I. Question Presented For Review

Can state court judges order their decisions which they know are diametrically-opposed to well-settled law, not to be published or cited (a strategy labeled "***the segregated toilet***" in correspondence with 51-inner city clergy who represent the 10 million inner-city children who have been disclosed from the outset as the "real parties at interest" in this law suit) in order to flush away the rights of the 10 million inner-city children without disturbing the rights of first-class American citizens – without violating the "Equal Protection of the Law" requirement of the Fourteenth Amendment of the U.S. Constitution?

II. List Of All Parties

John S. Karls v. The Bank of New York, et. al.
Additional Respondents:

1. BNY Mellon Performance & Risk Analytics, Inc.
2. Mellon Capital Management Corporation
3. Mellon Financial Services Corporation #1
4. Mellon Leasing Corporation
5. Mellon Ventures, Inc.
6. The Dreyfus Service Corporation, Inc.
7. MBSC Securities Corporation
8. Urdang Capital Management, Inc.

III. Corporate Disclosure Statement

The sole Petitioner in all three actions, John S. Karls, is an individual.

IV. Table of Contents

Table of Contents (continued)

Plaintiff-Petitioner's Appendix

V. Table Of Cited Authorities

Cases

Constitution – Statutes

Publications

Transcript

Citations Of The Official And Unofficial Reports Of The Opinions And Orders Entered In These Three Cases By Courts Or Administrative Agencies

None of the opinions and orders entered in these this case by any court or administrative agency have been published in any official or unofficial report.

The refusal of the judges to publish their decisions which they know are diametrically opposed to well-settled law, thereby denying 10 million inner-city children "Equal Protection of the Law" while preserving intact that well-settled law for first-class American citizens, is the basis for this Petition.

There are three decisions, all of which are included in the Appendix:

A Concise Statement Of The Basis For Jurisdiction In The U.S. Supreme Court

(i) The date of judgment sought to be reviewed was March 16, 2011.

(ii) There was no order respecting rehearing or extension of time.

(iii) Rule 12.5 is inapplicable.

(iv) The statutory provision believed to confer on the U.S. Supreme Court jurisdiction to review on a writ of certiorari the judgment or order in question.

U.S. Supreme Court Rule 10(c)

(v) Notifications Pursuant to Rule 29.4(b) or (c).

Rule 29.4(b) is not applicable.

Rule 29.4(c) – Pursuant to a super-abundance of caution, the Attorney General of the State of California has been served. As set forth below in the first three paragraphs of Section IX of this Petition entitled "Statement Of Facts Material To Consideration Of The Question Presented" the Plaintiff-Petitioner is not challenging the constitutionality of California Supreme Court Rule 8.1115 since it has many legitimate purposes; rather, Plaintiff-Petitioner is only challenging the use to which it has been put by the judges involved in this law suit to deny 10 million inner-city-children constituents of the

Attorney General the "Equal Protection Of The Law" as required by the Fourteenth Amendment to the U.S. Constitution by prohibiting the publication or citation of their decisions that they know are diametrically opposed to well settled law in order to preserve the well-settled law for first-class American citizens while denying it to the 10 million California inner-city children.

The Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations Involved In These Cases, Set Out Verbatim With Appropriate Citation

U.S. Const., Amendment 14, Section 1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Rules of Court, Rule 8.1115.

> Citation of opinions
>
> (a) Unpublished opinion
>
> Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.

(b) Exceptions

An unpublished opinion may be cited or relied on:

(1) When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or

(2) When the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

The Basis For Federal Jurisdiction In The Court Of First Instance

Rule 14(1)(g)(ii) is not applicable because this case was brought in the California Superior Court (San Francisco County).

I. Scope Of The Appeal

Two lawsuits, *Karls v. The Bank of New York, et al.,* and *Karls v. Mellon Capital Management Corporation, et al.,* were combined for hearing and decision by the California appellate courts.

Only *Karls v. The Bank of New York, et al.,* is being appealed. Therefore, only Section IV of the Court of Appeal's "Discussion" Section entitled "IV. Failure to State a Claim for Conversion" (Appendix, pp. 19a-26a) is relevant.

II. Statement Of The Facts Material To Consideration Of The Question Presented

All of the California state-court judges involved with this lawsuit and similar lawsuits against 14 other financial institutions have prohibited their opinions from being published or cited because the judges knew that they were denying the 10 million inner-city children the same rights that are regularly enjoyed by first-class American citizens.

In some instances, the judges cited at the beginning of their opinions California Rules of Court, Rule 8.1115, as authority for prohibiting publication and citation. It is not the contention of the Plaintiff-Petitioner that Rule 8.1115 violates per se the requirement of "Equal Protection of the Law" of the Fourteenth Amendment to the U.S. Constitution.

Instead, it is the contention of the Plaintiff-Petitioner that the use of Rule 8.1115 to prohibit publication or citation of an opinion, as well as such prohibition orders which do not cite that rule, violate the constitutional requirement of "Equal Protection of the Law" in the Fourteenth Amendment to the U.S. Constitution when the judges know that their decisions are diametrically opposed to well-settled law that protects first-class American citizens, and they prohibit publication or citation in order to leave undisturbed the law that protects first-class American citizens while denying the protection of that law to 10 million inner-city children.

A. The Real Parties At Interest Are The 10 Million Inner-City Children Rather Than The Plaintiff-Petitioner

From the initial trial-court briefs in this lawsuit and the lawsuits against the six of the remaining 14 financial institutions that did not agree to stays in the California Superior Court pending the final disposition of appeals to the California Court of Appeal, it has been disclosed that the 10 million inner-city children are the "real parties at interest" and that the Plaintiff-Petitioner has no financial interest in the outcome other than bearing all the costs of pursuing the lawsuits whether or not they are successful.

