No. _____

(N.D.C.A. Case No. C-97-3989-VRW)

TIME FACTOR: Trial Set For May 12, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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HEADWATERS FOREST DEFENSE

(*Ex. rel*. Vernell "Spring" Lundberg, Noel Tendick, Terri Slanetz, Eric Samuel Neuwirth, Lisa Sanderson-Fox, Maya Portugal, Jennifer Schneider, and Michael McCurdy)

Petitioners,

vs.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

(Real Parties in Interest: County of Humboldt, Calif., City of Eureka, Calif., Sheriff Dennis Lewis, and Chief Deputy Gary Philp)

Respondent.

_____

PETITION FOR WRIT OF MANDAMUS AND EXERCISE OF SUPERVISORY AUTHORITY

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STATEMENT OF JURISDICTION

This Court's jurisdiction is based on 28 U.S.C. § 1651 and F.R.A.P. 21(a).

ISSUES PRESENTED FOR REVIEW

I. Whether the district judge has abused his discretion, and violated plaintiffs' Seventh Amendment right to a fair trial, and Fifth and Fourteenth Amendment right to due process, by *sua sponte* transferring the re-trial from San Francisco, a neutral place, to Eureka, where there is pervasive hostility toward plaintiffs and their movement?

II. Whether the district judge is biased, and/or appears to be biased against plaintiffs, requiring that the case be reassigned to a different judge?

RELIEF SOUGHT

Petitioners request that this Court issue a Writ of Mandamus, or otherwise intervene and direct the district court to:

1. Return the trial, scheduled to begin May 12, 2003, to the neutral site of San Francisco, where the first trial occurred, the case and all subsequent papers have been filed, and all hearings have been conducted; and

2. reassign the case to a judge other than Judge Walker.

SUMMARY OF THE ARGUMENT

Plaintiff-petitioners are environmental activists who were injured by the cruel misuse of pepper spray by law enforcement officials during a series of anti-logging protests. They seek extraordinary relief from this Court, in order to prevent the impending retrial of their case on May 12, 2003 from becoming an exercise in futility, by virtue of the district court's abuse of discretion in moving the trial from San Francisco to Eureka. There was a hung jury in the first trial in San Francisco — part of a history well known to this Court by way of its double reversal of the district court, leading to the instant remand.[1] Now, the district judge, the honorable Vaughn R. Walker, plans to hold the re-trial in the very location where the wrongful, essentially sadistic use of pepper spray occurred — a community seething with active, current, overt hostility toward the plaintiffs and their Earth First! colleagues.

Plaintiffs believe there is great likelihood of another hung jury in Eureka; there is also a real threat of dishonest responses from jurors who may seek to help defeat the plaintiffs and/or avoid the disdain of their friends and family who harbor an intense dislike of the plaintiffs and their efforts to

[1] See Headwaters Forest Defense v. County of Humboldt ("Headwaters I"), 240 F.3d 1185, 1209 (9th Cir. 2001), *vacated and remanded*, 122 S.Ct. 24 (2001), with order to conform opinion to Saucier v Katz, 121 S.Ct. 2151, 2155 (2001), and conformed in Headwaters II, 276 F.3d 1125 (9th Cir. 2002), reversing the district court's grant of qualified immunity to the policymakers and dismissal of the action, and remanding for a new trial.

protect the Redwoods from clear-cutting. As the Court can see from the eight declarations, fifteen press clippings, two print ads, two press releases, and videotape of a television ad by Pacific Lumber Company equating environmentalists with terrorists, there is in Eureka just now exactly the type of atmosphere which generally prompts courts to move a trial away from a particular place. To move a trial into such a battle zone is unheard of, and simply unfair. Plaintiffs request that that this Court assert its supervisory authority, in the form of a writ or other direction to the Court below, to prevent a miscarriage of justice, and to keep the district judge from making the retrial a vehicle for vindication of his own viewpoint on the merits of the case.

