

ARGUMENT

A. Cal. Rules Of Court § 8.500(b)(2) And The U.S. Constitution's Fourteenth Amendment "Due Process" Clause Were Violated Because Two Of The Three Justices Participating In The Court Of Appeal Decision Were Demonstrably Prejudiced

Acting P.J. Margulies and Justice Dondero, who authored the Court of Appeal opinion, both signed an opinion in a related case which was promulgated on August 20, 2010 and which stated in its Footnote 1 on its first page (a copy of that opinion appears at pp. 1-5 of the Appendix to the Petition for Review) that Justice Margulies and Justice Dondero had already reached their decision on or before August 20, 2010 in the cases which are the subject of this Petition for Review.

The Defendants' attempt to white wash the admitted prejudice of Justices Margulies and Dondero as the result of an inadvertent drafting error (Defendants' Answer, p. 22) doesn't accord with the facts. Acting P.J. Margulies denied Plaintiff's Motion that all four justices of the First Division of the First Appellate District recuse themselves in a brief decision that is striking in three respects:

1. The only excuse offered for the denial was that the First Division always reaches its decisions before the hearings.

2. Even if there had been a chance that a hearing could overcome the admitted prejudice of the Justices, Acting P.J. Margulies' denial failed to recognize that the August 20, 2010 opinion's stated prejudice was "etched in stone" by virtue of being published, rather than merely being a draft that was subject to change.
3. Acting P.J. Margulies's denial failed to address why the Justices didn't bother to read what they signed, implying that they really had read what they signed and Footnote 1 didn't strike them as untrue because they really had already made their decision.

A much higher standard of judicial behavior was on display in *Mosk v. Superior Court of Los Angeles County*, 25 Cal.3d 474 (S.Ct. In Bank, 1979) with respect to Justices sitting in judgment of peers (much less one's self and a peer as Acting P.J. Margulies did). Stanley Mosk was an Associate Justice of the Supreme Court who had been subpoenaed to appear before the Commission on Judicial Performance. When the question of enforcement of the subpoena reached the Supreme Court, all Supreme Court Justices except one disqualified themselves. The Supreme Court Chief Justice then appointed six Court of Appeal Justices, selected by lot, to act as Supreme Court justices pro tempore. However, the Commission then challenged this procedure and the Supreme Court held

that although it would have been improper for its members to have decided the substantive issue of subpoena enforcement, it was not improper for its Chief Justice to have decided the procedural question of how to compose a Supreme Court comprising justices pro tempore.

A transcript in the cases at bar will show that the Plaintiff began his presentation by stating that he had filed a Motion for all of the Justices involved to recuse themselves and that he did not want to jeopardize any rights to a fair hearing. A transcript will also show that Acting P.J. Margulies responded that the Plaintiff would not be jeopardizing any rights by proceeding and, indeed, he might be foregoing any right to a hearing if he did not proceed.

The Petition for Review complied with Cal. Rules of Court § 8.504(b)(3) by stating that no Petition for Rehearing was filed and, though not required, disclosed that the reason for not doing so was to avoid jeopardizing Plaintiff's right to a hearing before Justices who were not admittedly prejudiced.

Accordingly, Cal. Rules of Court § 8.500(b)(2) and the U.S. Constitution's Fourteenth Amendment "Due Process of Law" requirement were violated.

B. Defendants And The Court Of Appeal Have Been Unable To Cite A Single Authority That Undercuts Plaintiff's Position From The Outset That The Wrongful Taking Of "Intangible Property That Is Merged In, Or Identified With" Tangible Property (Quoting *Freemont Indemnity General Corporation* (Cal.App. 2d Dist. 2007) and *Thrifty-Tel, Inc. v. Bezenek* (Cal.App. 4th Dist. 1996)) Is Actionable As Conversion

B-1. Plaintiff's Position According To The Complaints, Etc.

