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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE ESTATE OF JUDI BARI, by DARLENE COMINGORE, Administrator, and DARRYL CHERNEY,

Plaintiffs,

vs.

FBI Special Agent FRANK DOYLE, Jr., *et al*.,

Defendants.

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

PLAINTIFFS' CONSOLIDATED OPPOSITION TO THE FEDERAL AND OAKLAND DEFENDANTS' MOTIONS FOR JUDGMENT AS A MATTER OF LAW, NEW TRIAL, AND/OR REMITTITUR

Date: November 1, 2002
Time: 10:00 am., 4th Fl., Ctrm. 2
Honorable Claudia Wilken

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I. INTRODUCTION

Finally, after more than eleven years, ten conscientious jurors sat for a six week trial and deliberated for seventeen days to render a verdict in this momentous Civil Rights case. Defendants now seek to reargue their factual case to the Court -- in motions which are almost devoid of facts -- in order to have the verdict thrown out. They have no grounds, as we will show.

A. Applicable Legal Standards

1. Motion for Judgment as a Matter of Law (Rule 50)

The Seventh Amendment holds sacrosanct the right of trial by jury, and the verdict reached. The court can overturn the jury's verdict only if "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." F.R.Civ.P 50(a). "The standard that [defendants] must meet is very high." Costa v. Desert Place, Inc., 299 F.3d 838, 859 (9th Cir. 2002) The Court " 'may not substitute its view of the evidence for that of the jury,' [and may] neither make credibility determinations nor weigh the evidence. Costa, id., quoting Johnson v. Paradise Valley Unified Sch. Dist., 251 F.3d 1222, 1226 (9th Cir.2001).

The Court "must draw all inferences in favor of [the prevailing party]." Costa, id., citing Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150 (2000). Therefore, the Court is bound to give the prevailing party "the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962). Therefore, the Court must "disregard all evidence favorable to the moving party that the jury is not required to believe." Costa, 299 F.3d at 859, quoting Reeves, 530 U.S. at 151. "As the Ninth Circuit has emphasized,

> It is the jury, not the judge, which "weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts.... Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Cockrum v. Whitney, 479 F.2d 84, 86 (9th Cir. 1973), quoting Tennant v. Peoria & P.U. Ry., 321 U.S. 29, 35 (1944) (reversible error for judge to substitute his inference that town marshal shot plaintiff in self defense for jury's conclusion that it was excessive force).

"Put another way, 'j.n.o.v. should not be granted unless: (1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded [people] could not arrive at a verdict against him." In re Hayes Microcomputer Products, Inc. Patent Litigation, 766 F. Supp. 818, 821 (N.D.C.A. 1991), quoting Jamesbury Corp. v. Litton Indus. Products, Inc., 756 F.2d 1556, 1558 (Fed. Cir. 1985), citing Mattivi v. South African Marine Corp., 618 F.2d 163, 168 (2d Cir. 1980). Even though Rule 50 necessarily entails an evidentiary inquiry, defendants' motions are almost completely devoid of any discussion of the evidence.[1] That is because the evidence in plaintiffs favor was copious and compelling, as discussed herein.

2. Motion for New Trial (Rule 59)

"The trial court may grant a new trial only if the verdict is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or to prevent a miscarriage of justice." Passantino v. Johnson & Johnson, 212 F.3d 493, 510 n. 15 (9th Cir. 2000). The Court's denial of a Rule 59 motion is "virtually unassailable," and can be reversed only "for clear abuse of discretion only where there is an absolute 'absence of evidence' to support the jury's verdict. Pulla v. Amoco Oil Co., 72 F.3d 648, 656-57 (8th Cir.1995) (citations omitted); Desrosiers v. Flight Int'l of Fla. Inc., 156 F.3d 952, 957 (9th Cir.1998).

[1] Plaintiffs also note that they have no meaningful way of interpreting and responding to defendants' blanket adoptions of one another's arguments, without any analysis by defendants. What does it mean that defendants adopt one another's arguments? Do the FBI defendants adopt Oakland's argument that they all lied to Oakland? Do the Oakland defendants adopt the FBI's argument that Oakland rushed to judgment in arresting plaintiffs? Plaintiffs believe that their point by point opposition is sufficient to debunk all arguments and adopted arguments.

3. Damages in a Civil Rights Case

"[T]he fundamental policies behind Section 1983 are twofold: compensation for and deterrence of unconstitutional acts committed under state law. Bell v. City of Milwaukee, 746 F.2d 1205, 1239 (7th Cir. 1984), citing Robertson v. Wegmann, 436 U.S. 584, 590-591 (1978). "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bivens v. Six Unknown Defendants, 403 U.S. 388, 392 (1971), quoting Bell v. Hood, 327 U.S. 678, 684 (1946). Deterrence is accomplished through the mechanism of compensatory as well as punitive damages. As the Supreme Court stated in Memphis Community School District v. Stachura, "[p]unitive damages aside…deterrence is also an important purpose of [§ 1983], but it operates through the mechanism of damages that are *compensatory* -- damages grounded in determinations of plaintiffs' actual losses." 477 U.S. 299, 306-07 (1986) (emphasis in original). "To that end, compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation,...personal humiliation, and mental anguish and suffering." Id.

B. Defendants Have Waived Their Rule 50 Motions

Under rule 50(b), a party may move for a judgment notwithstanding the verdict only if the party has moved for a directed verdict at the close of all the evidence. Fed.R.Civ.P. 50(b). The federal defendants renewed their Rule 50 motions at the close of all the evidence, but as far as plaintiffs' can recall,[2] the Oakland defendants failed to do so. If so, they have waived the right to bring any Rule 50 motions. The waiver is jurisdictional. See Farley Transportation Co. v. Santa Fe Trail Transportation Co., 786 F.2d 1342, 1346 (9th Cir.1986). "A strict application of Rule 50(b) obviates the necessity for a court to engage in a difficult and subjective case-by-case determination of whether a failure to renew a motion for directed verdict at the close of all the evidence has resulted in [] prejudice to the opposing party under the particular circumstances of

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[2] The Court Reporter anticipates completing the transcript at the end of September 2002, after the filing of this Opposition.

that case." Id. at 1345 n. 2. The Ninth Circuit has consistently followed this rule. See, e.g., Johnson v. Armored Transport of California, Inc., 813 F.2d 1041, 1042-43 (9th Cir.1987); Lifshitz v. Walter Drake & Sons, Inc., 806 F.2d 1426,1428 (9th Cir. 1986).

In addition, both groups of defendants are barred from raising any Rule 50 issues which they did not raise in an earlier Rule 50 motion. A party must specify the grounds for directed verdict in the pre-verdict motion. Fed.R.Civ.P. 50 Advisory Committee's Note to 1991 Amendment. "A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion." Id.; See, Lifshitz, 806 F.2d at1429 ("A directed verdict motion can therefore serve as the prerequisite to a j.n.o.v. only if it includes the specific grounds asserted in the j.n.o.v. motion. [Otherwise, it] would not serve its purpose of providing clear notice of claimed evidentiary insufficiencies.").

In this case, most of defendants' arguments are completely novel. For these reasons, the Court should not entertain their Rule 50 Motions.[3]

II. ARGUMENT

A. FOURTH AMENDMENT VERDICTS

1. Against FBI Special Agent Doyle

The jury found Special Agent Doyle liable under the Fourth Amendment as follows:

- false arrest of Judi Bari - $23,500 (i.e. 10% of $235,000)
- illegal search (May 25) of Judi Bari's home - $133,000 (i.e. 70 % of $190,000)
- illegal search (May 25) of Daryl Cherney's home - $35,000 (i.e. 70% of $50,000)

Defendant Agent Doyle argues that he is entitled to judgment as a matter of law regarding the false arrest because he had no access to the bombed car until 2:40 pm (after it was cleared by the Alameda County Bomb Squad), with too little time to affect plaintiff Bari and Cherney's arrests, at 3:00 and 4:00 pm, respectively, and that plaintiffs are estopped from asserting that the

[3] Plaintiffs respond to defendants' Rule 50 motions anyway, to be on the safe side -- and because defendants do not make clear when they are seeking Rule 50 vs. Rule 59 relief -- but plaintiffs do not thereby mean to waive defendants' waiver.

arrests occurred any later. (Memorandum, p10.) Defendants do not challenge Doyle's liability for the searches.

Sgt. Sitterud's typed log (Ex. 118) reflects that he was able to get a close look at the car at 12:45 pm. Likewise, ATF Agent Flanigan testified that he was able to get close to the car soon after he arrived on scene, and Sgt. Sitterud reports speaking to him at 12:45 pm. (Ex. 118.) It is clear, therefore, that Agent Doyle was able to view the car well before 2:40 pm. Doyle testified that he arrived early. The evidence shows that he was probably there by 12:20 when Sitterud arrived and spoke to a group of FBI Agents, and no later than about 12:45, when Sitterud reported learning that the bomb was on the floor behind the driver's seat. (Ex. 118.) And since that was a lie, it did not depend on Doyle's having to view the car anyway (though there is no evidence he could not get close to it even if the Bomb Squad was clearing it).

Doyle was heard on the witness stand denying that he concocted the two big lies which Chenault attributed to him in the first search warrant affidavit – that the hole was on the rear seat floorboard, and that nails in bags in the car were identical to nails taped to the bomb. He denied that he was a bombing expert, though numerous other witnesses testified they deferred to him as one. But he boasted about his expert credentials to Chenault, for inclusion in the first search warrant affidavit. (Ex. 129.) Yet he denied that he ever reviewed the whole affidavit, saying (illogically) that he only reviewed that portion he wrote, as if his eye had an inner eye that knew exactly where to stop reading, in order to leave Chenault holding the bag. And every time he was impeached with his deposition testimony, he pretended, absurdly, that it had been mis-transcribed.

Doyle said he left early after meeting in the hall at O.P.D. Headquarters with Reikes and other agents. Contrast that with Reikes' testimony that he and Doyle stayed at Oakland headquarters late into the night, Sims' account of Doyle, Chenault and a district attorney huddled around the computer together, working on the affidavit, and Chenault's testimony that Doyle practically dictated the affidavit to him. In short, Doyle fooled no one in the courtroom, and his two big lies helped set the whole malign plan in motion.

Sgt. Sitterud testified that the FBI (presumably including Doyle) caused him to "tilt" toward considering plaintiffs to be perpetrators, rather than victims, before Sitterud went to Dave Kemnitzer's house (at approximately 2:30 pm). Thus, contrary to defendants' assertion, Doyle could have and obviously did play a part in the arrest. Moreover, the time of arrest is a jury question, and plaintiffs are not estopped from leaving it for the jury to decide.[4]

The federal defendants argue that the Court erred by rejecting their proposed instruction #39 and failing to instruct that probable cause is evaluated from the point of view of an officer on the scene; this prejudiced Doyle, their theory goes, since all trained bomb technicians on the scene independently arrived at the same conclusion about the location of the bomb. (Memorandum, p12.)

Three other bomb technicians went to the scene, in addition to Doyle. Agent Webb pretended he examined the car for fifteen minutes, but was impeached with his deposition testimony, in which he said he looked at it for less than five minutes. On the stand, he admitted he could see the pavement through the hole in the driver's seat. ATF Agent Flanigan said he thought the pipe was oriented lengthwise, raising questions about his expertise. And Sgt. Hanson testified that he deferred to the opinion of his bomb school instructor, Agent Doyle. Not very independent. In any case, defendants' "point of view" construction is not part of the applicable probable cause test. Probable cause is an objective standard, measured against the belief of a prudent person (not even a prudent officer). Beck v. Ohio 379 U.S. 89, 91 (1964); Orin v. Barclay, 272 F.3d 1207, 1218 (9th Cir. 2001).

