

FILED

MAR 28 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

No. 07-16527

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

REBECCA PROCTOR, REX
BROOKS, ET AL. ., et al.,
Plaintiffs-Appellants,

v.

VISHAY INTERTECHNOLOGY,
INC. ET AL., et al.,

Defendants-Appellees

District Court No. 5:06-CV-4134 JF
(N.D. Calif. San Jose Division)

On Appeal from the United States District Court
For the Northern District of California
Honorable Jeremy Fogel

REPLY BRIEF OF APPELLANTS

Maxwell M. Blecher, Esq. (SBN 026202)
James Robert Noblin, Esq. (SBN 114442)
BLECHER & COLLINS, P.C.
611 West Sixth Street, 20th Floor
Los Angeles, CA 90017
Telephone: (213) 622-4222
Facsimile: (213) 689 1944

James A. Hennefer (SBN No. 059490)
HENNEFER FINLEY & WOOD
425 California Street, 19th Floor
San Francisco, CA 94104
Telephone: (415) 421-6100
Facsimile: (415) 421-1815

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

	Pages
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	v
INTRODUCTION	1
A. The District Court Enforced the Delaware Injunction Without Any Analysis of Appellee’s Claim of <i>Res Judicata</i> as Required by <i>Donovan</i>	2
1. The <i>Donovan</i> Rule	2
2. The District Court Enforced the Delaware Injunction and Did Not Address the <i>Res Judicata</i> Effect of the Delaware Judgment	4
B. The Elements of <i>Res Judicata</i> Which the District Court Failed to Address	5
C. Determination of The <i>Res Judicata</i> Effect of the Delaware Judgment Requires Resolving Several Legal and Factual Questions Not Addressed by the District Court	6
D. Factual Issues and Legal Issues Preventing the Application of <i>Res Judicata</i>	8

1.	This Action and the Delaware Tender Offer Litigation Do Not have an “Identity of Claims”	9		
	a.	Comparison of the Delaware Complaint and the Complaints Here Shows No “Identity of Claims”	9	
	b.	The District Court Held That There Was Not an “Identity of Claims” in the Delaware Complaint and the Complaints Here	11	
	c.	Appellees Are Judicially Estopped from Asserting That There is an “Identity of Claims” in the Delaware Complaint and the Complaints Here	12	
	d.	Appellees’ Claims of Judicial Admissions by Appellants Are Frivolous	15	
	e.	Appellees Rely on Several Additional Misrepresentations of the Record	16	
		i.	Failure to Follow <i>Donovan</i>	16
		ii.	The Delaware Supreme Court’s Purported “Holding”	17
		iii.	Proceedings Before the Santa Clara Superior Court	18
2.	The Pre-SLUSA Case of <i>Matsushita Elec. Indus. Co., Ltd. v. Epstein</i> Does Not Support Appellees’ Case for Affirmance	21		

a.	The Policy and Provisions of SLUSA – Enacted After <i>Matsushita</i> – Legislate Against Applying <i>Matsushita</i>	23
b.	The Analytical Framework in <i>Matsushita</i> , under <i>Marrese</i> Factors Does Not Automatically Preclude the California Action and Requires Inquiry into Whether the Delaware Judgment Comported with Due Process	25
E.	Appellants’ Motion to Remand Should Have been Granted by the District Court	28
1.	The First Amended Complaint and Second Amended Complaint Allowed Appellees to “Ascertain” That This Action Was Removable under SLUSA	28
2.	By Moving to Arbitrate and Demurring to the SAC on the Basis of Res Judicata Appellees Waived their Right to Removal	30
	CONCLUSION	31
	STATEMENT OF RELATED CASES	32
	CERTIFICATE OF COMPLIANCE	32

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 106 S. Ct. 2505 (1986)	8
<i>Balcorta v. Twentieth Century-Fox Film Corp.</i> , 208 F.3d 1102 (9th Cir.2000)	12
<i>Blonder-Tongue Lab. V. University of Ill. Found.</i> , 402 U.S. 313, 91 S. Ct. 1434 (1971)	6
<i>Brinson v. Linda Rose Joint Venture</i> , 53 F.3d 1044 (9 th Cir. 1995)	7
<i>Burnside-Ott Aviation Training Center, Inc. v. United States</i> , 985 F.2d 1574 (Fed. Cir. 1993)	8
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548 (1986)	8
<i>City of Vernon v. Southern Calif. Edison</i> , 955 F.2d 1361 (9 th Cir. 1992)	7
<i>Constantini v. Trans World Airlines</i> , 681 F.2d 1199, (9 th Cir. 1982)	5

<i>Crain v. Electronic Memories & Magnetics Corp,</i>	
50 Cal. App. 3d 509 (1975)	11, 24
<i>Donovan v. City of Dallas,</i>	
377 U.S. 408 (1964)	passim
<i>Eastman Kodak Co. v. Image Technical Services, Inc.,</i>	
504 U.S. 451, 112 S. Ct. 2072 (1992)	8
<i>Epstein v. MCA, Inc.,</i>	
50 F.3d 644 (9th Cir. 1995)	25
<i>Federated Department Stores, Inc. v. Moitie,</i>	
452 U.S. 394, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981)	5
<i>General Atomic Co. v. Felter,</i>	
434 U.S. 12, 98 S.Ct. 76 (1977)	3
<i>Gilliland v. Motorola, Inc.,</i>	
873 A.2d 305 (Del. Ch. 2005)	24, 26
<i>Hall v. North American Van Lines, Inc,</i>	
476 F.3d 683 (9th Cir. 2007)	12
<i>Hamilton v. State Farm Fire & Cas. Co.,</i>	
270 F.3d 778 (9th Cir. 2001)	13

Hawthorne Savings F.S.B. v. Reliance Ins. Co. Of Illinois,
421 F.3d 835 (9th Cir. 2005) 3

In re MCA, Inc. Shareholders Litig.,
598 A.2d 687 (Del.Ch.1991) 27

In re Silicon Graphics Inc. Sec. Litig,
183 F.3d 970, 973 (9th Cir.1999) 23

In re Siliconix, Inc. Shareholders' Litigation,
C.A. No. 1143-N (Del. Ch., October 25, 2005) 19

