

Case no. 06-15513

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

STEEFEL, LEVITT & WEISS;  
HARVEY S. SCHOCHET; PASCOE  
& RAFTON; and WILLIAM R.  
PASCOE,

D.C. No. CV-03-0440-JCS  
Northern District of  
California, San Francisco

Plaintiff, Counterdefendants,  
Counterclaimants, and Appellees,

Hon. Joseph C. Spero  
United States Magistrate  
Judge

v.

ASTOR HOLDINGS, INC.; ROBOT  
WARS, LLC; STEVEN J. PLOTNICKI;  
and SMILE/ASTOR PLACE COMMU-  
NICATIONS,

Appeal from judgment on  
summary judgment rulings  
and verdict, and from  
ancillary awards

Defendants, Counterclaimants,  
Counterdefendants, and Appellants.

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**BRIEF FOR APPELLANTS**

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## TABLE OF CONTENTS

	<b>Page</b>
Table of Authorities .....	iv
INTRODUCTION .....	1
STATEMENT OF JURISDICTION .....	4
ISSUES PRESENTED FOR REVIEW .....	6
STATEMENT OF THE CASE .....	8
I. THE PARTIES AND PLEADINGS .....	8
II. THE SUMMARY JUDGMENT RECORD .....	11
A. The Duty of Care Regarding the Clients’ Pursuit of Roski, a Key Adversary .....	11
B. Liability for Consenting to Thorpe’s Hostile Reorganization Plan .....	19
C. Liability for the Clients’ Capitulating Settlement with Thorpe .....	20
D. The Sufficiency of the Attorneys’ Claims of Account Stated .....	27
1. Steefel’s Claim .....	28
2. Pascoe’s Claim .....	31
III. THE ORAL AGREEMENT SAID TO SUPPORT PLOTNICKI’S PERSONAL LIABILITY .....	34
SUMMARY OF ARGUMENT .....	37

ARGUMENT .....	40
I. THE SUMMARY JUDGMENT RULINGS WERE ERRONEOUS .....	40
A. THE CONTROLLING STANDARDS OF REVIEW .....	40
B. THE SUMMARY JUDGMENT RECORD ESTABLISHES THE ATTORNEYS’ DUTY OF CARE, AS A MATTER OF LAW, AS TO THEIR CLIENTS’ PURSUIT OF ROSKI .....	43
1. Introduction .....	43
2. Steefel’s Duty Arose from its Written Retainer Agreement .....	44
3. Both Firms’ Duty Arose from their Actual Involvement in this Matter .....	45
4. At a Minimum, Both Firms Had a Duty To Advise of the Issue and Warn It Exceeded the Scope of their Engagements .....	46
C. THE SUMMARY JUDGMENT RECORD PRESENTED A GENUINE ISSUE WHETHER PASCOE’S CONSENT TO THE CONFIRMATION OF THORPE’S REORGANIZATION PLAN CAUSED COMPENSABLE HARM TO THE CLIENTS .....	49
D. THE SUMMARY JUDGMENT RECORD PRESENTED A GENUINE ISSUE WHETHER THE CLIENTS COULD HAVE OBTAINED A BETTER RESULT AGAINST THORPE BUT FOR THE ALLEGED MALPRACTICE .....	52

E.	THE SUMMARY JUDGMENT RECORD PRESENTED A GENUINE ISSUE WHETHER THE CLIENTS' OBJECTIONS TO THE ATTORNEYS' INVOICES WERE SUFFICIENT TO DEFEAT THEIR CLAIMS OF ACCOUNT STATED .....	58
1.	The Moving Papers Were Insufficient .....	59
2.	The Opposition Evidence Raised Genuine Issues In any Event .....	61
II.	THE ERRONEOUS SUMMARY JUDGMENT RULINGS PRODUCED AN INCOMPLETE AND UNFAIR JURY TRIAL, REQUIRING A REVERSAL OF THE PRINCIPAL JUDGMENT AND ANCILLARY AWARDS FOR A NEW TRIAL ON REMAND .....	68
III.	THE LACK OF EVIDENCE SUPPORTING ANY AWARDS AGAINST PLOTNICKI INDIVIDUALLY COMPELS THE VACATION OF THOSE AWARDS AND ENTRY OF JUDGMENT IN HIS FAVOR .....	73
	CONCLUSION .....	78
	CERTIFICATE OF COMPLIANCE WITH RULE 32(A)	
	STATEMENT OF RELATED CASES	
	CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991) .....	70, 71
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986) .....	42
<i>Clark v. Coats &amp; Clark, Inc.</i> , 929 F.2d 604 (11th Cir.1991) .....	42
<i>Crane v. Stansbury</i> , 173 Cal. 631 (1916) .....	67
<i>Cusick v. Boyne</i> , 1 Cal. App. 643, 82 Pac. 985 (1st Dist. 1905) .....	67
<i>Friedman v. Merck &amp; Co., Inc.</i> , 107 Cal.App.4th 454 (2nd Dist. 2003), <i>cert. denied</i> , 538 U.S. 1033 (2003) .....	43
<i>Gleason v. Klamer</i> , 103 Cal.App.3d 782 (2nd Dist. 1980) .....	59, 61, 62
<i>Gulf Ins. Co. v. Berger, Kahn, et al.</i> , 79 Cal.App.4th 114 (2nd Dist. 2000), <i>review denied</i> .....	74
<i>Hemenover v. Lynip</i> , 107 Cal.App. 356, 290 P. 1089 (1st Dist. 1930) .....	65, 66
<i>Hendy v. March</i> , 75 Cal. 567, 17 Pac. 702 (1888) .....	67
<i>Janik v. Rudy, Exelrod &amp; Zieff</i> , 119 Cal.App.4th 930 (1st Dist. 2004), <i>review denied</i> .....	47
<i>Lacy Mfg. Co. v. Gold Crown Mining Co., Ltd.</i> , 52 Cal.App.2d 568 (2nd Dist. 1942) .....	66

<i>Lewis &amp; Queen v. N.M. Ball Sons</i> , 48 Cal.2d 141 (1957) . . . . .	77
<i>Marshak v. Bellesteros</i> , 72 Cal.App.4th 1514 (2nd Dist. 1999) . . . . .	56, 57
<i>Nichols v. Keller</i> , 15 Cal.App.4th 1672 (5th Dist. 1993), <i>review denied</i> . . . . .	37, 43, 45
<i>Nissan Fire &amp; Marine Inc. Co., Ltd. v. Fritz Companies, Inc.</i> , 210 F.3d 1099 (9th Cir. 2000) . . . . .	41, 42, 53
<i>Northrop Corp. v. Triad Intern. Marketing, S.A.</i> , 842 F.2d 1154 (9th Cir. 1988) . . . . .	5
<i>Oberson v. U.S. Dept. of Agriculture</i> , 441 F.3d 703 (9th Cir. 2006) . . . . .	43
<i>Obrey v. Johnson</i> , 400 F.3d 691 (9th Cir. 2005) . . . . .	3, 39, 69
<i>Olsen v. Idaho State Bd. of Med.</i> , 363 F.3d 916 (9th Cir. 2004) . . . . .	41
<i>Pacific Gas &amp; Elec. Co. v. Thompson Drayage &amp; Rigging Co.</i> , <i>Inc.</i> , 69 Cal.2d 33 (1968) . . . . .	62, 63
<i>Piscitelli v. Friedenber</i> g, 87 Cal.App.4th 953 (4th Dist. 2001) . . . . .	45
<i>U.S. SEC v. Carrillo</i> , 325 F.3d 1268 (11th Cir. 2003) . . . . .	5
<i>Slaven v. American Trading Transp. Co., Inc.</i> , 146 F.3d 1066 (9th Cir. 1998) . . . . .	38, 49, 50
<i>Soldano v. U.S.</i> , 453 F.3d 1140 (9th Cir. 2006) . . . . .	40, 41
<i>Standard Oil Co. v. Van Etten</i> , 107 U. S. 325 (1882) . . . . .	67
<i>Thompson v. Halvonik</i> , 36 Cal.App. 4th 657 (1st Dist. 1995), <i>review denied</i> . . . . .	53, 56

*Viner v. Sweet*, 30 Cal. 4th 1232 (2003) . . . . . 57

**STATUTES**

Cal. Bus. & Prof. Code § 6148 . . . . . 36, 40, 76, 77, 78

Cal. Civil Code § 1691 . . . . . 77

28 U.S.C. § 1332(a)(1) . . . . . 4

**MISCELLANEOUS**

1 Mallen & Smith, *Legal Malpractice* (2006 ed.) . . . . . 45, 47, 75

## INTRODUCTION

This case presents a complex attorney-client dispute with comparatively simple appellate issues. Erroneous summary judgment rulings decimated the clients' claims and defenses, resulting in an unfair jury trial on the remainder of the case.

