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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BARRY A. HAZLE, JR.,)
) 2:08-cv-2295-GEB-EFB
 Plaintiff,)
)
 v.) ORDER DENYING MOTION FOR NEW
) TRIAL
 MITCH CROFOOT, et al.,)
)
 Defendants.)
 _____)

Plaintiff Barry A. Hazle moves for a new trial under Federal Rule of Civil Procedure ("Rule") 59(a) arguing: the jury's verdict was contrary to the clear weight of the evidence; the jury failed to award damages which was contrary to law and evinces the jury did not follow the Court's instructions; and, newly discovered evidence shows the Defendants presented false information to the jury. Mitchell Crofoot ("Crofoot"), Brenda Wilding ("Wilding"), and Richard Jallins ("Jallins") (collectively, "Defendants") oppose Hazle's motion. For the reasons stated below, the motion is DENIED.

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1 **I. LEGAL STANDARD**

2 Rule 59(a) states, "A new trial may be granted . . . in an
3 action in which there has been a trial by jury, for any of the reasons
4 for which new trials have heretofore been granted in actions at law in
5 the courts of the United States." Fed.R.Civ.P. 59(a)(1). The Ninth
6 Circuit

7 has noted, Rule 59 does not specify the grounds on which
8 a motion for a new trial may be granted. Rather, the
9 court is bound by those grounds that have been
10 historically recognized. Historically recognized grounds
11 include, but are not limited to, claims that the verdict
12 is against the weight of the evidence, that the damages
13 are excessive, or that, for other reasons, the trial was
14 not fair to the party moving. [The Ninth Circuit has]
15 held that the trial court may grant a new trial only if
16 the verdict is contrary to the clear weight of the
17 evidence, is based upon false or perjurious evidence, or
18 to prevent a miscarriage of justice.

19 Molski v. M.J. Cable, Inc., 481 F.3d 724, 729 (9th Cir. 2007) (citations
20 and internal quotation marks omitted).

21 **II. FACTUAL BACKGROUND**

22 Prior to trial, an order issued granting Hazle's motion for
23 partial summary judgment against Defendants, in which each Defendant was
24 found liable for violating Hazle's Establishment Clause rights by
25 requiring him to participate in a 12-step drug rehabilitation program
26 that contained religious components. (Order, April 7, 2010, ECF No. 87.)
27 The final pretrial order prescribes: "The damage issues will be tried to
28 a jury[.]" (Final Pretrial Order, May 5, 2010, ECF No. 93 1:22-23.)

A jury trial commenced on the damages issues on June 22, 2010.
(Reporters Transcript ("RT") 4:1-4.) Following preliminary jury
instructions, the judge told the jury about the pretrial ruling on
liability as follows: "Ladies and gentlemen of the jury, I decided in a
pretrial ruling that each defendant violated plaintiff's First Amendment
Establishment Clause right by requiring that plaintiff attend a 12-step

1 drug rehabilitation program after plaintiff objected to the religious
2 components of the program, and by arresting and incarcerating plaintiff
3 because of that failure to participate in the program." Id. 73:14-19.

4 **A. Undisputed Facts**

5 The following undisputed facts were read to the jury:

6 As a condition of parole following his incarceration
7 on drug possession charges, Barry Hazle was required to
8 participate in a 12-step religious drug treatment
9 program.

10 The residential drug treatment program to which
11 Hazle was assigned to fulfill his parole condition was
12 called Empire Recovery Center.

13 Empire used a 12-step program that included
14 references to God and a higher power.

15 Mitch Crofoot was Barry Hazle's parole agent at the
16 time that Hazle was at Empire.

17 One of Mr. Crofoot's responsibilities was to make
18 sure that Hazle complied with the conditions of his
19 parole.

20 Hazle told Crofoot that he objected to participating
21 in the Empire program because he was an atheist.

22 Hazle asked Crofoot whether he could fulfill his
23 parole requirements through a secular program.

24 Crofoot told Hazle that he needed to continue at
25 Empire while Crofoot researched the situation, and told
26 Hazle not to leave class again.