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[4] Defendants' rely on State of New Hampshire v. Maine, 532 U.S. 742, 750 (2001) for the principle that a court may judicially estop a party from asserting "clearly inconsistent" positions at different stages of a legal proceeding. But any inconsistency is defendants', not plaintiffs'. Moreover, there isn't necessarily any inconsistency. Oakland is liable for falsely arresting plaintiffs at 3:00 pm. See Florida v. Royer, 460 U.S. 491, 500 (1983); U.S. v. Delgadillo-Velasquez, 856 F.2d 1292, 1295-96 (9th Cir. 1988); Hayes v. Florida, 470 U.S. 811, 816 (1985). But to the extent the jury might have believed Sims thought he was just "detaining" plaintiffs pending further investigation, Sims is liable for their de facto false arrest at 3:00 pm., and the evidence against Doyle for the false arrest (a.k.a. the ongoing detention) can include the lies he told later, in the Briefing and in the warrant application.

2. Against Oakland Police Lt. Sims, Sgt. Sitterud, & Sgt. Chenault

The jury found Oakland Police Lt. Sims, Sgt. Sitterud and Sgt. Chenault liable under the Fourth Amendment as follows:

Sims:
- false arrest of Judi Bari - $211,500 (i.e. 90% of $235,000)
- illegal search (May 25) of Judi Bari's home - liable but immune
- illegal search (May 25) of Daryl Cherney's home - liable but immune

Sitterud:
- illegal search (May 25) of Judi Bari's home - liable but immune

Chenault:
- illegal search (May 25) of Judi Bari's home - $57,000 (i.e. 30% of $190,000)
- illegal search (May 25) of Daryl Cherney's home - $15,000 (i.e. 30% of 50,000)

The Oakland defendants argue they are entitled to judgment as a matter of law because plaintiffs failed to prove either that defendants knew the information they relied on for probable cause was false, or they recklessly disregarded the truth, or that circumstances created a duty to investigate further. Additionally, they contest the duty to investigate instruction, and argue that even assuming there is such a duty, defendants had no notice of any need to investigate further under the circumstances. (Memorandum, p3-8.)

As a threshold matter, Sims was found liable for Ms. Bari's warrantless false arrest. The correct test, in these circumstances, is simply whether Sims participated in an arrest objectively lacking in probable cause. Whren v. U.S., 517 U.S. 806 (1996). Under § 1983, any officer who participated in the false arrest is liable. Since defendants only cite (approximately, though not quite accurately) the test for an illegal search based on a deceptive warrant, it appears they are not challenging Sims' liability for false arrest.[5].

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[5] See, Malley v. Briggs, 475 U.S. 335, 345-46 (1986) (if reasonable officer would not have applied for warrant, he can be held to account); Hervey v. Estes, 65 F.3d 784, 789 (9th Cir. 1995) (plaintiff must show deliberate falsehood or reckless disregard for the truth, and that "the remaining information in the affidavit is insufficient to establish probable cause"); Lombardi v. City of El Cahon, 117 F.3d 1117, 1123 (9th Cir. 1997) (plaintiff need not show specific intent to deceive the magistrate, and omissions are treated the same as misstatements). Accord, U.S. v. Kyllo, 37 F.3d 526, 528 (9th Cir. 1994).

The evidence was that Sergeant Chenault went to the scene, where he examined the car and the hole. The jury saw a video of him staring at the hole in the floor at close proximity. With Sitterud, Chenault interviewed Marr and Kemnitzer, and utterly distorted their statements in his affidavit, which were to the effect that they considered plaintiffs peaceful, not violent. (Marr's testimony; Sitterud's and Chenault's testimony and notes, Ex's 113 and 114.) Sims, who went to the scene and looked down through the hole in the seat and saw the pavement, hastily approved the arrests of plaintiffs, on grounds he therefore knew were false, and obviously dissembled on the stand in pretending that the arrest times stated in the reports were in error. He also patently lied in court about seeing a bag of identical nails, though obviously there was no such bag. Later, all three Oakland defendants interrogated Darryl Cherney at Headquarters. They completely ignored the threat evidence-- including the written threats, copies of which they had in their evidence (Ex. 102, e.g.) -- which various witnesses, including Kemnitzer, Marr, and plaintiffs themselves, told them about. Chenault drafted an utterly specious search warrant affidavit, combining his own lies with the FBI's (agents'). Sims approved the warrant affidavit, and withheld from the Magistrate the fact that he knew that the Seeds of Peace House, one of the places to be searched for bomb making materials, had already been searched inside out, and not a scintilla of evidence was found. This was exculpatory information, since it was the place where plaintiffs had spent the day before the bombing. (See further discussion, Part G-1, below.) This is some of the evidence of knowing falsehood and reckless disregard for the truth the jury received.

a. Fellow Officer Rule

The Oakland defendants continue to broadly overstate the fellow officer rule, which does not shield police who purport to rely on information which is palpably inaccurate. Oakland has been losing its right to rely argument since 1997, when this Court denied summary judgment, and emphatically again in 1999, when they lost their appeal. The centerpiece of their argument, then and now, is Whiteley v. Warden, 401 U.S. 560, 568 (1971), and progeny, out of which they try to torture a rule that any reliance on fellow officers is reasonable per se. Whiteley, in fact, held almost the opposite: Police officers are entitled to rely on radio bulletins that are based on

probable cause. If the relied-on information turns out to be false, the arresting officer's reliance does not insulate an otherwise illegal arrest. 401 U.S. at 568. Moreover, Whiteley has nothing to say about circumstances such as these, where the evidence was that the Oakland defendants went to the scene, examined the car, arrested and interrogated plaintiffs and their associates, distorted evidence, and ignored overwhelmingly exculpatory information. Whiteley just involved an arrest based on a radio bulletin from another requesting department-- and the Court held that there was no probable cause. Moreover, Reikes testified that he considered Sims an equal in the joint investigation, and did not direct him to do anything. (Accord, Sims' testimony.) And to the extent the jury believed the federal defendants' actually said they considered the arrest premature, this further showed that Oakland was acting on its own initiative, not at the FBI's behest.

Nor does the "collective knowledge doctrine" discussed in U.S. v. Barnard, 623 F.2d 551, 560-61 (9th Cir. 1980) help defendants, since the more defendants put their heads together (or the jury put together what was really in their heads), the less they had probable cause. See, U.S. v. Webster, 750 F.2d 307, 323 (5th Cir. 1984) ("[W]e will not allow the collective knowledge doctrine to be used as a subterfuge to evade probable cause requirements…[T]he 'laminated total' of the information known by officers who are in communication with one another must amount to probable cause to arrest.")[6]

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[6] Defendants' cases provide further support for plaintiffs' position. They cite U.S. v. Hensley, 469 U.S. 221, 232 (1985), citing U.S. v. Robinson, 536 F.2d 1298, 1299 (9th Cir. 1976) for the proposition that officers are not required to cross-examine one another. But in both cases, the police merely made an arrest at the behest of another department, based on a wanted flyer or bulletin. While recognizing society's interest in allowing officers to rely on such communiqués, both Courts nevertheless held, like Whiteley, that the mere fact of reliance does not create reasonable suspicion or probable cause if it is lacking, or shield the relying officers from a claim for false arrest. Rather, "[i]f the flyer has been issued in the absence of reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment." Hensley, 469 U.S. at 232. And, "[T]he direction does not itself supply legal cause for the detention, any more than the fact of detention supplies its own justification." Robinson, 536 F.2d at 1299. In Robinson, the officer "had no personal knowledge of any facts upon which to found suspicion. The foundation, if any, had to be supplied by the person whose observations and information generated the suspicion." Id.

b. Duty to Investigate

In conjunction with their right to rely argument, defendants contend they had no reasonable duty to investigate further, and that so instructing the jury was error. They lost this argument during the trial, when the Court correctly pointed out that their gripe is with the Ninth Circuit, which clearly outlined the reasonable duty to investigate, in the law of this case. Mendocino II, 192 F.3d 1283, 1293 n. 16. However, they have no cognizable gripe with the Ninth Circuit, for the reasons stated in "Plaintiffs' Response to Defs' Objections to Jury Instructions," filed 5/14/02.).[7]

The fallacy of defendants' argument is also exposed in their own footnote 2, in which they write: "Certain of [the information provided by the FBI] was independently corroborated by Oakland's own investigation." But they could not have corroborated it, because, as they admit elsewhere, it was false. (p4:13-15; p5:1-2.) And they not only failed to corroborate it, they embellished it with their own lies (see above). Defendants' cases are not to the contrary.[8]

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[7] Moreover, to appease defendants, plaintiffs acceded to a less favorable instruction than the appellate decision permitted. This Court had proposed, in keeping with the appellate decision: "A law enforcement officer is entitled to rely on information obtained from fellow law enforcement officers, but this in no way negates an officer's legal duty reasonably to inquire or investigate facts reported by other officers."

Plaintiffs agreed to strike "legal" in "legal duty", and to append the lines: "if the circumstances are such that a reasonable officer would inquire further. In other words, an officer's reliance on information obtained from a fellow law enforcement officer, or failure to make an independent inquiry, must be reasonable.

"Reasonableness in all the circumstances", after all, is the "touchstone" of Fourth Amendment analysis. Pennsylvania v. Mimms, 434 U.S. 106, 108-109 (1977).

[8] In Spiegel v. Cortese, the Seventh Circuit held that a police officer who makes an arrest based on a credible victim's allegations is entitled to disbelieve the suspect's denials, and once the officer has probable cause, s/he is not required to investigate further. Unlike in Spiegel, defendants in this case examined the scene, misreported the fruits of their own investigation, and never had probable cause. Cf. Illinois v. Gates, 462 U.S. 213, 233 (1983) (regarding right to rely on an "unquestionably honest" citizen). In U.S. v. Miller, officers' failure to discover perjury conviction during otherwise diligent inquiry into the background of a criminal informant was mere negligence, so failure to raise it in an arrest warrant affidavit was not reckless disregard for the truth. 753 F.2d 1475 (9th Cir. 1985).

3. Mr. Cherney's Undecided False Arrest Claim

The federal defendants' argument that they are entitled to judgment as matter of law because they had had no significant contact with Darryl Cherney before he was arrested at 3:00 pm. (Memorandum, p16.) fails for all the same reasons stated above. If anything, Mr. Cherney is entitled to judgment in his favor, on the same basis on which the jury found Ms. Bari to have been falsely arrested. Since defendants' purported probable cause grounds were the same for both arrests, the jury was likely prejudiced by defendants' irrelevant discussions of Mr. Cherney's "60 Minutes" quotation (which no defendant could claim to have been aware of before his arrest) and the mutating road-spiking, bomb-making, tree-spiking kit. As the Court knows, plaintiffs have agreed to defer any retrial of this claim pending the outcome of any appeal of the rest of the case. See Plaintiffs' "Memorandum in Support of Post-Trial Motion," filed 9/6 as of 9/9/02.

B. FIRST AMENDMENT VERDICTS

The jury found defendants liable under the First Amendment as follows:

Doyle:
- Liable to Judi Bari - $264,375 (i.e. 22.5% of $1,175,000)
- Liable to Darryl Cherney - $140,000 (i.e. 17.5% of $800,000)

Reikes:
- Liable to Judi Bari - $264,375 (i.e. 22.5% of $1,175,000)
- Liable to Darryl Cherney - $140,000 (i.e. 17.5% of $800,000)

Sena:
- Liable to Judi Bari - $58,750 (i.e. 5% of $1,175,000)
- Liable to Darryl Cherney - $40,000 (i.e. 5% of $800,000)

Sims:
- Liable to Judi Bari - $587,500 (i.e. 50% of $1,175,000)
- Liable to Darryl Cherney - $400,000 (i.e. 50% of $800,000)

Sitterud:
- Liable to Darryl Cherney - $80,000 (i.e. 10% of $800,000)

1. Liability Standard

a. Substantial or Motivating Factor

The federal and Oakland defendants both grossly mischaracterize the standard for liability under the First Amendment. The federal defendants argue that plaintiffs failed to prove by affirmative evidence that defendants "opposed the plaintiffs' lawful environmental advocacy", were "hostile" to it, and acted with the "purpose of devaluing" it. (Memorandum, p4- 5.) In another place, the federal defendants inappropriately draw on employment discrimination cases to argue that plaintiffs were required to invalidate defendants' pretext for their actions. The Oakland defendants, grasping at different straws, argue that plaintiffs failed to prove, by clear and convincing evidence of actual malice, that defendants knew their statements were false, or that they acted in reckless disregard of the truth. In addition, the Oakland defendants claim that the verdicts trample their own free speech rights to criticize plaintiffs.

