EXHIBIT A

West's Annotated California Codes
California Rules of Court (Refs & Annos)
Title 3. Civil Rules (Refs & Annos)
Division 15. Trial (Refs & Annos)
Chapter 9. Statement of Decision (Refs & Annos)

Cal.Rules of Court, Rule 3.1591
Formerly cited as CA ST PRETRIAL AND TRIAL Rule 232.5

Rule 3.1591. Statement of decision, judgment, and motion for new trial following bifurcated trial

Currentness

(a) Separate trial of an issue

When a factual issue raised by the pleadings is tried by the court separately and before the trial of other issues, the judge conducting the separate trial must announce the tentative decision on the issue so tried and must, when requested under Code of Civil Procedure section 632, issue a statement of decision as prescribed in rule 3.1590; but the court must not prepare any proposed judgment until the other issues are tried, except when an interlocutory judgment or a separate judgment may otherwise be properly entered at that time.

(b) Trial of issues by a different judge

If the other issues are tried by a different judge or judges, each judge must perform all acts required by rule 3.1590 as to the issues tried by that judge and the judge trying the final issue must prepare the proposed judgment.

(c) Trial of subsequent issues before issuance of statement of decision

A judge may proceed with the trial of subsequent issues before the issuance of a statement of decision on previously tried issues. Any motion for a new trial following a bifurcated trial must be made after all the issues are tried and, if the issues were tried by different judges, each judge must hear and determine the motion as to the issues tried by that judge.

Credits

(Formerly Rule 232.5, adopted, eff. Jan. 1, 1975. As amended, eff. Jan. 1, 1982; Jan. 1, 1985. Renumbered Rule 3.1591 and amended, eff. Jan. 1, 2007.)

Cal. Rules of Court, Rule 3.1591, CA ST CIVIL RULES Rule 3.1591

California Rules of Court, California Rules of Professional Conduct, and California Code of Judicial Ethics are current with amendments received through June 1, 2018. California Supreme Court, California Courts of Appeal, Guidelines for the Commission of Judicial Appointments, Commission on Judicial Performance, and all other Rules of the State Bar of California are current with amendments received through June 1, 2018.

Cal. Rules of Court, rule 232.5

California Statutes Annotated - 2006

Cal.Rules of Court, Rule 232.5

West's Annotated California Codes Currentness
California Rules of Court (Refs & Annos)
Title Two. Pretrial and Trial Rules
Division I. Rules for the Trial Courts (Refs & Annos)
Chapter 6. Other Trial Court Rules (Refs & Annos)

Rule 232.5. Statement of decision, judgment, and motion for new trial following bifurcated trial

When a factual issue raised by the pleadings is tried by the court separately and prior to the trial of other issues, the judge conducting the separate trial shall announce the tentative decision on the issue so tried and shall, when requested pursuant to Code of Civil Procedure section 632, issue a statement of decision as prescribed in rule 232; but no proposed judgment shall be prepared until the other issues are tried, except when an interlocutory judgment or a separate judgment may otherwise be properly entered at that time. If the other issues are tried by a different judge or judges, each judge shall perform all acts required by rule 232 as to the issues tried by that judge and the judge trying the final issue shall prepare the proposed judgment. A judge may proceed with the trial of subsequent issues before the issuance of a statement of decision on previously tried issues. Any motion for a new trial following a bifurcated trial shall be made after all the issues are tried and, if the issues were tried by different judges, each judge shall hear and determine the motion as to the issues tried by that judge.

CREDIT(S)

(Adopted, eff. Jan. 1, 1975. As amended, eff. Jan. 1, 1982; Jan. 1, 1985.)

DRAFTER'S NOTES

2005 Main Volume

1982-See note following rule 232.
1984-The rule was amended to clarify the statement of decision process following the first part of a bifurcated trial. The rule now provides that the court in its discretion may proceed with the second portion of a bifurcated trial even though the statement of decision process has not been completed on the first part.

HISTORICAL NOTES

2005 Main Volume

The 1982 amendment rewrote the first sentence by substituting “the separate trial” for “such separate trial”, “the tentative decision” for “his intended decision”, and “and shall, when requested pursuant to Code of Civil Procedure section 632, issue a statement of decision” for “and make findings of fact and conclusions of law”.

The 1985 amendment inserted the third sentence, allowing a judge to proceed with a trial of subsequent issues before issuance of a statement on previously tried issues.

CROSS REFERENCES

Bifurcation of issues, notice by clerk, procedural family law rules, see California Rules of Court, Rule 5.175.

EXHIBIT B

43 Cal.App.4th 1211, 51 Cal.Rptr.2d 147, 96 Cal. Daily Op. Serv. 2048, 96 Daily Journal D.A.R. 3433

EUROPEAN BEVERAGE, INC., et al., Petitioners,
v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
SAM MEARA, Real Party in Interest.

No. B098022.
Court of Appeal, Second District, Division 4, California.
Mar 25, 1996.

SUMMARY

An individual brought an action alleging he owned a one-half interest in a corporation, and alleging that various defendants committed intentional torts by diluting his interest in the corporation and diluting its assets. At the conclusion of the first phase of a bifurcated court trial, the trial judge determined that plaintiff was the owner of 50 percent of the shares of the corporation. The trial judge was reassigned to another department before the second phase of the trial began. Defendants filed an ex parte application for an order to prevent transfer of the case to a new trial judge, or alternatively, for a mistrial. The trial court denied the application and ordered the case transferred to another judge for trial. (Superior Court of Los Angeles County, No. LC005588, Thomas Schneider, Judge.)

The Court of Appeal issued a peremptory writ of mandate directing the trial court either to vacate its order transferring the case to a new trial judge or to declare a mistrial. The court held that defendants were entitled to have the second phase of the bifurcated trial heard by the same judge that heard the first phase, or, if he was unavailable as a result of being reassigned, to have a mistrial declared so that the entire action could be heard by a different judge. Although Cal. Rules of Court, rule 232.5, recognizes that different judges may hear different phases of a trial-an alternative available by stipulation-it does not undermine the right of a party to have the same judge hear all the evidence and decide the facts of the case. If the party chooses to waive that right, rule 232.5 provides guidance for the manner in which successive judges shall prepare their statements of decision and the final judgment. Defendants in this case did not waive their right to have the original judge hear the second phase of the trial, notwithstanding that, prior to the date set for that phase, they failed to object to having a discovery motion heard and decided by a different judge who was sitting in a law and motion department. Determination of a discovery motion, like other matters typically heard and decided in law and motion proceedings, is not the trial of a cause involving the hearing of evidence and the determination of facts. (Opinion by Epstein, J., with Vogel (C. S.), P. J., and Hastings, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1)
Judgments § 20--Rendition--Requirement That Decision Be Rendered by Judge or Jury That Hears Evidence.
In a civil action a party litigant is entitled to a decision upon the facts of his or her case from the judge who hears the evidence, where the matter is tried without a jury, and from the jury that hears the evidence, where it is tried with a jury. The litigant cannot be compelled to accept a decision upon the facts from another judge or another jury. Where there has been an interlocutory judgment rendered by one judge, and that judge then becomes unavailable to decide the remainder of the case, a successor judge is obliged to hear the evidence and make his or her own decision on all issues, including those that had been tried before the first judge, unless the parties stipulate otherwise. This is because an interlocutory judgment is subject to modification at any time prior to entry of a final judgment. It is considered a denial of due process for a new judge to render a final judgment without having heard all of the evidence.

