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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JUDI BARI, BY DARLENE COMMINGORE EXECUTOR OF THE ESTATE OF JUDI BARI, AND DARRYL CHERNEY PLAINTIFFS VS. THE UNITED STATES OF AMERICA, *ET AL.,* DEFENDANTS.	NO. C 91-1057 CW MEMORANDUM IN SUPPORT OF POST-TRIAL MOTION OF FEDERAL DEFENDANTS DOYLE, REIKES AND SENA FOR JUDGMENT AS A MATTER OF LAW, OR FOR A NEW TRIAL, OR FOR A REMITTITUR DATE: NOVEMBER 1, 2002 TIME: 10:00 A.M.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

On June 11, 2002, after twenty-four days of trial evidence, and seventeen days of jury deliberations, the jury returned a verdict on behalf of the plaintiffs against, *inter alia*, federal defendants Doyle, Reikes and Sena. The jury found all three of them liable on the plaintiffs' First Amendment claim, and found only Mr. Doyle liable on Ms. Bari's Fourth Amendment claims, and Mr. Cherney's Fourth Amendment search claim. The jury did not reach a verdict on Mr. Cherney's Fourth Amendment "false arrest" claim. Pursuant to Rules 50 (b) and 59 of the Federal Rules of Civil Procedure, the moving defendants now seek an order for entry of judgment as a matter of law in their favor, or, in the alternative, a new trial.

After the verdict was returned, the Supreme Court held that punitive damages may not be awarded in an action arising under 28 U.S.C. § 1331, because that statute permits only compensatory, not punitive awards. Thus even were the Court to determine not to enter judgment as a matter of law in the moving defendants' favor or to order a new trial, the punitive damages award must be vacated. Moreover, a substantial amount of the jury's "compensatory" award should also be remitted, as the plaintiffs' evidence simply will not support an award of the magnitude found by the jury.

DISCUSSION

1. THE STANDARD FOR CONSIDERATION POST-TRIAL MOTIONS

1. The Standard For Granting Judgment As A Matter Of Law

Rule 50(b) of the Federal Rules of Civil Procedure governs renewed motions for judgment as a matter of law subsequent to the entry of judgment pursuant to an adverse jury verdict. The Supreme Court has made it clear that the standard to be applied for consideration of *renewed* motions for judgment as a matter of law, as well as the standard which is applied to motions for judgment as a matter of law submitted at the close of a plaintiff's case-in-chief is the same as the standard for granting summary judgment under Rule 56: judgment as a matter of law is appropriate when "'there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530

U.S. 133, 149 (2000) (quoting FED. R. CIV. P. 50(a)). *See, also, Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250 (1986); *Alfaro v. Wal-Mart Stores, Inc.*, 210 F.3d 111, 114 (2d Cir.2000); *Kinserlow v. CMI Corp.,* 217 F.3d 1021, 1025 (8th Cir 2000). In interpreting this standard in the context of renewed motions for judgment as a matter of law subsequent to a jury verdict, the Ninth Circuit has held that a verdict can only stand if it is supported by "substantial evidence." *See, e.g., Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 889 (9th Cir. 2002); *George v. City of Long Beach*, 973 F.2d 706, 709 (9th Cir. 1992). "Substantial evidence" is defined as "'such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence.'" *George*, 973 F.2d at 709 (quoting *Landes Const. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987)).

2. The Standard For Evaluating Motions For A New Trial

Rule 59 of the Federal Rules of Civil Procedure governs motions for a new trial. Although this Court may not order a new trial simply because were it sitting as the trier of fact it would have come to a different decision to than did the jury, *see Wilhelm v. Associated Container Trans. Ltd.*, 648 F.2d 1197, 1198 (9th Cir. 1981), a new trial is justified "'if the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice.'" *Roy v. Volkswagen of America, Inc.*, 896 F.2d 1174, 1176 (9th Cir. 1990) (*quoting Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976)); *see also Hemmings v. Tidyman's Inc.*, 285 F.3d 1174 (9th Cir. 2002) (holding new trial appropriate if it is "'quite clear' that the jury has reached a seriously erroneous result"). Under Federal Rule 59, this Court may grant a new trial even if the jury's verdict is supported by "substantial evidence," and thus judgment as a matter of law is not warranted. *See Roy*, 896 F.2d at 1176. Further, a new trial may be ordered if attorney misconduct during the trial proceedings was such that "the jury was influenced by passion and prejudice in reaching its verdict," *see Hemmings*, 285 F.3d at 1192 (*quoting Kehr v. Smith Barney*, 736 F.2d 1283, 1286 (9th Cir. 1984)), or if, as in this case, the damage award provided by the jury is "'grossly excessive or monstrous, clearly not supported by the evidence, or only

based on speculation or guesswork.'" *Snyder v. Freight, Constr*., 175 F.3d 680, 689 (9th Cir. 1999) (*quoting Los Angeles Mem'l Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1360 (9th Cir. 1986)).

3. The Standard Under Which A Court May Order A Remittitur

Even if this Court were to hold that the jury's verdict on liability was supported by substantial evidence and not influenced by passion or prejudice, and therefore neither judgment as a matter of law nor a new trial is warranted, this Court may reduce an excessive verdict by ordering a remittitur. *See Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 905 (9th Cir. 2000) *(quoting Seymour v. Summa Vista Cinema, Inc*., 809 F.2d 1385, 1387 (9th Cir. 1987)); *see also Oltz v. St. Peter's Comm. Hosp*., 861 F.2d 1440, 1452 (9th Cir. 1988) (holding that when jury damage award is determined to be excessive, district court "may grant a motion for a new trial or condition denial of such a grant upon acceptance of remittitur by the prevailing party") .

