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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

EDWARD W. HUNT, in his official capacity as District Attorney of Fresno County, and in his personal capacity as a citizen and taxpayer, et. al.,

Plaintiffs,

v.

STATE OF CALIFORNIA; WILLIAM LOCKYER, Attorney General of the State of California, et. al.,

Defendants.

CASE NO. 01CECG03182

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR CHANGE OF VENUE

Date: January 16, 2001
Time: 8:30 a.m.
Dept.: 98A

SUMMARY OF ARGUMENT

Defendants seek to change venue based on two arguments, neither of which has even the slightest merit.

First, defendants' argue that an impartial trial cannot be had in Fresno county. This argument fails:

1) for lack of any claim (much less a showing) that an impartial *court trial* cannot be had in Fresno County;

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SUMMARY OF ARGUMENT

Defendants seek to change venue based on two arguments, neither of which has even the slightest merit.

First, defendants' argue that an impartial trial cannot be had in Fresno county. This argument fails:

1) for lack of any claim (much less a showing) that an impartial *court trial* cannot be had in Fresno County;

2) because defendants have failed to even make the appropriate statutory motion – which is a motion to disqualify the entire Fresno bench, not a motion for change of venue;

3) because the specific bias argument offered by defendants is clearly wrong -- indeed, patently absurd -- since it would justify a change of venue in every Fresno case (criminal prosecution) filed by the plaintiff HUNT; and

4) because the motion is premature, no answer having yet been filed.

Second, Defendants' argue for change of venue based on witness convenience. This fails:

1) because their motion is premature, no answer having yet been filed;

2) because the convenience involved is that of defendants and their employees which cannot be considered as a basis of the motion;

3) because the records defendants cite are irrelevant and not a factor in the case; and

4) because defendants have failed to show that their motion serves the ends of justice by showing that their records are likely to be involved in the case.

Last, but scarcely least, Code of Civil Procedure section 401(1)[1] precludes the sham argument defendants have made which is, in truth, addressed only to their own convenience and that of their employees and witnesses. Section 401(1) is a legislative command that if plaintiffs sue a state defendant in a county where the AG has an office, their convenience "is an overriding consideration" against that of the state. (*Harris* v. *Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 759, 766 [18 Cal.Rptr. 151].)

ARGUMENT

I. THERE IS NO REASON TO BELIEVE THAT AN IMPARTIAL TRIAL CANNOT BE HAD IN FRESNO

1. Code of Civil Procedure Section 397 Puts the Burden of Proof On Defendants To Show Actual Prejudice To Justify A Change Of Venue. They Haven't.

[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

Defendants' motion is brought "pursuant to section 397(b) and (c) of the Code of Civil Procedure." (*Defendant's Notice of Motion and Motion To Change Venue*, page 1, line 6-7 (hereafter, Defendant's Motion).) Yet defendants' discussion begins by erroneously invoking section 394 as construed in *McCarthy* v. *Superior Court* (1987) 191 Cal.App.3d 1023 [236 Cal.Rptr. 833]. Defendants' motion is not, *and cannot be*, made under section 394. Section 394 applies to cases between counties and the state. The County of Fresno is not a party to this case. Only one plaintiff has any official position with the County, and he is not suing on behalf of the County.[2] As indicated in the *McCarthy* case, if this were a proper section 394 motion, the state's change of venue would be granted automatically and without showing any actual prejudice.[3] But C.C.P. section 394 is beside the point here, where defendants' motion is made under section 397.

On a section 397 motion, deference is accorded the *plaintiff's* choice of venue. "A plaintiff who has brought this action in the proper county will not be compelled to go elsewhere merely because all of the defendants prefer it." (*Peiser* v. *Mettler* (1958) 50 Cal.2d 594, 606 [328 P.2d 953].)