[See 7 **Witkin,** Cal. Procedure (3d ed. 1985) Judgment, § 45.]

(2)
Judgments § 20--Rendition--Litigant's Right to Have Decision Rendered by Same Judge in Both Phases of Bifurcated Court Trial.
In an action to adjudicate an individual's ownership interest in a corporation and his claims for intentional torts, defendants were entitled to have the second phase of the bifurcated court trial heard by the same judge that heard the first phase, or, if he was unavailable as a result of being reassigned, to have a mistrial declared so that the entire action could be heard by a different judge. Although Cal. Rules of Court, rule 232.5, recognizes that different judges may hear different phases of a trial-an alternative available by stipulation-it does not undermine the right of a party to have the same judge hear all the evidence and decide the facts of the case. If the party chooses to waive that right, rule 232.5 provides guidance for the manner in which successive judges shall prepare their statements of decision and the final judgment. Defendants in this case did not waive their right to have the original judge hear the second phase of the trial, notwithstanding that, prior to the date set for that phase, they failed to object to having a discovery motion heard and decided by a different judge who was sitting in a law and motion department. Determination of a discovery motion, like other matters typically heard and decided in law and motion proceedings, is not the trial of a cause involving the hearing of evidence and the determination of facts. Moreover, strict adherence to the "same judge" rule does not defeat the judicial economy of bifurcated trials. If plaintiff had been unsuccessful in his claim of stock ownership during the first phase, there would have been no need for an accounting and trial on his claims of dilution and diversion in the second phase.

COUNSEL
Douglas Brian Levinson for Petitioners.

De Witt W. Clinton, County Counsel, and Frederick R. Bennett, Assistant County Counsel, for Respondent.
Jay S. Bloom for Real Party in Interest.

EPSTEIN, J.

In this case we hold that, in a court trial, absent a waiver or a stipulation to the contrary, a party is entitled to have the same judge try all portions of a bifurcated trial that depend on weighing evidence and issues of credibility, and that if that judge is unavailable to do so, a mistrial must be declared.

Factual and Procedural Summary

Sam Meara (real party in interest) brought this action claiming he owned a one-half interest in European Beverage, Inc., and that various defendants (petitioners) committed intentional torts by diluting his interest in European Beverage and diluting its assets. The matter proceeded to trial on June 27, 1994, before Judge Thomas Schneider. The court bifurcated the issues, ordering that the equitable issues of accounting and constructive trust be tried first in a court trial. At the conclusion of this first phase of trial, Judge Schneider determined that real party is the owner of 50 percent of the shares ***1214** of the corporation, and directed a special master to conduct an accounting of the net worth of the corporation and inquire into any diversion of assets to petitioners.

The special master issued his report in November 1994. The second phase of the trial was set to begin on December 12, 1995, before Judge Schneider. Before that date, Judge Schneider became the assistant supervising judge of the Northwest District, assigned to the master calendar department. On December 12, the matter was ordered trailed to allow petitioners' counsel to conclude a trial in which he was engaged. Judge Schneider informed the parties that he was no longer available to try the case, and that the remaining issues would be transferred to another judge. On December 14, petitioners filed an ex parte application for an order to prevent transfer of the case to a new trial judge, or alternatively, for a mistrial. The trial court denied the application and ordered the case removed from the trailing calendar and transferred "forthwith" to another judge for trial.

Petitioners then filed a petition for writ of mandate in this court, seeking an order directing the trial court either to quash the transfer or declare a mistrial. They argue that absent a waiver, the parties are entitled to have the judge who enters judgment in a court trial hear all the evidence and determine all the issues. We issued a temporary stay and an alternative writ. We now grant the requested relief.

Discussion

([1]) The law has long been settled that in a civil action "[a] party litigant is entitled to a decision upon the facts of his case from the judge who hears the evidence, where the matter is tried without a jury, and from the jury that hears the evidence, where it is tried with a jury. He cannot be compelled to accept a decision upon the facts from another judge or another jury." (*Guardianship of Sullivan* (1904) 143

Cal. 462, 467 [77 P. 153]; *Bodine v. Superior Court* (1962) 209 Cal.App.2d 354, 364-365 [26 Cal.Rptr. 260].) Where there has been an interlocutory judgment rendered by one judge, and that judge then becomes unavailable to decide the remainder of the case, a successor judge is obliged to hear the evidence and make his or her own decision on all issues, including those that had been tried before the first judge, unless the parties stipulate otherwise. (*Rose v. Boydston* (1981) 122 Cal.App.3d 92, 97 [175 Cal.Rptr. 836].) This is because an interlocutory judgment is subject to modification at any time prior to entry of a final judgment. (*Ibid.*) It is considered a denial of due process for a new judge to render a final judgment without having heard all of the evidence. (*In* ***1215** *re Marriage of Colombo* (1987) 197 Cal.App.3d 572, 581 [242 Cal.Rptr. 100]; 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 45, p. 483.)

([2]) Real party and respondent rely upon California Rules of Court, rule 232.5 as authority for having different judges hear different phases of a bifurcated trial. That rule provides in part: "When a factual issue raised by the pleadings is tried by the court separately and prior to the trial of other issues, the judge conducting the separate trial shall announce the tentative decision on the issue so tried and shall, when requested pursuant to Code of Civil Procedure section 632, issue a statement of decision as prescribed in rule 232; but no proposed judgment shall be prepared until the other issues are tried, except when an interlocutory judgment or a separate judgment may otherwise be properly entered at that time. *If the other issues are tried by a different judge or judges*, each judge shall perform all acts required by rule 232 as to the issues tried by that judge and the judge trying the final issue shall prepare the proposed judgment." (Italics added.)