As we will now show, under the applicable standards, the Court should set aside the jury's verdict and enter judgment as a matter of law for the moving defendants. In the alternative, we will also show that a new trial which is free of the "evidence" the Court improperly allowed to be presented to this jury, and which appealed to the jury's passions rather than to its reason, is required. And we will show that, even were the Court to conclude that neither judgment as a matter of law nor a new trial were required, still the Court should reduce the jury's excessive "compensatory" award, and vacate its punitive award.

2. THE VERDICT ON THE PLAINTIFFS' FIRST AMENDMENT CLAIM CANNOT STAND

1. The Elements Of A First Amendment Retaliation Claim

One of the elements the plaintiffs had to prove to establish their claim under the First Amendment is that the defendants' actions were taken for the very purpose of devaluing the plaintiffs' environmental advocacy. *See, e.g., Mendocino Envtl. Ctr. v. Mendocino County*, 14 F.3d 457, 464 (9th Cir. 1994). Moreover, the plaintiffs' own complaint expressly premises their First Amendment claim upon a belief that the defendants intended to interfere with their environmental advocacy. *See* Eighth Amended Complaint, ¶25

(averring that the defendants' conduct was intended to "infringe upon the lawful, protected activities of all plaintiffs on behalf of the environment"). The central element of the plaintiffs' First Amendment claim is that the defendants opposed the plaintiffs' lawful environmental advocacy, and that opposition motivated the defendants' actions. *See Crawford-El v. Britton*, 523 U.S. 574, 592-94 (1998); *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457, 464 (9th Cir. 1994); *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300-1301 (9th Cir. 1999).

2. Affirmative Evidence Is Required To Establish A First Amendment Claim.

In order to prevail on their First Amendment claim, the plaintiffs must come forward with evidence both that the defendants were hostile to their environmental advocacy, and that the hostility motivated the actions of which the plaintiffs complain. *See, Strahan v. Kirkland*, 287 F.3d 821, 825-26 (9th Cir. 2002); *Lindsey v. Shalmy*, 29 F.3d 1382, 1385 (9th Cir. 1994); *Technical Ordnance, Inc. v. U.S.*, 244 F.3d 641, 652 (8th Cir. 2001); *Rackovich v. Wade*, 850 F.2d 1180, 1191 (7th Cir. 1987). The Supreme Court has made it clear that, in order to carry their burden of proof, a plaintiff asserting a First Amendment claim must present affirmative evidence on these elements. *Crawford-El,* 523 U.S. at 600. For example, in a case involving a claim of intentional discrimination, the Court has made it clear that a plaintiff must establish both the basic *prima facie* case of discrimination, and the pretextual nature of an employer's explanation in order to prevail. *St Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993); *see, also, Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, 151-52 (2000). *See, also, Jeffers v. Gomez*, 267 F.3d 895, 907-908, 911 (9th Cir. 2001).[1/] As the Supreme Court observed in the context of a case requiring proof of the defendant's state of mind, a plaintiff must offer "concrete evidence from which a reasonable juror could return a verdict in his favor" and can not "merely assert[] that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or legal malice." The Court went on to observe that

[1/] *Jeffers*, of course, arose in the context of a motion for summary judgment. As we demonstrated above, a plaintiff's burden in opposing a pretrial motion for summary judgment is the same as is the burden of opposing a post-trial motion under Rule 50.

"discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion. *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485, 512 (1984). Instead a plaintiff must present affirmative evidence . . ."

Anderson v. Liberty Lobby, 477 U.S. 242, 256-57 (1986).

The Sixth Circuit's recent decision in *Arnett v. Myers*, 281 F.3d 552, 560-62 (2002) provides an example of the sort of proof a plaintiff alleging adverse action in retaliation for speech protected by the First Amendment is required to produce. In *Arnett*, the plaintiff claimed his property – duck blinds – was taken and destroyed by Tennessee environmental officials in retaliation for his criticism of their operations. There the plaintiff offered evidence not only of criticism of the defendant officials, but also: 1) that his duck blinds were removed only after his critical public statements; and 2) other unregistered duck blinds were not removed by the defendants; and 3) that of the duck blinds removed, only the plaintiffs' were destroyed. 281 F.3d at 561. Taken together, these elements of proof support an inference that the plaintiff was singled out for special treatment by the defendants because of his critical public speech.

The Court of Appeals' decision in *Keyser v. Sacramento City Unified School District*, 265 F.3d 741, 750–753 (9th Cir. 2001) is a further illustration of the requirement that a plaintiff alleging a First Amendment violation is required to come forward with affirmative evidence showing that the defendant's action was motivated by the plaintiff's protected speech. *Keyser* involved a claim that a school official demoted and reassigned subordinates in retaliation for their protected statements accusing the defendant official of financial improprieties. After finding that the plaintiffs' statements were protected by the First Amendment, and that the defendant knew two of the plaintiffs had made such statements, the Court of Appeals concluded that the defendant was entitled to summary judgment because the plaintiffs had failed to come forward with direct or circumstantial evidence that the plaintiffs' speech motivated the defendant's action. 265 F.3d at 750-53. In short, in order to provide the jury a basis in the evidence for a finding in their favor on the First Amendment claim, the plaintiffs were required to offer evidence both that the defendants were hostile to the

plaintiffs' environmental advocacy and that the hostility motivated the defendants in the action they took.

3. Affirmative Evidence Is Required To Overcome The Presumption That The Defendants Acted Lawfully

In addition to the elements of proof required of a plaintiff claiming retaliation in violation of the First Amendment, there is a second reason that the plaintiffs were required to come forward with affirmative evidence both that the defendants were hostile to their environmental advocacy *and* that this supposed hostility motivated them in taking the actions complained of. "The presumption of regularity supports the official acts of public officers, and, *in the absence of clear evidence to the contrary*, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926)(emphasis supplied). This rule applies as much to the official acts of law enforcement and prosecuting officers as it does to other officials of the Executive Branch. *United States v. Armstrong*, 517 U.S. 456, 464-465 (1996); *I.N.S. v. Miranda* 459 U.S. 14, 18 (1982)(more than mere negligence must be shown to overcome the presumption of regularity).

