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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Estate of JUDI BARI and DARRYL CHERNEY,

Plaintiffs,

vs.

FBI Special Agent FRANK DOYLE, etal., And the UNITED STATES,

Defendants.

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

PLAINTIFFS' MEMORANDUM IN SUPPORT OF POST-TRIAL MOTION

Date: November 1, 2002
Time: 10:00 a.m.
Judge WILKEN

For what seems likely to be the last time, plaintiffs entreat the Court to re-examine the merits of the case as it was first presented, in comparison with the case that was tried, and

thereupon — without prejudice to the verdict returned on June 12 — order a "new", additional trial, so that those FBI defendants excused by previous rulings can fairly be brought to account for their part in causing the violations found by the Jury on that day.

I.

As noted, these defendants include Richard W. Held, the Special Agent in Charge (SAC) of the San Francisco Division of the FBI during the relevant time period; Edward J. Appel, his assistant (ASAC); Supervising Special Agent (SSA) Patrick J. Webb, who helped engineer the frame-up the first day and later was chief of the Terrorist Squad; Terrorist Squad members Walt Hemje and John Conway; and SSA Horace Mewborn, stationed in Washington, D.C., who was the FBI Headquarters coordinator for the San Francisco operation in this case (as well as the THERMCON case). Held, Appel and Webb were granted summary judgment by the Court's Order of October 15, 1997. Hemje and Conway were dismissed at the close of plaintiffs' evidence at trial, per R.50, F.R.Civ P. Mewborn was dismissed in May, 1997, on a finding under the 'long-arm' rules that he had not had 'sufficient contacts in the forum state'.

All these rulings (in plaintiffs' view, as we have complained before) were erroneous, contrary to the evidence in the record, and highly prejudicial to plaintiffs, particularly with respect to the conspiracy allegations. All these rulings also were interlocutory, and thus remain subject to revision under R.54(b), F.R.Civ P., making it possible for the Court to grant the relief now sought. In addition, plaintiffs seek a New Trial under R.59 F.R.Civ P. on the issue of conspiracy — by all defendants — to violate their First Amendment rights, and also request reinstatement and trial of their Equal Protection claim.

Plaintiffs believe they are entitled to a further trial because, in a loud, clear way — which remains of burning importance to the Salvation of the Republic, etc, as well as to the plaintiffs — the case is not finished. The occurrence of the violations complained of is established, but the roster of those responsible is not. The damages due plaintiffs to compensate them for violations which occurred (except for Darryl's arrest) have been determined; plaintiffs' entitlement to

punitive damages against these other responsible defendants who were not on trial has not been.

Also not determined is plaintiffs' legitimate, cogent, well-supported claim that all defendants, in their concerted, recalcitrant and unlawful failure to make any attempt to detect, arrest and prosecute those truly responsible for the bombing(s) — in aid of their dark purpose of smearing and 'neutralizing' plaintiffs, precisely because of their status as dissenters, and activists — denied plaintiffs Equal Protection of the Laws.

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 AGENTS, 403 U.S. 388, 392 (1971), QUOTING BELL V. HOOD, 327 U.S. 678, 684 (1946). It isn't right, and we say forever it's against the urgent Public Interest in a supposed Democracy, etc, as well as that of plaintiffs and their movement, to make them settle for half a loaf here, instead of the Whole Enchilada. The evident sense of impunity on the part of the FBI agents and their police co-operators, up to and including arrogation of the authority to fabricate evidence, lie to magistrates (and the Press), and let would-be murderers go free, obviously was not confined to those in lower ranks who carried out the evil design against Earth First! in the field; nor could it have lasted a day or an hour under honest, oath-observing supervisors in the positions of Held and Appel.

Similarly, defendant Mewborn at Headquarters was operating in an administrative structure which is nothing if not centralized and hierarchical — as witness recent revelations concerning the heedless HQ domination of field agents' work in Minnesota, and Phoenix, in the weeks prior to the terrorist attacks last year — and his interactions with other defendants operating in the forum state were extensive, regular and critical to the continuation of the evil enterprise he — and his superiors! — were thereby so much a part of. The demonstrated flow of his (their) written and telephonic assistance, approval and ratification of the actions in San

Francisco as the operation went along was easily enough to satisfy the long-arm rule— at least until contrary facts might be proven at a trial. And Patrick Webb, then chief of the amorphous FBI 'administrative squad' — who was called to Oakland to assist Reikes as the ranking agent at the bomb scene and then at OPDHQ, who Reikes said he relied on 'even more than Doyle' as a bomb expert, and who later as squad chief himself had the case file "re-organized", losing 20% of its contents in the process, after the lawsuit was filed — clearly affirmed his own knowing, concerted part in the FBI program, then and now, with both the substance and the attitude of his trial testimony, and clearly belongs in the case also.

