

1 Steven M. Strauss, State Bar No. 099153
2 Michael S. Levinson, State Bar No. 104155
3 Paul A. Tyrell, State Bar No. 193798
4 PROCOPIO, CORY, HARGREAVES
5 & SAVITCH LLP
6 530 B Street, Suite 2100
7 San Diego, California 92101
8 Telephone: (619) 238-1900
9 Facsimile: (619) 235-0398

6 Casey Gwinn, City Attorney
7 Anita M. Noone, Assistant City Attorney
8 James M. Chapin, Senior Deputy
9 California State Bar No. 118530
10 OFFICE OF THE CITY ATTORNEY
11 CIVIL DIVISION
12 1200 Third Avenue, Suite 1100
13 San Diego, CA 92101
14 Telephone: (619) 533-5800
15 Facsimile: (619) 533-5856

16 Attorneys for Defendant City of San Diego

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 FOR THE COUNTY OF LOS ANGELES

16 CHARGERS FOOTBALL COMPANY,
17 LLC, a California limited liability company,

18 Plaintiff,

19 v.

20 CITY OF SAN DIEGO, a municipal
21 corporation,

22 Defendant.

Case No. BC 306758

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
CITY OF SAN DIEGO'S MOTION
FOR TRANSFER OF VENUE TO SAN
DIEGO COUNTY AND REQUEST
FOR ATTORNEYS' FEES**

Date: January 16, 2004 (Reserved)
Time: 9:00 a.m.
Dept: 51
Judge: Hon. Irving S. Feffer

Complaint Filed: November 25, 2003
Trial Date: None Set

TABLE OF CONTENTS

	<u>Page</u>
1	
2	
3	I. INTRODUCTION 1
4	II. BACKGROUND..... 1
5	III. SUMMARY OF ARGUMENT..... 2
6	A. The Venue Statutes Do Not Authorize Venue in
7	Los Angeles County 2
8	B. The Chargers’ Reliance on Section 32(a) of the
9	Use Agreement is in Error 3
10	C. Transfer of this Action is Mandatory and Sanctions
11	are Warranted 3
12	IV. DISCUSSION..... 4
13	A. Los Angeles County is Not Proper Venue Under
14	Any Applicable Venue Statute 4
15	1. Under the General Rule, Venue is Proper
16	Only in San Diego County..... 4
17	2. Venue Outside the Defendant’s Home
18	County Requires Express Statutory Authorization..... 4
19	3. Under the Venue Rule for Obligations to
20	be Performed in a Particular County, Venue
21	is Only Proper in San Diego County 6
22	B. The Chargers’ Reliance on Section 32(a) for Venue is Improper 8
23	1. Section 32(a) is Completely Unrelated to Venue 8
24	2. California Law Does Not Allow Parties to
25	Contract Around Applicable Venue Rules 9
26	C. Transfer of Venue to San Diego County is Mandatory 11
27	D. The Court Should Award the City its Reasonable
28	Expenses and Attorneys’ Fees 11
	1. The City Made a Reasonable Offer to Stipulate
	to Change Venue 12
	2. The Chargers’ Venue Selection was not in Good Faith 12
	V. CONCLUSION 14

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

FEDERAL CASES

M/S Bremen v. Zapata Off-Shore Co.
(1972) 407 U.S. 1 10

STATE CASES

Arganbright v. Good
(1941) 46 Cal.App.2d Supp. 877 9

Black Diamond Asphalt, Inc. v. Superior Court
(2003) 109 Cal.App.4th 166 6

Brown v. Superior Court
(1984) 37 Cal.3d 477 2, 4, 5, 9

Buck v. City of Eureka
(1863) 97 Cal. 135 5

Forster v. Superior Court
(1992) 11 Cal.App.4th 782 5, 10

Gallup v. Sacramento & San Joaquin Drainage District
(1915) 171 Cal. 71 4, 5, 8

General Acceptance Corp. of California v. Robinson
(1929) 207 Cal. 285 3, 10

Kaluzok v. Brisson
(1946) 27 Cal.2d 760 5, 9, 10

Mission Imports, Inc. v. Superior Court
(1982), 31 Cal.3d 921 6, 11

Mosby v. Superior Court
(1974) 43 Cal.App.3d 219 5, 10

Nguyen v. Superior Court
(1996) 49 Cal.App.4th 1781 5

Perkins v. CCH Computax
(N.C. 1992) 423 S.E.2d 780 11

Skidmore v. County of Solano
(1954) 128 Cal.App.2d 391 4, 8

Smith v. Smith
(1891) 88 Cal. 572 9

Smith, Valentino & Smith, Inc. v. Superior Court
(1976) 17 Cal.3d 491 10, 11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(con't)

