Moskovitz on Writing Winning Appeals and Writs

Reference Materials
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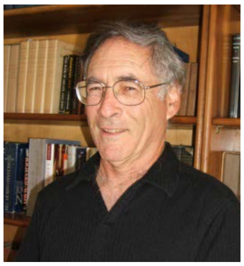

Myron Moskovitz has taught several thousand lawyers how to write winning briefs and argue their appeals effectively. He graduated from the University of California, Berkeley, School of Law and then served as a law clerk to Justice Raymond E. Peters of the California Supreme Court. He practiced law for several years, and then became Professor of Law at Golden Gate University, where he taught Constitutional Law and Advanced Appellate Practice. During this time he handled and consulted on hundreds of appeals in state and federal courts, including the California and United States Supreme Courts. He can be contacted at myronmoskovitz@gmail.com or (510) 384-0354. Website: MoskovitzAppellateTeam.com.

<u>Materials</u>
for
CEB
Program on

WINNING APPEALS & WRITS

February, 2017
<u>Presenter</u>: Myron Moskovitz, Esq.

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MYRON MOSKOVITZ

Myron Moskovitz graduated from Boalt Hall as a member of Law Review and Order of the Coif. He then served as a law clerk to Justice Raymond E. Peters of the California Supreme Court. He practiced law for several years, and then became Professor of Law at Golden Gate University, where he taught Constitutional Law and Advanced Appellate Practice.

During this time, he has handled and consulted on hundreds of appeals in state and federal courts, including the California and United States Supreme Courts. When representing appellants, he has obtained reversals in over 70% of his cases (while the average reversal rate is below 20%).

He has taught several thousand lawyers how to write winning briefs and argue their appeals effectively.

He is a Member of the California Bar, and is also admitted to practice before the United States Supreme Court, the United States Courts of Appeal for the Second and Ninth Circuits, and the U.S. District Courts for the Northern, Eastern, and Central Districts of California. He has handled cases in all of these courts.

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Excerpts from

MOSKOVITZ ON APPEAL
LexisNexis, 2015

PART I: HOW TO WIN

Chapter 1: The Key

The Great Myth

"I'm right on the law, so I'm sure to win my appeal." This is The Great Myth. Young lawyers don't know better; experienced lawyers should know better. But every appellate lawyer falls for the Myth at one time or another.

Appellate judges are just as human as the jurors and judge who nailed your client in the trial court. If there was something that annoyed the lower court about your case or your client, it will probably bother the higher court too. Appellate court judges are not automatons who mindlessly look up the law and mechanically apply it to your case. They want to "do justice". If the established law gets in the way, they will try to find a way to get around the law. If the judge believes that your client sexually molested and killed a child, you will have a tough time getting a reversal just because the police violated his *Miranda* rights – no matter how clear the law seems to be.* The court's opinion might twist the facts a bit, ignore the cases, or come right out and change the law, but one way or another, a court that *wants* you to lose will probably find a way to make you lose.

This is the key to winning most appeals: convince the appellate judges that ruling against your client would be *unjust*.

It's really that simple. Like jurors or trial court judges, appellate court judges want to do the right thing. Indeed, they pride themselves on their sense of justice. As they see it, doing justice is their business.

But it's not that simple. A lot goes into "justice." Judges would like to do justice for the parties, but sometimes that wish is trumped by their obligation to do justice to *something else*, such as the democratic system, by deferring to another branch of government that has values different from those of the judges. And because the court is writing precedent, the judges want to adopt a rule that achieves justice for *other* people that might be affected by this precedent.

If you have this eye for justice, you'll go a long way. You'll have a better chance of finding injustice in the appellate record and presenting it forcefully. It's amazing how successful a lawyer with this sense of justice can be, even without the best writing and oral skills.

But writing, organization, and oral skills matter too. So this book will include many pointers in these areas. They support – but never supplant – the need to focus on the key: a sense of justice.

* It can happen, however – at least temporarily. See *Brewer v. Williams* 430 U.S. 387 (1977), where the Supreme Court reversed just such a conviction – over some outraged dissents. But "justice" eventually prevailed: the Court later invoked the "inevitable discovery" doctrine to uphold the conviction anyway. See *Nix v. Williams*, 467 U.S. 431 (1984).

Two Ways to Win

There are two ways to win appeals. First, screen out the losers. Second, win the winners. The two ways are related. They are based on the same principles and insights.

When someone asks me to handle an appeal, I tell them I'll take the case in two stages.

First, I'll examine the record and then advise the person *whether* to appeal. This requires me to determine whether the record includes the ammunition I need to convince the appellate justices to reverse. More than half the time, I can't. I'm a good advocate, but I'm not good enough to convince an appellate justice that Hitler was a just a misunderstood saint – not with his record. I can't win without the ammo. If it isn't there, the case is a loser. How can I tell? I step into the shoes of the Deciders and consider how *they* would view the same record.

The trial court record is fixed. I'm not allowed to add new evidence into the record. Determining the likelihood of success on appeal depends on whether that trial court record permits me to write a winning brief. So *whether* to appeal and *how* to appeal are really based on the same principles.

Only if we get past the first stage do I move on to the second stage: arguing the appeal.

Think Strategically and Creatively.

Three themes dominate this book.

First, think constantly about how the appellate judge would see the case and your brief.

Second, think *strategically* about everything you do. Every case citation, every word, and every comma should contribute to persuading the court. Don't do anything automatically or just because other lawyers usually do it that way.

Third, be *creative*. The court's rules place very few limits on what you can do. Each case is different. If you get a new idea about how to make this brief more persuasive, check the rules to see if it is barred. If it isn't, and if it's not offensive in some way, do it.

This book will give you some tips that you might find useful. But the book will help you even more if it inspires you to come up with your own ideas about new ways to win.

HOW TRIAL LAWYERS CAN HELP APPELLATE LAWYERS WIN

By Myron Moskovitz

I handle appeals and writs. I'm pretty good at it, but I can't change the trial court record. I'm stuck with the one you create. Whether I win depends a lot on the record you give me.

Here are some things you can do to help me.

1. Order a court reporter for every hearing.

    Due to budget cuts, the days when the court provided and paid for a court reporter are over. Now the parties must both (1) arrange for a court reporter to appear, and (2) pay her. To avoid this expense, some lawyers simply dispense with a court reporter.

    If the case is worth more than a few bucks, don't dispense. Winning an appeal without a transcript is very difficult. All presumptions will be against us. We can ask our opponent for an "agreed statement", but why should he help us undo his victory? We can try to get a "settled statement" from the trial court, but why should she help us get her reversed.

    And order a court reporter for *every hearing*, not just the trial testimony. Often a judge will say something at a hearing on a motion that I can use either to attack or to support her ruling. Help me out by getting her statements on the record.

    If a case is worth trying, it's worth getting a court reporter. You want to keep open the possibility of appealing. Pay for the reporter to be there – but you don't need to pay for a transcript if you win in the trial court and don't need to appeal.

    And here's an added bonus: A court reporter might make the trial judge pay more attention to the law and the evidence. Some trial judges feel free to "take liberties" with the law or the facts if they see no court reporter, as they know that – if there's no transcript – it is very unlikely that an appellate court will ever review what they do.

2. Don't waive your rights. Get your objections to evidence and motions clearly on the record. Appellate courts like to avoid dealing with issues by deeming them waived. Don't make me fight that one.

3. Get a ruling. Sometimes in the heat of the argument, the judge “forgets” to give a clear ruling. Or an issue is discussed and ruled on in the judge’s chambers, with no court reporter. Insist on a ruling in open court, where a court reporter can put it in the record.

   If it’s not on the record, it’s tough for me to complain about it on appeal.

4. Make an offer of proof. Often one of my hardest jobs is showing that an error was *harmful*, i.e., that the result would have been different had the error not occurred. Help me out by making a clear offer of proof when an objection to your evidence is sustained. Tell the court what your evidence *would* have shown – and how it was relevant to the issues in the case.

5. If you’re winning, make the trial court look *good*. Don’t instinctively fight against everything your opponent wants. If the trial court is about to overrule your opponent’s objection to your evidence or deny your opponent’s motion for something, think carefully about whether the court is right. If you’re not sure, consider withdrawing your opposition. Don’t make me defend a defenseless position on appeal.

6. If you’re losing, make the trial court look *bad*. If the draft statement of decision against you is poorly reasoned, don’t automatically object to the poor reasoning. Why give the judge a chance to fix it? I might be better to just leave it alone. It’s much easier for me to get a lousy statement reversed than a good one.

   Attorneys often believe they can use objections to a proposed statement of decision to talk the judge into changing his mind about who wins. But I’ve yet to see that happen. So long as the draft statement of decision covers all issues, you don’t waive any rights on appeal by declining to argue that the court got it wrong.

   And the reverse is true. Suppose the draft statement of decision is in your favor and your opponent files objections. Rather than file knee-jerk oppositions to each one, ask the judge to redraft the statement of decision to take into account each objection that might have some merit. This might take the air out of what might have become your opponent’s best arguments on appeal.

Appeals turn on the trial court record. Make it a good one.

Note: The following brief was successful, resulting in a reversal of the trial court's summary judgment. See *Uthe Technology Corp. v. Aetrium, Inc.*, 808 F.3d 755 (9th Cir. 2015).

No. 13-16917

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UTHE TECHNOLOGY CORPORATION,

Plaintiff-Appellant,

v.

AETRIUM, INC.
AND HARRY ALLEN,

Defendants-Respondents.

On Appeal from the United States District Court for the Northern District of California, No. 3:95-CV-02377 (Honorable William H. Alsup, District Judge)

BRIEF FOR PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure section 26.1, Plaintiff-Appellant UTHE Technology Corporation identifies Crestek, Inc. as the corporation or any publicly held company that owns 10 percent or more of any class of UTHE Technology Corporation's equity interests.

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CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant certify the following:

1. The full name of every party or amicus represented in this appeal is:

UTHE Technology Corporation.

2. The full name of the real party in interest represented by the undersigned in this appeal is:

UTHE Technology Corporation.