27 After making inquiries, Crofoot told Hazle there
28 were no programs that were non-12-step.

Crofoot told Hazle that he could file an
inmate/parolee appeal, a 602 appeal, but that in the
meantime he should continue to participate in the Empire
program or he would be returned to prison.

Hazle presented Crofoot on April 3, 2007 with a 602
appeal that set forth the basis for his objection to
participation in the Empire program.

According to Crofoot, representatives of the Empire
told Crofoot on April 6, 2007, that Hazle has been
disruptive, though in a congenial way, to the staff as
well as other students.

As to Hazle's disruptive behavior, Crofoot's
understanding from the Empire representatives was that
Hazle was not being loud; he wasn't throwing things
around; he wasn't stomping around; he wasn't being
boisterous and that sort of thing. He was sort of passive
aggressive.

Crofoot spoke with his unit supervisor Brenda
Wilding and concluded that the right thing to do was to
refer Hazle to the BPH, the Board of Prison Hearings, on
a parole violation for failing to participate in the
board-ordered program.

1 Crofoot and Wilding decided together that Hazle
2 needed to be returned to prison so he could argue his
3 case before the BPH.

4 Crofoot arrested Hazle on April 6, 2007, and booked
5 him into Shasta County Jail.

6 After arresting Hazle, Crofoot called the CRC,
7 explained the circumstances pertaining to Hazle,
8 explained that he was requesting that Hazle be returned
9 to custody, and obtained an oral order of return, and an
10 oral order of return was authorized by Deputy
11 Commissioner Richard Jallins.

12 After the oral order of return was authorized by
13 Deputy Commissioner Jallins, Hazle was sent back to
14 prison.

15 Wilding understood that Hazle objected to
16 participating in the Empire Recovery Center program
17 because he was an atheist.

18 Wilding understood that Crofoot told Hazle that
19 Hazle either had to participate in the Empire Recovery
20 Center program or be returned to prison.

21 Richard Jallins made the oral order of return with
22 respect to Barry Hazle in April 2007.

23 Id. 73:25-76:12.

24 The following undisputed facts were also read to the jury:

25 Number 1, . . . concerning the conditions that
26 existed from May 2006 to July 2007 at the California
27 State Prison located in Norco, California, known as the
28 California Rehabilitation Center, may also be referred to
as CRC.

Number 2, from May 2006 to February 2007, plaintiff
Barry Hazle was incarcerated at CRC as a civil addict
after entering a no contest plea for a drug possession
related offense. His incarceration during this period of
time, which was later ruled to be improper by a
California appeals court, was not caused by any of the
defendants in this action.

Following his arrest by defendant Crofoot in April
2007, plaintiff was re-incarcerated in CRC until July
2007.

Number 3, between May 2006 and July 2007, CRC's
inmate population was comprised of civil addicts like Mr.
Hazle, as well as inmates convicted of other felonious
offenses.

Between April 2007 and July 2007 there were roughly
3200 inmates housed at CRC, of which civil addicts
accounted for approximately 18 percent.

Number 4, during this period, CRC was overcrowded.
The number of inmates housed in the facility was
approximately twice the prison's design capacity.

According to a study presented by the California
Department of Corrections and Rehabilitation to the
California State Senate in 2006, overcrowded prison
conditions can have negative psychological and behavioral

1 effects on inmates due to an increased likelihood of
2 tension and violence between inmates. The study also
3 found that prison overcrowding makes it more difficult
4 for prison guards to control or limit inmate violence and
5 provide rehabilitative or treatment programs.

6 In March 2007, Governor Schwarzenegger toured CRC
7 and expressed his opinion that overcrowding resulted in
8 increased danger to prison staff and inmates.

9 [I]n these proceedings, the parties have not agreed
10 to or stipulated to either the existence of or the extent
11 of any alleged emotional distress related injuries
12 suffered by Mr. Hazle during his incarceration at CRC, or
13 at any other prison or substance abuse treatment
14 facility.

15 The existence or extent of such emotional distress
16 related injuries and damages is a question of fact to be
17 determined by the jury based upon all of the admissible
18 evidence presented during the trial, as well as any
19 instructions that the judge may give to you, the jury.