	<u>Page</u>
<u>Ventura Unified School District v. Superior Court</u> (2001) 92 Cal.App.4th 811	13
<u>Westinghouse Electric Corp. v. Superior Court</u> (1976) 17 Cal.3d 259	13
<u>Willingham v. Pecora</u> (1941) 44 Cal.App.2d 289, 293	13

STATE STATUTES

Code of Civil Procedure

Sections 392-403	10
Section 394(a).....	13
Section 395	4
Section 395(a).....	2, 3, 4, 5, 6, 8
Section 395.5	5
Section 396b(a).....	3, 11
Section 396b(b)	4, 11, 12

MISCELLANEOUS

Witkin, 3 <i>California Procedure</i> (4th ed., 2003 Supp.) Section 701	9
--	---

1 I.

2 **INTRODUCTION**

3 In this action, the *San Diego* Chargers football team is suing the City of *San Diego* over a
4 contract that was entered into in *San Diego* and to be wholly performed in *San Diego*. Pursuant to
5 California's long-established statutory venue rules, San Diego County is the only proper venue for
6 this action. Because this action was improperly filed in this court, this action must be transferred
7 to the Superior Court for the County of San Diego.

8 II.

9 **BACKGROUND**

10 As the Complaint makes clear, this case arises out of a contract between the City of San
11 Diego and the Chargers Football Company, LLC ("the Chargers"), owner of the San Diego
12 Chargers football team. The City and the Chargers¹ are parties to the 1995 Agreement for Partial
13 Use and Occupancy of San Diego Jack Murphy Stadium, as supplemented ("the Use
14 Agreement").² The Use Agreement provides that the Chargers must play their home games at
15 San Diego's Qualcomm Stadium (formerly Jack Murphy Stadium "the Stadium") until the year
16 2020 and pay roughly 10% of their gross stadium income to the City. In return for this long-term
17 commitment by the Chargers, the City spent more than \$78 million on stadium improvements and
18 a new Chargers practice facility.

19 The Use Agreement includes a "Renegotiation Rights" provision, Section 31, which
20 provides a right of renegotiation under certain limited circumstances known as a "Triggering
21 Event." On March 4, 2003, the Chargers delivered a Renegotiation Notice to the City, claiming
22 that a Triggering Event had occurred pursuant to Section 31. If the Chargers' claim of a
23 Triggering Event is correct, then the City and the Chargers are obligated to negotiate in good faith,
24 pursuant to Section 31, to "offset the impact on the Chargers" of the purported Triggering Event.
25 If good-faith negotiations fail to achieve an amendment that offsets the impact, then the Chargers
26 may take steps to terminate the Use Agreement and relocate to a new stadium in another city.

27
28 ¹ The Chargers are successors to Chargers Football Company, a California limited partnership.

² A copy of the Use Agreement is attached to and filed with the Chargers' Complaint as Exhibit 1.

1 However, if the Chargers' claim of a Triggering Event is wrong, then it is *not* necessary to
2 renegotiate the Use Agreement and the Chargers may *not* take any steps to terminate the Use
3 Agreement or relocate.

4 On November 25, 2003, the Chargers filed this action in Los Angeles County, seeking a
5 declaration that a Triggering Event has occurred and that the Chargers are entitled to exercise
6 rights under Section 31. The City will address the validity of the Renegotiation Notice at the
7 proper time and in the proper venue. However, this is not the time to address the merits of
8 Chargers' contentions, and this Court is not a proper venue under any legal theory. Because Los
9 Angeles County is the wrong venue for this action, this Court must transfer this action to San
10 Diego County and should order the Chargers' lawyers to reimburse the City for the expense of this
11 motion.

