UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 15-56430

MICHAEL J. MANDELBROT and THE MANDELBROT LAW FIRM,

Defendants-Appellants,

v.

J.T. THORPE SETTLEMENT TRUST and THORPE INSULATION COMPANY ASBESTOS SETTLEMENT TRUST,

Plaintiffs-Appellees.

APPELLANTS' REPLY BRIEF

Appeal from final judgment and order
of the Honorable Virginia A. Phillips,
United States District Judge,
in the United States District Court
for the Central District of California,
Case No. CV 14-03883-VAP

Michael J. Mandelbrot, CSB #172626
THE MANDELBROT LAW FIRM
11 Bridle Path Lane
Novato, CA 94945
Telephone: (415) 408-4632

Defendants-Appellants Appearing *Pro Se*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Appellants Michael J. Mandelbrot and the Mandelbrot Law Firm (jointly "Mandelbrot") submit this reply to the answering brief ("Ans. Br.") of appellees J. T. Thorpe Settlement Trust and Thorpe Insulation Company Asbestos Settlement Trust (jointly "the Thorpe Trusts").

SUMMARY OF ARGUMENT

The Thorpe Trusts overreached by forcing Mandelbrot to accept a settlement involving non-parties and issues not the subject of trial as well as relief far beyond that sought in the pleadings. The settlement would virtually shut down Mandelbrot's legal practice. The bankruptcy court acknowledged that it had no jurisdiction to impose the settlement terms on Mandelbrot absent agreement. Mandelbrot promptly repudiated the settlement under California law which renders an agreement in restraint of professional practice void.

The Thorpe Trusts argue that Section 16600 does not prohibit agreements imposing professional restraints outside of the employment and noncompetition context. The interpretation of Section 16600 argued by the Thorpe Trusts is without support and is contrary to controlling case authority. *Edwards* and other California cases establish that Section 16600 protects the right of a person to practice his or her profession. *Edwards* also affirms that Section 16600 means what it unambiguously says and that any exceptions to the statute must come from the legislature, not the judiciary.

The Thorpe Trusts also argue that Rule 1-500 should be interpreted narrowly and not to apply to the restraint to Mandelbrot's law practice imposed by the settlement agreement. Again, the interpretation of Rule 1-500 advanced by the Thorpe Trusts has no basis in law and is contrary to the policy of the state to protect the right of attorneys to practice law as stated by the California Supreme Court in *Howard.*

In last ditch effort to avert invalidity under Section 16600 and Rule 1-500, the Thorpe Trusts contend that California law does not apply. The Thorpe Trusts waive this argument by failing to provide legal support. California law clearly applies to the Stipulated Agreement which was entered into and was to be performed in California.

Finally, the Thorpe Trusts attempt to avoid the Stipulated Agreement altogether by arguing that evidence at trial and facts purportedly admitted by Mandelbrot in the Stipulated Agreement justified the bankruptcy court's findings and Orders. The trial, however, had not been concluded and Mandelbrot's evidence had not all been received. The bankruptcy court stated that Mandelbrot had "waived the right to put on a defense." The bankruptcy court's "findings" – prepared by the Thorpe Trusts and copied verbatim from the Stipulated Agreement – were premature and improper. The bankruptcy court had no authority to enter all of the findings because only Mandelbrot's reliability with regard to the Thorpe

Trusts was in issue at trial. The bankruptcy court's order granting relief regarding the Western Trust and Plant Trust could only have been in reliance upon the void Stipulated Agreement because the relief granted was beyond that sought in the pleadings. Mandelbrot did not admit to any facts of wrongdoing, and no part of the void Stipulated Agreement may be used against Mandelbrot in any event.

For all of these reasons, the Court should reverse and remand this case with instructions for further proceedings below and so that any orders or judgment to be entered at the conclusion of trial will be limited to the issues and proceedings being tried in the bankruptcy court.

ARGUMENT

A. Interpreting Section 16600 to Apply to Only Certain Categories of Contracts as Argued by the Thorpe Trusts Is Contrary to Principles of Statutory Interpretation and Case Law.

The Thorpe Trusts argue that Section 16600 should be interpreted to categorically exclude from its application all contracts outside of the employment and noncompetition context. (*See* Ans. Br. at 5 and 25-42.) The interpretation of Section 16600 argued by the Thorpe Trusts is contrary to California principles of statutory interpretation, *Edwards*, and other California cases as well as this Court's decision in *Golden*.