The Court of Appeals has twice stated the applicable standard in this case:

> In order to demonstrate a First Amendment violation, a plaintiff must provide evidence showing that "by his actions [the defendant] deterred or chilled [the plaintiff's] political speech and such deterrence was a substantial or motivating factor in [the defendant's] conduct.[9]

Mendocino Env'l Center v. Mendocino County (Mendocino II), 192 F.3d 1283, 1300 (9th Cir. 1999), quoting Sloman v. Tadlock, 21 F.3d 1462, 1469 (9th Cir.1994), citing Mendocino I, 14 F.3d 457, 464 (9th Cir. 1994). The Court thus properly instructed the jury. (Instructions, p13:3-5.) Intent to inhibit speech can be demonstrated either through direct or circumstantial evidence. Mendocino II, 192 F.3d at 1300-1301,citing Magana v. Commonwealth of N. Mariana Islands, 107 F.3d 1436, 1448 (9th Cir.1997).

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[9] The Court goes on to say, "While this statement might be read to suggest that a plaintiff must demonstrate that his speech was actually inhibited or suppressed, our description of the elements of a First Amendment claim in Mendocino, which Sloman cited for its standard, requires only a demonstration that defendants '*intended* to interfere with Bari and Cherney's First Amendment rights.' Mendocino Env'l Ctr., 14 F.3d at 464 (emphasis added)."

b. Not "Purposeful Hostility"

The standard is not "purposeful hostility" toward environmental preservation, as the federal defendants suggest.[10] (Memorandum, p7.) And even if it were, the jury was not required to take defendants' self-serving statements about their sympathy for environmental protection, such as Sitterud's membership in an assortment of hunting groups, at face value. And when plaintiffs' counsel Cunningham asked Special Agent Buck if it wasn't true that his membership in environmental groups meant he could receive all their literature (that is, for counterintelligence purposes), he looked like a deer (a Buck?) caught in Sitterud's rifle scope. And obviously, no defendant claimed to be a member of Earth First! Thus, the jury clearly saw through this charade.

c. Not Title VII Standard

Nor does the Title VII employment discrimination standard apply, under which a plaintiff must prove by affirmative evidence that an employer's stated pretext for taking adverse employment action is false. (Memorandum, p5.) Defendants' cases are thus inapposite.[11]

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[10] Half the cases defendants cite are completely inapposite; the other half are supportive of plaintiffs' case.

Inapposite: Strahan v. Kirkland, 287 F.3d 821, 825-26 (9th Cir. 2002) involved adverse employment action. Lindsey v. Shalmy, 29 F.3d 1382, 1385 (9th Cir. 1994) involved employment discrimination based on gender; there was no First Amendment claim. Rackovich v. Wade, 850 F.2d 1180, 1190-91 (7th Cir. 1987) involved retaliatory discharge; anyway, the standard used was "substantial or motivating factor" in accord with Sloman. Keyser v. Sacramento City Unified School District, 265 F.3d 741, 750–753 (9th Cir. 2001) involved retaliatory discharge of a government employee.

Supportive of plaintiffs: Technical Ordnance, Inc. v. U.S., 244 F.3d 641, 652 (8th Cir. 2001) (standard is "improper motive"); Crawford-El, 523 U.S. at 600 (no heightened standard of pleading or proof required; overcoming summary judgment always requires affirmative evidence -- in this case of improper motive); Arnett v. Myers, 281 F.3d 552, 560-62 (6th Cir. 2002) (plaintiff "must show that the adverse action was motivated, at least in part, by his or her protected conduct," and may rely on circumstantial evidence to show it).

[11] St Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993), was a Title VII, race discrimination employment case. Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133, 151-52 (2000) was an Age Discrimination Employment Act case, analyzed under same standards as Title VII). Jeffers v. Gomez, 267 F.3d 895, 907-908, 911 (9th Cir. 2001) simply holds that to survive summary judgment, a plaintiff must allege specific facts showing improper motive.

The Oakland defendants try to make the case, which the federal defendants already lost (in the argument over jury instructions), that plaintiffs were required to show by clear and convincing evidence that defendants harbored actual malice. (Memorandum, p12.) But Oakland's reliance on a passel of defamation-related cases for this standard is completely misplaced.[12] The Supreme Court explicitly rejected the higher, clear and convincing standard in Firs Amendment cases such as this one. Crawford-El v. Britton, 523 U.S. 574 (1998).

d. Defendants' Free Speech Rights Are Not the Issue

Stranger yet is Oakland defendants' argument that the verdict tramples their own free speech rights to criticize plaintiffs. (Memorandum, p12-15.) But while some cases hold that government employees have First Amendment rights against their government employers, and others recognize the government's right to speak and control its own message, none recognize the government's First Amendment right, per se. How could they? The First Amendment protects the people against government, not the government against the people. Put another way, the Oakland defendants do not have a First Amendment right to violate plaintiffs' First Amendment rights. Just because plaintiffs' used defendants' statements as some of the evidence against them does not mean the jury found defendants liable for speaking. Rather, they were found liable for interfering with plaintiffs' protected speech and association, and proclaiming to the nation that plaintiffs were bombers, was one of the ways they did so. Defendants cases are thus inapposite.[13]

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[12] New York Times v. Sullivan, 376 U.S. 254, 279-80, 285-86 (1964), of course, is the landmark case which constitutionalized defamation law. Bose Corp v. Consumers Union, 466 U.S. 485, 511 n. 30 (1984), involved a product disparagement claim. Getz v. Robert Welch, Inc., 418 U.S. 323, 342, 345 (1974), involved alleged magazine defamation. Eastwood v. National Enquirer, Inc., 123 F.3d 1249, 1251 (9th Cir. 1997), also involved tabloid defamation. Rattray v. City of National City, 51 F.3d 793, 800 (9th Cir. 1995), involved employment discrimination and defamation.

[13] Conrick v. Myers, 461 U.S. 138, 145-47 (1983), involved the retaliatory discharge of a government employee. Legal Service Corp. v. Velazcuez 531 U.S. 533, 541 (2001), dealt with the extent to which Congress could regulate the speech of groups it subsidized. The High Court held that Congress could not restrict the types of cases Legal Services took. Downs v. L.A. Unified School Dist., 228 F.3d 1003, 1013-16 (9th Cir. 2000) involved a high school's right to

Defendants go so far as to suggest that their criticism of plaintiffs is not fundamentally different from the function of a newspaper. (Memorandum, p15.) Defendants are not a newspaper. Defendants are police officers who interfered by numerous means with plaintiffs' free expression and association.

2. Verdicts Against the Federal Defendants (Doyle, Reikes, Sena)

Plaintiffs more than proved their case by affirmative evidence. As the Court instructed, plaintiffs were entitled to prove their First Amendment case by showing that

> in carrying out the arrests and the searches, seeking high bails, making and repeating the public accusation that the plaintiffs were transporting the bomb, and conducting a bad faith investigation, the defendants were motivated by a desire to defame and discredit the plaintiffs, and to disrupt and neutralize their free speech and organizing work on behalf of the environment, in violation of their rights under the First Amendment [to] free speech, freedom of association, and freedom of assembly.

(Instructions, p12.) To borrow a term from criminal law, these were the *acti rei* by which defendants accomplished their First Amendment violations. The evidence showed that defendants acted as follows:

Doyle: Agent Doyle's two big lies -- about identical nails and a visible bomb -- were the twin pillars of the frame-up. This occasioned the false arrests, and the deceptive warrant affidavits and illegal searches, and provided fuel for Sims' and Sitterud's false public accusations. Indeed, Doyle's lies provided the foundation for the whole undying pretense that there could be no suspects other than plaintiffs, and thereby instigated the sham investigation, in

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control its own message, and limit contrary expressions by its teacher-employees. Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 235 (2000), involved a university's right to distribute student fees to groups so long as its system remained viewpoint neutral. The Supreme Court said, in dicta, that when government speaks, the remedy normally, should anyone disagree with the message, is to vote for a change in representation.

In NAACP V. Claiborne Hardware Co., 485 U.S. 886, 911 (1982), the High Court held that NAACP members could not be held liable for economic damage caused to racist store owners resulting from boycotts and strikes, just because such tactics had coercive or ostracizing tendencies. Rather, members could only be held liable for discreet illegal acts which caused damage. In the case at bar, the government defendants do not stand in relation to private protesters. They are not liable for their speech, but for their unlawful interference with protected activity. Similarly, in Wurtz v. Risley, 719 F.2d 1438, 1441 (9th Cir. 1983), the Court held that a statute which might constrain protected speech, rather than just true threats, was overbroad.

which defendants continued to try to railroad plaintiffs, and found new ways to chill them and disrupt their work. (See earlier discussion of Doyle's participation.)

Reikes: Defendants assert that Reikes truthfully reported the information available to him about Earth First. (Memorandum, p14.) In fact, the evidence showed that Reikes relentlessly pursued plaintiffs because they were Earth First!ers. He and his Squad were focused on Earth First! in the domestic security/terrorism ("DS/T") investigation in Santa Cruz, even though they knew the culprits were not Earth First!ers. A month earlier, he had dispatched Agent Conway to the Golden Gate Bridge banner-hanging action to gather information on the Earth First!ers involved, including Darryl Cherney. When he learned of the bombing on May 24, he dropped his fork in the middle of a luncheon with high officials from Moscow and rushed back to the office, even though he had left his perfectly competent relief supervisor, Agent Sachtleben, in charge.

That evening, in his briefing at O.P.D. Headquarters, Reikes did everything he could to make plaintiffs appear guilty by association, the import of which, as Sims testified, was to brand them as terrorists, in supposed league with various unrelated, (non-terrorist) saboteurs. Reikes omitted, for example, to tell the group that his Squad knew that neither plaintiffs nor Earth First! had anything to do with the Santa Cruz power line downing. Hanson's notes reflect that Reikes designated "Earth First!" as the general topic. (Ex 109.)[14] Also that evening, Reikes inserted the phony Heavy Hitters tip in Sims' ear -- even though he admitted he had no basis for considering it reliable. (At trial, to conform his testimony with Sena's, he backed away from even using the word "informant" (for the first time in 11 years), and went so far as to pretend it was just an anonymous call.) As the Terrorist-Squad Supervisor, Reikes directed the sham investigation for

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[14] It is also a legitimate inference after the fact -- one that the evidence clearly permitted the jury to make -- that Reikes and Sena would have known, based on their interest in Earth First!, that plaintiffs and Redwood Summer were avowedly non-violent, and opposed to sabotage too, and that Reikes deliberately withheld this information at the Briefing as well.

six to seven months, and he wrote or approved every document. He said he delegated out much of the investigation, and had regular meetings with his fellow Agents.[15]

Sena: Prior to the Oakland bombing, Sena had a pre-existing interest in Earth First!, as Oakland intelligence officer Kevin Griswold testified. The information about the Golden Gate Bridge arrest was placed in Sena's Santa Cruz power lines investigative file, along with a description of the upcoming nonviolent Redwood Summer campaign, inappropriately inserted there by defendant Conway, who classified the banner hanging on the bridge as a "terrorism/civil disobedience". As case agent in the Santa Cruz investigation, Sena initialed these documents in the file. Sena's Santa Cruz investigation led to the formation of Operation Peace Day, according to which police planned to do a dragnet-style investigation of area activists in the event there was another incident. According to Heartsner, Sena called and activated this plan on the day of the bombing. (Testimony of Heartsner and Sims.)

