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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE ESTATE OF JUDI BARI,
and DARRYL CHERNEY,

Plaintiffs,

vs.

FBI Special Agent FRANK DOYLE, Jr., *et al*.,
and the UNITED STATES,

Defendants.

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

PLAINTIFFS' TRIAL BRIEF

Trial Date: April 8, 2002
Judge WILKEN

TABLE OF AUTHORITIES

Federal Cases:

State Cases:

Other Authorities:

INTRODUCTION

The Court is well familiar with plaintiffs' legal and factual allegations herein, most fully spelled out in Plaintiffs' Motion re Qualified Immunity, filed March 18, 1997. To summarize them, plaintiffs charge that their (false) arrest and the attendant searches (including the second search of Judi's house a month after the bombing) were deliberately carried out without probable cause, through the instigation of the FBI and with the knowing and willing cooperation of the Oakland Police Department, for the purpose of politically discrediting and "neutralizing" plaintiffs' organizing work on behalf of Redwood Summer, Earth First!, and the environment generally. Plaintiffs charge that the grounds for arrest, alleged at the time and subsequently, were deliberately falsified by defendants and others acting in concert with them, to ensure that maximum sensational publicity harmful to the plaintiffs' lawful movement and cause, and their constitutionally protected activities in furtherance thereof, would arise from the false charges against them. They charge that defendants conspired unlawfully among themselves to achieve these illicit objectives.

Plaintiffs seek recovery for violations of their First and Fourth Amendment rights, and parallel rights under the California Constitution, Article 1, Secs. 7 & 13, in circumstances where defendants' concerted, deliberate falsification of evidence — leading to arrest and search(es) without probable cause in violation of the Fourth Amendment — was also the foundation for the First Amendment violations. The latter was then extended and amplified by defendants' (conspiratorial) malfeasance, nonfeasance and deliberate misdirection in supposedly investigating the bombing in the following days, weeks and months. Put another way, the facts showing false arrests and illegal search(es) are only the starting point for consideration of the broader, intent-based, First Amendment claim.

Accordingly, the anticipated evidence of false arrest and illegal search must be analyzed for its application to both claims, but the operation (and conspiracy) as a whole — involving continuation by all defendants of the sensational false public pretense that plaintiffs were guilty of possessing the bomb for the first several weeks after the explosion, until July 17, 1990, when

the Alameda County DA dropped the case, and for many months thereafter by the FBI — and the great injury to plaintiffs arising therefrom, occurs in the First Amendment context.

THE CONSPIRACY TO DEFAME EARTH FIRST!

As plaintiffs have constantly tried to get the Court to see, and accept, the gravamen of their case is that defendants' plot against them, the unconscionable and illegal acts and omissions by defendants, and the blatant lies told and now to be told again in furtherance of it, was born of the unholy, anti-constitutional mission of political repression set for the FBI by J. Edgar Hoover, maintained by his successors, and carried on by various chains of command and legions of field agents throughout its history. In this case, plaintiffs will show that the FBI defendants had a broad-based, pre-existing "Domestic Security/Terrorism" investigation of the northern California Earth First! movement already in progress when the bombing occurred, arising from the sabotage of power line support poles in Santa Cruz County a month earlier, and including also their response to the demonstration on the Golden Gate Bridge the day after the poles were cut.

Although defendant Terrorist Squad chief Reikes testified he never heard of plaintiffs before the day of the bombing, his right-hand man, SA Sachtleben, teletyped FBI Headquarters that same day that the two were suspects in the Santa Cruz case, and someone on the T-Squad apparently also confirmed to other agents in Oakland that they were "subjects on an investigation in the terrorist field..." Plaintiffs aver that the essence of the conspirators' secret efforts to smear Earth First!, and "otherwise neutralize" plaintiffs and Redwood Summer, was to manipulate the investigation of the Oakland bombing in such a way as to generate sensational news stories, proclaiming that these environmental activists had been engaged in an effort to carry out a terrorist attack of some sort. Since defendants well knew there were no actual grounds to believe plaintiffs had any guilty connection to the bomb — and since nothing of value as evidence was recovered from any house, vehicle, backpack, pocketbook or other property (illegally) searched by defendants and their cohorts, anywhere — it is a fair inference that the entire purpose of the resulting searches was to add fodder for the sensational news stories defendants were working to generate around the arrest. As reflected in plaintiffs' exhibits showing examples of print and broadcast media, the stories reporting the bombing, the purported suspicion and the arrest and

booking of plaintiffs on the bombing charges, the raid at the Seeds of Peace house and the dramatic midnight helicopter flight to the north counties for the searches, their calculated efforts paid off handsomely.

Defendants object to plaintiffs' media exhibits on grounds that "under the law of causation, the manner by which the media covered the Oakland bombing incident would be considered a superceding (*sic*) event for which the individual defendants could not be liable" (Objections to Evidence, p.3); this is exactly wrong. The manner by which the media covered the bombing incident was, precisely, brought about by defendants' purposeful and concerted lies and machinations in furtherance of the conspiracy; given their intent to discredit and neutralize the plaintiffs' movement, it was the most important part.

Likewise, where defendants object further that the coverage is irrelevant to the conspiracy cause of action (ibid), they ignore its central importance as a major measure of the damages plaintiffs suffered from defendants' plot. In this respect, the 'news coverage' exhibits constitute some of the most important evidence.

The Arrest

The evidence of false arrest is straightforward, and overwhelming. Defendants Sitterud and Chenault were assigned to respond to the bombing; Sitterud went to the scene and Chenault to the hospital. Their supervisor, defendant Sims, also went to the scene, as Chenault did later. Sitterud testified that at the scene he immediately encountered FBI agents, who told him the occupants of the car were known to the FBI as suspects in a terrorism investigation; he may also have had (false) information to this effect from the Intelligence section of his own department, which spied on Earth First! and traded information with the Terrorist Squad. Sitterud, Sims and Chenault embraced this interpretation of the bomb explosion, remaining willfully blind to any and all contrary evidence and information throughout, and immediately began to assemble their phony, sensational case.