This rule recognizes that different judges may hear different phases of a trial, an alternative that always has been available upon the stipulation of the parties. But it does not undermine the right of a party to have the same judge hear all the evidence and decide the facts of the case. If the party chooses to waive that right, California Rules of Court, rule 232.5 provides guidance for the manner in which successive judges shall prepare their statements of decision and the final judgment. [1]

1 Participation without objection in a subsequent phase of a bifurcated trial before a different judge may constitute waiver of this right. (See *In re Horton* (1991) 54 Cal.3d 82, 98-100 [284 Cal.Rptr. 305, 813 P.2d 1335].)

Real party claims petitioners waived their right to have Judge Schneider hear the second phase of the trial when, prior to the date set for that phase, they failed to object to having a discovery motion heard and decided by a different judge who was sitting in a law and motion department. The right to have the same trier of fact decide all the factual issues can be waived. (See *Medo v. Superior Court* (1988) 205 Cal.App.3d 64, 68-69 [251 Cal.Rptr. 924], discussing waiver of right to have same jury decide compensatory and punitive damages under Civ. Code, § 3295.) But the determination of a discovery motion, like other matters typically heard and decided in law and

motion proceedings, is not the trial of a cause involving the hearing of evidence and determination of facts. It would be unreasonable to construe acquiescence in allowing a law and motion judge to hear a discovery motion as amounting to a knowing waiver of the right to have the same judge hear and decide both phases of the evidentiary trial.

Respondent court has filed a letter brief, arguing that strict adherence to the "same judge" rule will defeat the judicial economy of bifurcated trials. ***1216** We do not agree. One of the bases for bifurcation is that determination of certain issues may alleviate the need for trial on any others. For instance, if a plaintiff is unsuccessful on the issue of liability, there will be no need for trial on the question of damages. In this case, if real party had been unsuccessful in his claim of stock ownership during the first phase, there would have been no need for an accounting and trial on his claims of dilution and diversion. This potential benefit remains even if a party demands his or her right to have the entire cause tried by the same judge.

Petitioners are entitled to have the second phase of this trial heard by Judge Schneider, or if Judge Schneider is unavailable, to have a mistrial declared so that the entire action can be heard by a different judge.

Disposition

Let a peremptory writ of mandate issue directing the superior court either to vacate its order transferring the case to a new trial judge or declare a mistrial.

Vogel (C. S.), P. J., and Hastings, J., concurred.

On April 24, 1996, the opinion was modified to read as printed above. ***1217**

EXHIBIT C

2012 WL 8133573 (Cal.Super.) (Trial Order)
Superior Court of California.
Los Angeles County

Kenneth CONETTO
v.
Kit MORRISON et al

No. BS118649.
January 27, 2012.

*1 Date: 01/27/12
Deft. 56
Electronic Recording Monitor
8:30 AM
Related to BC407275
None Reporter

ORDER ON MOTION TO DISMISS

Plaintiff Counsel

(No Appearances)

Defendant Counsel

Michael Morrissey, Attorney at Law, P.O. Box 2549 Cupertino CA, 95015-2549

Michael Johnson, Judge.
Honorable Michael Johnson Judge.
Honorable M. Lomeli, C.A. Deputy Sheriff.
Judge Pro Tem # 12.
P. Solis Deputy Clerk.

NATURE OF PROCEEDINGS:

RULING ON SUBMITTED MATTER:

MOTION OF INTERVENOR FOR MISTRIAL;

Motion for Mistrial is Granted.

This action involves competing claims of ownership for the "Bahia Emerald," now held by the Los Angeles Sheriff's Department. It was commenced as a Petition for Possession by Kenneth Conetto ("Connetto"). The petition named as respondents Kit Morrison and Todd Armstrong, who filed a claim in intervention for themselves and their related parties (collectively "Morrison"). Claims in intervention were also filed by Anthony and Wendi Thomas (collectively "Thomas"), Mark Downie ("Downie"), and others not relevant to this motion.

In pretrial rulings Judge John Kronstadt bifurcated the first cause of action alleged by Thomas, and he later conducted a bench trial on the question whether Thomas has a viable ownership claim for the Bahia Emerald. The trial was conducted during eight trial days between 9/2010 and 1/2011. After taking the matters under submission, Judge Kronstadt issued a Tentative and Proposed Statement of Decision on 4/8/11, which ruled against Thomas.

Judge Kronstadt's 4/8/11 decision states: "The Court now issues this Tentative Decision, which is also the Court's Proposed Statement of Decision. Cal. Rule of Court 3.1590(c), Any party may file timely objections to this Proposed Statement of Decision, pursuant to Cal. Rule of Court 3.1590(g). Upon receiving any such objections, the Court will determine whether to conduct a hearing on them pursuant to Cal. Rule of Court 3.1590(k), prior to the issuance of its Statement of Decision."

On 4/14/11 Judge Kronstadt left the Superior Court and became a federal judge. Thomas filed objections to Judge Kronstadt's 4/8/11 decision, and also filed the present motion for a mistrial and to strike the 4/8/11 decision. Thomas asked for his objections to be "set aside" at a hearing on 6/2/11, leaving the present motion for hearing.

Motion for Mistrial —

Thomas moves for an order declaring a mistrial and striking Judge Kronstadt's 4/8/11 decision. Thomas contends that no judge who succeeds Judge Kronstadt may finalize his 4/8/11 decision or enter judgment in conformity with that decision. Thomas relies on cases such as Raville v. Singh (1994) 25 Cal.App.4th 1127, Armstrong v. Picquelle (1984) 157 Cal.App.3d 122, and Swift v. Daniels (1980) 103 Cal.App.3d 263, which all held that a successor judge may not finalize a tentative decision prepared by a trial judge who becomes unavailable.

In opposition, Morrison and Downie cite Leiserson v. City of San Diego (1986) 184 Cal.App.3d 41. In that case, the Court of Appeal applied CCP § 635 and held that a successor judge properly finalized a tentative decision which was personally prepared by the unavailable trial judge and was so complete and comprehensive that it reflected the trial judge's final and steadfast views on the evidence.

***2** There is no question that the 4/8/11 decision was personally prepared by Judge Kronstadt and is a complete and comprehensive presentation of his views. While the 4/8/11 decision provided for further proceedings that could have resulted in modifications or additions, Judge Kronstadt's language leaves little doubt that he was expressing final and steadfast views that were subject to little more than minor modifications.

Nevertheless, Leiserson does not apply here. That is because Leiserson approved a tentative decision that was the final step in the case. The successor judge simply finalized the tentative decision and entered judgment in conformity with that decision. In our case, the 4/8/11 decision is just the first step in a series of proceedings that will determine the claims.