The evidence showed that Sena helped bias the Oakland defendants against plaintiffs by falsely reporting that he had received a tip from an informant close to the leadership of Earth First! that Earth First "heavy hitters" from up north were coming to Santa Cruz for an action -- a bombing, according to Sena and Reikes. Oakland defendants Sitterud and Sims affirmed that the fake tip was discussed in the Briefing at O.P.D. Headquarters, and again, according to Chenault, during the drafting of the search warrant affidavit. Chenault said it had an influence. But close

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[15] Defendants argue that the verdict against Reikes must be set aside because plaintiffs did not timely press a supervisory liability claim against him, and plaintiffs' counsel resorted to improper argument in closing (Memorandum, 13-14.). But supervisory liability is not a claim which must be pleaded simply because of a defendant's title. Rather, a supervisor is directly (not vicariously) liable to the same extent as any other § 1983 defendant for his/her own acts or omissions. Redman v. County of San Diego, 942 F.2d 1435, 1446-47) (9th Cir. 1991) (en banc); Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978).

Plaintiffs would have liked to receive an instruction on supervisory liability (as Requested in their Proposed Instruction No. 48, renewed and modified to clearly include Reikes, in their "Objections to Verdict Form and Instructions, 5/10/02, p9:3), but the lack of an instruction should not impair the jury's ability to find Reikes liable for his acts or omissions as a supervisor. Even without that, plaintiffs adduced ample evidence of Reikes' direct participation in the frame up, as shown.

examination of Sena demonstrated that he never really had a tip about Earth First!, or anyone from "up north," much less any information that a bomb was en route to Santa Cruz.

Likewise, Sena appears to have helped cause Sitterud to "tilt" toward considering plaintiffs perpetrators rather than victims, while still at the scene (Sitterud's testimony; Ex. 118.) Agent Sachtleben testified that Sena was the first person he assigned to go to the scene, immediately after the bombing was reported, based on his prior interest in Earth First! Sachtleben testified that Sena had told him back at the office that Judi and Darryl were possible suspects in the Santa Cruz case -- though Sena admitted at trial he knew they weren't -- so it was reasonable for the jury to infer that, upon arriving at the scene, Sena reported this same false information to Sitterud, who recorded it in his log. (Ex. 118.)

From the bomb scene, Sena went to the hospital to interview Darryl Cherney. According to Darryl, early in the interview he was accused by the agents, who told him to "make it easy on everyone and just confess." According to Agent Stewart Daley's report of the interview, Darryl asked to talk to a lawyer before taking a polygraph exam–a request so offensive to Sena that he took it as tantamount to proof that Darryl was guilty of transporting the bomb. (Testimony of Daley and Sena; Ex. 208-D.)

3. Verdicts Against the Oakland Defendants (Sims and Sitterud)

a. Reputation and Tangible Interests

The Oakland defendants claim they are entitled to judgment because plaintiffs did not prove damage to some more tangible interest than their reputations alone.[16] They further argue

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[16] "[D]amage to reputation is not actionable under § 1983 unless it is accompanied by 'some more tangible interests' " Gini v. las vegas Metro Police Dept., 40 F.3d 1041, 1045 (9th Cir. 1994), quoting Patton v. County of Kings, 857 F.2d 1379, 1381 (9th Cir. 1988), quoting Paul v. Davis, 424 U.S. 693 (1976); WMX Technologies v. Miller, 197 F.3d 367, 374 (9th Cir. 1999) (en banc) (injury to business' reputation resulting from D.A. report accusing it of criminal activity was not a constitutional violation). Plaintiffs believe that defendants reliance on Paul v. Davis is misplaced, since it and the other cases defendants cite involve far less tortious conduct than occurred in this case. All the Supreme Court sought to do in Paul v. Davis was avert the general constitutionalization of common law torts. In each of these cases, plaintiffs were overreaching: Thus, the Supreme Court held that petitioner's alleged defamation, a typical state tort claim, was not actionable under the 14th Amendment, because damage to reputation alone is

that there was no evidence plaintiffs were prevented from engaging in protest, public speaking, or other First Amendment expressions.[17] (Memorandum, p9-12.)

On the contrary, plaintiffs adduced copious evidence of damage to tangible interests, as well as damage to their reputations. Judi and her daughter Lisa Bari both testified extensively that the false accusations compounded Judi's distress during her recovery, and robbed her of time she otherwise would have devoted to her recovery and her organizing. Judi and Darryl both testified that the sham investigation compounded their terror because it frustrated the capture of the person or persons who tried to kill them, who remained free to try again, and gave tacit encouragement to other would-be assassins. Co-Redwood Summer organizers Betty and Gary Ball, along with Darryl, testified that the frame-up diverted Judi and Darryl's organizing power, scared would-be participants away from Redwood Summer, and diminished the protest, which plaintiffs had worked so hard to prepare for. Lisa Bari testified that the rest of Judi's life was taken up with trying to clear her name. Darryl testified that as a result of the frame up, he lost valuable credibility and indispensable media contacts, and that wherever he went, some portion of the people he interacted with viewed him as a bomber, which has provoked other frightening threats, including several he received even during trial. Defendants' maliciously misdirected efforts insured that the bomber would never be caught; any jury, with recourse to their own common sense, would know that this will continue to haunt and chill Darryl Cherney.

Defendants argue that damage to plaintiffs' organizing work is not compensable, with recourse to a passage lifted out of context from Justice Jackson's concurring opinion in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 183-84 (1951):

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neither a deprivation of "liberty" nor "property". Id. at 701. Similarly, application for a use permit by a waste management company is not a petition for redress under the First Amendment. WMX, 197 F.3d at 372. Thus, in each of these cases, plaintiffs were overreaching. Here, however, plaintiffs proved that defendants interfered with their free expression and assembly, in a vile manner over a sustained period of time, in direct violation of their First Amendment rights, and caused them substantial damage and losses to boot.

[17] Plaintiffs note that they are not required to prove defendants actually chilled them, but rather that their actions would chill a person of ordinary firmness. (See discussion at Part D, below.) Nevertheless, plaintiffs adduced ample evidence of actual chill, recounted here.

> [M]ere designation as subversive deprives the organizations themselves of no legal right or immunity…[Their inability to] attract audiences, enlist members, or obtain contributions as readily as before…are sanctions applied by public disapproval, not by law.

But Justice Jackson makes clear that he distinguishes the potential harm to individuals from that of organizations:

> If the only effect of the Loyalty Order was that suffered by the *organizations*, I should think their right to relief very dubious. But the real target of all this procedure is the government employee who is a member of, or sympathetic to, one or more accused organizations. He not only may be discharged, but disqualified from employment, upon no other ground than such membership or sympathetic affiliation.

Id. at 184 (emphasis added; footnote omitted). The eight-member decision was without a majority opinion, but four Justices, including Mr. Jackson, concurred with one another that the Due Process clause forbade the government from branding organizations Communist without giving them notice and an opportunity to be heard. And a fifth Justice, Mr. Burton, in announcing the judgment of the Court, called the Attorney General's designations "patently arbitrary," and recognized that their main effect was to "cripple the functioning and damage the *reputation* of those organizations in their respective communities and in the nation." Id. at 137, 139 (emphasis added). The Oakland defendants' citation is therefore misleading to say the least, and rather tends to support plaintiffs' case (during the dark days of the McCarthy period, no less).

Oakland's complaint that the jury relied on reputation damage (evident from their judging Sims 50% liable for Mr. Cherney's First Amendment damages, despite no finding of Fourth Amendment liability (Memorandum, p1.), is wrong in at least three respects. It's wrong because reputation damage is compensable, so long as it is combined with some more "tangible" injury. It's wrong, because the jury was undecided on Darryl's false arrest, so nothing can be gleaned about Sims' Fourth Amendment liability, *vel non* -- except of course that the jury did find Sims liable for Judi's false arrest, based on the same tissue of lies.[18] And it's wrong because the jury

[18] Probably, therefore, the jury was just prejudiced by defendants Sitterud's and Sims' unscrupulous smear at trial, in which they defied the Court's *in limine* order and pretended to

did in fact find Sims liable for the deceptive warrant affidavit and false search of Darryl's house -- though they found him immune.

b. Evidence of Interference With First Amendment Rights

Oakland next argues that plaintiffs did not prove that Sims and Sitterud "specifically intended to interfere…" Rather, they say, the evidence showed these defendants had never heard of Earth First! or plaintiffs before the bombing. And they claim Sims was so reasonable as to withhold mention of the inflammatory Uzi photo or Darryl's "60 minutes" interview.

Setting aside defendants' absorption with the wrong standard, as discussed above, the foregoing evidence was more than sufficient to demonstrate defendants' intent to interfere…, and there is no requirement on plaintiffs to show that defendants knew who they were.[19] Regarding the Uzi photo, plaintiffs showed that Sims never even received it until well after he approved the bogus warrant affidavit and began calumnizing plaintiffs in the press. So it is completely disingenuous for Sims to suggest he was doing plaintiffs any favor by not discussing it in the press. Regarding Darryl's "60 Minutes" interview, plaintiffs proved circumstantially that Sims knew or should have known Darryl's statement was hyperbole. Sims was not specific about when he heard it. However, the fact that he did not add it to the warrant affidavit shows that even if he had heard it by that time, he knew it was completely irrelevant for probable cause purposes anyway, and therefore knew he had no basis for discussing it in the press. Sims does not receive credit against his maliciousness for the bad things he refrained from doing. The jury, anyway, did not think so.

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believe an alleged road-spiking kit recovered in the course of a consensual search of Darryl's van after his arrest, was also at the same time an embryonic pipe bomb, was also a bundle of tree spikes -- even though Sitterud's own notes proved he knew it was just a road-spiking kit (thus a defense based on alchemy, not evidence).

[19] Of course, defendants would not admit it if they did. But circumstantial evidence supports the finding that that the Oakland defendants were familiar with Earth First! by dint of Officer Griswold's specific intelligence gathering on Earth First! and Redwood Summer. And Griswold testified that he spent time both at the scene and at OPD Headquarters on May 24.

After SSA Williams undercut the frame up by demonstrating that the bomb was squarely under the front seat, Sgt. Sitterud revived the frame up with a new lie about matching nails, (based on alleged information from Williams, which Williams absolutely denied). So Sitterud faked a new search warrant affidavit, based on the trumped-up need for more nails from Ms. Bari's house -- and padded it by attaching the entirety of Chenault's discredited first affidavit (*which Sitterud knew, beyond any doubt, to be false*) to his new affidavit. The headlines blazed anew, and Sitterud trumpeted the second phony nail match himself in a number of interviews. The second search was devastating -- chilling -- to Judi Bari, and caused her choke up in her deposition as she explained that she felt like she and her children were just beginning to get over their fear and get their lives back. It was also Sitterud who kept Shannon Marr in a locked room at OPD HQ and brazenly accused her of the bombing, showing how uninterested he was in learning the truth from this perfectly helpful witness, and what his attitude toward plaintiffs' friends and associates was, suggestive of his attitude toward plaintiffs themselves. Sitterud's corrupt motive was even apparent in his effort to keep up the smear campaign in court, e.g. by suggesting that a pipe recovered from Darryl's van was the same size as the pipe bomb, even though Sitterud knew, from his own notes, that it was tiny in comparison, and was part of the alleged road-spiking kit (so he also knew plaintiffs could not impeach him without introducing the road-spiking kit).