Plaintiffs do not say this lightly. They have sought recusal of the district judge, on grounds that he has resolutely taken sides against the plaintiffs, and reconfirmed the bias demonstrated in his October 1998 Order dismissing the case, resoundingly reversed by this Court, in two recent decisions: (1) his decision to move the trial to Eureka for no legitimate reason, and (2) his stated intention to present the *thrice-decided* issue of qualified immunity to the jury, despite a total lack of legal authority, inviting jurors to cancel out any finding they might make in plaintiffs' favor. With

trial just one week away, the undersigned pray for swift intervention by this Court.[2]

FACTUAL AND PROCEDURAL HISTORY

Factual History

This case arises from the actions of deputy sheriffs at the direction of the two individual defendants, Sheriff Lewis and Chief Deputy Philp, and pursuant to the official policy of Humboldt County and the City of Eureka, in using repeated, violently painful, wholly unorthodox and unprecedented swabbed-on applications of pepper spray base ointment, and spray itself at close range, directly in the eyes and faces of several young, non-violent protesters—who never resisted, and remained in the complete and unchallenged physical control of the police at all times — in prolonged and agonizing attempts to make them unfasten themselves from human chains, constructed by means of metal lockboxes covering their forearms. The sit-ins were part of an intense campaign by the Earth First! movement and various allied groupings in Humboldt County, in the Fall of 1997, protesting the continued heedless "harvesting" of 1000 to 2000 year-old redwood trees on California's North Coast, and a then-pending deal in the U.S. Congress

[2] Plaintiffs understand that the relief they seek may cause a delay in the start of trial. However, plaintiffs are willing to suffer such a delay in order to ensure that they receive a fair trial.

for the supposed preservation of the Headwaters Forest, which actually promised a lingering doom for that last great part of the ancient forest still in private hands.

The metal lockboxes, sometimes called “black bears”, had been used in this fashion in the region for several years, and police had developed a familiar methodology for opening them with hard-edged, steel-cutting electric wheels, or “grinders”. They could normally disengage the protesters from the boxes in 15 or 20 minutes, sometimes as quickly as five minutes, and routinely used the grinders to end literally dozens of sit-ins, without mishap.

By the Summer of 1997 there had been a series of increasingly effective and visible demonstrations aimed at saving Headwaters from the axe, and a corresponding sharp rise in public attention to the issue. In response, defendants Philp and Lewis developed the idea of smearing pepper spray ointment around the eyes of protesters who would refuse police orders to release themselves from the black bears, and then of refusing to immediately wash the substance away, as a means of forcing them to unlock to seek relief from the pain. Each time, as shown on videotape, officers acting on defendants’ orders held back the heads of the plaintiffs, and, sometimes forcing open their eyes with their fingers, used Q-tips to smear the pepper

ointment along the crack of the eye and on the skin of the eyelids and eye sockets, whence it sometimes also ran down the face and into the nose and mouth.

Procedural History

Plaintiffs brought suit. The court denied injunctive relief, and granted summary judgment to the underling deputies who carried out the swabbing, finding they were entitled to qualified immunity. At trial, the court further granted immunity to the supervisors, Lewis and Philp, at the close of plaintiffs' case. The jury deadlocked four to four on the liability of Humboldt County and the City of Eureka, and the Court ordered a new trial. Thereafter, however, the Court dismissed the claims against the two entities in October 1998, holding that no reasonable jury could find that the swabbing, etc. violated the Fourth Amendment.

In dismissing the case, the district court said it had concluded "that plaintiffs' claims are legally untenable". It held that the "uncontroverted evidence presented at trial unequivocally supports the conclusion that the officers acted reasonably in using OC [pepper spray] as a pain compliance technique in arresting plaintiffs." (October 26, 1998 Order, 1998 WL 754575, *1, *4.) In a strong rebuke, this Court reversed, holding that the district court misapplied the Supreme Court test for excessive force

established in Graham v. Connor, improperly weighed the evidence against plaintiffs, and erred extensively in stating that plaintiffs had failed to present certain evidence.[3] Headwaters I, 240 F.3d at 1197, 1199, 1204-1205. On certiorari, the U.S. Supreme Court vacated the decision in Headwaters I, with instructions to reconsider it in light of Saucier v. Katz 533 U.S. 194 (2001). On remand, this Court affirmed its decision and re-ordered the new trial. Headwaters II, supra.

