I. STATEMENT OF FACTS

A. Actions For The Classic Tort Of Conversion Of A Trade Secret, From Which Evolved The Additional Common-Law Tort Of Misappropriation Of A Trade Secret

The defendants in these two combined actions are among 15 large international financial institutions which have been sued in virtually-identical actions 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 © 2010) chronicles that evolution.

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 © 2010).

- "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.'" *Freemont Indemnity Company v. Fremont General Corporation, et. al.,* 55 Cal.3d 621, 638, 148 Cal.App.4th 97 (Cal.App. Second Dist. 2007).
- The *Freemont* Court, after considering the normal rule of "merged in, or identified with, some document," 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.
- In addition, *Thrifty-Tel, Inc. v. Bezenek,* 54 Cal.3d 468, 472, 46 Cal.App.4th 1559 (Cal.App. Fourth Dist. 1996) 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" before holding that it was not necessary to do so because the jury verdict of conversion could be justified as trespass which had not been pleaded.

With specific reference to the theft of trade secrets, this test for conversion is still used in jurisdictions that have not adopted the Uniform Trade Secrets Act --

- 2 Melvin F. Jager, *Trade Secrets Law, Chapter 50: The Trade Secrets Law of New York* (West Publishing Company – Looseleaf © 2010) – 12 of the 15 sets of defendants listed below are headquartered in New York which has never adopted the Uniform Trade Secrets Act in any form.
- 2 Melvin F. Jager, *Trade Secrets Law, Chapter 56: The Trade Secrets Law of Pennsylvania* (West Publishing Company – Looseleaf © 2010) – 1 of the 15 sets of defendants listed below was headquartered in Pennsylvania which adopted the UTSA on a prospective basis after the date of the conversion.

Barclays Capital Ltd. has admitted in unprivileged communications that it stole Petitioner's trade secret and that 15 international financial institutions acquired the trade secret from Barclays Capital Ltd. under conditions of confidentiality.

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 Petitioner sued the 15 international financial institutions in California Superior Court (San Francisco).

Goldman Sachs Group, Inc., et. al., Citicorp of North America, Inc., et. al., and ING Financial Holdings Corporation, et. al., fled to U.S. District Court (ND Cal.) on diversity grounds since all of the defendants in all three actions were headquartered in New York City.

Of the other 13 cases involving 12 large international financial institutions that remained in state court:

- *Karls v. The 26 U.S.C. § 1504(a)(1) "Affiliated Group" of The Wachovia Corporation 26 U.S.C. § 1504(b) "Includible Corporations"* (Cal. Sup. Ct. No 483297, Cal. Ct. App. No. 126702) was heard by California Superior Court Judge Paul Alvarado. It entailed solely procedural issues relating to whether a group of corporations that was alleged to be a common-law partnership that had been acting as a "criminal gang" could be sued in the "name it had assumed" by virtue of consenting to being assigned that name by 26 U.S. Code §§ 1501 and 1504.
- *Karls v. Wachovia Trust Company of California, et. al.* (Cal. Sup. Ct. No. 487535, Cal. Ct. App. No. 126669) and *Karls v. Wells Fargo & Company* (Cal. Sup. Ct. No. 486175, Cal. Ct. App. No. 126671),

were (1) combined for consideration in the California Superior Court by Judge Curtis E.A. Karnow, and (2) combined for consideration in the California Court of Appeal (First Appellate District – Division One). These two cases involve none of the procedural issues that were the sole focus of *Karls v. The 26 U.S.C. § 1504(a)(1) "Affiliated Group" of The Wachovia Corporation 26 U.S.C. § 1504 (b) "Includible Corporations"* (Cal. Sup. Ct. No 483297, Cal. Ct. App. No. 126702). Instead, both *Wachovia* and *Wells Fargo* focused solely on issues concerning the common-law tort of conversion.

- *Karls v. The Bank of New York, et. al.,* (Cal. Sup. Ct. No. 489460, Cal. Ct. App. No. 127444) and *Karls v. Mellon Capital Management Corporation, et. al.* (Cal. Sup. Ct. No. 489458, Cal. Ct. App. No. 127001) were combined in the California Court of Appeal (First Appellate District – Division Three) and are the subject of this Petition for Rehearing.
    - *Karls v. The Bank of New York, et. al.,* (Cal. Sup. Ct. No. 489460, Cal. Ct. App. No. 127444) is based on a Demurrer (Plaintiff's Opening *Bank of New York* Appendix, Volume 1 of 2, pp. 18-29) which focuses solely

on the issues concerning the common-law tort of conversion that were raised in *Wachovia* and *Wells Fargo.* Indeed, the Reporter's Transcript of the **11/12/2009 hearing** before Superior Court Judge Charlotte Woolard (Plaintiff's Opening *Bank of New York* Appendix, Vol. 2 of 2, pp. 174-189) contains a considerable number of references to Judge Karnow's opinion in *Wachovia* and *Wells Fargo* and, indeed, demonstrates that Judge Woolard followed Judge Karnow's decision.

- *Karls v. Mellon Capital Management Corporation, et. al.* (Cal. Sup. Ct. No. 489458, Cal. Ct. App. No. 127001) is based on a Demurrer (Plaintiff's Opening *Mellon* Appendix, pp. 13-20) which focuses solely on the type of procedural issues pertaining to a common-law partnership operating as a "criminal gang" involved in *Karls v. The 26 U.S.C. §1504(a)(1) "Affiliated Group."* Indeed, the Reporter's Transcript of the **9/14/2009 hearing** before Superior Court Judge Charlotte Woolard (Plaintiff's Opening *Mellon* Appendix, pp. 46-54) contains a considerable number of references to Judge Alvarado's

opinion in *Karls v. The 26 U.S.C. §1504(a)(1) "Affiliated Group."* Indeed, Judge Woolard's **9/14/2009 order** (Plaintiff's Opening *Mellon* Appendix, pp. 55-56) cites Judge Alvarado's decision in *Karls v. The 26 U.S.C. §1504(a)(1) "Affiliated Group"* as authority for her decision.

- 7 financial institutions, *ABN AMRO, AIG/AIU, Bank of America, Bear Stearns, HSBC Bank, JP Morgan Chase,* and *Merrill Lynch,* agreed last fall with the Petitioner to a stay of proceedings in California Superior Court (San Francisco) pending a final disposition of the appeals in *Wachovia* and *Wells Fargo.*
- 1 financial institution, *BNP Paribas,* settled with the Petitioner on December 21, 2009.

B. Regarding *Karls v. The Bank of New York* –

B-1. Superior Court Judge Curtis E.A. Karnow's "Pre-Packaged Appeal" of *Karls v.Wachovia Trust Co. of Cal.*, supra, and *Karls v. Wells Fargo & Co.*, supra

Two of the 13 virtually-identical actions remaining in state court were referenced constantly in the Superior Court in *Karls v. The Bank of New York*, as described above, and were combined for consideration by the California Superior Court expert on intellectual property, Judge Curtis E.A.