Defendants complain that they have no obligation to conduct an investigation in any particular way. (Memorandum, p16.) They rely on Gini v. Las Vegas Metro Police Dept., 40 F.3d 1041, 1045 (9th Cir. 1994). But Gini involved law enforcement's declination to undertake an investigation at all -- a far cry from this case, in which defendants undertook a thoroughly biased investigation, aimed at framing plaintiffs, and neutralizing their effective advocacy.

Finally, Oakland argues that there is no evidence Sgt. Sitterud had any role in hiking Darryl's bail so excessively, or that it extended Darryl's period of custody. (Memorandum, p16.) Karen Pickett testified that each time plaintiff's supporters took up a collection to bail out Darryl

Cherney, Lt. Sims told them bail had been raised, from $3,000, to $18,000, to $100,000, thus extending Darryl's custody, because it took them a while to be able to raise a $10,000 bond on $100,000 bail. Sims testified that he sought a single increase, from $3,000 (the scheduled amount) to $250,000, but that the Judge agreed to only $100,000. Therefore, the jury could infer two things: (1) that Sims was responsible, and (2) that he lied about the increase to $18,000, the first time he discouraged plaintiffs' supporters from bailing out Mr. Cherney, extending his custody. And the bail enhancements not only caused damage to plaintiffs (Judi, for example, in agony and fear I the hospital, continued to be prevented from even touching her children and friends), it is evidence of defendants' animus. As for Sitterud, it was his investigation, as the jury knew, so they could reasonably infer that he approved of the increase. In any case, seeking and obtaining excessive bail was only one of many means by which defendants pursued their corrupt ends. (See discussion at Part B-3(b) above.)

C. THE VERDICTS ARE NOT INCONSISTENT

Defendants Reikes, Sena, Sims, and Sitterud argue that the verdicts against them are inconsistent, in that they cannot be held liable under the First Amendment if the jury did not find them liable under the Fourth Amendment. (Memoranda, FBI pp13, 15; Oakland p15-16.)

"When faced with a claim that verdicts are inconsistent, the court must search for a reasonable way to read the verdicts as expressing a coherent view of the case, and must exhaust this effort before it is free to disregard the jury's verdict..." Norris v. Sysco Corp., 191 F.3d 1043, 1048 (9th Cir. 1999). There is nothing remotely inconsistent in these verdicts. First, the jury did find Reikes, Sims, and Sitterud liable under the Fourth Amendment, but granted Reikes and Sitterud qualified immunity.[20] More importantly, First Amendment liability in this case is not conditioned on Fourth Amendment liability. The false arrests and illegal searches are only

[20] The jury found Reikes liable for Judi's false arrest and the May 25 searches, and Sitterud liable for the May 25 search of Judi's home, but gave them both qualified immunity. The jury found Sims liable for Judi's arrest and awarded 90% of the damages ($211,500) against him, in a reasonable, and well-substantiated verdict, as discussed above. However, the jury found Sims liable but immune for the searches.

some of the means by which defendants' pursued their frame-up. The Court properly instructed the jury that First Amendment liability could be premised on "carrying out the arrests and the searches, seeking high bails, making and repeating the public accusation that the plaintiffs were transporting the bomb, and conducting a bad faith investigation…" Plaintiffs proved by overwhelming evidence that these defendants variously participated in these misdeeds. (See discussions at Parts A-2 & B-3, above.) They need not each have participated in all of them to be liable under the First Amendment.

Moreover, a First Amendment award based on Fourth Amendment misconduct is plainly acceptable. See, Collins v. Jordan, 110 F.3d 1363, 1375-76, notes 9 & 11 (9th Cir. 1997). The key element in a First Amendment claim is motive -- that is, the intent to interfere with protected expression or association. Liability results from the *intent* to interfere. Mendocino II, 192 F.3d at 1300 (emphasis in original), citing Mendocino I, 14 F.3d at 464, and Sloman, supra. The damages flow from the chilling or deterring effect of the interference.

D. DEFENDANTS ARE STILL NOT ENTITLED TO QUALIFIED IMMUNITY

1. Re: Mr. Cherney's False Arrest Claim[21]

The federal defendants argue that the jury's failure to agree on Darryl's false arrest claim establishes that they are qualifiedly immune, as it shows reasonable people could disagree. (Memorandum, p16.) This assertion is absurd on its face. First, the qualified immunity test is not whether reasonable jurors could disagree, but whether, as the Court instructed, a reasonable law enforcement officer could believe his/her conduct was lawful. Saucier v. Katz, 573 U.S. 194, 199 (2001). Second, the jury considered the question of immunity in conjunction with Darryl's arrest, and reported that they could not agree about that either.

[21] Plaintiffs still maintain that qualified immunity is a defense against suit, not a defense to liability, and that it therefore ceased to be an issue in the case after it was determined against defendants by both this Court and the Court of Appeals (and certainly by the time trial started).

2. Re: Clearly Established Duty to Investigate

The Oakland defendants argue that they are entitled to immunity because they had no clearly established duty to investigate in 1990. (Memorandum, p8.) But Oakland lost this very argument on interlocutory appeal in this case.

> We have denied qualified immunity to police officers who had indisputably relied on information obtained from other law enforcement officials, when we concluded that they violated their duty to conduct further investigation. See Guerra v. Sutton, 783 F.2d 1371, 1375 (9th Cir.1986).

Mendocino II, 192 F.3d at 1293 n. 16. Anyway, as shown in Part A-2 above, the Oakland defendants did not "indisputably rely" on the FBI Rather, they came, they saw, they lied. See Sevigny v. Dicksey " 'A police officer may not close his or her eyes to facts that would help clarify the circumstances of an arrest' [and] must be held to knowledge of reasonably discoverable information bearing upon probable cause to arrest..." 846 F.2d 953, 957, n.5 (4th Cir. *clearly established in* 1988), quoting BeVier v. Hucal, 806 F.2d 123, 128 (7th Cir. *clearly established in* 1986).

3. Re: Chilling a Person of Ordinary Firmness

Oakland quibbles with the Court's instructions that a First Amendment violation is complete if it would chill a person of ordinary firmness, even if it did not actually chill plaintiffs. They argue that this rule was not clearly established until 1996, in Crawford-El v. Britton, 93 F.3d at 826 (D.C. Cir. 1996) (en banc), before which actual chill was required, per Laird v. Tatum, 408 U.S. 1, 13-14 (1972). (Memorandum, p20.) First, the question does not even implicate qualified immunity analysis. Surely, the reasonableness of an officer's belief in his actions is not mediated by the subjective firmness of another person, the targeted speaker.

Second, Laird, was decided on narrow factual grounds very different from this case. The Supreme Court held that political activists lacked standing to seek an injunction against the Army, forbidding it from gathering data on their lawful activities, where they did not, and could not, plead any actual chilling or deterrence. The Court was concerned that the "logical end" of such litigation would be to make "the federal courts [] virtually continuing monitors of the wisdom and soundness of Executive action." Id. at 15. In the instant case, of course, plaintiffs

sued for damages, not injunctive relief, and they alleged (and proved) actual chilling. The distinction is important for two main reasons. One, a suit for damages permits an award of nominal damages if no actual damage can be proved, but a suit for injunctive relief does not allow for a nominal injunction. Two, the "logical end" of § 1983 suits for damages is not to make federal courts continuing monitors of executive action. [22]

Third, actual chilling has not been required since at least 1980. See Grossart v. Dinaso, 758 F.2d 1221, 1230 n. 11 (7th Cir. 1985), citing Branti v. Finkel, 445 U.S. 507, 517 (1980). See also, Shelton v. Tucker, 364 U.S. 479 (1960); Keyishian v. Board of Regents, 385 U.S. 589 (1967). The logic of the principle was eloquently stated by this Court in its 10/15/97 Order re Qualified Immunity, p57:21:

> It would be anomalous to require a civil rights plaintiff to surrender his or her speech, that is, to do exactly what the defendant is alleged to have impermissibly intended, in order to bring a lawsuit, regardless of how egregious the defendant's conduct may be.

(Docket #307). Affirmed in Mendocino II, 192 F.3d at 1300.

Finally, the jury necessarily determined qualified immunity against defendants when it found they intended to violate plaintiffs' First Amendment rights, which behavior no reasonable officer could believe is lawful.

E. THERE ARE NO GROUNDS FOR REMITTING THE COMPENSATORY DAMAGES

1. Applicable Law

"[S]ubstantial deference [must be afforded] to a jury's finding of the appropriate amount of damages, and [the Court] must uphold the jury's findings unless the amount is grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork."

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[22] Vernon v. Los Angeles, 27 F.3d 1385, 1395 (9th Cir. 1994), cited by defendants, presents an entirely different kind of First Amendment claim, for violation of the Free Exercise clause. In such cases, an adherent must show that the government action substantially burdens his/her religious practice by compelling him/her to commit a forbidden act. Mendocino II, 192 F.3d at 1300 controls this case. Plaintiffs believe that Village of Suffern, 268 F.3d 65, 73 (2d Cir. 2001), cited by defendants, was wrongly decided. In any case, it is not the law of this Circuit.

In re Exxon Valdez, 270 F.3d 1215, 1248 (9th Cir. 2001) (internal quotes omitted). "While Exxon presents a plausible argument against the soundness of the damages awards, the complexity and uncertainty of these damages questions left room for reasonable jurors to take many paths." Id.

2. Survivorship

The Oakland defendants argue that Judi Bari's "non-economic" damages for pain and suffering do not survive her death, per California Code of Civil Procedure § 377.34. They cite County of Los Angeles v. Superior Court (Schonert), 21 Cal. 4th 292, 303-308 (1999), in which the California Supreme Court held that Cal. C.C.P. § 377.34 is not inconsistent with the purposes and policies of § 1983.[23] However, the California decision plainly does not control. Defendants raised and lost this argument during trial. At that time, this Court correctly observed that Judge Patel's decision in Williams v. City of Oakland, 915 F. Supp 1074, 1076 (N.D. Cal. 1996), holding that Cal. C.C.P. § 377.34 is inconsistent with § 1983, directly controls the question in this case.[24] See also, Guyton v. Phillips, 532 F.Supp. 1154, 1167-68 (N.D.Cal.1981); Garcia v. Whitehead, 961 F.Supp. 230, 233 (C.D.Cal.1997) ("California's survivorship statute is inconsistent with the purposes of section 1983 because it excludes damages for pain and suffering of the decedent."); Bass by Lewis v. Wallenstein, 769 F.2d 1173, 1189 (7th Cir.1984) ("[I]in a section 1983 action, the estate may recover damages for…conscious pain and suffering experienced by the decedent prior to death…").

Defendants cite Lewis v. Telephone Employees Credit Union, 87 F.3d 1537, 1545 (9th Cir. 1996), for the proposition that federal courts are bound by decisions of the state's highest court when interpreting state law. That's all well and good, but the California Supreme Court in

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[23] If federal civil rights law does not furnish a particular rule, the most closely analogous state law may fill the vacuum if it furthers the purpose of the federal law. If state law is inconsistent, it must be disregarded in favor of the federal common law. Robertson v. Wegmann, 436 U.S. 584, 587-90; (1980); Bell v. City of Milwaukee, 746 F.2d 1205, 1234 (7th Cir. 1984).

[24] In Williams, as here, the victim died pending suit, from causes unrelated, and her estate representative maintained her claims for deprivations of Fourth Amendment rights.