Jara v. Suprema Meats, Inc.,
121 Cal. App. 4th 1238 (2004) 11, 24

Jones v. H. F. Ahmanson & Co.,
1 Cal. 3d 93 (1969) 10, 24

Karim-Panahi v. Los Angeles Police Department,
839 F.2d 621 (9th Cir. 1988) 6

Marrese v. American Academy of Orthopaedic Surgeons,
470 U.S. 373, 105 S.Ct. 1327 (1985) 22, 25

Matsushita Elec. Indus. Co., Ltd. v. Epstein,
516 U.S. 367, 116 S.Ct. 873, 134 L.Ed.2d 6, (1996) passim

Nebel v. Southwest Bancorp, Inc.,

Civ. A. No. 13618, 1995 UL 405750 at *7 (Del. Ch. July 5, 1995) . . 24, 26

New Hampshire v. Maine,

532 U.S. 742, 121 S.Ct. 1808 (2001) 14

Patenaude v. Equitable Life Assurance Society of U.S.,

290 F.3d 1020 (9th Cir. 2002) 23

Phillips Petroleum Co. v. Shutts,

472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985) 27

Prezant v. De Angelis,

636 A.2d 915 (Del.1994) 27

Rissetto v. Plumbers & Steamfitters Local ,

343, 94 F.3d 597 (9th Cir.1996) 13

Russell v. Rolfs,

893 F.2d 1033 (9th Cir.1990) 13

Smith v. Tele-Communication, Inc.,

134 Cal. App. 3d 338 (1982) 11, 24

Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.,

298 F.3d 1137 (9th Cir. 2002) 6

<i>Terracon v. Valley Nat'l Bank,</i>	
49 F.3d 555 (9 th Cir. 1995)	7
<i>U.S. Mortg., Inc. v. Saxton,</i>	
494 F.3d 833 (9th Cir. 2007)	25
<i>Western Radio Services Co., Inc. v. Glickman,</i>	
123 F.3d 1189 (9 th Cir. 1997)	5
<i>Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP,</i>	
365 F.3d 1244 (11 th Cir. 2004)	30

STATUTES and RULES

Federal Rules of Civil Procedure 12(b)(6)	passim
Federal Rules of Civil Procedure 56	passim
8 Del. C. § 262	passim
SLUSA (Pub. L. No. 105-535, 112 Stat. 3227	passim
PSLRA (Pub. L. No 104-67, 109 Stat. 733)	23
SEC Rule 10b-5	24
15 U.S.C. § 77	24
15 U.S.C. § 78	11, 24
28 U.S.C. § 1446	28

28 U.S.C. § 1738 26, 27

OTHER AUTHORITIES

Charles A. Wright et al.,

Federal Practice and Procedure, § 2741 (3d Ed. 1998) 4

Erwin Chemerinsky,

Federal Jurisdiction, § 11.21 (4th Ed. 2003) 4

Schwarzer, Tashima and Wagstaffe,

Cal. Prac. Guide Fed. Civ. Pro. Before Trial, (2006) 30

INTRODUCTION

Plaintiffs' First and Second Amended Complaints in this action ("FAC" and "SAC") alleged that, as part of the looting of Siliconix by defendants, Vishay and Felix Zandman misappropriated Siliconix/Vishay patents and gave Zandman, in 2004 an employment agreement, a 5% gross royalty from the sale of any products that incorporated these patents. (FAC ¶¶ 122-124, SAC ¶ 19) (ER 0101-02, 0801)

Vishay did not disclose the magnitude of the expected royalty from the misappropriated patents and Zandman's royalty in connection with the Delaware Tender Offer or the Delaware Judgment in 2005, which are the subject of this appeal. It was not disclosed until March 28, 2008 when Vishay filed with the SEC a preliminary proxy statement. Appellants are filing, with this Reply Brief, a request for judicial notice ("RJN") for these documents that just came to light, because of the extraordinary dollar amount and materiality of this disclosure – which was undisclosed and not taken into account in the Delaware Judgment.

What the RJN documents disclose is that Zandman's royalty, if "grossed up" as provided for under his royalty agreement and employment agreement and present valued (for its 10 year term) at a 5.5% discount rate would be approximately \$1.25 billion, or over 80% of Vishay's present market value

including its ownership of Siliconix. (RJN, Exhibit A; Exhibit B, pages 38-39)

This information goes to the heart of Appellants' claims that the District Court should have independently evaluated the *res judicata* effect of the Delaware Judgment and whether there was adequate representation satisfying the requirements of the Fourteenth Amendment's Due Process Clause, allowing the judgment to bind absent class members for federal claims and should have allowed discovery in aid of that evaluation. *See, Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 377-378 and 388, 116 S.Ct. 873 (1996) (discussing the Due Process requirement in applying *res judicata* to a state's class action judgment to preclude federal claims).

ARGUMENT

A. The District Court Enforced the Delaware Injunction Without Any Analysis of Appellee's Claim of *Res Judicata* as Required by *Donovan*

1. The *Donovan* Rule

The United States Supreme Court in *Donovan v. City of Dallas*, 377 U.S. 408, 412-413, 84 S.Ct. 1579 (1964) held that: (1) "state courts are completely without power to restrain federal-court proceedings, in *in personam* actions;" (2) "where the jurisdiction of a court, and the right of a plaintiff to prosecute his

suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court;” and (3) where defendants claim *res judicata* in a prior state court judgment “whether or not a plea of *res judicata* in the second suit would be good is a question for the federal court to decide.” *Donovan* was reaffirmed by the Supreme Court in a *per curiam* opinion in *General Atomic Co. v. Felter*, 434 U.S. 12, 98 S.Ct. 76 (1977). The Court in *General Atomic* held: “The right to pursue federal remedies and take advantage of federal procedures and defenses in federal actions may no more be restricted by a state court here than in *Donovan*.” *Id.* at 18-19.

This is precisely the right - to a determination of the merits of Appellees’ claim of *res judicata* and federal remedies, procedures and defenses – which was taken away by the District Court in dismissing this action, without analysis or determination whatsoever on the merits. (ER 1714-1718)

This rule is good law in the 9th Circuit. In *Hawthorne Savings F.S.B. v. Reliance Ins. Co. of Illinois*, 421 F.3d 835, 850-851 (9th Cir. 2005), amended at 433 F.3d 1089 (9th Cir. 2006), the 9th Circuit held that: (1) “even assuming that the anti-suit injunction in the liquidation order is a ‘judgment’ entitled to full faith and credit, a point we do not decide, state courts may never enjoin *in personam* proceedings in the federal courts;” (2) “the rule barring states from

enjoining *in personam* actions in the federal courts applies with equal force regardless of the basis for federal jurisdiction;" and (3) "[t]he argument that a state court could in effect enjoin a person from proceeding further in an action previously instituted in a federal court where the federal court admittedly has jurisdiction of both subject matter and the parties is a bit startling and finds no sanction in the law."

