

1 NO. _____

2
3 IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

4 SECOND APPELLATE DISTRICT

5 DIVISION _____

6 JAMES WARREN JONES, also known as
7 JIM JONES; PEOPLES TEMPLE OF THE
8 DISCIPLES OF CHRIST, a non-profit
9 corporation; ENOLA M. NELSON; HUGH
10 FORTSYN; and JAMES MC ELVANE,

11 Petitioners,

12 THE SUPERIOR COURT OF THE STATE OF
13 CALIFORNIA IN AND FOR THE
14 COUNTY OF LOS ANGELES,

15 Respondent,

16 [WADE B. MEDLOCK and MABEL M. MEDLOCK,

17 Real Parties In Interest.]

18 PETITION FOR WRIT OF MANDATE
19 AND

20 MEMORANDUM OF POINTS AND AUTHORITIES

21 Motion to Vacate the Judgment of the
22 Superior Court of the State of California in
23 and for the City and County of Los Angeles

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BB- 31-b-171

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8 DISCIPLES OF CHRIST, a non-profit)
corporation; ENOLA M. NELSON; HUGH)
FORTSYN; and JAMES MC ELVANE,)

9 Petitioners,)

10 vs.)

11 THE SUPERIOR COURT OF THE STATE)
12 OF CALIFORNIA IN AND FOR THE COUNTY)
OF LOS ANGELES,)

13 Respondent,)

14 [WADE B. MEDLOCK and MABEL M. MEDLOCK,)

15 Real Parties In Interest.])

16
17 PETITION FOR WRIT OF MANDATE
18 AND
19 MEMORANDUM OF POINTS AND AUTHORITIES

20 The Petitioners petition this Court for a Writ of
21 Mandate directed to the Respondent Superior Court In and For The
22 County of Los Angeles, and by this petition allege:

23 1. Beneficial Interest of Petitioners

24 The Petitioners are defendants in a cause which was
25 commenced in the Superior Court of the State of California in and
26 for the County of Los Angeles entitled WADE B. MEDLOCK and

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1 MABEL M. MEDLOCK, husband and wife v. JAMES WARREN JONES, also known
2 as JIM JONES; PEOPLES TEMPLE OF THE DISCIPLES OF CHRIST, a nonprofit
3 corporation; ENOLA M. NELSON; ENOLA M. NELSON REALTY; HUGH FORTSYN;
4 JAMES MC ELVANE, and FIRST DOE through FIFTIETH DOE, inclusive,
5 (Los Angeles County Superior Court No. C24-3292); and seek relief
6 from the Respondent Superior Court's order dismissing the Petition-
7 ers' motion for change of venue.

8 2. Capacity of Respondent

9 The Respondent is and has at all times mentioned herein
10 been a Superior Court of the State of California and was the
11 forum in which the Petitioners moved for a change of venue in the
12 aforesaid action No. C24-3292, WADE B. MEDLOCK and MABEL M. MEDLOCK
13 v. JAMES WARREN JONES and Others.

14 3. Beneficial Interest of the Real Parties In Interest

15 The Real Parties In Interest are and have at all material
16 times been the Plaintiffs in the aforesaid action No. C24-3292,
17 WADE B. MEDLOCK and MABEL M. MEDLOCK v. JAMES WARREN JONES and
18 Others.

19 4. Statement of Facts

20 On September 1, 1978 Petitioners filed a motion in the
21 Respondent Superior Court for a change of place of trial of the
22 aforesaid action No. C24-3292 entitled WADE B. MEDLOCK and MABEL M.
23 MEDLOCK v. JAMES WARREN JONES and Others on the grounds that,
24 pursuant to the provisions of the California Code of Civil
25 Procedure relating to the place of trial of civil actions, the
26 Respondent Superior Court in and for the County of Los Angeles

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1 was an improper court for the trial of the said action, and the
2 Superior Court of the State of California In and For the County
3 of San Francisco was and is a proper court. (Exhibit "A".)

4 On October 6, 1978 the Petitioners' said motion was heard
5 and dismissed by the Honorable Jess Whitehill, Judge Pro tem in
6 Department 88A of the Respondent Court. Notice of the Respondent
7 Court's order dismissing the Petitioners' motion was received by
8 the Petitioners on October 20, 1978.

9 5. Basis for Relief: By virtue of the provisions of the Califor-
10 nia Code of Civil Procedure relating to place of trial of civil
11 actions and the facts made known to the Respondent Court by the
12 Petitioners in their said motion for change of venue, the Respond-
13 ent Court erroneously determined that the Superior Court In and
14 For The County of Los Angeles is a proper forum for the trial of
15 the said action No. C24-3292.

16 Respondent Court has a clear and present judicial duty to
17 order that the place of trial of the said action No. C24-3292 be
18 changed from the Superior Court In and For the County of Los
19 Angeles to the Superior Court In and For The County of San Fran-
20 cisco by reason of §§ 395, 397, and 398 of the California Code of
21 Civil Procedure.