The clients, two related New York companies, retained California bankruptcy specialists for bi-coastal litigation against a former business partner, Mark Thorpe ("Thorpe"), and his new financier, Edward Roski ("Roski"). After receiving several hundred thousand dollars in fees, the bankruptcy attorneys produced the following results:

(1) a hostile reorganization plan advanced by Thorpe was adopted with the unauthorized consent of the clients' counsel, vitiating their right to appeal from the confirmation order;

(2) as a result of Thorpe's discharge under the plan, a bankruptcy court enjoined the clients' New York action against Thorpe although both bankruptcy counsel had advised it was proper;

(3) a contempt proceeding followed before an angry bankruptcy judge, targeting not only the clients but their principal individually, and

precipitating a threat by their lead bankruptcy counsel to withdraw for fear his testimony could undercut his firm's fee claim;

(4) on the eve of the contempt trial, under duress from all the foregoing circumstances, the clients settled with Thorpe on terms the bankruptcy counsel admitted below "essentially capitulat[ed] to all of Thorpe's demands" (Excerpts of Record ["ER"] 55, 59, 168); and

(5) the clients' New York action against Roski, a key "deep pocket" adversary, was decimated under a rule of bankruptcy law the bankruptcy counsel never mentioned despite their active involvement in planning the clients' litigation strategy against Roski;

Notwithstanding such a thorough debacle, the appellee law firm of Steefel, Levitt & Weiss decided to bring suit for its unpaid invoices. (ER 1-15) This naturally produced a malpractice counterclaim against both the Steefel firm and the other appellee, the firm of Pascoe & Rafton (ER 22-30), which counterclaimed for unpaid invoices as well. (ER 40-45)

Regrettably, the litigation below was decimated as badly as the underlying proceedings. Despite contrary evidence in their own summary

judgment papers, the attorneys obtained conclusive rulings that they had (1) no duty of care as to the pursuit of Roski, (2) no liability for consenting to the hostile reorganization plan; and (3) no liability for the injury reflected by the capitulating settlement with Thorpe. (ER 213-239)

The clients thus limped into a jury trial with only a remnant of their own claims and associated defenses to the attorneys' fee claims. The resulting verdict and judgment are untenable for that reason. The appellee attorneys cannot begin to meet their burden under *Obrey v. Johnson*, 400 F.3d 691, 699-702 (9th Cir. 2005), to prove that the verdicts for the entirety of their fee claims were *not* tainted by the clients' inability to pursue significant defenses at the trial.

If the Court agrees and remands for a new trial, it should hold that the trial should include the attorneys' alternate theory of account stated, that their invoices or statements of account became conclusive in the absence of timely objections. They obtained summary judgments on that theory (ER 227-230), but there were genuine issues on both the substance and timing of the clients' objections.

Finally, the Pascoe firm overreached in obtaining a personal judgment and prevailing-party fee award against the clients' principal, appellant Steven J. Plotnicki ("Plotnicki"). Although the Pascoe firm defended him personally at the contempt proceeding, this resulted solely from his companies' disputes (mishandled by counsel) and there was no evidence Plotnicki ever agreed to pay any resulting fees personally — let alone prevailing-party fees in litigation with the Pascoe firm. And on top of that, the personal judgment was for the *entirety* of the firm's fee claim, despite appellee William Pascoe's own testimony that the personal representation accounted for only a small fraction of that claim. (RT 383-384)

### **STATEMENT OF JURISDICTION**

Subject matter jurisdiction below was predicated on diversity of citizenship under 28 U.S.C. § 1332(a)(1). The amended judgment appealed from (ER 280-282) was final within the meaning of 28 U.S.C.

§ 1291 and this Court's appellate jurisdiction is predicated on that statute. The amended judgment resolved all outstanding claims between all parties.<sup>1</sup>

The amended judgment was entered on January 4, 2006 (ER 280), and appellants timely filed their notice of appeal from it on January 26, 2006. (ER 283) Moreover, they had timely moved for relief under Rule 59, Federal Rules of Civil Procedure, from the original judgment of August 19, 2005. (ER 251) That motion was denied on January 4, 2006 (ER 267), along with an order disposing of the appellees' motions for attorneys' fees. (ER 272)

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<sup>1</sup> The amended judgment awarded prejudgment interest to Steefel but without fixing the amount. (ER 281 ln. 5) However, the underlying principal amounts and dates were fixed by the relevant invoices and the interest rate was fixed by the law of the forum (10%) in this diversity action. *Northrop Corp. v. Triad Intern. Marketing, S.A.*, 842 F.2d 1154, 1155 (9th Cir. 1988). Thus, the outstanding calculation is ministerial and does not defeat appellate jurisdiction. *U.S. SEC v. Carrillo*, 325 F.3d 1268, 1272-1273 (11th Cir. 2003).

## ISSUES PRESENTED FOR REVIEW

### 1.

Were the attorneys entitled to summary judgment rejecting any duty of care as to the clients' pursuit of Roski, a key "deep pocket" adversary, when the attorneys' own moving papers evidenced that they knew the clients' pursuit of Roski was a central goal in their overall litigation strategy, they participated in that goal far more extensively than the district court acknowledged, and one of the firms expressly included that goal in the scope-of-duty provisions of its retainer agreement?

### 2.

Was the Pascoe firm entitled to summary judgment rejecting any liability for its unauthorized consent to the confirmation of Thorpe's reorganization plan, on the grounds that the clients suffered no harm because they noticed an appeal from the confirmation order, when as a matter of law Pascoe's consent made the appeal ineffectual and there was a genuine issue whether Thorpe's discharge produced by the consent led directly to the contempt proceeding and capitulating settlement?

**3.**

Were the attorneys entitled to a summary judgment rejecting any liability for the clients' settlement with Thorpe, on the grounds of insufficient evidence that a better outcome was possible, when the attorneys' own moving papers evidenced that the settlement was a capitulation to Thorpe under duress caused by their malpractice, not a reflection of the objective value of the clients' claims against him?

**4.**

If the Court agrees the summary judgment rulings erroneously deprived the clients of significant defenses at the subsequent jury trial, may the resulting judgment be affirmed nonetheless when the absence of a trial record on the excluded defenses makes it impossible for the appellees to meet their burden to *rule out* prejudice from the exclusion?

**5.**

If the Court orders a new trial for any of the foregoing reasons, should it include the attorneys' claims of account stated, adjudicated in their favor by summary judgment, when the record raised a genuine issue

as to the adequacy and timing of the clients' objections to the invoices and statements in question?

**6.**

Independently, should the principal and post-trial fee awards against appellant Plotnicki individually be vacated for insufficient evidence of any agreement to pay the relevant fees individually, or, at a minimum, reversed and remanded for a reduction in amount in light of undisputed testimony of the limited scope of the personal representation?

**STATEMENT OF THE CASE**

**I.**

**THE PARTIES AND PLEADINGS**

The legal services at issue in this case involved a dispute between the partners in an entertainment venture. In brief, the appellant New York companies (“the clients”)<sup>2</sup> financed an idea of their former partner,

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<sup>2</sup> While the clients had different rights and remedies in the underlying dispute, the differences are immaterial to this appeal involving their bankruptcy counsel.

Thorpe, to stage gladiator-style battles among remote-controlled robots. When the partnership broke down acrimoniously, the clients sued Thorpe in New York, he responded with a bankruptcy filing in Northern California, the clients sued him again in New York — precipitating contempt proceedings in the bankruptcy court — and also sued his new financier, Roski, for colluding with Thorpe in a variety of ways. The clients were represented and advised by bankruptcy specialists at the two appellee law firms in California, with other counsel prosecuting the actions venued in New York.