1. Section 16600 must be interpreted pursuant to California rules of statutory interpretation and case law.

In interpreting Section 16600, the Court must determine what meaning the California Supreme Court would give to the law. *See Goldman v. Standard Ins. Co.*, 341 F.3d 1023, 1027 (9th Cir. 2003). The Court must therefore follow California rules of statutory interpretation (*see Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 930 (9th Cir.2004), *cert. denied,* 544 U.S. 948, 125 S. Ct. 1694, 161 L. Ed. 2d 524 (2005)) and is bound to follow the decisions of the state's highest court in interpreting that state's law. *See Ogden Martin Sys., Inc. v. San Bernardino County, Cal.*, 932 F.2d 1284, 1288-89 (9th Cir. 1991). Only if no ruling exists from the California Supreme Court will the Court look to intermediate state appellate decisions for guidance. *See ibid.*

In any case involving statutory interpretation, the "fundamental task is to determine the Legislature's intent so as to effectuate the law's purpose." *People v. Murphy*, 25 Cal. 4th 136, 142 (2001). Statutory interpretation begins by "examining the statute's words, giving them a plain and commonsense meaning." *Id.*

2. The California Supreme Court interprets Section 16600 to advance a policy in favor of any lawful profession and to apply to all contractual restraints except those subject to statutory exceptions.

In *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008) ("*Edwards*"), the California Supreme Court interpreted Section 16600 to advance the longstanding policy of the state to protect the right of Californians to pursue any lawful profession.[1] The court also cautioned against diluting the effect of Section 16600 by interpreting the statute to be subject to any non-statutory exceptions as is argued by the Thorpe Trusts in this case.

In *Edwards*, the court found the agreement entered into by the plaintiff invalid under Section 16600 because "it restrained his ability to practice his profession." *Edwards*, 44 Cal. 4th at 948. The court held that Section 16600 "protects Californians and ensures that every citizen shall retain the right to pursue

---

[1] The public policy in California of ensuring that its citizens shall retain the right to pursue any lawful employment or enterprise of their choice existed long before it was recognized in *Edwards*. *See, e.g., KGB, Inc. v. Giannoulas*, 104 Cal. App. 3d 844, 859-60 (1980) (public policy prohibits restricting a person's "right to earn his living and to express his talents"); *Metro Traffic Control, Inc. v. Shadow Traffic Network*, 22 Cal. App. 4th 853, 859 (1994) (California courts have "consistently declared" this public policy); *Strategix, Ltd. v. Infocrossing W., Inc.*, 142 Cal. App. 4th 1068, 1072 (2006) ("California's public policy affirms a person's right to pursue the lawful occupation of his or her choice."). Section 16600 is simply a statutory expression of this longstanding policy of the state. *See ibid.* This policy is also evident in Rule 1-500 which specifically "assur[es] attorneys of the right to practice their profession." *Howard v. Babcock*, 6 Cal. 4th 409, 425 (1993) ("*Howard*"). (*See also* section B., *infra* at pp.12-15.)

any lawful employment and enterprise of their choice. It protects the important legal right of persons to engage in businesses and occupations of their choosing." *Edwards*, 44 Cal. 4th at 946 (internal quotations and citations omitted).[2]

The defendant in *Edwards* argued for a "narrow restraint exception" to be implied in Section 16600 in accordance with federal case law interpreting the statute, but the court rejected any judicially-created exception to the statute:

> [S]ection 16600 represents a strong public policy of the state which should not be diluted by judicial fiat. Section 16600 is unambiguous, and if the Legislature intended the statute to apply to only restraints that were unreasonable or overbroad, it could have included language to that effect. We reject Anderson's contention that we should adopt a narrow-restraint exception to section 16600 and leave it to the Legislature, if it chooses, to either relax the statutory restrictions or adopt additional exceptions to the prohibition-against-restraint rule under section 16600.

Id. at 949-50.[3]

---

[2] As the Ninth Circuit stated of the *Edwards* decision in *Golden v. California Emergency Physicians Medical Group*, 782 F.3d 1083 (9th Cir. 2015) ("*Golden*"): "The decisive concern for the [*Edwards*] court was that the agreement 'restricted [Edwards'] ability to practice his accounting profession.'" *Golden*, 782 F.3d at 1091 (citing and quoting from *Edwards*). *Edwards* "underscores how strictly the state understands the statutory prescription on professional restraints." *Golden*, 782 F.3d at 1091. *Edwards* reaffirmed California's "strong policy against restraints to professional practice" and disavowed "even narrow exceptions that the federal courts had begun to fashion." *Ibid.*

[3] The only possible non-statutory exception to Section 16600 acknowledged by the California Supreme Court in *Edwards* was one the court somewhat dismissively (cont'd)

The Thorpe Trusts argue for an interpretation of Section 16600 that would prohibit only unreasonable restraints by analogizing the statute to section 1 of the Sherman Act and citing federal cases interpreting section 1 to prohibit only unreasonable restraints. (*See* Ans. Br. at 29. *See also id.* at 27-31.) The Thorpe Trusts' Sherman Act argument is contrary to principles of statutory interpretation and *Edwards*.