22 6. The Petitioners have performed all conditions precedent to
23 the filing of this petition by moving for a change of venue in the
24 Respondent Court on October 6, 1978, which motion was dismissed as
25 aforesaid.

26 7. This petition is made to this Honorable Court in the first

1 instance rather than to the Superior Court of the State of
2 California, County of Los Angeles, for the following reason,
3 namely, that pursuant to § 400 of the California Code of Civil
4 Procedure the appropriate and sole method of obtaining relief from
5 the Respondent Court's order denying their motion for change of
6 venue is by way of a petition to the Court of Appeal for the
7 district in which the Respondent Court is situated for a Writ of
8 Mandate requiring trial of the case in the proper court.

9 WHEREFORE, the Petitioners pray that:

10 1. An alternative Writ of Mandate issue under the seal of
11 this Honorable Court commanding the Respondent Superior Court
12 In and For The County of Los Angeles, its officers, agents, and
13 all other persons acting on its behalf or through its orders to
14 vacate its said order of October 6, 1978 dismissing the Petition-
15 ers' motion for change of venue and to order that the trial of the
16 said action No. C24-3292 between the Real Parties In Interest
17 herein as Plaintiffs and the Petitioners herein as Defendants be
18 transferred to the Superior Court of the State of California In and
19 For The County of San Francisco, or to show cause before this
20 Honorable Court at a time and place then or thereafter specified
21 by court order, why a peremptory writ should not issue;

22 2. That on the return of the alternative writ and the
23 hearing of this petition, this Honorable Court issue its peremptory
24 writ of mandate commanding the Respondent Superior Court, its
25 officers, agents and all other persons acting on its behalf or
26 through its orders to vacate its said order of October 6, 1978 and

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1 to order that the trial of the said action No. C-24-3292 be
2 transferred to the Superior Court of the State of California In
3 and For The County of San Francisco;

4 3. For such other and further relief as this Honorable
5 Court deems just and proper.

6 Dated: October 27, 1978

7
8 GARRY, DREYFUS, McTERNAN, BROTSKY,
HERNDON & PESONEN, INC.

9
10 By Charles R. Garry
11 CHARLES R. GARRY
12 Attorney for Petitioners

13 NEIL ROSENBAUM
14 Barrister of Gray's Inn
15 Attorney of New York and
16 Pennsylvania Bars
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 STATEMENT OF FACTS

3 On or about June 7, 1978 the Real Parties in Interest to
4 this petition filed a complaint in the Superior Court of the
5 State of California in and for the County of Los Angeles against,
6 inter alia, the Petitioners.

7 The said complaint alleges three causes of action. The
8 first cause of action is an alleged conversion by the Petitioners
9 and and an additional defendant, namely, Enola M. Nelson Realty,
10 of property owned by the Real Parties in Interest. The second
11 and third causes of action are alleged conspiracies by the Peti-
12 tioners, with the exceptions of Enola M. Nelson and Hugh Fortsyn
13 (in the third cause of action) intentionally to inflict emotional
14 distress and mental suffering on the Real Parties in Interest.

15 On September 1, 1978 the Petitioners filed a Notice of
16 Motion for Change of Venue in the Respondent Court. Filed with
17 the said Notice of Motion were: (1) a Memorandum of Points and
18 Authorities in Support of Motion for Change of Venue; (2) a Dec-
19 laration of Merits and Residence in Support of Motion by James
20 McElvane; and (3) a Declaration of Merits and Residence in
21 Support of Motion by June Crym, Treasurer of the Peoples Temple
22 of the Disciples of Christ (hereinafter referred to as the "Peoples
23 Temple"). James McElvane's said Declaration was filed in the
24 Respondent Court on September 26, 1978.

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1 On or about October 1, 1978 the Real Parties in Interest
2 filed "Plaintiffs' Points and Authorities in Opposition to Motion
3 for Change of Venue."

4 At about 9:00 a.m. on October 6, 1978 the Respondent Court,
5 The Honorable Jess Whitehill presiding, dismissed the Petitioners'
6 said Motion in the absence of counsel for the Petitioners.
7 (Counsel's absence was due solely to an unanticipated and un-
8 controllable delay in air transport connections between San Fran-
9 cisco and Los Angeles.)

10 Upon his appearance before the Respondent Court, Petition-
11 ers' counsel was informed by the Learned Judge that the said motion
12 had been dismissed on two grounds, namely, (1) that the Petition-
13 ers had made no showing that Enola M. Nelson Realty was not a
14 resident of Los Angeles County at the time the action was com-
15 menced, and (2) that James McElvane did not state that he was a
16 resident of San Francisco at the time the complaint was filed.

17 Petitioners' counsel made an oral motion to vacate the
18 Respondent Court's ruling on the ground that, by reason of the
19 matters aforesaid, he had had no opportunity for oral argument
20 in support of the said motion for change of venue. Counsel in-
21 vited the Respondent Court's attention to James McElvane's said
22 amended Declaration of Merits wherein McElvane stated that at
23 the time the action was commenced he was not a resident of Los
24 Angeles County.