3. The names of all parent corporations and any publicly held companies that own 10 percent of the party represented are: Crestek, Inc.

4. The names of all law firms and the partners or associates that appeared in the district court or are expected to appear in this appeal for Plaintiff-Appellant are:

TAYLOR & COMPANY LAW OFFICES, LLP: Joshua R. Benson

LAW OFFICES OF MYRON MOSKOVITZ: Myron Moskovitz

MORRISON & FOERSTER LLP: Harold J. McElhinny

EDWARDS WILDMAN PALMER LLP: Clifford Judd McCord, Heather H. Harrison and Michael Dockterman

LAW OFFICES OF ROBERT YIN PONG CHAN: Robert Yin Pong Chan

ROPERS MAJESKI KOHN & BENTLEY: Walter C. Kohn

/s/ Joshua R. Benson
Joshua R. Benson

Dated: March 20, 2014

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A SUMMARY OF THIS BRIEF

Plaintiff (P) sues D1 and D2 for conspiring to steal P's customers and destroying P's business. P alleges that this constituted racketeering under RICO, and seeks the treble damages allowed by RICO.

Over P's objection, P's case against D2 is stayed while P's case against D1 is sent to arbitration. The arbitrator awards $9 million against D1, to compensate P for his loss. D1 pays the $9 million to P.

P then continues his suit against D2, seeking the remainder ($18 million) of the treble damages provided by RICO. Does D1's payment defeat P's suit against D2 for the additional $18 million?

"Yes," held the district court—because P has already recovered a "vast sum of money," "a remarkably huge sum," "leaving no point in continuing the litigation against the remaining defendants."

That is what happened in this case. But no language in the RICO statute deprives P of his right to treble damages merely because compensatory damages have been paid. And the district court's "Yes" threatens to undermine Congress's intent. If a racketeer manages to have the compensatory damage award paid before the trial on the treble damage claim, the district court's "Yes" would allow him to escape Congress's key deterrent to such racketeering: treble damages.

This is an issue of first impression in this Court, but the weight of authority from other circuits is contrary to the district court's view.

That, in a nutshell, is why the district court's ruling should be reversed.

STATEMENT OF RELATED CASES

The undersigned certifies that, as of this date, there are no such related cases to report.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331 and §1332, because the action involves a federal question, and because the parties are diverse and the matter in controversy exceeds $75,000.

The district court granted Appellees' motion for summary judgment on September 9, 2013 (ER 2), and issued judgment on September 13, 2013 (ER 1). That judgment is a final judgment disposing of all the parties' claims.

On September 23, 2013, Plaintiff timely filed notice of appeal from the summary judgment order and final judgment. ER 10. This Court has jurisdiction to hear this appeal under 28 U.S.C.A. § 1291, which provides that:

"The courts of appeals … shall have jurisdiction of appeals from all final decisions of the district courts . . . ."

STATEMENT OF ISSUE

Did the district court commit reversible error by granting summary judgment against Plaintiff's treble damage claim under RICO solely on the ground that Plaintiff was paid the compensatory damages award, where the evidence showed a triable issue of fact justifying an award of treble damages under the RICO statute?

PRIMARY AUTHORITY

18 U.S.C. §1964, subsection I provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

STATEMENT OF THE CASE

This saga spans two decades and the Pacific Ocean.

A. The Original Complaint

It began in 1993, when Appellant Uthe Technology Corp. (hereafter "Uthe"), then based in Milpitas, California, filed suit against Appellees Harry Allen and Aetrium, Inc., and against their co-defendants Peter Kwan, Y.K. Chow, Francis Chua[1], and Katherine Yip, in the Superior Court for Santa Clara County. The defendants removed the case to the U.S. District Court for the Northern District of California (ER 865 (Trial Docket)), and shortly thereafter Uthe filed an amended complaint. ER 838.

The amended complaint alleged the following. Uthe manufactures and distributes semiconductor products. Its subsidiary Uthe Singapore (called Uthe Singapore Technology Private Limited, or "USTPL") distributed its products and similar products in Asia, out of its principal place of business in Singapore. While Singapore co-defendants Kwan and Chua were working for USTPL, they secretly set up a company to poach USTPL customers and divert orders intended for USTPL to the secret company. Kwan and Chua conspired with one of USTPL's largest suppliers (Appellee Aetrium) and its officer in charge of

[1] Most documents in the record say "Chua," but sometimes "Chau." Apparently, "Chua" is correct.

sales in Asia (Appellee Harry Allen) to effectuate this diversion. The diversion caused Uthe to sell its shares of USTPL in 1992 to Kwan and Chua at distressed prices. The complaint alleges that defendants' acts violated federal securities laws, the federal RICO statute, and state laws against fraud. ER 838 (First Amended Complaint).

B. The Motion to Dismiss and Stay Pending Arbitration

Defendants Kwan and Chua moved to dismiss the case on the ground of *forum non conveniens* or, alternatively, to send the case to arbitration in Singapore pursuant to an arbitration provision in their stock purchase agreement. Docket # 12; ER 799 (Plaintiff's Motion to Reopen Case and Lift Stay) (2:12-15).[2] Defendants Allen and Aetrium (who were not parties to the stock purchase agreement) moved to stay the district court proceedings against them pending resolution of the Singapore arbitration. Docket # 9.[3]

Uthe opposed these motions (Docket # 22), presenting evidence that Uthe could not obtain full relief against Kwan and Chua in Singapore.

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[2] When Uthe moved to reopen the case in 2012, it summarized the lengthy procedural history. ER 799 (Docket # 106). For the convenience of the Court, and to control the size of the record, this Brief occasionally cites this filing to provide certain undisputed and background facts on the history of the case, particularly the foreign proceedings.

[3] For completeness, Uthe occasionally cites certain docket entries that are not relevant to the disposition of this appeal, and hence not included in the Excerpts of Record.

Singapore courts do not recognize RICO claims. ER 835 (Hock Decl.) (3:3-6). Nor does Singapore law recognize treble damage claims. ER 835 (3:8-10). While Singapore does allow punitive damages, these are rarely awarded, and are awarded mainly in defamation cases. ER 835 (3:10-15).

Nevertheless, in December of 1993, the district court granted the Kwan-Chua motion to dismiss, on the ground of *forum non conveniens*.[4] ER 824 (Order Granting Motion to Dismiss and Motion to Stay) (2:17-23). The court also granted the Allen-Aetrium motion to stay pending resolution of the arbitration, because "the arbitration may narrow or limit the issues raised by the claims alleged against Aetrium and Allen." ER 828 (6:19-25).

Uthe moved for reconsideration, contending that the alleged misconduct occurred prior to and was unrelated to the stock sale (Docket # 47), and for leave to file a second amended complaint (*id*. # 52), but the court denied both motions (*id.* # 59). Uthe filed notice of appeal (*id.* # 60), but the appeal was later dismissed (*id*. # 75). On October 27, 1997, the court entered an order "dismissing case for statistical purposes." Docket # 104.

4 The court so ruled because the agreement for sale of USTPL stock was negotiated in Singapore, it contained a "choice of law" provision specifying the application of Singapore law, and it provided for binding arbitration of any dispute arising out of the agreement. ER 807 (Order Granting Motion to Dismiss and Motion to Stay) (2:17-23).

C. The Arbitrator's Findings

In 1998, Uthe sued Singapore defendants Kwan, Chua, and Chow in the High Court of Singapore, which stayed that suit and sent the case to arbitration. ER 800 (Motion to Reopen Case) (3:13-18).

In 2005, the arbitrator (K.S. Rajah) issued a partial award, finding that the arbitration respondents were liable to Uthe. ER 800 (3:19-22); ER 596 (Second Amended Complaint, Exhibit 1, Partial Award). Singapore courts rejected several challenges respondents made to this award. ER 800 (3:23-4:7).

The liability award includes findings that were summarized as follows in the second arbitrator's damage award:

"The first tribunal has found the Respondents guilty of a litany of sins. The acts of the 1st Respondent [Peter Kwan] by which he breached his fiduciary duty were as follows:

> *(a) Diverting the business and revenue of USTPL to United Semiconductor,[5] and procuring the employees of USTPL to provide their services to United Semiconductor, without USTPL receiving any remuneration or benefit from the use of its employees by United Semiconductor;*

[5] The new corporation was incorporated on July 29, 1992, as "Brenner Investments Pte Ltd." On August 17, 1992, the conspirators changed the name to "United Semiconductors Pte Ltd." ER 611-612 (Partial Award).

(b) Removing from USTPL confidential information and records which were necessary for the purpose of carrying on the business of USTPL;

I Procuring the termination of two distributorship agreements that USTPL had with Aetrium and Microvision;

(d) Causing United Semiconductor to enter into distributorship agreements with Aetrium and Microvision;

(e) Causing United Semiconductor to enter into new distributorship agreements with Aetrium and Microvision on terms less favorable to USTPL compared to the previous agreement . . .;

(f) Procuring the en masse resignations of the employees from the marketing and distribution division of USTPL;

(g) Causing USTPL to agree to the cancellation of various agreements for the purchase of equipment and for such purchasers to subsequently enter into agreements with United Semiconductor;

(h) Persuading various purchasers to place all future orders for equipment with United Semiconductor and not USTPL, thus diverting business from USTPL;

(i) Procuring breaches of USTPL's distributorship agreements with various equipment manufacturers, in particular Aetrium;

(j) Procuring the agreement of various principals to delay payments of commissions earned and due and payable to USTPL;

(k) Rendering the accounts of USTPL false and inaccurate, by failing to take such delays in payment of commissions into account in UTSPL's books;

(l) Concealing the above facts concerning USTPL."