To overcome plaintiff's choice of venue, "[t]he burden rests on the party seeking change of venue to" affirmatively justify that change, both factually and legally. (*Buran Equipment Co.* v. *Superior Court* (1987) 190 Cal.App.3d 1662, 1666 [236 Cal.Rptr. 171].) To support a section 397 motion claiming an impartial trial cannot be had, the movant must "show actual prejudice . . . . [i.e., must] demonstrate a widespread feeling of prejudice [in that county] extending over a long time." (*Nguyen, supra*, 49 Cal.App.4th at 1791, and cases there cited.)

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[2] Plaintiff HUNT sues both in his personal capacities as a citizen and taxpayer and in his official capacity as a district attorney prosecuting *state* crimes under the Penal Code. In the latter capacity he acts on behalf of the state, not the county. (*Nguyen* v. *Superior Court* (1996) 49 Cal.App.4th 1781, 1787 [57 Cal.Rptr.2d 611], *Pitts* v. *County of Kern* (1998) 17 Cal.4th 340, 356 [70 Cal.Rptr.2d 823, 949 P.2d 920].)

[3] *McCarthy* v. *Superior Court, supra*, 191 Cal.App.3d 1023. See also *San Francisco Foundation* v. *Superior Court* (1984) 37 Cal.3d 285, 299 [208 Cal.Rptr. 31, 690 P.2d 1] ("A change of venue because of actual prejudice is within the purview of [C.C.P.] section 397, subdivision 2, not section 394.")

2. Defendants Have Made No Factual Showing Supporting The Theory Of Their Motion -- Which Theory Is Legally Dubious In Any Event.

Because this is a suit for equitable remedies in the form of injunctive and declaratory relief, plaintiffs have no right to jury trial. Therefore, defendants must provide convincing evidence that prejudice is likely "in a trial *by the court* rather than a jury." (*Nguyen, supra*, 49 Cal.App.4th at 1791, emphasis added.) But defendants' entire theory is that *jurors* are likely to be prejudiced by plaintiff HUNT's popularity as a long-time District Attorney, and his allegations of error by a state agency. Just as in *Nguyen, supra*, this theory fails to provide even an explanation, much less a showing, that prejudice is likely where the case will be tried by the court without a jury.

Indeed, it has been suggested that a section 397 motion does not lie in a case where there is no right to jury trial. (*Nguyen*, *supra*, 49 Cal.App.4th at 1791 quoting *San Francisco Foundation, supra*, 37 Cal.3d at 299 ["'The prospect of jury trial is extremely important, if not crucial, in determining whether "there is reason to believe that an impartial trial cannot be had" in the court where the matter is pending.'"])

Perhaps what defendants are really arguing is not juror bias but that the entire Fresno County bench is biased in favor of plaintiff HUNT – and against the defendants STATE OF CALIFORNIA, DEPARTMENT OF JUSTICE and the Attorney General. If so, we respectfully submit that the argument is absurd on its face. Moreover, if that is defendants' argument they have made the wrong motion and seek the wrong relief. The proper motion would be one to disqualify the entire Superior Court bench of Fresno County under Code of Civil Procedure section 170ff.

The fact that a local district attorney is a long-time and well respected local official could not justify a change of venue -- even as to bias by jurors, much less as to the county's entire bench. (See *Case Threshing Machine* v. *Copren Bros.* (1917) 35 Cal.App.70, 78 [169 P. 443] [the mere facts that defendant was popular in the county, and plaintiff was a foreign corporation, could not justify "an inference that an impartial jury cannot be called from the citizens of that county" -- inter alia because this "would include logically [disqualifying] the judge of the superior court"

from sitting on the case.].) If defendants are indeed arguing that the entire Fresno bench is prejudiced in favor of plaintiff HUNT, that argument is contrary to decisive authority (as well as absurd on its fact). (See *In re Marriage of Fenton* (1982) 134 Cal.App.3d 451, 457 [184 Cal.Rptr. 597] [wife's allegations that the entire Superior Court bench was biased in favor of her husband, a prominent attorney who had obtained bar association support for judges, did not show *personal bias* which showing is a requirement for disqualifying judges individually or as a group].)