Consequently, in order for the jury's verdict on their claim to stand, the plaintiffs must have proffered evidence which affirmatively points toward the unconstitutional motive they attributed to the defendants – the intention to infringe upon the lawful, protected activities of plaintiffs on behalf of the environment.

4. There Was No Evidence Of The Moving Defendants' Intent

Despite the importance to their case of evidence of hostility on the part of the defendants to the plaintiffs' environmental advocacy, there was not even a scintilla of evidence suggesting that the moving defendants harbored any animus against the plaintiffs' environmental advocacy. Indeed, as plaintiffs' counsel specifically conceded during his closing argument:

> The idea here is – is not that the defendants acted and did what they did in this frame-up because they were opposed to saving the environment. We don't accuse them of that. . . . The objective was not the views. . . . Not because of some abstraction about environmentalism, which I'm sure in their

fashion they share the feeling the environment should be preserved just as long as the status quo is preserved. The animus was to these people, these two in particular, Earth First! in particular, and activism in general. . . . It's the activism, the agitation, and success of it that was the premise for the attack on them.

Trial Transcript, Vol. XXV, at 3-5.[1]/

1. Plaintiffs' Counsel Conceded Their Failure To Prove The Required *Animus*

In their final argument, plaintiffs' counsel conceded that, far from offering evidence that the defendants were hostile to the plaintiffs' environmental advocacy, "they share the feeling the environment should be preserved." That is a concession that the plaintiffs wholly failed to offer any evidence on a central issue of their First Amendment claim. Moreover, the plaintiffs' concession is correct – the plaintiffs offered no evidence of the defendants' views on environmental advocacy; they offered no documents setting out the defendants' views on that subject; indeed, there was not a single item of evidence bearing on the defendants' views on environmental advocacy. In fact, record is devoid of evidence relating to the defendants' motivation at all. Thus, there was no evidence on which the jury could have based a finding that the moving defendants opposed the plaintiffs' lawful environmental advocacy, and they are entitled to judgment as a matter of law on the plaintiffs' First Amendment claim.

2. Plaintiffs' Counsel's Argument Was Improper And Misled The Jury

In their final argument, plaintiffs' counsel – improperly – argued that the defendants were motivated

[2]/ Although the Court Reporter has not yet been able to produce the entire transcript, she has been kind enough to provide the moving defendants with the completed transcript of Mr. Cunningham's closing argument.

by hostility to "activism in general. . . . It's the activism, the agitation, and success of it that was the premise for the attack on them." They offered no evidence at all as a predicate to that argument. This entire failure of proof left the jury to speculate as to the motivation of the defendants' actions; on this basis alone the Court should enter judgment as a matter of law for the defendants.

Not only was there no evidence to support it, but the plaintiffs' argument was grossly improper for another reason: the Court has consistently ruled that, in order to establish a First Amendment violation it was the plaintiffs' burden to prove that it was hostility to their environmental advocacy that motivated the defendants. By allowing the plaintiffs to argue that hostility to "activism in general" established their claim, without curative instruction or other rebuke, the Court permitted the plaintiffs to mislead and inflame the jury. Their verdict on the First Amendment claim, in the absence of supporting evidence, only shows that the plaintiffs were successful in misleading and inflaming the *venire*.

5. The Jury Confused Evidence Of Effect With Evidence of Intent

Given the lack of any evidence of hostility to the plaintiffs' message, the jury's verdict with respect to the plaintiffs' First Amendment claim can only be explained by the jury's misunderstanding of the import of evidence the Court admitted over the defendants' objections. That evidence included examples of print and broadcast press coverage concerning the plaintiffs' arrest in the days subsequent to the bombing incident. *See, e.g,* Ex. 401. The plaintiffs offered no evidence that the defendants had any role in the determination of the content of the news coverage of the arrest; or that any of them had given any consideration to how the press might cover the event prior to taking the actions they did. To the contrary, the evidence was undisputed that the press made its own decisions in the course of the coverage of this event, including decisions which closed off legitimate lines of investigation undertaken by the defendants.[1]/ In addition, the Court admitted

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[3]/ For example, the Santa Rose *Press Democrat*'s Managing Editor testified that the *Press Democrat* declined to make correspondence available for typewriter comparison with the "Lord's Avenger" letter, despite the request of Mr. Reikes for that assistance in the investigation.

evidence of the actions and arguments of advocates involved in opposing the "Forest Forever" initiative, despite affirmative evidence that the plaintiffs themselves played no role in the debate on that initiative. *See, e.g.* Ex. 511. Moreover, the plaintiffs did not even attempt to offer evidence that the defendants had any position on this initiative, or any role in sculpting or presenting the arguments on either side of the debate.

This evidence, all of which was admitted over the defendants' objections, must have led the jury to confuse evidence of the *effect* of the press coverage with evidence of the defendants' *intent* requisite for First Amendment liability. There was no evidence, either direct or circumstantial,[1]/ which would have established a factual predicate that the defendants either influenced or directed the press in its coverage of an event the plaintiffs conceded was newsworthy, or that they at any time considered how the press would report the events. Consequently, the jury's finding of liability under the First Amendment against the moving defendants lacks any support in the evidence, and must be reversed.

3. The Jury's Verdict On The Fourth Amendment Cannot Stand

The jury was unable to reach a verdict as to Mr. Cherney's claim of a Fourth Amendment violation in the nature of a false arrest. The jury concluded that Mr. Reikes was entitled to qualified immunity from the plaintiffs' other Fourth Amendment claims. The jury awarded the plaintiffs damages for violation of the Fourth Amendment only against Mr. Doyle. Consequently, the following discussion focuses on the evidence in the record of his conduct.