Section 16600 must be interpreted by looking to California, not federal, case law. *See Ogden Martin Sys., Inc. v. San Bernardino County, Cal.*, 932 F.2d 1284, 1288-89 (9th Cir. 1991). (*See also* section A.1., *supra* at p.4.) The Sherman Act cases cited by the Thorpe Trusts (*see* Ans. Br. at 27-31) shed no light on how the California Supreme Court would interpret Section 16600. Moreover, in *Edwards* the California Supreme Court specifically rejected the use of judicially-created exceptions to dilute the effect of the broad and unambiguous language of Section 16600. *See Edwards*, 44 Cal. 4th at 949-50. Accordingly, the Court should decline the Thorpe Trusts' invitation to read Section 16600 as subject to exceptions implied from federal case law.

The Thorpe Trusts also contend that five older California cases demonstrate a "longstanding understanding" that Section 16600 invalidates only undue or

---

referred to as "the so-called trade secret exception," suggesting that it was not actually an exception to Section 16600 at all. *See Edwards*, 44 Cal. 4th at 946 n.4.

unreasonable burdens on trade. (*See* Ans. Br. at 32-34.) None of the cases cited by the Thorpe Trusts supports such a narrow interpretation of Section 16600.[4] In *Edwards*, the California Supreme Court explicitly disapproved of two of these cases cited by the Thorpe Trusts to the extent that they were inconsistent with the court's analysis in *Edwards*. *See Edwards*, 44 Cal. 4th at 950 n.5 (disapproving of *Boughton v. Socony Mobil Oil Co.*, 41 Cal. Rptr. 714, 715 (Cal. App. 1964) and

[4] Two of the five older cases cited by the Thorpe Trusts did not even involve a contract by which any person was restricted from engaging in a profession, trade, or a business of any kind and therefore the contracts involved were not within the scope of the prohibition contained in Section 16600. *See Great W. Distillery Products v. John A. Wathen Distillery Co.*, 74 P.2d 745, 746 (Cal. 1937) ("The contract does not restrain anyone from exercising a trade or business of and kind within the purview of [Section 16600's predecessor statute] section 1673 of the Civil Code."); and *Boughton v. Socony Mobil Oil Co.*, 41 Cal. Rptr. 714, 715 (Cal. App. 1964) ("We conclude that the restriction in the deed does not fall within the purview of the statute. The single restriction is imposed, not personally on plaintiffs restraining them from engaging or carrying on any profession, trade or business but, on the use of the land upon which they as grantees are barred merely from selling petroleum products, and then only for a limited period of time.")

There is no indication that the exclusive licensing contracts mentioned by the Thorpe Trusts (*see* Ans. Br. at 29-30) would restrain anyone from engaging in a lawful profession, trade, or business as opposed to simply imposing limitations upon the use of intellectual property. Federal antitrust guidelines concerning intellectual property contracts (*see id.* at 30) and determining how the California Supreme Court might interpret Section 16600 in applying the statute to a hypothetical dispute involving an exclusive licensing contract for intellectual property (*see id.* at 29-30) are irrelevant to this appeal.

King v. Gerold, 109 Cal. App. 2d 316 (1952).[5] *Edwards'* disapproval of these cases refutes the assertion by the Trust that this line of authority establishes an exception under Section 16600 permitting "reasonable" restrictions on a person engaging in a profession, trade, or business.

Edwards establishes that Section 16600 protects the right of a person to practice his profession. *Edwards* also affirms that Section 16600 means what it unambiguously says and that any exceptions to the statute must come from the legislature, not the judiciary.

3. The Thorpe Trusts' argument that Section 16600 is subject to an implied limitation which would dilute its application "outside of the context" of a certain category of contracts was rejected by the Ninth Circuit in *Golden*.

The Thorpe Trusts argue that Section 16600 should not be applied to the Stipulated Agreement because of a "longstanding understanding" that "outside of the employment or non-compete context" the statute invalidates only "undue or unreasonable burdens on trade." (*See* Ans. Br. at 32-33.) The Ninth Circuit rejected an equivalent argument made by the defendant in *Golden*.

In *Golden*, the defendant argued that Section 16600 should not be applied according to its express terms "outside the context of non-compete covenants."

[5] As the Ninth Circuit noted in *Golden*, the *Edwards* court rejected the rule of reason purportedly suggested by the earlier California cases cited by the Thorpe Trusts *See Golden*, 782 F.3d at 1091.

Golden, 782 F.3d at 1091. Ninth Circuit rejected the argument, stating that Section 16600 does not target only contracts concerning competition nor does it implicitly constrain itself to contracts concerning employment, but voids "*every* contract" that restrains someone from engaging in a lawful profession, trade, or business. *Golden*, 782 F.3d at 1090 (emphasis in original). As stated in *Golden*, the correct analysis of whether a contract is invalid under Section 16600 begins with asking whether the contract restrains someone from engaging in a lawful trade, business, or occupation. *See Golden*, 782 F.2d at 1092. Beginning the inquiry by asking whether the contract falls into the category of a non-competition agreement or relates to a former employer's services is the incorrect way to analyze whether a contract runs afoul of Section 16600 because there is "no reason to believe that the State has drawn 16600 simply to prohibit [certain kinds of contracts] and not also other contractual restraints on professional practice." *See id.* at 1092-93.