25 Petitioners' Counsel further invited the Respondent Court's
26 attention to 5.10162 of the California Business and Professions

1 Code and contended that, pursuant to the provisions of that section,
2 the situs of the Defendant party Enola M. Nelson Realty was, on
3 the facts before the Respondent Court, not Los Angeles County,
4 but Guyana.

5 The Respondent Court denied Petitioners' Counsel's motion
6 to vacate its ruling, and augmented its reasons for so ruling
7 as follows: (1) that James McElvane's declaration that, inter alia,
8 Enola M. Nelson resided in Guyana was inadmissible hearsay; and
9 (2) that James McElvane was "involved" with Enola M. Nelson Realty
10 at the time of the alleged conversion.

11 The proceedings were not reported.

12 ARGUMENT

13 THE PETITIONERS DISCHARGED THEIR BURDEN OF SHOWING
14 THAT THE ACTION BROUGHT AGAINST THEM BY THE REAL
15 PARTIES IN INTEREST WAS NOT PROPERLY TRIABLE IN
16 LOS ANGELES COUNTY.

17 1. In the action brought against the Petitioners the Real
18 Parties in Interest, joined as Defendants four (4) identified
19 individuals (viz., James Warren Jones, High Fortsyn, Enola M.
20 Nelson, and James McElvane), one corporation (People's Temple)
21 and one party alleged in paragraph V.C of the Plaintiffs' Points
22 and Authorities in Opposition to Motion for Change of Venue to
23 constitute an unincorporated association for purposes of deter-
24 mining venue.

25 2. The county in which the Defendants or some of them
26 reside at the commencement of the action is the proper county for
the trial of the action: California Code of Civil Procedure, §395.

1 Where a corporation is joined as defendant in an action,
2 the county in which the corporation has its principal place of
3 business is also a proper county for the trial of the action:
4 California Code of Civil Procedure, § 395.5.

5 A similar rule applies to an unincorporated association,
6 if it has filed a statement designating its principal office
7 pursuant to Corporations Code § 24003: Ibid., §395.2.

8 In relation to corporations and unincorporated associations
9 the California Code of Civil Procedure §395.5 further provides
10 that an action may properly be tried in the county in which tort
11 liability arises.

12 However, when a plaintiff brings an action against several
13 defendants, both individual and corporate (or an unincorporated
14 association), in a county which is neither the residence nor the
15 principal place of business of any defendant, an individual has
16 a right upon proper showing to a change of venue to the county
17 of his residence, even though venue as initially laid may other-
18 wise be justifiable on the ground that liability in tort is
19 alleged to have arisen there: Mosby v. Superior Court, 43 Cal.App.
20 3d 219, 117 Cal. Rptr. 588.

21 Consequently where Plaintiffs sue both individual defendants
22 and a corporation and/or an unincorporated association, venue is
23 restricted to (a) counties in which the individual defendants are
24 resident, (b) counties in which the corporate defendant has its
25 principal place of business, and (c) the county in which the
26 unincorporated association has its principle place of business,

1 provided such association comes within the terms of § 395.2 of
2 the Code of Civil Procedure.

3 3. The First Cause of Action.

4 The first cause of action in the said complaint alleges
5 liability for conversion against individual defendants, a corpora-
6 tion, and a party alleged to constitute an unincorporated associa-
7 tion. By reason of the matters aforesaid, the action may properly
8 be tried in Los Angeles County only if that County was, at the
9 time the said action was commenced, the residence of at least
10 one of the individual defendants or the principal place of business
11 of the People's Temple, or the principal place of business of Enola
12 M. Nelson Realty, if, as a matter of law, Enola M. Nelson Realty
13 constituted an unincorporated association for purposes of deter-
14 ming venue.

15 4. Residence of Individual Defendants at Commencement
16 of Action.

17 None of the four said individual defendants was, at the
18 material time, a resident of Los Angeles County.

19 On September 18, 1978 Petitioner James McElvane declared
20 under penalty of perjury and as a matter of his own knowledge
21 that at the time the said action was commenced James Warren Jones,
22 Enola M. Nelson and Hugh Fortsyn were not residents of Los Angeles
23 County. McElvane's Declaration was filed in the Respondent Court
24 on September 26, 1978 and was before the Learned Judge at the
25 hearing of the Petitioners' motion for change of venue.

26 ///

1 The Respondent Court expressly omitted to take the said
2 Declaration into account in deciding the Petitioners' Motion on
3 the erroneous ground that McElvane's said declaration as to the
4 residence of Jones, Nelson and Fortsyn was inadmissible hearsay.
5 The Learned Judge gave no reasons for excluding the said declara-
6 tion as inadmissible hearsay.

7 By statute, an affidavit or declaration under penalty of
8 perjury may be used upon a motion: C.C.P. § 2009.

9 In respect of a motion for a change of venue,

10 "There is no statutory requirement of an
11 affidavit of residence. [But] C.C.P. 3966 provides
12 that the court may order a change of venue if, 'upon
13 the hearing,' it 'appears' that the action was brought
14 in the wrong county. Perhaps the defendant may make
15 his entire showing by oral testimony or exhibits.
16 But the practice is to file an affidavit or affidavits
17 showing that the moving defendant is a resident of the
18 County to which transer is sought, or is not a resi-
19 dent of the County in which the suit is brought."
20 Witkin, California Procedure, (2d Ed.) Vol. 2, § 539,
21 p. 1359.