Karnow – *Karls v. Wachovia Trust Company of California, et. al.* (Cal. Sup. Ct. No. 487535, Cal. Ct. App. No. 126669) and *Karls v. Wells Fargo & Company* (Cal. Sup. Ct. No. 486175, Cal. Ct. App. No. 126671). He granted pre-trial motions to dismiss on the grounds: (1) actions for common-law conversion are preempted by federal copyright law, and (2) an idea cannot be the subject of common-law conversion despite meeting the classic common-law-conversion test of being unable to exist "separate and apart from the property in the paper on which it is written, or the physical substance in which it is embodied"* – even though he was well aware that appeal would lie with the California Court of Appeal (First District) and that both positions were diametrically opposed to that court's decision in *Gladstone v. Hillel,* 203 Cal.App.3d 977, 250 Cal.Rptr. 372 (1st Dist. 1988). Moreover, Judge Karnow's orders granted the pre-trial motions to dismiss without leave to amend on the grounds that amendment would be futile – even though he was well aware that the separate tort of "misappropriation of trade secrets" does not require that the secret have any corporeal existence and is also not preempted by federal copyright law.

* An idea (a.k.a., artist's concept) that is unable to exist "separate and apart from the property on which it is written, or the physical substance in which it is embodied" is an older version of the modern day rule and is set forth in *Italiani v. Metro-Goldwyn-Mayer Corporation,* 45 Cal.App.2d 464, 466, 114 P.2d 370 (3rd Dist. 1941) quoting 13 Corpus Juris, p. 948, sec. 5-a.

The only explanation for such seemingly-bizarre behavior is that Judge Karnow wanted to compel a "pre-packaged appeal" to the California Court of Appeal (First District) of these issues to ascertain whether it would re-affirm its decision in *Gladstone, supra,* before the California Superior Court invested its time in trying the 13 cases that then remained in state court.

B-2. Pre-Emption By The California Uniform Trade Secrets Act Raised And Abandoned Under California Choice-Of-Law Principles By The Defendants In *Karls v. The Bank of New York, et. al.,* (Cal. Sup. Ct. No. 489460, Cal. Ct. App. No. 127444)

Another bizarre aspect of Judge Karnow's ruling is that although he raised on his own motion the spurious issue of preemption by federal copyright law, he did not raise on his own motion the issue of preemption by the California Uniform Trade Secrets Act.

However, this issue was raised before Superior Court Judge Charlotte Woolard by the defendants in *Karls v. The Bank of New York, et. al.,* (Cal. Sup. Ct. No. 489460, Cal. Ct. App. No. 127444) citing Cal. Civil Code § 3426.7 – another of the 13 virtually-identical actions remaining in state court **and one of the two cases involved in this Petition for Rehearing.**

The 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 (Plaintiff's Opening *Bank of New York* Appendix, Vol. 2 of 2, pp. 174-189) and **The Bank of New York abandoned this "choice of law" issue in its answering brief in the California Court of Appeal filed April 23, 2010**.

It should be noted that Wachovia and Wells Fargo are the only two of the 15 international financial institutions that were headquartered in jurisdictions (North Carolina and California, respectively) that had adopted the Uniform Trade Secrets Act.

It would appear that Wachovia and Wells Fargo chose not to raise the issue of preemption under the Uniform Trade Secrets Act because they did not want to get into such choice-of-law factual issues as where their negotiations with Barclays Capital, Ltd. took place, whose law governs their contracts with Barclays Capital, Ltd., etc. – to be considered together

with the facts that the trade secret was stolen in the U.K. by a U.K. citizen and a U.K corporation, Barclays Capital, Ltd., and that the U.K. citizen and Barclays Capital, Ltd., were well aware at the time of the theft that any proceeds to the Plaintiff from the exploitation of the trade secret were legally pledged to benefit the education of American inner-city children.

It would appear that Judge Karnow honored the apparent desire of Wachovia and Wells Fargo to defer this issue by not raising on his own motion the issue of UTSA preemption, even though he had raised on his own motion the spurious issue of preemption under federal copyright law. However, this is further evidence of bizarre behavior that can only be explained by an intent on the part of Judge Karnow to engineer a "pre-packaged appeal" to ascertain whether the Court of Appeal (First Appellate District) would honor its decision in *Gladstone v. Hillel,* supra, in actions for the classic common-law tort of conversion of a trade secret before the Superior Court invested its time and resources in trying the 12 cases then remaining in the Superior Court.

C. Updating The "Certificate Of Interested Entities Or Persons" With Regard To Additional On-Going Efforts To Contribute Gratis All Rights Against The 15 Groups Of Defendants To Benefit The Education Of 10 Million American Inner-City Children In Accordance With A Long-Term Preexisting Legally-Binding Obligation

Plaintiff-Appellant Karls' "Certificate Of Interested Entities Or Persons" filed with his Opening Brief in the Court of Appeals (First District) explained that 10 million present and future California inner-city children are the real parties at interest as follows:

> **Interested Entity or Person No. 1 = The "I Have A Dream"® Foundation, etc.**
>
> During the 1990's, I was the sponsor and chief benefactor of the "I Have A Dream"® Program of Stamford CT
>
> - IHAD-Stamford was patterned on self-made multi-billionaire Eugene Lang's promise in 1981 to the graduating sixth graders of Harlem PS 121 that he would guarantee their college tuition if they stayed in school – he then provided tutoring and mentoring until they graduated from H.S.
>
> - IHAD-Stamford was one of 178 such programs in 51 American cities in the 1980's and 1990's – providing tutoring and mentoring for inner-city children as they progressed from third-grade through HS graduation and guaranteeing their college tuition – typically transforming single-digit HS graduating rates to 65% - 70%.
>
> - IHAD-Stamford served 200 inner-city children in three public-housing projects.
>
> During the 1990's, I also served as the Volunteer Treasurer of Eugene Lang's National "I Have A Dream"® Foundation

As detailed on the attached resume and at the beginning of my Opposition Brief in the Superior Court in a section entitled "Future Party At Interest and Cal. Code Civ. Proc. § 367" and at the end of this attachment –

1. When I retired from Ernst & Young in 1997 at age 55 to become an investment banker, the reason communicated to my EY partners **and to the sponsors of the other 177 "I Have A Dream"® Programs (most of whom were CEO's of major U.S. corporations)** was to earn substantial amounts of money that could be used to fund new "I Have A Dream"® Programs.

2. The record will show that after funding a modest life style and the education of my children, all of my remaining resources have been contributed to the causes of educating inner-city children and the environment.

3. In line with these two points, it continues to be my intention to contribute any proceeds from this law suit (and from the related law suits described below) to California-based "I Have A Dream"® or similar programs **and that the only reasons this has not already been done are (1) that I am not admitted to practice law in California and a foundation, as a juridical entity, cannot proceed pro se, and (2) in line with having already given away all of my resources to the causes of educating inner-city children and the environment, I cannot afford to hire counsel for a juridical entity.**

Accordingly, California-based "I Have A Dream"® and similar programs are interested persons.

There are three subsequent developments. First, subsequently to the filing of this Certificate, all of the Plaintiff-Appellant's right, title and interest in all 15 law suits were offered gratis as a contribution to the National "I Have A Dream"® Foundation to benefit the education of present

and future California inner-city children. However, as expected, the National "I Have A Dream"® Foundation had to decline the gift because it was not in a position to shoulder the cost of counsel.

Second, subsequently to the offer to the National "I Have A Dream"® Foundation, all of the Plaintiff-Appellant's right, title and interest in all 15 law suits were offered gratis as a contribution to the "I Have A Dream"® Foundation of San Francisco and the "I Have A Dream"® Foundation of Los Angeles. However, as expected, they had to decline the gift because they were not in a position to shoulder the cost of counsel.