Here, the Thorpe Trusts attempt a slight variation on the tack employed by the defendant in *Golden*, arguing that Section 16600 should not be applied outside the context of non-complete covenants *or post-employment mobility*. (*See* Ans. Br. at 26-36.) *Golden*, however, states that Section 16600 applies to *all* contracts, not just some categories of contracts. The public policy being protected by Section 16600 is not limited solely to certain types of agreements such as "post-employment" agreements but extends more broadly to *any* agreement which would

"limit the opportunities that one may have to engage in one's chosen line of work." *Golden*, 782 F.3d at 1092 (footnote omitted).

For the same reasons as set forth in *Golden*, the Court should reject the Thorpe Trusts' argument that Section 16600 does not apply with equal force to contracts outside of the non-compete or post-employment context.

4. *Hassey* and *Case* are limited in application to cases involving employee reimbursement of training expenses and have no relevance to this action.

The Thorpe Trusts argue that *City of Oakland v. Hassey*, 163 Cal. App. 4th 1477 (2008) ("*Hassey*") and *USS-Posco Industries v. Case*, 244 Cal. App. 4th 197 (2016) ("*Case*"), lend support to the Thorpe Trusts' argument that the Stipulated Agreement does not violate Section 16600. (*See* Ans. Br. at 42-45.) *Hassey* and *Case* are inapposite because they involved only reimbursement of training expenses, not restraints on employment or professional practice.

In both *Hassey* and *Case*, the employees received expensive training subject to an agreement with their employers that they would reimburse the training expenses if they left their jobs within a certain period of time after the training occurred. The courts of appeal in those cases upheld the contracts because they required reimbursement irrespective of what kind of work the employee went on to perform, who the employee subsequently worked for, or whether the employee worked for anyone at all. *See Hassey*, 163 Cal. App. 4th at 1491 ("Nothing

prevented him from working for another police department, or anywhere else, for that matter.") and *Case*, 244 Cal. App. 4th at 208 ("It did not restrain Case from working for a competitor or any other entity. Indeed, Case quit UPI and went to work elsewhere, and he was entirely free to do so.").[6]

Hassey and *Case* have no relevance to this action.

B. The Thorpe Trusts Fail to Demonstrate That Rule 1-500 Does Not Apply to the Stipulated Agreement.

Just as with Section 16600[7], the Thorpe Trusts also argue that Rule 1-500 should be interpreted to be impliedly limited to only certain categories of agreements. (*See* Ans. Br. at 45-49.) The narrow interpretation of Rule 1-500 advanced by the Thorpe Trusts is contrary to the express terms of Rule 1-500, California case law, and the policy of the state.

---

[6] *Hassey* and *Case* can easily be reconciled with *Chamberlain v. Augustine*, 172 Cal. 285 (1916) ("*Chamberlain*"), the only pertinent California Supreme Court decision other than *Edwards*. The agreement at issue in *Chamberlain* required the payment of $5000 *only* if the defendant engaged in a business in competition with the plaintiff and therefore clearly restrained the plaintiff from "exercising a lawful profession, trade, or business." *See id.* at 286-88. *Chamberlain* is not inconsistent with *Hassey* or *Case* and remains good law.

[7] If the Court determines the Stipulated Agreement to be void under Section 16600, then there is no need to examine the effect of Rule 1-500 on this case. However, to the extent that Rule 1-500 applies to this case, it imposes only a higher – not a lesser – standard in determining whether the Stipulated Agreement is valid than that imposed by Section 16600. *See Howard v. Babcock*, 6 Cal. 4th at 418.

Statutory interpretation of Rule 1-500 must begin by examining the words of Rule 1-500, "giving them a plain and commonsense meaning." *See People v. Murphy,* 25 Cal. 4th 136, 142 (2001). The express terms of Rule 1-500 prohibit an agreement of the type involved in this case. The Thorpe Trusts do not dispute this, but argue that the purported "policy" underlying Rule 1-500 would not be served by such a prohibition. (*See* Ans. Br. at 45-49.)

The Thorpe Trusts cite no California cases in support of their narrow interpretation of Rule 1-500 and instead rely upon an opinion of the American Bar Association. (*See* Ans. Br. at 45-47.)[8] The Thorpe Trusts' reliance is misplaced because the Court must look to the California Supreme Court's interpretation of Rule 1-500 for guidance. *See Ogden Martin Sys., Inc. v. San Bernardino County, Cal.,* 932 F.2d 1284, 1288-89 (9th Cir. 1991). Rule 1-500 must also be read to serve the longstanding public policy in California "that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice." *Edwards,* 44 Cal.4th at 946 (internal quotations and citations omitted). (*See also* section A.1., *supra* at p.1 and n.1.)