Thus, while defendants have worked assiduously to deny it, the evidence shows that Darryl and Judi were put under arrest in very short order, at the hospital, while a number of their associates were quickly taken into custody at other locations. The arrest report on Judi was made

out at 3:00 p.m. by Officer Ludwig. Officer Slivinski testified that he relieved another officer guarding Darryl at the hospital about 4:00 p.m., and soon thereafter transported him to police headquarters; there he was put in a locked room, where defendants soon began interrogating him.[1] Shannon Marr and David Kemnitzer were taken into custody at the bomb scene and questioned extensively at police headquarters, and Karen Pickett, a close associate also working on Redwood Summer, was questioned and arrested at the hospital; famously, the Seeds of Peace house was raided on orders of Defendant Sims, who evidently ordered it searched for evidence to support bomb possession charges against plaintiffs, in addition to a safety sweep, despite the fact that no warrant was obtained until several hours later. Four people in the house and four or five more who approached while police were searching it were all detained, taken to police headquarters, and kept in locked rooms for several hours. Further details of this episode are recounted in plaintiffs' Offer of Proof re the Seeds raid, filed herewith, pursuant to the *in limine* ruling.

The FBI Briefing

In between the initial arrest of plaintiffs and the ultimate rationalization of the grounds for it in the warrant affidavit, defendants from both agencies met for a "briefing" conducted by defendants Reikes and Doyle. After Doyle summarized at least some of what had been learned about the bomb and the explosion — and apparently stated his supposed conclusion that plaintiffs had been transporting the bomb in the car — Reikes recounted a purported history of terrorist activities purportedly involving Earth First! and plaintiffs, reflected in notes taken by the

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[1] Defendants insist that the arrest did not occur until late that night, when Lt. Sims supposedly determined that OPD would go ahead with the case, and directed Sitterud and Chenault to get warrants to search plaintiffs' homes in Mendocino and Humboldt Counties. It is clear, however, that plaintiffs as well as a number of their associates were under arrest from early in the afternoon. Arrest depends not on what officers say, but on the totality of circumstances, Florida v. Royer, 460 U.S. 491, 500 (1983), according to whether a reasonable innocent person, similarly situated, would have felt free to leave. U.S. v. Delgadillo-Velasquez, 856 F.2d 1292, 1295-96 (9th Cir. 1988). Removing a person to a police station without his/her consent is *per se* an arrest requiring probable cause. Hayes v. Florida, 470 U.S. 811, 816 (1985).

two Oakland detectives, Hanson and Kraft, which served as foundation for the final decision by Sims that plaintiffs would be booked for possession and transportation of the bomb.

At the briefing or shortly afterwards, defendant T-squad member Sena, who was already the FBI "case agent" for the Santa Cruz terrorism investigation and was now assigned to the bombing case also, described — to the OPD defendants if not the entire company of 20 or so officers and agents assembled — the famous informant's tip, discussed more fully below, that "heavy hitters" from Earth First! supposedly would be carrying out an action in Santa Cruz.

Fabrication of the Grounds for Arrest and Search

The distortions, misrepresentations and outright lies defendants cobbled together to serve as their purported grounds for the arrest of plaintiffs — and the part each individual defendant played in this opening phase of the conspiracy — have been detailed to the Court in the Qualified Immunity Brief, and were reprised by the Court of Appeals in Mendo Env'l Ctr. v. Mendocino County, 192 F.3d 1283, 1302-03 (9th Cir. 1999) (Mendo II). They consist primarily of the matters spelled out by Sgt. Chenault — substantially as "almost dictated" to him, he said, by defendant Doyle, the FBI Terrorist Squad bomb technician — in the search warrant affidavit. The proof of these matters includes the following:

1. Location of the Bomb

The fundamental falsehood in defendants' bogus case against plaintiffs, apparently conceived of by Doyle and his collaborators at the scene, was then obviously embraced, adopted, ratified and acquiesced in by numerous co-conspirators, charged and uncharged herein, including but not limited to the three Oakland defendants; their 'bomb detail' detective colleagues, Hanson and Kraft; the other, even more senior FBI bomb technician at the scene — and successor Terrorist Squad chief — Patrick Webb; another FBI bomb technician, John Holford; the ATF agent James Flanigan and his colleagues; and FBI defendants Reikes, Buck and Sena. The theory was that the damage to the car showed that the bomb had been on "the rear seat floor board", where it would have been in 'plain view', and thus visible to the occupants of the car when they reportedly loaded their things into it before driving away to the explosion site; and, therefore, that they must have been knowingly in possession of it.

In point of fact it was patent, and subsequently established — and thereby admitted on behalf of the defendants — by the FBI Crime Lab expert, David R. Williams, that the bomb was hidden under the seat; and it is patent also from the physical evidence that the vastly experienced FBI bomb technician Doyle, like Webb and the others, and even Ray Charles, would have known and did know this, but lied, and perverted their office and their oath, in furtherance of their political mission for the FBI.

The lab expert also confirmed that the bomb had been constructed with a two-phase triggering action: a time-lapse mechanism fashioned from a clock, and a "booby trap" type of device, rigged with a ball bearing and two looped wires, positive and negative, which would finally fire off the explosion after the time-lapse connection was made, when the motion of the car would cause the ball bearing to roll against two adjacent wires to complete the connection. Agent Williams testified to his belief that the bomb had "functioned as designed" in exploding when it did, and did not go off accidentally, as defendants pretended to believe — pushing beyond absurdity their pretense that plaintiffs had carried an armed bomb inches from their bodies in the car, on a diabolic terrorist mission to plant it somewhere.

