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**UNITED STATES DISTRICT COURT**

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**NORTHERN DISTRICT OF CALIFORNIA**

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11 JUDI BARI, BY DARLENE COMINGORE,  
EXECUTOR OF THE ESTATE OF JUDY  
12 BARI, AND DARRYL CHERNEY,

13 Plaintiffs,

14 v.

15 UNITED STATES OF AMERICA, ET AL.,

16 Defendants.

Case No. C-91-1057-CW (JL)

**OAKLAND DEFENDANTS'  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR NEW TRIAL:  
EVIDENTIARY AND MISCONDUCT  
ISSUES**

Date: November 1, 2002

Time: 10:00 a.m.

Courtroom 2

The Honorable Claudia Wilken

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1 **INTRODUCTION**

2 The Oakland Defendants submit the following Memorandum of Points and  
3 Authorities, limited to evidentiary issues and misconduct, in support of their motion Federal  
4 Rule of Civil Procedure 59(a) for a new trial.

5 **LEGAL ARGUMENT**

6 **I. THE OAKLAND DEFENDANTS ARE ENTITLED TO A NEW TRIAL**  
7 **BECAUSE EVIDENCE AND TESTIMONY ERRONEOUSLY**  
8 **ADMITTED AT TRIAL CAUSED THE VERDICT REACHED.**

9 A jury verdict must be reversed upon a showing that evidence and testimony was  
10 erroneously admitted and that “the allegedly erroneous evidentiary ruling more probably  
11 than not was the cause of the result reached.” Jauregui v. City of Glendale, 852 F.2d  
12 1128, 1133 (9<sup>th</sup> Cir. 1988). Where the reviewing court is unsure as to whether the  
13 probabilities favor the same result, or whether the error was harmless, a new trial is  
14 required. U.S. v. Mitchell, 172 F.3d 1104, 1111 (9<sup>th</sup> Cir. 1993). When reviewing  
15 challenged evidence, it is important that it be viewed in light of the record as a whole.  
16 United States v. Nguyen, 284 F.3d 1086, 1090 (9<sup>th</sup> Cir. 2002).

17 Applying these principles to this case, as set forth below, evidence and testimony  
18 was admitted in error that without question caused the unfair result reached. The Oakland  
19 defendants are entitled to a new trial accordingly.

20 **A. Introduction Of Evidence, In Violation Of This Court’s Order, Of**  
21 **Purported Conduct By Non-Defendant Officers Was Error With**  
22 **Consequences For The Result.**

23 Defendants filed a motion in limine prohibiting any testimony concerning the events  
24 surrounding the search of the Seeds of Peace residence and the police officers' interaction  
25 with its residents. The court ruled that the plaintiffs could only introduce evidence or  
26 testimony regarding the search of the Seeds of Peace house if it could be connected in  
some direct manner to the actions of a defendant in this action. (Order Regarding Motions  
in Limine and Other Pretrial Issues) Despite the court's ruling, the plaintiffs repeatedly

1 extracted testimony concerning the conduct of non-defendant police officers without  
2 establishing any connection to any defendant. For example, plaintiffs' counsel repeatedly  
3 brought out that officers had searched the house for hours, had rifled through the  
4 residents papers and videotaped the contents of the residence. Witnesses also testified  
5 that some of the residents were detained and taken to the Police Administration Building.  
6 Plaintiffs' intent in interjecting this prohibited evidence into the record was obvious: to tar  
7 the defendant officers by association, and to call into question the need for a warrant with  
8 respect to a reasonable belief that bomb making materials might be found at a location  
9 that they had already "ransacked". By violating the court's order and without providing a  
10 connection to the defendants, the plaintiffs were able to make it appear the defendants  
11 were misrepresenting the facts in order to obtain a search warrant for the Seeds of Peace  
12 residence.

13 Further, the court allowed the plaintiffs to call George Shook as a rebuttal witness  
14 despite the fact that the court's order prohibited him from testifying. Again, plaintiffs'  
15 counsel elicited testimony concerning the conduct of non-defendant police officers with  
16 respect to his alleged detention. These issues were previously ruled inadmissible and  
17 were prejudicial to the defendants.