If such a showing sufficed to disqualify either jurors or judges, every Fresno County criminal defendant would be entitled to a change of venue. (See *People* v. *Thomas* (1972) 8 Cal.3d 518 [105 Cal.Rptr. 366, 503 P.2d 1374] [fact that judge had within two years previously been an assistant district attorney was not basis to disqualify him].)

3. Defendants' Motion Is Premature, Having Been Made Before Their Answer Has Been Filed.

Though Code of Civil Procedure section 397 recognizes multiple bases for a motion for change of venue, neither ground on which defendants' motion relies may be raised prior to their filing an answer. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2000) ¶ 3:567, p. 133 and case there cited [the proposition that a venue motion based on witness convenience may not be made until "AFTER [the defendant's] answer."], see also 3 Witkin, California Procedure (4th ed. 1997) Actions, § 870, p. 1058 [a motion based on inability to obtain an impartial trial "may not be made until *an answer is on file*. . . ."]

Witkin also cites authority that such a motion does not lie until after an attempt has been made to pick the jury. (3 Witkin, California Procedure (4th ed. 1997) Actions, § 870, p. 1058.)

II. WITNESS CONVENIENCE AND THE ENDS OF JUSTICE WOULD NOT BE PROMOTED BY A CHANGE OF VENUE

1. Defendants Have Failed To Make Either Of The Showings Needed To Support Their Motion As To Witness Convenience

Though defendants attempt to gloss the matter over, Code of Civil Procedure section 397's provision for venue change on witness convenience grounds sets out *two* requirements, *both* of

which must be proved: "'It is not only necessary that the convenience of witnesses be served but it is equally essential that the ends of justice be promoted.'" (*Lieberman* v. *Superior Court* (1987) 194 Cal.App.3d 396, 400.) To the same effect see also, *Peiser* v. *Mettler*, *supra*, 50 Cal.2d 594, 606 and *Minatta* v. *Crook* (1959) 166 Cal.App.2d 750, 754 [333 P.2d 782].

As discussed below, defendants' purported showings on both issues are not only factually unsupported, but false and highly misleading as well.

2. The Only Witnesses Whose Convenience is Involved are Defendants' Own Employees -- Whom Plaintiffs Have No Intention of Calling to Testify.

In determining a venue motion based on witness convenience, "the court *may not* consider the convenience of the parties or their employees." (*Lieberman, supra*, 194 Cal.App.3d at 400, emphasis added.) To this there is an exception, which defendants purport to invoke: the convenience of defendants' employees may be considered if they "are called as witnesses by the adverse party, *rather than* on behalf of their employer." (*Id.*, emphasis added.) This exception does *not* apply when the party-employer itself intends to call them, even if the opposing party may also be calling them. (*Id.* at 403.)

Thus to establish the witness convenience element of their motion, defendants were required to *prove* two things:

1) that their employees are going to be called as witnesses by plaintiffs; and,

2) are not going to be called by defendants themselves.

As to 1) defendants offer only a bald, unsupported assertion to that effect in their memorandum of points and authorities. And the fact is that plaintiffs have no current intention of calling defendants' employees as witnesses. (See declaration of C.D. Michel filed herewith.)

Significantly, the only arguably admissible evidence submitted by defendants, the declaration of Randy Rossi, says nothing about either 1) or 2). To reiterate, 1) and 2) appear only in their memorandum. That declaration is not persuasive. "The declarations must be competent evidence. A change of venue cannot be based on affidavits consisting of hearsay and conclusions." (1 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter

Group 2000) ¶ 3:576.1, p. 135, and cases there cited.) A fortiori, a bald assertion in an unsworn memorandum does not suffice -- particularly as to a matter that is not shown to be within the knowledge of the person signing the memorandum.