12. III.

13. SUMMARY OF ARGUMENT

14. A. The Venue Statutes Do Not Authorize Venue in Los Angeles County

15 California's general venue rule is set forth in Code of Civil Procedure section 395,³ which
16 creates a preference for trial in the county of a defendant's residence. Obviously, the City of
17 San Diego is not a resident of Los Angeles County, and San Diego County is the only proper venue
18 under the general rule.

19 Venue is only proper in a county other than the defendant's residence if there is express
20 statutory authority allowing venue elsewhere. (*Brown v. Superior Court* (1984) 37 Cal.3d 477,
21 483.) In this case, the only statutory authority capable of providing venue in some county other
22 than San Diego is the provision concerning actions upon contracts to be performed in particular
23 locations. (C.C.P. § 395(a).) That provision, contained within Section 395(a), provides that venue
24 in such an action may be proper in:

- 25 (1) the county in which the obligation is to be performed;
 - 26 (2) the county in which the contract was entered into; or
- 27

28 ³ Unless otherwise noted, all statutory references herein shall be to the Code of Civil Procedure ("C.C.P.").

1 (3) the county where the defendant or any defendant resides at
2 the commencement of the action. (C.C.P. § 395(a).)

3 Application of these tests to the undisputed facts relevant to this motion reveal that
4 San Diego County remains the only proper venue: the City “resides” in San Diego County; the Use
5 Agreement was made in San Diego County; and the Use Agreement was to be performed wholly in
6 San Diego. As such, the contract provision of Section 395(a) will not support venue in
7 Los Angeles County.⁴

8 **B. The Chargers’ Reliance on Section 32(a) of the Use Agreement is in Error**

9 The Chargers’ only stated basis for filing this action in Los Angeles County is
10 Section 32(a) of the Use Agreement. (Complaint, ¶ 7.) That provision states, in relevant part, as
11 follows:

12 The City and the Chargers covenant and agree to submit to the
13 **personal jurisdiction** of any state or federal court in the State of
14 California for any dispute, claim, or matter arising out of or related
15 to this Agreement. (Use Agreement, § 32(a), emphasis added.)

16 The Chargers’ reliance on Section 32(a) is improper for two reasons. First, that provision
17 has nothing to do with venue; its unambiguous language relates only to personal jurisdiction which
18 is a completely separate issue. Second, California law does not allow parties to contract around
19 the statutory venue rules. (See *General Acceptance Corp. of California v. Robinson* (1929) 207
20 Cal. 285, 289.)

21 **C. Transfer of this Action is Mandatory and Sanctions are Warranted**

22 Where an action is commenced in an improper venue, transfer of the action to the proper
23 venue is mandatory upon motion of the defendant. (C.C.P. § 396b(a).) Because San Diego
24 County is the only proper venue for this action, and because venue in Los Angeles County is not
25 proper under any theory, the Court *must* order this action transferred to San Diego County. Upon
26
27

28 ⁴ Tellingly, the Chargers’ Complaint lacks citation to any authority for its choice of venue, suggesting the Chargers’
recognition of their inappropriate venue selection.

1 granting this motion, the Court is authorized to award the City its expenses and attorneys' fees,
2 which must be paid by the Chargers' attorneys. (C.C.P. § 396b(b).)

3 IV.

4 **DISCUSSION**

5 **A. Los Angeles County is Not Proper Venue Under Any Applicable Venue Statute**

6 **1. Under the General Rule, Venue is Proper Only in San Diego County**

7 California's general venue rule is set forth in Code of Civil Procedure section 395
8 ("Section 395"), which creates a right to trial in the county of a defendant's residence. The general
9 rule is stated as follows:

10 Except as otherwise provided by law and subject to the power of the
11 court to transfer actions or proceedings as provided in this title, **the**
12 **superior court in the county where the defendants or some of**
13 **them reside at the commencement of the action is the proper**
14 **court for the trial of the action.** (C.C.P. § 395(a), emphasis
15 added.)

16 Within the meaning of Section 395, a municipal corporation "must be held to have its legal
17 residence in the county wherein it has its principal place of business." (*Skidmore v. County of*
18 *Solano* (1954) 128 Cal.App.2d 391, 393, fn. 2, quoting *Gallup v. Sacramento & San Joaquin*
19 *Drainage Dist.* (1915) 171 Cal. 71, 75.)

