UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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| JUDI BARI, et al.<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES OF AMERICA, et al.,<br><br>Defendants. | Case No. 91-1057 CW (JL)<br><br>ORDER (Granting Docket # 660, Denying Docket # 665) |

## I. Introduction

The parties' dispute over disposition of evidence was referred by the district court (Hon. Claudia Wilken) under 28 U.S.C. §636(b). The matter came on for hearing. Dennis Cunningham and Ben Rosenfeld appeared for Plaintiff, and R. Joseph Sher, Assistant U.S. Attorney, Department of Justice, Alexandria, Virginia, appeared for Defendants. After the hearing, counsel attempted to resolve their dispute but were unsuccessful. The Court took the matter under submission after issuing a stay and an order to the FBI not to destroy or dispose of the evidence at issue. The Court carefully considered the pleadings and arguments of counsel and hereby sustains Plaintiff's Objection to Destruction of Evidence of Who Bombed Judi Bari; grants Plaintiff's Motion for an Order *In Rem* Granting Access for Testing, Notice Against Spoliation, and motion in rem for enforcement of settlement agreement and that evidence not be destroyed (# 660); and denies Defendants' motion to strike the Wheaton Declaration (Docket # 665).

## II. Factual and Procedural Background

### A. The Bombing and the Arrest

Shortly before noon on May 24, 1990, a bomb went off underneath Judi Bari's car seat as she drove through Oakland, California. The blast shredded the driver's side of the car, from the dashboard into the passenger section behind the driver's seat. (Ex. 2 to Plaintiff's motion) The explosion severely injured Bari, a prominent leader of the environmental organization Earth First!, shattering her pelvis and causing other serious internal injuries that left her in constant pain for the rest of her life. The explosion also caused lacerations and other injuries to Darryl Cherney, another Earth First! activist and a passenger in Bari's car.

Within 24 hours of the explosion, Oakland police officers placed Bari and Cherney under arrest. Along with the FBI agents assigned to the investigation, the Oakland police concluded that the two injured individuals had been transporting the bomb and that an explosion had accidently been triggered. Shortly after Bari's arrest and immediately prior to Cherney's, the police obtained a warrant and searched Bari's residence; they later secured a second warrant for the same purpose. Law enforcement officials announced to the press their conclusion that Bari and Cherney were responsible for the explosion and released incriminating information about the two activists, much of which later turned out to be false.

Less than two months after the explosion, the Alameda County District Attorney's Office, having failed to find evidence of Bari and Cherney's culpability, announced that it declined to file charges against either of them.

### B. This Lawsuit

#### 1. Plaintiffs' Claims

In 1991, Bari [1] and Cherney filed a civil action in federal court. The amended

[1] Judi Bari died of cancer in 1997. Her part of this action is maintained by Darlene Comingore, the executor of her estate. There are two cases, which have been consolidated.

complaint named as defendants several members of the Oakland police department and a number of FBI agents; it alleged that the arrests and the two searches violated Bari and Cherney's Fourth Amendment rights, and that federal and local law enforcement officers had entered into a conspiracy to accuse them falsely of responsibility for the explosion, and thereby inhibit their political activities in violation of the First Amendment. *Mendocino Env'l Ctr. v. Mendocino County*,192 F.3d 1283, 1287-88, 1301-1304 ( 9TH Cir.1999).

**2. Motions and Interlocutory Appeals**

In 1994, the court of appeals rejected an interlocutory appeal filed by the defendant FBI agents, who challenged the district court's denial of their motion to dismiss on grounds of qualified immunity. *Mendocino Env'l Ctr. v. Mendocino County*, 14 F.3d 457, 459-60 (9th Cir.1994). In its decision the court of appeals noted that at the time the bomb exploded in her car, Bari and Cherney were in Oakland, taking part in a speaking and concert tour to promote the upcoming Redwood Summer and to attract young people from all over the country to Northern California to protest logging practices. This organizing campaign had "generated considerable opposition and animus among individuals in the logging and timber industry," which the plaintiffs contended was shared by local and federal law enforcement officials. 14 F.3d at 459. At 3:00 p.m. Just a few hours after the bomb went off, Bari was arrested in her hospital bed.

Later that evening FBI Special Agents (SAs) Reikes and Doyle briefed a group of Oakland police officers, including Lieutenant Sims, Sergeant Chenault and Sergeant Sitterud, about the progress of their investigation, reporting the preliminary conclusions that they had drawn from the physical evidence, including a statement that the bomb had been located *behind* Bari's seat, implying that she and Cherney knew it was in the car, and recounting their suspicions that in the past Earth First! had been involved in incidents of environmental sabotage. 192 F.3d at 1289.

Lieutenant Sims also purports to have relied on the same general information,

allegedly provided by the FBI both at the briefing and in less formal conversations, as the basis for his decisions to arrest both individuals. *Id.* In a related document, the search warrant affidavit, Sergeant Chenault stated that the decision to search Bari's home was based in part on his belief (which he subsequently testified was based on statements by FBI agents) that Earth First! was a "violent terrorist group." *Id.*

Bari and Cherney alleged that the FBI Agents knew the bombing was not accidental, based on "the physical evidence, the risk logic and other factors." This allegation refers to the Agents' purported knowledge that the bomb was located *under* Bari's seat, a fact that would indicate she and Cherney had no knowledge the bomb was in the car. Bari and Cherney claimed that a reasonable law enforcement official confronted with this knowledge would have known there was no probable cause to arrest them on charges of transporting an explosive device.

