Dennis Cunningham #112910
Benjamin Rosenfeld
Robert Bloom
3163 Mission Street
San Francisco, CA 94110
415-285-8091 / FAX 285-8092

William M. Simpich #
1736 Franklin Street
Oakland, CA 94612
510-444-0226 / FAX 444-1704

J. Tony Serra #32639
506 Broadway
San Francisco, CA 94133
415-986-5591/ Fax 421-1331

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

HEADWATERS FOREST DEFENSE, et al Plaintiffs, v. COUNTY OF HUMBOLDT, et al Defendants.	CASE C-97-3989 VRW **PLAINTIFFS' MOTION RE SITUS OF TRIAL** **POINTS AND AUTHORITIES** April 24, 2003

Plaintiffs, by their respective counsel, submit the following Points and Authorities in support of their Motion to restore the situs of the trial of this case to San Francisco, the location where the complaint was filed by plaintiffs and where all prior proceedings have taken place.

RELEVANT PROCEDURAL BACKGROUND

The instant action was filed in this Court in 1997 in the San Francisco Division of the Northern District of California. The case was assigned to Judge Vaughn R. Walker. In 1998, the case was tried to a jury in the District Court in San Francisco. The jury was unable to reach a verdict, and a mistrial was declared on August 25, 1998.

On October 26, 1998, pursuant to a motion by defendants herein, the Court dismissed the case, stating and/or finding, *inter alia,* that:

*"The uncontroverted evidence presented at trial unequivocally supports the conclusion that the officers acted reasonably in using OC as a pain compliance technique in arresting plaintiffs".

*".....the severity of the intrusion upon the arrestees' personal integrity was minimal"

*"....the testimony established that this risk was "protected against" by closing of the eyes, which of course was the state of the relevant plaintiff's eyes when sprayed."

*"...plaintiffs failed to present any evidence that the officers had a viable alternative means for effecting arrest."

*"The officers, before exposing plaintiffs to the threat of serious physical injury by cutting them out, opted instead to use first a pain compliance technique that posed no significant threat of physical injury to anyone present at the scene. No reasonable juror could conclude that this decision was unreasonable."

*"The officers' decision not to use such a device was unquestionably reasonable."

*“....the videotape footage plainly demonstrates that the officers were not making any attempt to open plaintiffs' eyes.”

*“Giving full credence to plaintiffs' factual testimony and to the reasonable inferences flowing from that evidence, this court concludes that, on the record of the case as tried and presented, there is no reasonable basis for jurors to find that the officers' use of OC was objectively unreasonable in light of the facts and circumstances confronting them."

*"In finding that there is no evidentiary basis for concluding that plaintiffs' arrests involved the use of excessive force, the court has determined as a matter of law that neither the officers nor, implicitly, the policies of defendants caused any deprivation of the plaintiffs' Fourth Amendment rights.”

Plaintiffs appealed the dismissal, and ultimately the Court of Appeals for the Ninth Circuit reversed Judge Walker’s dismissal of the case and remanded the case for retrial.

On January 23, 2003, counsel for defendants and new counsel for plaintiffs appeared for a Case Management Conference before Judge Walker. The judge announced *sua sponte* at the Conference that he was directing that the case be tried in Eureka, California, rather than San Francisco.

None of the attorneys for the plaintiffs had been consulted regarding this matter, nor had their input been sought by the Court, nor did they have the opportunity to address the issue prior to the pronouncement by Judge Walker.

THIS CASE SHOULD BE TRIED IN SAN FRANCISCO

Although this Court may have statutory authority (28 USC 1404) to order a change of venue, it would be grossly unfair to try this case in Eureka,. Moreover, the Court's Order that the case is to be tried in Eureka is a clear abuse of the discretion of this Court.

A. PLAINTIFFS CANNOT GET A FAIR TRIAL IN EUREKA.

Plaintiffs and other environmental activists have, as a result of their work to save the forests, become the target of intense hostility in Humboldt County, where the timber business is central to the livelihoods, and the lives, of a very high percentage of the population.

The Declarations and newspaper clippings attached hereto (exhibits A and B) make manifest this extreme community hostility toward environmental activists (and their attorneys and supporters) throughout Humboldt County. There is no way, given the wide-spread hostility and the extreme polarization of the community, that plaintiffs can get a fair trial and achieve a unanimous verdict in their favor if the case is tried in Eureka. The atmosphere pervades the community, and even jurors who may not share this hostility will feel the need to support their timber-industry friends and neighbors, whether motivated by kinship or by concern about rejection or retaliation if a juror were to cast his verdict for the environmentalist plaintiffs.