22 Accordingly, if the Respondent Court based its ruling that
23 McElvane's said declaration was inadmissible hearsay on the ground
24 that residence or non-residence cannot properly be proved by
25 affidavit (or declaration), then, for the foregoing reasons, the
26 Respondent Court's ruling was in error.

Further or alternatively, if the Respondent Court based
its ruling on the ground that James McElvane declaration was in-
admissible hearsay insofar as it related to defendants other than
heimself, then the Respondent Court was again in error.

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1 The Supreme Court of California has held that "one defendant
2 in a personal action may make an affidavit as to the residence of
3 all the defendants for their benefit on a motion for change of
4 place of trial of the action; and such an affidavit is sufficient
5 where it states that the residence of all the defendants was at
6 the time of the commencement of the action and ever since has
7 been in the county to which it is sought to move the action, even
8 though the affidavit does not contain the negative averment that
9 the defendants do not reside in the county where the action was
10 brought." Stone v. Stone, 203 Cal. 197.

11 Moreover, "An affidavit showing that all defendants were
12 residents of a particular county is prima facie proof of that
13 fact in the absence of any denial or contrary proof." Fielder v.
14 Superior Court of Shasta County, 213 Cal.App.2d 60.

15 The Real Parties in Interest have not at any time denied
16 that Petitioners James Warren Jones, Hugh Fortsyn, and Enola
17 M. Nelson were not residents of Los Angeles County at the time
18 this action was commenced.

19 The Petitioners concede that the Real Parties in Interest,
20 in Paragraph VI of their "Points and Authorities in Opposition
21 to Motion for Change of Venue," deny that Petitioner James McElvane
22 was not resident of Los Angeles County at the material time,
23 notwithstanding his said declaration to the contrary; but, to
24 the Petitioners' knowledge and belief, the Real Parties in Interest
25 have made no more than a bare denial, and at no time did they
26 adduce before the Respondent Court any evidence to substantiate

1 their bare assertion that at the material time James McElvane
2 was, in fact, a resident of Los Angeles County. No counter-affi-
3 davits were filed by the Real Parties in Interest; nor, despite
4 their assertion that "at the hearing herein [they] will present
5 proof" that McElvane was a resident of Los Angeles County, and
6 the Real Parties in Interest present such proof. Alternatively,
7 if such proof was presented to the Respondent Court at the hearing
8 of the Petitioners' motion, the record of the Respondent Court,
9 as known to the Petitioners, is silent about it, and it was, in
10 any event, presented in the absence of the Petitioners' counsel.
11 Accordingly, the Petitioners were denied any opportunity to deal
12 with such alleged proof.

13 By reason of the matters and authorities aforesaid, the
14 Petitioners respectfully submit that the burden of showing non-
15 residence in Los Angeles County of each of the four said indivi-
16 dual Defendants to this action was duly and sufficiently discharged
17 at the time the Petitioners' motion for change of venue was heard
18 by the Respondent Court, and that the Respondent Court therefore
19 erred in its ruling as to the residence(s) of Petitioners Jones,
20 Fortsyn, Nelson and McElvane at the commencement of this action.

21 In the Petitioners' respectful submission, the Respondent
22 Court erred if, insofar as it denied the Petitioners' Motion for
23 Change of Venue on the ground of residence in Los Angeles County
24 of any of the said individual Defendants.

25 ///

26 ///

1 5. Principal Place of Business of People's Temple at
2 Commencement of Action.

3 If, at the accommencement of the said action, the principal
4 place of business of The People's Temple (a non-profit corporation)
5 had been Los Angeles County, then pursuant to 5.395.5 of the
6 California Code of Civil Procedure, that county would be a proper
7 place for the trial of the action.

8 At all material times, however, the principal place of
9 business of The People's Temple was San Francisco County. Proof
10 of this fact was filed by the Petitioners in the Respondent Court
11 on September 1, 1978 in the form of a Declaration under Penalty
12 of Perjury executed on August 28, 1978 by June Crym, Treasurer of
13 the People's Temple.

14 To the Petitioners' knowlege and belief, the Real Parties
15 in Interest did not dispute this fact at the hearing of the said
16 motion. The Dismissal of the Petitioners' motion appears not to
17 have been based upon the principal of business of The People's
18 Temple.

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1 6. The Status for Venue Purposes of Enola M. Nelson Realty.

2 (a) If, at the material time, Enola M. Nelson Realty
3 had been a corporation with its principal place of business in
4 Los Angeles County, then Los Angeles County would be a proper
5 place for the trial of this action: California Code of Civil
6 Procedure, Sec. 395.5.