On September 24, 1999, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's denial of summary judgment to the Defendants on the issue of qualified immunity. The court also reversed the district court's grant of summary judgment to the Defendants on Plaintiffs' claims for conspiracy and violation of their First Amendment rights, and remanded the case for further proceedings. *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1303-1304 (9th Cir.1999).

On August 2, 2001, the district court granted in part the motion for summary judgment of the City of Oakland on Plaintiffs' second cause of action for violation of their First Amendment rights under 42 U.S.C. §1983. The court also dismissed with leave to amend Plaintiffs' fourth cause of action, for false arrest, with instructions that Plaintiffs plead compliance with California's government claim presentation requirement and state the specific enactment under which Plaintiffs sought to recover. Plaintiffs filed their Eighth Amended Complaint on August 3, 2001.

**3. Trial**

Finally, after years of courtroom battles and multiple interlocutory appeals and motions by both sides contesting virtually every ruling by the trial court, the case was

presented to a jury in 2002, 11 years after the first complaint was filed, and 12 years after Bari and Cherney were injured and then arrested.

**4. The Jury's Verdict**

After 21 days of trial and 15 days of deliberation the jury returned a 21-page Special Verdict.

**a. Fourth Amendment Claims**

With respect to Plaintiffs' Fourth Amendment claims, the jury found that as to the arrest of Judi Bari, three of six defendants had violated her Fourth Amendment rights; for two of the six, the jury found that no reasonable officer in that defendant's position could have believed that his conduct was lawful. The jury awarded Bari $235,000 for that claim. As to the May 1990 search of her home, the jury found that all five of the defendants named in that claim were liable for violating her Fourth Amendment rights, and that as to two of the five, no reasonable officer in that defendant's position could have believed that his conduct was lawful. The jury awarded Bari $190,000 for that claim. As to the June 1990 search of Bari's home, the jury found none of the five named defendants had violated her Fourth Amendment rights. As to violation of Darryl Cherney's Fourth Amendment rights by his arrest, the jury could not reach a verdict as to any of the six named defendants, answering "Undecided" to all questions, except that the jury found that one of the six could have reasonably believed that he was acting lawfully. As to the May 1990 search of Cherney's home, the jury found that four of five named defendants violated his Fourth Amendment rights. The jury found that as to two of the four, no reasonable officer in the defendant's position could have believed he was acting lawfully. The jury awarded Cherney $50,000 for that claim.

**b. First Amendment Claims**

With respect to Plaintiffs' First Amendment claims, the jury found that four of the seven named defendants violated Bari's rights, and awarded her $1,175,000 on this claim. As to Cherney, the jury found that five of the seven named defendants violated his First Amendment rights, and awarded him $800,000 on this claim.

**c. Conspiracy Claims**

The jury found no liability of any defendant for conspiracy to violate either Bari or Cherney's First Amendment rights.

**d. Punitive Damages**

The jury awarded punitive damages to Bari against one defendant in the amount of $300,000 for violating her Fourth Amendment rights. The jury also awarded punitive damages of $100,000 to Cherney against the same defendant on the same claim.

**5. Post-trial Motions**

Defendants filed a motion for judgment as a matter of law or in the alternative for a new trial. (Docket #s 610 and 611) Plaintiffs filed a motion for entry of judgment. Judge Wilken entered partial judgment for Plaintiffs. (Docket # 606)

**6. Settlement Negotiations**

The parties met for a settlement conference before this Court on October 3, 2002. (Minutes at Docket # 627) The case did not settle then, but the process continued. At the ninth settlement conference before this Court, more than one year later, on October 27, 2003, the parties reached a partial settlement. (Docket # 650). The parties met with this Court again on October 29, 2003 and January 13, 2004, reaching partial settlement at each of those sessions as well. (Docket #s 651, 652) This was firmed up in person and by telephone at an additional session in January 2004 (Docket # 653).

**7. Settlement Agreement**

On May 17, 2004, Plaintiffs Darlene Comingore, as executor of the estate of Judi Bari, and Darryl Cherney filed a partial satisfaction of judgment as to the Federal Defendants in the amount of $2,000,000. The partial satisfaction of judgment also memorializes the Oakland Defendants' agreement to pay Plaintiffs $2,000,000, in four annual payments of $500,000. (Docket # 654) On June 18, 2004, Judge Wilken dismissed the case with prejudice, retaining jurisdiction to enforce the parties' settlement agreement. (Docket # 655)

## II. This Motion

### A. Plaintiffs' Position

On June 30, 2010, counsel for the FBI informed Plaintiff's counsel that the government plans to destroy the remains of the two bombs in this case, the Oakland car bomb, and an unexploded bomb planted two weeks earlier at a mill in Cloverdale, California, (Ex. 3 to Plaintiff's motion, Docket # 661) which the parties generally agree were both built by the same hands. (Ex. 1 to Plaintiffs' Motion, June 30, 2010 email from AUSA R. Joseph Sher):

> "I will be advising the FBI that it may destroy the remaining contraband it has maintained in its evidence holdings. Over the years we have discussed this matter occasionally and inconclusively. At this point there is little point in maintaining continued possession of the contraband materials, and their destruction is the appropriate resolution."