[8] The Thorpe Trusts relegate the key state court decisions to footnotes in their analysis (*see* Ans. Br. at 48 nn.25-26) and instead rely exclusively upon the ABA opinion to support their position that Rule 1-500 should be limited in application to only two types of factual situations. (*See* Ans. Br. at 45.)

Indeed, in *Howard v. Babcock*, 6 Cal. 4th 409 (1993) ("*Howard*"), the California Supreme Court interpreted Rule 1-500 to serve the state's policy to protect "the legitimate concerns of assuring client choice of counsel *and assuring attorneys of the right to practice their profession*." *Id.* at 425 (emphasis added). The court stated that a policy underlying Rule 1-500 is to protect an attorney's ability to "continue to practice law anywhere within the state, and to be able to accept employment should he choose to do so from any client who desires to retain him." *Howard v. Babcock*, 6 Cal. 4th at 419 (emphasis added) (quoting *Haight, Brown & Bonesteel v. Superior Court*, 234 Cal. App. 3d 963, 969-70 (1991). The *Howard* court found that the agreement at issue in that case did not run afoul of Rule 1-500 because it did not restrict the attorney's practice of law whatsoever, but simply attached a monetary cost to the attorney's choice to pursue a particular kind of practice. *See Howard*, 6 Cal. 4th at 419.[9]

In the instant case, the Thorpe Trusts advocate an interpretation of Rule 1-500 that cannot be reconciled with *Howard* because it would not protect the policies underlying the rule of assuring the right of attorneys to practice their profession and protecting client choice of counsel. Moreover, the Stipulated

[9] Although the agreement at issue did not restrain the attorney's practice of law, the court remanded the case for a determination of whether the cost imposed on the attorney was "reasonable" under the statutory exception to Section 16600 provided by Business and Professions Code section 16602. *See Howard*, 6 Cal. 4th at 416.

Agreement in this case could not pass muster under the *Howard* case because it would restrict Mandelbrot almost entirely from the practice of asbestos law, rather than simply imposing a cost on his choice to pursue that kind of legal work. *See Howard*, 6 Cal. 4th at 419.

For all of these reasons, the Stipulated Agreement is void under Rule 1-500.

C. The Thorpe Trusts Fail to Demonstrate That California Law Does Not Apply to the Stipulated Agreement.

The Thorpe Trusts' argument of last resort against invalidity is choice of law. The Thorpe Trusts contend that California law should not be applied to the Stipulated Agreement because the Thorpe Trusts are Nevada entities, have not performed any Trust actions in California, and were created under authority of federal bankruptcy law and orders. (*See* Ans. B. at 49-51.) The Thorpe Trusts contend that Nevada or federal law should therefore be applied. (*See id.* at 49 and 50.) The Thorpe Trusts' argument is without support in law or fact.

The Thorpe Trusts cite no legal authority in support of their choice-of-law argument (*see id.* at 49-51) and have therefore waived it. *See U.S. v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1168-69 (9th Cir. 2000). *See also* Fed. R. App. Pro. Rule 28(a)(8)(A) (brief must be supported by citations to authorities).

The Thorpe Trusts' argument is also factually without support. The Thorpe Trusts' assertion that they have not taken any action in California (*see* Ans. Br. at 49) is false. The Thorpe Trusts acted in California by filing these adversary

proceedings against Mandelbrot, proposing the Stipulated Agreement to Mandelbrot, and seeking to enforce it against Mandelbrot in Los Angeles, California.[10] The Stipulated Agreement was also accepted and to be performed in California as well by the Thorpe Trusts dismissing their adversary proceedings in California and by restricting Mandelbrot's practice of law in California and as a member of the California State Bar.

The interpretation of the Stipulated Agreement is governed by California law. *See Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989) ("The construction and enforcement of settlement agreements are governed by principles of local law which apply to interpretation of contracts generally."). *See, e.g., Navarro v. Mukasey*, 518 F.3d 729, 733 (9th Cir. 2008) (applying California contract law to interpret a class action settlement agreement negotiated in California). *See also* Cal. Civ. Code § 1646 ("A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.")

[10] The Thorpe Trusts' assertion that they took no actions in California appears to be based on the unsupported argument of their counsel that their trustees make decisions only outside of the State of California. (*See* Ans. Br. at 19-20.) The *trustees* are not the *trusts*, however, and each of these Nevada trusts is "deemed to be an entity separate from its…trustees…." *See* Nev. Rev. Stat. § 88A.210. (*See also* footnote 20, *supra* at pp. 23-24.) The Thorpe *Trusts* indisputably acted in California by initiating, prosecuting, and settling these adversary proceedings in California.

For all of these reasons, the validity of the Stipulated Agreement must be interpreted according to California law.

D. The Thorpe Trusts Cannot Justify the Bankruptcy Court's Orders by Relying Upon the Disputed Evidence at Trial or the Premature Findings of the Bankruptcy Court Entered in Reliance Upon the Void Stipulated Agreement.