As Thomas has argued, there are many cases which hold that an interlocutory order following a bifurcated court trial cannot bind a successor judge without a stipulation of all the parties, and a mistrial must be granted when the judge who conducted the first phase of a bifurcated court trial is no longer available to hear subsequent phases of the trial. That is because a party is entitled to have the same trial judge consider all the evidence and decide all the issues. E.g. Guardianship of Sullivan (1904) 143 Cal. 462; European Beverage v. Superior Ct. (1996) 4 3 Cal.App.4th 1211; Rose v. Boydston (1981) 122 Cal.App.3d 92; David v. Goodman (1952) 114 Cal.App.2d 571; McAllen v. Souza (1937) 24 Cal.App.2d 247; Hughes v. De Mund (1929) 96 Cal.App. 365.

These cases all apply here. The conclusions expressed in Judge Kronstadt's 4/8/11 decision were based upon the first phase of a bifurcated court trial. The trial addressed only one of Thomas' claims his first cause of action for possession of personal property. Thomas still has four other claims remaining.

In addition the witnesses, events and facts addressed in the 4/8/11 decision are intertwined with the claims of the remaining parties. These witnesses and facts will undoubtedly arise in subsequent trial proceedings that will address the ownership claims of the other parties. The judge who presides over the subsequent proceedings should have the latitude to make independent findings and (credibility determinations, without any legal or practical influence of the 4/8/11 decision.

The motion for nonsuit is granted, and the 4/8/11 decision is stricken.

The case is set for a status and trial setting conference on February 15, 2012 at 8:30 am in Department 56.

Not later than 5 court days before the hearing, the parties shall file briefs stating their positions as to 1) how their claims should be tried, and 2) when trial should commence. The Court is inclined to order a single court trial of all ownership claims, in which each party presents its evidence and the Court rules on all ownership claims in a single decision at the end of the trial. The Court is also inclined to follow the same procedures used in the earlier trial, in which direct examination is presented by declaration and the witnesses are subject to wide-ranging direct and redirect examination in court.

Counsel for Intervenor to give notice.

CLERK'S CERTIFICATE OF MAILING/ NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 1-27-12 upon each party or counsel named below by depositing in the United States mail at the courthouse in Los Angeles, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

***3** Date: 1-27-12

John A. Clarke, Executive Officer/Clerk

By: <<signature>>

P. Solis, Deputy

Michael Morrissey

Attorney at Law

P.O. Box 2549 Cupertino CA

95015-2549

End of Document

EXHIBIT D

2011 WL 10657335 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Los Angeles County

Ken CONETTO By Eric Kitchen His Attorney in Fact, Petitioner,
v.
Kit MORRISON and Todd Armstrong, Respondents.
Mark DOWNIE, Intervenors,
v.
Eric KITCHEN et al., Kit Morrison and Todd Armstrong, Respondents.

No. BS118649.
July 15, 2011.

(PEtition Filed: 1/14/09)
Date: 7/26/11
Time: 8:30 a.m.
Dept.: 59

Respondents (Morrison, et al) Opposition to Thomas's Motion for Mistrial and to Strike Tentative Decision; Declaration of Andrew J. Spielberger

Greene Broillet & Wheeler, LLP, Lawyers, 100 Wilshire Boulevard, Suite 2100, P. O. Box 2131, Santa Monica, California 90407-2131, Tel. (310) 576-1200, Fax. (310) 576-1220, Browne Greene. State Bar No. 38441.

Balaban & Spielberger, LLP, Lawyers, 100 Wilshire Boulevard, Suite 2100, P.O. Box 1159, Santa Monica, California 90406-1159, Tel. (310) 566-1750, Fax. (310) 576-1220, Daniel K. Balaban State Bar No. 243652, Andrew J. Spielberger State Bar No. 120231, Attorneys for Respondents & Intervenors.

(Assigned to Hon. Robert O'Brien, Dept. 59).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. OVERVIEW & SUMMARY

Thomas's Motion For Mistrial Must Be Denied For the following reasons [1]:

1 In addition to this Court hearing Thomas's Motion For Mistrial, it should be remembered that Respondent previously filed Respondent's Status Conference Statement; ***Response To Thomas Objections; Request For Final Statement Of Decision***" which address the improper objections filed by Mr. Thomas. That document is attached hereto as Exhibit 9 to the extent the Court reviews the merits of Thomas's Objections.

(1) The Honorable Robert O'Brien has the authority under CCP Section 635 to enter an Order finalizing The Statement of Decision (and to eventually enter judgment when all remaining phases of the trial are completed); and

(2) The 4/8/11 Proposed Statement ofDecision became The Statement of Decision when Thomas told the Court to not consider his Objections to the Proposed Statement of Decision on 6/2/11 and the Court accepted Thomas's request; and

(3) An examination of the cases cited by counsel shows that there is no conflict in the Appellate Court decisions regarding the circumstances under which a subsequent judge can make rulings and the facts in this case show that the 4/8/11 Decision constitutes a "Statement of Decision" consistent with *Lieserson v. City of San Diego* (1986) 184 Cal.App.3d. 41; and

(4) Thomas's claim that the law mandates that only Judge Kronstadt try the remaining phases of the trial is belied by the facts and the law. Specifically,

(A) Judge Kronstadt was never going to be the trier of fact in Thomas's subsequent actions-a jury was. Thomas knew this, explicitly agreed to this and argued for it. [Exhibit 1@ 4:16-22] Thus, for this fundamental reason and for other reasons addressed below, the case of *European Beverage Inc. v. Superior Court of Los Angeles County* (1996) 43 Cal.App.4th 1211 does not apply to our facts and procedural history. Simply stated, Judge Kronstadt does not need to oversee the remaining trial phases in this action; and

(B) In his Trial Brief for Judge Kronstadt Regarding The Severance Of Legal And Equitable Issues in the trial, Thomas ***agreed that there would be a separate jury trial*** on Thomas's legal claims for damages from Fraud, Breach of Fiduciary Duty, etc. [Exhibit 1] In this Brief, Thomas ***agreed*** that Thomas's claim to ownership and possession of the Bahia Emerald ***would not be tried again after the first phase*** of trial and that said findings from the first phase would ***collaterally estopp anyone*** from re-litigating these issues again. [Exhibit 1 @4:16-22]. Since Thomas First Cause of Action to determine his rights to ownership and possession seek the same relief as to Thomas on his Declaratory Relief action, said Declaratory Relief action has already been adjudicated by the 4/8/11 Rulings. Furthermore, the fact that Thomas explicitly agreed that Judge Kronstadt would not be trying subsequent phases of the trial [Exhibit 1] shows that Thomas waived any claim that Judge Kronstadt had to do so. *Medo v. Superior Court* (1988) 205 Cal.App.3d 64; and

(C) Thomas's additional claims for Constructive Trust, Fraud, Breach of Fiduciary Duty, Conversion and Civil RICO arc all premised on one foundational fact-that Thomas had a claim to ownership and/or possession of the Bahia Emerald. But that foundational fact has now been adjudicated against Thomas and all of these other Thomas actions merely await a procedural dismissal by way of Summary Judgment or an Evidence Code Section 402 Hearing or a Non-Suit, Directed Verdict or JNOV even if they were to be tried by a jury.