*Id.*

The evidence comprises roughly the contents of two regular file storage boxes (Cunningham letter of October 1, 2010, Docket # 669.)

Cherney asks the Court to order the FBI to preserve and make available to him or to a reliable third-party custodian for testing and examination the remnants of the Oakland and Cloverdale bombs, along with a cardboard sign with the handwriting "LP [2] Screws Millworkers" apparently left behind by the would-be bomber(s) at Cloverdale. (Ex. 3 to Plaintiff's motion, Docket # 661)

Cherney argues that modern DNA testing, of the bombs and the sign, unknown when the criminal case was first investigated, could provide the best hope for discovering who really bombed Judi Bari and Darryl Cherney. He claims there is a public interest in discovering the truth of what happened and who is to blame, and whether the bomber was the "Lord's Avenger" who wrote letters claiming responsibility.

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[2] Louisiana-Pacific Corporation bought Pacific Lumber, a 140-year old Humboldt County institution, which had preserved thousands of acres of old-growth redwood trees. It was L-P's proposal to harvest old-growth redwoods that led to protests by environmentalists like Bari and Cherney.

(Ex. 4 to Plaintiff's motion, Docket # 661). He and others have at their own expense continued to investigate the bombing, and the series of threats that Bari received in the months before she was injured in the bombing. Their efforts have led to some promising results, including a typewriter match for several of the threatening letters, and similarities between those letters and the "Lord's Avenger" letter which claimed responsibility for both the Oakland and Cloverdale bombs. (Cherney declaration at end of exhibits to Plaintiff's motion, (Docket # 661) Cherney claims that the FBI lifted at least one latent fingerprint off the sign, but has failed to follow up. There is no statute of limitations on attempted murder.

Cherney denies that the bomb remnants are contraband, distinguishing them as not contraband *per se*, but rather as derivative contraband. *U.S. v. McCormick*, 502 F.2d 281 (9th Cir. 1974). Possession of the former is always illegal, but possession of the latter is only illegal if its illegal use makes it illegal. He contends that a court will never authorize return of contraband *per se* but examines the circumstances before deciding whether to return derivative contraband. *Conservation Force v. Salazar*, 677 F.Supp.2d 1203, 1210 (N.D.Cal. 2009); *U.S. v Kaczynski*, 551 F.3d 1120, 1129-1130 (9th Cir. 2009) (request considered for return of derivative contraband but denied on grounds of unclean hands). Cherney argues that the only bomb parts which might be contraband are powder residues. Cherney assumes that any powder remaining after the Oakland bomb exploded has been separated out by the FBI and he isn't interested in it anyway. The other bomb parts are not contraband in themselves, if they survived. Furthermore, the FBI can't reasonably contend that the sign is contraband.

Cherney argues that the Court has broad discretion under Rule 41(g), Federal Rules of Criminal Procedure, to fashion an order to preserve and examine evidence, even in a novel situation.

**B. Defendants' Position**

**1. The Settlement Agreement does not provide this Court with jurisdiction**

In her June 18, 2004 Order, Judge Wilken retained subject matter jurisdiction to

enforce the terms of the settlement agreement, any problems to be referred to this Court. But Defendants argue that no term of the settlement agreement supports Plaintiff's claim. The only term of the agreement which even arguably would apply, according to Defendants, is ¶2a.

That provision, which by its express terms applies only to the Oakland defendants, states:

> Non-monetary relief
>
> a. The City defendants have stated their intention to release all the evidence gathered in the underlying criminal investigation to plaintiffs (save and except contraband items which plaintiffs would have no lawful authority to possess). This will be reduced to a writing between the plaintiffs and the City defendants. The City will itemize any items withheld and the parties will refer any disputes regarding withheld items for resolution to Magistrate Judge Larson.

Defendants argue that nothing in that provision, or anywhere else in the settlement agreement, obligates the United States, or any of its agencies, to notify the plaintiffs of any proposed action concerning, or to provide them access to, or to transfer to them, any property gathered by law enforcement officials during the course of their investigation. Defendants ask the Court not to turn a courtesy to counsel into an obligation which was neither negotiated nor agreed upon during the settlement discussions and made part of the integrated settlement agreement embodying the parties "entire understanding and agreement," citing ¶5b of the Settlement Agreement.

Defendants ask this Court to find that the reservation of jurisdiction to resolve disputes arising from the settlement agreement does not provide the Court with jurisdiction.