20 Id. 77:16-79:10.

21 **III. DISCUSSION**

22 **A. Clear Weight of the Evidence**

23 Hazle protests the jury's failure to award him damages, and
24 argues that the jury's award "of zero damages is simply irreconcilable
25 with [the pretrial] adjudicated liability, undisputed facts, and
26 principles of law." (Mot. 12:13-14.) Hazle contends "[b]ecause that
27 verdict is contrary to the clear weight of the evidence, a new trial
28 must be ordered." Id. 12:14-15.

The trial record evinces that the Board of Prison Hearings
ordered Hazle to be placed in the inpatient Empire program as a civil
addict, and that eventually Empire ceased allowing Hazle to participate
in that program because Hazle became disruptive. Each defendant
testified concerning a lack of authority to do anything other than re-
incarcerate Hazle in prison after Hazle was no longer allowed to
participate in the Empire in-patient program. (RT 128:11-18, 135:6-8;
141:1-7, 144:12-15, 145:13-19, 154:9-14.)

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1 Hazle argues that the jury apparently determined that "some
2 other party or parties . . . bore primary responsibility for the
3 violation of Hazle's rights", and that this determination does not
4 salvage the verdict, since each defendant "bear[s] full responsibility
5 for the consequences of" Hazle's incarceration "[u]nder principles of
6 joint and several liability[.]" (Mot. 9:22-23, 10:1-2.) However, the
7 jury's verdict on the damages and causation questions is clearly
8 supported by the trial record. In fact, the judge alerted the parties
9 about the authority and causation trial issues, out of the presence of
10 the jury, in pertinent part as follows:

11 THE COURT: The trial record is different than the
12 record before me at the time I ruled on summary judgment.
13 There is an issue of authority that has been developed
14 during your case. That issue was not an issue that was in
15 the summary judgment record, at least I don't recall
16 seeing it.

17 Plaintiff said something during his testimony
18 concerning the development of conditions for release
19 which basically states that "I don't think either of the
20 defendants developed those conditions for release." And
21 two of the defendants have stated that they had no
22 authority to change the conditions of release.

23 Am I mistaken in my statement that this authority
24 issue was not an issue that was in the summary judgment
25 record?

26 MR. HELLER [attorney for Plaintiff]: Your Honor, my
27 best understanding, and I remember the summary judgment
28 papers fairly well, was that in the opposition raised by
the defendants to our motion for partial summary
judgment, they did not assert as a defense or a basis for
not ruling in summary judgment anything having to do with
authority. And that's not been an issue that was raised
in those papers, nor is it one that, given the ruling, we
were intending or have addressed in this trial. It's come
up -- you're right, I've heard that in their testimony,
but our focus in this trial has been not to prove or
disprove any of that.

THE COURT: I'm not sure you're completely right
about . . . the focus in the trial was not to prove any
of that, because when Crofoot was giving testimony, you
asked him about, I believe it was, the 602 appeal and the
form that was used.

MR. HELLER: Yes, I remember that.

THE COURT: And whether there was a place on the form
where he could have stated an opinion concerning whether

1 plaintiff should be allowed to attend a secular drug
2 rehabilitation program.

3 And I thought that his testimony was that place on
4 the form that you had referenced at some point during
5 your examination was not designed for that kind of input.
6 And I thought that you followed up with a question that
7 basically tried to elicit from him testimony [showing] he
8 could have used that space for . . . a purpose that would
9 have benefitted your client

10 MR. HELLER: Yes. You're correct.

11 (RT 335:9-337:2.)

12 THE COURT: So, plaintiff's position is that each
13 defendant should be held liable, whether or not he or she
14 had the authority to change the unconstitutional
15 condition to which plaintiff was subjected?

16 MR. HELLER: No. Our position -- no. If I may correct
17 Your Honor, my position is that liability has already
18 been established in this trial by your order, and that we
19 were not in a position to -- or did not attempt to refute
20 that issue, that the authority question was never raised
21 in the summary judgment motion, so therefore we did not
22 address it at that time.