In addition to the visible "end-cap" impact points pinpointing the location of the bomb, there are numerous other physical indications of the true position of the bomb when it went off, which will be demonstrated by plaintiffs' expert, Sid Woodcock, who made a detailed study of the bombed car and the seats, as well as the many evidence photographs taken that day and thereafter. Mr. Woodcock will demonstrate these factors with reference to the car itself, together with an intact counterpart of the same make and model, the original photos and a number of other photos he made himself, and it will readily be seen by lay persons just how very far-fetched and groundless the pretense was that the bomb had been behind the driver's seat, rather than hidden underneath, and that the defendants et al. undoubtedly understood this clearly.[2]

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[2] Defendants have promised to attack Sid Woodcock's expert qualifications, apparently on the specious grounds that he holds no degree in engineering or other advanced science, because his lifetime of technical experience with bombs and explosives has all been practical, going back to his service in the navy during and after World War II. As will be shown, however, his

The lab man's information made it quite clear on June 14, 1990, that the bomb had been rigged in an attempt to harm Judi, but it was kept secret by the defendants, and its meaning ignored. Instead, the case against plaintiffs was kept alive for another month — with its attendant drumbeat of scandalous publicity — before being abandoned by the Alameda County District Attorney's Office. And even then, the FBI failed to acknowledge what its own expert evidence showed, and pursued its "investigation" — which in fact was mere cover for political intelligence-gathering and trouble-making against Earth First! — for at least another year and a half.

2. Matching Nails, not

The Court is likewise familiar with defendants' three-part falsification of evidence supposedly showing that nails recovered at the bomb scene — which had been taped to the pipe for "shrapnel effect" when it exploded, as defendant Doyle immediately announced — matched other nails in plaintiffs' (actually Judi's) possession.

In the first phase, the first night, Sgt. Chenault stated in the affidavit that Doyle told him the bomb nails were "identical" to nails in "a separate bag" found in the car. In point of fact the bomb nails were totally different from those found in either of two bags recovered from the car. As plaintiffs' expert pointed out, use of the term 'identical' was deliberately misleading to the magistrate in any case, even if the nails had been of the same type, because it suggested that

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'specialized knowledge' of these matters is extensive, detailed, and more than sufficient for the explication of this evidence. 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) (witness' experience with railroad track equipment, maintenance, and safety procedures qualified him as an expert on Amtrak's responsibility to inspect and maintain tracks). "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). "[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) (affirming qualification of vocational expert based on practical work experience, notwithstanding his lack of formal training in the field). "A person may qualify as an expert on the basis of skill or practical experience rather than education or training." Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 702.06[4], at 702-39 (2d ed. 1997).

some scientific comparison had been made; in fact, the bags of nails were unaccountably left out of the materials taken to the FBI crime lab by defendant Buck.

In the second phase, after a box of nails of the same, 'finishing' type was recovered in the search of Judi's house, a more elaborate pretense was constructed, consisting of a claim that some — or one — nail from the box could be matched with a nail from those collected at the blast scene, from "gripper" marks imprinted in the manufacturing process. Although he had never made such a comparison before, the same lab man, Williams, asserted that he could tell, from microscopic similarities in the gripper marks, that both nails had been made on the same machine, and in the same batch — by which Williams said he meant the same term of the machine's operation — that it had not been turned off long enough to cool down between the time the two nails were fabricated.

This immediately became the strong point of the defendants' purported case against plaintiffs, despite the fact that there was no precedent for such a comparison, or scientific literature or information supporting its validity; Williams admitted he had no information about what machine or what company the nails had been made by, how long such a machine was or would be kept operating at one time, or how many nails would be made during a given operating session. Regardless, defendants trumpeted this supposed connection as proof of plaintiffs' involvement with the bomb.

In the third phase, the Oakland defendants obtained another warrant, for a second search of Judi's home a month later, when publicity about the case had begun to flag, on an affidavit in which Sgt. Sitterud said Williams told him the matching nails were made in the same batch of 200-1000 nails. This brought another round of juicy headlines, but Williams testified that he never said that, and couldn't have, because he had no information about the size of a batch of nails.

A Terrorist Squad agent, un-sued co-conspirator Stewart Daley, visited Ronald O'Connor, president of the Pacific Steel & Supply Co. in San Leandro, where nails were both made and imported for sale, and learned that nails of this type were probably imported from Saudi Arabia; they came packed in fifty pound boxes, distributed by Pacific to customers throughout

California, which apparently were untraceable. Eventually it was learned that a given batch of nails might contain millions, because the machines are left running for days at a time, but Mr. O'Connor testified he was never asked how big a batch might be. Thus it was clear that defendants knew or should have known the supposed match of the two nails had no evidentiary value in connecting the bomb to Judi, even if the comparison by Williams was valid, which was highly questionable to begin with.

3. Other Distortions, False Statements, and Tendentious Makeweight Notions...

This Court and the Court of Appeals have already seen through several other items of supposed evidence supposedly pointing to plaintiffs guilt which had no such meaning, but were and are relied on by defendants to justify the arrest and the first searches. These include the alleged statement by Darryl Cherney that someone "threw a bomb at us", claimed by defendants to be — and referred to in the affidavit as — a sign of guilt, because it was obvious that the bomb had not been thrown into the car; Judi's statement to rescuers that a bomb had exploded — right after the bomb exploded — because it was said she couldn't have known what had exploded; and, significantly — because their inclusion in the warrant affidavit reflects the active collusion of the Oakland defendants, as opposed to their mere passive adoption of the FBI's caper — alleged statements to Sitterud and Chenault by Seeds of Peace members David Kemnitzer and Shannon Marr (who both did and will again heatedly deny making) that Earth First! had "a reputation for violence". As both Courts found, none of these notions, even if true, would have added anything to the pretense of probable cause; that is the law of the case.