18 **B. The Redacted Media Reports Should Not Have Been Admitted.**

19 The court permitted the jury to view news footage of the search of the Seeds of  
20 Peace residence as well as voluminous print media excerpts. The search of the Seeds of  
21 Peace residence was not conducted by any of the defendants and accordingly was not  
22 relevant to any issue in the case. Indeed, the court had previously ordered that events  
23 surrounding the search were not admissible, yet allowed footage of the search to be  
24 shown to the jury. Moreover, the redacted newspaper articles contained erroneous  
25 information and attributed statements to the defendants that would have otherwise been  
26 inadmissible either as hearsay, because they were more prejudicial than probative, or

1 because they did not have sufficient circumstantial guarantees of trustworthiness. Larez  
2 v. City of Los Angeles, 946 F.2d 630, 642-644 (9<sup>th</sup> Cir. 1991). These articles should not  
3 have been admitted, and, insofar as they involved non-probative highly prejudicial and  
4 inaccurate accounts of the events, they “more probably than not” influenced the result.

5  
6 **C. Admission Of Evidence Concerning The Forest Forever Initiative  
Was Prejudicial Error.**

7 The jury heard substantial testimony concerning the “Forests Forever” initiative.  
8 Although both plaintiffs and witness Cecilia Lanman conceded that the plaintiffs had no  
9 role in the campaign to pass Proposition 130, the Forest Forever Initiative, Ms. Lanman  
10 was permitted to testify over the defendants' objections. Ms. Lanman testified that the  
11 initiative lost due to the timber industry labeling Proposition 130 the "Earth First! Initiative".  
12 There was however no evidence that the opponents of the initiative connected the  
13 plaintiffs' names to the initiative in any way. Indeed, there was no evidence connecting the  
14 incidents at issue in this trial with the failure of the initiative at all. Despite the non-  
15 probative and supremely prejudicial nature of Ms. Lanman's testimony, which left the jury  
16 with the impression that the defendants were a malign force for environmental  
17 degradation, she was allowed to testify and plaintiffs were permitted to argue for damages  
18 based on the initiative's failure to pass. This was clearly erroneous, and without question  
19 contributed to the result.

20  
21 **II. PLAINTIFFS' EXPERTS WERE ALLOWED TO TESTIFY IN  
ERROR.**

22 A District Court serves a “gatekeeping” function with respect to expert testimony.  
23 Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147-48 (1999), U.S. v. Hankey, 203 F.3d  
24 1160, 1167 (9th Cir. 2000). That function includes a “special obligation” to determine the  
25 relevance and reliability of an expert’s testimony in order to ensure accurate and unbiased  
26 decision making by the trier of fact. Kumho, at 147, Mukhtar v. California State University

1 Hayward, --F3d--, 2002 WL 1799785. Here, two of plaintiff's experts were allowed to  
2 testify without sufficient indicia of reliability, accuracy or lack of bias. Admission of that  
3 testimony was thus error that without question negatively influenced the result and thus  
4 requires a new trial.

5 **A. Sid Woodcock Was Not Qualified To Testify As A Bomb Expert**

6 Plaintiffs proffered Mr. Woodcock as a bomb expert at trial. Voir dire of Mr.  
7 Woodcock showed that he possessed no formal training in physics, engineering or  
8 forensic analysis of crime scenes. Despite his lack of qualifications, he was permitted to  
9 testify over the defendants' objections. This was plain error, because there was no  
10 indication of reliability whatsoever, and certainly no showing that he "employ[ed] in the  
11 courtroom the same level of intellectual rigor that characterizes the practice of intellectual  
12 rigor in the relevant field." Kumho at 152. Moreover, there is no question that the  
13 testimony contributed adversely to the result, insofar as Woodcock's testimony was held  
14 up in opposition to defendants' showing that the bomb could very likely have been behind  
15 rather than under the seat as plaintiffs claimed. This was a critical piece of evidence going  
16 to the question of probable cause, and to the credibility of the plaintiffs themselves.