Furthermore, as a result of this palpable and extreme hostility in the community, counsel for plaintiffs are very concerned about their physical safety and security. As reflected in the exhibits hereto, there have been a number of incidents involving violence and threats of violence to environmentalists and their supporters, who are constantly referred to with threatening and, for some reason, homophobic epithets.

As demonstrated by the declaration of plaintiffs' attorney Serra, in recent weeks he has been to Eureka and he has felt the threat of being physically assaulted by members of the community in Eureka who regard plaintiffs and their associates, including their attorneys, as the enemy. Given the level of aggression in Humboldt County on the part of those supporting the timber interests, plaintiffs and their attorneys regard it as physically dangerous to try this case in

Eureka. Even if security precautions are taken, the chilling effect and the distraction of such threats will without doubt have a negative effect on the ability of plaintiffs and their attorneys to effectively prepare and present the cases for the several plaintiffs. It is simply unfair and a denial of due process to require that this case be tried in Eureka.

Still further, Humboldt County jurors will be reluctant to find for plaintiffs because, in this small county, any damages that defendants would have to pay to plaintiffs and/or fees defendants might have to pay to plaintiffs' attorneys would come from a small county budget (which is now further depleted because of the economic downturn in the United States and in California) and would effectively require that the jurors themselves pay plaintiffs and their attorneys and/or see county services reduced. Jurors will surely be aware that, if they award substantial damages to the plaintiffs, Humboldt County would have to pay plaintiffs (and perhaps their attorneys) from county funds. Any reasonably intelligent juror would know that his or her taxes would be used to pay for a plaintiffs' verdict, and therein, of course, lies a serious conflict — jurors would be very reluctant to pay out of their own pockets.

A number of cases in various state courts have found that, because of this kind of conflict, change of venue was appropriate. *Berry v North Pine Elec. Co-op* (1951, Minn) 50 MW2d 117; *Board of Public Instruction v First National Bank* (1932, Florida) 111 Fla 4; *Brace v Steele County* (1951, North Dakota) 78 ND 429; *Linington v McLean County*, (1967, North Dakota) 150 NW2d 239; *Brittain v Monroe County*, (1906, Pa) 214 Pa 648.

Further, Humboldt County jurors would be inclined to favor the defendants in the instant case because the defendants, as well as their employees and/or agents, and their attorneys are "the home team". The defendants, the deputy sheriffs, the Pacific Lumber Company antagonists of the plaintiffs, and the local Eureka-based attorneys for the defendants are all "locals" to a Eureka jury. Once again, no matter how thorough the voir dire may be, human nature will lead jurors to favor "their own". This very significant source of prejudice was not and will not be a factor if the case is tried in San Francisco.

There can be no question that all litigants in a court of law in this country are entitled to a fair and impartial jury. *Irvin v Dowd,* (1961) 366 U.S. 717; *Groppi v Wisconsin,* (1971) 400 U.S. 505; *Frank v Mangum,* (1915) 237 U.S. 309; *Rideau v Lousiana* (1963) 373 U.S. 723*; Pamplin v Mason* (5th Circuit, 1966) 364 F.2d 1; *Moore v Dempsey* (1923) 261 U.S. 86; *Estes v Texas,* (1965) 381 U.S. 532; *Sheppard v Maxwell* (1966) 384 U.S. 333.

Historically, federal courts have permitted and/or endorsed changes of venue[1] to protect a litigant from the unfairness of having to undergo a trial by a jury in a community that is hostile to him or her, or to his or her interests.

At times, the hostility has been the result of unfavorable pre-trial publicity, but publicity is not the salient factor. The key concept is that venue is an issue where there is community hostility, whatever the cause of this hostility. As the Court stated in *Pamplin, supra,*

> 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. (364 F.2d at 5)

The *Pamplin* Court also pointed out that the courts must be skeptical as to protestations by jurors as to their absence of bias in circumstances where community feelings are pervasive. (364 F.2d at 7).