Appellee Steefel, Levitt & Weiss (“Steefel”) commenced the present action by complaint for damages filed on February 3, 2003. (ER 1) It asserted alternate theories of breach of contract and account stated to recover \$493,053.54 in unpaid invoices (ER 6, ¶ 15]), acknowledging the prior receipt of fees totaling \$246,690.64. (*Id.*)

Named as defendants were the two appellants, Astor Holdings, Inc. (“Astor”) and Robot Wars, LLC (“Robot Wars”), identified as the clients

in Steefel's attached retainer agreement. (ER 13)<sup>3</sup> However, Steefel never sued the clients' principal, appellant Steven J. Plotnicki ("Plotnicki"), individually. The retainer agreement and transmittal message attached to its complaint reflected that Plotnicki refused to sign the personal guarantee Steefel had requested. (ER 9 & 15)

Along with their answer to the Steefel complaint filed on or about June 18, 2003, Astor and Robot Wars filed a malpractice counterclaim against Steefel, its lead attorney Harvey S. Schochet ("Schochet"), the appellee firm of Pascoe & Rafton, and its lead attorney William R. Pascoe (together, "Pascoe," unless otherwise noted). (ER 22) The relevant details will be summarized in the following sections of this brief.

Finally, Pascoe responded with its own counterclaim on August 21, 2003. (ER 32) Pascoe sought to recover a total of \$114,403.03 in unpaid invoices on alternate theories of breach of contract and account stated.

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<sup>3</sup> Steefel and Pascoe also sued an alleged entity named Smile/Astor Place Communications because it was the requested addressee for invoices. (RT 203) But appellee Harvey Schochet, Steefel's principal attorney in the underlying dispute, testified that Smile/Astor was not involved in it. (*Id.* at 204) Nor was it a party to Steefel or Pascoe's retainer agreement.

(ER 44) Unlike Steefel, however, Pascoe sued Plotnicki individually even though its attached retainer agreement (ER 47) and all the letters transmitting its invoices (ER 177-191) named only the corporate client, Profile Records, Inc., the predecessor to Astor.

## **II.**

### **THE SUMMARY JUDGMENT RECORD**

As indicated previously, the central issue on appeal is the propriety of summary judgment rulings radically curtailing the clients' claims and defenses at the ensuing jury trial. Accordingly, it is unnecessary to elongate this brief with a detailed review of the underlying dispute or the relevant legal services. Instead, we focus on the relevant portions of the summary judgment record.

## **A.**

### **The Duty of Care Regarding the Clients' Pursuit of Roski, a Key Adversary**

We begin with the earliest of the three events material to this appeal. One of the clients' claims and defenses involved the attorneys' failure to advise them of a rule of bankruptcy law, the preemption doctrine, that

materially affected their pursuit of remedies against Roski and his competing company named BattleBots. The preemption doctrine wound up barring significant claims in their New York action known below as *Roski III*, filed on March 5, 2001. (ER 100-105) And in opposition to the summary judgment motions below, the clients submitted Plotnicki's declaration that they would not have brought *Roski III* at all, costing them a great deal of money, had they been advised of the preemption doctrine. (ER 211, ¶ 5)

The district court, however, held as a matter of law that Steefel and Pascoe "did not assume a duty of care" to the clients with respect to their pursuit of Roski (ER 236, lns. 7-9; 237 lns. 11-12), so they had no duty to mention the preemption doctrine. The court reasoned that the clients' New York counsel, Fran Jacobs, had primary responsibility for *Roski III*; that Steefel and Pascoe's only involvement was reviewing and editing her draft complaint four days before she filed it (ER -236, lns. 11-28); and that they only reviewed it for its possible "impact on the [Thorpe] bankruptcy proceeding," not its "likelihood of success" against Roski. (*Id.*, lns. 13-14)

However, Steefel and Pascoe's own moving papers<sup>4</sup> evidenced their much deeper and earlier involvement in the clients' goal of pursuing Roski and his company.

To begin with, the attorneys' moving papers included Steefel's retainer agreement. (ER 157-159) Although executed in August 2001, several months after the filing of *Roski III*, it began by confirming Steefel's representation "since August, 2000 of Robot Wars, LLC in connection with the Thorpe bankruptcy case and related litigation involving Thorpe, BattleBots and Ed Roski." (*Id.* at 157; emphasis added) Later, too, the agreement stated that the firm's representation, while originally limited to certain appellate work, "has expanded well beyond that appeal, involving work in the Thorpe bankruptcy case as well as several new litigation matters arising out of the Thorpe, BattleBots and Roski situation." (ER 158, ¶ 7; emphasis added)

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<sup>4</sup> Pascoe joined in Steefel's motion for summary judgment as well as filing its own. (ER 62-64)

Contracts aside, though, Pascoe and Steefel’s moving papers included a host of evidence confirming their early and active involvement in the clients’ goal of pursuing Roski. That involvement dated from the beginning of February 2001 — several weeks, not days, before the filing of *Roski III* on March 5, 2001. (ER 93) Indeed, Steefel included its invoices in its moving papers below, and they reflected work on Roski-related issues from February 7, 2001 through and after the filing of *Roski III*. (ER 160-166)

The attorneys submitted excerpts from the deposition of Schochet, Steefel’s principal attorney in this matter, that he and Pascoe began coordinating their efforts “as an outgrowth of a plan of reorganization that Thorpe filed sometime in early 2001. . . .” (ER 121, lns. 9-10) The attorneys’ moving papers established that the filing date of that plan was “on or about January 26, 2001.” (ER 114, lns. 23-25) And their papers included an excerpt from Plotnicki’s deposition stating he had discussed the pursuit of Roski in a conference call with both Steefel and Pascoe “following Thorpe’s plan being submitted.” (ER 133, ln. 18; 114, lns. 5-14)

The attorneys' moving papers also documented the importance of pursuing Roski to the clients' overall strategy. Included in their papers, for example, was Schochet's testimony that one of the clients' fears about Thorpe's proposed reorganization plan was its "impact on . . . [their] claims against a guy named Ed Roski and BattleBots." (ER 121, lns. 18-20) Schochet agreed with his questioner that, at this same juncture, the clients' "potential claims against Roski became . . . an issue in the strategy in handling the litigation . . . ." (ER 122, lns. 13-16)

And it was not just an issue, but a primary one. As Schochet testified: "[I]t was apparent to me from everything [Plotnicki] and Jacobs were saying that the real action was against Roski and BattleBots." (ER 127, lns. 17-19) Schochet testified that the clients' "real goal was . . . to collect from a deep pocket" (ER 130, lns. 10-11), namely, "Roski and BattleBots. That's what [Plotnicki] perceived the deep pocket to be." (*Id.*, lns. 14-15) "Roski was reported to be a fairly wealthy guy. . . ." (*Id.*, lns. 20-21)

The attorneys' moving papers also evidenced the depth of the clients' commitment to the pursuit of Roski. They submitted Plotnicki's testimony that he had discussed with both bankruptcy specialists a concern that confirmation of Thorpe's proposed reorganization plan might "impact on our ability to litigate issues against Mr. Roski and BattleBots in the District Court." (ER 137, lns. 18-22) And the attorneys adduced Schochet's testimony that even the new action against Thorpe was filed in part because it would "help[] [the] case against Roski and BattleBots to have Thorpe hanging out there." (ER 126, lns. 21-22)

Similarly, the attorneys adduced Plotnicki's report of conversations with both bankruptcy specialists about "how we could object to the disclosure statement [accompanying Thorpe's plan] without it impacting in a negative way our litigation against Mr. Roski and BattleBots in District Court, that we were planning to file in the District Court. . . ." (ER 138, lns. 12-17) Nor did the attorneys shut their eyes or cross their fingers for that part of the discussion because it exceeded the scope of their duties. Rather, "Mr. Schochet crafted a way to accomplish that" and "the

objections we filed [were] in line with Mr. Schochet's . . . suggestion."

(ER 138, lns. 17-20)

The attorneys' moving papers also proved their involvement in the goal of pursuing Roski far exceeded their review of the draft complaint in *Roski III* a few days before its filing. The excerpts from Schochet's deposition established that, from the beginning of February 2001, they participated in frequent phone conversations with Plotnicki and Jacobs, the clients' New York lawyer, and one topic was the pursuit of remedies "against Roski and BattleBots. . . ." (ER 128, lns. 1-4) Schochet added that "our conversations, when we were all on the phone together, . . . tended to be far-reaching and touched on all aspects of everything." (*Id.*, lns. 8-11) Indeed, the attorneys' excerpts from Schochet's deposition included testimony that Pascoe and he formed part of an ongoing "advisory team" with the clients' New York counsel. (ER 124, lns. 17-19) Steefel and Pascoe's work was not limited to isolated bankruptcy issues.