17 **B. Police Procedures Expert Anthony Bouza Was Improperly**  
18 **Allowed to Testify As To The Ultimate Issue Of Defendants'**  
**Liability.**

19 In its order following the motions in limine, the Court allowed the plaintiffs to call Mr.  
20 Bouza to testify as an expert in police investigative practices. The court ruled that Mr.  
21 Bouza could testify regarding the propriety of the actions taken by the FBI and OPD. Mr.  
22 Bouza was ostensibly prohibited, however, from testifying to legal conclusions (such as  
23 whether probable cause existed or whether the officers' actions were reasonable). The  
24 court heard argument before Mr. Bouza testified as to whether there were any subjects as  
25 to which Mr. Bouza could testify, based on the court's order. Despite the court's ruling, Mr.  
26 Bouza was permitted to testify, over vigorous and repeated objections, to actions that he

1 believed the officers should have taken. He was also permitted., also over objections, to  
2 testify that there was no basis for the officers to arrest the plaintiffs so quickly and that he  
3 would decline to prosecute the case.

4 This was prejudicial error. Mr. Bouza's testimony was impermissible direct opinion  
5 about the defendants' liability. U.S. v. Lockett, 919 F.2d 585, 590 (9<sup>th</sup> Cir. 1990) ("a  
6 witness is not permitted to give a direct opinion about the defendants' guilt or innocence").  
7 Bouza asserted in essence that there was not probable cause to arrest the plaintiffs, and  
8 that there was never a case to be made against them. The question of probable cause,  
9 and the basis for the defendants' prosecution of the case were of course the ultimate  
10 questions for the jury in this case. Bouza's testimony thus usurped the fact-finding role of  
11 the jury. Because this was the single most important issue in the trial, there can be no  
12 more obvious instance of error having an effect on the result.

### 13 **III. DEFENDANTS ARE ENTITLED TO A NEW TRIAL DUE TO** 14 **ATTORNEY MISCONDUCT.**

15 District courts have inherent power to control their dockets. Hamilton Copper &  
16 Steel Corporation v. Primary Steel, Inc., 898 F.2d 1248, 1429 (9<sup>th</sup> Cir. 1990). In the  
17 exercise of that power, they may impose sanctions for attorney misconduct, up to and  
18 including dismissal of the action. Id.

19 Here, there were multiple instances of misconduct that were sufficiently egregious  
20 to require a new trial.

#### 21 **A. Mr. Serra's Conduct Requires The Award Of A New Trial.**

22 As previously shown in Defendants' Motion for an Order Dismissing The Action And  
23 For Sanctions, brought by both the Oakland and Federal Defendants, plaintiffs' counsel J.  
24 Tony Serra, in a display of meticulous timing, exhorted the crowd at a rally in front of the  
25 federal courthouse, to "say a prayer for the jury" at the precise moment that the jurors  
26 were exiting the building. Mr. Serra and the plaintiffs' legal team were well aware that the

1 jury would be leaving at the time they took the stage, having previously been advised of  
2 that fact by the Court. The record shows that jurors slowed and listened to Mr. Serra's  
3 presentation.

4 It is hard to imagine a clearer example of an overt attempt to influence the jury  
5 during their deliberations. Although the jurors subsequently indicated that they were not  
6 swayed by Mr. Serra's call to prayer, their responses to the Court's questions show that to  
7 be untrue. This is so because they took offense at the suggestion that they could be  
8 influenced by such tactics, thus placing defendants in a bad light for raising the issue of  
9 Mr. Serra's brazen misconduct. The prejudice to defendants is obvious.

10 In addition, during his closing argument on May 16, 2002, Mr. Serra argued that the  
11 ancient redwoods are gone because of the defendants' actions in this case. There was  
12 obviously no evidence that the plaintiffs' arrests and the searches of their homes had an  
13 effect on the logging of ancient redwood forests. To the contrary, there was evidence that  
14 the plaintiffs enjoyed increased support for their movement due to the bombing incident  
15 and attendant publicity.

16 Mr. Serra also argued that Ms. Bari's terminal cancer might have been caused by  
17 the incident. That was an outrageous assertion, completely without support in the record,  
18 and an assertion that the plaintiffs agreed, disingenuously, as it turns out, not to proffer  
19 during the trial.

20 Plaintiffs' counsel's utter disregard for the orders of this court, and his contempt for  
21 the sanctity of the jurors deliberations require that defendants be granted a new trial.