**2. Rule 41(g) of the Federal Rules of Criminal Procedure does not provide jurisdiction**

Defendants argue that Mr. Cherney fails to claim, far less establish, any ownership interest in the remains of the improvised explosive devices he now seeks. Defendants ask this Court to find that failure to defeat his claim at the outset because the individual requesting return of property under Rule 41(g) must establish that he or she is entitled to its lawful possession before the property sought may be released to

him. Fed.R.Crim.P. 41(g). *U.S. v. Harrell*, 530 F.3d 1051, (9th Cir. 2008)(when motion is made during pending criminal investigation, movant bears the burden of proving both illegality of seizure and that he or she is entitled to lawful possession; when made after criminal investigation is closed, "person from whom the property is seized is presumed to have a right to its return, and the government has the burden of demonstrating that it has a legitimate reason to retain the property.") (emphasis added); *U.S. v. Van Cauwenberghe*, 827 F.2d 424, 433 (9th Cir.1987)("[t]o prevail on a Rule 41(e) motion, a criminal defendant must demonstrate (1) he is entitled to lawful possession of the seized property; (2) the property is not contraband; and (3) either the seizure was illegal or the government's need for the property has ended); *U.S. v. King,* 528 F.2d 68, 69 (9th Cir.1975) (per curiam). Mr. Cherney's claim that the bomber remains unknown is a red herring: it is well settled that Mr. Cherney "has no judicially cognizable interest" in the prosecution of another person. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *U.S. v. Gamma Tech Industries, Inc*., 265 F.3d 917, 923 n. 6 (9th Cir., 2001).

According to Defendants, the provision for return of property in Rule 41(g) is reserved for "[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property" to move for the return of his or her property. Fed.R.Crim.P. 41(g). Defendants contend that Mr. Cherney is not a "person aggrieved by an unlawful search and seizure of" the remains of either of the explosive devices that he seeks. Indeed, he nowhere suggests that the seizure of the devices was unlawful, and it plainly was not. Therefore, according to Defendants, Rule 41(g) of the Federal Rules of Criminal Procedure does not provide jurisdiction.

**3. Even if the Court had jurisdiction, it should not order the remains of explosive devices made available to Mr. Cherney because they constitute contraband**

Defendants argue that assuming, arguendo, that this Court had jurisdiction, it still should not prevent the destruction of the remains of the explosive devices to which Mr. Cherney seeks access, because such devices are contraband.

Plaintiffs claim that the remains of the improvised explosive devices are not contraband because only the explosive material itself is contraband. Memorandum at 6.

Defendants find that claim to be specious. Defendants contend that Mr. Cherney's reliance on *United States v. Kaczinski*, 551 F.3d 1120, 1129-30 (9th Cir., 2009), Memorandum at 6, is misplaced. The Court of Appeals did not determine that Mr. Kaczynski could possess "derivative contraband," far less did it describe pipe bombs as such. Rather, the court never reached that contention because it determined that Mr. Kaczynski had no right to possess derivative contraband as well as contraband *per se.* 551 F.3d at 1129-30. As one court put it, the "issue is not whether one element of the contraband may be lawfully possessed, but whether the element has been used to create an object that is contraband.

A pipe is not contraband, but a pipe manufactured into a bomb is contraband that may not be lawfully possessed. *In re Property Seized from International Nutrition, Inc*., 1997 WL 34605479 (D. Nev., 1997). See also *U.S. v. Lussier*, 128 F.3d 1312, 1315 (9th Cir., 1997)(noting that parts that have been converted into a bomb or similar device are "destructive devices" as defined in 18 U.S.C. §921(a)(4)(vi) possession of which is precluded by 26 U.S.C. § 5845(f) (emphasis supplied); see also *U.S. v. Price*, 877 F.2d 334, 337 (5th Cir., 1989) ("A homemade explosive device is a destructive device within the meaning of section 5845(f) even though all of its components may be possessed legally")*; U.S. v. Campbell*, 685 F.2d 131 (5th Cir.1982) (same); see generally *U.S. v. Wilson*, 472 F.2d 901, 903 (9th Cir., 1972)(characterizing "pipe bombs, blasting powder, and impact fuses" as contraband). In short, the remains of the improvised explosive devices sought by Mr. Cherney are plainly contraband, and therefore his claim to access to them is without merit. Defendants concede that the Court could legally allow Cherney to have the sign.

## IV. Analysis

### A. The Court has jurisdiction pursuant to the settlement agreement and based on the *in rem* nature of Plaintiff's motion

It is well-settled that a court has continuing supervisory jurisdiction over a settlement agreement brokered and finalized in that court (*Flanagan v. Arnaiz*, 143 F.3d 540, 543 (9th Cir. 1998)), and the government acknowledges that the court retained

jurisdiction to enforce the terms of the settlement agreement in this case. (Gov't Opp., p. 3:14-15). Moreover, the parties explicitly agreed to certify any disputes concerning the disposition of evidence in the case directly to this Court, which served as both the discovery judge and the settlement judge for most of this case. (See Exhibit to Gov't Opp. (Settlement Agreement, p. 6, "Non-monetary relief," ¶2a)). The Government disputes that it was party to this Agreement, saying that the Agreement applied only to the Oakland defendants, not to the United States or any of its agencies. However, Plaintiffs present the sworn declaration of the attorney responsible for negotiating and drafting the Settlement Agreement, that it was understood at the time that the United States would return all evidence in the case to Oakland, such that any dispute which arose would necessarily be between Plaintiffs and Oakland. (Wheaton Declaration, Attachment to Docket # 664)

Consequently, there was no need for any separate agreement with the United States concerning the disposition of evidence. The United States took the firm position that it could and would only return evidence to law enforcement officials in Oakland. Therefore, Plaintiffs' settlement counsel only sought to negotiate with the Oakland defendants terms regarding disposition of evidence. (See Decl. of James Wheaton, ¶s 3-9). Defendants move to strike Mr. Wheaton's declaration, as discussed at greater length at the end of this order,