1. Judgment AS A Matter Of Law Should Be Entered On Plaintiffs' Claim That Mr. Doyle Arrested Them Without Probable Cause

1. The Record Is Without Dispute As To The Time Of Plaintiffs' Arrest And The Time Of Mr. Doyle's Actions On The Scene

[4]/ The only circumstantial evidence noted even by the plaintiffs during the course of the trial was the purported "investigation of Earth First!" being carried by then-Agent Sena. The evidence at trial clearly showed that the investigation was into the destruction of power poles in Santa Cruz, and not Earth First!. Nonetheless, evidence of investigation by law enforcement officials of crimes that may have been motivated by a particular point of view cannot support an inference of animus on the part of the investigator.

Throughout the trial, the plaintiffs continuously maintained that Ms. Bari was placed under arrest at around 3 p.m. on May 24, 1990, and that Mr. Cherney was placed under arrest at around 4 p.m. on the same day. Not only was it their unequivocal contention that the arrest took place at that time; they also offered extensive testimonial and documentary evidence confirming these times. *See, e.g.*, Ex. 131A-B; Trial Transcript Vol. XXIV, at 8; id. vol. XXV, at 7. That evidence was effectively undisputed.[1]/

The trial record shows that Mr. Doyle did not have access to the car, and therefore did not begin his investigation of the bombing scene, until after 2:40 p.m., the time at which the Alameda County Bomb Squad declared the car free of other devices. Given this time line, and the lack of any evidence that Mr. Doyle provided any information concerning his findings inside the car before 4 p.m., Mr. Doyle cannot be held liable for the plaintiffs' arrest.

2. Plaintiffs May Not Contend That The Time Of Arrest Was Later Than 3 P.M.

As we have demonstrated above, the plaintiffs' own position in this litigation is that they were

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[5]/ To be sure, Captain Sims testified that he did not order the plaintiffs' arrest until the early morning hours of May 25, 1990. But while his testimony may create a dispute of fact relevant to Captain Sims' liability *vel non*, it does not place in doubt the unrebutted documentary and testimonial record that Oakland Officer Ludwig, pursuant to directions of his superiors, arrested Ms. Bari at about 3 p.m. on May 24; and Officer Slivinsky's testimony that he was assigned by his Watch Commander, Captain Rodrigue, to guard Mr. Cherney as a prisoner prior to 4 p.m.

arrested at about 3 p.m. on May 24. It is also clear that the federal defendants could have had no role in a decision to arrest the plaintiffs made at that time. In order to impose liability for the plaintiffs' arrest on the federal defendants, the plaintiffs must thus assert that as to the federal defendants the arrest place at a different time than the time at which, as to the Oakland defendants, they have shown it actually occurred. This they may not do.

It is clear, under the doctrine of judicial estoppel, that a party may not take one position as to a matter of fact or law at one point in litigation, and then assert an inconsistent position at a later stage. *See, e.g. State of New Hampshire v. Maine*, 532 U.S. 742 (2001). As the Supreme Court pointed out in that decision, "additional considerations may inform the doctrine's application in specific factual contexts." 532 U.S. at 751. In factual context of this case, plaintiffs cannot argue that their arrest occurred at different times for purposes of imposing liability on different defendants, because they do not contend, and they offered no evidence to prove, that either of them was arrested more than once.

Consequently, the evidence provides no basis on which to support the jury's verdict against Mr. Doyle on the plaintiffs' Fourth Amendment arrest claim, and judgment as a matter of law should be entered for him on that claim notwithstanding the jury's verdict.

2. The Court Did Not Instruct The Jury On The Necessity That They View The Evidence From The Point Of View Of An Officer On The Scene

The draft jury instructions proposed on behalf of the federal defendants, including Mr. Doyle, requested that the Court instruct that the jury was required to evaluate the evidence on the plaintiffs' claim of false arrest from the point of view of a reasonable officer on the scene of the bombing incident, and could only find against him if, from that perspective, and considering police officers' special training and experience, they concluded that the information he provided to other investigators was known to him to be false at the time he provided it. *See* Defendants' Proposed Instruction No. 39 – Unreasonable Seizure – Probable Cause. The Court declined to give the defendants' proffered instruction; the Court's instruction did

not include any direction regarding the requirement that the jury adopt the point of view of reasonable officers situated as were the defendants. *See* the Court's Jury Instructions on the subject of Unlawful Arrest at pp. 7–9.

The failure to instruct the jury that the Fourth Amendment required them to adopt the perspective of a reasonable officer on the scene prejudiced Mr. Doyle because the evidence was unequivocal that *all* trained bomb technicians on the scene concluded as did Mr. Doyle that the bomb must have been visible to people loading items into the back seat of the plaintiffs' car. *See*, the testimony of Alameda County Sheriff's Sergeant T.J. Roumph at Tr. Volume III p. 529 line 20 to p. 520 line 9; Special Agent Flanagan of the Bureau of Alcohol, Tobacco and Firearms, (Transcript Citation not yet available).

Since the evidence was undisputed that all officers with training comparable to Mr. Doyle's who viewed the evidence as he did came to the conclusion he did, the Court's failure to instruct the jury as to the proper perspective from which the view the evidence prejudiced him. Given that the evidence was undisputed that the trained officers on the scene all reached the same conclusion, Mr. Doyle is entitled to judgment as a matter of law on that issue. At a minimum, he is entitled to a new trial at which the jury will be informed as to the viewpoint they are required to adopt.

