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IN THE UNITED STATES DISTRICT COURT

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FOR THE EASTERN DISTRICT OF CALIFORNIA

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FRESNO DIVISION

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**CENTRAL VALLEY CHRYSLER-JEEP,
INC.; et al.,**

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Plaintiffs,

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v.

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CATHERINE E. WITHERSPOON,

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Defendant.

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NO. CIV F-04-6663 REC LJO

**DEFENDANT'S OPPOSITION TO
PLAINTIFFS' MOTION FOR
RECONSIDERATION;
DECLARATION OF COUNSEL**

Date: November 28, 2005
Time: 1:30 p.m.
Courtroom: One
Judge: Hon. Robert E.
Coyle

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Plaintiffs' motion for reconsideration has no merit. Plaintiffs could have raised these issues at the hearing on the motion to dismiss. More importantly, Plaintiffs are wrong on the merits of their motion. As the Court is undoubtedly aware, defendants do have a right to compliance with local rules setting intra-district venue, and that right can be vindicated by the Court of Appeals. The Court's certification of this interlocutory appeal was entirely appropriate.

1 **I. PLAINTIFFS HAD AMPLE OPPORTUNITY TO RAISE**
2 **THESE ISSUES AT THE HEARING ON THE MOTION TO**
3 **DISMISS.**

4 While the Court, of course, has the inherent power to reconsider its prior orders
5 while a case is pending, *City of Los Angeles v. Santa Monica BayKeeper*, 254 F.3d 882, 885 (9th
6 Cir. 2001), Plaintiffs’ motion rests on the premise that they had no opportunity to present their
7 views on the propriety of this interlocutory appeal. This is demonstrably false. In fact, counsel
8 for defendant Witherspoon raised the issue of interlocutory appeal with Plaintiffs’ counsel five
9 days before the Court’s hearing. (Counsel Decl. (attached).) This issue was no “afterthought.”
10 Plaintiffs knew that defendant Witherspoon would raise this issue at the hearing, as counsel did.
11 Plaintiffs could have raised each of the arguments made in this motion for reconsideration at the
12 motion to dismiss hearing, on July 25, 2005, just as defendant Witherspoon raised the issue of
13 interlocutory appeal. Instead, despite defendant Witherspoon’s advance notice and raising of the
14 issue, Plaintiffs were *absolutely silent* on this issue. At the hearing, Plaintiffs said nothing about
15 the propriety of certifying this issue for interlocutory appeal. Plaintiffs did not take issue with
16 defendant Witherspoon’s suggestion that the Court certify an interlocutory appeal. Nor did
17 Plaintiffs request the opportunity to submit supplemental briefing on that issue. Most likely,
18 Plaintiffs were silent because they thought saying something would signal some doubt on the
19 merits of the venue issue. Now, Plaintiffs seek a second chance. But, usually, a party does not
20 properly raise an issue for the first time on reconsideration, unless there was good cause to not
21 raise it on the underlying motion. *Self-Realization Fellowship Church v. Ananda Church of Self-*
22 *Realization*, 59 F.3d 902, 912 (9th Cir. 1995). The Court should be resistant to Plaintiffs’
23 request.

23 **II. PLAINTIFFS’ ARGUMENTS HAVE NO MERIT, AND DO**
24 **NOT AFFECT THE COURT’S CERTIFICATION.**

25 As a basis for reconsideration, Plaintiffs basically argue two things: that there is
26 no requirement that intra-district venue be proper in the Eastern District of California, and that
27 any error in the application of this District’s local rule on venue is not subject to review on
28 appeal. Plaintiffs’ arguments ignore the state of the law on these points. That law supports

1 defendant Witherspoon’s request for permission to appeal the venue issue.

2 In arguing that intra-district venue need not be proper, Plaintiffs ignore the
3 statutory provision authorizing motions challenging venue:

4 The district court of a district in which is filed a case laying venue in the wrong
5 *division* or district shall dismiss, or if it be in the interest of justice, transfer such
6 case to any district or division in which it could have been brought.