Mr. Wheaton swears, under penalty of perjury, that he is an attorney, licensed in California and:

> 3. The First Amendment Project, for which I am Senior Counsel, was hired as Fee Counsel for Plaintiffs in this case. That is, FAP was hired on the day the verdict was handed down by the jury, to represent the Plaintiffs and all of their counsel in preparing and presenting a claim for fees and costs. That representation also came to include settlement negotiations directly with the defendants City of Oakland and the Federal Bureau of Investigation. In that latter role I was principally responsible for drafting the settlement documents and communicating directly with counsel for the Defendants. Mr. Joseph Sher was the sole contact for Plaintiffs on behalf of the FBI with respect to the settlement discussions. [3]

[3] This Court reviewed Minute Orders, and its own recollection, and confirms that Mr. Wheaton participated directly in at least two settlement conferences.

4. Mr. Sher in his declaration provides a true and correct copy of the eventual final settlement agreement as it was reduced to writing and submitted to the Court as part of a Stipulated settlement. The issue of distribution of the evidence was addressed in Paragraph 2.a., which reads:

> 2. Non-monetary relief
>
> a. The City defendants have stated their intention to release all evidence gathered in the underlying criminal investigation to plaintiffs (save and except contraband items which plaintiffs would have no lawful authority to possess). This will be reduced to a writing between the plaintiffs and the City defendants. The City will itemize any items withheld and the parties will refer any disputes regarding withheld items for resolution to Magistrate Judge Larson.

5. That paragraph does not directly reference the FBI or any federal defendant for the following reasons.

6. First, Mr. Sher stated that the underlying criminal investigation was being conducted by the City of Oakland Police Department. Furthermore that the FBI did not have its own investigation, but was serving solely to assist local law enforcement on such matters as evidence analysis.

7. Second, Mr. Sher stated that the evidence it had did not belong to the FBI, but rather to the local law enforcement agencies that had sent it to the FBI for analysis. Furthermore that the FBI could dispose of the evidence only by returning it to the local law enforcement agencies, and could neither destroy it nor enter into any agreement with a private party regarding its disposition.

8. In short, he stated, without equivocation, that all evidence would be returned to the local law enforcement agencies from whence it came. He did state that the FBI would resist releasing any evidence to private parties that consisted of unlawful contraband no private party could lawfully possess. What that evidence might be and whether its possession was or was not lawful was left to be decided in the future.

9. Therefore, the Settlement Agreement in paragraph 2.a. does not reference the federal defendants directly but places the specific obligations on the City of Oakland, where the parties contemplated all the evidence would be returned and which had ownership of the evidence.

(Dec. of James Wheaton, *Id.*)

However, The FBI in fact did not return the bomb evidence, sign, or fingerprint analysis to Oakland. (Ex. 1 to Plaintiffs' Motion, June 30, 2010 email from AUSA R. Joseph Sher.).

For this reason, Plaintiff has also brought this action *in rem* – a third basis for

jurisdiction which the Government does not address. The Government should be estopped from asserting that the Court lacks jurisdiction to supervise the settlement agreement, where the Government, having been party to the three-way settlement negotiations, has not performed an obligation which gave rise to the terms of the agreement.

This Court concludes that it has full subject matter jurisdiction (a) under the settlement agreement (based on estoppel), (b) *in rem*, and (c) under the Court's inherent supervisory power, as recognized by a number of cases analyzing and implementing F.R.Crim.P. 41(g) (discussed immediately below).

**B. The Court has jurisdiction under the equitable principles governing and interpreting Rule 41(g)**

The Court rejects the Government's cramped interpretation of F.R.Crim.P. 41(g), belied by the case law interpreting and implementing it. The Government cites several, garden variety return of evidence cases which call upon the movant to establish a possessory interest in the evidence sought to be returned. See, e.g., *United States v. Van Cauwenberghe*, 827 F.2d 424, 433 (9th Cir. 1987). This may be required under the typical Rule 41 scenario. But this case does not present the typical scenario, and the law is clear that Plaintiff is not constrained by such a showing.

On the contrary, as numerous courts have made clear, Rule 41(g) sounds in, is shaped by, and invokes the Court's inherent equitable and supervisory powers, and can therefore be adapted to novel situations. See, e.g., *U.S. v. Castro*, 883 F.2d 1018 (11th Cir. 1989):

> "This Court is not without the power to fashion a remedy under its inherent equitable authority. Rule 41[g], Fed.R.Crim.P. is a crystallization of a principle of equity jurisdiction. That equity jurisdiction exists as to situations not specifically covered by the Rule."

*Id.* at 1020, citing *Smith v. Katzenbach*, 351 F.2d 810, 814 (D.C. Cir. 1965).

There are numerous additional authorities in support of the Court's equitable power to fashion an appropriate remedy in this case. (See Motion, Part III, ¶. 7-8).

In addition, the cases on which the Government relies are inapposite for each of the following three reasons: (1) The government's cases do not address the situation presented here in which the government seeks to destroy key forensic evidence in what should be an open attempted murder investigation; [4] (2) They involve requests by defendants, whereas Mr. Cherney is a victim and plaintiff; and (3) the government's cases deal only with requests for return of property, not requests for preservation and third party custody and examination of evidence, as in this case.