Defendants' motion also fails in that it does not provide other information required to justify a convenience of witnesses motion, to wit: "The affidavits in support of the motion for change of venue on this ground must set forth the names of the witnesses, and the nature of the testimony expected from each . . . ." (*Peiser* v. *Mettler*, *supra*, 50 Cal.2d at 607, 1 Weil & Brown,1 Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2000) ¶ 3:576, p. 135).

As previously noted, defendants' burden is to *prove* everything required to factually and legally justify the motion.[4] One of those required proofs is inconvenience to witnesses whose convenience the court is permitted to consider.[5] As there has been a total failure to prove inconvenience to such witnesses, defendants' motion fails, even if it were not lacking in proof as to the other statutorily required element (that venue change would promote the ends of justice).[6]

3. Defendants' Discussion Regarding The Location Of Their Records Are Irrelevant to the Convenience of Witnesses, and Unpersuasive with Respect to Promoting the Ends of Justice.

None of the cases defendants cite support defendants' attempt to portray the location of their records as probative on the issue of witness convenience. Though cases have considered location of records, that goes to the other issue defendants are required to prove. As stated in one of defendants' own cases, *Minatta* v. *Crook*, *supra*, 166 Cal.App.2d at 755:

> The fact that a defendant's records are located in another county is *not relevant* to the question of the convenience of witnesses, but such facts may be considered on the question of whether the ends of justice would be served by making more

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[4] *Buran Equipment Co., supra*, 190 Cal.App.3d at 1666, *Lieberman, supra*, 194 Cal.App.3d at 400.

[5] *Lieberman, supra*, 194 Cal.App.3d at 400; see also the cases cited in defendants' own memorandum at p. 5:18-21.

[6] *Lieberman, supra*, 194 Cal.App.3d at 400, *Peiser* v. *Mettler*, *supra*, 50 Cal.2d at 606 and *Minatta* v. *Crook*, *supra*, 166 Cal.App.2d at 754.

expeditious the production of records. (Emphasis added.)

(Accord, *Thompson* v. *Superior Court* (1972) 26 Cal.App.3d 300, 308 [103 Cal.Rptr. 94].)

A crucial further defect of defendants' argument is the lack of any competent evidence -- or even an allegation -- that the records referred to would be trial exhibits, or are even relevant. Compare *Minatta*, supra at 753, citing the declaration of plaintiff's counsel that the records were vital to his case. The declaration they have submitted is just speculation.

This case involves regulations adopted under the Administrative Procedures Act (APA) based on administrative determinations which are for the most part reflected in *published*, public DOJ documents. Most of these are exhibits attached to the complaint. (NOTE: these file documents do refer to other materials on which the determinations were made. But those other materials are also published and accessible anywhere in the nation rather than just in Sacramento. See declaration of C.D. Michel submitted herewith.)

The validity of the regulations must be decided primarily based on the materials, records, etc., that DOJ specified as having been used by it in formulating the regulations.[7] Thus the existence of unspecified other records in Sacramento has no bearing on the issues in this case. Although some subset of the documents could conceivably be *discoverable* to opposing counsel (or to anyone filing a public records act request for that matter), this possibility does nothing to bear up defendants argument that the location of their records repository in Sacramento makes Fresno so inconvenient as to justify a change of venue. Even if this case were in Sacramento, discoverable documents would have to be sent to opposing counsel at their offices in Los Angeles, or wherever.

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[7] See, e.g. *McBail & Co.* v. *Solano County Local Agency Formation Commission* (1998) 62 Cal.App.4th 1223, 1227 [72 Cal.Rptr.2d 923] (Administrative decision must be based on stated basis and "the stated basis for the decision must have a rational connection to the purposes of the enabling statute."), *Boehm* v. *County of Merced* (1985) 163 Cal.App.3d 447, 432-33 [209 Cal.Rptr. 530] (regulations cannot be defended on basis of studies which the issuing board never examined in the course of formulating them), *California Association of Nursing Homes etc., Inc.* v. *Williams* (1970) 4 Cal.App.3d 800, 811, fn. 3 [84 Cal.Rptr. 590].