II. THERE ARE NO GROUNDS FOR MISTRIAL

A. THERE IS (Or Can Be) A (FINAL) STATEMENT OF DECISION

1. The Honorable Robert O'Brien has the authority under CCP Section 635 To Finalize The Statement of Decision

The Honorable Robert O'Brien ***has*** the authority under CCP Section 635 (as provided to him by the Presiding Judge in a 5/13/11 Minute Order [Exhibit 2]and a 6/27/11 Minute Order) [Exhibit 3] to sign a formal Order finalizing the Statement of Decision signed on 4/8/11 by the Honorable John A. Kronstadt. [Exhibit 4]

CCP Section 635 states in pertinent part:

> "In all cases where the decision of the court has been entered in its minutes, and when the judge who heard or tried the case is unavailable, the formal...order conforming to the minutes may be signed by the presiding judge of the court or by a judge designated by the presiding judge."

Since Judge Kronstadt became unavailable to the California Superior Court in late April 2011, the Presiding Judge in the Stanley Mosk Courthouse (Honorable Carolyn Kuhl) had the authority to sign an Order conforming the 4/8/11 Proposed Statement of Decision to the Minutes as The Statement of Decision. In Minute Orders dated 5/13/11 [Exhibit 2]and 6/27/11 [Exhibit 3], the Presiding Judge authorized the Honorable Robert O'Brien to sign said Order pursuant to CCP Section 635.

2. When Thomas Chose Not To Assert His Objections To The Proposed Statement of Decision, The Proposed Statement of Decision Became The Statement of Decision

On 6/2/11, the parties appeared before the Honorable Robert O'Brien for a hearing regarding the finalization of the 4/8/11 Proposed Statement of Decision. At said Hearing, on the record, Thomas chose not to assert his Objections to the 4/8/11 Proposed Statement of Decision because he believed that the Court did not have the jurisdiction to hear said objections. Without ruling upon whether Mr. Thomas was right (or wrong) about the Court's jurisdiction to hear the objection argument, the Court accepted Mr. Thomas's withdrawal of his objections as reflected in the 6/2/11 Minute Order [Exhibit 5]. Counsel for Thomas was specifically asked two times if he wanted Judge O'Brien to consider Thomas's Objections To The Proposed Statement of Decision and each time he responded "no". [6/2/11 R.T. 4:6-8; 7:3-5 attached as Exhibit 8] That Mr. Thomas intended to withdraw his Objections To The

Proposed Statement of Decision is bolstered by the fact that he withdrew his reference to said objections in his Opposition To Respondent's Ex Parte To Finalize Statement of Decision. [Exhibit 6 @ 4:2]

The effect of Mr. Thomas's withdrawal of his Objections to the Proposed Statement of Decision is that the Proposed Statement of Decision became a Final Statement of Decision as Judge Kronstadt stated:
"If no objections are timely filed, this Proposed Statement of Decision will become the Court's Statement of Decision as to this phase of the action."

[Exhibit 4:4/8/11 Statement of Decision @ 2:15-17]

The aforementioned statement is proof that Judge Kronstadt was prepared to have the 4/8/11 (signed) Statement accepted "as is" as The Statement of Decision without any modifications-even though the document was titled at the time as "Tentative and Proposed Statement of Decision"). It is not as if Judge Kronstadt was going to modify this Statement of Decision on his own. Thus, as of 6/2/11 when Mr. Thomas told the Court not to consider his Objections and to set them aside, the effect was that there were no objections to consider and the 4/8/11 Proposed Statement of Decision became The Statement of Decision for the Thomas phase of this trial.

3. Case Law Also Shows That The 4/8/11 Ruling Is The Statement of Decision

The Appellate Court cases cited by the parties regarding an unavailable judge and the finalization of a Statement of Decision are not in conflict and the instant factual situation is practically on point with the decision in *Lieserson v. City of San Diego* (1986) 184 Cal.App.3d. 41. Unlike Thomas claims, *Lieserson* is not some "lone wolf" decision which stands out inconsistently from other appellate court cases cited by Thomas such as *Raville v. Singh* (1994) 25 Cal.App.4th 1127; *Armstrong v. Picquelle* (1984) 157 Cal.App.3d 122; *Swift v. Daniels* (1980) 103 Cal.App.3d 263 and *Mace v. O' Reilly* (1886) 70 Cal.231. Rather, as shown below, Lieserson involves a factual scenario which essentially mirrors the factual and procedural scenario in this case and is significantly distinguishable from the factual scenarios found in Raville (supra); *Armstrong* (supra); *Swift* (supra) and *Mace* (supra). (It seems that Thomas is hoping the Court will conduct a superficial reading of these cases and not analyze the factual basis for their respective holdings).

There are several simple but fundamentally important undisputed facts which show why our case is practically on point with *Lieserson v. City of San Diego* (supra) and why the cases (cited

by Thomas) *Raville v. Singh* (supra); *Armstrong* (supra); *Swift* (supra) and *Mace* (supra) do not apply. These simple facts are as follows:

(1) ***Judge Kronstadt personally wrote*** a 48 page detailed Proposed Statement of Decision which address the ultimate factual and legal issues in the Thomas phase of the trial. This undisputed fact is different than the unavailable judge orally announcing a tentative decision from the Bench--different from having counsel submit a proposed draft of a decision to the unavailable judge-- and different from a new judge signing off on a draft submitted by counsel. In our case, we have the actual and personal Statement of Decision drafted by Judge Kronstadt; and

(2) The 48 page detailed Proposed Statement of Decision was ***signed by Judge Kronstadt.*** This undisputed fact is different from not having Judge Kronstadt sign off on any finding or proposed finding; and

(3) ***The*** 48 page detailed ***Proposed Statement of Decision was entered into the minutes*** by a Minute Order of 4/8/11. This undisputed fact shows that the Minute Order reflects that the entire 48 page signed Proposed Statement of Decision was entered into the official Court Minutes-i.e the minutes did not enter some vague oral statement or unsigned/unfinished document.