In relation to conspiracy to injure the First Tribunal found:

"The unlawful purpose and the Respondents' intention to injure is established; inter alia, by the following facts:

(a) the setting up of United Semiconductor and directing Geraldine Tan to work there; diversion of USTPL's business and revenue to United Semiconductor;

(b) removal of documents which contained confidential information from USTPL;

I the termination of the distributorship agreement which USTPL had with Aetrium and Microvision;

(d) procurement by the Respondents of the en masse resignations of the employees from the marketing and distributorship division of USTPL;

(e) procurement by the Respondents of the cancellation of existing sale and purchase agreements for equipment between USTPL and its customers and persuading customers to place all future orders with United Semiconductor;"

and the "*aim was to destroy (the company) by unlawful means.*" ER 766-768 (Second Amended Complaint, Exhibit 2, Partial Award 2) (italics in original). These findings were included in the documents presented to the trial court with the motion for summary judgment that is the subject of the present appeal. ER 274-276 (Nath Decl., Exhibit D, Partial Award 2).

D. Arbitrator's Findings Relating to Aetrium and Allen

While Aetrium and Allen were not parties to the Singapore arbitration, some of the Arbitrator's findings involved their actions.

The Arbitrator found that co-conspirator Yip "had participated in a conference call with Joe Levesque (President and Chief Executive Office of

Aetrium) and other Aetrium executives, together with Peter [Kwan], Francis [Chua], and Yoke Keng. On that occasion Peter had explained his plans to divert Aetrium's distributorship contract with USTPL." ER 629-630 (Partial Award).

The participants in that conference call also discussed and agreed "(a) that the commissions already earned by USTPL was to be put on hold with Aetrium and paid out only on Peter's or Yok Keng's instructions; (b) that the terms of the existing contract be amended so that the contract would be automatically terminated if there was a change in management (*i.e.,* if Peter and Francis left Uthe Singapore)." ER 614.

The conspirators also sent a fax to Harry Allen stating that "CM Wong, purchasing manager of NSEM has agreed to cancel present order of 8 units 5050S/TCLB to Uthe and re-issue to Aetrium." ER 629-630.

The Arbitrator found that on September 27, 2003, Uthe CEO Michael Goodson wrote to Aetrium CEO Joseph C. Levesque, stating that "we have the facts of your involvement and Aetrium's involvement with Peter Kwan et el's [*sic*] conspiracy to defraud our subsidiary UTHE in 1992. . . ." ER 629-630.

Aetrium participated in the arbitration by submitting an affidavit from its Chief Administrative Officer (Douglas L. Hemer). Aetrium claimed that "it was too costly and inconvenient" to come to Singapore to give evidence. ER 630. However, the Arbitrator found that: "Mr. Hermer did not present himself for cross-examination although his evidence touched on important matters. I am unable to accept the explanation given for his absence." ER 635.

Regarding future legal actions, the Arbitrator held that:

> Save for this arbitration it was ordered there shall be no further or other actions or proceedings of any nature, either in Singapore or elsewhere by the Claimant [Uthe] against the Respondents or any of them * * * *, without prejudice to Claimant's rights in the U.S. action against the Respondents and the other defendants in the U.S. action or on matters not comprised in the U.S. Action or in [the current arbitration].
> ER 631.

E. The Arbitration Award on Damages

In 2010, arbitrator Rajah resigned due to poor health, and was replaced by Alan J. Thambiayah. ER 801 (Motion to Reopen Case) (4:8-10). In 2012, arbitrator Thambiayah issued a damage award against the respondents, leaving open only an award for costs. ER 801 (4:11-16); ER 709-797 (Partial Award 2). The arbitrator found that, but for respondents' misconduct, USTPL would have been worth more than $14 million in Singapore dollars. ER 769.

Because of respondents' misconduct, Uthe was forced to sell the company to the respondents for just under $3 million in Singapore dollars. Therefore, Uthe's damages were $12,286,350 in Singapore dollars. ER 784

(Partial Award 2). In addition, one respondent was found liable to Uthe for $500,000 for the value of diverted contracts. ER 771; ER 795. Interest at 1.5% per year was also awarded. ER 778. The arbitrator found Uthe's evidence on further damages not to be convincing. ER 769.

Applying the October 12, 1992, currency conversion factor, the $12,586,350 award in Singapore dollars coverts to $9,180,771 in U.S. dollars. ER 103 (McCord Decl., Exhibit B, Hosfield Expert Report).

F. The Second Amended Complaint

In 2012, soon after the Singapore arbitration award became final, Uthe moved to reopen the case in the Northern District and lift the stay. ER 798. The parties agreed to reopen the matter and allow Uthe to file a second amended complaint, which the court ordered. Docket # 133.

The Second Amended Complaint (ER 576) alleges the following. Uthe established its subsidiary, USTPL, to distribute semiconductors in Asia. In 1988, USTPL contracted with Aetrium for USTPL to be Aetrium's exclusive distributor of semiconductor equipment in Asia for 20 years. This was one of USTPL's largest distribution contracts, accounting for more than 90% of USTPL's revenue in 1992, and was vital to USTPL's financial viability. Harry Allen—an officer and director of Aetrium—knew this. In 1992, Kwan, Chua, and Yip—all officers and directors of USTPL—secretly set up a new Singapore corporation which they, along with Allen and Aetrium, intended to use to take over USTPL's semiconductor business in Asia. Allen and Aetrium helped establish the secret corporation by providing it with capital, office equipment, and personnel. Allen and Aetrium also helped conceal confidential information and documents that Kwan, Chua, and Yip took from USTPL's offices, including confidential client information. Allen and Aetrium also helped lure USTPL's clients away from USTPL and to the new secret corporation. While the 20-year Uthe-Aetrium agreement provided that it could be terminated only for breach, defendants conspired to replace the agreement with a new agreement that they kept secret from Uthe. The new agreement permitted Aetrium to terminate on 30 days' notice, which Aetrium promptly did—without notifying Uthe. Aetrium then transferred all of its business to the new secret corporation. And Aetrium redirected to the new corporation moneys it owed to USTPL. Allen and Aetrium kept all of these actions secret from Uthe, because they knew that Uthe would take steps to stop these actions if Uthe knew of them. Allen and Aetrium also worked to persuade USTPL's clients to cancel their orders with USTPL and place them with the secret corporation or with Aetrium itself. Before this scheme was effectuated, Aetrium was not the “world leader” in the semiconductor industry, but after the scheme took hold, Aetrium made exactly that claim on its website. Uthe finally learned of the scheme through an anonymous letter. When Uthe tried to find out what happened, Uthe found that USTPL’s documents were missing and all of its employees were gone. The scheme gutted USTPL’s business, destroying Uthe’s investment. ER 576.

The Second Amended Complaint attached the two Singapore arbitration decisions and alleged that the damage award did not make Uthe whole, and that neither Aetrium nor Allen was a party to the arbitration.

The Second Amended Complaint then stated several causes of action, including Count VI.[6] That Count, for Civil RICO (18 U.S.C. sections 1962I and

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[6] The other causes of action were:

> Count I, for fraud by omission, alleges that Aetrium and Allen affirmatively misled Uthe’s CEO and concealed from Uthe the fact that they were conspiring to destroy UTSPL by diverting its business to the new corporation.
>
> Court II, for conspiracy to commit fraud, alleges that Aetrium and Allen conspired to commit this fraud.
>
> Count III, for conversion, alleges that Aetrium and Allen diverted payments due from UTSPL’s customers to the new corporation.
>
> Count IV, for intentional interference with contract, alleges that by committing the above acts, Aetrium and Allen interfered with Uthe’s contract with UTSPL to distribute Uthe’s products in Asia.

(d)), alleges that Aetrium and Allen conspired with the officers and directors of USTPL to divert business from USTPL to the new corporation, to fraudulently amend the contract between Aetrium and USTPL and to conceal the amendment from Uthe, to withhold and divert commissions due to Uthe, and to use false representations to convince Uthe customers in Asia to cancel contracts and orders with Uthe and divert them to the new corporation—all via international phone calls from Aetrium headquarters in Minnesota to UTSPL officers and directors in Singapore. Aetrium and Allen also assisted Kwan in concealing from Uthe the existence of the new corporation. The

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Count V, for intentional interference with economic relations, alleges that Aetrium and Allen diverted business from UTSPL to the new corporation.

Count VII, for securities fraud, alleges that Aetrium and Allen falsely told Uthe's CEO that they knew nothing of any efforts to divert business from Uthe, and that this was done in order to suppress the market value of UTSPL and enable the conspiring officers to purchase all the stock of UTSPL at a heavy discount. Because Aetrium and Allen assisted those officers in diverting UTSPL's business, Uthe was fraudulently induced to sell its stock in UTSPL to the conspiring officers at a heavy discount.

Count VIII, for unfair competition, alleges that by committing the above acts, Aetrium and Allen violated California Business & Professions Code section 17200.

prayer seeks, on Count VI, "for an award of threefold of actual damages according to proof at trial," as well as reasonable attorneys fees.[7]

Aetrium and Allen filed an answer to the Second Amended Complaint. ER 555.

G. The First Motion for Summary Judgment

On February 21, 2013, Aetrium and Allen moved for summary judgment on the Second Amended Complaint, arguing that Uthe lacked evidence showing that it suffered direct harm from Aetrium's and Allen's contribution to the destruction of USTPL. Docket # 148. The court denied the motion, holding that Uthe had furnished evidence that USTPL had distributed Uthe's products

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[7] Aetrium and Allen moved to dismiss the Second Amended Complaint. The court granted part of the motion and denied part. ER 568.

Aetrium and Allen argued that Counts I through VI and VIII should be dismissed because a prior ruling (by Judge Ware) had held that Uthe's ownership of stock in USTPL gave Uthe no standing to sue for injuries to USTPL, and that this ruling was "law of the case." The court rejected this argument, because the challenged Counts included allegations of direct injuries to Uthe (including loss of sales of Uthe's products to customers in Asia).

The court granted the motion to dismiss Count VII, for securities fraud, because the Singapore arbitration already awarded Uthe damages for its loss on the stock sale. The court denied the motion to dismiss Count III for conversion, because Uthe sufficiently alleged that Aetrium and Allen induced Uthe's customers to withhold or redirect payments due to Uthe.