The Plaintiff's FAC's stated (Opening Appendix, Vol. 1, pp. 7-15 at p. 10 for Wachovia and Opening Appendix, Vol. 2, pp. 4-10 at p. 6 for Wells Fargo) that Plaintiff's property which was admittedly stolen –

“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 has always taken the position from the outset that when an intangible property (such as an idea of “interpretive, scientific or artistic significance” for which Cal. Code Civ. Proc. 338(c) tolls the 3-year statute of limitations until discovery) is merged in “an article” (using CCP 338(c)’s language) such as Plaintiff’s “written presentation” which was admittedly stolen, the theft is actionable as conversion. Nobody has ever suggested that the Plaintiff’s Trade Secret which was embodied in the “written presentation,” did not have “interpretive” significance.

B-2. The Two Most-Recent Court Of Appeal Decisions -- *Freemont Indemnity General Corporation* (Cal.App. Second Dist. 2007) and *Thrifty-Tel, Inc. v. Bezenek* (Cal.App. Fourth Dist. 1996) Support The Plaintiff

Both *Freemont Indemnity General Corporation*, 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) recite and honor:

The well-settled common-law principle that the wrongful taking of “intangible interests” that are “merged with, or reflected in, something tangible” are actionable as conversion.

The *Freemont* Court, after considering this principle, explicitly expanded it by holding that the misappropriation of a U.S. tax loss “supports a cause of action for conversion” even though it was not “merged or reflected in some document.” *Freemont, ibid*, p. 643.

The *Thrifty-Tel* Court also considered explicitly expanding the well-settled common-law principle in the case of a computer access code “which was never reduced to paper or reflected on a computer disk” (*Thrifty-Tel, ibid*, p. 472) 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 *Thrifty-Tel, ibid*).

As pointed out in the Petition for Review, the Court of Appeal's opinion in the cases involved with this Petition erroneously cited *Freemont*, *ibid*, and *Thrifty-Tel*, *ibid*, as undermining Plaintiff's position because, apparently, the Court did not read the opinions.

The Defendants' Answer To The Petition For Review fails to cite or discuss *Thrifty-Tel* and disingenuously describes *Freemont* as a case dealing with a U.S. tax loss "that can be recorded in tax records" when the *Freemont* Court, as set forth on p. 15 of Plaintiff's Petition for Review, found that the loss had **not** been recorded in any records, but nonetheless held:

"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 actions for conversion." *Freemont*, *ibid*, p 643 (emphasis added).

The Plaintiff's Trade Secret which was indeed embodied, as the FAC's allege was required, in the "written presentation" which was admittedly stolen, is well within the well-settled common-law principle recognized and honored by both the *Freemont* and *Thrifty-Tel* Courts of Appeal, and no expansion of that principle is necessary for Plaintiff's Trade Secret.

B-3. Am.Jur.2d, Corpus Juris And The Second Restatement Of Torts All Support Plaintiff's Position

The well-settled common-law principle recognized and honored by both the *Freemont* and *Thrifty-Tel* Courts of Appeal is reflected in Am.Jur.2d which Plaintiff has constantly cited from the beginning of these lawsuits:

“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) (emphasis added).

An older formulation is contained in *Corpus Juris* which Plaintiff has also constantly cited from the beginning of these lawsuits is –

An idea which cannot be comprehended “separate and apart from the property in the paper on which it is written or the physical substance in which it is embodied.” 13 *Corpus Juris*, p. 948, sec. 5-a, as quoted in *Italiani v. Metro-Goldwin-Mayer Corporation*, 45 Cal.App. 464, 466, 114 P.2d 370 (Cal.App. Third Dist. 1941).

Sec. 242 of the Second Restatement of Torts even goes so far as to posit:

“Where there is conversion of a document in which intangible rights are merged, the damages include the value of such rights.” (emphasis added)

Just like the Defendants' Answer fails to address these well-settled common-law principles as recognized and honored in *Freemont Indemnity General Corporation*, 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), the Defendants' Answer turns a blind eye to these secondary sources which have been constantly cited by the Plaintiff.