Several other, unique factors (which the government also wholly ignores) render this case a "situation not specifically covered by the Rule" *(United States v. Castro*, supra): (a) Plaintiffs alleged in their civil lawsuit that the FBI went to extraordinary efforts to frame and smear them, although they were the victims of the car bombing. Plaintiff points to the verdict in which a jury awarded them 80% of the $4.4 million in damages for First Amendment violations (See Decl. Cunningham, ¶ 14); (b) Plaintiff accuses the FBI of being uninterested in finding the actual bombers to the extent where it now intends to destroy key forensic evidence, preventing any eventual prosecution of the perpetrators; (c) the case is factually unique and of historic significance, as well as active, ongoing public interest; and, (d) Plaintiff Darryl Cherney has already demonstrated his interest and ability to pursue investigative leads, including compiling the only known DNA repository in the case thus far.

The government calls Mr. Cherney's interest in solving the bombing a "red-herring" because, it says, Mr. Cherney "'has no judicially cognizable interest' in the prosecution of another person." (Gov't Opp., p. 4:24 - 5:4, quoting *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973)). This remark fails to deal with the equitable considerations

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[4] There is no statute of limitations for willful, deliberate, and premeditated attempted murder, as Plaintiff alleges that the car bomb assassination attempt was in this case. See Penal Code § 664, prescribing a sentence of life without the possibility of parole in such circumstances, and Penal Code § 799, providing that prosecutions for offenses carrying a life sentence "may be commenced at any time." Cf. *People v. Abayhan*, 161 Cal.App.3d 324, 329 (1984) (noting that statute of limitations applies only if attempted murder was not willful, deliberate, and premeditated.)

before the Court pursuant to *United States v. Castro* and related authorities. In any event, the government fails to recite the complete holding of *Linda R.S.*, which actually strengthens plaintiff's position. In a subsequent ruling the Supreme Court delineated the limits of the holding in *Linda R.S.*:

> "In Linda R. S., the mother of an out-of-wedlock child filed suit to force a district attorney to bring a criminal prosecution against the absentee father for failure to pay child support. In finding that the mother lacked standing to seek this extraordinary remedy, the Court drew attention to 'the special status of criminal prosecutions in our system,' and carefully limited its holding to the 'unique context of a challenge to [the nonenforcement of] a criminal statute,'"

*Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* 528 U.S. 167, 188, 120 S.Ct. 693, 708 (2000) (internal citations omitted)." There is no such issue in this case. Cherney seeks to preserve key evidence for a future criminal prosecution or civil action against the bomber, but he raises no challenge to any alleged non-enforcement of any criminal statute. (Cherney declaration attached as Exhibit to Plaintiff's motion, Docket # 661).

Lastly, the Court has "inherent equitable authority" to order that the evidence be preserved or transferred to a facility where it will actually be examined under basic guiding principles of *Bivens*/Section 1983 litigation. "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 Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971), quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946). Plaintiffs in *Bivens*/Section 1983 actions are regularly regarded as "private attorney[s] general." See, e.g., *Wood v. Breier*, 54 F.R.D. 7, 10 (E.D.Wis. 1972). "Section 1983 represents a balancing feature in our governmental structure whereby individual citizens are encouraged to police those who are charged with policing us all." *Id.* at 11. For the foregoing reasons, the Court has jurisdiction to fashion an order ensuring the preservation of the contested items, and to grant plaintiff the opportunity to have them examined and tested by a neutral third party.

**C. Even if the material in question were contraband, the Court may still order that it be preserved and transferred to a third party. Plaintiff is not requesting that it be turned over to him directly.**

As a threshold matter, the Government does not contend that the hand-lettered cardboard sign ("LP Screws Millworkers") left with the Cloverdale bomb, or the latent fingerprints, or any fingerprint analysis which the United States may have conducted, is contraband. The FBI also acknowledges that a "latent print of value" was lifted from the "LP Screws Millworkers" sign by the Sonoma County Sheriff's Department and forwarded to the FBI Crime Lab for analysis. The Lab reported that it would conduct the fingerprint analysis (See Ex. 3 (5/31/90 FBI Airetel and 6/13/90 FBI lab inventory)). In addition, the FBI reportedly developed a fingerprint from the Lord's Avenger letter as well. (See Ex. 8 (Pltffs' Brief re Qualified Immunity, p. 33:2-6)).

The Government argues that the bomb remnants, consisting of common household items (and in the case of the Oakland bomb, mere fragments) are contraband. But even if the bomb remnants could be characterized as contraband, this does not end the inquiry, for again, Plaintiff is requesting preservation and transfer to a third party. Even if the Court were to determine that Plaintiff may not take custody of the items directly, the Government's authorities in no way foreclose ordering that the material be preserved and transferred, e.g. to a bona fide, third-party laboratory.