4. THE AWARD OF DAMAGES AGAINST MR. REIKES AND MR. SENA MUST BE REVERSED

The jury found Messrs. Reikes and Sena liable for violating the plaintiffs' First Amendment rights at the same time that the jury found that both individuals acted reasonably for purposes of the Fourth Amendment. As we will show, neither finding can stand.

1. The Award Of Damages Against Mr. Reikes Must Be Reversed

The award of damages against Mr. Reikes is inherently unfair, unsupported by the evidence, and must be reversed. Despite the total lack of evidence regarding Mr. Reikes' views on environmental advocacy in general, or on the plaintiffs' advocacy in particular, and the consequent absence of evidence that his actions were motivated by such views, the jury found that Mr. Reikes violated Ms. Bari's and Mr. Cherney's First

Amendment rights, causing 22.5% and 17.5% of their respective compensatory harm. The jury then awarded $600,000 and $300,000 to Ms. Bari and Mr. Cherney in punitive damages against Mr. Reikes for the First Amendment violations. This award is improper for at least two reasons.

First, the jury's First Amendment verdict is internally inconsistent as to Mr. Reikes. The jury found that Mr. Reikes acted reasonably for purposes of the Fourth Amendment[1]/, and yet, at the same time, found Mr. Reikes liable for violating the plaintiffs' First Amendment rights. The Supreme Court has held that, where conduct may be judged against a provision of the Constitution which directly bears upon it, resort should not be had to other, more general Constitutional provisions in determining whether an official comported with Constitutional norms. *Albright v. Oliver*, 510 U.S. 266 (1994). Moreover, the Supreme Court has also held that conduct that is found reasonable for purposes of the Fourth Amendment cannot give rise to liability under the First Amendment. *Cf. Zurcher v. Stanford Daily*, 436 U.S. 547, 565-67 (1978) (holding that the requirements of the Fourth Amendment need not be augmented when First Amendment implications are presented). Judgment as a matter of law should be entered in Mr. Reikes' favor on the plaintiffs' First Amendment claim. In the alternative, even though district courts must read a jury's verdicts so as to avoid potential inconsistency, *see Norris v. Sysco Corp.*, 191 F.3d 1043, 1048 (9th Cir. 1999), in circumstances in which the verdicts are irreconcilable, as in this case, a new trial should be ordered. *See Magnussen v. YAK, Inc.*, 73 F.3d 245, 246 (9th Cir. 1996).

Second, it is apparent from the face of the verdict that the jury's award of punitive damages against

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[6]/ The jury found that Mr. Reikes acted reasonably with respect to Ms. Bari's arrest and with respect to the May 25, 1990 search of her residence and the May 25, 1990 search of Mr. Cherney's residence. *See* Third Verdict Form, IA1(3), IA2(3), and IB2(3).

Mr. Reikes was premised upon his role as an FBI supervisor. Although the jury awarded compensatory damages for the First Amendment violations against Sims, Doyle, and Sena, the only other individual against whom the jury awarded punitive damages for First Amendment violations was then-Lt. Sims, the only Oakland defendant in a supervisory role. The jury found Lt. Sims 50% responsible for each of the plaintiffs' compensatory harm stemming from the First Amendment violations, as compared to the allocation of 22.5% and 17.5% against Mr. Reikes. The jury, however, awarded punitive damages against Lt. Sims in the amount of $400,000 to Ms. Bari and $250,000 to Mr. Cherney, as compared to the punitive awards against Mr. Reikes of $600,000 and $300,000, respectively. As the jury concluded that Mr. Reikes did not conspire with others to violate the plaintiffs' rights, the only explanation for this apportionment is the fact that Mr. Reikes was the only defendant who was an FBI supervisor.

Despite the fact that the damages awards were predicated on Mr. Reikes' FBI supervisory role, Plaintiffs never sought at the appropriate times to assert a claim of liability against Mr. Reikes as a supervisor. Plaintiffs conceded this fact in the proposed jury instructions submitted to this Court in September 2001. *See* Consolidated Proposed Jury Instructions, at 85-86. Indeed, the court denied the plaintiffs' belated attempt to do so at trial. Nonetheless, in closing arguments, plaintiffs' counsel repeatedly asked the jury to consider the supervisory role of Mr. Reikes in its deliberations. For instance, during closing argument, plaintiffs' counsel stated the following:

> He still had to do with that as Mr. Reikes did, as his supervisor, as the supervisor of the other agents who kept that case going and led up to the phone sweep, led up to – led to all those interviews with the timber people trying to get dirt on Earth First! that just was going on and on.

Trial Transcript, Vol. XXIV, at 20. Because there was no claim of supervisory liability against Mr. Reikes, the argument excerpted above was entirely improper, and the prejudice flowing from the argument is manifest from the jury's damage award. Such an award against Mr. Reikes is unfair and unwarranted, and should not be allowed to stand.

Moreover, the prejudice from such an argument goes not only to the *quantum* of damages awarded, it also infects the jury's finding of liability. It is plain and undisputed that Mr. Reikes did not arrest or order the arrest of Ms. Bari. The record is clear that he truthfully reported the information available to him about the organization the plaintiffs themselves insisted was pertinent to the investigation, Earth First. It is undisputed that Mr. Reikes' counterpart on the Oakland Police, then–Lieutenant Sims, was aware that, were it the FBI's decision, no arrest would have been made. Therefore, the plaintiffs uncorrected harping on Mr. Reikes supervisory role infected both the jury's determination of liability and their estimation of the *quantum* of damages to award. Accordingly, Mr. Reikes is entitled to judgment as a matter of law or to a new trial on the claims as to which the jury found him liable.