In an effort to sidestep the invalidity of the Stipulated Agreement, the Thorpe Trusts argue that the evidence at trial as well as the factual findings of the bankruptcy court provide an independent basis for the bankruptcy court's Orders apart from the Stipulated Agreement. (*See* Ans. Br. at 39-42.)[11] The Thorpe Trusts' argument is unfounded.

The bankruptcy court's findings of fact were prepared by counsel for the Thorpe Trusts and were copied verbatim from the Stipulated Agreement. The bankruptcy court also could only have entered its findings in reliance upon the void Stipulated Agreement because the trial had not been completed and Mandelbrot

[11] The Thorpe Trusts devote a large portion of their brief and their six volumes of supplemental excerpts of record containing more than 1200 pages of material to irrelevant attacks on Mandelbrot's character, arguing about their interpretation of the disputed and incomplete trial evidence as well as the purported "findings" of the bankruptcy court. (*See* Ans. Br. at 1-5, 12-17, 19, and 39.) Mandelbrot limits this reply to only the matters which are relevant to the issues on appeal. However, Mandelbrot's decision not to dispute or address the irrelevant facts and one-sided evidence argued by the Thorpe Trusts in their Answering Brief should in no way be construed to be an admission that those facts or characterization of the evidence by the Thorpe Trusts are true or that the evidence is admissible.

had not concluded his submission of evidence. Moreover, the bankruptcy court had no authority to enter all of those findings because only the Thorpe Trusts – and not the Western Trust or Plant Trust – sought relief in the adversary proceedings. Only Mandelbrot's reliability with regard to the Thorpe Trusts was in issue at trial. Similarly, the bankruptcy court's order granting relief regarding the Western Trust and Plant Trust could only have been granted in reliance upon the void Stipulated Agreement because it was outside of the scope of relief sought in the pleadings.

The Thorpe Trusts also argue that facts purportedly admitted by Mandelbrot in the Stipulated Agreement save the settlement from invalidity. (*See* Ans. Br. at 1, 6, 19, and 39-40.) Mandelbrot, however, did not admit to any facts of wrongdoing as the Thorpe Trusts contend.[12] In any event, if the Stipulated Agreement is void, then no part of it may be used against Mandelbrot as argued by the Thorpe Trusts.

Mandelbrot addresses each of these issues below in greater detail.

---

[12] Mandelbrot singlehandedly built his asbestos legal practice "from the ground up" after many years of study and hard work in the field. (ER 86-87.) Mandelbrot's reputation is the lifeblood of his asbestos trusts claims practice which depends on referrals from other trial attorneys. (ER 87:6-12.) Mandelbrot denies any unreliability in filing claims and evidence with the Thorpe Trusts and, to the contrary, asserts that he has been meticulous with his submissions to the trusts and has never filed an unreliable claim. (ER 70:1-2 and 87:24-26.) Prior to this controversy with the Thorpe Trusts, Mandelbrot had never encountered any allegations regarding his unreliability or untruthfulness from any trust with which he had filed claims. (ER 87:12-15.)

1. The bankruptcy court's "findings" could only be based upon the Stipulated Agreement because only Mandelbrot's reliability with regard claims filed with the Thorpe Trusts was at issue in the adversary proceedings and Mandelbrot had not concluded presenting Mandelbrot's evidence at trial.

The Thorpe Trusts state that the bankruptcy court made findings of its own of Mandelbrot's reliability in submitting claims evidence to all four trusts that are the subject of the Stipulated Agreement. (*See* Ans. Br. at 19, 39-40, and 42.) The Thorpe Trusts argue that the purported findings of the bankruptcy court regarding Mandelbrot's reliability distinguish this case from *Golden* which did not involve any determination of wrongdoing. (*See* Ans. Br. at 40. *See also id.* at 19 and 39.)

The bankruptcy court findings, however, were prepared by counsel for the Thorpe Trusts (SER 426:24-427:1) and were copied verbatim from the Stipulated Agreement.[13] The adversary proceeding before the bankruptcy court also only involved the Thorpe Trusts. Only the Thorpe Trusts sought declaratory relief with regard to their investigations into whether Mandelbrot had submitted unreliable information to the Thorpe Trusts.[14] Because only Mandelbrot's claims filed with

[13] *Compare* SER 413:10-415:2, 416:22-420:15, and 424:20-426:5 (Stipulated Agreement) *with* ER 22-25 ("Findings of Fact").