This rule is likewise recognized by federal practice scholars. Wright, Miller, *Federal Practice & Procedure*, § 4212 "State Injunctions Against Federal Proceedings" (3rd Ed.) ("It has been clear since 1964 that a state court is completely without power to restrain federal proceedings in actions *in personam*. It would not be possible to imagine a stronger case than *Donovan* for allowing the state court to issue such an injunction [but it was not allowed in *Donovan*];" Chemerinsky, *Federal Jurisdiction* § 11.2.1, at 717 n.10 (4th ed. 2003) ("[T]he only time that state courts can enjoin federal proceedings is when the state courts first acquire in rem or quasi in rem jurisdiction before the federal courts.")

2. The District Court Enforced the Delaware Injunction and Did Not Address the *Res Judicata* Effect of the Delaware Judgment

Faced with this unequivocal precedent, Appellees try to argue instead that "the District Court did not enforce the Delaware Injunction." (Vishay Brief pp.

29-31) This could not be further from the truth. The District Court clearly refused to address Appellant's substantive arguments (in its own words) "that they are entitled to a determination in California as to whether or not the Delaware settlement bars their claims and whether the Delaware Chancery Court had jurisdiction to issue the injunction." (ER 1717-1718) Rather, the District Court, relying entirely on the Delaware Injunction and with no analysis or authority cited, enforced the Delaware Injunction, holding that "[a]s a matter of federal-state comity, this Court will not entertain arguments regarding the jurisdiction of the Delaware Chancery Court unless and until Plaintiffs first have sought relief from the injunction in Delaware. Accordingly, the instant action will be dismissed." (ER 1718) (Emphasis supplied.)

B. The Elements of *Res Judicata* Which the District Court Failed to Address

Res judicata, also known as "claim preclusion, bars litigation in a subsequent action of any claims that were raised or could have been raised in the prior action. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2427-28, 69 L.Ed.2d 103 (1981); *Western Radio Services Co., Inc. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997); *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir.1982).

In order for *res judicata* to apply there must be: 1) an identity of claims, 2) a final judgment on the merits, and 3) identity or privity between parties.

Blonder-Tongue Lab. v. University of Ill. Found., 402 U.S. 313, 323-24, 91 S.Ct. 1434, 1439-40, (1971); *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 n. 3 (9th Cir. 2002).

A party asserting the defense of *res judicata* and collateral estoppel bears the burden of establishing the various elements of those defenses. *Karim-Panahi v. Los Angeles Police Department*, 839 F.2d 621, 627 n.4 (9th Cir. 1988).

Defendants did not attempt to lay out those elements and set forth the proof of each in their motions to dismiss and for summary judgment. The District Court also did not address any of these issues. Plaintiffs cannot be expected to refute each point necessary to a demonstration defendants have failed to make.

C. Determination of The *Res Judicata* Effect of the Delaware Judgment Requires Resolving Several Legal and Factual Questions Not Addressed by the District Court

Since the District Court clearly gave effect to the Delaware Injunction and did not determine the *res judicata* effect of the Delaware Judgment, Appellees are left to argue that this Court should try to resolve the many legal and factual questions involved, rather than remanding the case to the District Court for it to do so, as it was required to do under *Donovan*. Appellees' position is untenable

for several reasons.

The issue came before the District Court on a Ernst & Young's Rule 12(b)(6) motion to dismiss and the Vishay Defendants' Rule 56 summary judgment motion. Appellees' motions relied heavily on the Delaware Injunction (ER 1531-1533) which relied solely on the Delaware Judgment (ER 1526-1530). Both are nearly devoid of the factual and legal analysis required to establish a *res judicata* defense.

In a Rule 12(b)(6) motion the reviewing court must accept the factual allegations of the complaint as true and construe them in a light most favorable to plaintiff.¹ If this is done, Appellees' claim of *res judicata* cannot be sustained on several factual and legal issues that must be decided.

In a Rule 56 summary judgment motion, the reviewing court must determine whether there are any genuine issue of material fact, whether the district court correctly applied the substantive law (*City of Vernon v. Southern Calif. Edison*, 955 F.2d 1361, 1365 (9th Cir. 1992)) and whether the party seeking summary judgment has met its burden to identify those parts of the record that indicate the *absence* of a genuine issue of material fact. *Brinson v. Linda Rose Joint Venture, supra*, 53 Fed. 3d 1044, 1047-1048 (9th Cir. 1995) Appellees in

¹ *Terracon v. Valley Nat'l Bank*, 49 F. 3d 555, 558 (9th Cir. 1995).

the District Court, failed to make this showing on many issues, each of which would prevent the application of *res judicata*.

Moreover, where there has been little, or (as here) no discovery, and a Rule 56(f) application has been made, dismissal of an action should be sparingly granted.²

The District Court should not have granted Appellees' Rule 12(b)(6) motion to dismiss and Rule 56 motion for summary judgment on the following issues which would prevent application of *res judicata* of the Delaware Judgment to this action.

D. Factual Issues and Legal Issues Preventing the Application of *Res Judicata*

In light of the District Court's terse opinion, relying solely on the Delaware Judgment and Injunction, it is not possible to determine "whether the district court correctly applied the substantive law" with regard to each of the

² The Supreme Court has made it clear that a grant of summary judgment is inappropriate unless a district court permits the parties adequate time for discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S. Ct. 2548, 2554 (1986); see also *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 486, 112 S. Ct. 2072, 2092 (1992); *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993). Indeed, summary judgment should "be refused where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5, 106 S. Ct. 2505, 2511 n.5 (1986)

following issues must be decided before dismissing this action based on the *res judicata* effect of the Delaware Judgment.