The court denied the motion to dismiss Count VI, the civil RICO claim, holding that Uthe had sufficiently pleaded that Aetrium's and Allen's actions had extended over a substantial period of time.

to National Semiconductor, but these sales were ended by the destruction of USTPL. ER 551 (Order Denying Defendants' Motion for Summary Judgment). The court also rejected defendants' argument that the arbitration award compensated Uthe for all of its direct harm, holding that "defendants fail to establish how an arbitration award that compensated plaintiff for the depressed sale price and the lost profits due to the use of its former subsidiary also compensated plaintiff for reputational harms and the loss of its own customers." ER 553 (3:23-27).

H. The Second Motion for Summary Judgment

On August 1, 2013, Aetrium and Allen filed their second motion for summary judgment, arguing that there was no triable issue of fact on the following issues: (1) their actions did not cause Uthe to lose profits on sales of generators and transducers, (2) their actions did not cause Uthe to lose profits from head office expense payments, (3) Uthe has no evidence of a viable RICO claim, and (4) prejudgment interest is not awardable. Docket # 176. The motion was accompanied by extensive documents. ER 135 (Nath Decl.). Uthe opposed the motion (Docket # 182), with supporting documents. ER 132 (Goodson Decl.); ER 128 (Yip Decl.); ER 70 (McCord Decl.). Aetrium and Allen then filed a reply memorandum (Docket # 186), with additional documents.

ER 68 (Nath Decl.). Uthe filed an objection to the reply evidence. Docket # 188.

I. The Evidence

Documents presented in support of and in opposition to the motion for summary judgment show the following. Many of these facts come from the declaration of co-conspirator Katherine Yip (ER 128).[8] Until 1992, UTSPL distributed semiconductor products provided by Uthe and by Aetrium. Yip was the Sales Administration Manager of USTPL and was USTPL's primary contact with Aetrium and Harry Allen. ER 129.

In 1992, Yip developed a plan with other principals of USTPL to divert business away from UTSPL, cutting out Uthe and its principal, Michael Goodson.[9] "As part of this plan, in early July 1992, I [Yip] participated in a phone call with the USTPL officers and Aetrium President Joseph Levesque,

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[8] The summary judgment documents also included Yip's declaration filed in the arbitration (ER 337 (Nath Decl., Exhibit F, Yip Affidavit)), where she makes similar statements. (Yip also went by her Chinese name: Tan Lee Tian.)

[9] The first arbitrator's decision describes an incident that might have precipitated this plan. In early 1992, Respondents proposed to Uthe CEO Michael Goodson "that a secret operation could be set up in Hong Kong to which taxable income could be diverted from Singapore. 50% of the profits would go to Goodson and 50% to Peter, Francis, and Yoke Keng. Goodson turned down the offer"—apparently because such tax evasion was illegal. ER 610 (Partial Award).

and other executives from Aetrium. * * * * [T]he Aetrium persons on the call, including Mr. Levesque, specifically and verbally agreed: (1) that Aetrium would withhold commissions that were earned by and payable to USTPL on the sale of Aetrium products so that they would not show up USTPL's books; (2) to secretly alter the terms of Aetrium's distribution contract with USTPL so that it could be quickly terminated and switched over to a new shell company if necessary; (3) divert orders from customers away from USTPL; (4) conceal everything from Uthe USA and Mr. Goodson." ER 129-130.

The participants hoped their plan would drive business away from Uthe, which would enable them to convince Uthe and Goodson to sell their USTPL stock to them cheaply. But Goodson might refuse to sell. "That is why we set up a secret shell corporation in 1992—to divert USTPL orders to and continue the business of distributing products to USTPL customers in the event that USTPL remained under the control of Uthe USA. Taking over USTPL was never the end goal of the conspiracy, it was simply a step in the plan to profit by keeping all of the business and profits from that company for ourselves." Either way, "The planned partnership with Aetrium, including the servicing of USTPL clients, was intended to continue indefinitely into the future." ER 130.

Carrying out the plan, the conspirators persuaded all employees of USTPL to resign, leading to a mass walkout. ER 351-352 (Nath Decl., Exhibit F, Yip Affidavit). Yip and her colleagues also contacted USTPL customers to persuade them "to cancel the orders and reissue them with a competitor company that we had set up in secret." When some customers balked, Yip "worked with Aetrium and Harry Allen to convince the customers to reissue the orders with Aetrium directly." ER 130. "Also, from the beginning of the conspiracy until after it was discovered by Mr. Goodson, I and others at Uthe Singapore had many phone calls and exchanged dozens and dozens of faxes with Aetrium and Mr. Allen in the United States as part of the scheme to divert customers and business away from Uthe Singapore and continue to service the clients that we had diverted orders from." ER 130, lines 19-23.

While this was going on, Uthe CEO Michael Goodson phoned Harry Allen in August of 1992, after Goodson had received an anonymous letter about the secret corporation. ER 357 (Nath Decl., Exhibit G, Goodson Decl.). Goodson testified:

> I point blank asked Mr. Allen if he knew anything about it and he said he was not aware of any effort by UTHE Singapore's officers to create any secret corporation. I subsequently learned, through the testimony of

> one of Aetrium's co-conspirators in the Singapore arbitration, that Mr. Allen's statement was false. Not only was he aware of the effort to create the secret corporation, he and other executives of Aetrium had participated in the effort from the beginning of the conspiracy.
> ER 357 (2:12-17).

After Yip and her colleagues bought USTPL from Goodson at a steep discount, the conspirators continued to service Aetrium customers and accept payments that would have gone to Uthe. The scheme culminated in the summer of 1993, when Goodson learned of it and filed suit. "If Mr. Goodson had not discovered the conspiracy to divert orders and contracts away from USTPL, we would have kept it secret from him to this day and continued to service customers and withhold payments." ER 131 (Yip Decl.).

When Goodson sent Cooper & Lybrand accountants to Singapore to examine USTPL's records, they found that many of them had been removed. ER 143 (Nath Decl., Exhibit A, Goodson Depo.) (162:2-23). Aetrium would then have had access to that confidential information. ER 143 (164:3-6).

In October of 1992, Goodson again phoned Harry Allen:

> Mr. Allen stated that he was aware of the secret corporation and knew that UTHE Singapore's employees had left to work for it, but claimed that it had all come as a surprise to him. He portrayed himself and Aetrium as surprised, innocent bystanders. He even offered to step in and help resolve the situation. He never said that he and Aetrium CEO Joseph Levesque had been directly involved in the effort to create a secret corporation, divert officers, employees and UTHE business away

for the purpose of crippling UTHE.
ER 357 (2:20-25).

The conspirators changed the name of USTPL to UST Technology Pte Ltd. (“UST”). ER 353 (Nath Decl., Exhibit F, Yip Affidavit). Aetrium kept in close contact with UST regarding the arbitration. ER 123 (McCord Decl., Exhibit C, Koch Depo.) (95:14-19). Aetrium’s CEO, Mr. Levesque, sent a note to Peter Kwan stating, “We wish you all good luck on the outcome of the hearing and stand ready to help further if it is requested.” ER 126 (McCord Decl., Exhibit E). Daniel Koch, Aetrium’s Vice President of Marketing (ER 113 (Koch Depo.) (5:9-12)), testified at the arbitration hearing (ER 121 (82:23-83:7)). UST had asked him to testify (ER 123 (95:20-22)), and UST’s lawyer prepared him to testify (ER 123 (96:16-97:8)).

J. The District Court Ruling

The district court ruled that this evidence was not sufficient to permit a reasonable jury to find that Aetrium and Allen violated RICO, because the Singapore conspirators had fully paid the $9+ million arbitration award—“a remarkably huge sum”—that reimbursed Uthe for the amount the conspirators stole from Uthe. “As such, plaintiff cannot now pretend to have been denied its day in court or pretend to need a second run at recovery on the theory that it is entitled to treble damages under RICO, more than twenty years after the fact. The undersigned judge therefore respectfully disagrees with his good friend and colleague Wallace Tashima (who was then sitting as a district court judge)[10] and now rules that there are no more damages for which plaintiff may be compensated under RICO." ER 8 (Order Granting Defendants' Motion for Summary Judgment) (7:8-21).

On September 9, 2013, the court granted the motion for summary judgment, upholding all four of Aetrium's and Allen's arguments. ER 8. Uthe's motion for reconsideration (Docket # 196) was denied (Docket # 198). Judgment was entered on September 13, 2013. ER 1 (Judgment).

On September 23, 2013, Uthe filed a notice of appeal to this Court, stating that "Plaintiff limits appeal to one portion of the Court's September 9 order, specifically, the Court's ruling on Plaintiff's claim for damages under RICO." ER 10.

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[10] The reference is to Judge Tashima's decision in *In re National Mortg. Equity Corp. Mortg. Pool*, 636 F. Supp. 1138, 1151 (C.D. Cal. 1986).

SUMMARY OF THE ARGUMENT

First, the district court's reliance on the "one satisfaction" rule was error, because Uthe's claim for treble damages has never been satisfied.

Second, the district court's decision undermines all three of the recognized purposes of RICO's treble damage remedy: (1) to deter racketeering, (2) to give private parties an incentive to supplement Justice Department efforts to stop racketeering, and (3) to compensate victims for damages that are difficult to prove.

Third, from the U.S. Supreme Court on down, federal courts across the country have almost unanimously ruled that, in order to further legislative intent, statutory multiple damage remedies are not defeated by payments of compensatory damage awards. They have applied this approach to the False Claims Act, to antitrust statutes, to the Economic Recovery Act, to state statutes, and even to RICO itself. The district court gave no sound reason for departing from this dominant rule.

ARGUMENT

A. Standard of Review

An appeal from a summary judgment is reviewed *de novo*. *Travelers Cas. & Sur. Co. of America v. Brenneke*, 551 F.3d 1132, 1137 (9th Cir. 2009). The reviewing court must determine whether, "viewing the evidence in the light most favorable to the non-moving party, [] there are any genuine issues of material fact and whether the district court correctly applied the relevant [substantive] law." *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 916 (9th Cir. 2002). The district court's interpretation of the underlying legal principles is subject to *de novo* review. *Southwest Voter Registration Ed. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003).