23 And although there are issues that could be raised
24 with respect to authority, we are not in a position to do
25 that because we didn't prepare, or bring in evidence in
26 the course of the trial, to prove that issue. That would
27 be an issue that would be, obviously, our burden. And
28 it's a burden that would be unfairly imposed upon us.

THE COURT: It's a burden that's what?

MR. HELLER: It would be a burden that would not be
fairly imposed on us at this stage because we didn't --
we didn't anticipate it during the course of the trial.
So that's my -- I respectfully explain that is our
position, Your Honor.

THE COURT: But you must have anticipated it, because
if you are seeking punitive damages, and you are, against
each defendant, aren't elements of punitive damages
focused on what a defendant should have done, could have
done and failed to do, and if a defendant lacked the
authority to do what plaintiff opines the defendant
should have done, then that appears to have a clear
bearing on punitive damages.

MR. HELLER: You are right in the sense that we --
that punitive damages turns on what options were
available, what they did, what they didn't do. But we did
not put on a case because we did not anticipate that
authority would be a liability issue here that we would
have to prove.

There is case authority, regretfully I can't cite it
right now, but that punitive damages -- the fact that you
violated somebody's rights, as has been found in the
order that was the basis of the initial ruling, is itself
a basis, if that was done recklessly, or in a callously
or indifferent way, for the punitive damages.

1 So, our approach had to do with relying on that
2 ruling, on that prior ruling, and bringing out, as you
3 heard during the testimony, some of the things that the
4 -- that the defendants did, didn't do, or could have
5 done. So, it was not -- it is not -- it's not the same as
6 in the sense of a causation element or a -- for liability
7 purposes, Your Honor. And we didn't plan or put on that
8 type of a case.

9 Id. 365:12-367:9.

10 However, Hazle proposed a compensatory damages jury
11 instruction that included a causation element on which the court relied
12 when finalizing the compensatory damages instructions. "[D]amages
13 awarded in a § 1983 action must always be designed to compensate
14 injuries caused by the constitutional deprivation." Guy v. City of San
15 Diego, 608 F.3d 582, 587 (9th Cir. 2010). Although Hazle states in his
16 reply that his "motion does not argue that there were errors in the
17 instructions and verdict form" (Reply in Supp. of Mot. for New Trial
18 ("Reply") 2:4-5.), the causation and jointly and severally liable jury
19 instructions are considered when determining what "[t]he jury likely
20 concluded" and whether "substantial evidence supported the jury's
21 verdict[.]" Guy, 608 F.3d at 588. Specifically, Hazle's proposed jury
22 instruction number two stated: "Damages mean the amount of money that
23 will reasonably and fairly compensate the plaintiff for any injury you
24 find was caused by defendants." (ECF No. 118 9:10-11 (emphasis added).)
25 Ultimately, the Court defined compensatory damages in the jury
26 instruction as follows: "Compensatory damages means the amount of money
27 that will reasonably and fairly compensate plaintiff for any injury you
28 find was caused by a defendant." (RT 421:7-9 (emphasis added).)

 The jury instructions and verdict form also allowed the jury
to determine whether Defendants were jointly and severally liable based
on whether Hazle had "an indivisible injury that cannot be apportioned

1 to each defendant." (RT 422:2-3.) The jury was instructed on joint and
2 several liability as follows:

3 Whether defendants are jointly and severally liable
4 depends on whether you find that plaintiff has an
5 indivisible injury that cannot be apportioned to each
6 defendant. Where several independent actors concurrently
7 or consecutively produced a single indivisible injury,
8 each actor will be held jointly and severally liable for
9 the entire injury. Where plaintiff's injuries are
10 divisible and attributable to the action of a specific
11 actor or actors, you shall specify damages caused by each
12 actor.

13 Id. 422:1-9 (emphasis added). The Court also instructed the jury to
14 award nominal damages for emotional distress: "The law which applies to
15 emotional distress damages authorizes an award of nominal damages. If
16 you find that plaintiff has failed to prove emotional distress damages,
17 you must award nominal damages." Id. 421:14-17.