The attorneys also adduced Schochet's testimony he had *advised* his clients to pursue Roski. He advised them to settle with Thorpe "and chase

Mr. Roski” instead. (ER 129, lns. 10-15) He thought Roski’s financing of Thorpe’s bankruptcy “had one heck of a smell to it” that might justify remedies subject to further discovery. (*Id.*, lns. 20-23) He testified that “BattleBots had succeeded in managing to get itself on the Tonight Show . . . [and was] all over Las Vegas” (ER 130, lns. 22-24), profiting from a concept the clients believed had been “st[olen]” from their venture with Thorpe. (ER 131, lns. 1-2)

Finally, the clients’ opposition papers included deposition testimony by their New York counsel, Ms. Jacobs, establishing her reliance on Steefel and Pascoe for advice about any “bankruptcy ramifications” of *Roski III* or other related actions in New York. As she testified, “[i]f there were any issues that had bankruptcy ramifications, I would have expected the bankruptcy lawyers to call them to my attention.” (ER 197, lns. 8-11; see also ER 196, lns. 15-23) And she testified that the bankruptcy preemption issue fell in that category. (ER 197, lns. 12-16)

**B.**

**Liability for Consenting to Thorpe's  
Hostile Reorganization Plan**

The next claim and defense excised by summary judgment involved Pascoe's consent in April 2001 to the confirmation of Thorpe's hostile reorganization plan despite the clients' instructions to resist it. (ER 212, ¶ 10) Although the parties debated below whether the bankruptcy court would have confirmed the plan anyway, the district court did not address that issue. Instead, it ruled there was "no evidence Pascoe's alleged conduct caused any damages." (ER 237, lns. 19-20)

The court acknowledged Plotnicki's opposition declaration that the clients "would have appealed any confirmation of Thorpe's plan" but for Pascoe's "compromise" in court leading to the entry of the confirmation order by consent. (ER 237-238; see ER 211, ¶ 7) However, the court held the clients had in fact "appealed" from the order in question. (ER 238, lns. 2-4)

It is undisputed the clients "filed a notice of appeal from the plan confirmation order on October 23, 2001." (ER 110, lns. 26-27) But as

their trial counsel below aptly stated, there is a “difference between appealing something you stipulated to and what you didn’t.” (RT July 15, 2005, at 81, lns. 24-25) The difference is a legal matter, however, and therefore more appropriately addressed by way of argument.

Factually, however, the attorneys’ moving papers evidenced that the confirmation of Thorpe’s plan by consent triggered a chain reaction of injury to the clients. The plan included Thorpe’s “release[] from all dischargeable debts” (ER 108, ¶ 2), yet Pascoe and Steefel had advised the clients they could nonetheless pursue an action in New York against Thorpe. (ER 140, 141, 151, 211 at ¶¶ 3-4) As we now demonstrate, that advice proved devastating to the clients.

### C.

#### **Liability for the Clients’ Capitulating Settlement with Thorpe**

The third claim and defense summarily rejected by the district court involved a major consequence of the attorneys’ negligent advice to maintain the New York action against Thorpe notwithstanding his discharge under the confirmed reorganization plan. The attorney’s moving

papers evidenced that the advice backfired catastrophically into a contempt proceeding for violating the discharge order. (ER 111, ¶ 5; ER 95-99) And the clients, facing multifaceted duress as a result, entered into a “capitulating” settlement with Thorpe (*e.g.*, ER 55) on November 12 and 13, 2001, on the eve of the contempt trial. (ER 154-155)

While declining the attorneys’ invitation to strike that entire episode from the case, the district court sharply limited their potential liability for it. The court barred any claim or defense to the effect that a result better than the settlement was obtainable but for the malpractice causing the contempt proceeding. Instead, it limited the clients’ trial contention to the fees they incurred in those proceedings. (ER 235, lns. 23-28; ER 237, lns. 7-10) The court ruled there was literally no evidence in the summary judgment record that a better outcome was obtainable. (ER 235, lns. 20-22; ER 237, lns. 5-7)

At the outset, though, the attorneys admitted three times below, in legal memoranda and a Pascoe declaration, that the clients’ settlement on the eve of the contempt trial “essentially capitulat[ed] to all of Thorpe’s

demands.” (ER 55, lns. 20-21; ER 59, ln. 17, ER 168, ln. 25) The moving papers even documented that admission by submitting Plotnicki’s deposition testimony he had “essentially accepted Thorpe’s demands.” (ER 149, lns. 7-9)

Even standing by itself, the attorneys’ admission of a total capitulation on the eve of the contempt trial supports an inference that better terms would have been available under other conditions. But the moving papers went further. They made a compelling showing that the settlement reflected duress from multiple consequences of the New York action — not the objective value of the clients’ claims against Thorpe under the applicable facts and substantive law. This evidence creates a strong inference that, absent the extraneous duress caused by the malpractice, the clients would have obtained a result better than the settlement, either by judgment or a different settlement, more closely approximating the objective value of their claims against Thorpe.

To begin with, the attorneys’ moving papers included Schochet’s deposition testimony about the devastating effects of the New York action

in Thorpe's bankruptcy case. After suffering an injunction against that action because of Thorpe's discharge under his plan, the clients faced the wrath of the bankruptcy judge, the Honorable Alan Jaroslovsky, in the follow-up contempt proceedings and beyond. Schochet testified to intense planning "to do everything and anything to wrest that case away from Judge Jaroslovsky, which we all knew could have no good end to it for Astor and Robot Wars." (ER 123, lns. 21-24) Schochet warned Plotnicki "you are going to get hammered in this case. . . . Jaroslovsky is out for you. . . . [¶] Jaroslovsky was out to get Plotnicki and Astor and Robot Wars. No ambiguity." (ER 125, lns. 10-19)

The attorneys' moving papers also included Plotnicki's deposition testimony on the multi-pronged duress prompting the settlement. "[M]ountains of litigation . . . faced me if I went through with . . . that [contempt] hearing . . . ." (ER 142, lns.14-15) "[I]t appeared there was going to be a punitive damages hearing that I had to live through with Jaroslovsky where I'd have to disclose my personal finances." (*Id.*, lns. 19-22) Thorpe and his counsel were "saying they were going to bring another suit for violation of the automatic stay. . . ." (ER 143, lns. 9-10) "Mr.

Pascoe was almost a nonstop chorus for pay them the money . . . [because] if you don't get yourself away from Jaroslovsky, one day you're going to find yourself in trouble." (ER 144, lns. 9-15) Another lawyer Plotnicki consulted told him "you have got to get out of this black hole." (ER 152, ln. 25)

The attorneys' moving papers also included Plotnicki's testimony that "one of the biggest factors" in the clients' decision to capitulate was the Steefel firm's threat to withdraw from the case only a few days before the start of the contempt trial. (ER 148, lns. 18-25) Plotnicki learned one night that Schochet "was going to go to court the next morning and they were going to make some motion in front of Jaroslovsky to ask to be removed as counsel because they had a conflict." (ER 145, lns. 2-6) As Schochet explained to him: "[h]e was concerned that his testimony [at the contempt trial] would jeopardize his ability to collect his fees." (ER 146, lns. 7-9)

Plotnicki managed to talk Schochet out of it (ER 147, lns. 9-20), citing other attorneys' advice that "I was going to get creamed if we dare

go in front of Jaroslovsky and pull that, that I was going to be made mincemeat out of.” (ER 145, lns. 14-22) Nevertheless, Steefel’s threat to withdraw loomed large in the clients’ decision to capitulate by settlement on the eve of the contempt trial. (ER 148, lns. 18-25) The moving papers below also included deposition testimony to that effect by the clients’ designated lead counsel at the trial, Joseph Burton of the Duane Morris firm. (ER 154, lns. 13-17)

Moreover, the only evidence cited on this issue in Steefel and Pascoe’s opening legal memoranda cuts sharply against them. They relied on a 1999 pleading by the clients describing the terms of a 1997 settlement agreement with Thorpe (ER 70, ¶ 95), arguing that the terms of the 2001 agreement were “substantially similar” to the earlier one. (ER 57, ln. 2) They acknowledged, however, that the 2001 settlement included a larger payment to Thorpe reflecting additional fees he had incurred in the interim. (*Id.*, lns. 3-4) Other evidence in their moving papers established that the increased amount was \$75,000 (ER 149-150), and their summary judgment theory of no settlement harm is untenable for that reason alone.