Third, subsequently to these offers, I have contacted 51 inner-city clergy from San Francisco, Oakland and Los Angeles to form a foundation that would be capable of handling this project. Developments are slow to materialize, but this is the way that my IHAD-Stamford CT foundation was formed two decades ago – on the framework of an Advisory Board comprising a majority of ministers and rabbis, and utilizing as tutors and mentors many of their congregants.

II. ARGUMENT – *THE BANK OF NEW YORK* ISSUE - CONVERSION:

A. Standard For Review

A jury trial of all factual issues was requested in *Karls v. The Bank of New York, et. al.* (Plaintiff's Opening *Bank of New York* Appendix, Vol. 1, p. 30). The case was dismissed as the result of sustaining a Demurrer (Plaintiff's Opening *Bank of New York* Appendix, Vol. 2, pp. 192-193).

Accordingly, each fact alleged in the Complaint must be accepted as true for purposes of the Demurrer unless the alleged fact is incontrovertibly contradicted by unimpeachable evidence.

B. The Court of Appeal Should Not Ignore The Admissions Justice Martin Jenkins Elicited From Defendants' Counsel During Oral Argument That –

1. Both *Freemont Indemnity Company v. Freemont General Corporation, et. al.*, 55 Cal.3d 621, 148 Cal.App.4th 97 (Cal.App. Second Dist. 2007) and *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal.3d 468, 46 Cal.App.4th 1559 (Cal.App. Fourth Dist. 1996) Recognized That The Unauthorized Taking of "A Document In Which Intangible Rights Are Merged" is Actionable As Conversion, and

2. The Plaintiff's Claim For Conversion Is Well Within This Rule.

A transcript of the hearing before the Court of Appeal on December 8, 2010 will show that the Plaintiff attempted to summarize, as set forth in

Section B-1 below, all of the cases that have been cited by the Defendants or by the various California state courts that have been involved in this case or by Division One of the Court of Appeal (First District) in the virtually-identical cases of *Karls v. Wachovia, Ibid.* - *Karls v. Wells Fargo, Ibid.* However, due to time constraints, the Plaintiff was only able to explain:

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

2. That the *Freemont* Court, after considering the normal rule of "merged in, or identified with, some document," 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 some document." Ibid, p. 643.

3. That 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).

4. That 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 © 2010 and 2009) that the Plaintiff has always cited (please see Section B-2 below) 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 <u>intangible property that is merged in, or identified with, some document</u>." (footnotes omitted, emphasis added)

5. That every case cited by the Defendants or by the various California state courts that have been involved in this case or by Division One of the Court of Appeal (First District) in the virtually-identical combined cases of *Karls v. Wachovia, Ibid. - Wells Fargo, Ibid.* are consistent with the general rule as stated in

the *Freemont* and *Thrifty-Tel* decisions and in 18 Am.Jur.2d (as demonstrated in Section B-1 below).

6. That Plaintiff's *Bank of New York* FAC is well within the general rule since it pleads (Plaintiff's Opening *Bank of New York* Appendix, Volume 2, pp. 89-94 at page 94):

> "'The Property' which, as described below as 'an idea' that must be in the form of a 'written presentation,' is so complicated that it cannot be understood without being embodied in a 'written presentation.'"

A transcript of the hearing before the Court of Appeal on December 8, 2010 will show that immediately after the Plaintiff had made these six points, Justice Martin Jenkins asked Defendants' Counsel how he would respond to these points. A transcript will then show that Defendants' Counsel had no response to these points. Accordingly, Defendants' Counsel has conceded these points.

Since Defendants' Counsel has conceded that the wrongful taking of "intangible property that is merged in, or identified with, some document" is actionable as conversion and conceded that Plaintiff's Complaint for Conversion is well within this rule, the Court of Appeal should reverse the Superior Court's sustaining the Defendants' Demurrer.

B-1. <u>Every Case Cited By The Defendants And The Court of Appeal In Both This Case And The Related Combined</u>

Cases of *Karls v. Wachovia/Wells Fargo*, Ibid., Support The Plaintiff's Position That The Unauthorized Taking Of "A Document In Which Intangible Rights Are Merged" Is Actionable As Conversion

The most recent case cited by The Court of Appeal (Opinion, p. 11) is *Freemont Indemnity Company v. Fremont General Corporation, et. al.,* 55 Cal.3d 621, 148 Cal.App.4th 97 (Cal.App. Second Dist. 2007) which cites with approval (p. 638, footnote 6) Section 242 of the Restatement Second of Torts:

> "Section 242 of the Restatement Second of Torts, published in 1965, states: '(1) Where there is conversion of a document in which intangible rights are merged, the damages include the value of such rights.'"

The *Freemont* Court (op. cit., pp. 638-642) then analyzed the California Supreme Court opinion in *Payne v. Elliott,* 54 Cal. 339 (S.Ct. 1880) which relaxed the normal conversion requirement that an intangible right be merged with tangible property to include ownership of shares in a corporation (share certificates were considered to be intangible property). The *Freemont* Court (Op. Cit., p. 643) then held that a U.S. tax loss comes within the California Supreme Court's enlargement of the normal merged-in-tangible-property requirement for conversion:

> "A net operating loss is a definite amount (see 26 U.S.C. § 172(c)) that can be recorded in tax and accounting records. The significance of this, in our view, is not that the intangible right is somehow merged or reflected in a document, but that both the

> property and the owner's rights of possession and exclusive use are sufficiently definite and certain. [footnote omitted] The misappropriation of a net operating loss without compensation in the manner alleged in the complaint, causing damage to Indemnity as alleged, is comparable to the misappropriation of tangible personal property or shares of stock for purposes relevant here. We see no sound basis in reason to allow recovery in tort for one but not the other."

The *Freemont* Court finally concluded (op. cit., p. 643):

> "For purposes of ruling on the demurrer, it is sufficient to conclude as we do that the misappropriation of intangible net operating losses alleged here supports a cause of action for conversion."

It should be noted that the *Freemont* Court (Op. Cit., p. 638) was citing *Thrifty-Tel, Inc. v. Bezenek,* 54 Cal.3d 468, 46 Cal.App.4th 1559 (Cal.App. Fourth Dist. 1996) for the statement that supports the merged-in-tangible-property test for conversion (p. 638 of the *Freemont* 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)

In *Thrifty-Tel,* the Court was considering a complaint for conversion of a computer-access code for making telephone calls on the Plaintiff's telephone system. The Court noted (ibid, p. 472) that the computer access code "<u>was never reduced to paper or reflected on a computer disk</u>" in the course of considering (like the *Freemont* Court later did) whether intangible

property that was not merged in tangible property could qualify for a further-expanded scope of conversion beyond any tangibility requirement as was done by the Supreme Court in *Payne v. Elliot*:

> "Whether the computer access code, which was never reduced to paper or reflected on a computer disk, and the tie-up of Thrifty-Tel's system could be the subjects of conversion presents an issue of first impression in California – and apparently most everywhere else as well. However, it is not necessary to resolve the question because the evidence supports the verdict on a trespass."

Accordingly, *Thrifty-Tel* is also consistent with the position of the Plaintiff in this Petition for Review that conversion of a document in which intangible rights are merged is actionable – since the *Thrifty-Tel* Court was only considering whether to eliminate the tangibility requirement for conversion altogether and then rendered its discussion of the issue a dictum by adopting a trespass theory to sustain the jury verdict.