Indeed, pages 43a-54a of the Appendix comprise the Plaintiff-Petitioner's "Certificate of Interested Entities or Persons" that was required by California Rules of Court, Rule 8.208, to be included at the beginning of Plaintiff-Petitioner's Opening Brief filed with the California Court of Appeal. It discloses:

- That the 179 "I Have A Dream"® Foundations in 51 American cities during the late 1980's and 1990's replicated what self-made multi-billionaire Eugene Lang did by providing tutoring and mentoring to an entire class from Harlem Public Elementary School 121 as it progressed through High School graduation in 1987 with a guarantee of college tuition.
- That the Hon. Hillary R. Clinton served on the IHAD-National Board until the 1992 Iowa caucuses.
- That the first President Bush was fond of saying that the famous "1,000 Points of Light"

portion of his 1989 Inaugural Address was inspired by IHAD (President Bush raised prodigious amounts of contributions for IHAD-Houston where he resided and for IHAD-Boston whose founder and principal benefactor was his nephew, Jamie Bush).

- That the IHAD programs have consistently produced H.S. graduation/college matriculation rates of 60%-65% even though the rates for the classes preceding and succeeding each IHAD class were typically ***single digits.***
- That during the 1990's, Plaintiff-Petitioner served as the volunteer Treasurer of IHAD-National, as well as being the founder and chief benefactor of IHAD-Stamford CT which served 200 children in public-housing projects.
- That in 1997, Plaintiff-Petitioner took early retirement as Senior International Tax Partner (Technical) of Ernst & Young International to become an investment banker for the purpose of inventing trade secrets whose value would be used to fund new IHAD or IHAD-style programs. That purpose was announced to the other 179 IHAD sponsors (most of whom were CEO's of major corporations) and to the Plaintiff-Petitioner's Ernst & Young partners. The continued contributions to IHAD from persons in both categories are routinely held to be the "bargained for consideration" that makes such an announcement a binding contract.
- That the only reason why Plaintiff-Petitioner had not already assigned all of his rights in this and the 14 similar lawsuits to IHAD or an IHAD-style program was that a foundation, as

a juridical entity, is required to be represented by counsel.

- Plaintiff-Petitioner has in fact offered to assign all of his rights in all of the lawsuits gratis to IHAD-National, but IHAD-National was not in a position to shoulder the costs of legal counsel.
- Petition has in fact offered to assign all of his rights in all of the lawsuits gratis to IHAD-Los Angeles and IHAD-San Francisco and a to-be-reformed IHAD-Oakland, but none of them were in a position to shoulder the costs of legal counsel.
- Plaintiff-Petitioner cannot himself act as counsel for a foundation because, when he retired in 1997 from Ernst & Young International to become an investment banker based in London, his membership in the New York Bar lapsed and California requires reinstatement (which would require a 12-month legal procedure) followed by passing the California Bar Exam.
- Plaintiff-Petitioner is not in a position to shoulder the cost of legal counsel for a juridical entity because throughout his career, Plaintiff-Petitioner has given away all of his excess wealth to IHAD programs and to UNEP for which he was a volunteer fundraiser following his association with IHAD at the personal request of the U.N. Under-Secretary General for the Environment.

- That following the inability of IHAD-National and the IHAD-California programs to accept his offers, the Plaintiff-Petitioner has been corresponding with 51 inner-city clergy from Los Angeles, San Francisco and Oakland so that if the Plaintiff-Petitioner were ever able to obtain the funds for legal counsel from other sources, there could be immediate substance for a new foundation. [In this regard, Plaintiff-Petitioner's IHAD-Stamford CT foundation featured a board comprising primarily clergy whose congregants served as the volunteer tutors and mentors.]

The Defendant-Respondents, The Bank of New York, et al. have never challenged any of these facts regarding the real parties at interest.

B. The California Superior Court Sustains A Demurrer To A Complaint For Common-Law Conversion Of Intangible Property That Was Not Only Merged In Tangible Property That Was Admittedly Stolen, But Was Incapable Of Being Comprehended In The Absence Of The Tangible Property That Was Admittedly Stolen

The Defendant-Respondents, The Bank of New York, et al., have been sued for the classic tort of English-American common-law *conversion* of a trade secret, from which evolved the *additional* English-American common-law tort of *misappropriation* of trade secrets. 1 Melvin F. Jager, *Trade Secrets Law, Ch. 2: The Historical Development Of Trade Secret Concepts* (West Publishing Company – Looseleaf © 2011).

The classic tort of English-American common-law *conversion* of a trade secret rests on the principle that governs the application of English-American common-law *conversion* to any intangible property:

- "An action for conversion ordinarily lies only for personal property that is tangible, or to *intangible property that is merged in, or identified with, some document*." 18 Am.Jur.2d Conversion *§ 7: "Tangible and Intangible Property, Generally"* (West Publishing Company – Looseleaf © 2011).
- Section 242 of the Restatement Second of Torts, published in 1965, states: "*Where there is conversion of a document in which intangible rights are merged, the damages include the value of such rights.*"

With specific reference to the theft of trade secrets, this classic test for conversion is still used in jurisdictions that have not adopted the Uniform Trade Secrets Act such as New York and, if the classic conversion test is satisfied, the injured party may sue for conversion or misappropriation or both. 2 Melvin F. Jager, *Trade Secrets Law, Chapter 50: The Trade Secrets Law of New York* (West Publishing Company – Looseleaf © 2011).

The Plaintiff-Petitioner's trade secret that was stolen was alleged to have been "merged in, or identified with some document" –

- The Complaint alleges that the trade secret was "in the form of a written presentation, stating the accounting or tax benefit intended to be achieved, the transaction steps to be implemented, and the accounting or tax technical analysis

accompanied by diagrams." (Appendix, p. 31a, last full paragraph.)

- The Complaint also alleges that the trade secret was "so complicated that it cannot be understood without being embodied in a 'written presentation.'" (Appendix, p. 31a, fourth paragraph.)

The Plaintiff-Petitioner's trade secret was described in the last four pages of the complaint (Appendix, pp. 31a-34a) and in a Wall Street Journal front-page article that was attached to, and made part of, the complaint (Appendix, pp. 35a-42a). In this regard the opinion of the California Court of Appeal erroneously states that the Plaintiff-Petitioner's trade secret was "similar to" the trade secret described in the Wall Street Journal article (Appendix, p. 8a). This is directly contradicted by the complaint which states (Appendix, p. 28a):

> "The June 30, 2006 issue of the Wall Street Journal reported in the attached article on its front page, first column, that a number of companies have used [the trade secret] which the Wall Street Journal reports was both confidential and proprietary.
>
> "The [trade secret] is indeed confidential and proprietary.
>
> "The [trade secret] belongs to the Plaintiff."