Plaintiffs retained new trial counsel. At a status conference on January 23, 2003, Judge Walker announced *sua sponte* that he was transferring the trial to Eureka, where there is a federal courtroom, but no regular session, and that he would travel there too and preside at trial. Plaintiffs voiced their concern at the next hearing on March 27, 2003, but the court remained firm. On April 14, 2003, plaintiffs filed a motion to return the trial to San Francisco (Ex. 1), supported by eight declarations (Ex. 2) and fifteen press

[3] In Headwaters I, this Court found that the district judge mischaracterized key evidence in his October 26, 1998 Order dismissing the case, i.e.: (1) that the physical intrusion against plaintiffs was minimal, when in fact it created "excruciating pain" (240 F.3d at 1199-1200); (2) that the use of pepper spray was necessary to remove plaintiffs quickly from the premises, when the evidence showed that this actually delayed their removal (id. at 1201-1202); (3) that the officers made no effort to pry open the eyes of plaintiffs, when in fact the videotapes show they did (id. at 1201 n. 9); and (4) that plaintiffs failed to show that defendants had a viable alternative, when in fact plaintiffs showed that defendants could have used the "grinders," as they had done so many times before (id. at 1204-1205).

clippings (Exhibits 3 & 4) describing the bias and hostility currently being directed at environmental activists in and around Eureka.

At the same time, plaintiffs moved for recusal (Ex. 5) on the grounds that the Judge's decision to move the trial to a hostile place, coupled with the clearly erroneous findings he made in his 1998 Order dismissing the case, demonstrate both actual bias and the appearance of bias, under 28 U.S.C. §§ 144 and 455, respectively. Judge Walker had the recusal motion reassigned (April 17, 2003 Order, Ex. 6), alerting the new judge that the decision as to any appearance of bias (§ 455) was *his* to make, in keeping with this Court's decision in In re Bernard, 31 F.3d 842 (9th Cir. 1994)[4] Judge Phyllis Hamilton received the motion, and ruled against plaintiffs as to both actual bias (§ 144) and appearance of bias (§ 455), ignoring the holding in In re Bernard. (April 23, 2003 Order, Ex. 7.)

Thereafter, in a written order dated April 30, 2003, Judge Walker denied plaintiffs' motion to return the trial to San Francisco. (Ex. 8.) In the same Order, he avoided deciding the appearance of bias question which he had indirectly reserved, instead relying on Judge Hamilton's order. (pgs. 15:25-16:5.) This Petition follows.

[4] Accord 28 U.S.C. § 455(a), which provides that a judge or magistrate "shall disqualify *himself* in any proceeding in which his impartiality might reasonably be questioned". (Emphasis added.)

ARGUMENT

I. THIS COURT SHOULD ORDER THAT THE TRIAL BE RETURNED TO SAN FRANCISCO

A. Plaintiffs have a constitutional right to an impartial jury.

Clearly, plaintiffs are entitled to a fair and impartial jury. Frank v Mangum, 237 U.S. 309 (1915); Moore v Dempsey (1923) 261 U.S. 86; Irvin v Dowd, 366 U.S. 717 (1961); Rideau v Lousiana 373 U.S. 723 (1963); Estes v Texas, 381 U.S. 532 (1965); Sheppard v Maxwell 384 U.S. 333 (1966); Groppi v Wisconsin, 400 U.S. 505 (1971); Pamplin v Mason (5th Cir. 1966) 364 F.2d 1. Plaintiffs' right to an impartial jury is "inherent in the [Seventh Amendment] right of trial by jury and is implicit in the requirement of the Fifth Amendment" due process clause. Kiernan v. Van Schaik, 347 F. 2d 775, 778 (3rd Cir. 1965).

Historically, federal courts have endorsed changes in the place of trial to protect a litigant from having to brave hostility in the community to the litigant or his or her interests. "As we read the Supreme Court cases, the test is: Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial." Pamplin, 364 F.2d at 5. Pamplin also pointed out that the courts must be skeptical to protestations by jurors as

to their absence of bias in circumstances where certain community feelings are pervasive. Id. at 7.

The Supreme Court has held that a fair trial simply cannot be conducted in a community where a significant segment of that community harbored hostility toward one of the parties. Groppi v. Wisconsin, supra, 400 U.S. at 509-510; Irvin v Dowd, supra, 366 U.S. at 728. Irvin and Groppi made clear that all litigants are entitled to a trial by an "indifferent" jury. A jury drawn from Humboldt and neighboring counties, and seated in Eureka, will be the antithesis of "indifferent".