4. The Bogus Informant's Tip about "Heavy Hitters" Coming with a Bomb

The Court is also familiar with the story of the purported "heavy hitters" informant's tip, which was not recounted in the warrant affidavit, but was communicated to the Oakland defendants by defendant Sena, the Terrorist Squad agent who was in touch with the purported source, and Reikes, the squad chief, who (falsely) assured Sims that the source was proven

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reliable, as part of the FBI's assurance that plaintiffs were previously known to it as terrorist suspects, and that the basis for their arrest by OPD was sound and would pan out.[3]

The Court will recall ordering the 'de-redactions' which disclosed the heavy hitters paragraph in Sena's report of his political intelligence-gathering conversation with the source — who he had only just met, and not yet tested for reliability in any way. Here it was established that Sena's report contained the only FBI record of any kind about the alleged tip made prior to the bombing. Plaintiffs continued to press for further disclosures of information contained in that document and others pertaining to this source (whose identity was disclosed in the "heavy hitters" document, despite its extensive and obviously unwarranted deletions). The Court eventually ruled that, unless the FBI made the disclosures, neither group of defendants would be permitted to maintain that they had received the tip.

Because plaintiffs felt this created a conflict of interest between the two groups of defendants, which would guarantee at least some defendants a successful appeal, we agreed with defendants to drop the demand for further disclosures at this time, and rest on our original claim that we were entitled to full disclosure unconditionally, under the rule of Roviaro v. United States.[4] In return, defendants agreed, *inter alia*, that in the event plaintiffs find it necessary or desirable to introduce additional testimony about the purported informant from Sgt. Joe Heartsner of the Santa Cruz County Sheriff's Department, who had been in charge of his department's investigation of the power poles and related matters, and had testified about the informant at deposition, defendants would waive any hearsay objection to Heartsner's testimony,

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[3] Since the lie about the informant was said to have been important to the OPD defendants' decision to (join the conspiracy and) go through with the arrest and the searches, as Sims and Chenault both testified, and was obviously cooked up — if not previously prepared — by Sena, with Reikes' approval, for the exact purpose of bolstering the OPD defendants' resolve, the dismissal of SA Sena from the Fourth Amendment count is not just contrary to the evidence, and baffling, but highly disruptive of plaintiffs' proof of the false arrest. Thus, while the Court summarily rejected this point at the pre-trial conference, we are compelled to raise it yet again, and at every stage, no offense, because the decision remains unfounded, illogical, and highly prejudicial — and obviously subject to timely revision per R.54(b), F. R. Civ P.

[4] Roviaro v. United States, 353 U.S. 53 (1957); Hampton v. Hanrahan, 600 F.2d 600, 639 (7th Cir. 1979).

or waive objection to testimony from Heartsner's subordinate, Deputy Leonard Lofano, who was the Santa Cruz officer directly in contact with the source, so that Heartsner's evidence could be received. In addition, the parties agreed that the source could be identified in the trial as "Ms X" or by some other code name.

Other Aspects of the False Arrest, etc.

There are numerous additional facts, direct and circumstantial, showing that the bomb was an attempt to murder Judi Bari, not least the reality that there were no grounds whatsoever for any suspicion that the two activists, both publicly committed to principled non-violence, would undertake anything so counter-productive, dangerous and evil as a bombing plot. In contrast, there were myriad reasons for good faith investigators to understand that plaintiffs were — or at least Judi was — the intended victim. Most glaringly, both plaintiffs had in their possession copies of numerous very explicit written threats against them, received by mail and other means in the preceding weeks. While the gathering hostility and violence against Earth First! in reaction to its campaign to save the old growth redwoods from destructive corporate logging practices was well known, the defendants simply ignored the obvious, exculpating significance of the threats, and never investigated them, or even fingerprinted the originals, because they contradicted defendants' conspiratorial accusations against plaintiffs.

Nor did defendants make any serious effort to investigate the mysterious "Lord's Avenger" letter, sent to a member of the press several days after the bombing, which took credit for the bombing. The writer ranted in fanatical anti-abortion and religious or pseudo-religious rhetoric against Judi Bari, but also methodically recited detailed information about the construction of the bomb which only the bombers — and the FBI and the Oakland Police — had knowledge of. The author(s) also described another, similar bomb, planted two weeks earlier at a Louisiana-Pacific lumber mill in north Sonoma County, which had exploded only partially, apparently by design. The earlier bomb was marked by a sign which said, "L-P screws mill workers", which clearly qualified it as an act of terrorism under the FBI's working definition ((M.I.O.G., Part I, § 174-2.1(2)(b), Rev'd 8/21/87), and was mostly intact after it went off. This made it a veritable "holy grail" for any bombing investigators, yet, strikingly, local sheriffs

gathered the evidence and notified the FBI, but took none of the other obvious, normal, indicated steps to investigate it, and the Terrorist Squad ignored it completely.

Instead, defendants pretended to believe that Judi was the source of the letter, personally — though that was obviously impossible in the circumstances—and so Sitterud contrived their application for the second search warrant around that pretense, along with the canard about the thousand-piece batch of nails. Of course he left out the true information that the bomb was under the driver's seat—even though he had admitted this to the press—and he also submitted the uncorrected earlier affidavit as an exhibit, so that the second search was based on a double deception of the magistrate, as the Court of Appeals did not fail to notice. More nails were recovered—taken this time from the very woodwork in the house—which were also said to match, though in fact they were never tested; and defendants again proclaimed the nails to the press as conclusive proof of plaintiffs' guilt. Notwithstanding these last-ditch efforts, however, the District Attorney announced on July 17, 1990, that no charges would be filed.

The absolute lack of evidence connecting plaintiffs to the bomb in any way did not deter the FBI, however, because their illicit, disruptive "counter-intelligence" purposes in the case were continuing. Thus defendant Reikes teletyped FBIHQ on July 19 that the Oakland case had been dropped, but that—specifically on the basis of the lie about matching nails, alleged "development" of the source who provided the information used for the bogus "heavy hitters" tip, the previously ignored Sonoma County bomb, and the Lord's Avenger letter—the San Francisco Terrorist Squad was keeping its "investigation" going.