Finally, defendants Hemje and Conway, while not directly involved in the FBI actions resulting in the False Arrest on the day of the bombing, were both part of the terrorist squad operation against Earth First!, before May 24 and for months thereafter, as the evidence also clearly showed. Just because their activities were not as central to the FBI plot against plaintiffs and Earth First!, or as patently illegal, doesn't mean their conduct was not importantly probative of the devious, illicitly political, evil intent behind FBI actions (and non-actions) in the case — and, critically, of conspiracy — *or that they could not reasonably have been found jointly liable for the First Amendment violations by the trier of fact*. Like the earlier dismissal of Webb, the Court's decision to exonerate Hemje and Conway took away more political depth of field from the evidence of the First Amendment violation — and their purposeful non-investigation is central to the Equal Protection claim, as well.

II.

Which brings us (back) to the conspiracy. The plaintiffs charged and, despite the limitations on their proofs complained of herein, pretty well proved at trial, that their First Amendment injuries resulted from a latter-day FBI "counterintelligence" initiative against Earth First! It arose first as a sequel to the THERMCON case in Arizona, when power lines were mysteriously and imitatively toppled in Santa Cruz County, late in April, 1990, advanced when

SA Sena came across "Ms.X" to purvey as a purported source "close to the leadership" of Earth First!, then escalated sharply as it homed in on plaintiffs when they were bombed. Although defendants Reikes and Sena vehemently denied it, the pretense that Earth First! was not the target of the Santa Cruz investigation was thoroughly demolished by the trial evidence showing the defendants' feverish reaction to the news of the bombing — keyed by the striking image of the squad chief Reikes dropping his fork and leaping up from his lunch, with hasty apologies to the high officials from Moscow with whom he was planning security arrangements for a visit to San Francisco by President Gorbachev, no less, to rush back and take personal charge of the FBI response to a car bomb in Oakland — which was already being covered by two or three other appropriate agencies, as well as several of his own agents — because Earth First!ers were involved; that is, because "counterintelligence" was afoot...

Indeed, as we've often said, it was as if the FBI was waiting around the corner when the bomb went off, holding their ears — although, paradoxically, they somehow never heard the faintest echo of the companion bomb in Cloverdale, two weeks before... Sena himself, the Santa Cruz case agent, was out the door immediately upon getting the word from the T-squad relief supervisor, SA Sachtleben — while defendant Doyle just happened to be "driving around the East Bay" in his Suburban, and thus also reached the scene forthwith — and a total of some 40 agents were ultimately mobilized that day, the files showed. Reikes himself stayed tied up with the case until 5:00 a.m. the next morning, before leaving on his weekend trip; helicopter pilots were mustered along with the other personnel, FBI headquarters was notified and kept up to date by phone — as were the defendant SAC and ASAC, in person, according to Sachtleben and Reikes — press statements were prepared, the physical evidence was brought into the FBI office and laid out on the SAC's conference table, etc, etc. Agent Sachtleben said he had to remain at the T-Squad command desk for 36 hours straight, to stay on top of this large-scale activity.

All this and more went to prove at trial that this was a high-powered, coordinated operation, working all available energies of the San Francisco FBI office, with oversight by

appropriate echelons at FBIHQ, and unmistakably commanding the attention — i.e. 'involvement', as a matter of law — of the whole chain of command.[1] The particular pretense that this was "any given investigation", on which defendant Held's bald and wholly dishonest denials of involvement depended entirely[2] — was shattered. Likewise, any notion that this enterprise, involving all the named FBI defendants and many others, could have gone forward without a Meeting of the Minds around the unlawful actions they took and the evil purpose behind them, was also dispelled.

At least the evidence in plaintiffs' Best Light shows this, and plaintiffs were entitled to an opportunity to persuade a Jury of it, and remain entitled, because the facts, by virtue of plaintiffs' good and ample evidence showing the higher-ups' involvement, were in dispute. The case that was tried obscured the true picture of what happened. The Juror who has spoken out reported several jurors were skeptical that the defendant officers and agents, out of concern for their jobs, would ever do such illegal and underhanded things. Plaintiffs were entitled to show there was no risk; this was official business, officially ordained and directed from the top, and the defendants were 'just doing their jobs'. Indeed, when the operational involvement of the agency is seen as

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[1] Meaning the law of supervisory liability for civil rights violations, which we (most recently) spelled out in our "Status Report and Motion for Revision of Orders", filed July 2, 2001, at page 4-6.