B. The district court has abused its discretion by relocating the trial from San Francisco to Eureka.

The district court's decision to move the trial, pursuant to 28 U.S.C. § 1404(c), is reviewable for abuse of discretion. El Ranco, Inc. v. First National Bank, 406 F.2d 1205, 1219 (9th Cir.1968), cert. denied 90 S.Ct. 150 (1969).[5] In this case, all of the following facts evidence the court's

[5] It is not a foregone conclusion that the court was even allowed to act under 28 U.S.C. § 1404(c). Subsection (c) provides, "A district court may order any civil action to be tried at any place within the division in which it is pending." However, as the court acknowledges, the Northern District is not divided into divisions like, for example, the Central District is. (4/30/03 Order, p2:10-27.) Compare 28 U.S.C. §§ 84(a) and 84(c).

Whereas cases within the Circuit have held that § 1404(c) permits a court to move a trial around the district in a state like Nevada or Alaska which only has one district, no case within the Circuit has held that the same applies to a state like California, which has multiple districts. El Ranco, Inc.

abuse of discretion: (1) the court plans to move the trial from San Francisco, a neutral place, to a community in which a large percentage of the population is openly hostile toward plaintiffs and their movement; (2) the court has articulated no legitimate reason for relocating the trial, and the one reason it does offer — that the excessive force question should be decided according to a local, community standard — reflects the court's determination to have the jury decide the case based on passion or prejudice, not law; (3) the court has failed to respect plaintiffs' choice to file in federal court *in San Francisco*, rather than state court in Eureka, in order to avoid the prejudice and hostility there; and (4) a jury comprised substantially of residents of Humboldt County would face a financial conflict of interest in awarding damages to plaintiffs, enhanced by a natural tendency to favor its "home team."

1. Eureka is full of community hostility toward plaintiffs and their interests.

As a result of their work to save California's ancient forests from clear-cutting, plaintiffs and other environmental activists have become the targets

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v. First National Bank, 406 F.2d 1205, 1219 (9th Cir.1969) (Nevada); U.S. v. Rybachek, 643 F.Supp. 1086 (D. Ala. 1986) (Alaska). To the contrary, at least one case outside the Circuit has held that "Section 1404(c) is clearly inapplicable [where the district] is not subdivided into divisions." Buchheit v. United Air Lines, Inc., 202 F.Supp. 811, 815 (S.D.N.Y. 1962) (Southern District of New York).

of intense hostility in Humboldt County, where the timber business is central to the livelihoods, and the lives, of a high percentage of the population. Eureka is the timber capital of northern California, and the epicenter of the "Timber Wars". Currently, the huge landowner and employer Pacific Lumber, the main object of plaintiffs' protests in this case, is physically (often assaultively) extracting tree sitters from ancient redwood trees, bringing civil "SLAPP" suits against them and their supporters, and running daily radio, television, and print ads which explicitly brand environmental activists as "terrorists", and call on the community to band together in "defense". (See Pacific Lumber press releases, print ads, and videotape of television ad, Exhibits 9 & 11.) Meanwhile, the Humboldt County District Attorney has filed a highly publicized civil fraud suit against Pacific Lumber related to its environmental impact statements, provoking a backlash and recall effort in the community against the D.A. Environmental activists throughout the region face increasing epithets, taunts, threats, and physical violence. Recently, one of plaintiffs attorneys feared for his own safety while representing a tree-sitter during a criminal case in Eureka. (Declaration of Tony Serra, Ex. 2.) The Mayor of Arcata, eight miles northeast of Eureka, characterizes the hostility against environmental activists in the community as "extreme", and declares that it would be "impossible for [plaintiffs] to

receive a fair trial in Humboldt County or anywhere in timber country." (Declaration of Robert Ornelas, Ex. 2.)

The district court concludes that plaintiffs have not demonstrated there is a "wave of public passion" against them in northern California. (4/30/03 Order, pgs. 6:16-24, 8:19-28.) Plaintiffs submit that the court is simply wrong. Moreover, the court has turned a deaf ear to any further proof by declining counsel's offer, at the hearing on 4/24/03, to submit live witnesses who would testify to the hostility. In Groppi, supra, the Supreme Court took issue with a trial court's similar refusal.

It matters not, as the district judge argues, that this lawsuit directly concerns police practices, not logging. (4/30/03 Order, p5:2-6.) In each case in which the courts have addressed the problem of community hostility and prejudice, the case itself could have been narrowly characterized to make it seem like the hostility was about something else. For example, Irvin v. Dowd, supra, was about a murder. And Groppi v. Wisconsin, supra, was about a priest involved in anti-(Vietnam) war demonstrations. The salient factor in all of the cases cited by plaintiffs is the *attitude of the community toward one of the parties*. Thus, the district judge's narrow emphasis on the behavior of the police defendants is misplaced.