The Wall Street Journal article states that the trade secret was unique and that it was used by Barclays Capital Ltd. in deals with at least 9 major financial institutions of which the Wall Street Journal was only able to identify Wells Fargo, Bank of America and Wachovia Bank. The Wall Street Journal article also states (Appendix, p. 39a):

> "When the Wall Street Journal asked the [the U.S. Office of the Comptroller of the Currency] for documents on the transactions, several banks opposed their release, citing client confidentiality and trade secrets."

Barclays Capital Ltd., a U.K. subsidiary of Barclays Bank PLC of the U.K., has admitted in unprivileged communications that it stole the trade secret belonging to the Plaintiff-Petitioner and that Barclays Capital transferred it under conditions of confidentiality to the Defendant-Respondents, The Bank of New York, et al., and the other 14 financial institutions that the Plaintiff-Petitioner has sued.

Since the tort of English-American common-law conversion permits the owner to proceed against either the thief or the current holder (*the classic example would be the heirs of Holocaust victims whose fine art was stolen by the Nazis*), the Plaintiff-Petitioner sued The Bank of New York, et al., in California Superior Court (San Francisco).

However, the Defendant-Respondents demurred on the grounds that no "idea" can be the subject of an action for common-law conversion.

The California Superior Court sustained the demurrer on that basis which is addressed in Argument III-A below, as well as on the grounds of federal copyright preemption and California Uniform Trade Secrets Act Preemption which are both addressed in Argument III-B entitled "Red Herrings." (The California Superior Court's Order Is pp. 2a-4a of the Appendix.)

C. The California Court Of Appeal Affirms Sustaining The Demurrer Even Though Counsel For The Defendant-Respondents, The Bank of

New York, et al., Admitted In Oral Argument That Two Recent Decisions Of The Court Of Appeal Recognized The Well-Established Principle That Common-Law Conversion Lies For Intangible Property That Is Merged In Tangible Property That Is Stolen, And That Plaintiff-Petitioner's Complaint Was Well Within That Principle

As stated in the opinion of the Court of Appeal (Appendix, p. 12a), the Plaintiff-Petitioner appealed solely the sustaining of Defendant-Respondents' demurrer in the order of the California Superior Court of November 12, 2009 (that order is Appendix, pp. 2a-4a).

As noted above in Section A entitled "Scope of the Appeal" (page 1 of this brief), this Petition for Certiorari includes only *Karls v. The Bank of New York, et al.*, and not *Karls v. Mellon Capital Management Corporation, et al.*, which was one of the lawsuits brought against the other 14 financial institutions but which involved only procedural issues which are wholly unrelated to the conversion issue addressed by the November 12, 2009 order of the California Superior Court in *Karls v. The Bank of New York, et al.*

Accordingly, only the portion of the opinion of the Court of Appeal labeled "IV. Failure to State a Claim for Conversion" (Appendix, pp. 19a-25a) is relevant to this Petition for Certiorari. (Section IV-D of the opinion, Appendix, pp. 24a-25a, discusses the Plaintiff-Petitioner's argument of denial of "Equal Protection Of The Law" requirement of the Fourteenth Amendment of the U.S. Constitution.)

The Court of Appeal affirmed the California Superior Court's sustaining Defendant-Respondents' demurrer on the grounds that "intangible property that is merged in, or identified with, some document" (quoting Am.Jur.2d Conversion *§§ 7: "Tangible and Intangible Property, Generally"* (West Publishing Company – Looseleaf © 2011)) is not the proper subject of a claim for common-law conversion.

The Court of Appeal did so despite the concessions of counsel for the Defendant-Respondents during oral argument on December 8, 2010 that both *Fremont Indemnity Company v. Fremont General Corporation, et. al.,* 148 Cal.App.4th 97, 55 Cal.3d 621 (Cal.App. Second Dist. 2007) and *Thrifty-Tel, Inc. v. Bezenek,* 46 Cal.App.4th 1559, 54 Cal.3d 468 (Cal.App. Fourth Dist. 1996) recognized the general rule that (p. 638 of the *Fremont* opinion and p. 472 of the *Thrifty-Tel* opinion):

> "Courts have traditionally refused to recognize as conversion the unauthorized taking of intangible interests that are not *merged with, or reflected in, something tangible*" (citations omitted)

and that Plaintiff-Petitioner's complaint was well within this well-settled principle of common-law conversion.

D. The Defendant-Respondents, The Bank of New York, et al., Opposed An Appeal To The California Supreme Court On The Grounds That The Requirement of "Equal Protection Of The Law" In The Fourteenth Amendment To The U.S. Constitution Is Not Violated Unless There Is A "Holocaust" Affecting The 10 Million Inner-City

Children And Alleging That There Is Not A "Holocaust" Affecting Them – The California Supreme Court Refused To Accept An Appeal

The Plaintiff-Petitioner filed a Petition for Review with the Supreme Court of the State of California. The Petition was based on three grounds:

1. Neither the Defendant-Respondents nor the lower courts had been able to cite a single authority that conflicted with the well-settled principle that an action for common-law conversion lies for intangible property that is merged in a document or other tangible property.
2. Counsel for the Defendant-Respondents conceded in oral argument before the California Court of Appeal (1) that two recent cases of the Court of Appeal had recognized an action for common-law conversion lies for intangible property that is merged in a document or other tangible property, and (2) that the Complaint was well within this principle.
3. The "Equal Protection of the Law" requirement of the Fourteenth Amendment of the U.S. Constitution was violated by the Court of Appeal's ordering that its decision could not be published or cited because the judges knew:
    - that their decision was diametrically opposed to this well-settled principle of common-law conversion, and
    - that prohibiting publishing or citing a decision denying the benefit of this

> well-settled principle of common-law conversion to 10 million inner-city children would preserve the well-settled principle of common-law conversion enjoyed by first-class American citizens.