B. Under RICO, Payment Of Compensatory Damages Does Not Defeat A Treble Damage Claim

The documents before the district court would permit a reasonable jury to find that Aetrium and Allen violated RICO, by conspiring with the USTPL defendants to engage in a pattern of racketeering activity involving fraud. *See* 18 U.S.C. §1961(1)(B), §1961(5) and §1962(c) and (d). The district court's ruling does not dispute this.

Nevertheless, the district court ruled that RICO's treble damage remedy was unavailable to Uthe, solely because the compensatory damage award had been paid. This was error. The great weight of authority is to the contrary, because such a rule would undermine the purposes of the statutory remedy.

1. The "One-Satisfaction" Rule Does Not Support The District Court's Ruling.

Uthe seeks from Aetrium and Allen only the portion of treble damages not already covered by the USTPL defendants' payment, *i.e.,* $18 million, not the full $27 million treble damages. The district court disallowed this claim because the UTSPL defendants had paid the $9 million judgment for Uthe's compensatory damages.

The district court relied on the "one-satisfaction" rule: when one defendant satisfies a judgment, plaintiff cannot collect the same amount from a co-defendant. According to the district court, since the USTPL defendants paid the $9 million judgment for compensatory damages, there was nothing left to treble, so Aetrium and Allen are totally off the hook.

But Uthe seeks *only one* satisfaction: $9 million trebled, with the $9 million that Uthe has already received *credited* against a treble damage judgment against Aetrium and Allen. Uthe did *not* receive this satisfaction from the USTPL defendants.

The district court relied on a single California Court of Appeal case: *Fletcher v. California Portland Cement Co.*, 99 Cal. App. 3d 97 (1979). The

Fletcher opinion is short and straight-forward. Fletcher was working for his railroad employer when he fell through a hole on the premises of a cement company. He sued both his employer and the cement company in federal court. The cement company was dismissed for lack of jurisdiction. Fletcher went to trial against the railroad. The jury awarded him over $75,000, which the railroad paid. Fletcher then sued the cement company in California superior court, seeking compensation for the same injury arising out of the same incident. The California Court of Appeal held that the action was barred by the "one-satisfaction" rule:

> An injured person is entitled to only one satisfaction of judgment for a single harm, and full payment of a judgment by one tortfeasor discharges all others who may be liable for the same injury. This rule, designed to prevent double recovery and never-ending litigation by dissatisfied claimants, applies whether a single judgment has been obtained against joint or concurrent tortfeasors, whether separate judgments of equivalent or disparate amounts have been obtained against tortfeasors, or whether no other judgment has been obtained against other tortfeasors.
> Id. at 99.[11]

[11] *Accord*: *Neubauer v. Goldfarb*, 108 Cal. App. 4th 47, 52 (2003) ("if one joint tortfeasor satisfies a judgment against all joint tortfeasors the judgment creditor cannot obtain a double recovery by collecting the same judgment from another of the tortfeasors"); *Milicevich v. Sacramento Med. Ctr.*, 155 Cal. App. 3d 997, 1003 (1984) (the purpose of the single-satisfaction rule is to "prevent unjust enrichment").

As the district court noted, *Fletcher* and the one-satisfaction rule are designed to prevent double recovery.[12] Fletcher was entitled to only one award of compensatory damages, and that is what his employer paid him. His suit against the cement company sought double recovery, and was therefore barred by the one-satisfaction rule. However, if Fletcher's employer had paid him *less* than the amount he properly sought against the cement company, he would have been allowed to seek the difference. *See McCall v. Four Star Music Co*., 51 Cal. App. 4th 1394 (1996): "where fewer than all of the joint tortfeasors satisfy less than the entire judgment, such satisfaction will not relieve the remaining tortfeasors of their obligation under the judgment."[13]

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[12] California courts have further explained how the one-satisfaction rule is meant to prevent double recovery in the following cases: *Jhaveri v. Teitelbaum*, 176 Cal. App. 4th 740, 753-54 (2009); *Neubauer*, 108 Cal. App. 4th at 52; and *McCall v. Four Star Music Co*., 51 Cal. App. 4th 1394, 1399 (1996).

[13] In *Yates v. Nimeh*, 486 F. Supp. 2d 1084 (N.D. Cal. 2007), the court held that, under California's single-satisfaction rule, payment of compensatory damages by one defendant did not bar an action to collect punitive damages from a second defendant. The court noted four non-California cases that appear to disagree. *Id*. at 1087, fn. 9. None of the four cases cited involved RICO claims. In one, the court was troubled by the fact that the plaintiff "made a tactical decision not to name [the second defendant] as a defendant in their original action [against the first defendant"]. *Bridgestone/Firestone North America Tire, L.L.C. v. Naranjo*, 206 Ariz. 447, 454 (2003). Nothing of the sort occurred in the present case. In another, the jury in the first case found that the predicate acts for punitive damages had not been committed wantonly or recklessly. This effectively estopped plaintiff from seeking punitive damages

Uthe does not seek double recovery. Uthe was entitled to an award of compensatory damages—but Uthe was also entitled to have it *trebled*, according to a statute enacted by Congress. Only *part* of that amount—one-third—was paid to Uthe. Therefore, the one-satisfaction rule does not bar the company from seeking the remaining two-thirds from Aetrium and Allen.

The district court refused to follow another district court opinion that had rejected the one-satisfaction argument against treble damages under RICO: *In re Nat'l Mortg. Equity Corp. Mortg. Pool*, 636 F. Supp. 1138 (C.D. Cal. 1986) (hereafter "*National Mortgage*"). There, like here, a party claimed that payment of compensatory damages defeated a RICO claim for treble damages. That court (per then-district judge Tashima) addressed the question: "What

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against the second defendant. *See Ruiz de Molina v. Merritt & Furman Ins. Agency, Inc.*, 220 F. Supp. 2d 1249, 1252-53 (N.D. Ala. 2002). Again, nothing of that sort occurred in the present case. In *Sprague, Levinson & Thall v. Advest, Inc.*, 623 F. Supp. 11, 13 (D.C. Pa. 1985), the court struck a punitive damages award solely because the jury found no compensatory damages to support it. Again, nothing of the sort occurred here. Only one of the four cases is not so easily distinguishable, but that opinion failed to discuss the policy reasons for allowing punitive damages against the second defendant. The fourth case, *Mike Loehr & Co., Inc. v. Wal–Mart Stores, Inc.*, 919 F. Supp. 244, 248, fn. 8 (E.D. Tex. 1996), concerned compensatory damages, not punitives. The court stated in dicta in a footnote that if plaintiff had sought punitive damages, those too would be barred by the single-satisfaction rule. In any event, the *Yates* court rejected all four cases, holding that in California, "where a claimant's award of compensatory damages was completely offset, he could still receive punitive damages." 486 F. Supp at 1088.

constitutes 'full satisfaction' of a treble damages claim?" *Id*. at 1151. The court concluded: "the other two-thirds of the Investor Institutions' potential treble damage awards would remain unaffected by the one-satisfaction rule." *Id*.

National Mortgage found no precedent dealing directly with this issue, but found antitrust cases analogous, because the Sherman Act also provides for treble damages. The court noted, "Without exception, courts hold that the full award to which such plaintiffs are entitled is an amount three times the proven actual damages and that, to ensure that plaintiffs receive complete satisfaction of their claims, settlement payments should be deducted from the award against the non-settling defendant(s) *after* actual damages are trebled." *Id*. The court quoted *Hydrolevel Corp. v. Am. Soc'y of Mech. Eng'rs, Inc*., 635 F.2d 118, 130 (2nd Cir. 1980):

> First, the antitrust laws provide that the plaintiff should receive three times the proven actual damages. If settlement proceeds are deducted before trebling, the plaintiff's total award is less than what the law allows. Since antitrust defendants are joint tortfeasors, each is liable to complete the total deserved damages irrespective of fault. Second, . . . one purpose of the trebling provision is to encourage private plaintiffs to bring suit. Any ultimate recovery totaling less than three times proven damages would weaken the statutory incentive through judicial construction. Third, deduction of settlement proceeds before trebling would discourage settlement by making litigation relatively more profitable for plaintiffs; every dollar received in settlement would cause

> a three dollar reduction in the judgment at trial.
> *Nat'l Mortgage*, 636 F. Supp. At 1152.

Judge Tashima's approach was later confirmed by this Court in *William Inglis & Sons Baking Co. v. Continental Baking Co.*, 981 F.2d 1023 (9th Cir. 1992), an antitrust case where this Court ruled that "under our existing law settlement payments should be deducted from the damages after they have been trebled." *Id*. at 1024.

2. The District Court's Ruling Is Inconsistent With The Three Purposes For Providing Treble Damages for RICO Violations.

The RICO statute provides for treble damages in 18 U.S.C. §1964, subsection I:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

No words in this subsection (or in any other RICO statute) say that payment of compensatory damages bars recovery of these "threefold" damages. Reading such words into RICO would undermine each of the three purposes of the treble damages remedy identified by the courts: (1) to deter racketeering, (2) to encourage victims to supplement the Justice Department's limited resources in bringing actions to deter racketeering, and (3) to compensate victims for damages difficult to prove.

(a) Congress Intended The Treble Damage Remedy to Deter Racketeering. The District Court Opinion Undermines This Purpose.

"The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering activity, an object pursued the sooner the better." *Rotella v. Wood*, 528 U.S. 549, 558 (2000). *See also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977) ("treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing").

The evidence showed that Aetrium and Allen engaged in racketeering activity that should be suppressed "the sooner the better."

In July of 1992, Aetrium President Joseph Levesque and other Aetrium executives agreed with the USTPL conspirators:

- that Aetrium would withhold commissions payable to USTPL on the sale of Aetrium products so that they would not show up USTPL's books;

- that they would secretly alter the terms of Aetrium's distribution contract with UTSPL so it could be quickly terminated and switched over to a new shell company if necessary;
- that they would divert orders from customers away from USTPL; and that they would conceal everything from Uthe and Mr. Goodson. ER 130 (Yip Decl.).

The USTPL conspirators then contacted customers to persuade them "to cancel the orders and reissue them with a competitor company that we had set up in secret." When some customers balked, Aetrium and Allen helped to convince the customers to reissue the orders with Aetrium directly. ER 130.