Schonert was interpreting state law, not federal law. Federal courts are the best interpreters of federal civil rights law. See, e.g., Williams v. Taylor, 529 U.S. 362, 377 (2000) (wrong to require federal courts to defer to state court's interpretations of federal law); Brotherhood of Locomotive Engineers v. Springfield Terminal R.Ry. Co., 210 F.3d 18, 26 (1st Cir. 2000) ("If the federal statute in question demands national uniformity, federal common law provides the determinative rules of decision.") [25]

In this case, where Judi suffered little pecuniary loss and defendants did not cause her death (so no wrongful death action could have been brought), the twin goals of compensation and deterrence under § 1983 are best served by permitting her estate to recover for her emotional damages. Bell v. City of Milwaukee, 746 F.2d at 1239; Robertson v. Wegmann, 436 U.S. at 590-591; Memphis Community School District v. Stachura, 477 U.S. at 306-07 & n. 9(1986). Moreover, her two daughters are beneficiaries of her estate. Cf. Robertson (decedent had no surviving close relatives).

Finally, Oakland suggests that this Court, by following its own authority, would create an unnecessary discrepancy leading to different results depending on whether a § 1983 claim were brought in federal or state court. However, the discrepancy already exists (between Schonert on the one hand, and Williams, Guyton, and Garcia on the other), and it would not be the first such

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[25] The California Supreme Court's analysis in Schonert helps illustrate why federal courts, not state courts, should shape federal common law. The Schonert Court found that "[b]y specifically providing for punitive or exemplary damages, our state law seeks to deter future wrongful behavior of the kind complained of and is thus consistent with the [deterrence] goal of the federal civil rights law…" 21 Cal.4th at 304. But the Court undertook no analysis of the difficulty most civil rights plaintiffs have in obtaining punitive damages.

And somehow the Schonert Court, in finding that state law is not preempted because "a federal court sitting in California would apply section 377.34" ignored the fact that two federal courts sitting in California -- the Northern District in Williams and Guyton, and the Central District in Garcia, supra -- *did* find § 377.34 inconsistent with federal law. Id. at 308. The Eastern District, in a cursory opinion in Venerable v. City of Sacramento, 185 F.Supp.2d 1128, in a cursory opinion, went the other way, and the Southern District does not appear to have weighed in.

discrepancy. (For example, the federal courts do not recognize certain state privileges under which police often seek to withhold their personnel and disciplinary records, and the state courts do not recognize the qualified immunity defense.) It just means that for the present time, estate representatives are better advised to bring § 1983 actions on behalf of their decedents in federal rather than California Superior court.

3. The Awards Are Not Excessive

a. Judi Bari's False Arrest

Similarly, the Oakland defendants argue that plaintiffs offered little or no proof of actual damages flowing from Judi Bari's arrest, and any such damage resulted not from the arrest, but from its effect on her First Amendment activities. (Memorandum, p27.)

On the contrary, Judi, her daughter Lisa Bari, and Judi's close friend Karen Pickett all testified extensively to the horror which Judi's arrest, connoting a frame up, caused her. Even more detrimental, plaintiffs showed, her arrest meant she was forbidden from having physical contact with he daughters and her friends, which she desperately craved, while she lay terribly wounded. Defendants did all of this damage while Judi was at her most physically fragile and emotionally vulnerable, after a bomb almost took her life, and the bombers remained free, encouraged if they should wish to try again by defendants' malicious misdirection of resources and attention. $235,000 is a small price for defendants to pay for such an oppressive campaign.

b. The May 24 Searches

"The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." Payton v. New York, 445 U.S. 573 (1980). "[T]he zone of privacy [is never] more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home--a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their…houses …shall not be violated." Id. at 589.

The federal and Oakland defendants argue that the damage awards were excessive compared to the actual harm plaintiffs suffered in the May 24 searches of their homes.[26] Plaintiffs were not required to prove that their homes were ransacked, or that some great quantity of valuable property was removed.

> If your home is illegally invaded or you are illegally prevented from voting or speaking you can seek substantial compensatory damages without laying any proof of injury before the jury, provided that you do not ask for heavy damages on the ground that the constitutional right invaded was "important."

Hessel v. O'Hearn, 977 F.2d 299, 301 (7thCir 1992). In Hessel, an officer who stole a can of soda during an otherwise constitutional search of plaintiff's home was not entitled to summary judgment.) "A violation of constitutional rights is never de minimis," The Court said. Id. at 303, quoting Lewis v. Woods, 848 F.2d 649, 651 (5th Cir.1988).

Of course, this case presents a far more egregious deprivation of security in one's "house, papers, and effects" than in Hessel. The searches in this case were not just unreasonable; they were unlawful to the core, and predicated on a despicably dishonest affidavit. What defendants seized, they stole. And what they stole included papers, a seizure which is chilling to the core. And they used what they stole to create even more misery for plaintiffs up the road -- i.e. fabricating another supposed nail match -- and then by obtaining another false search warrant on that basis, which Judi testified wrecked her and her kids emotionally, just as they were all starting to recover from the first search.

Plaintiffs are entitled to substantial damages against defendants' for swearing out a grossly false warrant affidavit (*Malley v. Briggs*), for the invasion of the sanctity of their homes (Payton), for the theft of their personal effects, for the time they are still spending requiting this injustice (Hessel), etc.

The Jury understood all of this. "The determination of the amount of damages to be awarded is left to the discretion and good judgment of the fact finder as guided by the facts of the

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[26] The federal defendants argued this in reference to Darryl (p17) and Oakland in reference to both plaintiffs (p26). The jury awarded Judi $190,000 and Darryl $50,000 for the illegal

particular case." Smith v. Heath, 691 F.2d 220, 222, 226 (6th 1982) (involving "an unconstitutional orgy of unique proportions"). "This concept has been specifically applied in section 1983 cases for both punitive and compensatory damages." And presumed damages are always available "when substantive constitutional rights, such as the right to freedom of speech, or the right to be free from unreasonable searches and seizures, are infringed." Id., citing Memphis v. Stachura, 477 U.S. at 310-11. In these circumstances, the jury's award was reasonable.

c. The First Amendment Violations

The Oakland defendants complain that the First Amendment damages are excessive because (1) they compensate damage to reputation, (2) they compensate statements which do not meet N.Y.T. v. Sullivan actual malice standard, (3) they cause a double recovery, duplicative of Fourth Amendment awards, (4) they are grossly excessive -- the product of passion and prejudice, and (5) plaintiffs' status was actually enhanced! (Memorandum, p21.)

Plaintiffs have thoroughly refuted #s (1) through (3) elsewhere in this brief, and will spare the court a repetition of their arguments. Regarding # (4), defendants make only a bare allegation that the verdicts were motivated by passion or prejudice, but provide no factual support, nor can they. The awards are quite reasonable in measuring plaintiffs' actual losses (as discussed above). As for # (5), the argument is simply offensive, and they again cite no evidence for it. Plaintiffs' devotion was to preserving old growth forests, jobs, and a way of life on the North Coast, not to working for the rest of their days to requite a personal injustice and clear their names, much less be looking over their shoulder, worrying whether murderous enemies, given a kind of immunity by defendants, might try again.

d. Apportionment Was Fair

The Oakland defendants argue that some Fourth Amendment damages were assigned *sub silento* to defendants who were found to be immune, since the jury was first asked to determine the size of an award, then apportion it among defendants. (Memorandum, p25.) In fact,

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searches on May 24.

however, this mechanism overtly insulated immune defendants from liability for any damages. Obviously, the proper focus for determining a compensatory damages figure is on the loss suffered by plaintiff, not the actions of defendants, or the number of defendants involved. (In contrast, punitive damages focus on the actions of defendants.) Each tortfeasor is then jointly and severally liable for the entire award. See, e.g., Lockard v. Missouri Pacific R.R. Co., 305 (8th Cir. 1990).[27]

4. There Is No Double Recovery

The Oakland defendants contend that the Fourth Amendment damages wrought a double recovery, duplicative of damages awarded under the First Amendment. Again, however, the verdict shows the exact opposite. The Court directed the jury to tally the First and Fourth Amendment damages on separate lines, under separate instructions, in completely separate areas of the verdict form. This is in perfect keeping with the directive in Collins v. Jordan, cited by defendants:

> We leave it to the district court to decide in the first instance whether to submit to the jury both the First and the Fourth Amendment claims. If it does so, it could help clarify the issues for this court in the event of a further appeal by eliciting from the jury separate verdicts stating whether it finds liability on each of the alleged First Amendment violations, i.e., the arrests and the detentions, and, if so, how it apportions damages between the two. Similarly, the jury could be asked to assess the damages under the Fourth Amendment theory separately. Such an inquiry might help avoid the award of duplicative damages.

110 F.3d 1363, 1376 n. 11 (9th Cir. 1997). Defendants have no basis for gainsaying that this conscientious jury, which deliberated for 17 days, followed the instructions and carefully parsed liability and damages as provided for in the verdict form.

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[27] Over plaintiffs' objection, the Court allowed the jury to assign percentages of responsibility among the non-immune, joint tortfeasors. This does not punish any defendant for wrongs committed by another; it simply makes those found liable responsible for the full sum of damages. While such a scheme aids the federal and Oakland defendants in divvying shares between these two camps, it neither helps nor hinders any apportionment within each camp, since the City of Oakland is obligated to pay its employees' judgment, per Cal. Government Code § 825(a), and the federal government, as a practical matter, will pay its employees' judgment. See 28 C.F.R. § 50.15(c)(1) and (4).

F. THERE ARE NO GROUNDS FOR REMITTING THE PUNITIVE DAMAGES

The jury awarded punitive damages against defendants as follows:

Doyle:
- $300,000 to Judi Bari (Fourth Amendment)
- $100,000 to Darryl Cherney (Fourth Amendment)

Reikes:
- $600,000 to Judi Bari (First Amendment)
- $300,000 to Darryl Cherney (First Amendment)

Sims:
- $400,000 to Judi Bari (First Amendment)
- $250,000 to Darryl Cherney (First Amendment)

1. Court Has Jurisdiction to Award Punitive Damages

The federal defendants assert, outlandishly, that the Court lacks jurisdiction to award punitive damages in Bivens actions, in the wake of the Supreme Court's recent decision in Barnes v. Gorman, 122 S.Ct. 2097, 2102 (2002). Barnes holds no such thing. In Barnes, the Court held that a wheelchair bound man injured when police transported him in a non disabled-equipped van could not recover punitive damages under § 202 of the ADA and § 504 of the Rehabilitation Act, because violations of those sections are limited to breach of contract remedies, excluding punitive damages.[28]

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[28] The Court explained that § 202 of the ADA and § 504 of the Rehabilitation Act are spending clause statutes, whose remedies are coextensive with Title VI of the 1964 Civil Rights Act, under which Congress availed itself of its Spending Clause power to prohibit racial discrimination in federally funded programs and activities.

> A remedy is appropriate relief only if the recipient is on notice that, by accepting federal funding, it exposes itself to such liability. A funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation but also to those traditionally available in breach of contract suits. Title VI mentions no remedies; and punitive damages are generally not available for breach of contract…
>
> [C]ompensatory damages alone might well exceed a recipient's level of federal funding…[P]unitive damages on top of that could well be disastrous…In sum, it must be concluded that Title VI funding recipients have not, merely by accepting funds, implicitly consented to liability for punitive damages.

Barnes v. Gorman, 122 S.Ct. at 2008-2009, 2102 (internal quotes and cites omitted).

The Barnes opinion does not even mention Bivens; it does not disturb the basic principle that punitive damages are available in Bivens actions. Carlson v. Green, 446 U.S. 14, 22 (1980), citing Bivens itself.[29] Moreover, the Supreme Court went out of its way to square its holding with the "well settled" rule that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Id. at 2102, quoting Bell v. Hood, 327 U.S. 678, 684 (1946), on which the Bivens decision was founded. Defendants reliance on Barnes is therefore totally baseless.