But the summary judgment record revealed the settlement was much worse than that. In opposition to the motions, the clients adduced a contemporaneous statement by Schochet in an e-mail to Plotnicki on December 1, 2001. (ER 201) In an e-mail earlier that day, Plotnicki mentioned having only a \$24,000 exposure to Thorpe at one point. (*Id.*) But Schochet responded: “I’ve been told that Thorpe proposed a ‘walkaway’ deal at about that time” — before the clients retained him in 2000 — “so your exposure could have been zero I suppose.” (*Id.*) That benchmark of zero means the *entirety* of the 2001 settlement represented compensable harm to the clients.

Finally, the attorneys’ moving papers evidenced still another benchmark of the harm of the settlement. The 1999 pleading they relied on explained that Thorpe never agreed in good faith to the “substantially similar” 1997 settlement terms. On the contrary, he did everything in his power — with Roski’s powerful but disguised support — to thwart its implementation. (ER 67-73) And the pleading went on to describe a host of other hostile activities by Thorpe after the 1997 settlement agreement,

activities that caused injury to the clients in excess of \$5,000,000 and entitled them to trebled and punitive damages. (ER 73-92)

Thus, by evidencing the terms and circumstances of the 1997 settlement in their moving papers, the attorneys evidenced that the “substantially similar” 2001 settlement was a *prodigious* capitulation by the clients. They took what Thorpe had offered them in bad faith in 1997, gave up any remedy whatsoever for the injury he had caused them over the ensuing years, and handed him an additional \$75,000 for the privilege of surrendering to him on the eve of the contempt trial.

#### **D.**

#### **The Sufficiency of the Attorneys’ Claims of Account Stated**

In addition to attacking the foregoing claims and defenses, the attorneys successfully moved for summary judgments for the entirety of their fee claims under the California doctrine of account stated. The court held the documents the clients adduced as objections to the relevant invoices and statements were not sufficient. The record is as follows.

1.

**Steefel's Claim**

Steefel's moving papers relied entirely on one question and answer in Plotnicki's deposition. (ER 61, ¶ 22) By way of introduction, the questioner acknowledged Plotnicki's previous testimony that he "didn't see [invoices] as they were coming in. . . ." (ER 135, lns. 18-19) Nevertheless, Steefel relied on the following question and answer: "to your knowledge was there any specific objection raised to any particular bill during the course of your relationship with Steefel? [¶] And by that I mean did somebody contact Steefel and say this time entry is wrong or . . . we don't think this task should have been performed?" (ER 135-136) Plotnicki answered: "[n]ot that I know of." (ER 136, ln. 3)

Whether that showing satisfied Steefel's burden as the moving party we leave for argument. In opposition, however, the clients adduced an e-mail from Plotnicki to Schochet on December 3, 2001 (ER 201), two weeks after the capitulating settlement with Thorpe. (ER 154-155) The district court ruled the e-mail communicated nothing but a shortage of

funds, not an objection to Steefel's entitlement to payment. (ER 228-229)

But consider the text and its context.

Plotnicki began by referring to Schochet's recent e-mails, which the firm did not include with its moving papers (or reply). Indeed, their omission prompted the court to observe that "the significance of the statements in the e-mail message on which Astor relies is not entirely clear because the message clearly occurred in the context of an ongoing discussion, much of which was not provided to the Court." (ER 228, lns. 26-28)

In any event, the missing e-mails presumably demanded payment of unpaid invoices because Plotnicki commented: "I don't believe you are being realistic given the circumstances." And the "circumstances" Plotnicki identified constituted the devastating injury his companies had just suffered as a result of Schochet's malpractice: "Initially, my exposure to Thorpe was \$24K. I was subsequently put in a position where it made financial sense to settle the case for a much greater amount of money. And that doesn't even address the royalty issue, which I won't get into here."

Especially in light of the record already summarized in this brief, Plotnicki's evident point was that the predicament compelling the adverse settlement had been created by Steefel's malpractice, and for that reason the firm was not *entitled* to payment of its outstanding invoices. At a minimum, though, that is a reasonable interpretation of Plotnicki's language.

The district court relied on the next paragraph of the e-mail, but even there Plotnicki did not admit an obligation and request its postponement or forgiveness. What he said was: “[a]s it is, raising the money to pay for the settlement is a terrible burden. In light of what has happened, I won't be in a position to have any conversation with you until the settlement has been completed and paid for.”

Granted, it is possible to read that language as nothing but a plea of poverty. But in light of the preceding paragraph and the surrounding circumstances evidenced in Steefel's moving papers, a more reasonable interpretation is that Plotnicki was again challenging Steefel's entitlement to fees because of the injurious settlement its malpractice had brought

about. Plotnicki rejected even a “conversation” about Steefel’s outstanding invoices until the Thorpe settlement “ha[d] been completed and paid for.” And his open-ended term, “conversation,” plainly warned of a substantive discussion about Steefel’s performance, not just a payment schedule.

The clients also adduced letters sent by their counsel to both Steefel and Pascoe on September 23, 2002, objecting to their fee demands because of wide-ranging malpractice. (ER 193-194, 202-203) The district court, however, held the letters were insufficient to avoid summary judgments on the account stated claims because they “were not sent within a reasonable time of the invoices which give rise to an account stated.” (ER 229, lns. 14-15) The court ruled they exceeded an absolute deadline in California of six months. (ER 229-230)

## **2.**

### **Pascoe’s Claim**

The Pascoe firm submitted an opening declaration on the account stated issue, but the relevant paragraph was limited to “Mr. Plotnicki.” (ER 169, ¶ 8) The declaration had previously distinguished the firm’s

corporate clients, “the Astor parties,” from “Mr. Plotnicki individually.” (ER 168, ln. 28) Moreover, Pascoe’s letters citing balances due — even during its representation of Plotnicki individually in 2001 — stated the services in question had been “rendered on behalf of Profile Records, Inc.” rather than Plotnicki individually. (ER 177-191) Nonetheless, Pascoe’s moving declaration stated only that “Mr. Plotnicki” had failed to object to any invoices or the “propriety” of the services they covered. (ER 169, ¶ 8)

In short, the only evidence Pascoe adduced as to the corporate clients failed to rule out possible objections by corporate officers or agents other than Plotnicki. On the other hand, the evidence of Plotnicki’s failure to object did not support an account stated as to him personally because none of Pascoe’s invoices were *addressed* to him personally.

But even assuming Pascoe’s evidence satisfied its burden as the moving party, the clients and Plotnicki submitted an opposition declaration by Plotnicki stating in relevant part: “[i]n August 2001, I was very upset that Mr. Pascoe had compromised Astor’s rights by compromising at the Thorpe confirmation, and told him I was unhappy to

be billed for his unauthorized malpractice.” (ER 211, ¶ 9) The district court ruled that statement was sufficient evidence of a timely objection to Pascoe’s services at the confirmation hearing, which took place less than six months earlier. (ER 230, lns. 3-10)

However, the court construed the objection as limited to the fees Pascoe claimed for the confirmation hearing itself. (*Id.*) But given the context previously summarized in this brief, Plotnicki’s language is reasonably susceptible to a broader meaning. When he told Pascoe he was unhappy to be billed for “unauthorized malpractice,” it is fair to construe that term to include all the consequences of the malpractice, not just the moment when Pascoe consented to Thorpe’s reorganization plan.

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### III.