7 Enola M. Nelson Realty was not, however, a corporation
8 at the time of commencement of this action or at any time. The
9 Real Parties in Interest have not disputed that fact. Accordingly
10 venue in Los Angeles County cannot validly be based on Sec. 395.5
11 of the said Code.

12
13 (b) If, at the time of commencement of this action,
14 Enola M. Nelson Realty had been an unincorporated association
15 which had "filed a statement with the Secretary of State pursuant
16 to Section 24003 of the Corporations Code listing its principal
17 office in this state," then the county in which Enola M. Nelson
18 Realty had its principal office would be a proper place for
19 trial of the action: California Code of Civil Procedure,
20 Sec. 395.2.

21 For purposes of this Petition, the Petitioners concede
22 that the principal office of Enola M. Nelson Realty was situated
23 in Los Angeles County. Nevertheless:

24 "Section 395.2 does not apply unless the
25 association ... has filed a statement
26 designating its principal office in this
State (in accordance with the) procedure
for filing such a statement (as) prescribed
by Corporations Code, Sec. 24003." 14 West's
Annotated California Codes, Code of Civil Procedure
Sec. 395.2, p. 329.

1 In the absence of such a statement an unincorporated
2 association is not recognized as a jural entity for purposes
3 of determining venue and may therefore be sued only in those
4 counties where the plaintiff can sue the individual members of
5 the association: Juneau Spruce Corp. v. Int'l. Longshoremen's
6 Union, 37 Cal.2d 760, 235 P.2d 607 (1951).

7 Therefore, even if contrary to the Petitioners'
8 contention, Enola M. Nelson Realty were an unincorporated as-
9 sociation between Petitioners and McElvane within the meaning
10 of Sec. 395.2 of the Code of Civil Procedure, by reason of the
11 matters set out in this paragraph and in paragraph 4 hereinabove
12 (relating to the residences of Enola M. Nelson and James McElvane),
13 Enola M. Nelson Realty could not properly be sued in Los Angeles
14 County, since no evidence has ever been produced, nor any
15 suggestion ever made, by the Real Parties in Interest that
16 a statement designating principal office in California was
17 filed on behalf or in respect of Enola M. Nelson Realty prior to
18 the commencement of this action.

19 Accordingly, even if, contrary to the Petitioners'
20 contention, Enola M. Nelson Realty were an unincorporated
21 association within the meaning of Sec. 395.2, venue in Los
22 Angeles County would be improper.

23
24 (c) Further or in the alternative, "Enola M. Nelson
25 Realty" is not an association at all, but merely a trade name
26 under which Petitioner Enola M. Nelson conducts the real estate

1 brokerage business of which she is the sole proprietor and in
2 which she is the sole participant.

3 Paragraph 4 of the complaint of the Real Parties in
4 Interest alleges no more than that Petitioner McElvane was at
5 the material time a licensed real estate salesman doing business
6 for, inter alia, Enola M. Nelson Realty. In Paragraph V of their
7 Memorandum of Points and Authorities in Opposition to Motion
8 for Change of Venue the Real Parties in Interest contend that
9 their allegations in said paragraph 4 are sufficient to establish
10 that Enola M. Nelson Realty "is an organization of two or more
11 persons (i.e. Enola M. Nelson and James McElvane) and an
12 association within the meaning of Section 395.5 of the Code of
13 Civil Procedure."

14 In the Petitioners' respectful submission, the said
15 allegations are insufficient for such purposes. Even if, which
16 has not been admitted by the Petitioners, James McElvane was
17 "doing business as a salesman for ... Enola M. Nelson Realty"
18 at the material time, that fact would not bring Enola M. Nelson
19 Realty within the ambit of the terms "unincorporated association"
20 or "organization" as those terms have been construed by the
21 Appellate Courts of this state.

22 The Supreme Court of California has held that the usual
23 meaning of the term "association" is

24 "an unincorporated organization,
25 composed of a body of men partaking
26 in its general form and mode of
procedure of the characteristics of
a corporation." In re Irwin's Estate,
327 P. 1074, 196 C. 366.

1 The Court of Appeal subsequently applied the abovesaid
2 definition and noted that the term "association" "is often used
3 as synonymous with 'company' or 'society.'" Law v. Crist, 107 P.2d
4 953, 41 C.A.2d 862.

5 The Petitioners submit that, even assuming the
6 allegations made in said paragraph 4 of the said complaint to be
7 true, the Respondent court could not reasonably have concluded
8 as a matter of legal construction that Enola M. Nelson Realty
9 was an unincorporated association at the material time.

10 The Respondent Court must, however, have assumed or
11 concluded that Enola M. Nelson Realty was an unincorporated
12 association (or a corporation) in order to have dismissed the
13 Petitioners' motion on the ground, inter alia, that the defendants
14 made no showing that Enola M. Nelson Realty was not a resident
15 of Los Angeles County at the time the action was commenced.

16 By reason of the matters aforesaid, the Respondent
17 Court erred in its ruling that venue in Los Angeles County was
18 proper by virtue of the location in Los Angeles of Enola M.
19 Nelson Realty's brokerage office.