In *Groppi, supra,* the Supreme Court held that a fair trial simply could not be conducted

[1]28 USC 1404 is entitled "Change of Venue". Although the word "venue" is susceptible of more than one meaning, it is used in the instant Motion to signify "place of trial".

in a community where a significant segment of that community harbored hostility for one of the parties. *Groppi* cited *Irvin v Dowd, supra,* to support its holding that a fair trial cannot be had in a community where the venire holds an unfavorable view of one of the parties. *Irvin* and *Groppi* make clear that all litigants are entitled to a trial by an "indifferent" jury. The newspaper clippings and the declarations attached hereto, not to mention the very facts of this case as elicited at the first trial, demonstrate beyond any doubt that a jury in Eureka will be the antithesis of "indifferent". When it comes to timber and environmental activists, Eureka is the center of a war zone.

To the extent that this Court may reason that voir dire examination will reveal any bias or prejudice, the Supreme Court has addressed that issue. In *Irvin v Dowd,* the Court specifically pointed out that jurors' statements of impartiality, as expressed in voir dire in a community where feelings run high, can be given "little weight" (366 U.S. at 728). Furthermore, as Justice Holmes pointed out 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, therefore, a substantial likelihood that voir dire in Eureka will not reveal the true hostility of the community toward plaintiffs herein. The true feelings of the community are described in the press clippings and declarations that are attached hereto.

B. PROCEDURALLY AND SUBSTANTIVELY, THIS COURT HAS ABUSED ITS DISCRETION IN DIRECTING THAT THE CASE BE TRIED IN EUREKA.

This Court has abused its discretion in directing that the trial take place in Eureka for a number of reasons:

1. The most egregious abuse of discretion is, of course, the Court's substantive decision to try this case in a venue where it is virtually impossible for plaintiffs to get a fair trial and to achieve a unanimous jury, as set forth above.

2. At no time prior to the Court's pronouncement that the case would be tried in Eureka did this Court provide an opportunity for plaintiffs to be heard regarding the issue. Without any

forewarning, *and without any motion by the defendants*, the Court informed the attorneys at the January 23, 2003 Case Management Conference that the Court had decided that the case would be tried in Eureka. No attorney had asked the Court to change venue, because venue was not an issue in this case until the Court decreed that the case would be tried in Eureka. This *sua sponte* action by the Court, imposed by the Court without input from plaintiffs, represents an abuse of the Court's discretion.

3. It is virtually unprecedented for a trial to be moved from a neutral venue to one which is thoroughly polarized, extremely hostile to one or more parties, and physically dangerous to one or more parties and their attorneys. The purpose of a change of venue is to move the locus of a trial ***away from*** a venue in which one party or another would be prejudiced because of community hostility and/or community prejudice. On the rare occasions where venue has been changed, the reason is virtually always related to the fact that one party or another cannot get a fair trial in the venue ***from which*** the venue is moved.

In the instant case, the venue for the first trial was San Francisco, a neutral site. There is no community hostility in San Francisco against any of the parties in this case. On the other hand, Eureka, the receiving venue that has been designated by this Court is extremely polarized and blatantly hostile to plaintiffs, their supporters, and their attorneys. (See attached exhibits).

It is an abuse of this Court's discretion to change venue *to* one where community hostility and prejudice is substantial. It is clear that 28 USC 1404 is certainly not intended to authorize a change of venue from a neutral and fair situs to one that is hostile and unfair.

4. The Court informed counsel on January 23rd, 2003, that it was directing that the case be tried in Eureka because the initial jury in San Francisco had been unable to reach a verdict. Counsel for plaintiffs are unaware of any other case in this district, or in any other district, for that matter, where the venue was changed because the first jury was unable to reach a verdict. Juries are often unable to agree on a verdict. It is a novel concept that the failure of a jury to agree can be the basis of a change of venue, absent a showing that the inability to agree was

based on community hostility or some other factor that would undermine the opportunity of a litigant to receive a fair trial. It is an abuse of the Court's discretion to change venue based upon the fact that the original jury was unable to reach a verdict.[2]

5. At the time the Court announced its decision on January 23rd, 2003, to try the case in Eureka, the Court also spoke of convenience to the parties and the witnesses. There can be no denying that trying the case in Eureka is convenient to the defendants, their attorneys, and their witnesses. But conducting the trial in Eureka is extremely *inconvenient* to some of the witnesses, to some of the plaintiffs, and to all of the attorneys for the plaintiffs, all of whom live and work in the San Francisco area.

It is simply incorrect to suggest that trying this case in Eureka is convenient to the plaintiffs and their attorneys. Plaintiffs are essentially impecunious. Their attorneys have agreed to represent them on a contingency basis. The attorneys for the plaintiffs are not people of means. They are individual practitioners. In contrast, the attorneys for the defendants are, upon information and belief, being paid by defendants for their work.