[2] See Order of 10/15/97, p.65. Etc

an organic whole, with each actor 'aware of the general purpose, and playing his individual part', the conspiracy is implicit.

The Court itself apparently believed it was not implicit but redundant, treating it as an afterthought, left dangling like an orphan at the end of the Verdict Form, with all needed explication refused or crabbed by the time constraint, and the whole later phase of phony investigation thoroughly undercut by the Rule 50 dismissal of Conway and Hemje. As a result, plaintiffs didn't get a full and fair trial of what the FBI really did and was trying to do, through its active policy with agents working on all levels, to the plaintiffs and Earth First! Even so, we clearly did convince the Jury that Reikes, Sena and Doyle were out to "neutralize" Judi and Darryl, in violation of the First Amendment; and the Court knows — or knows now — that didn't happen in a vacuum, or while the boss was on vacation, or asleep at the switch, period.

So by now, the Court should realize the decision to absolve Richard Held in advance was a mistake, and Headquarters equally so. Both involved pre-judgment of the facts, appearing to reflect not so much a healthy skepticism as a bout of serious denial with respect to the lurid truth about FBI political crimes. Be that as it may, the fact remains that a much larger and more serious wrong was done to plaintiffs, and a much greater and more scandalous and dangerous constitutional betrayal was committed by defendants, than the Jury was permitted to learn about; and this should be remedied now by trial of the remaining defendants and claims, before the case is taken to the higher court. Plaintiffs believe the Court can now see the fair basis they had for the case as it was originally conceived and presented (at least after the 'north county' defendants were dismissed in 1992), and move to rectify its earlier errors now, rather than multiply and extend the proceedings which must come in the future.

III

In the alternative, plaintiffs ask the Court to enter partial final judgment on these elements also, so the appeal(s) can encompass these questions as well as those the defendants

wish to raise about the trial and the verdict. Otherwise, these issues: dismissal of Held, Appel, Webb and Mewborn, and the Equal Protection claim, will still be pending when the matters now before it — including the quiescent false arrest claim — are otherwise laid to rest in one way or another. The Court has just had the occasion to study and pronounce itself upon the law relating to partial final judgment under Rule 54(b), and particularly the problem of multiple appeals and how to avoid them, in the Order of August 13, 2002. Without rehearsing the precedent discussed at that time, it seems clear that, where the judgment is otherwise all but complete — in that Darryl's 'undecided' claim will only survive the current proceedings if there is a remand — leaving the summary judgment matters hanging fire at this time would undo the finality the Court sought to establish, and generate the duplicate appeals it sought to avoid.

WHEREFORE, this honorable Court is respectfully but earnestly asked to revise its Orders of May 9 and October 15, 1997, by vacating the awards of summary judgment to defendants Richard W. Held, Edward J. Appel and Patrick J. Webb, and the dismissal of Horace Mewborn, reinstating them as defendants, and reinstating the plaintiffs' claim that the actions of all defendants violated their right to Equal Protection of the Laws under the Fourteenth Amendment; to vacate its Order of May 15, 2002, dismissing defendants Conway and Hemje under Rule 50; and to set the case down for trial of these matters, and trial or *pro tanto* re-trial of plaintiffs' conspiracy claim against all defendants.

In the Alternative, plaintiffs ask the Court to enter a finding that there is No Just Cause to delay the entry of final judgment on the dismissals of defendants Held, Appel, Webb and Mewborn, and of the Equal Protection claim, and to direct the entry of such judgment — or perhaps of an all-inclusive final judgment on all parties and claims in the case **except** for Darryl's false arrest claim — under Rule 54(b), F.R.Civ P. Plaintiffs pray also for such other and further relief as may prove just and appropriate in the premises.

Respectfully submitted,

DATED: September 6
as of Sept. 9, 2002.

Dennis Cunningham
Attorney for plaintiffs

CERTIFICATE

I certify that I served the within Memorandum on defendants by E-mail and FAX to the offices of R. Joseph Sher and Maria Bee in Washington and Oakland, respectively, on September 9, 2002.

Dennis Cunningham