18 The verdict form allowed the jury to determine joint and
19 several liability for "Plaintiff's emotional distress damages" and, if
20 the jury determined Defendants were not jointly and severally liable
21 asked: "What is the amount of emotional distress damages caused by [each
22 Defendant], if any?" (ECF No. 158 2:4-15 (emphasis added).) The verdict
23 form repeated these questions for Hazle's "loss of time and freedom of
24 movement damages" and, required the jury to answer the following
25 question if the jury determined the Defendants were not jointly and
26 severally liable: "What is the amount of loss of time and freedom of
27 movement damages caused by [each Defendant], if any?" Id. 3:11-22.

28 The damages causation issue appeared to be a focus of the jury
during deliberations since the jury sent a note to the Court seeking:

Verification of the court's determination of a guilty
verdict having been rendered against the Defendants for
violation of the Plaintiff's constitutional rights. We
are confused as to whether the Defendants are the only
parties to have been found in violation of the
Plaintiff's rights.

1 (ECF 156.) The parties ultimately agreed that the Court would respond to
2 the jury as follows: "I found each defendant liable but did not decide
3 whether any defendant caused damages to plaintiff." (RT 458:8-459:4.)
4 While discussing the jury's question with the parties, the Court
5 explained that the word "cause" was not defined in the jury instruction
6 and there is both a lay and legal meaning for that word. Id. 449:22-
7 459:4, 469:20-471:17. The Court offered to instruct the jury on the
8 meaning of the word; however, Hazle refused the Court's offer stating:
9 "I believe they've been adequately instructed on that point[.]" Id.
10 470:14-15.

11 The jury returned a verdict finding: Defendants are not
12 jointly and severally liable for Hazle's emotional distress damages;
13 "the amount of emotional distress damages caused by [each] Defendant" is
14 zero; Defendants are not jointly and severally liable for Hazle's loss
15 of time and freedom of movement damages; "the amount of loss of time and
16 freedom of movement damages caused by [each] Defendant" is zero; and,
17 Hazle is not entitled to punitive damages. (ECF No. 158.) After the
18 verdict was read in open court in the presence of the parties and the
19 jury, the judge asked counsel: "Any further action to take with respect
20 to the jury?" (RT 488:2.) To which both parties responded "[n]o". Id.
21 488:3-4.

22 Hazle now argues that the jury's zero damages award was
23 contrary to law and disregarded the Court's instructions. Specifically,
24 Hazle argues it is well-established law that when there is an
25 adjudication of a constitutional violation that resulted in a loss of
26 liberty, plaintiff is entitled to compensatory damages that exceed mere
27 nominal damages. (Mot. 6:21-23.) Hazle also argues the jury disregarded
28 the Court's instructions in failing to award at least nominal emotional

1 distress damages. Id. 8:17-18. Defendants counter Hazle waived his
2 arguments regarding the zero damages award when he failed to challenge
3 the zero damages verdict after the jury's verdict was read and before
4 the jury was discharged. (Defs.' Opp'n to Mot. for New Trial ("Opp'n")
5 9:11-14.)

6 [M]otions for a new trial challenging a zero damages
7 award as inconsistent with liability are waived when
8 either: (1) a jury verdict finds liability but no damages
9 and the moving party does not object before jury
10 discharge; or, more generally, (2) the moving party
argues that the jury has rendered a verdict that contains
two legal conclusions that are inconsistent with one
another, and the moving party does not object before jury
discharge.

11 Kode v. Carlson, 596 F.3d 608, 611 (9th Cir. 2010). "This rule
12 recognizes that district court judges are in a unique position to
13 instruct the jury regarding the meaning of the law, including whether
14 two legal conclusions by the jury are inconsistent." Id. Here, Hazle's
15 "motion[] for a new trial challenging [the] zero damages award as
16 inconsistent with [the Court's finding of] liability [is] waived . . .
17 [since Hazle did] not object before jury discharge[.]" Id.