The Defendant-Respondents opposed the Petition for Review on the grounds that "Equal Protection of the Law" is not violated by denying the 10 million inner-city children who are the "real parties at interest" the right to claim common-law conversion unless they are faced with a Holocaust, as is involved when of heirs of Holocaust victims whose fine art was stolen by the Nazis are permitted to claim common-law conversion vis-à-vis the current holders of that fine art.

The Supreme Court of the State of California denied the Petition for Review without comment (Appendix, p. 1a).

III. Argument

A. The Well-Settled Principle That Common-Law Conversion Lies For "Intangible Property Merged In, Or Identified With, Some Document" – (Court of Appeal Decision - Bank Of NY Issues A and B (Appendix, pp. 19a-22a))

A-1. American Jurisprudence 2d, The Restatement (Second) of Torts and, As Quoted With Approval By The California Court of Appeal, Corpus Juris

As evidence of the well-settled common-law of conversion regarding "intangible property merged in, or identified with, some document," the Plaintiff-Petitioner has always cited from the outset of this lawsuit three authorities:

(1) 18 Am.Jur.2d *Conversion § 7: Tangible and Intangible Property, Generally* (Loose Leaf © 2009-2011) which states:

> "An action for conversion ordinarily lies only for personal property that is tangible, or to *intangible property that is merged in, or identified with, some document*."

(2) The Restatement (Second) of Torts *Chapter 9: Conversion* (1965) – § 242. Conversion of Documents and Intangible Rights:

> "Where there is conversion of a document in which intangible rights are merged, the damages include the value of such rights."

(3) The older, more inclusive formulation of 13 Corpus Juris, p. 948:

> Whether "intangible property" can exist "separate and apart from the property in the paper on which it is written, or the physical substance in which it is embodied." (As quoted with approval in *Italiani v. Metro-Goldwyn-Mayer Corporation*, 45 Cal.App.2d 464, 466, 114 P.2d 370 (Cal. App. Third Dist. 1941).

The Plaintiff-Petitioner's Complaint alleged (Appendix, p. 31a, last full paragraph) that:

> "the [trade secret] had to be 'in the form of a written presentation, stating the accounting or tax benefit intended to be achieved, the transaction steps to be implemented, and the accounting or tax technical analysis' accompanied by diagrams."

The Plaintiff-Petitioner's Complaint further alleged (Appendix, p. 31a, fourth paragraph) that:

> The trade secret "is so complicated that it cannot be understood without being embodied in a 'written presentation.'"

In affirming the California Superior Court's Sustaining the Demurrer of the Defendant-Respondents, the California Court of Appeal held (Appendix, p. 21a):

> "In sum, while an action for conversion may be entirely appropriate in the context of paintings and other tangible media of artistic expression, the tort is not available to plaintiffs suing for infringement of their intellectual property rights, *regardless of whether the concepts at issue have been memorialized in writing*."

A-2. The Failure Of The California State Courts To Conjure Even One Authority (Including

California Decisions) That Conflict With The Well-Settled Principle Regarding "Intangible Property Merged In, Or Identified With, Some Document"

Fremont Indemnity Company v. Fremont General Corporation, et. al., 148 Cal.App.4th 97, 55 Cal.3d 621 (Cal.App. Second Dist. 2007) and *Thrifty-Tel, Inc. v. Bezenek,* 46 Cal.App.4th 1559, 54 Cal.3d 468 (Cal.App. Fourth Dist. 1996) actually recognized the well-settled principle that conversion lies for "intangible property merged in, or identified with, some document" – as explained in greater detail in Argument A-3 below.

Gladstone v. Hillel, 203 Cal.App.3d 977, 250 Cal.Rptr. 372 (First Dist. 1988) dealt with an idea comprising an artist's concept and illustrates the older, broader formulation of the well-settled principle that conversion lies for "intangible property" that cannot exist "separate and apart from the paper on which it written, or the physical substance in which it is embodied" (13 Corpus Juris, p. 948, sec. 5-a, as quoted with approval by *Italiani v. Metro-Goldwin-Mayer Corporation*, 45 Cal.App.2d 464, 466, 114 P.2d 370 (Third District 1941)) – as explained in greater detail in Argument A-4 below.

All of the remaining cases cited by The Court of Appeal are easily reconciled with Plaintiff-Petitioner's position that conversion of a document in which intangible rights are merged is actionable –

- *Melchior v. New Line Productions, Inc.,* 106 Cal.App.4th 779, 131 Cal.2d 347, (Cal.App. Second Dist. 2003) involved only a script which the plaintiff did not write

and a book authored by the plaintiff which was not wrongfully taken.

- *Dielsi v. Falk,* 916 F.Supp. 985 (C.D. Cal. 1996) involved solely a script which was not wrongfully taken.
- *Oakes v. Suelynn Corp.,* 24 Cal.App.3d 345, 100 Cal. 838 (Cal.App. First Dist. 1972) involved solely architectural plans which were not wrongfully taken.

Both the Defendant-Respondents and the Superior Court cited only two cases – *Melchoir, supra,* and another case that The Court of Appeal did not cite –

- *Minniear v. Tors,* 266 Cal.App.2d 495, 72 Cal. 287 (Cal. App. Second Dist. 1968) involved solely a pilot script for a television series which the defendants did not use, and an outline for additional episodes which contained only one bullet-point idea ("undersea jet pilot rescue") that bore any relationship to an actual episode in the television series and, in any event, there was no evidence in the opinion that the outline was wrongfully taken.