1. This Action and the Delaware Tender Offer Litigation Do Not have an “Identity of Claims”

As set out in Appellant’s Opening Brief “[i]dentity of claims [for *res judicata*] exists when two suits arise from ‘the same transactional nucleus of facts’” and (2) the differences between this case (concerned with misconduct long before the tender offer and short-form merger) and the Delaware Tender Offer Litigation (challenging only the tender offer) is wider than that in other cases holding *res judicata* does not apply. (Opening Brief, pp. 56-59)

Appellees nevertheless advance the argument that under principles of full faith and credit, and case law, “[t]o the extent plaintiffs argue that this action pleads claims that are different from the claims covered and released by the Delaware settlement, release and Judgment, the decisions by the Delaware Court of Chancery and Delaware Supreme Court – holding to the contrary that plaintiffs’ claims in this action *are* encompassed within the Delaware settlement, release and Judgment – are [still] entitled to collateral estoppel and *res judicata* effect.”³

³ Vishay Defendants’ Opposition Brief, pp. 16, 18-24.

a. Comparison of the Delaware Complaint and Complaints Here Shows No “Identity of Claims”

Appellees’ argument is not supported by an analysis of the operative complaints: (1) in the Delaware action (the “Consolidated Amended Class Action Complaint,” filed April 18, 2005, ER 1499-1518)(“Delaware Complaint”); and (2) in this action (the “Second Amended Complaint,” filed November 21, 2005, ER O793- 0878, and the “Amendment to Second Amended Complaint Re Ernst & Young” filed March 31, 2006, ER 1141-1144) (jointly “SAC”).

The Delaware Complaint – as it had to, in order to fall within the “Delaware carve-out” and not to be preempted by the Securities Litigation Uniform Standards Act (“SLUSA”) (Pub.L. No. 105-353, 112 Stat. 3227, codified in scattered sections of 15 U.S.C) – is limited to two very narrow claims under Delaware fiduciary law, Count I and II, each for “Breach of Fiduciary Duty.” Each is solely in connection with the “Proposed Transaction” (*viz.* the Tender Offer and Freeze Out Merger) in 2005. (ER 1515-1515) The SAC has both a much broader transactional nucleus of facts, and different claims. None of the three claims for relief in the SAC are based on Delaware fiduciary law, rather, they are based on a derivative action by Siliconix for breach of California’s law on fiduciary duty and waste of corporate assets (First

Cause of Action, ER 0802-0805);⁴ on a direct action by Siliconix minority shareholders for breach of fiduciary duty by majority shareholders and others conspiring with them pursuant to California law (Second Cause of Action, ER 0805-808);⁵ and on a direct action by Siliconix minority shareholders who voted against the Delaware Tender Offer for quasi-appraisal of their shares based on defendants' failure to comply with the requirements of Del. Code Ann. tit. 8, § 262 ("8 Del. C. § 262"), thereby depriving plaintiffs of their statutory appraisal rights (Third Cause of Action, ER 808-812).

b. The District Court Held That There Was Not an "Identity of Claims" in the Delaware Complaint and the Complaints Here

Not surprisingly, based on this, the District Court found, in deciding Appellants' motion to remand this case to state court, that, unlike the Delaware Action, the complaints here did not fall within the "Delaware carve-out" to

⁴ See, *Jones v. H. F. Ahmanson & Co.*, 1 Cal. 3d 93 (1969)(minority shareholders have standing to prosecute direct actions against majority shareholders when there was some transaction or business relationship other than the simple status as majority shareholder, by which the majority obtained a benefit to itself, rather than to the company as a whole, even if the transaction also resulted in diminishing the value of all the shares in the corporation.

⁵ *Id.* ; *Jara v. Suprema Meats, Inc.*, 121 Cal. App. 4th 1238, 1257-58 (2004); *Smith v. Tele-Communication, Inc.*, 134 Cal. App. 3d 338 (1982); *Crain v. Electronic Memories & Magnetics Corp.*, 50 Cal. App. 3d 509 (1975).

SLUSA⁶ and that federal law “completely preempts” the state law basis for the SAC. (ER 1438-1442) In making this holding, the District Court, of necessity, found that the claims in the SAC must be “recharacteriz[ed]” “as federal claims” – viz., that the SAC in California was not identical with the Delaware Complaint.⁷ As the 9th Circuit found recently in *Hall v. North American Van Lines, Inc*, 476 F.3d 683, 687 (9th Cir. 2007):

Under the ‘artful pleading’ doctrine, a well-pleaded state law claim presents a federal question when a federal statute has completely preempted that particular area of law. See *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1107 (9th Cir.2000). ‘[A]ny claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law.’ *Id.*

c. Appellees Are Judicially Estopped from Asserting That There is an “Identity of Claims” in the Delaware Complaint and the SAC

In obtaining the favorable ruling from the District Court denying Appellant’s motion to remand the case to Superior Court, Appellees argued that

⁶ 15 U.S.C. § 78bb(f)(3)(A)(ii)(II).

⁷ ER 1438:4-10, 1442:4-5. The District Court held: “Complete preemption creates federal removal jurisdiction by ‘recharacterizing’ the state law claim as a federal claim for purposes of the ‘well pleaded complaint’ rule. . . . Therefore, because Ernst & Young’s alleged communications do not fall within the scope of the Delaware carve-out, the carve out does not apply to the present case.”

the Delaware Complaint and the SAC did not have an ‘identity of claims’ – that the SAC, unlike the Delaware Complaint was not within the “Delaware carve-out.” The District Court, in its “Order (1) Denying Motion to Remand and (2) Denying Plaintiff’s Request for Costs and Attorney’s Fees” (ER 1431-1443) characterized Appellees’ arguments, on which they prevailed, as follows:

Defendants argue that the asserted class claims based on Defendants’ breach of fiduciary duty and quasi-appraisal [in the SAC] do not fit within the description of the Delaware carve-out. They argue that the alleged material misstatements made in the financial reports did not relate to the Vishay tender offer [the subject of the Delaware Complaint], and that to the contrary, Plaintiffs have alleged misconduct occurred throughout the entirety of Ernst & Young’s relationship with Siliconix. Such alleged misconduct may have had the effect of lowering the value of Siliconix minority shares in the tender offer, but Defendants argue that the Delaware carve-out encompasses only communications that concern shareholders’ actual exercise of voting rights, not a long series of actions that may have had a delayed impact on the exercise of such rights. (ER 1440:12-21)

It is well established that in this situation, Appellees are “judicially estopped” from a contrary position -- that the Delaware Complaint and SAC have an “identity of claims.” In *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, (9th Cir. 2001) this Court discussed the doctrine of “judicial estoppel” finding:

Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position. *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600-601 (9th Cir.1996); *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir.1990). This court invokes judicial estoppel not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of "general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings," and to "protect against a litigant playing fast and loose with the courts." *Russell*, 893 F.2d at 1037.