2. The Award Of Damages Against Mr. Sena Must Be Reversed

The jury found that Mr. Sena did not violate Ms. Bari's Fourth Amendment rights. They also found that he did not conspire with others to do so. Consequently, only his own conduct, as shown by the evidence, is pertinent to an evaluation of the verdict. Moreover, it was the plaintiffs' contention throughout the trial that it was their arrest and the searches of their homes – and the resulting publicity – which were the foundation of their First Amendment claim. As the evidence at trial made clear, Mr. Sena took no action at all relevant to the case after the evening of May 24, 1990. And the jury found Mr. Sena's conduct on May 24, 1990 reasonable for purposes of the Fourth Amendment. The Supreme Court has held that, where conduct may be judged against a provision of the Constitution which directly bears upon it, resort should not be had to other, more general Constitutional provisions in determining whether an official comported with Constitutional norms. *Albright v. Oliver, supra.* . Thus, that same conduct cannot give rise to liability under the First Amendment. *Cf. Zurcher v. Stanford Daily, supra*. The jury's finding that Mr. Sena acted reasonably for purposes of the Fourth Amendment, yet violated the plaintiffs' First Amendment rights is internally inconsistent. Judgment as a matter of law should be entered in Mr. Sena's favor on the plaintiffs' First Amendment claim. In the alternative, even though district courts must read a jury's verdicts so as to avoid

potential inconsistency, *see Norris v. Sysco Corp.*, 191 F.3d 1043, 1048 (9th Cir. 1999), in circumstances in which the verdicts are irreconcilable, as in this case, a new trial should be ordered. *See Magnussen v. YAK, Inc.*, 73 F.3d 245, 246 (9th Cir. 1996).

The jury's verdict as to Mr. Sena cannot stand for an additional reason: the evidence demonstrated that all he did was interview Mr. Cherney, with Mr. Cherney's consent, at Highland Hospital, and later that evening to advise the investigating officers of certain information provided to him by a confidential source. Neither act itself violates the plaintiffs' First Amendment rights; nor did the plaintiffs proffer an evidence that Mr. Sena was hostile to their environmental advocacy, far less that such unproven hostility somehow motivated him in acting as he did. Accordingly, Mr. Sena is entitled to judgment as a matter of law, or, in the alternative, to a new trial.

5. THE REMAINING FEDERAL DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON MR. CHERNEY'S FALSE ARREST CLAIM

With respect to the claim on which the jury could not reach a verdict, Mr. Cherney's Fourth Amendment "false arrest" claim, the moving defendants are now entitled to judgment as a matter of law. As we demonstrated above, the plaintiffs cannot contend that Mr. Cherney was arrested at a time later that about 3 p.m. At that time, none of the federal defendants had yet had any significant contact with Oakland officers; clearly the decision to arrest was made by Oakland, not federal, officers;[1]/ and without input by the moving defendants. Accordingly, they are entitled to judgment as a matter of law on Mr. Cherney's claim.

There is a second reason that the moving defendants are entitled to judgment as a matter of law on Mr. Cherney's "false arrest" claim: The jury's failure to agree that the conduct proven at trial violated Mr. Cherney's Fourth Amendment rights. That failure to agree demonstrates, at a minimum, that there is room disagreement among reasonable individuals as to whether there was probable cause to arrest Mr. Cherney.

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[7]/ As noted above, it appears that the Oakland officers who made that decision did not include the Oakland officers the plaintiffs chose to name as defendants in this action.

Because a public official's entitlement to immunity from suit under the Fourth Amendment is established when it is shown that reasonable minds could disagree as to whether the facts known to the officer amounted to probable cause, *see Malley v. Briggs*, 475 U.S. 335, 344 (1986); *Nelson v. Heiss*, 271 F.3d 891, 896 (9th Cir. 2001) ("reasonably but erroneously"), the jury's inability to resolve the merits of the Fourth Amendment claim itself establishes the moving defendants' entitlement to immunity. Accordingly, even were the Court to order a new trial as to other claims, judgment as a matter of law is now appropriate on Mr. Cherney's "false arrest"claim.

6. THE JURY'S AWARD OF COMPENSATORY DAMAGES WAS EXCESSIVE

The evidence produced at trial concerning the plaintiffs' actual losses – the appropriate standard to be employed in deriving a damage figure – bears absolutely no relation to the enormous amounts awarded by the jury for compensatory damages. The amount of First Amendment damages awarded by the jury can only be explained by the erroneous admission of evidence concerning the "Forest Forever Initiative" (notwithstanding the undisputed fact that neither plaintiff had any role in drafting or campaigning for its passage), *see, e.g.*, Ex. 511 p.9, and the improper emphasis placed upon press coverage, over both of which the evidence showed the moving defendants had neither control nor influence. *See, e.g., Ex.* 410.

The jury's award to Mr. Cherney on his Fourth Amendment "search" claim is illustrative. The jury awarded damages on this claim against Mr. Doyle. The plaintiffs offered no evidence that the search caused Mr. Cherney any actual harm at all. Mr. Cherney did not testify that, upon his return to his residence he had any difficulty finding his property, or that any damage was done to his residence or his goods. Nor did he testify that he suffered any other loss, physical psychological, or reputational, as a result of the search. In short, the evidence provided no basis for an award of substantial damages to Mr. Cherney as a result of the issuance of the search warrant. In such a case, nominal damages only may be awarded. *Ruggiero v. Krzeminski*, 928 F.2d 558, 563-64 (2d Cir. 1991). That the jury, in the face of a total failure of proof of actual damages, nonetheless awarded a sum as substantial as $50,000 demonstrates that they were inflamed

and misled by improper argument on the part of plaintiffs' counsel throughout the trial, and, most importantly, during closing argument, including plaintiffs' counsel's repeated references to the "value of First Amendment rights," notwithstanding the Supreme Court's clear holding that constitutional rights – including expressly First Amendment rights – have no monetary value for purposes of an award of damages. *See, e.g., Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986); *Carey v. Piphus,* 435 U.S. 247 (1978).