A-3. Indeed, Two Recent California Decisions Recognized The Well-Settled Principle Regarding "Intangible Property Merged In, Or Identified With, Some Document" – But Despite The Concessions Of Counsel For Defendant-Respondents In Oral Argument That These Two Cases Recognized This Well-Settled Principle and That Plaintiff-Petitioner's Complaint Satisfied This Test, The California Court of Appeal Held In A

"*Segregated Toilet*" Opinion That The Two Recent California Decisions Held The Opposite Of What They In Fact Did

Both *Fremont Indemnity Company v. Fremont General Corporation, et. al.,* 148 Cal.App.4th 97, 55 Cal.3d 621 (Cal.App. Second Dist. 2007) and *Thrifty-Tel, Inc. v. Bezenek,* 46 Cal.App.4th 1559, 54 Cal.3d 468 (Cal.App. Fourth Dist. 1996) recognized the general rule that (p. 638 of the *Fremont* opinion and p. 472 of the *Thrifty-Tel* opinion):

> "Courts have traditionally refused to recognize as conversion the unauthorized taking of intangible interests that are not *merged with, or reflected in, something tangible*." (citations omitted)

The Fremont Court, after considering the normal rule of "merged in, or identified with, something tangible," explicitly expanded the rule by holding that the misappropriation of a net operating loss for U.S. tax purposes "supports a cause of action for conversion" even though it was not "merged or reflected in a document." Ibid, p. 643.

The Thrifty-Tel Court also considered explicitly expanding the normal rule in the case of a computer access code "which was never reduced to paper or reflected on a computer disk" (p. 472 of the *Thrifty-Tel* opinion) before holding that it was not necessary to do so because the jury verdict for conversion could be justified as trespass which had not been pleaded (also p. 472 of the *Thrifty-Tel* opinion).

Both the Freemont and Thrifty-Tel decisions recognized the general rule summarized in 18 Am.Jur.2d Conversion: Tangible and Intangible

Property, Generally (West Publishing Company – Looseleaf © 2011) that the Plaintiff-Petitioner has always cited from the outset in this and the 14 virtually-identical cases:

> "An action for conversion ordinarily lies only for personal property that is tangible, or to *intangible property that is merged in, or identified with, some document."* (footnotes omitted, emphasis added)

As set forth in Argument A-2 above, every case cited by the Defendant-Respondents or by the various California state courts that have been involved in this case are consistent with the general rule as stated in the *Freemont* and *Thrifty-Tel* decisions and in 18 Am.Jur.2d.

Plaintiff-Petitioner's Complaint as amended is well within the general rule since it pleads (Appendix, p. 31a):

> The [trade secret] which "must be in the form of a 'written presentation,' is so complicated that it cannot be understood without being embodied in a 'written presentation.'"

During oral argument before the Court of Appeal on December 8, 2010, the Plaintiff-Petitioner had just finished making these points when Justice Martin Jenkins asked Counsel for the Defendant-Respondents how he would respond to these points and Counsel had no response to these points. Accordingly, Defendant-Respondents have conceded these points.

Nevertheless, the Court of Appeal in a "*segregated toilet*" opinion that was ordered not to be published or cited (Appendix, pp. 5a-26a), affirmed

the California Superior Court's sustaining of the Demurrer.

A-4. Moreover, The Court of Appeal's Attempt To Distinguish A Third Recent California Decision Regarding An Artistic Concept Which, Of Course, Is Intangible Property Merged In Tangible Property (The So-Called "Mona Lisa Issue") By Claiming That A Photocopy Of A Document Captures The Value Of The Intangible Property It Contains, Not Only Contradicts The Well-Settled Common Law Regarding "Documents" But Also Contradicts Both The Court's Own Recent Opinion Regarding Copies Of An Artistic Concept (The So-Called "Rembrandt Etchings Issue") And The More General Formulation Of The Well-Settled Common-Law Principle In Corpus Juris

Gladstone v. Hillel, 203 Cal.App.3d 977, 250 Cal.Rptr. 372 (Cap. App. First Dist. 1988) was a lawsuit for common-law conversion of molds for making fine jewelry:

> "Like other jewelry designers, Gladstone makes rubber molds of his successful designs and dedicates them to a limited number of copies. Later pieces of the design, produced from wax shot into the mold, are numbered to indicate the size of the edition and the place in the series, e.g., 3 of 45." *Supra,* 203 Cal.App.3d at p. 982.

In this regard, the facts of *Gladstone v. Hillel* are identical to fine-art etchings for which

Rembrandt, for example, was famous. Rembrandt produced more than 300 etchings over the course of his career. The "idea" (aka artist's concept) was etched on metal, often copper. From the etching, a limited number of "prints" would be made with each "print" indicating, like Gladstone's jewelry, "the size of the edition and the place in the series, e.g., 3 of 45."

In *Gladstone v. Hillel, supra,* not only did the defendants make copies of the fine-art designs, but the defendants also "made wax models from the original molds and then simplified the designs to make them more suitable for mass production." *Supra,* 203 Cal.App.3d at p. 986.

Gladstone v. Hillel, supra, 203 Cal.App.3d at p. 990 affirmed as a remedy for conversion, orders:

> "(1) to refrain from using (i) Gladstone's molds or other representations of his designs which they wrongfully acquired or retained possession of, or (ii) copies of such molds or other representations of his designs or of his jewelry which were derived from his molds, designs or jewelry while appellants wrongfully retained possession thereof; and
>
> "(2) to destroy all molds, jewelry, sketches, designs, and other representations of Gladstone's work that appellants wrongfully acquired or retained possession of."

Accordingly, it is disingenuous of the California Court of Appeal in the *Karls v. The Bank of New York, et al.,* to attempt to distinguish *Gladstone v. Hillel, supra,* on the grounds that –

> "An 'idea' does not qualify as property subject to conversion, even if the idea is complicated and is reduced to writing.

> Further, the value of the Mona Lisa is in the physical substance in which it is embodied. A photocopy of the Mona Lisa would have a marginal value, at best. By contrast, a photocopy of Karls's complicated tax scheme would presumably have as much value as the original to anyone who might be interested in the scheme. Thus, unlike the value of the Mona Lisa, the value of Karls's idea does not inhere in the tangible substance on which the idea is expressed." (Appendix, pp. 20a-21a.)