III. CONSIDERATION OF THESE DEFENDANTS' CONVENIENCE IS ABSOLUTELY PRECLUDED BY CODE OF CIVIL PROCEDURE SECTION 401(1)

For many years the Government Code dictated that suits against the state and state agencies-officers generally could only be brought in Sacramento. But since 1947, section 401(1) has provided that such suit may be brought in any county "where the Attorney General has an office." (See discussion in 3 Witkin, California Procedure (4th ed. 1997) Actions, § 780, p. 96-67.)

The only case construing section 401(1) emphasizes that it must be construed broadly to effectuate its remedial purposes, and cautions against "a curtailed application" which would not carry out those purposes fully. (*Harris, supra*, 197 Cal.App.2d at 763, 764.)

Harris identifies two purposes: first, to promote the convenience of plaintiffs who are suing the state or its agencies and officers; and second, to prevent concentration of such litigation in Sacramento.[8] Obviously, granting defendants motion would not advance these purposes, but rather would retard them. Courts should implement the legislative purpose by denying such a motion. (*Harris, supra*, 197 Cal.App.2d at 764-66.)

The disingenuous way in which the motion is presented cannot disguise its real purpose: to exalt defendants' convenience over that of plaintiffs. That is precisely what the Legislature has forbidden. *Harris* notes the inconvenience to residents of Marin or Monterrey Counties of having their cases against the state tried in distant Sacramento rather than nearer San Francisco, etc., etc. The court goes on:

> Many similar examples suggest themselves. It is unreasonable and even absurd to suggest that in the above situations residents from all over California must have their cases against state agencies tried in Sacramento when under [§ 401 they are privileged to select] . . . alternative forums nearer to their residence or place of business, more convenient for the conduct and preparation of their litigation and certainly involving less expense. *This may or may not result in additional expense for the defendant agency.* If it does, we think that the [Legislature's] offering of a new implement of venue [under § 401 (1)] . . . in line with the object and purpose of the statute, is *an overriding consideration.* (*Harris, supra*, 197 Cal.App.2d at 764-66, emphasis added.)

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[8] *Harris, supra*, 197 Cal.App.2d at 763 (purposes are to "promote the convenience of, and eliminate financial hardship for, litigants who would otherwise have to commence and try their cases in Sacramento and at the same time effect a decentralization of business in the public interest.").

Evidently, defendants disagree with section 401(1)'s preference of the convenience of plaintiffs suing the state over the convenience of such defendants. If so, defendants' arguments must be "addressed to the Legislature." Until it decides to revise or abolish the policies section 401(1) embodies, the judicial function is to effectuate those policies, not to "substitute its judgment for that of the Legislature." (*Board of Education* v. *Round Valley Teachers Ass'n.* (1996) 13 Cal.4th 269, 279 [52 Cal.Rptr.2d 115, 914 P.2d 193] and cases there cited.)

CONCLUSION

Because defendants' motion is both legally invalid and factually unsupported, it should be denied.

Date: January 3, 2002

TRUTANICH • MICHEL, LLP:

C. D. Michel
Attorneys for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Haydee Villegas, am employed in the City of San Pedro, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 407 North Harbor Boulevard, San Pedro, California 90731.

On January 4, 2002, I served the foregoing document(s) described as

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR CHANGE OF VENUE

on the interested parties in this action by placing
[ ] **the original**
[X] **a true and correct copy**
thereof enclosed in sealed envelope(s) addressed as follows:

Douglas J. Woods
Attorney General's Office
1300 "I" Street, Ste. 125
Sacramento, CA 94244-2550

__ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Pedro, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.

Executed on January 4, 2002, at San Pedro, California.

X (VIA OVERNIGHT MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.

Executed on January 4, 2002, at San Pedro, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

__ (FEDERAL) I declare that I am employed in the office of the member of the bar of this of this court at whose direction the service was made.

HAYDEE VILLEGAS