Id. at 782.

Each of the three criteria for imposing "judicial estoppel" listed by the U.S. Supreme Court in *New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808, 1815(2001) is satisfied here. (1) A party's later position must be "clearly inconsistent" with its earlier position. Appellees' position on Appellant's motion to remand -- that the SAC was different from the Delaware Complaint and thus did not meet the "Delaware carve-out" criteria -- is clearly inconsistent with their position here -- that there is an "identity of claims" between the SAC and the Delaware Complaint. (2) The party must have succeeded in persuading a court to accept that party's earlier position. Appellees clearly succeeded in persuading the District Court to find the SAC, unlike the Delaware Complaint, not within

the “Delaware carve-out” and thus subject to SLUSA. (3) The party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. Appellees, having secured the advantage of removal of this action to District Court based on their first position, now seek to apply *res judicata* from the Delaware action based on their inconsistent second position – that there is an ‘identity of claims” for *res judicata*. Judicial estoppel does not allow Appellees to do that.

**d. Appellees’ Claims of Judicial Admissions by Appellants
Are Frivolous**

Apparently lacking any better arguments, Appellees repeatedly⁸ misquote, misunderstand and legally mischaracterize the statement, under “STATEMENT OF FACTS,” in Appellants’ Opening brief that:

The Delaware Judgment, resulting from this settlement, *purported* to release all claims of the Minority Shareholders, including their claims under California law, pending in this action since August 12, 2002. (Opening Brief, page 9)(Emphasis supplied.)

First, as a statement of fact, the Delaware Judgment, did *purport* to release all claims in this action. The Vice Chancellor, Leo E. Strine, who signed the Delaware Judgment, so ruled in the June 13, 2008 Delaware Injunction, stating

⁸ Vishay Defendants’ Opposition Brief, page 2, 14, 22, 28, 29.

(without authority or analysis) that: “in the Order and Final Judgment, plaintiffs settled and released, among other claims, all of the claims asserted in *Proctor v. Vishay Intertechnology, Inc.*, Case No. 1-04-CV-018977.” Second, this unsupported statement by the Delaware court totally begs the questions required to decide the *res judicata* effect of the Delaware Judgment. Third, based on the standards for judicial admissions, set out above, Appellees’ contention that this is a “judicial admission”⁹ even were it not merely a statement of a record fact, is utterly without merit. It is frivolous.

e. Appellees Rely on Several Additional Misrepresentations of the Record

In several other arguments Appellees rely on clear misrepresentations of the record. Some of these are as follows.

(i) **Failure to Follow *Donovan*.** Appellees claim that “the District Court proceeded exactly as directed by *Donovan*,” that “[the District Court] determined whether the Judgment issued in Delaware, as well as the decisions of the Court of Chancery and Delaware Supreme Court, were entitled to collateral estoppel and *res judicata* effect” and that “the decision below fully accords with

⁹ Vishay Defendants’ Opposition Brief, page 28, lines 3-12.

Donovan.”¹⁰ No fair reading of the District Court’s short “Order Granting Defendants’ Motion to Dismiss and Motion for Summary Judgment” of July 19, 2007 (“Dismissal Order”) supports these statements. (ER 1714-1719) After over four (4) pages of reciting the history of the proceedings, the Dismissal Order, in less than ten (10) lines, simply quotes, without analysis, the Delaware Injunction language that “the injunction at issue here ‘encompasses, among other claims, all of the claims asserted by the representative plaintiffs in *Proctor v. Vishay Intertechnology, Inc.* Case No. 1-04-CV-018977,’ and ‘plaintiffs settled and released, among other claims, all the claims asserted in [that action] . . .’ Injunction at 2.” The District Court then refused to even “entertain arguments” (let alone address them) regarding the scope of the Delaware Chancery Court Judgment, dismissing the case based on the Delaware Injunction, “unless and until” the Delaware Injunction was modified,” instead basing its dismissal solely on the Injunction. This clearly did not comport with *Donovan*’s unequivocal requirements that: (1) “state courts are completely without power to restrain federal-court proceedings, in *in personam* actions;” (2) “where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court;” and

¹⁰ Vishay Defendants’ Opposition Brief, pages 29-31.

(3) where defendants claim *res judicata* in a prior state court judgment “whether or not a plea of *res judicata* in the second suit would be good is a question for the federal court to decide.” This is not close, *Donovan* was not followed.

(ii) **The Delaware Supreme Court’s Purported “Holding.”** Appellees repeatedly misrepresent as a “holding” of the Delaware Supreme Court that “the claims in this action ‘encompassed the same claims that had been released in the settlement of the Delaware Action.’”¹¹ The actual holding of the Delaware Supreme Court, plainly, on the face of its decision, was only that the appeal was dismissed for lack of standing. The decision stated:

In Delaware, a nonparty to an action generally has no standing to take an appeal to the Delaware Supreme Court. [Citation omitted.] Moreover, the fact that a nonparty has an interest in the outcome of the litigation, or has participated in the proceedings below, is insufficient to confer standing upon him for purposes of the appeal. [Citation omitted.] There are no circumstances in this case that justify departing from this settled principle of Delaware law. Therefore, this appeal from the judgment of the Court of Chancery should be dismissed.

NOW, THEREFORE, IT IS ORDERED that this appeal is DISMISSED.

(ER 1541)

¹¹ Vishay Defendants’ Opposition Brief, pages 2, 3, 12-13, 32, 34.

The “holdings” being proffered to this Court by Appellees as support for *res judicata* are not holdings at all, but are pure *dicta*.

(iii) **Proceedings Before the Santa Clara Superior Court.** Appellees repeatedly misrepresent the proceedings before the Superior Court for Santa Clara County on whether Judge Komar addressed their claim of *res judicata* based on the Delaware Judgment and Injunction. They claim that the Santa Clara Superior Court did not reach the defense of *res judicata*. This is not true.

Both the Vishay Defendants and defendant Ernst & Young demurred to the SAC based on the *res judicata* defense.¹² The May 8, 2008 “Order After Hearing on Vishay Defendants’ Demurrer to the Second Amended Complaint” stated clearly:

4. The Vishay Defendants’ demurrer to all causes of action in plaintiffs’ Second Amended Complaint, based on an alleged release of claims in the class action settlement in *In re Siliconix, Inc. Shareholders Litigation*, C.A. No 1143-N (Del. Ch., October 25, 2005), **is overruled.** (ER 1180) (Emphasis supplied.)