B-4. The First Appellate District's Own Decision In *Gladstone v. Hillel* (Cal.App. First Dist. 1988) Is Not An "Inapt Analogy" But Directly "On Point" For Plaintiff When Considered Together With The Legislative Intent Of Cal. Code Civ. Proc. 338(c)

Plaintiff has also constantly cited the First Appellate District's own decision in *Gladstone v. Hillel*, 250 Cal. 372, 203 Cal.App.3d 977 (Cal.App. First District 1988) as an illustration of the older, broader formulation of the well-settled common-law principle as reflected in Corpus Juris (as quoted in Sec. B-3 above) regarding, in the alternative, **"the physical substance in which an idea is embodied."**

Since *Gladstone* was dealing with an "idea" (aka artist's concept for, in that case, fine jewelry), it is instructive that the California Legislature enacted at about the same time as the Corpus Juris formulation of the common-law conversion principle, that the three-year statute of limitations would be tolled until discovery for the conversion of "articles" that were of

“interpretive, scientific or artistic significance” as provided currently in Cal. Code Civ. Proc. § 338(c).

Nowadays, nobody even questions whether, if Leonardo da Vinci’s Mona Lisa were stolen, it would comprise an “article” of “artistic significance” (Cal. Code Civ. Proc. § 338(c)) that comprises an “idea” aka artist’s concept that is “embodied” in a “physical substance” (Corpus Juris) for which the measure of damages is not merely the nominal value of an old piece of canvas to which some old paint still adheres, but instead includes the value of the intangible rights aka “idea” aka artist’s concept (Restatement of Torts, Second, § 242).

Because nowadays nobody bothers to analyze the conversion of a work of fine art such as The Mona Lisa or the conversion of fine jewelry as was involved in *Gladstone*, they are susceptible to the error of the Court of Appeal in the cases at bar in calling Plaintiff’s citation of *Gladstone* a mere analogy that is “inapt” (p. 5 of the opinion) – or the error of the Defendants’ (p. 16 of their Answer) in claiming that the artist’s concept for fine jewelry is not an “idea.”

B-5. All Other Authorities Cited By The Defendants Are Consistent With Plaintiff's Position Which Is Well-Settled Law

All of the remaining authorities cited by the Court of Appeal or by the Defendants are consistent with the well-settled common-law of conversion regarding intangible property that is merged in, or identified with, tangible property:

- *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. Sue Lynn Corp.*, 100 Cal. 838, 24 Cal.App.3d 345 (Cal.App. First Dist. 1972) involved solely architectural plans which were not wrongfully taken.
- *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.

C. The Petition For Review Demonstrated That All Of The Other Arguments Of The Court Of Appeal Comprised A “House Of Cards” Because Each Was Predicated On The Erroneous Premise That “Intangible Property” Merged In, Or Identified With, Tangible Property Is Not Actionable As Conversion

The Defendants’ Attempts In Their Answer To Make Three Cards In The “House Of Cards” Stand Up Again Are Fatally Flawed

C-1. Statute Of Limitations

As set forth in Argument C-3 of the Petition For Review, the rejection of the Statute of Limitation provided in Cal. Code Civ. Proc. § 338(c) was based on the erroneous premise that the wrongful taking of “intangible property” merged in, or identified with, tangible property is not actionable as conversion.

The Defendants’ Answer argues (p. 17) that the terms of Cal. Code Civ. Proc. § 338(c) can be dishonored. Cal. Code Civ. Proc. § 338(c) provides that the three-year statute of limitations applies to:

“(c) An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property. The cause of action in the case of theft, as defined in Section 484 of the Penal Code, of any article of historical, interpretive, scientific, or artistic significances is not deemed to have accrued until the discovery of the whereabouts of the article by the

aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft.”

Nobody has ever suggested that the “written presentation” which the FAC alleged contained Plaintiff’s Trade Secret and which was admittedly stolen, was not an “article” of “interpretive significance.”

Instead, the Defendants argue (p. 17 of their Answer), without citing any authority for their argument, that the plain language of the statute can be dishonored if the “gravaman” of an action for conversion of “intangible” property that is merged in, or associated with, “tangible property” is the theft of the “intangible property.”