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

- *Melchior v. New Line Productions, Inc.,* 131 Cal.2d 347, 106 Cal.App.4th 779 (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.,* 100 Cal. 838, 24 Cal.App.3d 345 (Cal.App. First Dist. 1972) involved solely architectural plans which were not wrongfully taken.

Both the Defendants and the Superior Court cited only two cases – *Melchoir* and another case that The Court of Appeal did not cite –

- *Minniear v. Tors,* 72 Cal. 287, 266 Cal.App.2d 495 (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 and, in any event, there was no evidence in the opinion that the outline was wrongfully taken.

B-2. <u>The Plaintiff's Unaltered Position From The Beginning Has Been That The Unauthorized Taking Of "A Document In Which Intangible Rights Are Merged" Is Actionable As Conversion</u>

The Plaintiff has steadfastly maintained from the outset in both *Karls v. The Bank of New York, et. al.,* and the 14 virtually-identical cases

that the property which was converted is a document in which intangible rights are merged.

- The Original Complaint (pp. 8-15 of the Opening *Bank of New York* Appendix Vol. 1) clearly describes a trade secret (pp. 10-13).
- Indeed, the 6/30/2006 Wall Street Journal Article which was attached to, and made part of, the Complaint states the Defendants opposed the release to the Wall Street Journal by the U.S. government of documents involving the implementation by the Defendants of deals using Plaintiff's trade secret on the grounds that the documents contained confidential trade secrets (please see the second full paragraph of the second column of p. 15 of Plaintiff's Opening *Bank of New York* Appendix, Vol. 1).
- The Complaint stated that Plaintiff's trade secrets "had to be 'in the form of a written presentation, stating the accounting or tax benefit intended to be achieved, the transactions steps to be implemented, and the accounting or tax technical analysis' accompanied by diagrams." (p. 11 of Plaintiff's Opening *Bank of New York* Appendix, Vol. 1).

In defending the right to bring an action for conversion for the unauthorized taking of "a document in which intangible rights have been merged" under American common law, the Plaintiff has from the outset continually cited:

- 18 Am.Jur.2d *Conversion: Tangible and Intangible Property, Generally* (West Publishing Company – Looseleaf © 2010 and 2009) 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." (footnotes omitted, emphasis added)
- 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) as posing the test of whether an intangible property "exists separate and apart from the property in the paper in which it is written, or the physical substance in which it is embodied."
- *Gladstone v. Hillel,* 203 Cal.App.3d 977, 250 Cal.Rptr. 372 (First Dist. 1988) which holds that an "idea" (aka, artist's concept) for fine jewelry which is embodied in molds is the proper subject of an action for conversion and that even new molds made from the

stolen molds had to be destroyed or given to the plaintiff under the Court's decision. The Court of Appeal's *Bank of New York* opinion, however, dismisses all arguments based on "ideas" which are artist's concepts, such as Mark Gladstone's jewelry design or Leonardo da Vinci's Mona Lisa, as a mere analogy which is "inapt" (pp. 11-12 of the *Bank of New York* opinion). However, **this is not a mere analogy but is directly on point, as demonstrated by the older *Corpus Juris* formulation of the rule and, indeed, as reflected by the California Legislature when it enacted in Cal. Code Civ. Proc. 338(c)** which tolls the 3-year statute of limitations for conversion in three cases involving ideas – articles of "interpretive, scientific or artistic significance." Nobody has ever suggested that Plaintiff Karls' Trade Secret Report was not an article of "interpretive" significance, just like unpatented scientific inventions are also Trade Secrets of "scientific" significance. It is easy to forget, as has the Court of Appeal, that articles of "artistic" significance are also in this same class of "ideas."

The Plaintiff has then proceeded to reconcile all cases cited by the Defendants or by the Courts with these principles, as in fact was done in the first portion of this Section B.

All such cases are in accord with these principles. Indeed, as set forth above, the most recent case, *Freemont Indemnity Company v. Fremont General Corporation,. al.,* 55 Cal.3d 621, 148 Cal.App.4th 97 (Cal.App. Second Dist. 2007) even quotes with approval Sec. 242 of the Restatement Second of Torts for precisely the same "merged in" test described in the current looseleaf edition of Am.Jur.2d. before deciding to expand beyond the normal "merged in" requirement.

It should be noted that the old Corpus Juris formulation set forth above might appear to be more rigorous than the Restatement/Am.Jur.2d test since it seems to posit a requirement that the intangible property cannot exist "separate and apart from the property in the paper in which it is written, or the physical substance in which it is embodied" rather than merely being "merged in" tangible property.

However in the case at bar, *Karls v. The Bank of New York, et. al.,* unlike Judge Karnow in *Karls v. Wachovia-Wells Fargo*, Ibid., Superior Court Judge Charlotte Woolard permitted an amendment to the Complaint before following Judge Karnow's decision and Plaintiff amended the

Complaint to add a specific allegation that his Trade Secret "is so complicated that it cannot be understood without being embodied in a 'written presentation.'" (Plaintiff's Opening *Bank of New York* Appendix, Volume 2, pp. 89-94 at p. 94).

C. The Court of Appeal's "House of Cards" – All Other Objections By The Court of Appeals Regarding Conversion Depend On Its Erroneous Premise That The Plaintiff Does Not Have A Cause Of Action For Common-Law Conversion For "A Document In Which Intangible Rights Are Merged"

C-1. The FAC Alleges Substantial Interference (Opinion § IV-B)

Sec. IV-B of the Court's Opinion (pp. 12-13) claims that the *Bank of New York* FAC does not allege substantial interference. The second paragraph of the Opinion states (p. 12):

> "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 has indeed alleged the unauthorized taking of "a document in which intangible rights are merged" with respect to which the Defendants exercised an action of ownership.

The Wall Street Journal article that was attached to, and made a part of, the Complaint alleges that the Defendants 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's right of dominion over the trade secret and his right to prohibit its unauthorized use.

The next paragraph of the Opinion and the last paragraph on federal copyright preemption (bottom of page 12 – top of page 13) cites only *Zaslow v. Cronert*, 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 Defendants 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) *Freemont Indemnity Company v. Fremont General Corporation,. al.,* 55 Cal.3d 621, 148 Cal.App.4th 97 (Cal.App. Second Dist. 2007), (2) *Thrifty-Tel, Inc. v. Bezenek,* 54 Cal.3d 468, 46 Cal.App.4th 1559 (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). Especially not when –

- Justice Martin Jenkins was able to elicit admissions from Defendants' Counsel at the Hearing (1) that the unauthorized taking of "a document in which intangible rights are merged" is actionable as conversion, and (2) that Plaintiff's claim for conversion is well within this rule.

- Plaintiff's Complaint alleges that the Defendants exercised an act of ownership over Plaintiff's property 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.

C-2. Federal Copyright Preemption (Opinion § IV-C)

Section IV-C of the Court's Opinion (pp. 13-14) recognizes that among the many authorities comprising the well-settled law on this issue is its own decision in *Gladstone v. Hillel,* 203 Cal.App.3d 977, 250 Cal.Rptr. 372 (First Dist. 1988) which holds that the wrongful possession in an action for common-law conversion constitutes the "extra element" that precludes preemption under the federal copyright law. [The *Gladstone* opinion cites and discusses a plethora of authorities on this point that wrongful possession in a common-law conversion action is the "extra element" that precludes preemption.]