20
21 7. The Petitioners respectfully submit that with regard to the
22 first cause of action the Respondent Court could not
23 reasonably have found any ground for deciding that Los
24 Angeles County was a proper place of trial since:

25 (a) The Petitioners adduced sufficient admissible
26 evidence which established that none of the four named individual

1 Defendants was a resident of Los Angeles County at the material
2 time;

3 (b) The Real Parties in Interest did not dispute the
4 fact that at the material time the principal place of business
5 of the People's Temple was San Francisco County; and

6 (c) Enola M. Nelson Realty was either not an unincor-
7 porated association at all, or, if it was an unincorporated
8 association, it was not at the material time a jural entity for
9 purposes of determining venue within the ambit of Sec. 395.2
10 of the Code of Civil Procedure.

11 In the premises, the Respondent Court erred in its
12 ruling on the Petitioners' motion.

13
14 8. The Second and Third Causes of Action.

15 The second and third causes of action in the said
16 complaint allege liability for intentional infliction of emotional
17 distress and mental suffering against the People's Temple and
18 Petitioners Jones, McElvane and Fortsyn.

19 Petitioner Enola M. Nelson and Enola M. Nelson Realty
20 are expressly excluded as defendant parties to the second and
21 third causes of action. No allegations are made against
22 Petitioner Fortsyn in respect of the third cause of action.

23 9. Venue with Respect to the Second and Third Causes of Action.

24 Pursuant to Sections 395 and 395.5 of the Code of Civil
25 Procedure, the said second cause of action can properly be tried
26 in Los Angeles County only if at least one of the Petitioners

1 Jones, Fortsyn and McElvane was resident there when the action
2 was commenced, or if the principal place of business of the
3 People's Temple was in Los Angeles County at that time.

4 The said third cause of action can properly be tried
5 in Los Angeles County only if, at the material time, either
6 Petitioner Jones or McElvane resided there, or the People's Temple
7 had its principal place of business in that county.

8 (a) The Petitioners repeat the matters and authorities
9 set out in paragraph 4 hereinabove.

10 By reason of those matters and authorities, the
11 Petitioners submit that they duly and sufficiently discharged
12 their burden of establishing that at the time the said action
13 was commenced neither James Warren Jones, nor Hugh Fortsyn, nor
14 James McElvane was a resident of Los Angeles County. The
15 Respondent Court therefore erred in ruling that the residence(s)
16 of the said Petitioners were not shown to have been other than
17 Los Angeles County at that time and that for that reason the
18 Petitioners' motion for change of venue with regard to the
19 second and third causes of action must be denied.

20 (b) The Petitioners repeat the matters set out in
21 paragraph 5 hereinabove. The Petitioners properly and sufficiently
22 established at the hearing in the Respondent Court that the
23 principal place of business of the People's Temple was San
24 Francisco County at all material times.

25 In the premises, neither the second nor the third causes
26 of action can properly be tried in Los Angeles County. The

1 Petitioners are therefore entitled to a change of venue in
2 respect of those causes of action.

3
4 10. Joinder of Transitory Actions.

5 The instant action by the Real Parties in Interest
6 against the Petitioners is one in which three (3) transitory
7 counts or claims for transitory relief are joined. If, in such
8 cases, defendants are entitled to a change of venue to a residence
9 county in respect of any one count or cause of action, then a
10 motion to change venue as to the entire action will lie even
11 though the defendants may not be entitled to such change in
12 respect of other counts:

13 "When several causes of actions are alleged in
14 a complaint, a motion for change of venue must
15 be granted on all causes if defendant is entitled
16 to a change on any one." Quick v. Corsaro, 180 C.A.2d
17 831, 835; Johnson v. Superior Court, 232 C.A.2d 212, 217.

18 "... if in (an action joining several transitory
19 counts) the non-residence county in which the
20 action was commenced is improper venue with
21 respect to one of the counts, even though good
22 as to the rest, the entire action will be
23 transferred on motion to the county of a
24 defendant's residence..." Chadbourn, Grassman, &
25 Van Alstyne, 1 California Pleading, S. 386, p. 349,
26 citing Pacific Bal. Industries v. Northern Timber,
118 C.A.2d 815, 259 P.2d 465; Crofts and Anderson v.
Johnson, 101 C.A.2d 418, 225 P.2d 594; Goosen v.
Clifton, 75 C.A.2d 44, 170 P.2d 104.

23 11. Since the Petitioners were entitled, by reason of the
24 matters set out in paragraph 9 hereinabove, to a change of
25 venue with respect to the second and third causes of action in
26 the said complaint, they were equally entitled to a change of

1 venue with respect to the entire action against them. The
2 Petitioners respectfully submit that this is so entirely
3 apart from the matters set out in paragraph 3 through 7,
4 inclusive hereinabove.

5 For these reasons, in addition to those set out in
6 paragraphs 3 through 7 hereinabove, the Respondent Court's
7 denial of the Petitioners' motion for a change of venue was in
8 error.