7. THE AWARD OF PUNITIVE DAMAGES CANNOT STAND

1. The Court Lacks Jurisdiction To Award Punitive Damages In A *Bivens* Case

AS TO THE MOVING DEFENDANTS, THIS IS AN ACTION UNDER THE PRINCIPLE ARTICULATED BY THE SUPREME COURT IN *BIVENS V. SIX UNKNOWN AGENTS*, 403 U.S. 388 (1971). AS THE SUPREME COURT MADE CLEAR IN ITS DECISION IN *BIVENS*, SUCH CLAIMS ARE EXCLUSIVELY CREATURES OF FEDERAL LAW, 403 U.S. AT 394-95, AND REST ON THE JURISDICTIONAL GRANT FOUND IN 28 U.S.C. Â§ 1331. *BELL V. HOOD*, 327 U.S. 678, 684 (1946). RECENTLY, IN *BARNES V. GORMAN*, 122 S.CT. 2097, 2102 (2002), A CASE ALSO RESTING ON Â§ 1331'S GRANT OF "ARISING UNDER" JURISDICTION, AND RELYING ON THE PORTION OF *BELL* ON WHICH *BIVENS* RESTS, THE SUPREME COURT CONCLUDED THAT WHERE A CLAIM IS BASED ON A VIOLATION OF LAW, "THE WRONG IS MADE GOOD WHEN THE [WRONGDOER] *COMPENSATES* [THE VICTIM] FOR THE LOSS CAUSED . . ." (EMPHASIS IN ORIGINAL.) 122 S.CT. AT 2102. THUS, IN THIS CASE, AS IN *BARNES* THE WRONG (IF ANY THERE BE) IS MADE GOOD BY COMPENSATION, AND HERE AS IN *BARNES*, PUNITIVE DAMAGES ARE UNAVAILABLE.

WE RECOGNIZE THAT, IN DICTA IN *CARLSON V. GREENE*, 446 U.S. 14, 22 (1980) THE SUPREME COURT HINTED THAT PUNITIVE DAMAGES MIGHT BE

AVAILABLE IN *BIVENS* ACTIONS. BUT IT IS THE HOLDINGS OF THE SUPREME COURT THAT ARE BINDING, NOT PRIOR DICTA. . *SEE UNITED STATES V. DIXON*, 509 U.S. 688, 706, 113 S.CT. 2849, 125 L.ED.2D 556 (1993) (*QUOTING WITH APPROVAL UNITED STATES NAT. BANK OF ORE. V. INDEPENDENT INS. AGENTS OF AMERICA, INC.*, 508 U.S. 439, 463, N. 11, 113 S.CT. 2173, 124 L.ED.2D 402 (1993), ON " 'THE NEED TO DISTINGUISH AN OPINION'S HOLDING FROM ITS DICTA' "); *CF WILLIAMS V. TAYLOR*, 529 U.S. 362, 412 (2000).

ACCORDINGLY, THE JURY'S AWARD OF PUNITIVE DAMAGES AS AGAINST THE FEDERAL DEFENDANTS EXCEEDED THE COURT'S JURISDICTION. AFTER *BARNES*, IN CASES RESTING ON Â 1331'S GRANT OF "ARISING UNDER" JURISDICTION, "THE WRONG IS MADE GOOD WHEN THE [WRONGDOER] *COMPENSATES* [THE VICTIM] FOR THE LOSS CAUSED . . ." 122 S.CT. AT 2102. HERE AS IN *BARNES*, PUNITIVE DAMAGES ARE UNAVAILABLE.

2. The Jury's Punitive Award Was Excessive

Assuming, *arguendo*, that the Court were to conclude, notwithstanding the foregoing, that punitive damages might be awarded in a *Bivens* case, the amount of punitive damages awarded by the jury in this case is excessive in light of the requirements of due process, and therefore requires a new trial or, in the alternative, a remittitur. In *Cooper Indus., Inc. v. Leatherman Toop Grp., Inc*., 532 U.S. 424, 434 (2001), the Supreme Court set out the test a punitive award must satisfy:

> In determining whether a punitive damages award passes constitutional muster, a court must look to (1) the degree of reprehensibility of the defendant's conduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id. at 444 (*citing BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996)). The Court must also keep in mind the fact that punitive awards are a windfall to the plaintiff and are intended to deter the defendants from repeating their conduct. In the present case, a punitive award cannot achieve this goal, because the defendants are all retired, and are no longer in a position to repeat their putatively unconstitutional conduct.

Consideration of the factors the Supreme Court identified clearly shows that the punitive award is excessive. The law does not provide for civil penalties for conduct of the type charged by the plaintiffs; thus the responsible Branches may be taken to have concluded that a financial disincentive is inappropriate in the circumstances of this case. Nor is the award of punitive damages supported by the harm suffered by the plaintiffs – harm which, when not seeking an award of damages Mr. Cherney discounted – and which is in any event more than fully covered by the compensatory award. Thus, here, as in *Cooper Indus., Inc. v. Leatherman Toop Grp., Inc*, 285 F3d 1146, (9th Cir. 2002)(*after remand*), if a punitive award may be made, it must be significantly reduced.

8. PLAINTIFFS' COUNSEL'S IMPROPER ARGUMENT AND OTHER MISCONDUCT

1. Plaintiffs Counsel Appealed To Jury Prejudice

The closing argument presented by the plaintiffs' counsel was rife with improprieties, each of which essentially asked the jury to consider inappropriate aspects of either the plaintiffs' case or the jurors own experiences in pondering their verdict. Initially, plaintiffs' counsel repeatedly referred to the FBI (and the San Francisco Field Office's Squad 13) as the American version of the KGB, a veritable "political police," creating a "totalitarian state" in the Bay Area, clearly invoking the type of argument and evidence that this Court held irrelevant and overly prejudicial in August 2001 in its order *in limine*.