¹² The “Vishay Defendants Notice of Demurrer to Second Amended Complaint” stated as a ground for demurrer that “Plaintiffs’ claims are also barred by *res judicata* based upon an Order and Final Judgment entered October 25, 2005, in the Delaware Court of Chancery, and also on account of a settlement in that action encompassing the claims brought by plaintiff here.” (ER 0880) Defendant Ernst & Young’s “Notice of Demurrer to Plaintiffs’ Second Amended Shareholder Derivative Class Action Complaint” stated: “Plaintiffs’ claims against E&Y were released as part of a class action settlement in *In re Siliconix, Inc. Shareholders Litigation*. C.A. No. 1143-N (Del. Ch. Oct. 10 2005).” (ER 1012)

When defendants subsequently presented to the Santa Clara Superior Court the Delaware Injunction which was based on the Order and Final Judgment entered October 25, 2005, in the Delaware Court of Chancery, at the Case Management hearing on June 13, 2006, they sought to renew their demurrer on the basis of the newly-minted Delaware Injunction – they sought to bring “a dispositive motion based on this new development.” (ER 1213:2-10)

Appellees¹³ (and the District Court in its Dismissal Order)¹⁴ quote selectively from the comments of the Santa Clara Superior Court on June 13, 2006, during the time when the Superior Court was logically working through implications of the Delaware Injunction (sprung on the Court just that morning). Appellees and the District Court claim that Judge Komar “gave plaintiffs’ counsel until August 15, 2005 to ‘get your papers together and decide what you are going to do.’” A fair reading of the full transcript of the June 13, 2006 hearing does not support this. The Superior Court, after thinking out loud, finally ruled: (a) that it was going to “put this matter over” to August 15, 2006 and “decide how we will proceed on this” – *viz.*, decide whether the Delaware

¹³ Vishay Defendants’ Opposition Brief, page 12, lines 7-16.

¹⁴ ‘Order Granting Defendants’ Motion to Dismiss and Motion for Summary Judgment,’ July 19, 2007, page 4, lines 17-25. (ER 1717)

Injunction was valid (ER 1213:21- 1214:8); (b) that “it is rather extraordinary for a court in one state to tell the parties in litigation in this state how the court basically ought to be ruling on the issue of whether or not settlement in that other state affects this litigation [and that the Court] “expect[ed] that [the effect of the Delaware settlement and injunction] to be litigated appropriately with due deliberation” (ER 1215:27-1216:7); and (c) that it would refuse to stay the proceedings in the Santa Clara Superior Court – by refusing to extend E&Y’s time to answer and ordering them to “demur or answer” (ER 1216:7-12).

The Santa Clara Superior Court “got it right” on June 13, 2006 under the principles in *Donovan*. It refused to stay the proceedings based solely on the conclusive language in the Delaware Injunction and it determined that it would move toward determining “with due deliberation” the *res judicata* effect of the Delaware Judgment and Injunction. The Appellees’ and District Court’s reliance on the transcript of the June 13, 2005 proceedings is badly misplaced.

Defendant Ernst & Young and the Vishay Defendants, of course, did not like the Superior Courts decision to proceed “with due deliberation” to a determination in California of the *res judicata* effect of the Delaware Judgment, and promptly removed this action to District Court, where they got what they s wanted – a court which gave rote effect to the Delaware Judgment and Delaware

Injunction. The District Court erred in doing so and must be reversed.

2. The Pre-SLUSA Case of *Matsushita Elec. Indus. Co., Ltd. v. Epstein* Does Not Support Appellees' Case for Affirmance

In claiming that the Delaware Judgment is entitled to blind and rote adherence, the Vishay Defendants repeatedly cite *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 116 S.Ct. 873, 134 L.Ed.2d 6, (1996).¹⁵ However, in doing so, the Vishay Defendants neglect to address two issues, each of which compels reversal of the District Court disposition and an instruction for the District Court to decide, under *Donovan*, the *res judicata* effect of the Delaware Judgment.

These two issues are: (a) whether SLUSA, enacted in 1998 (after *Matsushita*) for the purpose of “prevent[ing] certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of” the Private Securities Litigation Reform Act;¹⁶ prevents Delaware from reaching results on Federal and foreign-state claims (as to which it had no subject matter jurisdiction) contrary to the result that would have been reached in a federal court or that of the foreign state; and (b) whether, Appellees and the District

¹⁵ Vishay Defendants' Brief, pages, 19, 20, 37, 40 and 44.

¹⁶ SLUSA §§ 2(2), (5); 112 Stat. 3227

Court met their burden under the two part analytical framework laid down in *Matsushita* (taken from *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S.Ct. 1327, 1331 (1985)) for deciding whether the Delaware judgment precludes the this action (including a review of whether procedures in prior litigation afforded plaintiffs, against whom earlier judgment has been asserted a “full and fair opportunity to litigate the claim or issue” and has been "determined to be fair and to have met all due process requirements").

a. The Policy and Provisions of SLUSA – Enacted After *Matsushita* – Legislate Against Applying *Matsushita*

As this Court held in *Patenaude v. Equitable Life Assurance Society of U.S.*, 290 F.3d 1020 (9th Cir. 2002), SLUSA, in its policy and statutory provisions, was designed to promote “uniform standards for . . . litigation concerning, a defined class of covered securities.” *Patenaude* stated:

SLUSA was an outgrowth of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub.L. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.), which was intended to prevent the filing of frivolous securities class action lawsuits by imposing, among other restrictions, heightened pleading requirements. *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 973 (9th Cir.1999). When it became evident that class actions plaintiffs were avoiding PSLRA's requirements by filing class action suits in state courts under state statutory or common law theories, Congress enacted SLUSA to foreclose this

alternative. See *Lander*, 251 F.3d at 108 ("SLUSA was passed in 1998 primarily to close this loophole in the PSLRA."). To accomplish this purpose, SLUSA mandated that federal court be "the exclusive venue for class actions alleging fraud in the sale of certain covered securities" and that "such class actions be governed exclusively by federal law." *Id.*

* * *

When considered in concert, SLUSA, NSMIA, and PSLRA demonstrate that Congress intended to provide national, uniform standards for the securities markets and nationally marketed securities. Through these statutes, Congress erected uniform standards for registration of, and litigation concerning, a defined class of covered securities...

Id. at 1025-1026.