20 The Chargers admit in their Complaint that the City is a "a municipal corporation with its
21 principal place of business in San Diego County." (Complaint, ¶ 6.) Accordingly, the City
22 "resides" in San Diego County which, under the general rule of Section 395, is the *only* proper
23 venue for this action.

24 **2. Venue Outside the Defendant's Home County Requires Express**
25 **Statutory Authorization**

26 It is well established under California law that "a defendant is entitled to have an action
27 tried in the county of his or her residence unless the action falls within some exception to the
28 general venue rule." (*Brown, supra*, 37 Cal.3d at 483.) It is similarly well established that venue

1 rules are exclusively creations of statute. (*Ibid.*; *Buck v. City of Eureka* (1863) 97 Cal. 135, 139
2 [“The statute alone must be looked to for a definition of the right of a defendant as to the place of
3 trial of this action....”]; *Nguyen v. Superior Court* (1996) 49 Cal.App.4th 1781, 1786 [“The
4 Legislature determines where venue lies....”].) As stated by the Supreme Court:

5 The right of a defendant to have an action brought against him tried
6 in the county of his residence is an ancient and valuable right,
7 safeguarded by statute and supported by a long line of decisions.
8 **The right of a plaintiff to have an action tried in a county other**
9 **than that of the defendant’s residence is exceptional.** If the
10 plaintiff would claim such right, he must bring himself within the
11 exception. (*Kaluzok v. Brisson* (1946) 27 Cal.2d 760, 763, emphasis
12 added.)

13 Thus, a plaintiff’s right, if any, to trial in some county other than that of a defendant’s
14 residence is an exception to the general rule and requires “express statutory justification.” (*Forster*
15 *v. Superior Court* (1992) 11 Cal.App.4th 782, 789, citing *Brown, supra*, 37 Cal.3d at 483; *Mosby*
16 *v. Superior Court* (1974) 43 Cal.App.3d 219, 224.) The courts may not permit venue except in
17 accordance with the express venue statutes. (*Ibid.* [“We cannot – and should not – create a judicial
18 exception to the venue statutes.”].)

19 In this case, the only statutory authority capable of providing venue in some county other
20 than San Diego is the provision concerning actions upon contracts to be performed in particular
21 locations. (C.C.P. § 395(a).)⁵ As shown below, however, that provision does not authorize venue
22 in Los Angeles County under the facts of this case.

23
24
25
26 ⁵ Section 395.5 dictates the proper venue for actions against corporations, however, that statute is limited to private
27 corporations and does not apply to municipal corporations such as the City. (See *Buck v. City of Eureka* (1893) 97
28 Cal. 135, 138-139; *Gallup v. Sacramento & San Joaquin Drainage Dist.* (1915) 171 Cal. 71, 75.) Even if Section
 395.5 did apply here, application of its venue rules (providing that in a contract dispute, a corporation may only be
 sued in (1) its place of residence, (2) where the contract is made or to be performed, (3) where the obligation or liability
 arose, or (4) where the breach occurs – all of which are only in San Diego County) demonstrates that the only proper
 venue for this action is San Diego County.

1 3. Under the Venue Rule for Obligations to be Performed in a Particular
2 County, Venue is Only Proper in San Diego County

3 Venue for an action seeking only declaratory relief with respect to the obligations of a
4 contract is treated like any other contract action. (*Mission Imports, Inc. v. Superior Court* (1982)
5 31 Cal.3d 921, 930; *Black Diamond Asphalt, Inc. v. Superior Court* (2003) 109 Cal.App.4th 166,
6 170.) The Chargers' Complaint alleges a controversy between the Chargers and the City relating
7 to "their respective rights and duties under the Use Agreement." (Complaint, ¶ 23.) By the
8 explicit terms of the Use Agreement, it is a contract to be performed in San Diego County, as it
9 governs the parties' relationship with regard to the Stadium, which is located within the City of
10 San Diego in San Diego County. (Use Agreement at 1.) Therefore, venue may also be determined
11 pursuant to the rule for actions upon contracts to be performed in a particular county. (C.C.P.
12 § 395(a).)

13 Under Section 395(a), when a defendant has contracted to perform an obligation in a
14 particular county, trial of an action founded on the obligation is proper in:

- 15 (1) the county in which the obligation is to be performed;
16 (2) the county in which the contract was entered into; or
17 (3) the county where the defendant or any defendant resides at
18 the commencement of the action. (C.C.P. § 395(a).)