The Court's position is disingenuous not only because there is no legal basis for such a distinction, but also because the Court's position is diametrically opposed to precisely what it did in *Gladstone v. Hillel, supra.*

A-5. <u>The Court of Appeal's Factual Claim That There Was No Substantial Interference With The Plaintiff-Petitioner's Property Rights: (A) Was Contradicted By The Complaint And Therefore Cannot Be The Basis For Sustaining A Demurrer, and (B) Was Also Contradicted By The Court's Own</u>

Recent Decision On The So-Called "Rembrandt Etchings Issue"

Sec. IV-B of the Court's Opinion (Appendix, pp. 21a-22a) claims that the Plaintiff-Petitioner's complaint does not allege substantial interference. The second paragraph of the opinion states (appendix, pp. 21a-22a):

> "To state a claim for conversion, a plaintiff must allege an intention on a defendant's part to 'convert the owner's property, or to exercise some act of ownership over it, or to prevent the owner's taking possession of his property [Citation.]' (*Simonian v. Patterson* (1994) 27 Cal.App.4th 773, 782.)" [emphasis added]

As discussed above, the Plaintiff-Petitioner has indeed alleged the unauthorized taking of "a document in which intangible rights are merged" with respect to which the Defendant-Respondents exercised an action of ownership.

The Wall Street Journal article that was attached to, and made a part of, the Complaint alleges that the Defendant-Respondents exercised an act of ownership over it by claiming that it was their confidential trade secret, and alleges that they used the trade secret to the mutual advantage of Barclays Capital Ltd. (the admitted thief) and themselves in deals they implemented with Barclays Capital. The unauthorized use of the trade secret which was "merged" in the stolen document, of course, was a wrongful interference with the Plaintiff-Petitioner's right of dominion over the trade secret and his right to prohibit its unauthorized use.

After all, how are the 10 million inner-city children supposed to derive any benefit from the value of Plaintiff-Petitioner's trade secret if a potential user of the trade secret steals it and, together with the Defendant-Respondents (and the 14 other financial institutions who have been sued)—*who are in receipt of stolen property which is a common-law crime*—make free use of it?

The next paragraph of the Court of Appeal's Opinion and the last paragraph on federal copyright preemption (bottom of page 12 – top of page 13) cites only *Zaslow v. Kroenert*, 29 Cal.2d 541 (1946) for the principle that the "[F]ailure to allege substantial interference with possession or the right to possession permits rejection of the conversion claim."

The Defendant-Respondents had, in addition, cited *Jordan v. Talbot*, 55 Cal.2d 597 (1961). *Jordan* involved an apartment occupied by a plaintiff. The owner of the apartment building removed the plaintiff's furniture and other property and stored it in a warehouse in the plaintiff's name.

Zaslow also involved a dispute of occupancy rights following which the plaintiff's personal property was removed and stored – again in the name of the plaintiff. Both courts held that there was mere "inter-meddling" because neither plaintiff had been deprived of full and immediate possession or enjoyment of their property – only interference with where that possession and enjoyment could occur.

Such "intermeddling" cases that do not deprive the owner of full and immediate possession or enjoyment of his property are no authority for the Court's position which, as discussed above, is diametrically opposed to (1) *Fremont Indemnity*

Company v. Fremont General Corporation, et. al., 148 Cal.App.4th 97, 55 Cal.3d 621 (Cal.App. Second Dist. 2007), (2) *Thrifty-Tel, Inc. v. Bezenek,* 46 Cal.App.4th 1559, 54 Cal.3d 468 (Cal.App. Fourth Dist. 1996), (3) 18 Am.Jur.2d *Conversion: Tangible and Intangible Property, Generally* (West Publishing Company – Looseleaf © 2010 and 2009), (4) Section 242 of the Restatement Second of Torts, and (5) 13 Corpus Juris, p. 948, sec. 5-a, as quoted in *Italiani v. Metro-Goldwyn-Mayer Corporation,* 45 Cal.App.2d 464, 466, 114 P.2d 370 (Cal.App. Third Dist. 1941).

After all, does any U.S.Supreme Court Justice believe that if someone tried to store her/his property in the living room of the Justice, s/he would not be justified in putting that property in storage in the name of the owner?

B. "Red Herrings"

B-1. Federal Copyright Preemption Vis-à-vis Which The California State Courts Admit They Are Wrong If They Are Wrong On The Conversion Issue (Federal Copyright Conversion Is Court of Appeal Decision – Bank of NY Issue C (Appendix, pp. 22a-24a)

Section C of the California Court of Appeal Decision (Appendix, pp. 22a-24a) deals with the issue of federal copyright preemption. *It effectively concedes that if the Court is wrong on the conversion issue, then it is also wrong on whether federal copyright law preempts the Plaintiff-Petitioner's complaint for conversion.*

There is no mystery here.

Gladstone v. Hillel, 203 Cal.App.3d 977, 250 Cal.Rptr. 372 (First Dist. 1988) holds that the wrongful possession in an action for common-law conversion constitutes the "extra element" that precludes preemption under the federal copyright law. *Gladstone* states (203 Cal.App.3d at p. 987):

> "In a much quoted passage, Nimmer postulates an 'extra element' test to distinguish valid state causes of action from those 'equivalent' to copyright claims:
>
> > "[A] right which is 'equivalent to copyright' is one which is infringed *by the mere act* of reproduction, performance, distribution or display.…If under state law the act of reproduction, performance, distribution or display,…will *in itself* infringe the state created right, then such right is preempted. But if other elements are required, *in addition to* or instead of, the acts of reproduction, performance, distribution or display, in order to constitute a state created cause of action, then the right does not lie 'within the general scope of copyright' and there is no preemption." (1 Nimmer, The Law of Copyright, *op. cit supra*, § 1.01[B] at pp. 1-11, 12.)
>
> "While generally accepting this test, the courts have demanded that the extra element 'must be one which changes the nature of the action so that it is *qualitatively* different from a copyright infringement claim. (citations omitted)

> "*Under the extra element test, it is clear that federal copyright law does not preempt state causes of action alleging fraud or conversion* – the two theories pleaded in the complaint. Fraud involves 'the extra element of misrepresentation.' (citation omitted) *Conversion entails the 'wrongful possession of the tangible embodiment of the work.'* (2 Nimmer, The Law of Copyright, *op. cit. supra*, § 8.23, fn. 1 at p. 8-272.9, *Harper & Row Publishers, Inc. v. Nation Enterprises* (2d Cir. 1983) 723 F.2d 195, 201, rev'd on other grounds in *Harper & Row Publishers, Inc. v. Nation Enterprises* (1985), 471 U.S. 539 [85 L.Ed.2d 588, 105 S.Ct. 2218; *Oddo v. Ries* (9th Cir. 1984) 743 F.2d 630, 635.)"