And it continued for many months more, with dozens of slanted and tendentious interviews of timber people, other opponents of Earth First!, and law enforcement officials in the north counties—several of whose responses were seriously misrepresented in reports, according to the officers—conducted by defendant Buck, all devoted to the accumulation of political intelligence about environmentalists of all stripes working in the north coast area. During that time also, defendants obtained the originals of the threats to plaintiffs, but did nothing to investigate them, and otherwise utterly failed to take logical investigative steps or follow up on concrete leads. Much of this malfeasance and non-feasance is reflected by 'lacunae' in the bombing

investigation files, which were discussed with the Court and are the subject of proposed stipulations being discussed between the parties, to facilitate their introduction into evidence.

Defendants also finally carried out the bizarre and constitutionally indefensible "phone sweep", whereby the FBI investigated hundreds of people and groups across the country—through the efforts of agents in some 42 other FBI field offices—who had been called long distance by fifteen or twenty apparent Earth First! associates of plaintiffs, termed "suspects" by the case agents but not named in the files, around the time of the bombing. In his memo to the other offices setting this operation in motion, defendant Conway recited the FBI's stubbornly false and distorted version of the facts, complained of "a continuous stream of news media coverage nationwide... (mostly)... stimulated by (plaintiffs and Earth First!)... accusing the FBI of mounting a COINTELPRO-type operation against environmentalists," and of this very "$40 million(!) lawsuit against the FBI and other local law enforcement agencies charging them with harassment and complicity(!) In connection with the bombing." (Airtel of 11/21/91, SF-174A-90788, S.141, p.3).

The case was finally declared closed in March, 1993, with its failure to produce results described to the U.S. Attorney's office by defendant Webb, then chief of the Terrorist Squad — who echoed a huffy, scandalized theme sounded by defendants all during the case—as due to the reprehensible failure of plaintiffs and their friends to cooperate with the FBI!

ARGUMENT

I. DEFENDANTS ARRESTED PLAINTIFFS WITHOUT GROUNDS IN ORDER TO 'DISRUPT, DISCREDIT AND NEUTRALIZE' THEIR POLITICAL ACTIVITIES, IN VIOLATION OF THE FIRST AMENDMENT.

A. Intent to Chill Speech

The concerted conduct of defendants in arresting plaintiffs, searching their homes and effects and seizing property, and making defamatory public accusation against them, was intended to and did wrongfully disrupt, chill, neutralize and otherwise infringe upon the lawful, protected activities of plaintiffs and Earth First! on behalf of the environment, and in protest of destructive corporate logging practices (and the tacit police support for the same), including but not limited to Redwood Summer, in violation of the First Amendment, entitling plaintiffs to

judgment against defendants. Such conduct seeking to chill and retaliate against plaintiffs' free expression "strikes at the heart of the First Amendment." Gibson v. United States, 731 F.2d 1334, 1338 (9th Cir. 1986). Plaintiffs will show that interfering with their protected activities was a substantial or motivating factor in defendants' conduct. Sloman v. Tadlock, 21 F.3d 1462, 1469 (9th Cir. 1994). Plaintiffs need not demonstrate that their speech was actually inhibited or suppressed, only that defendants "intended to interfere with Bari and Cherney's First Amendment activities." Mendocino Env'l Ctr. v. Mendocino County, 14 F.3d 457, 464 (9th Cir.1994) (Mendo I). Such intent can be demonstrated by direct or circumstantial evidence. See Magana v. Commonwealth of N. Mariana Islands, 107 F.3d 1436, 1447 (9th Cir.1997), and the violation is established if the defendants' "intent or desire to curb the expression was the determining or motivating factor in making the arrest." Mendocino Env'l Ctr v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999) (Mendo II), citing Tatro v. Kervin, 41 F.3d 9, 18 (1st Cir.1994). Plaintiffs will introduce numerous items of evidence showing defendants' intent to chill their expression.

1. Prior Investigation of Earth First!

Defendants had knowledge of and malign interest in Earth First!'s protest activities, including but not limited to the attention developed locally as part of the THERMCON investigation, and were engaged in illicit 'investigation' of them and Redwood Summer before the bombing, as shown by:

+ OPD Officer Kevin Griswold's intelligence gathering on Earth First! before the bombing;

+ Defendants' knowledge of numerous threats against plaintiffs, communicated to SA Stan Walker at the Eureka FBI Resident Agency by Darryl Cherney in April, 1990;

+ Investigation by Griswold and defendant Conway of Darryl and other Earth First!ers at the Golden Gate Bridge on April 24, 1990, where they appropriated materials from Darryl's backpack showing that the principle of non-violence had been established and proclaimed for Redwood Summer;

+ FBI liaison with Humboldt and Mendocino County Sheriffs' deputies to monitor Redwood Summer activities;

+ Reports and statements on the day of the bombing that the FBI was already investigating Bari and Cherney as members of a terrorist group;

2. Defamatory Public Accusations

Defendants' active campaign to disrupt plaintiffs' activities, following the arrest, began with the May 25, 1990, press conference announcing plaintiffs had been arrested for possessing and transporting the bomb, despite clear evidence of attempted murder. The public vilification continued with:

+ Statements to the press in the days after the bombing, shown in the video exhibit, that plaintiffs were "absolutely" the only suspects and reports that police had "hard, cut and dry physical evidence" of guilt;

+ False claims of a match between nails from the bomb and nails found in Bari's car;

+ The exploding of audio tapes of Cherney's music by Berkeley police, found in a search of his van, for no logical purpose but to generate sensational footage for television and the media;

+ A press conference following the second search of Bari's home proclaiming plaintiffs' guilt, even after key "evidence" relied on for the arrests and the first search — the nails and the location of the bomb — was tested and found to be incorrect;

