule of Evid. 802)**

15 Defendants object to the following evidence on the grounds that it contains inadmissible  
16 hearsay pursuant to Fed. Rule of Evid. 802: (1) Zimmerman Dec. ¶6, Ex. 5 (*Palmer II Depo.*) at  
17 313:18-22, 314:8-12, 314:18-20, 314:23-315:2, 315:18-20, and 316:21-24; (2) Zimmerman Dec.  
18 ¶20, Ex. 19; (3) Palmer Dec. 2:25-27; and, (4) Miller Dec. 2:4-5.

19 **C. Lacks Foundation (Fed. Rules of Evid. 602 and 701)**

20 Defendants object to the following evidence on the grounds that it lacks foundation pursuant  
21 to Fed. Rules of Evid. 602 (personal knowledge) and/or 701 (lay opinion): (1) Zimmerman Dec. ¶5,  
22 Ex. 4 (*Palmer I Depo.*) at 25:18-26:3; (2) Zimmerman Dec. ¶6, Ex. 5 (*Palmer II Depo.*) at 293:12-  
23 15, 293:16-19, 293:6-9, 297:17-24, 313:18-22, 314:8-12, 314:18-20, 314:23-315:2, 315:5-8,

24 <sup>24</sup> Plaintiffs' supporting declarations are replete with mischaracterizations of the cited  
25 testimony, incorrect citations, and inadmissible evidence. However, for the ease of the Court and  
26 for the sake of brevity, Defendants have listed only the most egregious violations of the Federal  
Rules of Evidence and mischaracterizations of testimony here. Defendants reserve the right to  
address additional objections in later briefing or hearings.

27 <sup>25</sup> The Ninth Circuit has "repeatedly held that unauthenticated documents cannot be  
28 considered in a motion for summary judgment." *Orr v. Bank of America, NT & SA*, 285 F.3d  
764, 773 (9th Cir. 2002) (citations omitted).

1 315:18-20, 316:21-24, 325:11-14, 377:24-378:3, and 381:22-382:1; (3) Zimmerman Dec. ¶12,  
 2 Ex. 11 (*Lyons Depo.*) at 85:10-12, 86:1-6, 86:14-21, and 89:13-21; (4) Zimmerman Dec. ¶19, Ex. 18  
 3 (*Harris Depo.*) at 73:24-74:3; (5) Zimmerman Dec. ¶20, Ex. 19; (6) Palmer Dec. 2:12, 2:17-19,  
 4 2:22-24, 2:25-27, 3:3-9, 3:18-20, 5:4-6, 5:18-20, 5:24-25, 6:3-5, 6:10-12, 6:26-27, and 7:10-12; (7)  
 5 Lyons Dec. 2:5-13, 2:14-15 and 2:17-19; and, (8) Miller Dec. 2:4-5, 2:18-22, 2:25-26, and 3:2-5.

6 **D. Mischaracterizes Cited Testimony or Document**

7 Defendants object to the following evidence on the grounds that the declarant has  
 8 mischaracterized the cited deposition testimony or document: (1) Zimmerman Dec. ¶¶5(h), 5(i),  
 9 6(g), 6(l), 7(h), 7(k), 7(p), 7(t), 7(v), 7(cc), 8(d), 8(g), 8(h), 8(l), 8(q), 9(i), 9(n), 11(a), 12(e), 12(g),  
 10 12(i), 12(j), 13(e), 13(k), 13(l), 13(m), 13(o), 13(p), 16(b), 17(b), 27(a), 29(a), and 30(a); and  
 11 (2) Palmer Dec. ¶11.

12 **V. CONCLUSION**

13 For the foregoing reasons, the University Defendants and the Federal Defendants each  
 14 respectively request this Court to enter summary judgment in their favor on each claim asserted  
 15 against them by Plaintiffs Long Haul and EBPS, respectively and to deny Plaintiffs' motion for  
 16 summary judgment in its entirety.

17 Dated: February 14, 2011

SCHIFF HARDIN LLP

18  
 19 By: /s/ William J. Carroll

William J. Carroll

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22 Dated: February 14, 2011

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