[14] The First Amended Complaints filed by the Thorpe Trusts sought declaratory relief only on the issues of whether Mandelbrot had "engaged in a pattern or practice of submitting unreliable information to the Thorpe Insulation Trust" (ER 96) as well as the J.T. Thorpe Trust. (ER 98.)

the Thorpe Trusts were in issue at trial, only the Thorpe Trusts TDPs are referenced in the record. (*See* Ans. Br. at n.8.)[15] The issues of whether Mandelbrot had engaged in a pattern or practice of filing unreliable evidence before the Western Trust and the Plant Trust were not matters being determined by the bankruptcy court or the subject of the evidence being submitted by the parties.[16] The Western Trust and the Plant Trust are not parties to this case and therefore did not submit any evidence at trial.[17]

---

[15] The Thorpe Trusts contend that each of the four trusts which is the subject of the Stipulated Agreement is authorized under its trust distribution procedures (TDPs) to decline to accept evidence from an individual that the trust has reasonably determined to engage in a pattern or practice of providing unreliable evidence to the trust. (*See* Ans. Br. at 10 and n.8.) However, only the TDPs for the two Thorpe Trusts are referenced in the record. (*See* Ans. Br. at n.8 (citing only to the Thorpe Trusts' TDPs, but arguing without any evidence that the Western Trust TDPs have the same provision as the Thorpe Trusts and that the Plant Trust TDPs have a provision that is "substantially the same").)

[16] The trusts' respective TDPs do not permit the trusts to make any findings that a particular individual is unreliable without regard to evidence that individual has submitted to that particular trust. (*See* Ans. Br. at 10 and n.8.) The Western Trust and Plant Trust may make a determination under their own TDPs as to Mandelbrot's reliability based upon evidence Mandelbrot submitted to those trusts and to seek declaratory relief from their supervising bankruptcy court, the Northern District of California.

[17] The Western Trust commenced an adversary proceeding against Mandelbrot in the U.S. Bankruptcy Court for the Northern District of California having jurisdiction over that trust's operations seeking relief similar to that sought by the Thorpe Trusts. (ER 65.) However, that adversary proceeding was dismissed that that court. (ER 86 and 88.) The Plant Trust was not a party to any adversary (cont'd)

Indeed, the bankruptcy court could not have made any determination of Mandelbrot's reliability in providing information to the Plant Trust because the Plant Trust had only just been formed and had not yet opened for claims at the time of the trial in January 2014. (ER 81) For this reason, it would have been impossible for the bankruptcy court to have received or considered any evidence that Mandelbrot submitted unreliable evidence to the Plant Trust as would be required to make a finding of unreliability under the Plant Trust TDPs. (*See* Ans. Br. at 10-11 n.8.)

Finally, the bankruptcy court could not have made any findings in the absence of the Stipulated Agreement because the trial had not yet been concluded.[18] The Thorpe Trusts had only completed a portion of their case-in-chief. (ER 74:2-6 and 75:20-23; SER 687:4-122.) Mandelbrot had not yet completed his cross-examination of the Thorpe Trusts' witnesses that had testified, presented his case in rebuttal, put his experts on the stand, or even taken the stand to testify himself. (*Ibid.* *See also* Ans. Br. at 3.) The bankruptcy court stated that

---

proceedings against Mandelbrot. (ER 81. *See also* Appellants' Opening Brief ("Op. Br.") at 5-6.)

[18] *See* Fed. R. Civ. Pro. Rule 52(a)(1) ("findings and conclusions may be stated on the record…after the close of the evidence") and (a)(2) (judgment on partial findings appropriate only after "a party has been fully heard on an issue"). *See also* Fed. R. Bk. Pro. Rule 7052 (stating Rule 52 applies in bankruptcy adversary proceedings).

Mandelbrot had "waived the right to put on a defense" at trial by entering into the Stipulated Agreement. (ER 75:13-15.) The suggestion by the bankruptcy court judge that she *might* have made factual findings similar to those contained in the Stipulated Agreement at the conclusion of trial (*see* Ans. Br. at 19) must be disregarded as a hypothetical statement based on incomplete evidence from Mandelbrot. The "findings" of the bankruptcy court are premature and were entered entirely in reliance upon the void Stipulated Agreement.

For all of these reasons, the bankruptcy court acted without authority or sufficient evidence to make findings as to Mandelbrot's reliability with regard to the four trusts involved with the Stipulated Agreement.

2. The bankruptcy court was without authority to grant relief to non-parties and exceeding that sought by the Thorpe Trusts in their complaints.

The bankruptcy court acted without authority by granting relief that was outside of the scope of the complaints filed by the Thorpe Trusts in the adversary proceedings.[19] The only relief sought by the Thorpe Trusts in this action was a declaration confirming their decisions to investigate Mandelbrot's filings with the

[19] *See Quiksilver, Inc. v. Kymsta Corp.*, 466 F.3d 749, 754 n.4 (9th Cir.2006) (district court's inclusion in an injunction of prohibition going "beyond the claims asserted in the complaint" was "in contravention of well-settled Ninth Circuit authority holding that a court may not…enter a judgment which goes beyond the claim asserted in the pleadings[ ]") (internal quotations and citation omitted).

Thorpe Trusts and for a return of any improper payments to those two trusts. (ER 96 and 98-99.) The Thorpe Trusts did not seek any relief whatsoever concerning the Western Trust or the Plant Trust nor would the Thorpe Trusts have had standing to do so.[20] Furthermore, the Thorpe Trusts did not seek an order compelling Mandelbrot to transfer all pending claims before the Thorpe Trusts to another attorney. (*Ibid*.)