The cases cited by Thomas: *Raville* (supra), *Armstrong* (supra) and *Swift* (supra) all involve situations in which a judge orally announced a tentative decision from the Bench but the Judge never personally prepared and/or signed a Proposed Statement of Decision nor entered that Proposed Statement of Decision into the Court Minutes. In the 1886 decision of *Mace v. O'Reilley* (supra), the judge never wrote any findings of fact or law-he just signed an Order to enter Judgment after a Bench Trial. In our case, like *Lieserson,* the Proposed Statement of Decision was prepared by the judge-signed by the Judge and entered into the Minutes by the judge-***before*** the judge became unavailable. Furthermore, like *Lieserson,* our Proposed Statement of Decision is thorough and addresses all necessary ultimate facts that were at issue in the case.

Mr. Thomas's claim that the ***comprehensiveness*** of the 48 page Proposed Statement of Decision is not relevant in determining if it is regarded as The Statement of Decision [Motion 9:13-16] is blatantly refuted by his own cited case of *Raville v. Singh* (1994) 25 Cal.App.4th 1127. The ultimate issue is to determine if the Decision of the Court was entered into the Minutes and if that Decision is detailed enough to explain the factual and legal basis for the Court's decision.

Specifically, *Raville v. Singh* (supra) states in pertinent part:

"The issue to decide in this case is whether or not the decision of the court had been entered in its minutes...On November 26, 1991, a minute order was entered reflecting the oral statement of tentative decision issued by [unavailable judge] from the bench. However, this minute order was only reflective of the tentative [oral] decision of the court...This minute order does not bring this case within the situation presented in *Lieserson v. City of San Diego* (1986) 184 Cal.App.3d. 41. In *Lieserson,* a detailed intended decision supplied by the trial court to the litigants was held comparable to a statement of decision...Also, the minute order in this case is not comparable to the detailed tentative decision in *Lieserson* because it does not explain...the factual and legal basis for its [court's] decision as to each of the principal controverted issues...Rather it merely states conclusions." *Raville v. Singh* (1994) 25 Cal.App.4th 1127,1130-1131.

Again, in our case, like *Lieserson,* Judge Kronstadt provided the parties (and any other trial judge or appellate justice) with a 48 page detailed explanation and breakdown of each of the witnesses and his findings on the ultimate issues in the case which was authored by and signed off by Judge Kronstadt and which he had entered into the Court's Minutes. This combination of undisputed and critical facts distinguishes our facts from the facts in *Raville* (supra), *Armstrong* (supra), *Swift* (supra) and *Mace* (supra).

In trying to distinguish Lieserson from the instant case, Mr. Thomas claims that the Lieserson decision was "based on the deceased judge's statement that its decision would remain the same." [Thomas Motion 8:14-16] Of course, Raville (supra) did not state that the Lieserson decision was "based on the deceased judge's statement that its decision would remain the same". as shown above, rather Raville found that Lieserson was based on the thoroughness of the written decision (written and signed by the judge and entered into the minutes). The opinion in Lieserson does not say that the decision is based on a statement by the deceased judge that he was not going to change his decision. Rather, this is Mr. Thomas's reference to a Footnote in Lieserson in which the Court of Appeal said: "We cannot confirm counsel's representation [that the judge indicated his decision would remain the same].Significantly, however Lieserson did not challenge defense counsel's representation." *Lieserson v. City of San Diego* (1986) 184 Cal.App.3d. 41, 48.

No where in the *Lieserson* case can one find the words or the holding that the Lieserson decision was based on the alleged oral statement by the unavailable judge that he was not going to modify the Proposed Statement of Decision. This is overreaching and speculation by Thomas and not supported by the record. Rather, the ***holding*** in Lieserson is based on the fact that the Proposed Statement of Decision provided a complete and adequate basis for review by another judge or judges. The Court in Lieserson recognized that theoretically a "Proposed Statement of Decision" might be modified but held that when a thorough and complete

Proposed Statement of Decision is written by the unavailable judge such a document is "in reality" a Statement of Decision.

"Both Armstrong and Swift, however, i***nvolve the very different situation*** where, although a tentative decision was rendered, ***no statement of decision was ever prepared or signed by the trial judge.*** As the Swift court explained, section 635 cannot be invoked to defeat the principle that 'the judge who hears the evidence should be the one to decide the case'. No violence is done to that principle here because [the unavailable judge's] 'Intended Decision' is in reality the 'Statement of Decision' initially requested by Lieserson pursuant to section 632...We recognize that the fact that a party may file objections to a proposed statement of decision...necessarily implies that the statement may be modified, perhaps even to the point of changing the result. We are presented here, however, with a situation in which there is no indication such modification was contemplated or ever considered. [The unavailable judge's] Intended Decision-in reality a proposed statement of decision-***provides a complete and adequate basis for appellate review.*** In such circumstances, we hold a presiding judge is empowered by section 635 to sign and enter the judgment." *Lieserson v. City of San Diego* (1986) 184 Cal.App.3d. 41, 48. [Emphasis added]

The holding and reasoning in Lieserson (supra) applies herein. As stated, the Honorable Robert O'Brien has the authority under CCP Section 635 to enter an Order in conformity with a Statement of Intended Decision since he was authorized by the Presiding Judge to do so and since the 4/8/11 Proposed Statement of Decision (drafted and signed by Judge Kronstadt and entered into the Court's Minutes) offers ***no indication*** that Judge Kronstadt ever contemplated any modification to the ultimate factual findings and conclusions in his decision and where the Proposed Statement of Decision provided a ***complete and adequate basis for review.*** *Lieserson v. City of San Diego* (1986) 184 Cal.App.3d 41. *Yield Dynamics Inc. V. Tea Systems Corporation* (2007) 154 Cal.App.4th 547; *Wolfe v. Lipsey* (1985) 163 Cal.App.3d 633; *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372.

As held in Lieserson (supra) and Valentine (below), just because a document is titled: "Tentative And Proposed Statement of Decision" or "Interlocutory Judgment" does not mandate that the Decision or Judgment can or will be modified. The Courts look at the basis and thoroughness of the "Proposed Statement of Decision" and/or "Interlocutory Judgment" to determine if in substance (over format) the decision was and is a final adjudication of a matter. *Valentine v. Baxter Healthcare Corporation* (1999) 68 Cal.App.4th 1467; *Lieserson* (supra). This is precisely what we have here.