#### THE ORAL AGREEMENT SAID TO SUPPORT PLOTNICKI'S PERSONAL LIABILITY

The only trial evidence relevant to this appeal concerns the Pascoe firm's \$103,121.36 verdict (ER 252, lns. 19-24) and \$204,919 prevailing-party fee award (ER 281, lns. 13-14) against Plotnicki individually.<sup>5</sup>

As already noted, all of Pascoe's letters stating balances due, even in the period it was representing Plotnicki personally, said they were for "services rendered on behalf of Profile Records, Inc.," Astor's corporate predecessor. (ER 177-191) Similarly, the firm's retainer agreement specified Profile Records as the only client. (ER 47, 171) And Plotnicki signed the agreement only on behalf of that entity. (ER 50, 174)

Moreover, Pascoe's retainer agreement began with this broad statement of its purpose: "[t]his document ('the agreement') is intended to

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<sup>5</sup> Because Pascoe and Steefel had already obtained summary judgments on their theory of account stated, the court ruled that the ultimate judgment would reflect the greater of the account stated awards or any breach of contract verdicts in the attorneys' favor, netted against any malpractice damages assessed by the jury. (RT 7/27/05 at 82-83)

meet the requirement of California law that lawyers have a written fee contract with their clients.” (ER 47) It is undisputed, however, that Pascoe never had a written fee contract with Plotnicki in his personal capacity. Indeed, Mr. Pascoe admitted as a trial witness he had asked Plotnicki to sign a personal retainer agreement and sent him one, but “I never did get an executed copy back.” (RT 383, lns. 1-3)

Despite the firm’s avowed policy of relying on written retainer agreements, it asked the jury for a personal award against Plotnicki on the grounds that “there was a clear oral agreement.” (RT 1214-1215) But an oral agreement to what?

Plotnicki never disputed that the clients (not he personally) asked Pascoe to represent him when he suddenly and unexpectedly became a party in this case, against his will, as a target of the contempt proceeding in the bankruptcy court. Thus, the key question posed to Mr. Pascoe on the stand, on direct examination, was: “Did he [Plotnicki] ask you to represent him personally in the defense of that litigation?” ( RT 382, lns. 1-2) Pascoe answered truthfully: “Yes, he did.” (*Id.*, ln. 3)

But that testimony does not support an oral agreement by Plotnicki to *pay* personally for his representation, let alone any other services by Pascoe. Indeed, Pascoe's candid admission that Plotnicki rejected a written retainer agreement (RT 383, lns. 1-3) belies any arguable inference of an oral agreement to the contrary. The oral agreement stopped precisely where Pascoe's testimony stopped: at personal representation.

Nor did the Pascoe firm limit its personal claim against Plotnicki to the *amount* justified by Mr. Pascoe's trial testimony. The firm obtained a personal verdict against Plotnicki for the entirety of its \$103,121.36 fee claim. (ER 281) However, Pascoe testified that *all* his work in connection with the contempt proceeding — representing both Plotnicki and the corporate client — was only “between 28 and \$30,000. . . .” ( RT 383-384)

Finally, the jury's finding of an oral agreement emboldened Pascoe to seek further relief against Plotnicki. It moved for a prevailing-party fee award against him along with the corporate client. (ER 257-259) But Plotnicki responded by formally voiding any such agreement for violation of the written-contract requirement of Section 6148 of California's Business

& Professions Code. (ER 260-261) Plotnicki also submitted a declaration that he never knew before Pascoe's trial testimony that the firm had incurred anywhere near \$28,000 for his personal representation, and that he would have paid even that amount long ago to avoid the much greater financial burden that followed. (ER 262-263)

### SUMMARY OF ARGUMENT

The summary judgment rulings are erroneous. First, regarding the attorneys' duty of care as to the pursuit of Roski, their moving papers established that (1) Steefel's retainer agreement expressly embraced that goal; (2) both Steefel and Pascoe had a duty of care as to that goal because, irrespective of any contracts, they *undertook* to assist in that goal; and (3) under California law since *Nichols v. Keller*, 15 Cal.App.4th 1672 (5th Dist. 1993), *review denied*, they had a duty at least to mention the relevant bankruptcy rule and warn that it exceeded the scope of their engagements.

Second, the court erroneously rejected Pascoe's liability for its unauthorized consent to the confirmation of Thorpe's reorganization plan

on the grounds the consent caused no harm. The court relied on the clients' filing of a notice of appeal from that order, but the bare notice is immaterial. Under *Slaven v. American Trading Transp. Co., Inc.*, 146 F.3d 1066 (9th Cir. 1998), there can be no *effective* appeal from orders entered by consent. Moreover, the attorneys' moving papers established that Pascoe's consent caused a chain reaction of harm. Thorpe's conclusive discharge under the confirmation order led directly to the contempt proceeding for violating that discharge and, in turn, to the clients' capitulating settlement with Thorpe.

Third, the court erroneously ruled there was insufficient evidence to permit the clients to pursue their contention that an outcome better than the capitulating settlement would have been obtainable but for the malpractice. The attorneys' own moving papers evidenced that the settlement was a capitulation under multifaceted duress caused by their negligent advice, not reflecting the objective value of the clients' claims. And the record confirmed and even quantified in several ways that the settlement terms with Thorpe were worse than those reasonably obtainable but for the malpractice.

Fourth, the court erroneously granted the attorneys' summary judgment motions on their claims of account stated. Their moving papers failed to establish all required elements of such a claim, and the clients' opposition evidence raised triable issues as to the sufficiency and timing of their objections to the attorneys' invoices or statements of account.

The first three rulings excluded major defenses to the attorneys' contract claims at the ensuing trial, and the attorneys will be unable to meet their burden under *Obrey v. Johnson, supra*, 400 F.3d 691, to demonstrate the exclusion did *not* cause prejudice. Their primary obstacle is the lack of a trial record on the excluded defenses, but common experience also teaches that a better outcome was likely had the clients been able to pursue three major defenses improperly excluded.

Finally, there is no evidentiary support for the Pascoe firm's verdict and prevailing-party fee award against Plotnicki individually. The evidence supports only a bare representation agreement as to Plotnicki, and in California such agreements are distinct from any payment

obligation. Moreover, Plotnicki exercised his absolute right to declare void any oral agreement with Pascoe for violation of Cal. Bus. & Prof. Code § 6148. And even assuming that right could be waived by delay — contrary to California case law — Plotnicki exercised it promptly after Pascoe’s motion for prevailing-party fees.

## **ARGUMENT**

### **I.**

#### **THE SUMMARY JUDGMENT RULINGS WERE ERRONEOUS**

##### **A.**

#### **THE CONTROLLING STANDARDS OF REVIEW**

This Court will “review the district court’s summary judgment de novo.” *Soldano v. U.S.*, 453 F.3d 1140, 1143. In that process, the Court will “determine, viewing the evidence in the light most favorable to . . . the nonmoving party, whether there are any genuine issues of material fact

and whether the district court correctly applied the substantive law.” *Id.*, quoting *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

Other rules govern the burdens of production, opposition, and ultimate persuasion on such motions. *Nissan Fire & Marine Inc. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099 (9th Cir. 2000), held that the moving party “has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment.” *Id.* at 1102. The Court defined those burdens as follows:

In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party’s claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. . . . [¶] If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial. . . . If, however, a moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense. . . . [I]f the nonmoving party produces enough evidence to create a genuine issue of material fact, the nonmoving party defeats the motion. *Id.* at 1102-1103.

Finally, *Nissan Fire* held “it is never enough simply to state that the non-moving party cannot meet its burden at trial.” *Id.* at 1105, quoting *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir.1991). Rather, the moving defendant must adduce competent evidence to that effect. Thus, the Court cited *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), where the moving defendant adduced plaintiff’s “answer to interrogatories admitting that she had no witnesses who could testify that her husband had been exposed during the statutory period to asbestos manufactured by Celotex,” *id.* at 1105, and likewise established “the absence of any other evidence of exposure in the materials compiled during discovery.” *Id.*

As we now demonstrate, Steefel and Pascoe failed to meet even their initial burden of production below, let alone the ultimate burden of persuasion. Indeed, regarding their duty of care for the clients’ pursuit of remedies against Roski, their own moving papers compel a ruling opposite to the one they were urging.

**B.**

**THE SUMMARY JUDGMENT RECORD ESTABLISHES  
THE ATTORNEYS' DUTY OF CARE, AS A MATTER OF  
LAW, AS TO THEIR CLIENTS' PURSUIT OF ROSKI**

**1.**

**Introduction**

This Court will apply an applicable state rule that “[t]he existence of a legal duty can be determined as a matter of law.” *Oberson v. U.S. Dept. of Agriculture*, 441 F.3d 703, 712 (9th Cir. 2006) (applying Montana law). In California, “[t]he question of the existence of a legal duty of care in a given factual situation presents a question of law which is to be determined by the courts alone.” *Nichols v. Keller, supra*, 15 Cal.App.4th 1672, 1682. *Accord, Friedman v. Merck & Co., Inc.*, 107 Cal.App.4th 454, 464 (2nd Dist. 2003), *cert. denied*, 538 U.S. 1033 (2003) (“[w]hether a duty exists is a question of law”). Thus, this Court’s *de novo* review of the summary judgment record encompasses a *de novo* legal determination whether Steefel or Pascoe owed a duty of care regarding their clients’ pursuit of remedies against Roski.