19 Unless there is a special written contract to the contrary, the county in which an obligation
20 is incurred is deemed to be the county in which it is to be performed. (C.C.P. § 395(a).)
21 Application of these statutory tests to the undisputed facts relevant to this motion demonstrates
22 that San Diego is, again, the only proper venue for this action.

23 First, San Diego County is the only "county in which the obligation is to be performed."⁶
24 By the express terms of the Use Agreement, all of the parties' obligations are to be performed in
25

26
27 ⁶ Because "the county in which an obligation is incurred is deemed to be the county in which it is to be performed,"
28 (C.C.P. § 395(a).), this aspect of the analysis is effectively subsumed in the question of where the Use Agreement was
entered into. Nonetheless, this analysis is provided to demonstrate that, no matter what the test, the only permissible
venue for this action is San Diego County.

1 San Diego County. (See Use Agreement §§ 3, 9, 11, 21, and generally.) Under the Use
2 Agreement, the parties' obligations to perform in San Diego County include the following:

- 3 • The City was required to spend \$60 million – later increased to
4 \$78 million – on improvements *to the Stadium* and construction of a new
5 Chargers practice facility *in San Diego*. (Use Agreement, § 3.)
- 6 • The Chargers are obligated to play all of their home games *at the Stadium in*
7 *San Diego*. (Use Agreement, § 7.)
- 8 • An “Attendance Guaranty” requires the City ensure minimum attendance
9 levels for Chargers games played *at the Stadium in San Diego*. (Use
10 Agreement, § 9.)
- 11 • The City is obligated to satisfy certain maintenance obligations *as to the*
12 *Stadium in San Diego*. (Use Agreement, § 11.)
- 13 • The Chargers are obligated to maintain certain books and records related to
14 ticket revenues, which “shall be kept or made available *in the City of*
15 *San Diego*.” (Use Agreement, § 21.)
- 16 • With regard to “[a]ny notice, demand, request, consent, approval and any
17 other communications” related to the Use Agreement, each party is required
18 to direct such notices, etc., to the other party *in San Diego*. (Use
19 Agreement, § 30.)

20 As shown by these examples, all of the obligations to be performed under the Agreement
21 are to be performed in San Diego County. Importantly, the Use Agreement does not call for either
22 party to perform any obligations in Los Angeles County or anywhere other than San Diego County.

23 Second, San Diego County is the “county in which the contract was entered into.” By its
24 express terms, the Use Agreement was “entered into as of May 30, 1995, at San Diego,
25 California....” (Use Agreement, p. 1.) Each of the four supplements to the Use Agreement
26 contains similar language on its first page, confirming that each was “made and entered into . . . at
27 San Diego, California.” (Exhibits 2, 3, 5 and 6 to the Complaint.) Thus, there it is established that
28 the Use Agreement was entered into in San Diego County.

1 Third, as noted above, the “the county where the defendant or any defendant resides at the
2 commencement of the action” is also San Diego County. As discussed above, and as the Chargers
3 admit in their Complaint, the City is a “a municipal corporation with its principal place of business
4 in San Diego County.” (Complaint, ¶ 6.) As such, the City resides in San Diego County.
5 (*Skidmore v. County of Solano, supra*, 128 Cal.App.2d at 393, fn. 2; *Gallup v. Sacramento etc.*,
6 *supra*, 171 Cal. at 75.)

7 Thus, the only proper venue under *any* of the criteria set forth in Section 395(a) is San
8 Diego County, and that provision does not support venue in Los Angeles County.

9 **B. The Chargers’ Reliance on Section 32(a) for Venue is Improper**

10 In a desperate attempt to escape the unambiguous statutory framework which limits proper
11 venue to San Diego County, the Chargers allege that Section 32(a) of the Use Agreement
12 somehow provides a basis for venue in Los Angeles County. The Chargers’ position in that regard
13 is wholly without merit. Section 32(a) does not relate to, or even mention, venue. Moreover,
14 California law does not allow parties to contract around the statutory venue rules.