7 28 U.S.C. § 1406(a) (emphasis added). It is simply inexplicable that Plaintiffs ignore this
8 provision in their motion for reconsideration,¹ as it was quoted in defendant Witherspoon’s
9 opening brief on the motion to dismiss (at page 12). By its plain language, this *statutory*
10 provision gives defendants a right to insist that both inter-district *and* intra-district venue be
11 proper. Defendant Witherspoon “has a right to invoke the protection which Congress has
12 afforded [her].” *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338, 340 (1953).

13 Plaintiffs also ignore the language in this Court’s local rules. Statute authorizes
14 courts to adopt local rules. 28 U.S.C. § 2071(a). *See also id.* § 137 (“The business of a court
15 having more than one judge shall be divided among the judges as provided by the rules and
16 orders of the court.”). Such local rules are treated as laws, just like statutory provisions. *U.S. v.*
17 *Hernandez*, 251 F.3d 1247, 1251 (9th Cir. 2001). This Court’s duly-adopted intra-district venue
18 local rule *requires* cases to be filed in particular divisions.² E.D. Cal. L.R. 3-120(d). This local
19 rule is not optional, but instead uses the phrase “shall be commenced.” *Id.* This provides
20 defendants with a right to insist on proper venue.

21 Contrary to Plaintiffs’ suggestions, the repeal of 28 U.S.C. section 1393 does not
22 diminish this right:

23 1. In their filing at the Ninth Circuit, Plaintiffs asserted that transfer is required
24 under 28 U.S.C. section 1406(a) *only* if the suit was filed in an improper district, citing *Santana*
25 *v. Holiday Inns, Inc.*, 686 F.2d 736, 737 n.1 (9th Cir. 1982). But *Santana* only talked about
26 districts because the parties were only arguing about which district was proper; divisions were
27 not at issue. 686 F.2d at 737. *Santana* certainly did not intend to write the words “division or”
28 out of 28 U.S.C. section 1406(a). Nor could it, consistent with principles of statutory
interpretation.

29 2. In contrast, the Texas trial court decision cited by Plaintiffs, *Says v. M/V David C*
Devall, 161 F.Supp.2d 752, 753 (S.D. Tex. 2001), involves no local rule requiring intra-district
venue to be correct. Rather, the defendant in that case cited only to statutory provisions
pertaining to inter-district venue. *Id.*

1 The repeal of § 1393 was not intended to act as a prohibition against districts
2 distributing their business by a divisional venue process, but as a removal of that
3 requirement in order to afford districts greater flexibility and freedom to
4 implement any process which would be effective in the distribution of their
5 business. If Congress had intended to prohibit divisional venue, they would not
6 have merely repealed the requirement of divisional venue, but would have
7 explicitly prohibited it. Since the repeal of § 1393 was not for the purpose of
8 prohibiting divisional venue, but rather not requiring it, a district can, if it
9 chooses, distribute its business through a divisional process such as Local Rule
10 15.

11 *Moysi v. Trustcorp, Inc.*, 725 F.Supp. 336, 339 (N.D. Ohio 1989) (cited in “Commentary on
12 1988 Repeal of § 1393” at 28 U.S.C.A. § 1393 (West 1993)). It would be a different outcome if
13 the Eastern District of California had not adopted an intra-district venue local rule. *See Bishop v.*
14 *C & P Trucking Co.*, 840 F.Supp. 118, 119 (N.D. Ala. 1993); *Jordon v. Bowman Apple Prods.*
15 *Co.*, 728 F.Supp. 409, 419 (W.D. Va. 1990). But the fact is that this District has set these
16 mandatory rules, as the Court is aware.