Moreover, the police defendants changed their policy and began using swabbed pepper spray on plaintiffs and their associates just as plaintiffs were drawing increasing attention to the rapacious logging practices through their protests. Defendants Lewis at one time worked for Pacific Lumber, and has family working there still. It is likely that a large number of the prospective jurors summoned from this community will have close, personal ties to the logging industry, and betting otherwise will only make a vain and wasteful exercise of this trial, or worse, irrevocably prejudice plaintiffs, given the pressure to seat a jury anyway.

Nor can the court rely on voir dire to unmask the bias or avert the prejudice. In Irvin, supra, the Supreme Court specifically pointed out that jurors' statements of impartiality, as expressed in voir dire in a community where feelings run deep, can be given "little weight". 366 U.S. at 728. Furthermore, as Justice Holmes observed in his dissent in Frank v Mangum, supra, "[jurors]....are extremely likely to be impregnated by the environing atmosphere" 237 U.S. at 349. There is a substantial likelihood that voir dire in Eureka will not reveal the true hostility of the community toward plaintiffs. Similarly, voir dire is unlikely to reveal the immense pressure that jurors in Eureka will be under to protect the pecuniary interests of their friends, their family, and their neighbors. Pamplin, supra, 364 F.2d at 7.

Expecting jurors to resist such pressures is simply unrealistic and, given the availability of San Francisco/Oakland for the re-trial, completely unnecessary.

The case was first tried in San Francisco in 1998. There is no community hostility in San Francisco against any of the parties in this case. No one complained that the jury was infected by bias; yet the excessive force issue was still contentious enough that the jury could not resolve it. Plaintiffs are aware of no case upholding the idea that a trial should be relocated from a neutral place to one which is thoroughly polarized, and hostile — and potentially physically dangerous — toward some of the parties and/or their attorneys. Certainly, 28 U.S.C. § 1404(c) is not intended to authorize such a transfer. Nor can plaintiffs and their attorneys be expected to concentrate on their work at trial under such circumstances, or if they must seek the protection of U.S. Marshals, as the court's 4/30/03 Order appears to contemplate. (p9:2-12.) This case should no more be tried in Eureka than a civil rights trial in 1965 should have been moved to Selma, Alabama.

2. The court has cited no legitimate reason for the transfer.

Insisting — incorrectly, as shown above — that it has unfettered discretion to transfer the trial to Eureka, and "need not present 'good

cause' " (4/30/03 Order, p3:3-14), the court fights shy of adducing any reason for the transfer. The reason the court finally supplies — that excessive force should be judged by a local, community standard — is both legally incorrect and illogical.

Legally incorrect

The court writes that "[t]he community living under the use of force at issue certainly possesses a strong interest in considering the reasonableness of the practice, and it is appropriate to submit the question to a jury drawn from that community for determination," based on its own "conscience" and "community judgment." (Order, p12:13-21). The court cites two district court cases from other Circuits: But it is well-settled that excessive force is judged by an objective standard. Graham v. Connor, 490 US 386, 397 (1989); Chew v. Gates, 27 F.3d 1432, 1441 (9th Cir.1994). The cases cited by the court do not say otherwise. In Bennett v. Murphy, 127 F.Supp.2d 689, 690 (WD Pa 2000), a pre-Saucier v. Katz excessive force case, the court found, as this court had in Headwaters I, that the police officer defendant was not entitled to qualified immunity because the reasonableness inquiry was the same as the question on the merits, and thus for a jury to decide. The Bennett court held that the "standard of reasonableness…should emerge from the conscience of the community, not the mind of a single

judge." Thus, the court used the term "community" to distinguish a group of jurors from a single judge, but did not opine on the scope of community. 127 F.Supp.2d at 690.

In Wells v. Smith, 778 F.Supp.7, 8 (D. Md. 1991), the court barred expert testimony on the question of what constituted excessive force, on the grounds that it would not be helpful to the trier of fact, per F.R.E. 702, which must decide excessive force based upon its "common sense and community sense." 778 F.Supp. at 8. Once again, the court did not opine on the scope of community.[6]

Illogical

In the case at bar, the court takes great pains to show that the Eureka session is ostensibly part of the San Francisco/Oakland "division" (though 28 U.S.C. § 84(a) does not say so), and that the venires for the two courthouses substantially overlap. (Order, pgs. 4:10-27, 11:9-12.) One is forced to wonder, therefore, what different community standard the court has in mind, except for one which it knows will be infected with bias against plaintiffs.