18 Further, the jury's award of zero damages is consistent with
19 its causation findings in the jury verdict, and is not contrary to the
20 clear weight of the evidence. The jury "likely concluded" that no
21 defendant was a cause of any injury Hazle received or suffered as a
22 result of his Establishment Clause claim. Guy, 608 F.3d at 588. "[I]t
23 has long been held that a jury may properly refuse to credit even
24 uncontradicted testimony." Id. Here, it is evident that the jury did not
25 find any defendant was a cause of any of Hazle's injuries. Further, it
26 is undisputed that the Board of Prison Hearings ordered Hazle to
27 participate in the Empire program. Hazle himself testified he was "still
28 in custody" when he was sent to the Empire program. (RT 322:3.) Since

1 Hazle "has not shown that the jury's verdict was clearly not supported
2 by the evidence or only based on speculation or guesswork[,] " his motion
3 for a new trial based on his arguments that the jury's verdict was
4 contrary to the clear weight of the evidence and that the jury failed to
5 award damages which was contrary to law and evinces that the jury did
6 not follow the Court's instructions is denied. Id.

7 **B. False Testimony/Newly Discovered Evidence**

8 Hazle also argues a new trial is warranted because the
9 Defendants presented false testimony that their only option under the
10 circumstances was to return him to prison, and this testimony tainted
11 the trial proceedings. (Mot. 11:1-2.) Defendants rejoin that Hazle's
12 "argument that such testimony was false is wholly specious and is
13 contradicted by what Plaintiff learned in depositions of the Defendants
14 . . . months before trial." (Opp'n 12:17-18.)

15 A new trial may be granted if the verdict "is based upon false
16 or perjurious evidence[.]" Molski, 481 F.3d at 729. Hazel has not
17 presented evidence suggesting that any Defendant's testimony was false
18 or perjurious.

19 Hazle also argues that "[e]ven a cursory review of the
20 governing regulations [in the CDCR Operations Manual] demonstrates that
21 Crofoot and Wilding . . . could have made recommendations to the board
22 to remove or adjust the conditions of Hazel's parole[;] [and,] [h]ad the
23 truth been revealed at trial, it would likely have led to a different
24 verdict." (Mot. 11:15-18.) Defendants counter that this Hazle's his
25 argument is tantamount to an objection to their lack-of-authority
26 defense, which Hazel waived since his questions during his cross
27 examination invited this testimony and he did not object to this
28 evidence. (Opp'n 8:26, 9:1-9, 11:24-12:8.) Hazle responds that he is not

1 arguing that the Court improperly admitted the lack-of-authority
2 evidence. (Reply 2:6-8.) Hazle argues:

3 Notwithstanding defendants' testimony to the contrary,
4 CDCR's Operations Manual provides that a parole agent and
5 his supervisor have a variety of options when a civil
6 addict parolee such as Hazle is deemed to be in violation
7 of the terms of his parole. Specifically, a parole agent
8 is required under these circumstances to prepare a report
9 to the [Narcotic Addict Evaluation Authority ("NAEA")] in
10 which he must make one of several recommendations, at
11 least three of which do not involve returning the parolee
12 to prison. He may, for example, recommend that the NAEA
13 "add, delete or modify any special condition of civil
14 addict parole," that the parolee "continue on parole" (a
15 recommendation which may be made when the "civil addict
16 parolee has violated conditions of parole or when a
17 violation is minor"), or that parole be suspended and
18 reinstated (a recommendation which "may be made when a
19 violation has occurred, but civil addict parolee's best
20 interests would be better served by retention in
21 community"). See Article 14 - Civil Addict Violations, §§
22 82050.1, and 82050.7. Even in the absence of a violation
23 of a condition of parole, a parole agent may recommend
24 that NAEA "add or remove special conditions of release or
25 civil addict parole." Article 11 - Conditions of Release,
26 Parole and NAEA Appeals, §82020.2.1.

27 (Mot. 4:2-15.)