9 CONCLUSION

10 For the foregoing reasons, the Petitioners respectfully
11 urge this Honorable Court to grant a writ of mandate requiring
12 the Respondent Court to order that the trial of the instant
13 action be trasferred from Los Angeles County to San Francisco
14 County.

15 DATED: October 27, 1978

Respectfully submitted,

16 CHARLES R. GARRY
17 GARRY, DREYFUS, McTERNAN, BROTSKY,
18 HERNDON & PESONEN, INC.

19 By Charles R. Garry
20 CHARLES R. GARRY
Attorneys for Petitioners

21 NEIL ROSENBAUM
22 Barrister of Gray's Inn
23 Attorney of New York and
24 Pennsylvania Bars.
25
26

PROOF OF SERVICE BY MAIL---1013(a), 2015.5 C.C.P.

I am a citizen of the United States; my business address is 1256 Market Street at Civic Center, San Francisco 94102. I am employed in the City and County of San Francisco, where this mailing occurs; I am over the age of eighteen years and not a party to the within cause. I served the within

Petition for Writ of Mandate and
Memorandum of Points and Authorities

on the following person(s) on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at San Francisco, California, addressed as follows:

Timothy Oliver Stoen
120 Montgomery Street
Suite 1700
San Francisco, CA. 94104

Clerk of the Superior Court
of Los Angeles County
P. O. Box 151
Los Angeles, CA. 90053

I certify or declare under penalty of perjury that the foregoing is true and correct. Executed on October 27, 1978 at San Francisco, California.

Signature

BB-31-b-194

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COUNTY CLERK

CHARLES R. GARRY
GARRY, DREYFUS, McTERNAN, BROTSKY,
HERNDON & PESONEN, INC.
1256 MARKET STREET AT CIVIC CENTER
SAN FRANCISCO, CALIFORNIA 94102
TEL: 864-3131

Attorneys for Defendants
People's Temple of the Disciples
of Christ, a nonprofit corporation,
and James McElvane

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

WADE B. MEDLOCK AND MABEL M.
MEDLOCK, husband and wife,

NO. C243292

Plaintiffs,

vs.

JAMES WARREN JONES, also known
as JIM JONES; PEOPLES TEMPLE
OF THE DISCIPLES OF CHRIST, a
nonprofit corporation; ENOLA M.
NELSON; ENOLA M. NELSON REALTY;
HUGH FORTSYN; JAMES McELVANE; AND
FIRST DOE through FIFTIETH DOE,
inclusive,

NOTICE OF MOTION
FOR CHANGE OF VENUE
[CCP § 397(1)]

Dept: Law and Motion
Time: 9:00 A.M.
Date: October 6, 1978

Defendants.

TO EACH PARTY AND TO THE ATTORNEY OF RECORD FOR EACH PARTY:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE THAT on
October 6, 1978, at the hour of 9:00 A.M., or as soon thereafter
as the matter may be heard, in the Law and Motion Department of
the above-entitled Court, at 111 N. Hill Street, Los Angeles,
California, defendant James McElvane will move for an order
changing the place of trial of this action to the Superior Court

195
BB-31-6-195
-1- EXHIBIT "A"

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1 of the State of California in and for the City and County of CLERK
2 San Francisco.

3 Said motion will be based on this notice of motion, the
4 attached declarations under penalty of perjury of June Crym and
5 James McElvane, the attached memorandum of points and authorities,
6 such supplemental affidavits, declarations and memoranda of points
7 and authorities as may be filed subsequently herein, and such oral
8 and documentary evidence as may be presented at the hearing of this
9 motion.

10 Dated: August 28, 1978

11 GARRY, DREYFUS, McTERNAN, BROTSKY,
12 HERNDON & PESONEN, INC.

13 By Charles R. Garry
14 CHARLES R. GARRY
15 Attorney for Defendants
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CHARLES R. GARRY
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Attorneys for Defendants
People's Temple of the Disciples
of Christ, a nonprofit corporation,
and James McElvane

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

WADE B. MEDLOCK AND MABEL M.
MEDLOCK, husband and wife,

Plaintiffs,

NO. C243292

vs.

JAMES WARREN JONES, also known
as JIM JONES; PEOPLES TEMPLE
OF THE DISCIPLES OF CHRIST, a
nonprofit corporation; ENOLA M.
NELSON; ENOLA M. NELSON REALTY;
HUGH FORTSYN; JAMES McELVANE; AND
FIRST DOE through FIFTIETH DOE,
inclusive,

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR CHANGE OF VENUE
Department: Law & Motion
Time: 9:00 A.M.
Date: October 6, 1978

Defendants.