In August of 1992, when Uthe CEO Michael Goodson phoned Harry Allen and asked him if he knew anything about an alleged secret corporation, Allen falsely stated that "he was not aware of any effort by Uthe Singapore's officers to create any secret corporation." ER 357 (Goodson Decl.) (2:12-17).

In October of 1992, when Goodson again phoned Harry Allen, Mr. Allen admitted that he was aware of the secret corporation and knew that Uthe Singapore's employees had left to work for it, but falsely claimed that it had all come as a surprise to him. ER 357 (Goodson Decl.) (2:20-25).

In 2005, in the Singapore arbitration, Aetrium gave extensive help to the USTPL conspirators, in their effort to deprive Uthe of compensation for its loss. *See* ER 354 (Yip Affidavit); ER 113 (Koch Decl.) (5:9-12; 82:23-83:7; 95:14-96:16-97:8).

In *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987), the defendant had returned to the plaintiff some property defendant had wrongfully obtained. The court held that this return had no effect on plaintiff's claim for treble damages under RICO:

> While the return of the cylinders may compensate Liquid Air for the replacement value of the cylinders, it does not compensate it for rents lost prior to litigation. More importantly, it does not negate the frauds perpetrated by defendants. We conclude that setting-off damages *after* trebling is more likely to effectuate the purposes behind RICO.
> *Id.* at 1310 (and citing *National Mortgage*, 636 F. Supp. At 1151).

Also, the district court's reasoning would allow the following. Plaintiff sues one or several defendants under RICO. The trial is going badly for defendants, and plaintiff presented strong evidence that damages totaled $1 million. So before the verdict comes in, defendants tender $1 million to plaintiff. If the district court's opinion correctly states the law, that offer puts plaintiff in a bind. If plaintiff accepts the $1 million, there is nothing left to treble, so defendants will have defeated plaintiff's right to treble damages. But if plaintiff declines the offer, plaintiff might have serious collection problems later. If defendants offer to settle for slightly more than $1 million, plaintiff's best option might be to agree. Nothing in the RICO legislation suggests that Congress intended to bestow such leverage on racketeers, which would significantly diminish the deterrent effect of the treble damages provision.

(b) Congress Intended The Treble Damage Remedy to Encourage Victims to Supplement The Justice Department's Enforcement Efforts. The District Court Opinion Undermines This Purpose.

In *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987), the Court held:

> Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees. Both statutes bring to bear the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages.

Malley-Duff was followed in *Rotella v. Wood*, 528 U.S. 549 (2000), where the Court held that the enactment of the civil RICO statute was motivated by a "congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the . . . prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." 528 U.S. at 557-558.

The district court's approach would undermine this purpose. The next time a RICO victim recovers a compensatory damage award from one racketeer, will the victim supplement the Justice Department's efforts by seeking to enforce RICO against a co-conspirator? Of course not. The district court's opinion removes any incentive to do so.

(c) Congress Intended The Treble Damage Remedy to Help Compensate Victims For Damages That Are Difficult to Prove. The District Court Opinion Undermines This Purpose.

In *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 240-41 (1987), the Court noted that the legislative history of § 1964I shows that Congress intended to emphasize "the remedial role of the treble-damages provision."

This "remedial role" was made more explicit in *Liquid Air Corp. v. Rogers*, *supra*, where the court held, "Although there is some sense in which RICO treble damages are punitive, they are largely compensatory in the special sense that they ensure that wrongs will be redressed in light of the recognized difficulties of itemizing damages." 834 F.2d at 1310, n.8. *See also State Farm Fire & Cas. Co. v. Estate of Caton*, 540 F. Supp. 673, 681 (N.D. Ind. 1982), *overruled in part on other grounds by Ashland Oil v. Arnett*, 656 F. Supp. 950 (N.D. Ind. 1987) ("the treble damages provided by the statute serve to liquidate uncertain actual damages and encourage the victim to bring suit to redress the violation").[14]

The "difficulties in itemizing damages" played a role in the present case. While the district court viewed the $9+ million compensatory damage award as "vast sum of money" and "a remarkably huge sum," in fact this award might be insufficient to fully compensate Uthe for its loss. In the Singapore arbitration, Uthe was unable to secure the damages Uthe believed were inflicted by the conspirators. The arbitrator:

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[14] Antitrust cases recognize a similar purpose. *See Ortho Diagnostic Sys. v. Abbott Labs., Inc.*, 822 F. Supp. 145, 151 (S.D.N.Y. 1993) ("while such damages may be difficult to prove, that difficulty is not insurmountable. Furthermore, the availability of treble damages under the antitrust laws might well counteract this perceived problem"); *Connecticut v. Tobacco Valley Sanitation Serv. Co.*, 818 F. Supp. 504, 508 (D. Conn. 1993) ("In antitrust cases, a non-multiplied recovery may leave a plaintiff lacking because of the difficulty in measuring actual damages. By awarding treble damages, courts guarantee that antitrust plaintiffs receive full recoveries. . . . Multiple damages also help compensate plaintiffs for costs that are not quantifiable."); *Martin Oil Serv., Inc. v. Koch Refining Co.*, 718 F. Supp. 1334, 1363 (N.D. Ill. 1989) ("treble damages in antitrust adjudication are the legislature's attempt to ensure that plaintiffs actually receive all to which they are entitled. Demonstrating what one's business position would have been, absent the defendant's conduct, is no easy task. For example, with respect to an illegal price-fixing conspiracy, damages are measured by subtracting the agreed price from the price that 'would have prevailed in the absence of illegal conduct.' Because the latter determination is fraught with uncertainty, treble damages are utilized to ensure that plaintiff is actually made whole.") (internal citation omitted).

- Limited Uthe's damages to only the first 4 years after the stock sale—and then subtracted "reasonable remuneration" to the defrauding respondents! ER 771 (Partial Award 2);
- Valued the stock as of the date of the sale, rather than the higher value it would have as of the date of the arbitration, in part because "no relevant evidence appears to be available for any assessment of damages to be made on the basis of a difference between the value of the company today and the Purchase Price." ER 774;
- Declined to award Uthe its losses from diverted contracts with customers. ER 788;
- Awarded Uthe simple interest at only 1.5% per annum—even though "Awarding interest at the rate of 5.33% is Singapore court practice." And the arbitrator rejected Uthe's claim for compound interest. ER 790-791.

Awarding treble damages against Aetrium and Allen would serve the statutory purpose of giving the victim some relief for the difficulties of obtaining full recompense for damages. The district court opinion undermines this goal.

3. Congress Intended RICO's Treble Damage Remedy to Be Implemented The Same Way That *Antitrust* Treble Damage Remedies Are Implemented. The District Court's Rule Is Inconsistent With This Court's Antitrust Decisions On Treble Damages.

The treble-damages remedy of RICO was modeled closely on the treble damages provisions of the antitrust laws, and therefore "courts frequently turn to Clayton Act case law for guidance in construing RICO." Gregory P. Joseph, *Civil RICO: A Definitive Guide*, § 2 at p. 2 (Am. Bar Assoc., 2d ed., 2000); *see also Shearson/American Express*, *supra*, 482 U.S. at 240-41 (noting Clayton Act precedent for treble damages); *Agency Holding Corp.*, 483 U.S. at 151 (construing RICO and antitrust statutes in parallel). Indeed, "[e]verything in RICO's own language and history supports the view that Congress viewed RICO's treble damage remedy as similarly remedial to the Clayton Act provision on which it was so closely patterned." *Epstein v. Epstein*, 966 F. Supp. 260, 262 (S.D.N.Y. 1997) (Rakoff, J.).

Accordingly, rulings that discuss how the single-satisfaction rule applies to antitrust treble damages are persuasive precedent for RICO claims. On this antitrust issue, the Ninth Circuit's position has long been settled. In *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 397-98 (9th Cir. 1957), the court concluded that the receipt of compensatory damages offsets an antitrust award only after trebling, not before. An alternate rule would "do violence to the clear intent of

Congress. . . . The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction." *Id.* The Ninth Circuit reaffirmed this position as recently as 1992, in *William Inglis & Sons Baking Co.*, 981 F. 2d at 1024 ("under our existing law settlement payments should be deducted from the damages after they have been trebled").

There is no sound reason to depart from these rulings and introduce a disparity between RICO and antitrust law on the question of the application of the single-satisfaction rule to claims for treble damages.

4. Other Federal Courts Have Adopted The Approach Taken By Judge Tashima.

Federal courts from around the country have held that payment of compensatory damages does not defeat a claim for treble damages under RICO. In *Pyramid Secur., Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1117, n.3 (D.C. Cir. 1991), the court held that "Under RICO it appears that the proceeds of prior judgments are set off against a recovery only *after* the trebling of damages."

In *Pennsylvania v. Cianfrani*, 600 F. Supp. 1364 (E.D. Pa. 1985), the court held: "Cianfrani's interpretation would enable any person guilty of violating §1962 to avoid the imposition of treble damages by the simple device of making restitution before the injured person brings suit. To adopt such a restrictive reading of § 1964I would contravene Congress' mandate that the RICO statute be construed liberally to effectuate its remedial purposes." *Id.* at 1367.

See also Morley v. Cohen, 888 F.2d 1006, 1013 (4th Cir. Md. 1989) ("The deduction here should be made after trebling"); *Liquid Air Corp. v. Rogers, supra*, 834 F. 2d 1297; *Lukaszuk v. Sudan*, No. CV 02-5143 (JG)(MDG), 2007 U.S. Dist. LEXIS 95919, *25 (E.D.N.Y. Nov. 27, 2007) ("Even if Freeman is entitled to a credit at some time in the future, where plaintiffs are entitled to trebled damages under federal law, courts have upheld the trebling of damages before crediting settlement payments"); *Robertson v. White*, 113 F.R.D. 20, 28 (W.D. Ark. 1986) ("R.I.C.O. damages, if any, are to be trebled before they are reduced by credits").