28 Although Hazle indicates the CDCR's Operations Manual, which
he contends reveals Defendants had options other than returning him to
prison after he was removed from the Empire program, is newly discovered
evidence that warrants a new trial, he has not addressed the standard
applicable to determining whether this evidence is newly discovered
evidence that justifies granting his motion for a new trial. To prevail
on his motion for a new trial under Rule 59 based on newly discovered
evidence Hazle has the burden of establishing: "(1) the evidence was
discovered after trial, (2) the exercise of due diligence would not have
resulted in the evidence being discovered at an earlier stage and (3)
the newly discovered evidence is of such magnitude that production of it
earlier would likely have changed the outcome of the case." Far Out
Productions, Inc. v. Oskar, 247 F.3d 986, 992-93 (9th Cir. 2001).

1 Hazle "fails to [address or] meet any of these three
2 criteria." Coastal Transfer Co. v. Toyota Motor Sales, U.S.A., 833 F.2d
3 208, 212 (9th Cir. 1987). On the first point, Hazle indicates he had
4 possession of this evidence prior to trial as follows: "Since defendants
5 had never raised this 'lack of authority' defense as an affirmative
6 defense or in the pretrial statement, trial brief, or other submissions
7 that called for disclosures of such defense, plaintiff had neither
8 anticipated the need for such evidence nor included these Operations
9 Manual provisions in his pretrial exhibit list." (Mot. 4:23-26.)
10 "Evidence is not 'newly discovered' under the Federal Rules if it was in
11 the moving party's possession at the time of trial or could have been
12 discovered with reasonable diligence." Coastal Transfer Co., 833 F.2d at
13 212.

14 Hazle's argument indicates he did not realize before trial
15 that the Operations Manual could be probative of each Defendant's state
16 of mind at the time each Defendant made a decision relevant to Hazel's
17 punitive damages claims. The punitive damages jury instruction indicated
18 this evidence could have probative value since it stated in part: "An
19 act or omission is oppressive if the defendant injures or damages or
20 otherwise violates the rights of Plaintiff with unnecessary harshness or
21 severity, such as by the misuse or abuse of authority or power or by the
22 taking advantage of some weakness or disability or misfortune of
23 Plaintiff." (RT 423:1-6.) This provision of the punitive damages jury
24 instruction is almost identical to a provision in Hazle's proposed jury
25 instruction number eight, which also used the language "misuse or abuse
26 of authority or power". (ECF No. 118 16:16-19.) Since "misuse or abuse
27 of authority or power" was a trial issue, it should have been apparent
28 to Hazle that the trial could include evidence on what each Defendant

1 understood to be his or her authority. The pretrial order states that
2 "[t]rial on the damage issues shall be to a jury[,]" and the parties
3 understood that damage issues included punitive damages. See U.S. v.
4 First Nat. Bank of Circle, 652 F.2d 882, 886 (9th Cir. 1981) (indicating
5 that "a pretrial order should . . . be liberally construed to permit
6 evidence and theories at trial that can fairly be said to be embraced
7 within its language").

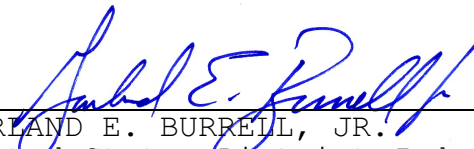
8 Hazle does not adequately explain why he could not have
9 obtained the referenced Operations Manual provisions before the trial
10 was over. Even if each Defendant's lack-of-authority testimony at trial
11 surprised Hazle, it is unclear why Hazle did not obtain the referenced
12 Operations Manual provisions before the trial ended. Hazle has not shown
13 that his decision, resulting in his failure to use this evidence during
14 the trial, constitutes the measure of diligence required under the newly
15 discovered evidence criteria. Therefore, the Court need not reach the
16 question of whether this evidence would have changed the outcome of the
17 case.

18 Accordingly, Hazle has not shown that a Defendant perjured him
19 or herself, or that he is entitled to a new trial based on newly
20 discovered evidence.

21 **IV. CONCLUSION**

22 For the stated reasons, Hazle's motion for a new trial is
23 DENIED.

24 Dated: January 12, 2011

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27 _____
GARLAND E. BURRELL, JR.
United States District Judge