[6] The court also spends considerable time in its order extolling the civics opportunity which will be created for a Northern California jury by moving the case to Eureka. (Order, p11.) But plaintiffs' constitutional and concrete right to a fair trial and impartial jury can hardly be offset by the abstract value which might accrue to prospective jurors summoned in Northern California.

It is also revealing of the district judge's biased motive that he continues to cast about for a justification for the transfer, after originally suggesting that it was simply because the jury in San Francisco had deadlocked. Plaintiffs are not aware of any case which supports such a reason for relocating a trial. Nor has the court substantiated such a reason. Moreover, the logic is counter-intuitive. Jury deliberations inflamed by passion and prejudice increase, not decrease, the likelihood that the jury will deadlock.

3. Plaintiffs' choice of forum is entitled to respect.

While moving the trial to Eureka does not constitute a change of venue, plaintiffs' choice of a federal forum *in San Francisco* is nevertheless entitled to respect.[7] In electing to file their action in federal court, plaintiffs specifically declined to pursue their case in Eureka. Their choice is consistent with the basic purpose of Section 1983 of the Civil Rights Act, which was to provide a federal forum for civil rights claims, often remote from the community where the violation occurred. See, e.g., Mitchum v.

[7] In its 4/30/03 Order, the district court sets up a straw man argument about venue, to hold that "plaintiffs' motion to 'change venue' is denied." (p2:25-26.) Plaintiffs never brought a change of venue motion. Venue is not the issue. The issue, rather, is plaintiffs' fundamental rights to an impartial jury, and an impartial jurist.

Foster, 407 U.S. 225 (1972).[8] Plaintiffs did not, and *could not*, have filed their federal action in Eureka. Under Civil Local Rule 3-2(d), "All civil actions which arise in the count[y] of…Humboldt …*shall* be assigned to the San Francisco Division or the Oakland Division." (Emphasis added.)[9] For these reasons, and by analogy to the cases on venue, plaintiffs' choice to file their action in federal court, and thereby avoid the hostility against them in Eureka that would have attended a state-court trial, is entitled to respect.[10]

[8] "Proponents of [§ 1983] noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." Mitchum, 407 U.S. at 240-242.

[9] As the court observes, the Local Rules use the term "division" for administrative convenience; it does not have statutory significance. (4/30/03 Order, p2:20-23.)

[10] "[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981). "[U]nless the balance [of private and public interest factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). There is a "strong presumption" in favor of a plaintiff's choice of forum. Royal Queentex v Sara-Lee, 2000 WL 246599 *2 (Judge Jenkins), cited with approval by Judge Walker in Williams v Bowman, 157 F.Supp.2d 1103, 1106 (2001). In Williams, Judge Walker himself noted that "substantial deference" should be given to plaintiff's choice of venue, and that the "moving party" carries the burden of establishing that any transfer is appropriate. Id. at 1107.

4. Jurors from in and around Humboldt County would face a fiscal conflict of interest.

It seems clear that jurors from in and around Humboldt County would be reluctant to find for plaintiffs because, given the relatively small county budget (further depleted by the economic downturn), they would effectively have to pay plaintiffs' damages and attorneys' fees themselves. Various courts have found that change of venue is appropriate in such circumstances. See, e.g., Berry v North Pine Elec. Co-op, 50 NW2d 117 (Minn. 1951); Board of Public Instruction v First National Bank, 111 Fla 4 (Fla. 1932); Brace v Steele County, 78 ND 429 (N.D. 951); Linington v McLean County,150 NW2d 239 (N.D. 1967); Brittain v Monroe County, 214 Pa 648 (Pa 1906). The case cited by the district court, Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1400 (9th Cir. 1984), is distinguishable because it involved a much larger county, with a vastly larger budget, than Humboldt County.