15 **1. Section 32(a) is Completely Unrelated to Venue**

16 The Charger’s Complaint alleges that “[v]enue is proper in this Court pursuant to
17 Section 32(a) of the Use Agreement.” (Complaint, ¶ 7.) The falsity of that statement becomes
18 obvious upon reviewing the plain language of Section 32(a), which states, in its entirety, as
19 follows:

20 California Law. This Agreement shall be deemed to be made and
21 shall be construed in accordance with the laws of the State of
22 California. The City and the Chargers covenant and agree to submit
23 to the *personal jurisdiction* of any state or federal court in the State
24 of California for any dispute, claim, or matter arising out of or
25 related to this Agreement. (Use Agreement, § 32(a), emphasis
26 added.)

27 Section 32(a) has nothing to do with venue. It does not even *mention* venue. Rather, it
28 states that it provides for *personal jurisdiction* in the State of California. Jurisdiction and venue

1 are, of course, very different concepts. Indeed, the complaint itself explicitly recognizes the
2 difference between the two concepts. (Complaint, ¶¶ 6, 7.)

3 “Jurisdiction relates to the *power* of the court to act, and a court with that power may
4 render a valid judgment though it is not the court of the proper county for trial.” (Witkin,
5 *3 California Procedure* (4th ed., 2003 Supp.) Actions, § 701 at 892-893 [italics in original].)

6 Venue rules, on the other hand, serve to narrow geographically the place for trial. “Venue”
7 designates the particular county or city in which a court with jurisdiction may hear and decide the
8 case. (Black’s Law Dictionary (6th ed. 1990) at 1079, col. 2, *see also* Witkin, *3 California*
9 *Procedure* (4th ed., 2003 Supp.) Actions, § 701 at 892-893.) Venue rules are designed to give the
10 defendant some control in the choice of forum. (*Smith v. Smith* (1891) 88 Cal. 572, 576.) Venue
11 does not refer to jurisdiction at all. (*Arganbright v. Good* (1941) 46 Cal.App.2d Supp. 877, 878-
12 879.)

13 As noted above, “the right of a defendant to have an action brought against him tried in the
14 county of his residence is an ancient and valuable right, safeguarded by statute and supported by a
15 long line of decisions.” (*Kaluzok v. Brisson, supra*, 27 Cal.2d at 763; *see Brown, supra*, 37 Cal.3d
16 477.) The Chargers’ Complaint does not even attempt to explain how an unambiguous
17 *jurisdiction* clause could possibly create proper *venue* in Los Angeles County or otherwise abridge
18 such an “ancient and valuable right,” but whatever they may argue, they cannot and will not say
19 that Section 32(a) contains any express reference to venue or to Los Angeles County.

20 Simply stated, Section 32(a) has nothing to do with venue and does not provide a basis for
21 venue in Los Angeles County, or anywhere other than San Diego County.

22 **2. California Law Does Not Allow Parties to Contract Around Applicable**
23 **Venue Rules**

24 The impropriety of the Chargers’ effort to use Section 32(a) as a basis for filing this action
25 in Los Angeles County is further demonstrated by the absence of California authority allowing
26 parties to circumvent the statutory venue rules by way of contract.

27 As noted above, the applicable venue statutes dictate that the only proper venue for this
28 action is San Diego County. To establish proper venue elsewhere, the Chargers must be able to

1 demonstrate some “express statutory justification.” (*Forster, supra*, 11 Cal.App.4th at 789; *Mosby,*
2 *supra*, 43 Cal.App.3d at 223-224.) “If the plaintiff would claim such right, he must bring himself
3 within the exception.” (*Kaluzok v. Brisson, supra*, 27 Cal.2d at 763.) Thus, for the Chargers to
4 invoke Section 32(a) as a basis to create venue in Los Angeles County, there would have to be
5 some express statutory authority allowing private parties to contract around applicable venue laws.
6 (See *ibid.*) There is none.

7 California’s venue statutes *do not* authorize parties to contract around the state’s venue
8 rules. (See C.C.P. §§ 392-403.) Further, there are *no* reported California cases holding that a
9 private contractual provision can expand venue beyond the statutory framework set forth in the
10 Code of Civil Procedure. To the contrary, the California Supreme Court has *rejected* a contractual
11 provision that attempted to confer venue in a county that was not authorized by statute. (*General*
12 *Acceptance Corp. supra* 207 at 289.)