The holding of the *Bank of New York* Court of Appeal that federal copyright preemption applies rests wholly on its erroneous premise that the Plaintiff has not stated a proper claim for conversion.

III. ARGUMENT – *MELLON CAPITAL MANAGEMENT* ISSUE - WHETHER AN UNINCORPORATED ASSOCIATION FORMED PURSUANT TO AN ELECTION BY ITS MEMBERS UNDER FEDERAL LAW AND ACTING AS A CRIMINAL GANG CAN BE SUED UNDER THE NAME BY WHICH IT IS KNOWN

A. Standard For Review

A jury trial of all factual issues was requested in *Karls v. Mellon Capital Management Corporation, et. al.* (Plaintiff's Opening *Mellon Capital Management* Appendix, p. 21). The case was dismissed as the result of granting a Motion to Dismiss (Plaintiff's Opening *Mellon Capital Management* Appendix, pp. 55-56).

Accordingly, each fact alleged in the Complaint must be accepted as true for purposes of the Demurrer unless the alleged fact is incontrovertibly contradicted by unimpeachable evidence.

B. Plaintiff's Complaint Alleges That The Defendant *Mellon* Unincorporated Association Was Formed Pursuant To An Election By Its Members Under Federal Law – Defendants Did Not Introduce One Scintilla Of Evidence To Dispute This Fact

The Opinion of the Court of Appeal constantly refers to "Non-Existent Entities" even though:

- The Plaintiff's Complaint alleges (Plaintiff's Opening *Mellon Capital Management* Appendix, p. 4):

> "The Mellon Financial Corporation U.S.-Tax 'Consolidated Group' of Corporations is defined by 26 U.S.C. § 1504 and has been an unincorporated association, acting as a common-law partnership.
>
> "The Mellon Financial Corporation U.S.-Tax 'Consolidated Group' of Corporations was formed by its members for the purpose of reducing their combined U.S. income tax liability."

- The Defendants did not introduce one scintilla of evidence to dispute these facts.

Accordingly, it is improper for the Court of Appeal to make a factual determination that both directly contradicts the factual allegations that the Defendant *Mellon* Unincorporated Association exists, and also is not supported by one scintilla of evidence.

C. Plaintiff Introduced Expert Testimony That (1) There Has Been Only One Case In 43 Years Of A U.S. Parent Corporation And Its Subsidiaries NOT Filing Consolidated U.S. Income Tax Returns and (2) One Reason Why U.S. Companies Always File Consolidated U.S. Income Tax Returns Is That It Would Otherwise Be Impossible To Obtain Directors' and Officers' Liability Insurance – Defendants Did Not Introduce One Scintilla Of Evidence To Dispute These Facts

The record shows that the Plaintiff introduced expert testimony (Plaintiff's Opening *Mellon Capital Management* Appendix, pp. 24-26, authenticated as Expert Testimony by Plaintiff's Opening *Mellon Capital Management* Appendix, pp. 31-32) stating:

- There has been only one case in 43 years of a U.S. Parent Corporation and its subsidiaries NOT filing consolidated U.S. income tax returns, and
- One reason why U.S. companies always file consolidated U.S. income tax returns is that it would otherwise be impossible to obtain Directors' and Officers' Liability Insurance.

As noted in the immediately-preceding Section B, the Defendants did not introduce one scintilla of evidence to dispute the fact that the Defendant *Mellon* Unincorporated Association exists.

Accordingly, this is an additional reason why it is improper for the Court of Appeal to make a factual determination that directly contradicts the factual allegations that the Defendant *Mellon* Unincorporated Association exists and that is not supported by one scintilla of evidence.

D. Plaintiff's Complaint Designates The Defendant *Mellon* Unincorporated Association By The Name By Which It Is Known – Defendants Did Not Introduce One Scintilla Of Evidence To Dispute This Fact

The Plaintiff's Complaint designates the Defendant *Mellon* Unincorporated Association by the name by which it is known, in accordance with Cal. Code Civ. Proc. § 369.5(a) which provides in its entirety:

> "A partnership or other unincorporated association, whether organized for profit or not, may sue or be sued in the name it has assumed or by which it is known."

As can be seen from the statute, there are two alternative names under which an unincorporated entity can be sued:

- The name the unincorporated association has assumed, **or**
- The name by which the unincorporated association is known.

The record also shows that Judge Woolard cited as the authority for her decision (Plaintiff's Opening *Mellon Capital Management* Appendix, pp. 55-56), the decision of the Superior Court in *Karls v. The 26 U.S.C. § 1504(a)(1) "Affiliated Group" of The Wachovia Corporation 26 U.S.C. § 1504(b) "Includible Corporations.* The problem with Judge Woolard's decision vis-à-vis the name issue is:

- "The 26 U.S.C. § 1504(a)(1) 'Affiliated Group' of The Wachovia Corporation U.S.C. § 1504(b) 'Includible Corporations'" is the name which the *Wachovia* Unincorporated Association **assumed** by virtue of the election of its members under 26 U.S.C. § 1501 which included their consent to the Unincorporated Association being **defined by that name** pursuant to 26 U.S.C. § 1504.
- "The Mellon Financial Corporation U.S.-Tax 'Consolidated Group' of Corporations" is the name by which the *Mellon*

Unincorporated Association **<u>was known around the world</u>** – since (1) everyone but tax professionals thinks and talks of "consolidated groups" for which financial statements are used by the world's investors and the world's regulatory agencies, rather than the term "Affiliated Group" specified by 26 U.S.C. § 1504(a)(1), and (2) "US-Tax" identifies the type of "consolidated group" since, unlike financial-statement consolidated groups, U.S.-Tax "Affiliated Groups" do not include, inter alia, foreign-incorporated subsidiaries, and (3) "The Mellon Financial Corporation" (NYSE Symbol = MEL) identifies which "U.S.-Tax Consolidated Group" is being considered.

Plaintiff's Reply Brief (*Mellon Capital Management* Reply Brief, pp. 19-20) sets forth the type of Expert Testimony that Plaintiff was ready to introduce at Judge Woolard's hearing on September 14, 2009 if she had been willing to consider the issue of "name assumed" vs. "name by which known." However, the transcript of that hearing (Plaintiff's Opening *Mellon Capital Management* Appendix, pp. 46-54) indicates that Judge Woolard was unwilling depart in any respect from her Tentative Decision that *Karls v. The 26 U.S.C. § 1504(a)(1) "Affiliated Group" of The Wachovia Corporation 26 U.S.C. § 1504(b) "Includible Corporations* (Cal.

Sup. Ct. No 483297, Cal. Ct. App. No. 126702) controlled the outcome and nothing else was relevant.

The record in *Karls v. The 26 U.S.C. § 1504(a)(1) "Affiliated Group" of The Wachovia Corporation 26 U.S.C. § 1504(b) "Includible Corporations* (Cal. Sup. Ct. No 483297, Cal. Ct. App. No. 126702) discloses that Superior Court Judge Paul Alvarado began the "hearing" in that case with a statement that the Defendant *Wachovia* Unincorporated Association in that case did not exist because Plaintiff **was suing a section of the Internal Revenue Code** and when the Plaintiff politely pointed out that the Defendant *Wachovia* Unincorporated Association was an "affiliated group" of "corporations" and the Sections of the Internal Revenue Code were only adjectives that identified the "affiliated group" and the "corporations", Judge Alvarado abruptly terminated the "hearing" and would not permit any further argument. [A transcript of the "hearing" in that case was attached to Plaintiff's Opening *Mellon Capital Management* Brief in the Court of Appeal filed on January 6, 2009, but the Court Clerk later rejected the Brief on the grounds that a Reporter's Transcript in a different case is not permitted as an attachment to a Brief and, accordingly, the Brief had to be re-submitted on January 19, 2009 without the Reporter's Transcript which was, though, quoted in relevant part in the Brief.]