The present action presents a situation where certain of the claims may be styled under California,¹⁷ Delaware¹⁸ and/or federal law.¹⁹

¹⁷ The First and Second Claims for Relief in the SAC are supported by: *Jones v. H. F. Ahmanson & Co.*, 1 Cal. 3d 93 (1969); *Jara v. Suprema Meats, Inc.*, 121 Cal. App. 4th 1238, 1257-58 (2004); *Smith v. Tele-Communication, Inc.*, 134 Cal. App. 3d 338 (1982); *Crain v. Electronic Memories & Magnetics Corp.*, 50 Cal. App. 3d 509 (1975).

¹⁸ The Third Claim for Relief in the SAC for "quasi-appraisal" based on defendants' failure to comply with the requirements of Del. Code Ann. tit. 8, § 262 ("8 Del. C. § 262") is supported by *Gilliland v. Motorola, Inc.*, 873 A.2d 305 (Del. Ch. 2005) (granting remedy of quasi-appraisal when defendants failed to provide adequate information about the corporation's financial condition); *Nebel v. Southwest Bancorp, Inc.*, Civ. A. No. 13618, 1995 WL 405750, at *7 (Del. Ch. July 5, 1995) (unpublished) (granting remedy of quasi-appraisal when defendants failed to include copy of proper statute in appraisal notice).

¹⁹ The First, Second and Third Claims for relief are broad enough to support claims under both the Securities Act of 1933, 48 Stat. 74, codified at 15 U.S.C. §

Promoting SLUSA's goal of "uniform standards for . . . litigation concerning, a defined class of covered securities" legislates for the claims of Siliconix shareholders to be determined uniformly under federal securities laws with federal procedures under SLUSA – not to be determined solely under Delaware law by applying the Delaware Judgment. Amendment of the SAC to state federal law claims should be allowed²⁰ and adjudication under federal securities law and the uniform standards of SLUSA.

b. The Analytical Framework in *Matsushita*, under the *Marrese* Factors Does Not Automatically Preclude this Action and Requires Inquiry into Whether the Delaware Judgment Comported with Due Process

In *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 372-373, 116 S.Ct. 873, (1996) the Supreme Court reversed a 9th Circuit holding in *Epstein v. MCA, Inc.*, 50 F.3d 644, 665 (9th Cir. 1995) that "the preclusive force of a state court settlement judgment is limited to those claims that 'could . . .

77a et seq.), and the Securities Exchange Act of 1934, 48 Stat. 881, codified at 15 U.S.C. § 78a et seq. and SEC Rule 10b-5.

²⁰ *U.S. Mortg., Inc. v. Saxton*, 494 F.3d 833, 843 (9th Cir. 2007) ("Congress included no express prohibition against amendment and no court has held that SLUSA completely and categorically bars any amendment of the complaint following removal. Moreover, there is precedent in the district courts of this circuit for the view that a plaintiff may avoid SLUSA dismissal through amendment.")

have been extinguished by the issue preclusive effect of an adjudication of the state court claims” – viz. that exclusively federal claims could not be released in a state court class or derivative action. The Supreme Court found that “*Marrese*²¹ provides the analytical framework for deciding whether the Delaware court's judgment precludes this exclusively federal action” and that this framework involved a two step test: (1) determining whether “the particular claim or issue would be barred from litigation in a court of that state;” and (2) if it would, “whether, ‘as an exception to § 1738,’²² it ‘should refuse to give preclusive effect to [the] state court judgment.’”

(1) The Delaware Judgment, on its face, does not pass the first test of *Marrese*, because the “Order and Final Judgment,” entered in Delaware Chancery Court on October 25, 2005, specifically “exclud[ed] any claims . . . for appraisal pursuant to 8 Del C. § 262” from release – viz., the claims made in the

²¹ *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 105 S.Ct. 1327 (1985).

²² 28 U.S.C. § 1738, the Full Faith and Credit Act requiring that the “judicial proceedings” of any state “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.”

Third Claim for Relief in the California Action SAC.²³ So, this claim would not be barred from litigation in a Delaware court under Delaware law. (ER 1529)

(2) Certain exceptions exist to the application of § 1738, the “Full Faith and Credit Act” for state judgments. These include the requirement, noted by the Supreme Court in *Matsushita* that under Delaware law, a state court settlement of a class action could release or preclude claims only where that settlement was “determined to be fair and to have met all due process requirements.” *Id.* at 377-78, (quoting *In re MCA, Inc. Shareholders Litig.*, 598 A.2d 687, 691 (Del.Ch.1991)) – that “[a] state-court judgment generally is not entitled to full faith and credit unless it satisfies the requirements of the Fourteenth

²³ The SAC includes factual allegations (which must be taken as true for purposes of a Rule 12 (b) (6) motion, that defendants failed to comply with their statutory obligations under 8 Del. C. § 262(d)(2) to notify Siliconix shareholders of their appraisal rights “within ten days” after the merger. In particular, paragraph 59 of the SAC alleges both that “many Siliconix shareholders received no notice whatsoever of their appraisal rights” and that “[t]hose who did receive notices were nonetheless harmed because those notices did not contain adequate financial or other information to allow the shareholders [to] determine the fair value of their shares.” The Delaware courts have consistently held such allegations sufficient to support the remedy of quasi-appraisal. *See, Gilliland v. Motorola, Inc.*, 873 A.2d 305 (Del. Ch. 2005) (granting remedy of quasi-appraisal when defendants failed to provide adequate information about the corporation's financial condition); *Nebel v. Southwest Bancorp, Inc.*, Civ. A. No. 13618, 1995 WL 405750, at *7 (Del. Ch. July 5, 1995) (unpublished) (granting remedy of quasi-appraisal when defendants failed to include copy of proper statute in appraisal notice)

Amendment's Due Process Clause . . . In the class action setting, adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808, 812, 105 S.Ct. 2965, 2972, 2974, 86 L.Ed.2d 628 (1985); *Prezant v. De Angelis*, 636 A.2d 915, 923-924 (Del.1994).” *Id.* at 388 (concurring opinion).

The SAC contains allegations that due process standards were not met and there was not to adequate notice and representation of the class. (SAC ¶¶ 58 and 59) (ER 0809-0810).

The *Matsushita* case does not, as claimed by Appellees, automatically require that the Delaware Judgment be accorded Full Faith and Credit, without an inquiry into and decision of the facts under the law described above.