Furthermore, Judge Kronstadt ruled that he did not believe the testimony of Mr. Thomas-and that he believed the testimony of the Brazilians-such that Judge Kronstadt found that Mr. Thomas never had an agreement to purchase the Bahia Emerald and that he never

bought it and that he never owned it. [Exhibit 4] None of Mr. Thomas's briefs explain how his objections were going to change Judge Kronstadt's mind so as to have the Statement of Decision modified on this fundamental and ultimate issue regarding the lack of credibility of Mr. Thomas as it pertains to his ownership claim of the Bahia Emerald. There is nothing to indicate that Judge Kronstadt was going to change his Statement of Decision about Thomas's lack of credibility and lack of ownership of the Bahia Emerald and stated as such in his Statement of Decision:

"The Court has considered all of the evidence presented as well as the many briefs submitted in this matter, including those just referenced, and now issues this Tentative Decision, which is also the Court's Proposed Statement of Decision. Cal, Rule of Court 3.1590(c)." [Statement of Decision 2:9-12]; and

"As a result of this phase of the trial proceedings, it is determined that the Thomas parties' claims under the first cause of action for "Recovery and Possession of Personal Property" fail. This determination shall become part of the judgment that is entered in this matter upon the final adjudication of all remaining claims of all parties." [Exhibit 1 @ 47:23-48:11.

B. THOMAS'S DUE PROCESS RIGHTS ARE NOT VIOLATED BY OTHER JUDGES TAKING OVER THE REMAINDER OF THIS CASE

Mr. Thomas claims he is entitled to a mistrial because Judge Kronstadt will not be available to oversee the remaining phases of the trial and that Mr. Thomas's due process rights will therefore be violated. Nothing could be further from the truth. Let's start with the fact that *Thomas had his day in Court* - fact he had five months to put on his case and cross-examine witnesses. So, Mr. Thomas has no claim that he was not provided due process to put forth his claim to ownership and/or possession of the Bahia Emerald. Furthermore, California Rules of Court, Rule 3.1591 clearly shows that different judges can try different phases of a trial without violating any party's due process rights.

In an unfair "swipe" at Judge Kronstadt, Mr. Thomas misstates the record when he claims that "the court rigidly restricted the initial phase of the trial to just the Fall, 2001" (when his alleged purchase transaction occurred). [Motion 3:4-5] The reality is that Mr. Thomas was allowed to put on evidence of matters that occurred after his alleged purchase of the Bahia Emerald in Brazil in September-October 2001. [Exhibit 4] Specifically, Mr. Thomas was allowed to put on evidence of his interactions with Mr. Conetto, Mr. Catlett and Mr. Kitchen from 2001 through the present (2011) [Exhibit 4]. Mr. Thomas was allowed to put on evidence of his interactions with the Brazilians after Mr. Thomas left Brazil-up to the last time he ever spoke with any of the Brazilians (at their depositions in 2010) [Exhibit 4]. Mr. Thomas was allowed to put on evidence about his alleged house fire in 2006 and even was

given the testimonial liberty to arbitrarily accuse 90% of the people in this lawsuit of having burned down his home. [Exhibit 4] To say that Mr. Thomas was restricted to putting on evidence only up to the fall of 2001 is simply wrong and misleading to this Court. Be that as it may, Mr. Thomas' Motion For Mistrial on due process grounds must be denied for the following reasons:

(1) Judge Kronstadt Was Not The Trier Of Fact For All Phases Of The Trial

Judge Kronstadt was never going to be the trier of fact in Thomas's subsequent actions-a jury was. Thomas knew this and agreed to this. [Exhibit 1] Thus, for this fundamental reason and for other reasons addressed below, the case of *European Beverage Inc. v. Superior Court of Los Angeles County* (1996) 43 Cal.App.4th 1211 does not apply to our facts and procedural history.

Specifically, *European Beverage Inc.* (supra) involved a Bench Trial for two phases: the first phase was to determine if a claimant had an ownership interest in a corporation and the second phase was to determine the value of that ownership. Both phases were to be Bench Trials. In our case, a jury was going to hear Mr. Thomas's claims (Second Cause of Action) for Fraud, Misrepresentation and Concealment; (Third Cause of Action) For Breach of Fiduciary Duty against Mr. Conetto; (Fourth Cause of Action) For Conversion; (Fifth Cause of Action) For Trespass To Chattel and (Sixth Cause of Action) For Civil RICO. As a jury was to be the finder of fact on these causes of action, there was no contemplation or agreement that Judge Kronstadt would be the trier of fact for causes of action two through six.

As to Mr. Thomas's Seventh Cause of Action For Declaratory Relief, this action might have been tried by the Court or by a jury (some Declaratory Relief actions are tried by a jury)-but it doesn't matter because the Declaratory Relief Action mirrors the First Cause of Action for Ownership and Possession-and that matter has already been determined by the 4/8/11 Statement of Decision. (“An action to quiet title is akin to an action for declaratory relief.”) *Caira v. Offner* (2005) 126 Cal.App.4th 12, 24.

Specifically, Thomas alleges in his First Amended Complaint that: “An actual controversy has developed and now exists between Thomas, on the one hand, and all the other defendants...regarding rights and claims to and ownership of the BAHIA EMERALD. As hereinabove alleged, THOMAS claims all rights to and ownership of the BAHIA EMERALD since October 2001.” This Declaratory Relief action is the same claim as Mr. Thomas's First Cause of Action For “Ownership and Possession” of the Bahia Emerald and will not be tried again Even Thomas admits that Thomas's claim to ownership and possession of the Bahia Emerald would ***not*** be tried again after the first phase of trial and that said

findings from the first phase would collaterally estopp ***anyone*** from re-litigating these issues again. [Exhibit 1]

(2)Thomas Admits His Claims To Ownership Are Over

Thomas agreed that Thomas's claim to ownership and possession of the Bahia Emerald would *not* be tried again after the first phase of trial and that said findings from the first phase would collaterally estopp *anyone* from re-litigating these issues again. In his "Memorandum Of Points And Authorities Re Severance Of Legal And Equitable Issues" which was filed pursuant to Judge Kronstadt's request to have the parties brief and state their positions about how the trial(s) should be conducted, Thomas stated the following:
"Notwithstanding the likelihood of a subsequent separate jury trial on the legal claims (i.e. monetary damages for fraud, etc.) severance of the equitable and legal issues, and trial of the equitable issues first, will still promote judicial economy as this Court's findings of fact on the equitable issues (i.e. ownership of the Bahia Emerald) will be binding on the jury. [Citation]. Consequently, in any subsequent separate jury trial, the threshold issue of ownership will NOT have to be relitigated." [Exhibit 1 @ 4:16-22].