13 In this respect, it is important to distinguish cases interpreting “forum selection”
14 provisions, as the Supreme Court did in *Smith, Valentino & Smith, Inc. v. Superior Court* (1976)
15 17 Cal.3d 491, 495-496 where it approved of a “forum selection” provision. Indeed, in the leading
16 case on modern interpretation of “forum selection” provisions, *M/S Bremen v. Zapata Off-Shore*
17 *Co.* (1972) 407 U.S. 1, the United States Supreme Court expressly held that “[a] contractual
18 choice-of-forum clause should be held unenforceable if enforcement would contravene a strong
19 public policy of the forum in which suit is brought, whether declared by statute or by judicial
20 decision.” (*Id.* at 15.) Accordingly, although declining to follow *General Acceptance*, the *Smith,*
21 *Valentino* court expressly distinguished the venue selection clause in *General Acceptance* from the
22 forum selection clause at issue before it:

23 In the *General Acceptance* case . . . the parties had attempted to
24 specify the county in which contract disputes would be tried. We
25 held the contractual provision void since it would contravene general
26 statutory provisions which designate the proper counties in which
27 actions may be tried. **Forum selection clauses, in contrast, violate**

1 **no such carefully conceived statutory patterns.”** (*Smith,*
2 *Valentino, supra*, 17 Cal.3d at 495, emphasis added.)⁷

3 Therefore, the Chargers’ attempt to use Section 32(a) to lay venue in Los Angeles County
4 is ineffective for the additional reason that doing so would clearly contravene the applicable venue
5 statutes and violate the public policy favoring the right of trial at the defendant’s residence.

6 **C. Transfer of Venue to San Diego County is Mandatory**

7 If, as here, an action is commenced in an improper court, the defendant may move for
8 transfer to the appropriate court. Section 396b(a) provides that transfer is *mandatory* upon a
9 finding that venue is improper:

10 Upon the hearing of the motion [for an order transferring the action
11 or proceeding to the proper court] the court **shall**, if it appears that
12 the action or proceeding was not commenced in the proper court,
13 order the action or proceeding transferred to the proper court.
14 (Emphasis added.)

15 As discussed herein, San Diego County is the only proper venue for this action, and Los
16 Angeles County is *improper under any theory*. Therefore, the Court must order a transfer of the
17 action to San Diego County. (C.C.P. § 396b.)⁸

18 **D. The Court Should Award the City its Reasonable Expenses and Attorneys’**
19 **Fees**

20 Pursuant to Section 396b(b), this Court is authorized to order payment of reasonable
21 expenses and attorneys’ fees incurred in making a motion to transfer. In determining whether such
22 fees and costs are to be awarded:

23 . . . the court shall take into consideration (1) whether an offer to
24 stipulate to change of venue was reasonably made and rejected, and
25 (2) whether the motion or selection of venue was made in good faith
26

27 ⁷ See also *Perkins v. CCH Computax* (N.C. 1992) 423 S.E.2d 780, 782 [distinguishing *intrastate venue* clauses, which
contravene state venue statutes, from *interstate forum selection* clauses which are not governed by any state statute].

28 ⁸ Once the defendant has filed its motion for a change of venue, the trial court’s power to act in other regards in the
case is suspended until the motion is heard and decided. (*Mission Imports, supra*, 31 Cal.3d 921.)

1 given the facts and law the party making the motion or selecting the
2 venue knew or should have known. (C.C.P. § 396b(b).)

3 In this case, consideration of both of these criteria favor such an award to the City.

4 **1. The City Made a Reasonable Offer to Stipulate to Change Venue**

5 In a December 2, 2003 letter from Steven M. Strauss, Esq., counsel for the City, sent a
6 letter to the Chargers' counsel of record, Harriet S. Posner, Esq., requesting that the Chargers
7 stipulate to transfer venue to San Diego County. (Strauss Decl., ¶ 2, Exhibit 1.) Mr. Strauss' letter
8 further informed the Chargers' counsel that if the Chargers failed to stipulate to transfer venue to
9 San Diego, the City would bring a motion to transfer venue to San Diego and for reasonable
10 expenses and attorneys' fees pursuant to Section 396b. (Strauss Decl., ¶ 2, Exhibit 1.) The
11 Chargers' counsel refused to stipulate. (Strauss Decl., ¶ 3, Exhibit 2.)