2. PLAINTIFFS' COUNSEL CONSCIOUSLY MISLED THE JURY AS TO DAMAGES

1. The Improper "Golden Rule" Argument

Plaintiffs' counsel invoked what is colloquially known as the "golden rule" argument, which invites jurors ignore the evidence presented at trial concerning the losses suffered by these particular plaintiffs, and

to award damages based upon the amount that they would desire if they were in the plaintiffs' shoes. See Trial Transcript, Vol. XXIV, at 23 ("What would it take? What if it happened to you? What if it happened to your sister or your brother or your kid?"). As counsel for the moving defendants noted at the time of the argument, see Request for Curative Instruction (filed May 17, 2002), courts have consistently held such argument improper. *See, e.g., McNely v. Ocala Star-Banner Corp*., 99 F.3d 1068, 1076 (11th Cir. 1996); *Arnold v. Eastern Airlines, Inc*, 681 F.2d 186, 199-200 (2d Cir. 1982). Moreover, even after the defendants' complaint to the court at the conclusion of the plaintiffs' closing argument, plaintiffs' counsel repeated the argument in his rebuttal. See Trial Transcript, Vol. XXV, at 20 ("You think about the injury. You think about the harm. Put yourself in their position. You would like – not like it if it happened to you like it happened to them.").

3. PLAINTIFFS' COUNSEL ASKED THE JURY TO PLACE A MONETARY VALUE ON CONSTITUTIONAL RIGHTS CONTRARY TO ESTABLISHED LAW

Plaintiffs' counsel also repeatedly asked the jury to award damages based upon their thought of what First Amendment rights were "worth," despite the Supreme Court's holdings to the effect that constitutional rights have no inherent value. *See, e.g., Memphis Comm. Sch. Dist. v. Stachura*, *supra*; *Carey v. Piphus, supra.*

4. IMPROPER OUT OF COURT INFLUENCES ON THE JURY

As indicated by the defendants' joint filing during jury deliberations, the plaintiffs and their supporters held a demonstration inside the courthouse plaza on May 24, 2002, and as the jury was planning to exit the building at the completion of their daily deliberations, plaintiffs' counsel spoke about the alleged "evidence" presented at trial. *See generally* Defendants's Motion for Dismissal and Sanctions (filed May 24, 2002). Given the circumstances of the demonstration, and the jury's announced schedule, there can be little doubt that the speeches of counsel were deliberately timed to coincide with the jurors' exit. In addition, plaintiffs' counsel violated the Court's order to remain out of the courthouse plaza during the times that jurors would be

likely to be present. *See* Defendants' Report to the Court (filed June 10, 2002). Regardless of the jurors' post-verdict disclaimer of any influence, this type of blatant misconduct – in direct contravention of the ethical rules of the California State Bar – should result in the outright dismissal of the plaintiffs' claims.

News reports published after the Court relaxed its instructions to the jury regarding interviews indicate that there were improper influences on the jury that were previously unrevealed. In an interview with journalist Hank Sims, juror Mary Nunn disclosed that she was influenced in the plaintiffs' favor by comments from the plaintiffs supporters she overheard while in the security line at the entrance to the courthouse, and by the packing of the courtroom by the plaintiffs' supporters. *See,* H. Sims, *Amazing Judi Bari Juror Interview*, at pp. 8-9 (available at www.sf.indymedia.org/news/2002/07/137374.php.) (A copy of the relevant pages is attached for the convenience of the Court and the parties). The Court of Appeals has recognized that, while trials are public proceedings, when spectators actions – even actions protected by the First Amendment – impact on a fair trial, the spectators' rights must give way. *Norris v. Risley*, 918 F.2d 828, 832-33 (9th Cir. 1990); *see also, United States v. Yahweh*, 779 F.Supp. 1342, 1343-44 (S.D. FL 1992)(barring from attendance at trial spectators wearing clothing indicative of support for a party).. And, of course, it is clear that when a juror is influenced by out-of-court statements by a litigant or supporters of a party, the integrity of the verdict is undermined. Here, in light of Juror Nunn's admissions, which were not revealed when the Court conducted a limited *voir dire* of the jury following receipt of the verdict, the verdict must be set aside.

9. THE COURT'S ORDER OF PROOF DEPRIVED THE DEFENDANTS OF THE ABILITY TO PRESENT A COHERENT DEFENSE CASE

This Court's pretrial order to the effect that witnesses were only allowed to testify once prevented the federal defendants from asserting a coherent defense to the plaintiffs' case-in-chief. By obligating the federal defendants to examine witnesses (even the defendants' own direct examination) at the time chosen by the plaintiffs as most favorable for the presentation of their case, the court precluded the moving defendants from

giving the jury an organized and comprehensive presentation of the events in question from the defendants' perspective. Especially in a case such as this one, in which the jury is required as a matter of substantive law to view the evidence from the defendants' perspective, denying the defendants an opportunity to present that perspective in a comprehensible whole denied them the process that was due. *Cf. Washington v. Texas,* 388 U.S. 14, 19 (1967). Accordingly, they are entitled to a new trial on the claims on which the jury found them liable.

CONCLUSION

As set out above, and in their prior motions for judgment as a matter of law, the moving defendants have substantial grounds for entry of judgment as a matter of law, or for a new trial. The moving defendants respectfully request this Court enter judgment as a matter of law in their favor on all claims. In the alternative, they request a new trial. In the alternative, they request that the Court reduce the jury's damages award by striking the punitive award in its entirety and by reducing the compensatory award to an amount congruent with the proof of damage actually presented by the plaintiffs.

Dated: September 5, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing motion on the parties remaining in this action by depositing a copy of it in the United States mail, first class postage fully prepaid, addressed to their respective counsel of record as follows:

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