22 **B. Mr. Cunningham's Closing Argument Was Improper.**

23 Mr. Cunningham argued May 16, 2002, that the jury was permitted to award  
24 damages for injury to reputation, the failure of the Forest Forever Initiative to pass and  
25 some perceived damage to Redwood Summer. Neither the evidence nor the law  
26 supported those arguments. Moreover, Mr. Cunningham urged the jury to award

1 damages under the universally condemned “Golden rule” theory, asking that the jury place  
2 itself in the plaintiffs’ shoes with respect to damages. Spray-Rite Serv. Corp. v. Monsanto  
3 Co., 684 F.2d 1226, 1246 (7<sup>th</sup> Cir. 1982).

4 In summary, plaintiffs’ legal team repeatedly defied the orders of this court, and  
5 conducted themselves in a manner intended to play on the passions and prejudices of the  
6 jury. Under these circumstances, the court should exercise its “inherent powers” and order  
7 a new trial for defendants.

8  
9 **IV. The Jurors' Questions To The Court Should Have Been Answered Fully**

10 The court received a note from the jury requesting a copy of Penal Code Section  
11 12355(b), the “booby trap” provision. Mr. Cherney was charged with violating the booby  
12 trap section; the section was crossed off of Ms. Bari's arrest card. The plaintiffs had  
13 argued repeatedly and vigorously that the explosive device was a booby trap device.  
14 They further argued that the defendants knew it was a booby trap device and that was the  
15 reason the plaintiffs were charged with violating the booby trap provision. However, there  
16 was evidence that a road spiking or tree spiking kit was found in Mr. Cherney's van. The  
17 jury was prevented from reading the section and ascertaining its significance to Mr.  
18 Cherney's arrest and his possession of the spikes. Indeed, the note asked for the section  
19 so that the jury could determine if there was probable cause for the charge.

20 Failure to instruct the jury on the penal code section at issue was extraordinarily  
21 prejudicial in that it prevented the jury from conducting any meaningful analysis of  
22 probable cause. This is so because, without knowing the elements of the offense, they  
23 could not possibly ascertain whether there was a reasonable suspicion that the statute had  
24 been violated. This too was error, and had an indisputable effect on the result.

25 The jury submitted another note to the court dated May 22, 2002, asking when the  
26 determinative time is for considering whether there is probable cause for an arrest. The



1 question queried whether there would be a constitutional violation if there was probable  
2 cause initially, but later dissipated. The court referred the jury to the jury instructions  
3 instead of instructing them that the proper inquiry as to the existence of probable cause is  
4 the moment of the arrest and that any subsequent lack of probable cause is not a  
5 constitutional violation. This too was error, because it allowed the jury to proceed with its  
6 deliberations under an evident misapprehension of the applicable law. Under those facts,  
7 it can scarcely be doubted that the error would affect the result to defendants' prejudice.

8 **CONCLUSION**

9 As demonstrated above, multiple errors with respect to the admission of testimony  
10 and evidence had a detrimental effect on the result in this case. Moreover, attorney  
11 misconduct poisoned the deliberations, compelling a new trial. For all the foregoing  
12 reasons, individually and in the aggregate, the Oakland defendants respectfully urge this  
13 Court to grant their motion, and issue an order pursuant to FRCP 59(a) for a new trial.

14 Dated: September 6, 2002

15 JOHN A. RUSSO, City Attorney  
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20 By: \_\_\_\_\_  
21 Attorneys for Oakland Defendants

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**PROOF OF SERVICE**  
**BARI, ET AL. VS. USA, ET AL.**  
**Court of Appeals Case No. 97-17375**  
**United States District Court Case No. CV-91-1057-CW (JL)**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is City Hall, One Frank H. Ogawa Plaza, 6th Floor, Oakland, California 94612. On September 6, 2002, I served the within documents:

**OAKLAND DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL: EVIDENTIARY AND MISCONDUCT ISSUES**

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California addressed as set forth.
- by causing personal delivery by messenger of the document(s) listed above to the person(s) at the address(es) set forth below.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by causing such envelope to be sent by Federal Express/ Express Mail.

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I am readily familiar with the City of Oakland's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on September 6, 2002, at Oakland, California.

\_\_\_\_\_  
Kristin Ericsson