II. THIS COURT SHOULD ORDER THAT THE CASE BE REASSIGNED TO A DIFFERENT JUDGE, IN ORDER TO CURTAIL THE BIAS AGAINST PLAINTIFFS, AND TO FORESTALL ANOTHER APPEAL AND A THIRD TRIAL

The district court's bias has become increasingly apparent, as shown by this highly prejudicial transfer of the case, which can have no rational purpose except to ensure plaintiffs' defeat, and to vindicate the court's 1998

Order of dismissal. Specifically, the district judge has (1) relocated the trial from neutral ground, to a place which is overtly hostile toward plaintiffs and their interests, without any legally sufficient justification; (2) plainly ignored General Order 44(E)(3), requiring random reassignment to another judge in such circumstances;[11] and (3) strained to preserve some means to award qualified immunity to defendants, by submitting the question to the jury, despite the fact that this Court has already firmly decided qualified immunity against defendants, and there is no legal or rational basis for submitting the question to the jury.[12] (See Plaintiffs' submissions re qualified immunity, and the district court's 4/28/03 Order, Ex. 10.)

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[11] General Order 44(E)(3) provides: "Whenever a civil or criminal case is transferred from one Courthouse of the Court to another, the Clerk shall randomly reassign the case to a Judge designated to hold court at the receiving Courthouse." (G.O. No. 44, "Assignment Plan", amended through 1/30/03.) The Court's failure to direct the clerk to randomly reassign the case is a flagrant abuse of discretion, and further evidence that the district judge has its own agenda in remaining on this case. Why else would the court ignore such a clear rule, raised by plaintiffs both in their motion, and at oral argument? Notably, the court does not say a word about General Order 44(E)(3) in its Order of 4/30/03.

[12] In its Model Civil Jury Instructions, this Court does not provide a qualified immunity instruction, but rather makes clear that qualified immunity is only for a jury to consider in a rare case, where an issue of fact prevents the court from determining qualified immunity. No. 11.3 (Comment Only). Such is not the case here, where both the district court and this Court have decided qualified immunity against defendants, and no purpose could be served by submitting this vexing legal question to the jury, after a trial has been had.

While it is true that recusal is ordinarily reserved for situations in which "bias stems from 'extrajudicial source[s] and not from a judge's conduct or rulings during the course of judicial proceedings," Cordoza v. Pacific States Steel Corp., 320 F.3d 989, 998-999 (9th Cir. 2003) (internal quotes and cites omitted), recusal may be appropriate in a case, such as this one, where the bias and/or appearance of bias is apparent within the four walls of the case by the rulings and/or statements of the judge.

Indeed, the district court's bias first began to emerge in 1998, when it dismissed the municipal entities, and granted qualified immunity to the commanders, Sheriff Lewis and Chief Deputy Philp. The court held that the "uncontroverted evidence presented at trial unequivocally supports the conclusion that the officers acted reasonably in using OC [pepper spray] as a pain compliance technique in arresting plaintiffs," 1998 WL 754575, *4. In reversing and remanding for a new trial, this Court strongly rebuked the district court, finding that it had misapplied the Supreme Court test for excessive force established in Graham v. Connor, improperly weighed the evidence against plaintiffs, and clearly erred in stating that plaintiffs had failed to present certain evidence, which they clearly presented. Headwaters I, 240 F.3d at 1197, 1199, 1204-1205. (See footnote 3, supra.)

CONCLUSION

For all the foregoing reasons, and in order to conserve everyone's resources and to ensure that plaintiffs receive a fair trial by an impartial jury, plaintiffs ask this honorable Court to issue a Writ of Mandamus or other supervisory order directing the district court to (1) return the trial to the neutral place of San Francisco, and (2) reassign the case to a judge other than Judge Walker for trial.

Respectfully Submitted,

DATED: May 6, 2003:

_____

Ben Rosenfeld
Robert Bloom
Dennis Cunningham
William Simpich
J. Tony Serra
Brendan Cummings

Attorneys for Plaintiff-Petitioners

CERTIFICATE OF SERVICE

I certify that I served the within Petition for Writ of Mandamus and Exercise of Supervisory Authority on the respondent, Honorable Vaughn R. Walker, U.S. District Court Judge, Northern District of California, by delivering a true copy to the Clerk's Office, in an envelope addressed to Judge Walker, and on the real parties in interest, defendants in the underlying case, by emailing, and thereafter mailing a true copy to their attorneys of record, Nancy Delaney and William Mitchell, at their office at 814 7th Street, Eureka, CA 95501, on May 6, 2003.

_____

Ben Rosenfeld

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

I certify that the within Petition is proportionately spaced, has a typeface of 14 points, and contains 5,335 words.

_____

Ben Rosenfeld