A typical state-law claim that would be preempted would be for breach of contract not to make copies of copyrighted material of which the defendant is in lawful possession.

However, as set forth in *Gladstone, supra, Nimmer, supra, Harper & Row, supra and Oddo, supra,* making copies of copyrighted material of which defendant is in "wrongful possession" does not result in federal copyright law preemption.

Indeed, the California Court of Appeal in *Gladstone* recognized that molds for making fine jewelry was copyrightable and that the defendants had made new molds from the stolen molds. Nevertheless, the Court of Appeal First ordered destroyed or returned to plaintiff both the new and old molds and jewelry made from either set of molds. *The Court did not fail to take action because copies of the stolen molds had been made.*

B-2. California Uniform Trade Secrets Act Preemption Vis-à-vis Which The Defendant-Respondents, The Bank of New York, et al., Conceded In California Superior Court That Either New York Or British Substantive Law Applies And Neither Has Adopted The Uniform Trade Secrets Act, And Then Abandoned The Issue In Their Appellate Briefs (Court of Appeal Decision – Bank of New York Footnote 6 (Appendix, p. 25a))

What does it take to "drive a stake through the heart" of this issue?

Preemption under the Uniform Trade Secrets Act was raised by the Defendant-Respondents in the California Superior Court.

The Plaintiff-Petitioner pointed out that his trade secret was stolen in the U.K. by a U.K. citizen and a U.K. corporation, that when the U.K. corporation transmitted the trade secret to The Bank of New York the transmittal occurred in either the U.K. or New York, and that neither the U.K. nor New York has adopted the American Uniform Trade Secrets Act.

On November 12, 2009, The Bank of New York effectively conceded this "choice of law" issue in oral argument in the California Superior Court before Judge Woolard (a transcript of that hearing appears at Plaintiff-Petitioner's Opening California Court of Appeal Appendix, Vol. 2 of 2, pp. 174-189) and *The Bank of New York abandoned this "choice of law" issue be failing to include anything on it in the answering brief in the California Court of Appeal filed April 23, 2010.*

B-3. Res Judicata Vis-à-vis Which The Defendant-Respondents, The Bank of New York, et al., Conceded In California Superior Court That There Had Been No Decisions In Any Of The 14 Similar Lawsuits That Had Become Final (Court of Appeal Decision – Last Sentence Of The Penultimate Paragraph Of The "Factual And Procedural Background" Section (Appendix, p. 11a))

Counsel for the Defendant-Respondents raised the issue of Res Judicata in the California Superior Court.

The Plaintiff-Petitioner pointed out in oral argument (1) that only six of the other 14 financial institutions that had refused to agree to stays in the California Superior Court pending the final disposition of appeals to the California Court of Appeal, (2) that of the six active lawsuits, none had reached a final judgment, and (3) that the doctrine of Res Judicata only applies to final judgments.

Thereupon, counsel for the Defendant-Respondents conceded this issue and they have not raised it since.

However, of the six other cases that were active, three were removed to U.S. District Court (N.D. Cal.) and have resulted in final judgments.

[Two of the other six were settled before judgments became final and the last of the six was *Karls v. Mellon Capital Management Corporation, et al.,* which involved solely a procedural issue of whether affiliated groups of corporations filing consolidated U.S. income tax returns could be sued

under California law, an issue that is not involved in this *Karls v. The Bank of New York, et al.*, Petition for Certiorari.]

With regard to the three lawsuits that were removed to U.S. District Court (N.D. Cal.), final judgments were reached when the U.S. Supreme Court denied a Petition for Certiorari on September 27, 2010 (U.S. Supreme Court Docket No. 09-1527).

On September 28, 2010 (and, for technical reasons, again on October 4, 2010), the Plaintiff-Petitioner in this case against *The Bank of New York, et al.*, and in the three cases involved in the Petition for Certiorari No. 09-1527 (*The Goldman Sachs Group, Inc., et al., Citicorp of North America, Inc., et al., and ING Financial Holdings Corporation, et al.)* notified the California Court of Appeal and the California Supreme Court with respect to *Karls v. The Bank of New York, et al.,* that the Petition for Certiorari in *Goldman-Citicorp-ING* had been denied by the U.S. Supreme Court.

Both notifications were accompanied by a brief that cited, inter alia, *People v. Barragan,* 23 Cal.4th 236, 256 (Cal. S.Ct. 2004) that "[W]hether res judicata applies in a given context is not simply a matter of satisfying the doctrine's technical requirements" but also a matter of whether, for example, the party against whom it is sought to be applied has had a fair day in court. The brief went on to argue that the judgments in *Goldman-Citicorp-ING* could not be the basis for applying Res Judicata under *People v. Barragan, supra,* because of egregious violations of the "Due Process of Law" and "Equal Protection of the Law" requirements of the U.S. Constitution by both the U.S. District Court and the three-judge Ninth Circuit Panel (which even

"re-construed" a Petition for Rehearing En Banc as a mere Motion for Rehearing so that they could kill it without the other 47 judges of the Ninth Circuit even being informed what they had done).

Needless to say, both the U.S. District Court and Ninth Circuit decisions were contained in *"segregated toilet"* orders that were not published and cannot be cited.

The Defendant-Respondents, *The Bank of New York, et al.,* did not contest this new Res Judicata issue in an opposing brief, even though more than two months elapsed before oral argument on December 8, 2010.

In addition, Defendant-Respondents did not contest this new Res Judicata issue during the oral argument.

Accordingly, they have abandoned the issue.