The district court rejected such a duty on the grounds that Steefel and Pascoe's engagement was limited to advice and representation within the four corners of the Thorpe bankruptcy. But the summary judgment record and applicable California law are irreconcilable with that ruling. First, Steefel's retainer agreement expressly included the pursuit of Roski within the scope of the firm's engagement. Second, irrespective of any formal agreement Steefel and Pascoe owed this duty of care because they *undertook* the task of assisting their clients in the pursuit of Roski. Finally, even if they had never undertaken that task, California law still required them at least to mention the doctrine of bankruptcy preemption and warn it exceeded the scope of their engagements.

## 2.

### **Steefel's Duty Arose from its Written Retainer Agreement**

As to Steefel, of course, its written retainer agreement expressly identified the pursuit of Roski as part of the firm's engagement. (*Ante*, p. 13) Moreover, the agreement admitted the pursuit of Roski was of the firm's duties in the February-March 2001 period when Steefel actively participated in planning discussions on that subject. (*Ante*, pp. 14-18)

Thus, the Steefel retainer agreement alone established the firm's duty of care in this regard.

3.

**Both Firms' Duty Arose from their  
Actual Involvement in this Matter**

“An attorney, by accepting employment to give legal advice or render legal services, impliedly agrees to use ordinary judgment, care, skill, and diligence in the performance of the tasks he or she undertakes.”

*Nichols v. Keller, supra*, 15 Cal.App.4th 1672, 1682 (emphasis added).

*Accord, Piscitelli v. Friedenber*g, 87 Cal.App.4th 953, 983 (4th Dist. 2001)

(“[a]n attorney's duty to his or her client depends on not only the existence of an attorney-client relationship, but also the scope of the duties assumed by the lawyer”).

Nor is a prior agreement or obligation necessary to the creation of a duty of care. “Although there may be no duty to undertake a specific task, if an attorney does so voluntarily for a client, the task must be done with reasonable care.” 1 Mallen & Smith, *Legal Malpractice* (2006 ed.), § 8.2, at p. 942.

In this case, accordingly, no matter how limited Steefel and Pascoe's original or formal engagements may have been, the summary judgment record establishes that they *in fact* undertook the task of advising their clients about pursuing Roski. As a matter of law, therefore, both firms had a duty of care in the performance of that task. The district court emphasized the role of foreseeability in creating such a duty, but it was foreseeable that failing to mention the doctrine of bankruptcy preemption would undercut the clients' litigation strategy that ran directly afoul of that doctrine.

4.

**At a Minimum, Both Firms Had a Duty  
To Advise of the Issue and Warn It Exceeded  
The Scope of their Engagements**

Finally, the district court's ruling would be erroneous even if Steefel and Pascoe had gone so far as to tell the clients in writing, in triplicate, that their engagements excluded anything about Roski. Because they were bankruptcy specialists, and knew the clients were considering claims against Roski that were potentially barred by the doctrine of bankruptcy preemption, Steefel and Pascoe had a duty at least to mention that doctrine

and warn that analyzing its possible application exceeded the scope of their engagements.

*Nichols v. Keller* established California's rule to that effect as early as 1993. *Nichols* held that an attorney retained solely for a workers' compensation claim nonetheless had a duty to mention the possibility of a third-party action and its statute of limitations. The court reasoned:

Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client's objectives. . . . [E]ven when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention. The rationale is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client's legal needs. The attorney need not represent the client on such matters. Nevertheless, the attorney should inform the client of the limitations of the attorney's representation and of the possible need for other counsel. *Id.* at 1683-1684.

*Nichols* has been followed in California in other settings as well. For example, *Janik v. Rudy, Exelrod & Zieff*, 119 Cal.App.4th 930, 941-942 (1st Dist. 2004), *review denied*, followed *Nichols* in holding that class counsel

have a duty to advise of potential claims even if they are outside the scope of the certified class action. (“[B]oth the representative plaintiffs and the absent class members similarly are entitled to assume that their attorneys will consider and bring to the attention of at least the class representatives additional or greater claims that may exist arising out of the circumstances underlying the certified claims that class members will be unable to raise if not asserted in the pending action.”)

The *Nichols* rule applies *a fortiori* here. Even if Steefel and Pascoe had disclaimed any responsibility for the clients’ pursuit of Roski, and had not participated in that goal so actively, they would still have had a duty to advise of the doctrine of bankruptcy preemption and warn it exceeded the scope of their engagements.

**C.**

**THE SUMMARY JUDGMENT RECORD PRESENTED A  
GENUINE ISSUE WHETHER PASCOE'S CONSENT TO THE  
CONFIRMATION OF THORPE'S REORGANIZATION PLAN  
CAUSED COMPENSABLE HARM TO THE CLIENTS**

The district court summarily rejected any liability on Pascoe's part, and any defense to its fee claim, based on its unauthorized consent to the confirmation of Thorpe's proposed reorganization plan. (*Ante*, p. 19) The court ruled that no harm resulted from the consent, citing a perceived flaw in Plotnicki's declaration that the clients would have appealed the confirmation of Thorpe's plan but for Pascoe's "compromise" in court leading to the entry of the confirmation order by consent. (*Ante*, p. 19) As noted previously, the court pointed to the undisputed fact that the clients actually filed a notice of appeal from that order.

At the outset, though, the mere filing of the notice of appeal hardly disproves the possibility of harm as a matter of law. A case directly in point is *Slaven v. American Trading Transp. Co., Inc.*, *supra*, 146 F.3d 1066.

There, despite a “timely appeal[],” *id.* at 1069, the Court dismissed the appeal because the appellant had consented to the entry of the order it was challenging, the approval of a class action settlement. Although the appellant “initially filed objections to the settlement agreement,” *id.* at 1069, ultimately it “signed [a] stipulation approving the settlement without condition or reservation.” *Id.*

*Slaven* held that “[i]n general, a party cannot appeal a judgment entered with its consent. . . . [A] decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause. . . .” *Id.* at 1070 (cits. and internal quot. marks omitted) While *Slaven* recognized “[a]n exception to this longstanding rule . . . where a party specifically preserves its right to appeal,” *id.*, there is no inkling in the record below that Pascoe did any such thing. It unconditionally consented to the entry of the order confirming Thorpe’s reorganization plan.

What Plotnicki’s declaration meant, of course, was that the clients could and would have prosecuted a *tenable* appeal from the confirmation

order but for Pascoe's consent to its entry. And Pascoe made no showing at all, let alone a conclusive one, that the loss of a *tenable* appeal did not represent compensable harm to the clients.

Pascoe has suggested the consent caused no harm because the bankruptcy court would have confirmed the reorganization plan anyway. But even if Pascoe could conclusively prove that assertion it misses the point. Pascoe's consent to the confirmation order vitiated any appeal from it. An order entered over the clients' objections would have left them in a much better position.

Finally, Pascoe's own moving papers (including Steefel's, via the joinder) raised a genuine issue whether its consent to the confirmation of the plan was the effective cause of the contempt proceeding and the capitulating settlement that followed. Thorpe's discharge under the reorganization plan (ER 108, ¶ 2) led directly to the contempt proceeding for violating the discharge by maintaining the New York action. Even if the clients could not claim damages in the form of the loss of a better outcome (see next section), the summary judgment record raised a genuine

issue of Pascoe’s liability for causing the substantial legal costs to the clients associated with the injunction and contempt proceedings arising out of Thorpe’s discharge under the reorganization plan.

**D.**

**THE SUMMARY JUDGMENT RECORD PRESENTED A  
GENUINE ISSUE WHETHER THE CLIENTS COULD  
HAVE OBTAINED A BETTER RESULT AGAINST THORPE  
BUT FOR THE ALLEGED MALPRACTICE**

As shown previously, Steefel and Pascoe admitted below — and thoroughly documented in their moving papers — that the clients entered into a “capitulating” settlement with Thorpe on the eve of trial in what promised to be a devastating contempt proceeding generated by the ill-advised action in New York. (*Ante*, pp. 20-21) Nevertheless, the district court summarily rejected any claim or defense at the jury trial that a better result would otherwise have been obtainable. (ER 235, lns. 23-28; ER 237, lns. 7-10) The court ruled it could only be “based upon sheer speculation

or surmise” (ER 235, lns. 11-12, quoting *Thompson v. Halvonik*, 36 Cal.App. 4th 657, 661 (1st Dist. 1995), *review denied*).