2. Applicable Law

"Punitive damages "are not compensation for injury[;] they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). "Once the threshold standard for punitive damages is met (which, as here, may be the same as the substantive standard for ordinary liability) we cannot review the jury's decision to award punitive damages, which represents its discretionary moral judgment about [defendant's] culpability." Larez v. City of Los Angeles, 946 F.2d 630, 649 (9th Cir. 1991). In Larez, the Court found that the standard for liability "largely overlaps" the standard for finding punitive damages -- that is, whether defendants acted with "reckless or callous disregard or indifference to [plaintiffs'] constitutional rights." Id., citing Smith v. Wade, 461 U.S. 30, 56 (1982). The same is true here: Defendants who intentionally violated plaintiffs' First Amendment rights, necessarily acted with "callous disregard or indifference" to their constitutional rights.

However, the Court should consider three "guideposts" to evaluate whether the award is excessive: (1) the degree of reprehensibility, (2) whether there is a gross disparity between the harm and the punitive award, and (3) the difference between the award and the sanctions or civil

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[29] Even though the Supreme Court in Carlson stated the rule somewhat tentatively -- "our decisions, although not expressly addressing and deciding the question, indicate that punitive damages may be awarded in a Bivens suit" -- courts routinely cite both Carlson and Bivens for this rule. See, e.g., Nurse v. U.S., 226 F.3d 996, 1004 (9th Cir. 2000).

penalties authorized or imposed in comparable cases. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 435 (2001); BMW of North America, Inc. v. Gore, 517 U.S. 559, 574-75 (1996). Of these, reprehensibility is "the most important indicum of the reasonableness of a punitive damages award." BMW, 517 U.S. at 575. The Court instructed the jury to consider the first two guideposts, so they are built into the verdict.

The federal and Oakland defendants argue that the punitive damage awards are excessive under the three BMW guideposts (Memoranda, FBI p18-19; Oakland, p22-24.) Oakland further asserts that that defendant Sims's wealth is a factor, and the federal defendants assert that punitive damages do not serve the deterrence goal, because Agents Reikes and Doyle have retired.

3. Guidepost Analysis (Reprehensibility, Ratio, and Comparable Awards)

(1) Reprehensibility: The jury carefully selected the three most reprehensible defendants to impose punitive damages against: Agent Doyle, whose big lies started the juggernaut rolling; Supervisory Special Agent Reikes, who abandoned a meeting with high officials from Moscow to start railroading plaintiffs, falsely branded them terrorists at the Briefing, relayed the bogus Heavy Hitters tip to Lt. Sims, and deployed his T-Squad agents in the thoroughly one-sided, sham investigation against plaintiffs, rather than tasked them to solve a crime; and Lt. Sims, who approved the false affidavits and trumpeted Doyle's lies to the media (even though he personally knew from they were lies), and failed to rein in his officers. Moreover, the jury witnessed these defendants' mendacity during their testimony in court, as discussed in detail above. Reprehensible they are.

Oakland suggests that the jury impliedly found that Sims did not act with requisite malice, because he was not found liable for the Fourth Amendment violations. (Memorandum, p23.) But Fourth Amendment violations do not require malice; the standard is objective. Whren, 517 U.S. 806 (1996). Moreover, actual malice is not a required showing for punitive damages. Smith v. Wade, 461 U.S. 30, 56 (1982) (jury may assess punitive damages under § 1983 when defendants' conduct involves "reckless or callous indifference to the federally protected rights of others"; actual intent or malice not required). Accord, Larez v. City of Los Angeles, 946 F.2d

630, 639 (9th Cir. 1991). In any case, the jury did find Sims liable for First Amendment violations, which are intent-based. Oakland's effort to rehabilitate Sims by rearguing their factual case to the Court is unavailing. It was Sims, after all, who patently lied when he testified that he had seen a bag of matching nails, which was nowhere in evidence. "Trickery" gives support to a large punitive award. TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 460 (1993) (affirming a $10 million punitive award).

(2) Ratio: The Oakland defendants concede there is no significant disparity between the harm suffered and the punitive award (p23-24). The harm to be considered includes both the actual harm to the victim and the harm that was likely to occur. BMW, 517 U.S. at 581; Swinton v. Potomac Corp., 270 F.3d 794, 819 (9th Cir. 2001). And "noneconomic harm that might have been difficult to determine" creates a case for large punitive awards. BMW, 517 U.S. at 582. "In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified...." Id. at 583. Here, the jury awarded punitive damages against Sims and Doyle in amounts less than the compensatory damages, and against Reikes by a little more than double. Defendants' actions were an egregious abuse of their power and public trust; had they succeeded in their enterprise, a criminal court jury likely would have convicted plaintiffs on false evidence, resulting in their imprisonment for a crime they did not commit.

Oakland argues that for Sims, $650K "represents not deterrence but financial ruin." They cite Swinton, 270 F.3d at 818, for the proposition that the wealth of the defendant is a fourth factor to be considered. In fact, wealth is a sub-factor under the ratio analysis. Id. The Swinton briefly considered it, and dismissed it. Moreover, defendants have proffered no evidence that Lt. Sims would be "ruined", that he is susceptible to judgment, or even that he would be personally liable for the award, as opposed to insurance, a union, or the City of Oakland, under Cal. Gov't Code § 825.

(3) Comparable Awards: The Oakland defendants assert that the punitive awards far exceed the civil penalty of $25,000 prescribed by California in a civil rights statute, Civil Code § 52.1. However, the comparison is not apt for at least three reasons. First, this statute does not set penalties in a federal civil rights case. See Swinton, 270 F.3d at 819, 820 (aware of no

statutory penalties which served to compare with Title VII punitive award, nor any discernible pattern in the results in other cases). Second, § 52.1(b), by its express terms, leaves the damages measure wide open. Third, § 52, which enumerates some of the damages available in an action under § 52.1, provides for triple actual damages. By this calculus, defendants got off lightly.

Moreover, under Cal. Government Code § 825(b), the City of Oakland is authorized to pay defendant Sims' punitive damages if it finds three enumerated factors to be true.[30]

Similarly, the federal defendants argue that penalizing Doyle and Reikes will not deter them because they are retired. (Memorandum, p19.) However, deterrence is aimed at the class, not just the individual. Moreover, it came to light at trial that Doyle is currently working as a counter-terrorism consultant, on contract to the Department of Defense. As such, he could still be liable under Bivens on a theory of "state action."

G. ALLEGED IMPROPER INTRODUCTION OF EVIDENCE

1. Search of the Seeds of Peace House

The Oakland defendants allege that plaintiffs elicited prejudicial testimony from non-defendants concerning the detention of members of Seed of Peace and the search of their house (Memorandum re Evidentiary and Misconduct Issues, p1; hereinafter "Memo")

On the contrary, plaintiffs sought to, and did, elicit exactly what the Court permitted them to (3/28/02 Order) -- that the Oakland and Berkeley police officers involved in the Seeds Raid reported to defendant Sims; that the Seeds detainees/arrestees were delivered to O.P.D.'s Headquarters, and Sims interviewed them (or tried to); and that Sims participated in deceiving the magistrate by failing to inform her that defendants already knew the Seeds House had been searched inside out, and no evidence of bomb making was found, so another search was

[30] "(1) The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity. (2) At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity. (3) Payment of the claim or judgment would be in the best interests of the public entity."

unnecessary. Thus, the jury could reasonably conclude that Sims deceived the Magistrate, and his deception was also legitimate evidence of his proclivity for deceit.

Affirmative evidence of the extensiveness of the Seeds search was relevant to rebut defendants' basic defense that they reasonably considered plaintiffs suspects, when in fact the place where plaintiffs had spent the previous day together contained not a shred of evidence. Regarding George Shook, plaintiffs' counsel Serra did not, as defendants allege, ask him any questions about his detention. At other times in the trial, the Court sustained objections to questions regarding Seeds of Peace, and plaintiffs' counsel respected those rulings.

The Oakland defendants also claim they were prejudiced by alleged flashes of news footage showing the post-search condition of the Seeds House. (Memo, p2.) If there were any, they were not the focus of the broadcasts, and were not redacted by the Court. But they would be relevant, as discussed above, to show that the house had been so thoroughly searched before defendants asked to search it again, and therefore that defendants knew or should have known it could not possibly contain any evidence of bomb making.

Thus, defendants cannot show that the Seeds-related evidence was improperly admitted, or even if it was, that it robbed jurors of their reason in setting the awards.

2. Media Reports

Oakland further argues that the redacted newspaper articles contained inadmissible hearsay statements attributed to defendants, which lacked sufficient circumstantial guarantees of trustworthiness, per Larez, 946 F.2d at 642-644. (Memo, p2.) The Court thoroughly examined the articles and ordered substantial portions redacted before receiving them into evidence. Defendants do no specifically describe what if any content they find objectionable, or why. Their blanket request must therefore be denied . Anyway, it was made very clear to the jury that the clippings were not introduced for the truth of the matters asserted, but to show defendants' animus, and the effect their nefarious actions had on the public through the press, and the damage to plaintiffs therefrom.

3. Forests Forever Initiative

Both the federal and Oakland complain that discussion of Proposition 130, the "Forests Forever" Initiative (Prop. 130) was improper, because plaintiffs played no role in the campaign. (FBI, p9; Oakland, p3.) On the contrary, Darryl Cherney testified that the goal of Redwood Summer was to keep as many trees standing pending the passage of Forests Forever, and that its goals were concomitant with Earth First's. Darryl testified that he and Judi had attended Forests Forever meetings, and persuaded the group to make provisions for worker retraining in the event it passed. Gary Ball testified that Darryl and Judi both participated in the campaign. Co-Redwood Summer organizers Betty and Gary Ball, along with Cecilia Lanman, all testified that after the bombing and framing of plaintiffs, industry groups began for the first time to label the Initiative the Earth First! initiative, and the Balls both testified that they saw industry fliers linking the initiative to terrorism. The jury could reasonably infer that Forests Forever's slim loss was a consequence of defendant's frame up, resulting in their loss -- not of the initiative, but of their organizing momentum, drive, and support.

4. Expert Witnesses

a. Sid Woodcock: Oakland argues that Mr. Woodcock was not qualified to testify as a bomb expert because he lacked formal training. (Memo, p4.) On the contrary, voir dire showed that Mr. Woodcock has extensive, practical bomb investigation experience going back to World War II, and has been hired as an expert in some of the country's recent most notorious cases, including investigations of the Oklahoma City and the first World Trade Center bombings. An expert can qualify under Rule 702 "on the basis of practical experience alone, and a formal degree, title, or educational speciality is not required." Lauria v. National Railroad Passenger Corp., 145 F.3d 593, 598-99 (3rd Cir. 1998). "[O]rdinarily an otherwise qualified witness is not disqualified merely because of a lack of academic training." Waldorf v. Shuta, 142 F.3d 601, 626 (3d Cir.1998) "We have eschewed imposing overly rigorous requirements of expertise and have been satisfied with more generalized qualification." In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 741 (3rd Cir. 1994). (See Plaintiffs' Trial Brief, n. 2.)

b. Anthony Bouza: Oakland complains that Mr. Bouza impermissibly gave legal conclusions in the case, but fail to cite any. (Memo, p4-5.) Rather, they say he testified "in essence" that there was no probable cause. The Court permitted Mr. Bouza to testify regarding the propriety of investigative steps taken by defendants, and he did so. At least he tried to. His testimony was so broken up by objections from defendants that it is unlikely the jury understood or got much out of it. Mr. Bouza did not, however, testify that defendants lacked probable cause. And even if he had, F.R.E. 704 allows an expert to testify to an ultimate issue in the case.