Nevertheless, the Defendants have not introduced a single scintilla of evidence that the name by which the Defendant *Mellon* Unincorporated Association has been designated in Plaintiff's Complaint is not the name by which the Defendant *Mellon* Unincorporated Association is known by the world's investors and the world's governmental-regulatory bodies.

Accordingly, it would have been improper for the Court of Appeal to make a factual determination that the name by which the Defendant *Mellon* Unincorporated Association has been designated in Plaintiff's Complaint is not the name by which the Defendant *Mellon* Unincorporated Association is known by the world's investors and the world's governmental-regulatory bodies.

It would appear that this is the reason why the Court of Appeal, without the citation of any authority, is positing an ex post facto requirement that the Plaintiff's Complaint should have contained an allegation that the name by which the Defendant *Mellon* Unincorporated Association has been designated in Plaintiff's Complaint is the name by which the Defendant *Mellon* Unincorporated Association is known.

Since (1) Superior Court Judge Woolard's decision had nothing to do with the name issue, (2) Plaintiff was prepared to introduce at the hearing an Expert Affidavit if Judge Woolard had been willing to consider

anything other than Judge Alvarado's decision in a **name-assumed case** (as distinguished from the *Mellon* **name-by-which-known case**) which would have demonstrated that the name by which the Defendant *Mellon* Unincorporated Association was designated in the Complaint is indeed the name by which it was known by the world's investors and the world's governmental-regulatory bodies, (3) Defendants have not introduced one scintilla of evidence disputing the fact that the name by which the Defendant *Mellon* Unincorporated Association was designated in the Complaint is the name by which it is indeed known around the world, much less what name the Defendants think their Unincorporated Association is known to the world's investors and the world's governmental-regulatory bodies, and (4) the Plaintiff's Complaint has never been amended and Judge Woolard did not grant leave to amend it -- in the interests of justice the Court of Appeal should grant leave to amend the Complaint to add an allegation that the name by which the Defendant *Mellon* Unincorporated Association was designated in the Complaint is indeed the name by which it is known by the world's investors and the world's governmental-regulatory bodies.

E. Plaintiff's Complaint Alleges That The Defendants Were Acting As A Criminal Gang Since The Complaint Alleges That The Defendants Had Received Stolen Property And That The

Defendants Had Been Reckless In Their Failure To Obtain Permission Of The Plaintiff To Use His Property (A Felony At Common Law And, Since The Defendants Are American And The Thieves Are Alleged To Be British, A Crime Under Federal Statutory Law As Well) – Defendants Did Not Introduce One Scintilla Of Evidence To Dispute The Fact That They Had Been Operating As A Criminal Gang

As set forth above, Cal. Code Civ. Proc. § 369.5(a) provides in its entirety:

> "A partnership or other unincorporated association, whether organized for profit or not, may sue or be sued in the name it has assumed or by which it is known."

Cal. Corporations Code § 18035(a) provides in its entirety:

> "'Unincorporated association' means an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not."

Cal. Corporations Code § 10835(a), as written, has been satisfied because the Plaintiff's Complaint alleged:

- "The following Defendant Corporations have been members of The Mellon Financial Corporation U.S.-Tax 'Consolidated Group' of Corporations", thereupon naming four Defendant corporations (Plaintiff's Opening *Mellon Capital Management* Appendix, pp. 4-5). Their number exceeds the two required by Cal. Corporations Code § 18035(a).

- "The Mellon Financial Corporation U.S.-Tax 'Consolidated Group' of Corporations was formed by its members for the purpose of reducing their combined U.S. income tax liability." (Plaintiff's Opening *Mellon Capital Management* Appendix, p. 4). There has never been a suggestion from the Defendants or Courts that this reason why the Internal Revenue Code permits such groups to file consolidated income tax returns is unlawful.

Nevertheless, the Court of Appeal's opinion states (pp. 7-8):

> "Labor unions, political parties, social clubs, religious organizations, environmental societies, condominium owners, lodges, gangs, stock exchanges, and veterans are common types of unincorporated associations. (*Barr, supra,* 90 Cal.App.3d at p. 266; *Totten, supra,* at pp. 38-39)."

This point was addressed by the Plaintiff in the oral argument on December 8, 2010 with three arguments:

1. Cal. Corporations Code § 18035(a) is satisfied by its terms and the courts should not add additional requirements that were not included by the California Legislature.

2. The list set forth above, which purports to be exclusive, did not cause the Court in *Barr v. United Methodist Church,* 90 Cal.App.2d 540 (Fourth Dist. 1979) to require the Plaintiff to show that the United Methodist Church was a criminal gang or some other type of unincorporated organization that was already on the list prior to *Barr*, which was the first time a religious organization was added to the list.

3. The *Mellon* Defendants were in fact acting as a "criminal gang" which is on the list.

With regard to the third point, the Plaintiff's Complaint (Plaintiff's Opening *Mellon Capital Management* Appendix, pp. 4-11) contains the following:

- The Wall Street Journal article (O.A., pp. 10-11) that was attached to, and made part of, the Complaint states that Barclays Capital Ltd. had used the Property in deals with at least nine other banks (there were, in fact, 15 banks, all of which were sued as set forth in the Statement of Facts),
- An allegation (O.A., p. 5) that "The Property belongs to the Plaintiff."
- Allegations (O.A., p. 5) that the Defendants had converted Plaintiff's Property.
- An allegation (O.A., p. 6), that "The Defendant Corporations' agent, Mellon Financial Corporation, was reckless in its failure to obtain the permission of the Plaintiff to use The Property."

Taken together, these allegations present a clear picture that Barclays Capital Ltd. stole the Plaintiff's Property, the Defendants' agent Mellon Financial Corporation had received the stolen Property, and the Defendants' agent Mellon Financial Corporation was reckless in its failure to obtain the permission of the Plaintiff to use The Property.

The Court of Appeal might have leapt to the erroneous conclusion that the Defendants were not acting as a criminal gang because, presumably, they did not ordinarily do so. However, in *People ex. rel Totten v. Colinia Chiques,* 156 Cal.App.4th (Second Dist. 2007), the defendant criminal street gang argued that it could not be sued as an "unincorporated association" because Cal. Corporations Code § 18035 requires a "common lawful purpose." The Court held that an association can have more than one purpose, and so long as one of them is lawful, the definition is satisfied. By the same token, the Defendant *Mellon* Unincorporated Association can have more than one purpose and so long as one of them is unlawful, it is acting as a "criminal gang" with respect to that purpose.

F. If The Court of Appeal Believes That Plaintiff's Complaint Is Deficient Then, Since The Complaint Has Never Been Amended And The Superior Court's Decision Did Not Grant Leave To Amend, In The Interests Of Justice Leave To Amend Should Be Granted – Especially Since The Court Of Appeal's Decision Filed December 15, 2010 Is Refusing To Enforce Cal. Corporations Code § 18035 As Written

The Plaintiff's Complaint has never been amended and Judge Woolard did not grant leave to amend it.