12 **2. The Chargers' Venue Selection was not in Good Faith**

13 The Chargers' venue selection was nothing more than a blatant attempt at venue shopping.
14 The Chargers' lack of good faith under Section 396b(b) may be inferred from the absence of legal
15 or factual support for their decision to file this action in Los Angeles County. The Chargers'
16 Complaint fails to specify any statutory basis for their venue selection. (See Complaint, ¶ 7.)
17 Similarly, in rejecting the City's request for a stipulation to change venue, the Chargers' counsel
18 offered no reason and provided no additional facts or authorities to support the Chargers' choice of
19 venue, simply stating "with respect to your letter of yesterday, needless to say we disagree with
20 your claims about the propriety of Los Angeles as a forum for this case." (Strauss Decl., ¶ 3;
21 Exhibit 2.)

22 In addition, the letter from the Chargers' counsel confirms that the Chargers' venue
23 selection was an effort to avoid the proper venue, San Diego County. In rejecting the City's
24 proposal to stipulate to transfer this action to the proper county, the Ms. Posner stated as follows:

25 While we are prepared to consider alternatives to Los Angeles, we
26 are not willing, as you request, to stipulate to transfer the Action to
27 San Diego. (Strauss Decl., ¶ 3; Exhibit 2.)

28

1 Ms. Posner also expressed a clear desire to obtain venue anywhere but in the proper county,
2 and confirmed her disregard for the applicable venue statutes, stating that “the Chargers are
3 prepared to stipulate to transfer the Action to the Superior Court for either Orange County or San
4 Francisco.” (Strauss Decl., ¶ 3; Exhibit 2.) Of course, neither Orange County nor San Francisco is
5 a proper venue for this action.

6 The Chargers’ venue shopping is further demonstrated by public statements revealing the
7 improper underlying reasons for the decision to file this action in Los Angeles County. For
8 example, in a statement issued on the day this action was filed, the Chargers expressly stated that
9 the decision to file the Complaint in Los Angeles was motivated, in part, by the fact that Los
10 Angeles “is the location of the Chargers’ long time counsel.” (Strauss Decl., ¶ 4; Exhibit 3.)
11 Surely the Chargers and their attorneys know that convenience of counsel is *not* a permissible
12 consideration with regard to venue. (*Willingham v. Pecora* (1941) 44 Cal.App.2d 289, 293).

13 As a further demonstration of their venue shopping, the Chargers public statements suggest
14 that they chose not to file in the proper venue based on their perception that San Diego County is
15 not a “neutral” venue. (See Strauss Decl., ¶ 4; Exhibit 3 [referring to “a ‘neutral’ forum (other
16 than San Diego)”].) That is also an improper basis for venue selection. A party seeking a neutral
17 county in an action brought by a city⁹ must proceed under Section 394(a), which does not apply
18 here, since the Chargers – owners of the *San Diego* Chargers football team – have their principal
19 place of business in San Diego County. (*Westinghouse Elec. Corp. v. Superior Court* (1976) 17
20 Cal.3d 259, 266.) Further, Section 394(a) is a removal statute which is only applicable to actions
21 commenced in a proper court. (*Ventura Unified School Dist. v. Superior Court* (2001) 92
22 Cal.App.4th 811, 814.) The Chargers’ unfounded claim of bias is not a good faith basis for filing
23 this action in the wrong venue.

24 Because the City made a reasonable effort to stipulate to transfer before filing this motion,
25 and because the filing of this action in Los Angeles County was not in good faith, the City should
26 be awarded its reasonable expenses and attorneys’ fees incurred in making this motion, in the
27 amount set forth in the accompanying declaration of Steven M. Strauss.

28 _____
⁹ Section 394 does not apply for the additional reason that this action was not brought by the City, but by the Chargers.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

V.

CONCLUSION

For all the foregoing reasons, the Court should grant the City's motion to transfer venue to San Diego County, order this action transferred to the Central Division of the Superior Court for the County of San Diego and award the City its reasonable expenses and attorneys' fees incurred in connection with this motion.

DATED: December 5, 2003

PROCOPIO CORY HARGREAVES
& SAVITCH LLP

By: Steven M. Strauss

Steven M. Strauss
Michael S. Levinson
Paul A. Tyrell
Attorneys for Defendant,
City of San Diego