H. MISCELLANEOUS ASSIGNMENTS OF ERROR TO THE COURT

1. Order of Presentation of Witnesses

The federal defendants complain that the Court's order that witnesses testify only once deprived them of the ability to present a coherent case. (Memorandum, p21-22.) However, the Court properly exercised its discretion to control the order of witnesses, under F.R.E. 611(a).[31] See also, United States v. Bolt, 776 F.2d 1463, 1471 (10th Cir.1985) (questions concerning the order of proof and permission to reopen the evidence are within the trial court's discretion). Defendants cite Washington v. Texas, 388 U.S. 14, 19 (1967), a case in which a criminal defendant was prevented entirely from putting on a certain witness. Nothing of the sort happened to defendants here.

2. Questions From Jurors

The Oakland defendants complain that they were prejudiced by the Court's failure to answer two questions by the jury. (Memo, p7-8.)

a. Re: Penal Code § 12355(b): As Plaintiffs recall, defendants had the opportunity, but declined to introduce this code section into evidence. There was however discussion of it at trial. The court acted within its discretion in refusing to re-open the evidence. See United States v. Bolt, 776 F.2d at 1471.

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[31] F.R.E. 611(a) provides: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

b. Re: Determinative Time for Considering Probable Cause for Arrest: Oakland contends that the Court should have answered that the determinative time is the moment of arrest, and that "any subsequent lack of probable cause is not a constitutional violation." (Memo, p-8.) By re-directing the juror's attention to the jury instructions, the Court did answer that the determinative time is the time of arrest.[32] "[I]t is well settled that a trial court is not required to speculate upon the purpose of the jury's inquiry during its deliberations[;] the court, if it chooses to reply, should answer the inquiry within the specific limits of the questions presented." United States v. Arpan, 887 F.2d 873, 877 (8th Cir 1989). In fact, there was evidence that this jury deliberately sought to hide the ball in its questions (as when they provided a sample verdict chart), so as not to signal which way they were tending. See also, United States v. Powell, 469 U.S. 57, 66 (1984) ("Jurors, of course, take an oath to follow the law as charged, and they are expected to follow it.")

3. Packed Courtroom

The federal defendants complain that juror Mary Nunn, in an interview with reporter from the Anderson Valley Advertiser, revealed that she was influenced in plaintiffs' favor by overhearing comments from plaintiffs' supporters in line at the entrance to the Court, and by their "packing of the courtroom". (Memorandum, p21.) Defendants are no more specific than that.

It is a "near universal and firmly-established common-law rule" that juror testimony cannot be used to impeach a jury verdict. Tanner v. United States, 483 U.S. 107, 116-127, *117; F.R.E. 606(b). Even if it were admissible, there is nothing in the referenced article to suggest that Ms. Nunn was influenced in her deliberations by anything she saw or heard outside the presentation of evidence, or that she did not follow the instructions she received. In the same article, Ms. Nunn said that other jurors resisted the much higher awards she sought for plaintiffs.

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[32] See Instructions, p9:10-13: "Probable cause must be judged at the point at which the arrest is made. Information discovered subsequent to the arrest must not be considered in determining whether there was probable cause at the time of the arrest."

One might just as easily speculate that these jurors were influenced in defendants' favor by some extrinsic detail, but "speculate" is the operative word.[33]

I. ALLEGED IMPROPER CONDUCT BY PLAINTIFFS AND COUNSEL

"To grant a new trial because of attorney misconduct, 'the flavor of the misconduct must [have] sufficiently permeated [the] entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'" Larez v. City of Los Angeles, 946 F.2d 630, 637 (9th Cir. 1991), quoting McKinley v. City of Eloy, 705 F.2d 1110, 1117 (9th Cir. 1983).

1. Closing Arguments by Mr. Serra

a. Destruction of Redwoods

Oakland complains that counsel improperly argued that defendants are responsible for the destruction of the redwoods. (Memo, p6.) But plaintiffs cannot find any such comments by Mr. Serra. Regardless, defendants never raised any such objection at the time.

b. Judi Bari's Cancer

Mr. Serra hinted that Ms. Bari's cancer might have been caused by anxiety caused by defendants' actions. The defense objected, the Court admonished counsel, and he moved on. There is no basis for concluding that this fleeting and oblique comment inflamed the jury, or caused them to depart from the instructions or their general mandate. Defendants charge that plaintiffs deliberately violated a stipulation is overblown.

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[33] Defendants rely on two, atypical criminal cases. In Norris v. Risley, 918 F.2d 828, 832-33 (9th Cir. 1990), a rape defendant was prejudiced by the presence of trial spectators wearing large, bold buttons that read "Women Against Rape". The Court found that this tainted his right to a fair trial by eroding the presumption of innocence. In United States v. Yahweh, 779 F.Supp. 1342, 1343-44 (S.D. Fla. 1992), the trial court ordered defendants' supporters in the gallery to refrain from all wearing the same religious uniform, which might intimidate the jury, in a case which involved violent crimes. At most, the un-reviewed order provides a glimpse of a trial court's authority to ensure a fair proceeding, but it does not furnish defendants here with any rule, or show how their rights were violated in any way. The court did however rule that supporters would not be excluded from the courtroom. Plaintiffs' supporters in this case were quiet, orderly, non-threatening, and did not wear any uniform.

2. Closing Arguments By Mr. Cunningham

a. Damage to Reputation

As discussed earlier, no rule precludes compensation for damage to reputation in this context. The damage to tangible interests was amply shown. In any case, defendants do no appear to have raised any objection in closing. (Oakland, p6.)

b. Defeat of Forests Forever

Contrary to defendants' assertion, Mr. Cunningham in fact acknowledged in closing that plaintiffs' cannot claim damages for the initiative's defeat. And its relevance has been thoroughly discussed above. (Oakland, p6.)

c. Redwood Summer

Defendants' complaint is too vague to interpret and respond too, and they do not appear to have raised any objection in closing on this subject. Suffice to say, though, that damage to Redwood Summer impacted plaintiffs. (Oakland, p6.)

d. Golden Rule Argument

Both groups of defendants complain that they were prejudiced by counsel's resort to an improper "golden rule" argument, when he said: "What would it take? What if it happened to you? What if it happened to your sister or your brother or your kid?" And later, "You think about the injury. You think about the harm. Put yourself in their position. Not like it happened to you, it happened to them, but you have to think about that."[34]

There is no uniformity within or among the state or federal courts about the so-called "golden rule" argument. "The objection to it is no fixed constellation in our judicial firmament. Har-Pen Truck Lines, Inc. v. Mills, 378 F.2d 705, 714 (5th Cir. 1967). Plaintiffs are aware of no Ninth Circuit or California District Court case which proscribes it. This much is clear: "An impermissible golden rule argument is one "in which the jury is exhorted to place itself in a party's shoes with respect to damages,…not the reasonableness of [an adversary's] actions."

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[34] Defendants report (p20) that counsel said "You would like – not like it if it happened to you like it happened to them," but this is a mis-transcription.

McNeley v. Ocala Star-Banner Corp., 99 F.3d 1068 (11th Circ 1996) (not impermissible), quoting Burrage v. Harrell, 537 F.2d 837, 839 (5th Cir.1976).

Counsel generally appealed to jurors to put themselves in plaintiffs' position by considering what it would be like to be framed by police in retaliation for political activism. This is not a common occurrence, and would naturally require some careful thought on jurors' parts. In essence, counsel asked jurors to step into plaintiffs' shoes to imagine what it would be like to be plaintiffs. To that extent, the argument was proper.

Regardless, "[t]he argument was not immoderate or unduly emotional and the trial court instructed the jury quite fully" on all applicable standards. Burrage, 537 F.2d at 839. Moreover, counsel reminded the jury of the proper standard within the argument several times saying, "The compensation has to measure the harm, make people whole for what they lost; repair the injury." And, "Not like it happened to you, it happened to them..." (Trial Notes.) For these reasons, there is no basis upon which to conclude that counsel's argument inflamed the jury, or caused them to depart from their instructions, and is at worst harmless error.[35]

3. Closing Arguments by Unidentified

a. Worth of First Amendment

The federal defendants complain that counsel asked the jury to award damages based on the inherent "worth" of First Amendment rights, in derogation of the rule in Memphis v. Stachura, 477 U.S. 299 (1986), and Carey v. Piphus, 435 U.S. 247 (1978) (Memorandum, p20.) Plaintiffs do not recall making any such argument, and defendants do not quote plaintiffs.

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[35] Defendants' cases are not to the contrary. In Arnold v. Eastern Airlines, Inc, 681 F.2d 186, 196 (2d Cir. 1982), the Court found that no prejudice likely resulted from counsel's exhortations, "place yourself if you can in their shoes," and "I'm asking, I'm begging for your sympathy for this man," -- among numerous other improper comments. The Court said, "There are too many other and proper bases upon which their concededly generous amounts may be explained." Id. at 204. In Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1246 (7th Cir. 1982), even counsel's urging the jury to trade seats with plaintiff was harmless error, in part because "the jury was properly instructed concerning the law it should apply in determining liability and damages."

Regardless, there is no evidence to show that the jury disregarded its instructions and based its award on any "inherent worth" concept.

b. Political Police / K.G.B.

The federal defendants complain that branding them "political police" and the American version of the K.G.B. was prejudicial. (Memorandum, p19.) Defendants may not like it, but that is a fair characterization of their behavior, and it contravened no Court Order. In any case, the ju

4. The Rally

Defendants again assert that plaintiffs' rally on the Federal Building Plaza, and Mr. Serra's speech, were timed to, and did, improperly influence jurors in plaintiffs' favor as they exited the Courthouse. (FBI, p20-21; Oakland, p5-6.).

Plaintiffs and their supporters have held an annual "Fiddle Down the FBI" rally, commemorating the May 24 anniversary of the bombing, at one of the two area federal buildings for years. The event is both solemn and festive. On this occasion, the rally was held at the opposite end of the plaza from the entrance to the Courthouse. Counsel took no part in the planning, and did not know in advance they would be called up to speak. The timing was a complete coincidence. There was nothing in counsel's brief remarks which anyone remotely following the trial could consider new or revelatory, anyway.

As we all know, the Court polled the jurors, one at a time, to ask if they had been influenced by anything they heard, and they each testified that they simply did not hear anything, or break stride to listen, or pay any attention. The jury was instructed at various times to disregard publicity in the case, and there is no evidence they did not heed this requirement. However tenaciously they may cling to their conspiracy theory, certainly defendants do not mean to question the honesty of the jurors, or suggest that they all ten conspired to lie to the Court. Oakland's assertion that jurors slowed and listened to Mr. Serra's remarks is false, and repeating it will not change that fact. (p5:2-3.)

The federal defendants' allegation that plaintiffs' counsel violated the Court's subsequent Order to stay out of the plaza when the jurors might be present is completely spurious. As for Oakland's clever argument that a juror took offense toward defendants for suggesting she might

be unduly influenced by the rally, thereby prejudicing defendants by placing them in a bad light for raising the argument (p6): the juror didn't say she took offense; she said she could not understand what the big deal was.

VI. PRAYER

WHEREFORE, Plaintiffs respectfully request that this Honorable Court deny defendants Rule 50 & 59 motions in full, and let stand the verdicts reached, and grant such other and further relief as the Court deems just and proper in the premise of this important civil rights case.

Respectfully Submitted,

DATED: September 27, 2002:
as of September 30, 2002:

_____
DENNIS CUNNINGHAM
BEN ROSENFELD
Attorneys for Plaintiffs

Plaintiffs gratefully acknowledge the assistance of bar candidate John Tanghe in preparing this Opposition.

CERTIFICATE OF SERVICE

I am a citizen of the United States, over the age of 18, and not a party to this action. I certify that I served "Plaintiffs' Consolidated Opposition to the Federal and Oakland Defendants Motions for Judgment as a Matter of Law, New Trial, and/or Remittitur" on defendants, by emailing true copies to their respective counsel, R. Joseph Sher and Maria Bee, on September 28, 2002, and thereafter by personally delivering true copies to them on September 30, 2002.

_____
Dennis Cunningham