The bankruptcy court itself acknowledged that it lacked jurisdiction without the stipulation of the parties to grant the relief to the trusts set forth in the

[20] The Thorpe Trusts argue that the four trusts have common trustees and contract with the same staff to provide each of the trusts with claims handling services. (*See* Ans. Br. at 1 and n.3.) Nevertheless, each of the trusts is an independent Nevada trust entity formed under separate plan confirmation orders and subject to the supervision of the court issuing that order and each trust has its own TDPs. The Western Trust and Plant Trust are under the supervisory jurisdiction of the U.S. District Court for the Northern District of California, not the Southern District of California where the trial in this case occurred. (*See* Ans. Br. at 1 n.3, 7 n.6, 10-11 n.8, and 49-50.) The trusts are governed by and construed according to Nevada law. *See, e.g., In re Western Asbestos Co.*, 416 B.R. 670, 677 (N.D. Cal. 2009) (Western Trust's agreement provides that it "shall be governed by, and construed in accordance with, the laws of the State of Nevada"). Under Nevada law, each of these Nevada trusts is "deemed to be an entity separate from its…trustees…." *See* Nev. Rev. Stat. § 88A.210. *See also Blackwell v. Transamerica Occidental Life*, 707 F. Supp. 437, 442 n.8 (D. Nev. 1987) ("The Teamsters Trust Fund is a distinct legal entity, separate from the union and its employees.) Each trust must therefore make its own determination under its own TDPs based upon the claim submitted only to that particular trust and subject to the supervising authority of the district court which issued the relevant confirmation order.

Stipulated Agreement. (ER 55. *See also* Op. Br. at 9.) Therefore, if the Stipulated Agreement is void, the bankruptcy court was without authority to order that relief.

3. Mandelbrot did not admit to any wrongdoing as the Trust contends and no part of the Stipulated Agreement may be used against Mandelbrot in any event.

The Thorpe Trusts falsely assert: "Mandelbrot admitted that he was unreliable and had engaged in a pattern and practice of filing unreliable evidence with the Trusts." (*See* Ans. Br. at 1.) Mandelbrot did *not* admit that he was unreliable or had filed unreliable evidence with the trusts but only agreed that the trusts actions against him were "reasonable." (ER 23:14-19) Mandelbrot therefore did not acknowledge or admit to any wrongdoing or stipulate to any evidentiary "predicate fact" as the Thorpe Trusts repeatedly claim. (*See, e.g.,* Ans. Br. at 5-6, 26, and 40.)

More importantly, if the Stipulated Agreement is void as Mandelbrot contends, then the contract[21] is void in its entirety and no part of it may be used against Mandelbrot. *See* Cal. Civ. Code § 1608.[22] The Thorpe Trusts cannot seek

[21] A stipulation in a bankruptcy proceeding is a contract and "is subject to the general principles governing the construction, interpretation and law of contracts." *In re Royster Co.*, 132 B.R. 684, 687-88 (Bankr. S.D.N.Y. 1991).

[22] California Civil Code section 1608 provides:

(cont'd)

to selectively enforce some provisions of the Stipulated Agreement, including purported stipulations to factual matters, which were part of the void transaction or claim that Mandelbrot is estopped from disputing those factual matters in further proceedings. *See City of Santa Cruz v. P. Gas & Elec. Co.*, 82 Cal. App. 4th 1167, 1177 (2000) ("contractual estoppel based on factual recitations in an instrument is inapplicable to the extent that the agreement is void"); and *Wells v. Comstock*, 46 Cal. 2d 528, 532 (1956) (when the illegality of the contract renders the bargain unenforceable, "[t]he courts will leave [the parties] where they were when the action was begun" (citations and internal quotations omitted)).

For these reasons, the Stipulated Agreement may not be used against Mandelbrot or to support the bankruptcy court's findings.

> Effect of its illegality. If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void.

Id.

CONCLUSION

For all of these reasons, the district court's order and judgment affirming the bankruptcy court's Orders should be reversed and this matter remanded with instructions for further proceedings.

DATED: this 7th day of April 2016

MANDELBROT LAW FIRM

By: */s/ Michael J. Mandelbrot*
Michael J. Mandelbrot
Appearing *Pro Se* for Defendants-Appellants Michael J. Mandelbrot and the Mandelbrot Law Firm

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure Rule 32(a)(7)(B) because this brief is proportionately spaced, has a typeface of 14 points or more, and contains 4,543 words.

/s/ Michael J. Mandelbrot
Michael J. Mandelbrot
Appearing *Pro Se* for Defendants-Appellants Michael J. Mandelbrot and the Mandelbrot Law Firm

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2016, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Michael J. Mandelbrot
Michael J. Mandelbrot
Appearing *Pro Se* for Defendants-Appellants Michael J. Mandelbrot and the Mandelbrot Law Firm