In *Commercial Union Assurance Co. PLC v. Milken*, 17 F.3d 608 (2d Cir. 1994), the Second Circuit deviated from this approach. There, the court held that a plaintiff who has been made whole (from whatever source) prior to a RICO judgment is not entitled to trebling. However, a leading treatise has criticized the *Milken* ruling—and lauded Judge Tashima's opinion. *See* David B. Smith and Terrance G. Reed, *Civil RICO* (2011 ed., Pub. 527), at pp. 10-32.1 to 10-32.4 And *Milken* appears to be an outlier even within the Second Circuit. *See, e.g., Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. N.Y. 1989), where the court noted that "we have held that it is proper to treble the damage award before crediting settlement payments." *Id.* at 601.

5. The District Court Opinion Is Inconsistent With Cases From Other Circuits Construing Similar Statutes.

Besides RICO, several other statutes employ multiple damages to discourage egregious acts. When construing these statutes, courts almost never disallow multiple damage claims merely because compensatory damages were paid, and courts almost always *set off* compensatory damage payments against the multiple damages awards. "In cases where plaintiffs are entitled to trebled damages under federal law, courts have generally upheld the trebling of damages before crediting settlement payments." *In re Crazy Eddie Sec. Litig.*, 948 F. Supp. 1154, 1169 (E.D.N.Y. 1996). *See also* Dan B. Dobbs, Law of Remedies: Damages-Equity-Restitution, § 3.12, p. 548 (West Pub., 2d ed. 1993).

Courts have applied this approach to a variety of statutes that impose multiple damages:

<u>The False Claims Act.</u> *See U.S. v. Bornstein,* 423 U.S. 303, 314 (1976), *superceded by statute on other grounds as stated in U.S. v. McGinnis, Inc.*, 1994 U.S. Dist. LEXIS 20953 (S.D. Ohio Oct. 26, 1994) ("We agree that the Government's damages should be doubled before any compensatory payments

are deducted, because that method of computation most faithfully conforms to the language and purpose of the Act.")

Antitrust Statutes. *See, e.g., Sciambra v. Graham News Co.*, 841 F.2d 651, 657 (5th Cir. 1988) ("Once the court on remand determines the proper amount of damages, we agree with Sciambra's claim that the court should treble the amount of the damage award against ARA *before* deducting the amount of the Graham settlement."); *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp*., 995 F.2d 425, 433 (3d Cir. 1993); *Burlington Indus. V. Milliken & Co*., 690 F.2d 380, 393 (4th Cir. 1982); *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 534 (3d Cir. 1976).

The Economic Stabilization Act. *See Vranken v. Atlantic Richfield Co.*, 699 F. Supp. 1420, 1428 (N.D. Cal. 1988) ("The court does agree with the plaintiff class in that the offset should be subtracted from the total amount of damages *after* trebling. In actions like this where treble damages are available, the plaintiff is entitled to full satisfaction of the claim for harm done. The amount awarded as damages is then trebled as punishment to the defendant").

The most significant precedent is *U.S. v. Bornstein, supra*. There, the government brought an action under the False Claims Act, which at the time provided for double damages. Although another wrongdoer had compensated the government for almost 99% of the loss, the Supreme Court ruled that plaintiff was nevertheless entitled to the double damages, and the defendant was only then allowed an offset for the earlier payments. The court found that the doubling was necessary to fully compensate the government for the wrong suffered, and because a defendant should not be able to escape double or treble liability simply by paying actual damages prior to a judgment.

The district court overlooked these authorities and gave no sound reason why it should depart from them.

CONCLUSION

In *Sedima v. Imrex Co.*, 473 U.S. 479, 497-498 (1985), the Court held that "RICO is to be read broadly," noting that Congress had expressly admonished that RICO is to "be liberally construed to effectuate its remedial purposes" and that "The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity."

The district court's approach is not consistent with these purposes. Its summary judgment should be reversed, so this case can proceed to trial.

Respectfully submitted,

/s/ Myron Moskovitz

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March 20, 2014

Electronic Filing Attestation

I, Joshua R. Benson, am the ECF user whose ID and password are being used to file the foregoing Brief for Plaintiff-Appellant. I hereby attest that each listed counsel above has concurred in this filing.

/s/ Joshua R. Benson
JOSHUA R. BENSON

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Circuit Rule 32(b), the brief contains 9,421 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Joshua R. Benson
JOSHUA R. BENSON

March 20, 2014

Note: The following Petition was successful. The Court granted the writ of supersedeas.

No. A146393
In the Court of Appeal of the State of California
First Appellate District, Division One

INVESTEK PROPERTIES COMPANY, A General Partnership
consisting of ROBERT GILMARTIN and WILLIAM TREVOR,
Petitioner and Appellant,

vs.

SAN FRANCISCO COUNTY SUPERIOR COURT,
Respondent.

MARK TECHNOLOGIES CORPORATION,
a California corporation,
Real Party in Interest and Appellee.

PETITION FOR WRIT OF SUPERSEDEAS
AND
OTHER EQUITABLE RELIEF

STAY REQUESTED NO LATER THAN THURSDAY, OCTOBER 8, 2015

Appeal from an Order Quashing
Petitioner's Writ of Execution
San Francisco County Superior Court,
Case No. CGC-99-306249
Honorable Ernest Goldsmith, Dept. 302
Telephone 415-

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Attorneys for Petitioner and Appellant, Investek Properties Company

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.488, the undersigned, counsel for Petitioner and Appellant INVESTEK PROPERTIES COMPANY, A General Partnership consisting of ROBERT GILMARTIN and WILLIAM TREVOR, ("Petitioner" or "Investek") certifies that he knows of no other entity or person other than the parties to this proceeding and EDF Renewable Energy, Inc. and Earth Construction, who have financial or other interests in its outcome.

Executed on September ____, 2015 at Los Gatos, California.

____

REG J. LORMON

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Food and Grocery Bureau of Southern California v. Garfield (1941) 18 Cal.2d 174

Kaplan v. Pierce (1970) 5 Cal.App.3d 316

Mills v. County of Trinity (1979) 98 Cal.App.3d 859

OTHER AUTHORITIES

Eisenberg, Horvitz, & Weiner, *Calif. Appeals & Writs*, Rutter Group, §§7:74 et.seq. and §§7.260.

A SUMMARY OF THIS PETITION

Petitioner Investek held a 26% interest in Alta Mesa Wind Partners, whose only asset was a stream of royalties and whose general partner was Real Party in Interest Mark Technologies. In 1999, Investek sought arbitration of its claims for dissolution and damages for breach of fiduciary duty. In 2010, former Judge Michael Ballachey rendered an arbitration award against Mark Technologies for over $1.2 million. Investek then obtained a Judgment adopting that award from San Francisco Superior Court Judge Busch. Judge Busch drafted the Judgment himself, and it was not as clear as it might have been.

Investek recorded an Abstract of Judgment in Riverside Count, and then sought to execute the Judgment against Mark Technologies' only sizeable asset: a parcel of undeveloped real property it owns in Riverside County, worth about $12 million. Mark Technologies then moved to quash the writ of execution.

San Francisco Superior Court Judge Goldsmith issued an order quashing the writ, ordering Investek not to attempt to collect the Judgment from any asset other than royalties, and vacating Investek's lien. Judge Goldsmith ruled that the Judgment was for only $532,000 (rather than $1.2 million), and that amount is recoverable only from certain royalties, and not from Mark Technologies' real property or other assets. Because Mark Technologies has no more royalties due, Judge Goldsmith's order effectively means that Investek's entire Judgment is worthless.

Judge Goldsmith was mistaken. Properly construed in light of the Arbitration Award the Judgment incorporates, the Judgment is for the full $1.2 million, and it is executable for this amount against *any* property owned by Mark Technologies. $532,000 of this amount is *also* executable against certain royalties, if Investek prefers to pursue those royalties.

Investek has filed a notice of appeal against Judge Goldsmith's order. But Investek immediately needs a stay of the part of the order vacating Investek's lien, for the following reason. After Investek recorded its Abstract of Judgment in Riverside County (thereby creating a lien with top priority against Mark Technologies' real properties there), another creditor (Earth Technologies) filed a $450,000 mechanics lien against Mark Technologies in Riverside County. And then a third creditor (EDF Renewable Energy, Inc.) recorded an attachment lien and then recorded a $20.8 million lien against Mark Technologies in Riverside County.

If Judge Goldsmith's order vacating Investek's lien stands for even a moment, these two subsequent lienholders may at any time execute their liens, the property will be sold, and the entire proceeds of the sale will go to those subsequent lienholders. And more liens might be filed and executed upon during the appeal. Thus, even if Investek's appeal of Judge Goldsmith's order is ultimately successful, it would be useless, because the only known asset will be gone by then. Indeed, once the property is sold, Investek's appeal will most likely become moot.

Investek moved the trial court for a stay during the appeal of his order vacating the lien - pointing out the above facts. The court denied that motion, but granted a temporary 10-day stay to give Investek the opportunity to seek a writ of supersedeas from this Court. Therefore, Investek now petitions this Court for an immediate stay and a writ of supersedeas staying the vacating of the lien until its appeal is resolved.

Mark Technologies will suffer no prejudice from a stay or writ, because Investek seeks neither a stay nor a writ from the portion of the order barring Investek from "any attempt to recover against any asset other than the post-judgment royalties", i.e., executing against the Riverside property. Investek will challenge that part of the order in Investek's appeal, and if the order is reversed, will then seek to enforce its lien against the Riverside property. For now, however, Investek seeks only to preserve its lien (and the priority of that lien) on property that Mark Technologies could not sell or encumber in any event, because of the size of the two other liens on that property.

THE PETITION

1. On June 30, 2010, Petitioner Investek obtained an arbitration award against Real Party Mark Technologies Company, in a proceeding for breach of fiduciary duties and an accounting, winding up and dissolution of Alta Mesa Wind Partners, a California limited partnership. See The Arbitration Award, attached as Exhibit A.

2. On July 20, 2011, Investek obtained from Respondent Court (per Busch, J.) a Judgment enforcing the arbitration award. See Judgment, attached as Exhibit B.