3. General Animus Against Plaintiffs

Defendants harbored a general animus against Earth First! and plaintiffs' protest activities on behalf of the ancient redwood trees and otherwise, shown in numerous ways, including:

+ Defendants ignored Darryl's requests for an attorney while he was in custody, being interrogated and accused to his face by defendant Sena and others, despite that Attorney Linda Fullerton and other lawyers were in the police station for several hours, repeatedly demanding to see him and being repeatedly refused;

+ Defendant Sims refused to allow Susan Jordan, Judi's attorney, to see her unless she had a court order;

+ The raid, illegal search, arrest of residents, and ultimate trashing of the Seeds of Peace house after the bombing, at the direction of defendants Sitterud and Sims;

+ Sims' remark, "This wasn't a carful of nuns" when defending the relevance of background information on Earth First! in the decision to arrest;

+ Defendants' interviews of timber people in Humboldt and Mendocino counties, laced with leading questions designed to elicit negative information about Earth First!, plaintiffs, and the falsely reported "core group capable of violence", while making no meaningful effort to learn about anyone who might have tried to harm plaintiffs;

B. Actual Chilling of Speech

Demonstration of the actual chilling of speech is not a required element to make out a First Amendment violation, but defendants' did in fact chill plaintiffs' speech and activism:

+ Redwood Summer organizing was hugely hampered by the need to defend Darryl and Judi from defendants' false charges against them;

+ Judi had to be especially concerned about the disruption of her new friendly relationships and budding alliance with loggers, distracting her from organizing;

+ Plaintiffs and their associates had to contend with distrust in their own communities and multiple other distractions and difficulties with their organizing work arising from the false charges;

+ All concerned likewise had to work to counter the stain on the image of Earth First! and Redwood Summer nationally.

By painting Bari and Cherney as bombers and "eco-terrorists," defendants' activities were designed to retaliate against and chill the political expression of Bari, Cherney, and the Earth First! movement, showing clearly that obstructing and derailing the movement "was a substantial or motivating factor" in defendants' conduct. Sloman v. Tadlock, *supra;* Mendo I & II, *supra*. It obviously follows that plaintiffs may recover for defendants' "discrete acts of police…intimidation directed solely at silencing" plaintiffs, Redwood Summer and the Earth First! movement. Gibson, *supra*, 781 F.2d at 1338.

II. DEFENDANTS FALSE ARREST OF PLAINTIFFS ALSO VIOLATED THE FOURTH AMENDMENT.

The arrest of plaintiffs for possession and transport of the bomb, where defendants knew or should have known the purported bases for their guilt were false and insubstantial, was without probable cause. The concerted acts and omissions of defendants in deciding upon the arrest, carrying it out, and publicizing it in a defamatory way constituted unreasonable seizure of their persons, in violation of the Fourth Amendment and Article 1, §§ 7 and 13 of the California Constitution. Similarly, the searches of plaintiffs' homes, cars and belongings and those of their associates by defendants and others acting at their direction, with and without the warrants obtained through the same false pretense used to justify the false arrests, were unreasonable and

unlawful, in violation of the Fourth Amendment and Cal. Constitution §§ 7 and 13, entitling plaintiffs to judgment.

A. False Arrest

The Fourth Amendment is the appropriate constitutional basis for §1983 claims in unlawful arrest cases. Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). A false or unlawful arrest is treated as a claim of unreasonable seizure of the person under the Fourth Amendment. See Brower v. County of Inyo, 489 U.S. 593, 596, 109 S.Ct. 1378, 1381, 103 L.Ed.2d 628 (1989). Defendants violated plaintiffs' rights under the Fourth Amendment by arresting them on misleading or patently false factual bases, without true or honest grounds to believe they knowingly possessed the bomb. Likewise, defendants failed and refused to investigate many obvious and legitimate evidentiary leads.[5]

California law likewise holds police liable for false arrest/false imprisonment. Although a "public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law," this does not "exonerate[]" the officer "from liability for false arrest or false imprisonment". Cal. Gov't Code §820.4. See Sullivan v. County of Los Angeles, 12 Cal. 3d. 710, 726, 117 Cal. Rptr. 241, 527 P.2d 865 (1974). False imprisonment is defined as "the 'unlawful violation of the personal liberty of another.'" Fermino v. Fedco Inc., 7 Cal.4th 701, 715, 30 Cal.Rptr.2d 18, 872 P.2d 559 (1994). A charge of false imprisonment requires plaintiffs to show simply that they were restrained of their liberty without sufficient complaint or authority, which can be accomplished by words or acts of police which the arrestees feared to disregard. See Asgari v. City of Los Angeles, 15 Cal.4th 744,754-55 (1997). Temporary

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[5] Mendo II, 192 F.3d at 1293 n.16 (law of this case); Guerra v. Sutton, 783 F.2d 1371, 1375 (9th Cir. 1986); Sevigny v. Dicksey, 846 F.2d at 957, n.5 (4th Cir. 1988); Rogers v. Powell, 120 F.3d 446, 453 (3d. Cir. 1997); U.S. v. Kyllo, 37 F.3d 526, 529 (9th Cir.1994); BeVier v.Hucal, 806 F.2d 123, 128 (7th Cir. 1986); U.S. v. Bater, 830 F.Supp. 28, 36 (D. Mass. 1993).

detention is sufficient, and the use of physical force is not necessary. Ware v. Dunn, 80 Cal.App.2d 936, 943-44, 183 P.2d 128, 132, (1947).[6]

Probable cause for arrest exists when the agents or officers have reasonably trustworthy information, sufficient to warrant a prudent person in believing that the accused has committed an offense. U.S. v. Butler, 74 F.3d 916, 920 (9th Cir. 1996). An arrest is unreasonable or unlawful if the officers making the arrest know, or in the circumstances ought to know, that no probable cause exists. U.S. v. McDowell, 475 F.2d 1037, 1039 (9th Cir. 1973). Reasonableness on the part of the officers is judged by an objective standard. Forster v. County of Santa Barbara, 896 F.2d 1146, 1148 (9th Cir. 1990). Mere suspicion, conjecture, "common rumor, or even strong reason to suspect" that a person is responsible for a crime is not enough to constitute probable cause to arrest; 'articulable' facts are required. Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1498 (9th Cir.1996),citing Henry v. United States, 361 U.S. 98, 101, 80 S.Ct. 168, 170, (1959).