6. The imbalance of resources is itself a factor that this Court has ignored in its decision to try this case in Eureka. Plaintiffs and their attorneys and support-staff will have to pay for lodging and other expenses if this trial takes place in Eureka. Upon information and belief, it is likely that any such expenses that the defense team would have to pay if the trial were in San Francisco will be reimbursed by the defendants.

There can be no question that the Court should consider the relative means of the parties insofar as it impacts the question of venue. In fact, in *Williams v. Bowman*, 157 F.Supp.2d 1103, 1107-1108 (N.D. Cal. 2001), this very Court stated: "Considering the

[2]There is no transcript of the January 23, 2003, Conference at which the Court made its pronouncement because there was no court reporter present. The references herein reflect counsels' best recollection of what the Court stated.

relative means of the parties, [citing Schwarzer §§ 4:275.1 at 4-75], the court concludes that the convenience of the parties tips in favor of maintaining venue in this district".

7. In deciding to try this case in Eureka, this Court ignored a compelling factor that is to be considered when a court addresses the question of venue. It is clear that a plaintiff's choice of forum must be afforded substantial weight in evaluating the question of changing venue, as this Court itself stated in *Williams v Bowman, supra,* (2001). In *Williams*, this Court approvingly cited Judge Jenkins' opinion in *Royal Queentex v Sara-Lee*, (2000) 2000 WL 246599, in which Judge Jenkins spoke of the *strong* presumption in favor of plaintiff's choice of forum (unless there is a question of "forum shopping", which is not an issue in the instant case).

This Court, in *Williams*, agreed, stating that "substantial deference" should be given to plaintiff's choice of venue, and that the burden of showing that transfer is appropriate is on the "moving party" (157 F.Supp.2d at 1107).[3] In the instant case, this Court (the moving party?) has seemingly overlooked its own reasoning. Plaintiffs' choice of forum is entitled to great weight. *Piper Aircraft Co. v. Reyno*, (1981) 454 U.S. 235, ("[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."); *Gulf Oil Corp. v. Gilbert*, (1947) 330 U.S. 501, 508 ("unless 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").

8. This Court has failed to comply with the terms and direction of General Order 44 of

[3]This Court did change venue in *Williams*, but *Williams* was not a case that involved a hostile receiving venue.

the Northern District, subdivision (E)(3) of which provides that, whenever a civil case is transferred from one courthouse of the Court to another, the clerk *shall* randomly assign the case to a judge designated to hold court at the receiving courthouse.[4] The Court's failure to direct the clerk to randomly assign the case to a judge who is designated to hold court at the receiving courthouse (i.e., any judge in the San Francisco or Oakland divisions of this District), demonstrates an abuse of the discretion of this Court.[5]

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[4]The propriety of Judge Walker presiding over the case is addressed in a separate Motion to Recuse that is to be filed concurrently with the instant Motion.

[5]As noted above, plaintiffs seek to recuse Judge Walker from this case, for the reasons that are set forth in a separate Motion which will be filed concurrently with the instant Motion. Plaintiffs believe that Judge Walker should recuse himself, as plaintiffs argue in that Motion, and that Judge Walker's failure to comply with General Order 44, compliance with which would likely result in the case being re-assigned to a judge other than Judge Walker, is further proof of the fact that Judge Walker's fiat that the trial will take place in a venue hostile to plaintiffs is intended to prejudice plaintiffs.

As set forth above, the most egregious abuse of discretion is the Court's decision to transfer this trial from a neutral venue, San Francisco, to one wherein it will be impossible for plaintiffs to prevail because of community hostility toward plaintiffs and toward their cause. The fact that there have been ongoing "timber wars" between logging interests and environmental activists has been public information for many years. Even if Judge Walker was for some reason unaware of this angry and violent warfare prior to the case being assigned to him, certainly presiding over the first trial and the pre-trial proceedings must have alerted him to the intense hostility of the timber people toward the environmental activist plaintiffs. This case should no more be tried in Eureka than a civil rights case in 1964 should have been moved to Selma, Alabama for trial.

CONCLUSION

This Court should direct that the re-trial of the case take place in the original venue that was chosen by plaintiffs, San Francisco.

Respectfully submitted on behalf of all plaintiffs,

DENNIS CUNNINGHAM
BENJAMIN ROSENFELD
WILLIAM SIMPICH
J. ANTHONY SERRA

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ROBERT BLOOM

April 14, 2003.