If it seems as if Thomas is taking the exact opposite position now in his Mistrial Motion than he was before the trial-it is because he is. Thomas wanted to use collateral estoppel if he won-but does not want to have it used against him since he lost. But collateral estoppel requires that Thomas not be allowed to re-litigate his claim to ownership and/or possession in his Declaratory Relief action since he already lost this claim in the In Rem action. *Bernard v. Bank of merica* (1942) 19 Cal.2d 807; *People v. Taylor* (1974) 12 Cal.3d 686. Consistent with the above, Thomas will not have standing to litigate the ownership claims that remain between Respondents and Downie since the 4/8/11 Rulings hold that Thomas has no claim to ownership of the Bahia Emerald.

In addition to the collateral estoppel effect from the 4/8/11 Rulings, Thomas's position should also be taken as his ***waiver*** of his claim that only Judge Kronstadt could oversee the remaining phases of the trial and a waiver of any claim to ownership of the Bahia Emerald in any subsequent action since he clearly stated that "the threshold issue of ownership will NOT have to be relitigated". [Exhibit 1] See *Medo v. Superior Court* (1988) 205 Cal.App.3d 64; *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307. In *Medo* (*supra*), the defendant waived his claim for the same trier of fact ***just by remaining silent*** when the issue was raised by the court. In our case Thomas did not remain silent, ***Thomas affirmatively stated his position*** that a jury would be the trier of fact in subsequent phases of the trial-not Judge Kronstadt. Additionally, Thomas agreed that he would not re-litigate the ownership and possession issue and waived his right to do so. *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307.

(3) Thomas's Remaining Claims Are Based On An Already Adjudicated Fact-That He Has No Ownership Interest In The Bahia Emerald

Thomas's additional claims for Constructive Trust, Fraud, Breach of Fiduciary Duty, Conversion and Civil RICO are all premised on one foundational fact-that Thomas had a claim to ownership and/or possession of the Bahia Emerald. But that foundational fact has now been adjudicated against Thomas and all of these other Thomas actions merely await a procedural dismissal by way of Summary Judgment or an Evidence Code Section 402 Hearing or a Non-Suit, Directed Verdict or JNOV. As the 4/8/11 Rulings show, Thomas never had an agreement to purchase the Bahia Emerald, never paid $60,000 for the purchase of the Bahia Emerald and never had any ownership claim to the Bahia Emerald. [Exhibit 4]

Mr. Thomas claims that he is entitled to a Constructive Trust in the Bahia Emerald because he was fraudulently prohibited from obtaining title due to an alleged conspiracy between the Brazilians, Conetto and Catlett. Again, Mr. Thomas is factually and legally wrong.

A Constructive Trust is an equitable remedy that compels a wrongful possessor to convey the property or interest in the property to the ***rightful owner.*** *Communist Party of the U.S. v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980. Thus, in order to prevail on his Constructive Trust theory, Mr. Thomas first has to prove that he is the rightful owner. He then has to prove that he has been deprived of his rightful ownership. But the 4/8/11 Rulings held that Mr. Thomads is not-and never was- the rightful owner or even a rightful claimant to the Bahia Emerald. Thus, Mr. Thomas' Construction Trust claim fails before it even starts.

As proof that Causes of Action 2-7 are premised upon Thomas having an ownership interest in the Bahia Emerald, an examination of Thomas's First Amended Complaint [Exhibit 7] shows that each and every cause of action is based on the same foundational allegation-that Thomas had an ownership interest in the Bahia Emerald. Specifically, Thomas First Amended Complaint reads in pertinent part as follows:

In his Preamble at Paragraph 6, Thomas state the basis for their Intervention into the action: “THOMAS intervenes on the grounds they own the property at issue in this action...” [Exhibit 7]

In their First Cause of Action For Recovery And Possession of The Bahia Emerald, Thomas states at Paragraph 26: “At all times herein relevant, since on or about October 17, 2001 when he paid the $60,000 purchase price for the BAHIA EMERALD, TI IOMAS has been its rightful owner and entitled to exclusive possession of it.” [Exhibit 7]

In their Second Cause of Action for Fraud, Misrepresentation and Concealment against Mr. Conetto, Mr. Kitchen and Mr. Catlett, Thomas alleges at Paragraphs 30 and that these men "colluded and conspired...to deprive him of ownership and possession of the Bahia Emerald...first by falsely and fraudulently representing to him that the Bahia Emerald had been shipped from...Brazil to him in California and then subsequently beginning in and around January or Fenbruary 2002, falsely and fraudulently representing to him that the Bahia Emerald had been stolen at point of shipment." [Exhibit 7]

In their Third Cause of Action For Breach of Fiduciary Duty against Mr. Conetto, Thomas alleges in Paragraph 48 that the "violation of his fiduciary duties to Thomas were performed intentionally as part of a scheme to defraud and deprive Thomas of his rights of ownership to and possession of the Bahia Emerald." [Exhibit 7]

In their Fourth Cause of Action For Conversion, Thomas alleges at Paragraph 50 that: "At all times herein relevant since October 2001, Thomas has been the rightful owner of entitled to possess the Bahia Emerald." [Exhibit 7] In their Fifth Cause of Action For Trespass To Chattel, Thomas alleges at Paragraph 54 that:"At all times herein relevant since October 2001, Thomas has been the rightful owner of entitled to possess the Bahia Emerald." [Exhibit 7] In their Sixth Cause of Action For Civil RICO, Thomas alleges at Paragraph 61 that the purpose of the enterprise "was to steal Thomas' personal property, specifically.the Bahia Emerald and through a pattern of racketeering." [Exhibit 7]

In their Seventh Cause of Action For Declaratory Relief, Thomas alleges at Paragraph 72 that: "An actual controversy has developed and now exists between Thomas, on the one hand, and all the other defendants...regarding rights and claims to and ownership of the BAHIA EMERALD. As hereinabove alleged, THOMAS claims all rights to and ownership ofthe BAHIA EM ERALD since October 2001." [Exhibit 7]

The above shows that every cause of action brought by Thomas is based on the lynchpin premise that Mr. Thomas obtained an ownership interest in the Bahia Emerald at any time-specifically for Mr. Thomas-in October 2001. But the 4/8/11 Statement of Decision by Judge Kronstadt holds that none of these allegations are true-that Mr. Thomas never had an agreement to purchase the Bahia Emerald-that Mr. Thomas never paid $60,000 to purchase the Bahia Emerald-and that Mr. Thomas never had-nor does he have-any ownership interest in the Bahia Emerald-nor any right to possess the Bahia Emerald. [Exhibit 4]

III. CONCLUSION

For all of the aforementioned reasons, the Thomas Motion For Mistrial must be denied.

DATED: July 14, 2011

Respectfully submitted,

GREENE BROILLET & WHEELER, LLP BALABAN & SPIELBERGER, LLP

Browne Greene

Andrew J. Spielberger

Attorneys for Respondents & Intervenors