Defendants arrested plaintiffs the day of the bombing without fair and reasonable evaluation of the evidence before them. Judi was booked at 3:00 p.m. while in surgery, with guards at her door in the hospital, when she obviously posed no danger to anyone; she was clinging to life, and in no position to go anywhere. The simple proof that she was confined is enough to demonstrate defendants' liability. Du Lac v. Perma Trans, 103 Cal.App.3d. 937, 945 (1980). Such confinement "under pretended color of official right" by officers acting on fraudulent grounds, "without right" and against her will, is false imprisonment even if she was

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[6] Under California Government Code § 815.2(a), a public entity is liable for injury caused by its employees effecting a false imprisonment, such as a false arrest, if the employee is liable therefor. Government Code § 815.2(b) provides derivative immunity for a public entity employing any officer committing false imprisonment under his or her official duties. The governmental entity is immune from liability only if the employee is immune. Cal. Gov't Code § 815.2(b); See Scott v. County of Los Angeles, 27 Cal.App.4th 125, 134-35, 32 Cal.Rptr.2d 643, 650 (1994). Defendants Sims, Sitterud and Chenault, in their official capacity as Oakland police officers, helped concoct the false bases for purported probable cause, deliberately failed to investigate available evidence in determining the existence of probable cause, and behaved as if probable cause existed when they knew and had reason to know that it did not. The City of Oakland is thus liable in *respondeat superior* for the official misconduct of these employees.

not conscious enough to notice it at the time. McAlmond v. Trippel, 93 Cal.App. 584, 588 (1928). Darryl was less injured but still disoriented from the blast, with his ear drum blown out. While his arrest report was not completed until 3:00 a.m. May 25, he was in custody at least from the time defendants and company took him from Highland Hospital in the late afternoon of May 24 to the station house, where they placed in a locked room and began interrogating him in relays, if not sooner (i.e. when they posted a guard outside his door at the hospital).

The Oakland defendants' pretense of reliance on information supposedly supplied to them by various FBI defendants has been disposed of in the recent appeal and need not detain us. As the Ninth Circuit pointed out, officers cannot blindly rely on statements from other officers when evidence showing the non-existence of probable cause is readily available.[7] They have an independent duty to investigate the facts, which Chenault, Sitterud and Sims failed to do here. Instead, these officers joined with the FBI in perpetuating the fraudulent probable cause, when the true evidence was readily available for honest evaluation.[8] An officer who aids an arrest by providing deliberately false information is liable for false arrest when another officer carries it out. Asgari, 15 Cal.4th at 757.

B. First Search Warrant

A search warrant is valid only if supported by an affidavit establishing probable cause. U.S. v. Stanert, 762 F.2d 775, 778 (9th Cir.), amended, 769 F.2d 1410 (9th Cir.1985). Where plaintiffs show that defendants deliberately or recklessly included false statement in, or omitted material information from, the affidavit, and the materiality of those statements was critical to the ultimate determination of probable cause, the search is unlawful. Hervey v. Estes, 65 F.3d 784, 789 (9th Cir. 1995); Stanert, 762 F.2d at 782. The Ninth Circuit recognizes that by reporting less than the full story, the police can manipulate the inferences the magistrate will

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[7] See, e.g., U.S. v. Bernard, 623 F.2d 551, 560-61 (9th Cir.1980), while an officer may rely on information obtained from fellow law enforcement officers or agents, this "in no way negates a police officer's duty to reasonably inquire or investigate" facts reported by the other officers.

[8] See footnote five, *supra*.

draw. Lombardi v. City of El Cajon, 117 F.3d 1117, 1123 (9th Cir. 1997) (citing Stanert, 762 F.2d at 781).Here defendants deliberately included false statement in and omitted material information from the search warrant affidavit, as evidenced by the varied facts contradicting the purported probable cause determination, outlined above.

C. Second Search Warrant

A month later, just as Judi was beginning to recover from the bombing and her two daughters were slowly returning to some semblance of a normal life after the attack and the police raid on their home, defendants concocted a second fraudulent affidavit and perpetrated another illegal invasion of the household. Purporting to act on a belief that Judi was the source of the mysterious "Lord's Avenger" letter — which was impossible — defendants obtained a new warrant, on an affidavit by Sitterud in which he included as exhibits the letter, the falsely sworn first affidavit, and a portion of the lab man Williams' report about the supposed tool mark match of two finishing nails, together with the new false statement that a batch of finishing nails contained only 800-1000 pieces. As the Court of Appeals pointed out, this affidavit was deceptive *ipso facto*, because the first affidavit was made part of it, uncorrected. Mendo II, 192 F.3d at 1293. And it was doubly so, because the statement about the size of a batch was patently false and misleading, and defendants knew it.

And so the magistrate was deceived again. On June 26, another search of Bari's home was performed, purporting to look for more nails — apparently to make the same match again — and for typewriter exemplars to match the letter. Some nails were found there, naturally, since nails are a common household item and because Bari was a carpenter at the time of the bombing. So, despite the lack of any meaning — and to distract audiences from their belated admission that they now knew the bomb had been under the driver's seat and not behind it — defendants again put out the spurious claim that a new match of nails was hard evidence that the bomb belonged to the plaintiffs.

Again, defendants' misrepresentations were plainly material; their lies were the basis for the probable cause determination, and comprised the only available factors upon which the magistrate could issue the second warrant. Such deception provides obvious grounds for

defendants' liability for the second illegal search and seizure against Judi (Hervey v. Estes, *supra*), and the press conference showed the continuing intent to neutralize the plaintiffs' speech.