17 Plaintiffs’ second argument – that the Court’s order, even if contrary to its local
18 rule on venue, is not subject to review on appeal – fails for the same reasons that Plaintiffs’ first
19 argument fails. There is, in fact, a *statutory* provision that requires intra-district venue to be
20 proper. *See* 28 U.S.C. § 1406(a). And the local rules that set intra-district venue are ““laws of
21 the United States.”” *Hernandez*, 251 F.3d at 1251 (quoting *U.S. v. Hyass*, 355 U.S. 570, 575
22 (1958)). As the Court is aware, the issue that it certified for interlocutory appeal is a legal issue
23 – whether harm is a part of the calculus on venue. That is why the Court’s order qualifies for an
24 interlocutory appeal under 28 U.S.C. section 1292(b). The Ninth Circuit would review this legal
25 issue *de novo*. *See Koon v. U.S.*, 518 U.S. 81, 100 (1996) (“A district court by definition abuses
26 its discretion when it makes an error of law.”). That being said, as Plaintiffs assert, prejudice is
27 required for the failure to comply with a local rule to justify reversal. *Hernandez*, 251 F.3d at
28 1251. That is no different than any other rule of law, which also requires that the Court of
Appeals find prejudice for a error to be grounds for reversal.³ *E.g., Obrey v. Johnson*, 400 F.3d

3. It bears remembering that the question of whether reversal is justified is a
question for appeal – for the Ninth Circuit to decide if it grants permission to appeal and finds
error.

1 691, 699 (9th Cir. 2005). However, it should be self-evident that there is prejudice to having this
2 case heard in an improper venue – and for defendant Witherspoon for her, her staff, and her
3 counsel to have to travel the approximately 175 miles from Sacramento to Fresno for future
4 proceedings in this case. Review of a venue issue in a civil case always presents the same
5 obvious prejudice (the distance to the courthouse),⁴ such that many of the cases reversing
6 judgments – after trial or summary judgment – due to improper venue do not even discuss the
7 issue of prejudice.⁵ See *Olberding*, 346 U.S. 338 (finding violation of right to proper venue
8 sufficient for reversal); *Water West, Inc. v. Entek Corp.*, 788 F.2d 627 (9th Cir. 1986) (same);
9 *District No. 1 v. Alaska*, 682 F.2d 797 (9th Cir. 1982) (same). But see *Cottman Transmission*
10 *Sys., Inc. v. Martino*, 36 F.3d 291, 296-97 (3rd Cir. 1994) (discussing cases, including
11 *Olberding*, and finding prejudice); *Gogolin & Stelter v. Karn's Auto Imports, Inc.*, 886 F.2d 100,
12 104 (5th Cir. 1989) (citing *Olberding*, and finding no prejudice inquiry necessary). If prejudice
13 was not established by a plaintiff simply filing in an improper venue, or the distance to the
14 courthouse, then venue rulings would never be subject to review on appeal – since venue is
15 entirely collateral to the merits. Given the number of reported cases on venue, that cannot be the
16 rule.

17 Almost as an aside, Plaintiffs assert that an interlocutory appeal will delay this
18 Court's trial. This makes no sense. The Ninth Circuit and this Court can proceed in parallel. It

20 4. A showing of prejudice is not the same as a showing of inconvenience under 28
21 U.S.C. section 1404. The term “prejudice” is an abbreviated way of stating that a ruling
22 “affect[s] the substantial rights of the parties.” See 28 U.S.C. § 2111; Fed. R. Civ. P. 61; *Obrey*,
23 400 F.3d at 699. It is presumed that prejudice exists if error occurred. *Obrey*, 400 F.3d at 701.
24 If improper venue is sought, that does in fact affect substantial rights of the parties: “Venue
25 provisions deal with [a] right too important to be denied review.” *Pacific Car & Foundry Co. v.*
26 *Pence*, 403 F.2d 949, 952 (9th Cir. 1968). In contrast, to show enough inconvenience to justify
27 transfer from one proper venue to another, a defendant “must make a strong showing of
28 inconvenience to warrant upsetting the plaintiff's choice of forum.” *Decker Coal Co. v.*
Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986). This involves the court
exercising its discretion in looking at a number of private and public factors. *Id.* This is a
different, and much higher, standard.

5. In fact, as one Court has indicated, prejudice is even more evident when an
interlocutory appeal is sought (before trial occurs). See *Whittier v. Emmet*, 281 F.2d 24, 30-31
(D.C. Cir. 1960) (finding no prejudice because the party complaining of venue prevailed on the
merits on appeal).