In addition to having no authority for this novel argument, the Defendants obviously haven’t thought it through. Of the three types of “ideas” specified in Cal. Code Civ. Proc. § 338(c) – interpretive, scientific and artistic – the “idea” is always going to possess virtually all of the value and the physical “article” (that is, the used paper or the old canvas to which some old paint still adheres) is always going to be worthless in the absence of the idea.

Accordingly, the Defendants are really suggesting that the Cal. Code Civ. Proc. be amended by the Supreme Court by deleting § 338(c)’s three-year limitation which is tolled for articles of interpretive, scientific or

artistic significance since, under their argument, these provisions would never apply.

C-2. Copyright Preemption

As set forth in Argument C-2 of the Petition For Review, the argument of the Court of Appeal that federal copyright law preemption applies was based on the erroneous premise that the wrongful taking of “intangible property” merged in, or identified with, tangible property is not actionable as conversion.

The Defendants’ Answer attempts to resuscitate this argument by claiming (pp. 18-21) that federal copyright preemption applies in the case of the “extra element” of “wrongful possession” if the thief makes a copy of the property that was stolen.

That argument is diametrically opposed to *Gladstone v. Hillel*, 250 Cal. 372, 203 Cal.App.3d 977 (Cal.App. First Dist. 1988) which 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” is not preempted.

It is worthwhile considering the facts of *Gladstone, supra*. It involved the theft of molds for making fine jewelry, which the *Gladstone* Court recognized was copyrightable (203 Cal.App.3d at p. 985). Defendant Hillel not only made jewelry from the molds, but also made new molds from the stolen molds which new molds were also used to make jewelry. The Court of Appeal First Appellate District ordered the original molds be returned to the plaintiff and the destruction of the new molds and all jewelry made from either sets of molds. **The Court did not fail to take action because copies of the stolen molds had been made.**

Even if the Defendants' novel argument that *Nimmer, op. cit.*, and *Gladstone, op. cit.*, are wrong that making copies of material of which Defendant is in wrongful possession is not preempted – so that the issue was a “case of first impression” – the policy underlying Defendants' position is inadequate to deal with “The Rembrandt Etchings” issue posed by Plaintiff in his arguments from the beginning of these lawsuits.

Rembrandt was most famous for his etchings, from which a limited number of prints would be made (each typically bearing the notation of the number of the print and the total number of prints). The value of each print derived not only from Rembrandt's “artistic idea” but also from the limited number of prints made from the etching. Now suppose a Rembrandt

etching is stolen from the Getty Museum and the thief begins to make more prints. Under the Defendants' novel argument, the theft of the Rembrandt etching would not be actionable as soon as the first print is made!!!

Such a result is not only contrary to *Nimmer, op. cit., and Gladstone, op. cit.*, but would comprise bad public policy.

C-3. Intermeddling – Also Deprivation Of Plaintiff's Exclusive Right To Exploit His Trade Secret

As set forth in Argument C-1 of the Petition For Review, the argument of the Court of Appeal that there has been no substantial interference with Plaintiff's ownership rights was based on the erroneous premise that the wrongful taking of "intangible property" merged in, or identified with, tangible property is not actionable as conversion.

The Defendants attempt to resuscitate this argument in the last paragraph on p. 16 of their Answer. However, they cite only the "intermeddling" case of *Zaslow v. Cronert*, 29 Cal.2d 541 (S.Ct. 1946) which, as explained in Plaintiff's Petition For Review (p. 25) involved a dispute over occupancy rights of real property following which the owner removed the personal property of the occupant and stored them in the name of the occupant; accordingly, there was at no time any interference with the occupant's right to immediate possession and enjoyment of the personal

property, but only with the location at which that possession and enjoyment could take place.

Nevertheless, the Defendants' Answer (last paragraph on p. 16) claims that Plaintiff's FAC contains "no allegations as to how defendants substantially interfered with his own use or possession of the property at issue."