III. DEFENDANTS ENGAGED IN A CONSPIRACY TO VIOLATE PLAINTIFFS' CIVIL RIGHTS.

Plaintiffs charge that the violations complained of herein were brought about by a conspiracy among the defendants, who arrived at a "meeting of the minds" to "expose, disrupt, misdirect, discredit or otherwise neutralize" and chill the protected activities of the plaintiffs, Earth First! and Redwood Summer, by maliciously and sensationally accusing plaintiffs of responsibility for the bomb, in violation of the First and Fourth Amendments. The participation of the state (Oakland) officers with federal agents recognized by the Court of Appeals provides the requisite state action to make the entire conspiracy actionable under §1983.

A civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.' " Hampton v. Hanrahan, 600 F.2d 600, 620-21 (7th Cir. 1979), reversed in part on other grounds *per curiam*, 446 U.S. 754, 100 S.Ct. 1987 (1980). To establish the defendants' liability for a conspiracy, plaintiffs must demonstrate the existence of "an agreement or meeting of the minds to violate constitutional rights." United Steelworkers of America v. Phelps Dodge Corp., 865 F.2d 1539, 1540-41 (9th Cir.1989) (*en banc*),quoting Fonda v. Gray, 707 F.2d 435, 438 (9th Cir.1983). The Defendants must have "by some concerted action, intend[ed] to accomplish some unlawful objective for the purpose of harming another which results in damage." Gilbrook v. City of Westminster, 177 F.3d 839, 856 (9th Cir.1999), quoting Vieux v. East Bay Reg'l Park Dist., 906 F.2d 1330, 1343 (9th Cir.1990). "To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." Phelps Dodge, 865 F.2d at 1541. Plaintiffs need not prove that each participant in a conspiracy knew the "exact limits of the illegal plan or the identity of all participants therein." Hoffman-LaRoche, Inc. v. Greenberg, 447 F.2d 872, 875 (7th Cir. 1971). In proving a civil conspiracy, plaintiffs are not required to

provide direct evidence of the agreement between the conspirators, as "(c)ircumstantial evidence may provide adequate proof of conspiracy." Id. The jury can then "infer from the circumstances [that the alleged conspirators] had a 'meeting of the minds' and reached an understanding" to achieve the conspiracy's objectives. Adickes v. Kress & Co., 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1609 (1970).

As stated in the Complaint, the objectives of the conspiracy were:

(1) To endeavor to cause Redwood Summer to be seen and branded in the public's mind as likely to involve lawless conflict and violence to the end that its meaning and non-violent premise would be hidden and people would be frightened and discouraged from coming to participate;

(2) To endeavor to nurture the atmosphere of conflict, danger and division in the logging communities of Northern California and among the people there, so as to impede the organizing work of plaintiffs and their associates directed at the logging companies and their responsibility for destruction of the forests and the ultimate impoverishment of forest workers; and,

(3) To seek to falsely portray plaintiffs and Earth First!, and cause them to be portrayed, as dangerous extremists, involved with bombs, guns and tree-spiking, willing to resort to violence, power-hungry and without conscience in the pursuit of their ends. Defendants thus maintained a constitutionally impermissible, politically-based animus, not grounded in any legitimate law enforcement interest, against plaintiffs personally, their organizing work, and Earth First!

The conspiracy (or conspiracies) had the overarching goal of violating plaintiffs' free speech and association rights under the First Amendment, first and foremost by means of the arrest and searches without probable cause which also violated the Fourth Amendment. Reikes, Doyle, Sena, Buck and Webb initiated the activity immediately after the bombing — based on pre-existing FBI animus towards Earth First! — and drew in the other defendants and a large number of knowing assistants as the "investigation" went forward. While the decision to seize upon the bombing as a means to smear Earth First! and persecute plaintiffs — assuming no defendant had foreknowledge of it — arose immediately after the explosion, strong circumstantial evidence demonstrates that the shared animus towards Earth First!, if not the particular conspiracy arising from the bombing, existed beforehand. This includes:

+ Intelligence gathering on Earth First! by both the FBI Terrorist Squad and OPD 'Intelligence' in the person of Officer Griswold and others;

+ The ongoing interest of both agencies in Redwood Summer and their no-jurisdiction response to the non-violent Golden Gate Bridge protest;

+ The haste with which defendants moved to arrest plaintiffs;

+ The raid, illegal search and trashing of the Seeds of Peace house and the baseless arrest of Seeds members and other associates of plaintiffs including Karen Pickett and George Shook;

+ Defendants' joint participation in fabricating the bases for the false arrest and the searches, and false and defamatory statements in affidavits and to the press about purported physical evidence, particularly the supposed visibility of the bomb and the purported match of finishing nails;

+ Concoction of the "Heavy Hitters" tip;

+ The made-for-TV searches of plaintiffs' homes following the sensational arrests;

+ Defendants' repeated insistence that plaintiffs were the only suspects in the bombing;

+ Failure to investigate the death threats and the true author of the Lord's Avenger letter;

CONCLUSION

For the foregoing reasons, plaintiffs are entitled to judgment against the FBI and OPD defendants, jointly and severally, for violation of the plaintiffs' fundamental rights under the First and Fourth Amendments to the U.S. Constitution, for conspiracy to violate constitutional rights, and for false arrest under California common law against the Oakland defendants, and the City of Oakland in *respondeat superior*, entitling plaintiffs to compensatory and punitive damages, and costs and attorneys fees.

Respectfully submitted,

DATED: January 22, 2002

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CERTIFICATE

I certify that I served the within Trial Brief on defendants by emailing it to R. Joseph Sher and Maria Bee, and thereafter by delivering a true copy to the office of Maria Bee in Oakland, on January 22, 2002.

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Ben Rosenfeld