Only one of the five cases relied on by the government, *In re Property Seized from International Nutrition, Inc*., 1997 WL 34605479 (D. Nev. 1997), even dealt with a question of return or transfer of property. The other four cases simply wrestled with questions of proof in criminal trials concerning what constitutes a destructive device. And although *International Nutrition* dealt with a transfer issue, it did not deal at all with pipe bombs or destructive devices, despite the Government's suggestion. Rather, in that case, the company sought return of drugs it had mislabeled, promising to re-label them to make them legal. The Court refused, saying the request was "akin to the creator of a seized pipe bomb asking for the return of the pipe with the promise that the pipe will be used for plumbing..." *Id*. at 2 (emphasis added). Thus, the language in the case

about pipe bombs is pure dicta. Furthermore, in *International Nutrition,* it was the culpable party who sought direct return of the evidence. In contrast, Mr. Cherney is the victim, not the culpable party. Nor does his motion depend on transfer of the items in question directly to him. In *United States v. Wilson*, 472 F.2d 901 (9th Cir. 1972), relied on by the Government, the Court of Appeals vacated an order suppressing explosives evidence seized without a warrant after defendant abandoned his lodgings and the landlady discovered them and alerted police.

The government's three other cases are factually even more remote from the case at bar. *United States v. Lussier*, 128 F.3d 1312 (9th Cir. 1997), *United States v. Campbell*, 685 F.2d 131 (5th Cir. 1982), and *United States v. Price*, 877 F.2d 334 (5th Cir. 1989), all dealt with questions of proof at trial regarding what constituted a destructive device, not with any issue of transfer of property.

Finally, the Government contends that Plaintiff's reliance on *United States v. Kaczynski*, 551 F.3d 1120 (9th Cir. 2009) is misplaced because, the Government says, the Court did not determine that Mr. Kaczynski could possess 'derivative contraband' or describe pipe bombs as such. (Gov't Opp., p. 5, n. 2). However, although the court stopped short of explicitly characterizing Kaczynski's bomb making-materials as derivative contraband, it strongly implied that this would be the right characterization. The court wrote: "Although Kaczynski emphasizes that many listed items are not "'per se' contraband, this argument does not get him as far as he hopes, because the court is entitled to prohibit him from possessing derivative contraband as well." *Id.* at 1129. The court went on to explain that it was denying Kaczynski's request for return of property because he had unclean hands, suggesting again that such material might properly be characterized as derivative contraband, legal to possess on the right showing, but not by the Unabomber. The court wrote:

> Thus, even if the items sought to be returned could somehow be construed as innocent in and of themselves, the motion could be denied if such items had been utilized or intended to be utilized for illegal purposes. ...[I]t makes scant sense to return to a convicted drug dealer the tainted tools used or intended to be used in his illegal trade when the same were lawfully seized. [Quotations and citation omitted]. Kaczynski similarly has unclean hands and should be denied

> the right to possess or direct the disposition of these otherwise innocent materials. [Citation omitted].

*Id.* at 1129-1130 (emphasis added).

Thus the court of appeals implied that a different result might obtain but for Mr. Kaczynski's unclean hands. In the present case, of course, Mr. Cherney, the sole surviving plaintiff and a victim in the case, has both clean hands and good intentions, rooted in compelling public policy considerations. Therefore, *U.S. v. Kaczynski* in fact provides support for Plaintiff's position.

Because Plaintiff does not request that the evidence be transferred directly to him, this Court need not reach the issue of whether the evidence constitutes contraband.

**V. Conclusion and Order re Preservation of Evidence**

This Court hereby orders that the United States preserve against loss, alteration, destruction, or contamination all components and remnants of the Oakland and Cloverdale bombs, along with the "LP Screws Millworkers" sign, the "lifted" fingerprints, and any fingerprint analysis; and further orders that the same be transferred to a reliable third-party custodian, for examination and testing, when an appropriate custodian is identified by the Court.

**VI. Defendants' motion to strike Wheaton Declaration**

**A. Argument**

**1. Defendants' Position**

Defendants move to strike the Declaration of James R. Wheaton, filed by Plaintiff in support of his motion. Defendants object that this declaration is inadmissible as evidence of the terms of the settlement agreement in this case because it violates the parol evidence rule.

The parol evidence rule prohibits, as between the parties to a contract, the admission of extrinsic evidence of prior or contemporaneous agreements, whether oral or written, to explain the meaning of a contract when the parties have reduced their agreement to an unambiguous integrated writing. 11 Samuel Williston & Richard A.

Lord, *A Treatise on the Law of Contracts*, § 33:1, at 541 (4th ed.1999). Evidence of a collateral agreement may be admitted only if (1) it does not contradict a clear and unambiguous provision of a written agreement, and (2) the parties did not intend the written agreement to be the complete and exclusive statement of their agreement. *U.S. v. Triple A Machine Shop, Inc.* 857 F.2d 579, 585 (9th Cir., 1988) quoting *Sylvania Elec. Prod., Inc. v. U.S.*, 458 F.2d 994, 1005-06 (1972). See also *Gumport v. AT & T Techs., Inc. ( In re Transcon Lines*), 89 F.3d 559, 568 (9th Cir.1996); *Wilson Arlington Co. v. Prudential Ins. Co. of Am.,* 912 F.2d 366, 370 (9th Cir.1990).