On the contrary, attached to Plaintiff's FAC and made a part thereof, was a Wall Street Journal article which stated that the Wachovia Defendants and the Wells Fargo Defendant had used the Trade Secret in deals they implemented with Barclays Capital, Ltd., which has admitted in unprivileged communications that it stole Plaintiff's Trade Secret.

There could be no greater interference with Plaintiff's ownership rights of his Trade Secret than the theft of that Trade Secret by a British Bank that would be the primary user of that Trade Secret in implementing deals with the Defendants and the 13 other large financial institutions described in Section A of the Statement of Facts in Plaintiff's Petition For Review. Plaintiff has never been able to use his Trade Secret to implement a single deal because of the unlawful behavior of the users of his Trade Secret.

In this regard, it should be noted that the FAC's allege that the Defendants' were "reckless" in their "failure to obtain the permission of the Plaintiff to use The Property." (Opening Appendix, vol. 1, p. 10 for Wachovia and Opening Appendix, vol 2, p. 5 for Wells Fargo.)

Accordingly, they are guilty of the common-law crime of receiving stolen property and, as American companies receiving stolen property from a British company, guilty of the Federal statutory crime of receiving stolen property.

CONCLUSION

The Petition For Review should be granted and the decision of the Court of Appeal reversed because:

1. Per Cal. Rules of Court § 8.500(b)(2), the Court of Appeal decision lacked the concurrence of sufficient qualified justices because two of the three participating justices were prejudiced, as set forth in Argument A.
2. Per Cal. Rules of Court § 8.500(b)(1), the decision conflicts with the well-settled common law of conversion in general and, inter alia, *Freemont Indemnity Company v. Fremont General Corporation, et. al.*, 55 Cal.3d 621, 638, 148 Cal.App.4th 97

(Cal.App. Second Dist. 2007), *Thrifty-Tel, Inc. v. Bezenek*, 54 Cal.3d 468, 472, 46 Cal.App.4th 1559 (Cal.App. Fourth Dist. 1996), and *Gladstone v. Hillel*, 203 Cal.App.3d 977, 250 Cal.Rptr. 372 (1st Dist. 1988).

3. Per Cal. Rules of Court § 8.500(b)(1), destroying the rights of the estimated 10 million California inner-city children to a decent future in unpublished opinions that fail to follow the well-established common law of conversion constitutes “separate and inherently unequal” jurisprudence which violates the Fourteenth Amendment to the U.S. Constitution.

With regard to the third point, the Defendants argue that 10 million California inner-city children being the real party at interest is a new allegation (Answer, p. 23). This is false. Plaintiff’s “Certificate of Interested Entities or Persons” filed with his Opening Brief 12 months ago set forth at great length why the California inner-city children were the real party at interest. Section D of the Statement of Facts of the Petition for Review merely quoted a portion of that Certificate from 12 months ago (pp. 11-12) and then updated it (p. 13) to describe Plaintiff’s actions during the intervening 12 months to donate gratis all of the Plaintiff’s right, title and interest in all 15 lawsuits to:

1. The National “I Have A Dream”® Foundation for the benefit of the 10 million California inner-city children (IHAD-National had to decline the gift because it was not in a position to shoulder the cost of counsel);
2. The “I Have A Dream”® Foundation of San Francisco and the “I Have A Dream”® Foundation of Los Angeles for the benefit of the 10 million California inner-city children (they also had to decline the gift because they were not in a position to shoulder the cost of counsel);
3. A foundation to be formed with the assistance of 51 inner-city clergy from San Francisco, Oakland and Los Angeles with whom I have been corresponding since last Spring.

The Defendants have also disputed Plaintiff’s legal obligation to do so under well-settled contract law which treats contributions from other donors to whom a pledge is communicated as the bargained-for consideration making the pledge a binding contract as described in the Plaintiff’s Original Certificate, which was reproduced in Section A of the Petition. Defendants have cited no authorities for disputing this well-settled principle of contract law.

DATED: January 5, 2011

Respectfully submitted,

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 13 of the Statement of Facts of the Petition For Review)