C. The Requirement Of "Equal Protection Of The Law" Of The Fourteenth Amendment To The U.S. Constitution (Court of Appeal – Bank of NY Issue C (Appendix, pp. 24a-25a))

C-1. The 10 Million Inner-City Children Need Not Be Facing A Holocaust In Order For Their Rights To Merit The Same "Equal Protection Of The Law" As First-Class American Citizens

The Defendant-Respondents have argued, as set forth in Section D of the Statement of Facts, that the 10 million inner-city children (who, as set forth in Section B of the Statement of Facts, are the real parties at interest in this lawsuit) must be facing a Holocaust in order to be accorded the same "Equal

Protection of the Law" of common-law conversion that is routinely enjoyed by first-class American citizens.

It would appear that the asserted requirement of a Holocaust is prompted by the notion that the classic example of common-law conversion involves heirs of Holocaust victims whose fine art was stolen by the Nazis and the fine art is many years later discovered to be "owned" by a museum or individual collector.

Indeed, the transcript of the PBS News Hour With Jim Lehrer for November 16, 2009 (Appendix, pp. 55a-61a) affirms that much, if not most, of the fine art stolen by the Nazis from Holocaust victims is still in unknown hands, but is expected to be re-discovered in the near future when the "owners" pass away and the contents of their estates come to light.

Contrary to the Defendant-Respondents' argument, there has never been a case that required as an element of common-law conversion the facing of a Holocaust. Indeed, both *Fremont Indemnity Company v. Fremont General Corporation, et. al.,* 148 Cal.App.4th 97, 55 Cal.3d 621 (Cal.App. Second Dist. 2007) and *Gladstone v. Hillel,* 250 Cal. 372, 203 Cal.App.3d 977 (Cal.App. First Dist. 1988) had no difficulty in holding that common-law conversion had occurred without any discussion of whether either Fremont Indemnity Company or Mark Gladstone was facing a holocaust. Indeed, Freemont Indemnity Company was only facing the theft of a U.S. tax loss and Mark Gladstone was only facing the theft of molds for making fine jewelry.

The prohibition by the California state court judges involved in *Karls v. The Bank of New York, et*

al., against publication or citation of their decisions which they knew, from the concession of counsel for the Defendant-Respondents during oral argument, are diametrically opposed to the well-settled law enjoyed by first-class American citizens is not just a case of "separate" being "inherently unequal" as described by Chief Justice Earl Warren in a unanimous opinion of the U.S. Supreme Court in *Brown v. Board of Education of Topeka,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

Karls v. The Bank of New York, et al., is a case in which "separate" is "demonstrably unequal."

C-2. Moreover, The 10 Million Inner-City Children Are Facing A Kind Of Holocaust That Comprises "A Fate Worse Than Death"

As set forth above in Section B of the Statement Of The Facts Material To Consideration Of The Question Presented, the 10 million California inner-city children are the real parties at interest in this case and the Plaintiff-Petitioner John S. Karls long ago pledged in legally-binding fashion 100% of any proceeds from the exploitation of his trade secret to provide them with tutoring and mentoring from Kindergarten to High School Graduation with a guarantee of college tuition – and the only reason why he is forced to protect their rights on a pro se basis is that the National "I Have A Dream"® Foundation, the California local "I Have A Dream"® Foundations, and the 51 inner-city clergy from San Francisco, Los Angeles and Oakland with whom he has been working to form a foundation, are not in a

financial position to shoulder the cost of legal counsel.

It is very callous of the Defendant-Respondents to suggest that the 10 million California inner-city children are not facing a kind of Holocaust. As set forth in Section B of the Statement Of The Facts Material To Consideration Of The Question Presented, inner-city high school graduation rates are typically **single digit** if there is taken into account the children who drop out before high school begins, the children who are killed, and the children who are incarcerated – which is no surprise because when the Plaintiff-Petitioner was the volunteer treasurer of IHAD-National and the benefactor-organizer of one of the 178 local IHAD programs (most were organized by CEO's of major corporations) operating in 51 major American cities, the inner-city milieu which IHAD programs faced comprised, inter alia, 99% of the "Dreamers" coming from single-adult households, 95% of total Dreamer households headed by a single adult who was a drug addict, and 75%-80% of total Dreamer households headed by a single-adult drug addict who turned any receipts over to the pusher so that the kids had to steal just in order to eat.

If not killed or incarcerated, the inner-city children who are not covered by IHAD or IHAD-style programs will replicate the statistics set forth above when they reach adulthood.

There is a proverbial phrase – "a fate worse than death!!!" The 10 million California inner-city children face "a fate worse than death"!!!

If the Defendant-Respondents want to persist with their unsupported factual claim that the 10 million California inner-city children are not facing a

Holocaust in the form of "a fate worse than death," then the following books by education expert and award-winning author, Jonathan Kozol, are commended for their reading:

- The Shame of the Nation: The Restoration of Apartheid Schooling in America (2005)
- Ordinary Resurrections: Children in the Years of Hope (2001)
- Amazing Grace: The Lives of Children and the Conscience of a Nation (1995)
- Savage Inequalities: Children in America's Schools (1991)
- Rachel and Her Children (1988)
- Illiterate America (1985)
- The Night is Dark and I Am Far From Home: Political Indictment of US Public Schools (1975)
- Death at an Early Age (1967)

V. Conclusion

For the reasons stated above, it is respectfully requested that the U.S. Supreme Court answer in the negative the Question Presented For Review – that state court judges cannot order their decisions which they know are diametrically-opposed to well-settled law, not to be published or cited in order to flush away the rights of 10 million inner-city children without disturbing the rights of first-class American citizens – without violating the "Equal Protection of the Law" requirement of the Fourteenth Amendment of the U.S. Constitution.

As a consequence, it is respectfully requested that the order of the California Superior Court sustaining the demurrer of the Defendant-Respondents (Appendix, pp. 2a-4a) be reversed, that all of the issues addressed in Arguments A and B be treated as resolved on a final basis in favor of the Plaintiff-Petitioner, and that the case be remanded to the California Superior Court for further proceedings consistent with these two decisions.

On behalf of the millions of American inner-city children whose futures the U.S. Supreme Court literally holds in its hands with this Petition for Certiorari, the Plaintiff-Petitioner offers profound thanks for the Court's consideration.

Respectfully submitted,

John S. Karls, Petitioner, Pro Se
1534 Clay Street - Unit 1
San Francisco, CA 94109
917-270-1280