Under this rule, Defendants argue that the Wheaton Declaration should be stricken. The settlement agreement is plainly, as it recites, an integrated agreement setting forth "the entire understanding and agreement between the parties" and "supersedes any prior or contemporaneous oral or written agreements or representations." Settlement Agreement at ¶5(b). Moreover, ¶5(d) represents that "each party and its counsel have reviewed the Settlement Agreement carefully and that, accordingly, the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Settlement Agreement." Consequently, Defendants insist that the Wheaton Declaration may not be employed to explicate the Settlement Agreement, because it is clearly an integrated agreement, and the parties intended it to be the complete and exclusive statement of their agreement.

Defendants contend that Plaintiffs may not use parol evidence of their reliance on extrinsic information before agreeing to the terms of the Settlement Agreement, because all parties agreed to Section 3(b), which provides that: "Except as expressly stated herein, none of the parties has relied on any statement or representation made by or on behalf of any other party or parties hereto in entering into this Settlement Agreement."

**2. Plaintiffs' Position**

Plaintiff argues that the government is incorrect, because the parol evidence rule

has no application here. The parol evidence rule is used to fix the rights and obligations of parties under a contract based on the express contract language. Plaintiff argues that the United States has invoked the parol evidence rule for an improper collateral purpose: to challenge jurisdiction. See, e.g., *Babcock v. O'Lanagan*, 1924 WL 132 (D.Ala. Terr. 3. Div. 1924) ("The rule that parol testimony is inadmissible to prove the contents of a written document is inapplicable, where the document is collateral to the issue in the trial.") Similarly, see *U.S. v. Martel*, 792 F.2d 630, 635 (7th Cir. 1986) (parol evidence rule has no application in criminal proceedings and where the United States was not a party to the contract). The United States argues that if you look at the settlement agreement, only Oakland, not the United States, has any obligation to plaintiff with respect to evidence. Ergo, the Court has no jurisdiction over the United States based on the settlement agreement.

Further, Plaintiff argues that the United States agreed to turn over to Oakland evidence remaining after the close of the case, and that Plaintiff may use parol evidence such as the Wheaton declaration, to show that the other side induced his reliance to enter into a written agreement or that he was fraudulently induced into entering into the settlement agreement. *Dewing v. MTR Gaming Group, Inc.*, 72 Fed. Appx. 655 (9th Cir. 2003); *Bell v Exxon Co., USA,* 575 F.2d 714, 715-716 (9th Cir. 1978).

Plaintiff also argues that he may use extrinsic evidence to clarify or explain ambiguous terms of the parties' agreement and that "contraband" is an ambiguous term.

**B. Analysis**

**1. Extrinsic evidence may be used to clarify the intent of the parties when a provision of their agreement is ambiguous**

This Court finds that parol evidence may be used as necessary to clarify the terms of the parties' Settlement Agreement: "When the operation of an ordinary contract is not clear from its language, a court generally may consider extrinsic evidence to determine the intent of the parties in including that language. See generally 3 Corbin on Contracts § 536, at 27-28 (1960)." *Arizona Laborers, Teamsters and Cement Masons*

*Local 395 Health and Welfare Trust Fund v. Conquer Cartage Co.* 753 F.2d 1512, 1517 (9th Cir. 1985)

However, the Court finds a different term rather than "contraband" to be in need of clarification. In the Settlement Agreement, the Oakland Defendants promise that they will turn over to Plaintiffs "*all* evidence gathered in the underlying criminal investigation," with the exception of contraband (emphasis added). Reading the plain language of this promise, the Court finds that a reasonable person could interpret it to mean that the Oakland Defendants were in possession of *all* the evidence from the criminal investigation of Bari and Cherney, despite the fact that they were not in possession of all the evidence, that in fact the FBI had retained possession of the most significant evidence, the two bombs, the sign, and the fingerprint analysis. Another reasonable interpretation would be that the Oakland Defendants were referring only to evidence which they themselves had gathered. Therefore, the phrase "all evidence gathered in the underlying criminal investigation" is ambiguous, and Plaintiff may use the Declaration of Mr. Wheaton to clarify that the Oakland Defendants were supposed to have custody of all evidence, because the FBI had earlier agreed to turn it over to the Oakland Defendants, and that therefore when the Oakland Defendants agreed to turn over all evidence, except for contraband, they meant *all* evidence, including that initially in the possession of the FBI, which the parties expected the FBI to turn over to Oakland, even though the FBI apparently did not.

**C. Conclusion re Wheaton Declaration**

Accordingly, this Court finds that the Wheaton Declaration is necessary to clarify the terms of the parties' agreement, in which the Oakland Defendants promise to turn over all evidence, when in fact the most important evidence was being retained by the FBI, contrary to the parties' intent and expectations when they entered into their Settlement Agreement. Accordingly, Defendants' motion to strike the Wheaton Declaration is denied.

**VI. Order**

This Court hereby orders that the United States preserve against loss, alteration, destruction, or contamination all components and remnants of the Oakland and Cloverdale bombs, along with the "LP Screws Millworkers" sign, the "lifted" fingerprints, and any fingerprint analysis; and further orders that the same be transferred to a reliable third-party custodian, for examination and testing, when an appropriate custodian is identified by the Court. Plaintiffs are hereby ordered to propose such a custodian for the Court's consideration.

Defendants' motion to strike the Declaration of James R. Wheaton is denied.

IT IS SO ORDERED.

Date: March 21, 2011

James Larson
United States Magistrate Judge

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