1 would be reasonable to assume that, given the Ninth Circuit’s knowledge of the Court’s trial
2 date, this interlocutory appeal would be briefed and decided in the interim. The real delay in
3 resolution of this case would occur if a trial occurs in this Division, only to be remanded for re-
4 trial after reversal on the venue issue. This is precisely what defendant Witherspoon seeks to
5 avoid – and the Court recognized.

6 **III. THE COURT SHOULD NOT ADOPT PLAINTIFFS’ SELF-
7 SERVING PROPOSED FINDINGS OF FACT AND
8 CONCLUSIONS OF LAW.**

8 As an alternative, Plaintiffs request that the Court make formal, supplemental
9 findings of fact and conclusions of law. Nothing prevented Plaintiffs from making this request
10 when the Court heard the motion to dismiss, and Plaintiffs surely could have asked the Court to
11 allow them to submit such a proposed order at that hearing. Plaintiffs’ failure to do so does not
12 provide a basis for reconsideration that can be grounded in the requirements of Local Rule 78-
13 230(k). In any event, by rule, formal orders of this nature are not required on this issue:
14 “Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12
15” Fed. R. Civ. P. 52(a). Moreover, there is no indication that Plaintiffs’ self-serving
16 proposed findings of fact actually match the Court’s reasoning. Defendant Witherspoon suggests
17 that the Court need not review the proposed findings of fact and conclusions of law, and need not
18 revisit the parties’ arguments on the facts and on the admissibility of certain evidence. This
19 interlocutory appeal – if granted by the Court of Appeals – can proceed, without any further
20 explanation, on the legal issue of whether harm is part of the calculus on venue.

21 **CONCLUSION**

22 In deciding to grant an extraordinary writ on a venue issue, the Ninth Circuit
23 noted the importance of definitively deciding venue in a complicated case:

24 Venue provisions deal with [a] right too important to be denied review. Yet error
25 in denying change of venue cannot be effectively remedied on appeal from final
26 judgment. The purpose of the rule is to avoid the disruption, expense, and
27 inconvenience parties and witnesses must suffer by having the trial in an improper
28 forum. To require litigants to await final judgment for relief serves to defeat the
very purpose of the venue rule by requiring them to submit to the disadvantages
from which the rule is designed to relieve them. Once trial has been completed
damages cannot be collected for the extra expense suffered.

1 *Pacific Car*, 403 F.2d at 952 (footnote omitted). It was entirely appropriate for this Court to
2 have certified an interlocutory appeal.

3 Defendant Witherspoon respectfully requests that the Court deny the motion for
4 reconsideration.

5 Dated: November 11, 2005

6 Respectfully submitted,
7 BILL LOCKYER
8 Attorney General of the State of California

9 /s/ Marc N. Melnick
10 MARC N. MELNICK
11 Deputy Attorney General
12 Attorneys for Defendant
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1 **DECLARATION OF COUNSEL**

2 I, Marc N. Melnick, declare:

3 1. I am a Deputy Attorney General for the California Attorney General’s Office, and
4 am assigned to this matter. I am a member of good standing of the Bar of the State of California,
5 and this Court, and am entitled to practice in the courts of this State.

6 2. Attached is a true and correct copy of an email that I sent, on July 20, 2005, to
7 Andrew B. Clubok, counsel for Plaintiffs in this action, raising the issue of an interlocutory
8 appeal of the venue issue in this action. That email was also sent to Mr. Clubok’s co-counsel,
9 including Timothy Jones.

10 3. Between the time I sent the email and the Court’s hearing on the motion to
11 dismiss (held at 9:00 a.m. on July 25, 2005), I had at least two conversations with Mr. Clubok
12 about this issue. Mr. Clubok declined to agree that this issue should be certified for interlocutory
13 appeal, and I made it clear I would be raising the issue with the Court at the hearing.

14 4. I first learned of this motion for reconsideration a little less than an hour before I
15 received service of the motion from the Court’s electronic filing system. That was when Mr.
16 Clubok told me that Plaintiffs would be filing this motion.

17 I declare under penalty of perjury that the foregoing is true and correct. Executed on
18 November 11, 2005, in Oakland, California.

19
20 /s/ Marc N. Melnick
21 MARC N. MELNICK

22 90030221.wpd