Accordingly, if the Court of Appeal believes that Plaintiff's Complaint is deficient, then in the interests of justice the Court of Appeal should grant leave to amend the Complaint, especially since:

- The Court of Appeal's decision filed December 15, 2010 is refusing to enforce Cal. Corporations Code § 18035(a) as written, and
- It is reasonably clear that Plaintiff's Complaint has presented a picture, if indeed it has not specified short of alleging a legal conclusion, that the Unincorporated Association of *Mellon* Defendant Corporations has been operating with respect to Plaintiff's Property as a criminal gang.

G. Whether The Defendant *Mellon* Unincorporated Association Is A Partnership, As Alleged In The Complaint, Is Irrelevant To The Conclusion Of The Court Of Appeal That An Unincorporated Association Acting As A Criminal Gang Cannot Be Sued In The Name By Which It Is Known – Moreover, The Defendant *Mellon* Unincorporated Association Was Acting As A Common-Law Partnership As Alleged

As demonstrated in Sections A-F above, the question of whether the Defendant *Mellon* Unincorporated Association was acting as a common-law partnership, as alleged in the Complaint (second paragraph of the Complaint which is pp. 4-5 of Plaintiff's Opening *Mellon Capital Management* Appendix), is irrelevant to the conclusion of the Court of

Appeal that an unincorporated association cannot be sued under Cal. Corporations Code § 18035(a) in the name by which it is known.

Nevertheless, the opinion of the Court of Appeal talks at great length in justifying its Cal. Corporations Code § 18035(a) conclusion about whether the Defendant *Mellon* Unincorporated Association was acting as a common-law partnership as alleged in the Complaint.

Though irrelevant to the holding of the Court of Appeal regarding Cal. Corporations Code § 18035(a), the following argument is reproduced from Plaintiff's Reply Brief:

> Plaintiff has no quarrel with the contention of The Defendant Corporations that in order to constitute a partnership, an "unincorporated association" must be formed to "carry on a business for profit." (Answering Brief, pp. 12-13.)
>
> Plaintiff's Arguments A and B above establish that The Defendant Partnership is an "unincorporated association" under Cal. Corporations Code § 18035.
>
> Accordingly, the question is whether The Defendant Partnership, as an "unincorporated association," is formed to "carry on a business for profit."
>
> The Defendant Corporations have cited no authority bearing on this question. The only authorities they cite go to the question of whether an association that is not formed to "carry on a business for profit" can be a partnership.
>
> It is instructive (though not necessarily controlling) how an "unincorporated association" would be treated in this regard under the federal income tax law.

26 U.S.C. § 482 permits the Internal Revenue Service to treat related "organizations" (which includes associations, corporations and partnerships) on an arm's length basis, whether or not an inter-company charge was made that was not arm's length, and even whether or not an "organization" even kept books and records so that any inter-company charge was even made.

26 Code of Federal Regulations § 1.482-9 deals with "organizations" that provide services to related "organizations." 26 CFR § 1.482-9 permits an "organization" providing services to related "organizations" to use the so-called "Cost Method" **which would not generate profit or loss for the service "organization"** only under very limited circumstances **and not at all for the following types of services:**

- Manufacturing,
- Production,
- Extraction, exploration, or processing of natural resources,
- Construction,
- Reselling, distribution, acting as a sales or purchasing agent, or acting under a commission or similar arrangement,
- Research, development, or experimentation,
- Engineering or scientific,
- Financial transactions, including guarantees, or
- Insurance or reinsurance.

The Plaintiff's Complaint alleges (Opening Appendix, p. 5 at lines 10-11) that The Defendant Partnership converted Plaintiff's "Property" and the Complaint describes "The Property" (Opening Appendix, pp. 6-9) as a written presentation describing a financial transaction.

Since financial transactions are the penultimate item on the list of services set forth above for which the "cost" (or non-profit) method cannot be used, an "unincorporated association" implementing a financial transaction such as the one described in the Plaintiff's written report would be treated by the I.R.S. as having earned from its partners an "arm's length" service fee that would generate a profit.

Accordingly, there is no question that the I.R.S. would view The Defendant Partnership as an "unincorporated association" engaged in business for profit – and that the I.R.S. would view it as a partnership.

Even if the court decides not to follow the analysis of the Internal Revenue Service in determining that The Defendant Partnership is "carrying on a business for profit" simply because The Mellon Financial Corporation did not treat The Defendant Partnership as an "unincorporated association" or permit it to make an "arm's length" charge to its partners reflecting the economic value of the services rendered, then the court should at least leave the issue as a factual question to be determined by the jury.

H. <u>Dismissal Is Not Permitted By Code Civ. Proc. § 430.10 Unless The *Mellon* Defendants Are "The Same Parties" As The *Bank of New York* Defendants Since, Even If The Unincorporated-Association Defendants Are Dismissed From Both Cases, the "Same Parties" Requirement Is Still Not Satisfied – The Court Of Appeal Has Failed To Address Superior Court Judge Woolard's Supposition That The Defendants In *Bank of New York* (NYSE Symbol - BK) Can Be Sued After The Statute of Limitations Has Run For The Unlawful Behavior Of *Mellon Financial Corporation* (NYSE Symbol - MEL) And Its Subsidiaries</u>

The Superior Court's Order from which this appeal is taken (Plaintiff's Opening *Mellon Capital Management* Appendix, pp. 55-56) concludes:

"The Action is dismissed in its entirety against all other named Defendants with prejudice because it is identical to and duplicative of the *Karls v. Bank of New York et. al.,* Case No. CGC-09-489460 (filed June 15, 2009). Code Civ. Proc. § 430.10(c)."

Code Civ. Proc. § 430.10(c) provides:

> **"§ 430.10. Demurrer or defense to complaint or cross-complaint.** The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:
> ……**(c)** There is another action pending between **the same parties** on the same cause of action." (Emphasis added.)

However, the parties are not the same:

- The 5 defendants in the *Mellon Capital Management* case are not "the same" as the 10 defendants in *The Bank of New York* case; and
- The *Mellon Financial Corporation* Unincorporated Association is not a party to *The Bank of New York* case, and *The Bank of New York* Unincorporated Association and **five of its corporate members** are not parties to the *Mellon Financial* case.

The People ex rel. John Garamendi vs. American Autoplan, Inc., et. al., 20 Cal. App. 4th 760 (2d Dist. 1993) emphasized at considerable length on the requirement of Cal. Code Civ. Proc. § 430.10(c) that "**the same parties**" in both lawsuits must be precisely identical.

The wisdom of *The People ex rel. John Garamendi vs. American Autoplan, Inc., et. al.,* can be illustrated by a simple example posed in Plaintiff's Reply Brief. Suppose Chevron believes that one of its patents

has been infringed by a research partnership between the Iranian state oil company and Stanford University, and that Chevron also believes that the same patent has been infringed by a research partnership between the Venezuelan state oil company and Stanford University.

Judge Woolard's order in this case is equivalent to dismissing Chevron's lawsuit against the Iranian partnership, because Stanford University is a partner in both the Iranian partnership and the Venezuelan partnership. However, Chevron is not going to be able to recover damages against the Venezuelan partnership for the infringement by the Iranian partnership.