I. WHEN A PLAINTIFF BRINGS A TORT ACTION AGAINST SEVERAL
DEFENDANTS, BOTH INDIVIDUAL AND CORPORATE, IN A COUNTY WHICH
IS NEITHER THE RESIDENCE NOR THE PRINCIPAL PLACE OF BUSINESS
OF ANY DEFENDANT, NOR A COUNTY IN WHICH INJURY TO PERSON OR
PROPERTY OCCURRED, AN INDIVIDUAL DEFENDANT HAS A RIGHT TO A
CHANGE OF VENUE, EVEN THOUGH VENUE AS INITIALLY LAID MAY
OTHERWISE BE JUSTIFIABLE IN AN ACTION AGAINST THE CORPORATION

Griffin & Skelly Co. v. Magnolia & Healdsburg Fruit
Cannery Co., 107 Cal. 378 (1895)

Carruth v. Superior Court, 80 C.A.3d 215, 220 (1978)

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1 Mosby v. Superior Court, 43 C.A.3d 219, 226 (1974)

2 CCP § 395.

3 II. UNDER THE CIRCUMSTANCES OUTLINED IN SECTION I ABOVE, AN
4 INDIVIDUAL DEFENDANT IS ENTITLED TO A CHANGE OF VENUE TO THE
5 PRINCIPAL PLACE OF BUSINESS OF THE CORPORATE DEFENDANT.

6 United Pac. Ins. Co. v. Superior Court,
7 254 C.A.2d 897, 899 (1967)

8 Walker v. Wells Fargo Bank & Union Trust Co.,
9 24 C.A.2d 220, 222-223 (1937)

10 CCP § 395.

11 III. DEFENDANT McELVANE IS ENTITLED TO A CHANGE OF VENUE TO THE
12 CITY AND COUNTY OF SAN FRANCISCO BECAUSE NONE OF THE DEFEND-
13 ANTS ARE RESIDENTS OF LOS ANGELES AND NO INJURY TO PERSON OR
14 PERSONAL PROPERTY WITHIN THE MEANING OF CCP § 395 OCCURRED
15 WITHIN THAT COUNTY, AND BECAUSE SAN FRANCISCO IS THE PRINCIPAL
16 PLACE OF BUSINESS OF PEOPLE'S TEMPLE OF THE DISCIPLES OF
17 CHRIST AND THE COUNTY OF RESIDENCE OF JAMES McELVANE.

18 The complaint in the above-entitled action contains one
19 cause of action for conversion and two for infliction of emotional
20 distress. None of these causes of action are for injury to person
21 or personal property within the meaning of CCP § 395.

22 The words "injury to person or property" as used in
23 CCP § 395 are limited to physical or corporeal injury. California
24 courts have frequently held that conversion is not the sort of
25 injury encompassed by that phrase.

26 Spangenberg v. Spangenberg, 123 C.A. 387, 391 (1932)

Haurat v. Superior Court, 241 C.A.2d 330 (1966)

Thus, the first cause of action is not one for injury to person or
personal property within the meaning of CCP § 395.

Similarly, the courts have held that a cause of action for
infliction of emotional distress is not a cause of action for

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1 injury to person. This is true even where the complaint alleges
2 some physical injury.

3 Lucas v. Lucas Ranching Co., 18 C.A.2d 453 (1937)

4 The Court explained the rationale for this rule as follows:

5 ...the inspiration for the language we are
6 considering was the 'situation brought about
7 by the increasing use of motor vehicles.' In
8 motor vehicle accidents, as in other cases
9 where physical injury is directly caused by
10 what has happened, the injury occurs at the
11 place where the happening occurs, and there
12 is logic in having that place a proper one
13 for the trial. In an action such as plaintiff's,
14 however, the place where the injury occurs is
15 not the locale of the events which, ultimately,
16 cause the injury. She is injured not at the
17 site of the events, but, brooding over the
18 wrongs done her, at the place or places where
19 worry and loss of sleep finally take their toll.
20 No reason appears why an injury which has no
21 definite situs should be given potency in
22 determining the place of trial.

23 Id. at 456, quoted in Carruth, supra., at 219-220.

24 Thus, plaintiffs' allegations of emotional and physical distress
25 and injury in mind and body as a result of defendants' actions
26 are insufficient to bring the second and third causes of action
within the "injury to person or personal property" requirement of
CCP § 395.

Since none of the causes of action are for injury to person
or personal property, the action must be tried in the county of
residence or principal place of business of one of the defendants.

Griffin & Skilly Co., supra.; CCP § 395(a).

But none of the defendants resides in the County of Los Angeles.
See Declarations of Crym and McElvane. Therefore, defendant

TEL: 864-3131

1 McElvane's motion for change of venue to San Francisco, his resi-
2 dence and the principal place of business of defendant People's
3 Temple, must be granted.

4 In this case none of the causes of action is triable in
5 Los Angeles County. But it should be noted that defendant's
6 motion would have to be granted even if he was entitled to a change
7 of venue for only one of these causes.

8 Johnson v. Superior Court, 232 C.A.2d 212 (1965)

9 Sanborn v. Pomona Pump Co., 131 C.A. 241 (1933).

10 CONCLUSION

11 For all of the reasons stated above, defendant's motion for
12 change of venue must be granted.

13 Dated: August 28, 1978

14 Respectfully submitted,

15 GARRY, DREYFUS, McTERNAN, BROTSKY,
16 HERNDON & PESONEN, INC.

17 By Charles R. Garry
18 CHARLES R. GARRY
19 Attorney for Defendants
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