3. Mark Technologies owns a parcel of real property in Riverside County. See Declaration of Reg J. Lormon In Support of Reply to Motion for Stay of Enforcement, attached as Exhibit C. On information and belief, the fair market value of that property is approximately $12 million.

4. On January 20, 2012, Investek recorded an abstract of that Judgment in Riverside

County. See Abstract of Judgment, attached as Exhibit D.

5. On July 20, 2012, another creditor (Earth Construction) of Mark Technologies filed a mechanics lien for about $450,000. On November 18, 2013, EDF Renewable Energy, Inc., another creditor of Mark Technologies, recorded an attachment lien in Riverside County, for a judgment that became approximately $20.8 million. See Exhibits B and C to Declaration of Reg J. Lormon In Support of Reply to Motion for Stay of Enforcement, attached as Exhibit C.

6. On August 14, 2015, Respondent Superior Court (per Goldsmith, J.) issued an "Order Granting Motion to Recall And/Or Quash Writ of Execution and Vacate Execution Levy and Liens." The order was entered on August 21. A copy of that Order is attached as Exhibit E. The Order provides that "any and all liens on Mark Technology Company's property are hereby vacated and expunged."

8. The order also provides that "any attempt to recover against any asset other than the post-judgment royalties . . . are hereby enjoined." In fact, however, there are no post-judgment royalties. See Exhibit F, Declaration of Gary R. Kershner, at 3:16-25

9. On September 15, 2015, Investek filed in this Court a notice of appeal from Judge Goldsmith's order. See Notice of Appeal, attached as Exhibit G. A case number has yet to be assigned to this appeal.

10. On August 20, 2015, Investek filed in Respondent Superior Court a motion for stay of the Judge Goldsmith's order until this appeal is resolved, presenting the same arguments that are made in this petition. Attached as Exhibits H1, H2, and H3 are the motion, the

opposition, and the reply.

11. On September 28, 2015, Respondent Superior Court denied Investek's motion for stay during the appeal, but did grant a temporary 10-day stay to give Investek the opportunity to seek a writ of supersedeas from this Court. See Exhibit I, attached. Thus, Investek has exhausted its effort to obtain from the trial court the relief it seeks in this petition.

12. Investek has no adequate remedy at law. Unless a stay and a writ of supersedeas is issued, Investek will suffer serious and irreparable harm, because Mark Technologies has no significant assets other than its real property in Riverside County, and the other lienholders are likely to execute their liens and have that property sold before this appeal can be resolved. Therefore, a stay and writ of supersedeas are needed to maintain the status quo and avoid the possibility that Investek's appeal will become moot.

13. On , Investek filed in Respondent Superior Court a Motion for Order to Correct Clerical Error In Judgment. See Exhibit J, attached. That "nunc pro tunc" motion, however, is set to be heard on October 8, 2015. Between now and October 8, it is highly likely that the other lienholders will have the Riverside property sold to satisfy their liens - if Judge Goldsmith's order vacating Investek's lien is not stayed. Thus, the need for an immediate stay. (If Investek's nunc pro tunc motion is granted, this will moot Investek's appeal, and we will then dismiss it.)

14. Mark Technologies will suffer no prejudice from the issuance of a stay and a writ of supersedeas, because the two subsequent liens on the Riverside property will prevent Mark Technologies from selling or encumbering that property during this appeal in any event. Therefore, no bond should be required as a condition to the stay or writ. (If this

Court disagrees, Investek will provide a bond in a reasonable amount.)

WHEREFORE, Petitioner prays that this Court (1) issue an immediate stay of the portion of the trial court's order vacating Investek's lien, and (2) then issue its writ of supersedeas staying the trial court's order vacating Investek's lien until the conclusion of Petitioner's appeal.

Date: September 28, 2015

____
Myron Moskovitz
Attorney for Petitioner

MEMORANDUM OF LAW

I. THE APPEAL RAISES SUBSTANTIAL QUESTIONS.

To support issuance of a writ of supersedeas, the petition need not show that the appeal will be successful, but only that the appeal raises substantial questions. *Deepwell Homeowners' Protective Ass'n v. City Council of Palm Springs* (1965) 239 Cal.App.2d 63. 67. This petition shows at least that.

Investek brought a lawsuit that was ordered to binding arbitration proceeding, to dissolve and wind up Alta Mesa Wind Partners, and to recover damages against Mark Technologies ("MTC") for breach of fiduciary duty. Judge Ballachey's Arbitration Award provided that Mark Technologies and Alta Mesa are "jointly and severally liable for all damages awarded." Exhibit A, page . The award granted Investek the sum of $1,238,379 in two parts. First, $532,733 was awarded for breach of fiduciary duties, with a constructive trust also imposed on Alta Mesa's royalty stream. The award stated that these damages "are the joint and several liabilities" of Mark Technologies and Alta Mesa. *Id.* at page . The award *also* provided that "One Hundred Per Cent (100%) of all royalty payments are to be paid to [Investek] until such time as the total amount of the $532,733.00 has been received by [Investek]." *Id.* at page . Second, $705,646 was awarded for the accounting and dissolution of Alta Mesa.

Judge Busch's Judgment confirmed Judge Ballachey's award, by attaching to the Judgment as Exhibit 1 the award portion of the Arbitration Award. In addition, the Judgment expressly stated: "Petitioner…shall have Judgment against…Alta Mesa…and Mark Technologies Corporation…in the amount of $1,238,379.00…in the form attached hereto as Exhibit 1 which is incorporated herein by this reference." Exhibit B at pages 1-2.

The balance of the language in the Judgment itself is confusing and unclear. But the Judgment must be read to conform to the arbitration award, because a court drafting a judgment confirming an arbitration award is required to conform the judgment to the terms of the arbitration award. "If an award is confirmed, judgment shall be entered in conformity therewith." Code of Civil Procedure §1287.4.

When read in light of the incorporated Arbitration Award, it seems clear that the Judgment was intended to provide that (1) Mark Technologies and Alta Mesa are jointly and severally liable for the entire $1,238,379, with no limits on the assets against which this amount might be executed, and (2) if no other assets can be found, $532,733 may be executed against royalties Defendants might receive from a company called Foras.

On appeal, we will develop these points. If the Court would prefer that we submit a brief presenting the merits more fully before it is willing to issue a writ of supersedeas, we will be happy to do so. But we do need a temporary stay until then.

II. THE BALANCE OF THE HARDSHIPS FAVORS GRANTING THE STAY AND WRIT.

Because the trial court order vacates Investek's lien and enjoins Investek from "any attempt to recover against any asset other than the post-judgment royalties", the trial court's order is prohibitory rather than mandatory. Therefore, it is not automatically stayed by Investek's appeal. Eisenberg, Horvitz, & Weiner, *Calif. Appeals & Writs*, Rutter Group, §§7:74 et.seq. Therefore, a writ of supersedeas is Investek's only remedy. *Id*. at §§7.260 et, seq.

"The purpose of a writ of supersedeas is to maintain the subject of the action in status quo until the final determination of the appeal so appellant will not lose the fruits of a meritorious appeal." *Dry Cleaners and Dyers Institute v. Reiss* (1936) 5 Cal.2d 306, 309.

The writ will issue when necessary to protect appellant from the irreparable injury appellant will sustain if he prevails on appeal, giving due consideration to the injury to respondent if the judgment ultimately is affirmed. *Food and Grocery Bureau of Southern California v. Garfield* (1941) 18 Cal.2d 174 [appellant merchant would suffer irreparable harm if long standing practice of giving trading stamps is disrupted pending appeal, but no direct harm to respondent if enforcement of prohibitory injunction is delayed]. See also *Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 860 [appellant would suffer irreparable harm if not allowed to collect disputed fees pending appeal, but injury to respondent is minimal because the fees can be refunded]; *Kaplan v. Pierce* (1970) 5 Cal.App.3d 316, 319 [irreparable harm to father's relationship with his daughter if his visitation is terminated, but no serious harm to mother if father/daughter relationship continues pending appeal].

The hardship that Investek will suffer if the stay and writ are not granted is severe. Unless the trial court's order vacating Investek's lien is stayed, present and subsequent lienors may execute on the Riverside property during Investek's appeal. This would effectively make Investek's entire judgment worthless and nullify Investek's eleven years of litigation to obtain that judgment. It would also probably moot Investek's appeal. So a writ of supersedeas is needed to "preserve appellate jurisdiction".

On the other hand, granting the stay and writ would impose no significant hardship on Mark Technologies. In its Opposition to Motion for Stay of Enforcement filed in the trial court, Mark Technologies argued that a stay would be prejudicial because the notice of appeal had not yet been filed, and an appeal would lack merit. See Exhibit H2, attached, at page 3. But the notice of appeal has since been filed (see Exhibit G, attached), and - as shown above - the appeal will have merit.

Mark Technologies also noted that maintaining Investek's lien during the appeal would "cloud its title". But Mark Technologies presented no argument that such a cloud would injure it in any way, given the fact that the other liens (including one that dwarfs Investek's lien) will prevent Mark Technologies from selling or encumbering the property anyway. For this reason, no bond should be required as a condition to the stay or writ. If this Court disagrees, Investek will provide a bond in a reasonable amount.

Date: September 28, 2015

Myron Moskovitz
Attorney for Petitioner

VERIFICATION

I, Reg J. Lormon, declare:

1. I am an attorney admitted to practice before the courts of this state and am counsel representing Petitioner Investek Properties Company. I make this verification because I am familiar with the proceedings giving rise to this Petition.

2. I have read this Petition, and either know its allegations to be true or believe them to be true based on the documents contained in the accompanying Appendix. Further the Appendix contains true and correct copies of documents filed or lodged in Respondent San Francisco County Superior Court relating to the Order in Investek Properties Company, et al. v. Mark Technologies Corporation, et al., San Francisco County Superior Court No. CGC-99-306249, decided on August 14, 2015 and entered on August 21, 2015, quashing Investek's writ of execution, which is the subject of this Petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Verification was executed in Los Gatos, California on September ______, 2015.

REG J. LORMON

Dated: September 13, 2015