Similarly, in this case of the *Mellon Financial Corporation* group (NYSE Symbol - MEL) compared to *The Bank of New York* group (NYSE Symbol - BK), both groups converted Plaintiff's property just as both the Iranian partnership and the Venezuelan partnership infringed Chevron's property. But that does not give the Plaintiff the right to recover damages from *The Bank of New York* group (NYSE Symbol - BK) for the transgressions of the *Mellon Financial Corporation* group (NYSE Symbol - MEL), just as Chevron cannot recover damages from the Venezuelan partnership for the transgressions of the Iranian partnership.

The Court of Appeal appears to have been led astray by a factual finding in its opinion that is not supported a single scintilla of evidence:

> "…especially in light of **the fact** that he has already sued all of the business entities that comprise both the Mellon tax return group and the BNY tax return group." Opinion, p. 8.

Not only is there not a single scintilla of evidence to support this factual finding, but –

- The most recent Form 10-K Annual Report filed with the Securities and Exchange Commission by the *Mellon Financial Corporation* (NYSE Symbol - MEL) shows that the *Mellon Financial Corporation* had well in excess of 100 subsidiaries.
- The Form 10-K Annual Reports filed by *The Bank of New York* group (NYSE Symbol - BK) also have consistently shown that *The Bank of New York* has had well in excess of 100 subsidiaries.

It was improper for Judge Woolard to dismiss *Karls v. Mellon Capital Management Corporation, et. al.* both because the requirements of Code Civ. Proc. § 430.10(c) are not satisfied, and also because *The Bank of New York* Defendants are not liable, under the Complaint in *Bank of New York* (NYSE Symbol - BK), for the illegal acts of the *Mellon Financial Corporation* group (NYSE Symbol - MEL). [Judge Woolard might have been justified in combining the two cases, but not in dismissing either.]

IV. CONCLUSION

A. The *Bank of New York* Conversion Issue

As set forth in Section II-B above:

1. Justice Martin Jenkins elicited an admission from Defendants' Counsel during oral argument that:

    1. 18 Am.Jur.2d *Conversion: Tangible and Intangible Property, Generally* (West Publishing Company – Looseleaf © 2010) posits that an action for conversion ordinarily lies for "intangible property that is merged in, or identified with, some document";

    2. Both *Freemont Indemnity Company v. Freemont General Corporation, et. al.,* 55 Cal.3d 621, 148 Cal.App.4th 97 (Cal.App. Second Dist. 2007) and *Thrifty-Tel, Inc. v. Bezenek,* 54 Cal.3d 468, 46 Cal.App.4th 1559 (Cal.App. Fourth Dist. 1996) honored this rule; and

    3. The Plaintiff's claim for conversion is well within this rule.

2. Every case cited by The Defendants and The Court of Appeal in both this case and the related combined cases of *Karls v. Wachovia/Wells Fargo, Ibid.,* are consistent with the Plaintiff's unaltered position from the outset that the unauthorized taking of a document in which intangible rights are merged or with which intangible rights are identified is actionable as conversion.

As set forth in Section II-C, the only other objections of the Court of Appeal regarding (1) federal copyright preemption and (2)whether there

was substantial interference with Plaintiff's ownership of his property – disappear if Plaintiff's property is the proper subject of a conversion action.

Accordingly, the Court should reverse the Superior Court's decision to grant the Motion to Dismiss *Karls v. The Bank of New York, et. al.*

B. The *Mellon Capital Management* Unincorporated-Association Issues

As set forth in Section III above:

1. Defendants failed to introduce a single scintilla of evidence to dispute the allegations in the Complaint that the Defendant *Mellon* Unincorporated-Association was formed by an election under 26 U.S.C. §§ 1501 and 1504 by its members including the Defendant *Mellon* Corporations, and that it accordingly did exist.
2. Defendants failed to introduce a single scintilla of evidence to dispute the fact that Plaintiff's Complaint designates the Defendant *Mellon* Unincorporated-Association by the name by which it is known and, indeed, Superior Court Judge Woolard cites as the only authority for her decision a name-assigned case rather than a name-by-which-known case.

3. The Plaintiff's Complaint alleges that the Defendant *Mellon* Unincorporated-Association and its members which include the Defendant *Mellon* Corporations, were acting as a criminal gang.
4. Superior Court Judge Woolard erred in dismissing *Karls v. Mellon Capital Management Corporation, et. al.,* citing as her authority Code Civ. Proc. § 430.10(c) because that provision requires complete identity of the parties and, even if the Defendant *Mellon* Unincorporated-Association is dismissed as a Defendant, there are still five *Bank of New York* Corporate Defendants that are not parties to *Karls v. Mellon Capital Management Corporation, et. al.*

Accordingly, the Court of Appeal should:

- Reverse the Superior Court's decision to dismiss *Karls v. Mellon Capital Management, et. al.,* pursuant to Code Civ. Proc. § 430.10(c).
- With respect to the Defendant *Mellon* Unincorporated Association (1) whose existence was not challenged by a single scintilla of evidence, and (2) whose name specified in the Complaint was not challenged by a single scintilla of evidence and (3) which the Complaint reasonably describes, together with

its members including the Defendant *Mellon* Corporations, as operating as a criminal gang –

- The Court should reverse the Superior Court's decision to dismiss the *Mellon* Unincorporated Association as a Defendant, or
- The Court should grant leave to amend the *Mellon* Complaint which has never been amended if the Court of Appeal believes that it is deficient – especially since the Court of Appeal's decision filed December 15, 2010 is refusing to apply Cal. Corporations Code § 18035(a) as written.

C. The Estimated 10 Million California Inner-City Children For Whose Education 100% Of Any Proceeds From *Karls v. The Bank of New York, et. al.*, and *Karls v. Mellon Capital Management Corp., et. al.*, and All Of The Virtually-Identical Lawsuits Are Dedicated In Legally-Binding Fashion

Section D of the Statement of Facts updated plaintiff's "Certificate of Interested Entities or Persons" regarding how any proceeds from these two lawsuits and the virtually-identical lawsuits against 13 other international financial institutions were wholly dedicated in legally-binding fashion to the education of American inner-city children long before the stolen Trade Secret was created. The subsequent events were that the plaintiff had offered to assign all rights to the proceeds from the 15 lawsuits

gratis to the National "I Have A Dream"® Foundation to benefit the education of present and future California inner-city children but, as expected, the National "I Have A Dream"® Foundation had to decline the gift because it was not in a position to shoulder the cost of counsel. Thereupon the plaintiff offered to assign all the rights gratis to the "I Have A Dream"® Foundation of San Francisco and the "I Have A Dream"® Foundation of Los Angeles but, as expected, they also had to decline the gift because they were not in a position to shoulder the cost of counsel. Whereupon plaintiff contacted 51 inner-city clergy from San Francisco, Oakland and Los Angeles for the purpose of forming a foundation capable of handling this project.

The estimated 10 million California inner-city children whose education will ultimately benefit from 100% of any proceeds of these lawsuits deserve the same treatment under the law as any other American citizens.

DATED: December 27, 2010

Respectfully submitted,

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John S. Karls, Plaintiff-Appellant, Pro Se

cc: (A) Mr. Michael Moore
(B) 51 Inner-City Clergy From San Francisco, Oakland and Los Angeles (Please See Page 14 of the Statement of Facts)