E. Appellants' Motion to Remand Should Have been Granted by the District Court

1. The First Amended Complaint and Second Amended Complaint Allowed Appellees to “Ascertain” That This Action Was Removable under SLUSA

The removal statute, 28 U.S.C. 1446(b) requires that a notice of removal be filed within 30 days of receiving “a copy of an amended pleading, motion, order or other paper *from which it may first be ascertained* that the case is one

which is or has become removable.” (Emphasis supplied.) Ernst & Young concedes that if the FAC or the SAC (before the SAC Amendment) meet this standard the removal notice was tardy. Ernst & Young’s claim that it could not “ascertain” that this action fell outside the “Delaware carve-out” with the service of the FAC or the SAC is not tenable.

The FAC contained both of the claims for relief that the District Court found were preempted by SLUSA – the First Claim for Relief based on California derivative claims for breach of fiduciary duty and waste of corporate assets and the Second Claim for Relief based on direct shareholder claims for breach of fiduciary duty. The FAC contained the allegation that Ernst & Young became the auditor for Siliconix (well as Vishay) in 1998, and that Siliconix and Vishay thereafter filed statements with the SEC (as to which Ernst & Young acted as the auditor) that were misleading and/or supported the looting of Siliconix. (FAC ¶¶ 24, 92, 94, 95, 96, 98, 101, 108) In paragraph 108 of the FAC, for example, it alleges that:

“Vishay benefitted from Siliconix’s profits and cash balances in obtaining a loan with lower interest rates and greater borrowing capabilities. . . . Reference is made in the [Vishay] financial statements to guarantees by significant subsidiaries. However, a corresponding footnote referencing the guarantees does not appear in Siliconix’s financial statements, *even though both*

companies are audited by defendant Ernst & Young.”

(Emphasis supplied.)

The SAC, likewise, specifically names Ernst & Young as the auditor for both Vishay and Siliconix in the filing of misleading financial statements. (SAC ¶¶ 4, 36)

Ernst & Young cannot credibly claim that, as the auditor for both Vishay and Siliconix, it could not “ascertain” that it had a part in the misleading financial statements to the SEC that supported the looting of Siliconix alleged in the FAC and the SAC both directly and by inference and that it could not ascertain the SLUSA preemption from the FAC and the SAC.

2. By Moving to Arbitrate and Demurring to the SAC on the Basis of Res Judicata Appellees Waived their Right to Removal

Appellees clearly waived their right to remove “by taking some substantial offensive or defensive action in the state court action indicating a willingness to litigate in that tribunal before filing a notice of removal with the federal court” [*Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP* (11th Cir. 2004) 365 F3d 1244, 1246” *Cal. Prac. Guide Fed. Civ. Pro. Before Trial*, Schwarzer, Tashima and Wagstaffe, ¶ 2:874 (2006) As set out in Appellants’ Opening Brief (pp. 48-51) and above, Appellees clearly demurred to the SAC based on the

Delaware Judgment, lost, and sought to resurrect that challenge before filing their notice of removal when they lost. (ER 0880, 1012 and ER 1180, 1213:2-10). Prior to that, under the FAC, they moved to compel arbitration. (ER 0195-0372)

The only response that Appellees have as to why their actions on the merits were not waivers of their right to remove is that neither the FAC nor the SAC allowed them to ascertain that SLUSA preempted this action. As set out at subparagraph 1, immediately above, this is not correct. The FAC and SAC, according to the District Court clearly fell outside the “Delaware carve-out” and was subject to SLUSA preemption. Moreover, Appellees cite no authority from the 9th Circuit supporting a requirement that a party can litigate on the merits and then, later, file a timely notice of removal.

CONCLUSION

For the foregoing reasons, and those set out in Appellants’ Opening Brief,:

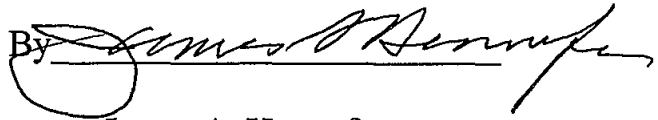
(1) the District Court’s Dismissal Order, relying on application of *res judicata* from the Delaware Judgment and the Delaware Injunction and its dismissal of this action under Fed.R.Civ.P. 12(b)(6) and Fed.R.Civ.P. 56, were in error and the Dismissal Order should be reversed; and (2) the District Court’s denial of Plaintiffs’ motion to remand this action to California State Court was also in

error and should be reversed and the case remanded to Santa Clara Superior Court, from which it was removed, for further proceedings.

Dated: April 25, 2008

Respectfully submitted,

HENNEFER FINLEY & WOOD, LLP

By 

James A. Hennefer
Attorneys for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the Rules of this Court, Appellants and their counsel of record state that they are unaware of any related case pending in this Court.

CERTIFICATE OF COMPLIANCE

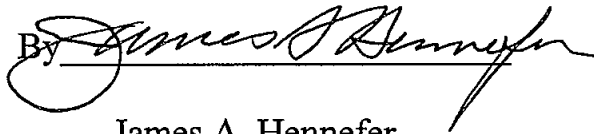
I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Opening Brief is proportionately spaced, has a typeface of 14 points and contains 6894 words of text, as calculated by the word processing program used to prepare the brief. The text of the brief is double-spaced.

DATED: April 25, 2008

Respectfully submitted,

HENNEFER, FINLEY & WOOD, LLP

By 

James A. Hennefer
Attorneys for Plaintiffs-Appellants

PROOF OF SERVICE BY U. S. MAIL

I, Tessie Francisco, declare as follows:

I am employed with the law firm of Hennefer, Finley & Wood , whose address is 425 California Street, San Francisco, California 94104. I am readily familiar with the business practices of this office for hand deliver of legal pleadings for delivery of Federal Express packages and for U.S. mail delivery. I am over the age of eighteen years and not a party to this action.

On April 25, 2008 I served the following:

REPLY BRIEF OF APPELLANTS; REQUEST FOR JUDICIAL NOTICE

on the below parties in this action by placing true copies in a sealed envelope and depositing them in the United States Mails.

Daniel H. Bookin, Esq.
O'Melveny & Meyers, LLP
Embarcadero Center West
275 Battery Street
San Francisco, California 94111

David M. Friedman, Esq.
Latham & Watkins, LLP
505 Montgomery Street, Suite 2000
San Francisco, California 94111

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California, on April 25, 2008



Tessie Francisco