At the outset, Steefel and Pascoe failed to meet their initial burden of production on this issue under *Nissan Fire, supra*, 210 F.3d 1099, and their motion should have been denied for that reason alone. They adduced no evidence at all, let alone to the requisite certainty, that a better outcome would *not* have been available but for their negligent advice and the resulting contempt proceeding. The closest they came — and it was not very close — was to cite evidence that the 2001 settlement was “substantially similar” to terms Thorpe had offered in bad faith in 1997. (*Ante*, p. 25; ER 57, ln. 2)

The attorneys never explained how that purported similarity ruled out the possibility of a better outcome on or after November 2001 but for the malpractice and resulting contempt proceeding. They adduced no evidence, for example, that the objective value of the clients’ *claims* against Thorpe remained unchanged between 1997 and 2001. With no evidence providing that context, the 1997 settlement terms simply had no tendency

to prove that the 2001 terms were comparable to the objective value of the clients' claims at *that* time, and therefore were no worse than the outcome they might otherwise have expected.

But even if the 1997 settlement terms had any probative force on this issue, it was negated by other evidence adduced in the attorneys' moving papers. Their own evidence created a genuine issue barring a grant of their summary judgment motion.

The attorneys' moving papers came close to establishing as a matter of law that the 2001 settlement *was* a capitulation under duress from the disastrous consequences of their negligent advice. (*Ante*, pp. 20-27) Which is to say it was not reflective of the objective value of the clients' claims against Thorpe at that time. The hostility of the bankruptcy judge, the runaway legal expenses, the threat of punitive damages and other sanctions, the threat of forced revelation of Plotnicki's personal finances, Steefel's eleventh-hour threat to withdraw — all those circumstances tend to prove a better outcome would have been available in or after November

2001 had it not been for the duress caused by the attorneys' negligent advice.

The duress is highly probative on this issue because none of its components related to the objective value of the clients' claims against Thorpe, a value measured by the facts and substantive law relevant to their underlying dispute with him. Reasonable jurors could well conclude on this record that, absent the extraneous duress, the clients would not have "capitulat[ed] to all of Thorpe's demands" (*ante*, pp. 21-22), but would have obtained *better* terms, either by judgment or a different settlement, more closely approximating the objective value of their claims.

In addition, the summary judgment record provided several benchmarks for concluding that the 2001 settlement represented measurable harm to the clients. First, the settlement was at least \$75,000 more costly to them compared to the 1997 terms the attorneys themselves cited as a useful benchmark. (ER 149-150) Second, paying Thorpe *anything* reflected harm to the clients because he had previously proposed a "walkaway deal." (ER 201) Third, to the extent the 2001 settlement

approximated the 1997 settlement terms Thorpe had offered, it represented substantial harm to the clients because they had suffered much greater injury at his hands in the interim. (ER 73-92)

Especially when compared to the present record, the attempted showings of better outcomes in *Thompson* and its progeny, *Marshak v. Bellesteros*, 72 Cal.App.4th 1514 (2nd Dist. 1999), were markedly hollow. The best evidence on the matter in *Thompson* was a court petition that “d[id] not state that the value of appellant’s case was affected by any negligent act or omission of his former counsel. . . . [It] . . . makes no mention of any error or omission by respondents that caused a settlement less than the actual value of the case. Nor does the petition indicate that the case was settled for less than its fair value.” 36 Cal.App.4th 657, 664.

The showing in *Marshak* was no better: “plaintiff simply alleges that the case was worth more than he settled it for. He proffered no evidence to establish the value of his case, other than his own declaration that the family residence was worth more, and the accounts receivable were worth

less, than they were valued at for the purposes of settlement.” 72 Cal.App. 4th at 1519.

Moreover, the California Supreme Court’s held recently in *Viner v. Sweet*, 30 Cal. 4th 1232 (2003), that circumstantial evidence is sufficient to prove the loss of “a more favorable result,” *id.* at 1239, and the plaintiff need only establish a probable causal link between the malpractice and the loss. *Viner* rejected the plaintiff’s argument (among others) that the ordinary “but for” test is too onerous because it

would require them to obtain the testimony of the other parties to the transaction, who have since become their adversaries, to the effect that they would have given the Viners more favorable terms had the Viners’ attorneys not performed negligently. Not so. In transactional malpractice cases, as in other cases, the plaintiff may use circumstantial evidence to satisfy his or her burden. An express concession by the other parties to the negotiation that they would have accepted other or additional terms is not necessary. And the plaintiff need not prove causation with absolute certainty. Rather, the plaintiff need only introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. *Id.* at 1242-1243 ( internal quot. marks omitted).

In the present case, the attorneys' own moving papers adduced strong circumstantial evidence that a better outcome would have been obtainable but for their negligent advice. That evidence was more than sufficient to compel the denial of their summary judgment motions.

**E.**

**THE SUMMARY JUDGMENT RECORD PRESENTED A  
GENUINE ISSUE WHETHER THE CLIENTS' OBJECTIONS  
TO THE ATTORNEYS' INVOICES WERE SUFFICIENT TO  
DEFEAT THEIR CLAIMS OF ACCOUNT STATED**

Steeffel as plaintiff, and Pascoe as counterclaimant, obtained summary judgments on their claims of account stated but failed to meet even their initial burden of production on that issue. We begin by addressing their initial showings and then, in case the Court finds it necessary to look farther, the evidence adduced in opposition.

1.

**The Moving Papers Were Insufficient**

As shown previously, Steefel relied on a single question and answer in Plotnicki's deposition. But the question was incomplete and the answer inconclusive. The question was:

was any specific objection raised to any particular bill during the course of your relationship with Steefel? [¶] And by that I mean did somebody contact Steefel and say this time entry is wrong or . . . we don't think this task should have been performed?" (ER 135-136)

What that question omitted, of course, was the possibility of objections to Steefel's invoices on other grounds — such as the poor quality of its work and the harm it caused.

Because an account stated is a new contract, *Gleason v. Klamer*, 103 Cal.App.3d 782, 786 (2nd Dist. 1980), there must be mutual assent not only that a balance has been calculated correctly but it is "due and owing" on the merits. *Id.* Accordingly, objections to the quality of work have no

less force in barring an account stated than objections that a “time entry is wrong” or a particular task was unnecessary.<sup>6</sup>

But even if only narrow objections counted, the question and answer Steefel relied on still failed to carry its initial burden of production. Its clients were corporate entities with various possible agents, but the question and answer established no more than that Plotnicki himself, admittedly the clients’ principal agent, did not “know of” any objections of the kind inquired about. So his testimony did not rule out the possibility of such objections by other agents unbeknownst to him. And it was Steefel’s burden as moving party to rule out that possibility as a matter of law.

Pascoe’s moving papers were deficient in the same manner. As to the corporate client, Pascoe’s declaration stated only that Plotnicki himself had failed to voice any objections. (ER 169, ¶ 8) Just as in Steefel’s case,

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<sup>6</sup> Even Pascoe acknowledged the materiality of objections based on the quality of the work. Its declaration on this issue included an assertion that there had been no objections to the “propriety” of its services. (ER 169, ¶ 8)

therefore, Pascoe failed to rule out the possibility of objections by other corporate agents.

Finally, Pascoe's showing was deficient as to Plotnicki individually because none of the relevant statements of balances due were addressed to him individually, even during the period of his personal representation. (ER 177-191) Accordingly, they never *offered* him an account stated contract that he might accept either expressly or by acquiescence, so such a contract could not have arisen either way. To put it differently, the statements never put him on notice of the *peril* of an account stated in his personal capacity, and Pascoe has cited no authority permitting an account stated to arise nonetheless.

## 2.

### **The Opposition Evidence Raised Genuine Issues In any Event**

Even if Steefel and Pascoe had satisfied their initial burden of production, the clients' opposition evidence raised a genuine issue as to the sufficiency of their objections. *Gleason v. Klamer, supra*, 103 Cal.App.3d 782, is persuasive authority to that effect.

In *Gleason*, likewise a summary judgment appeal, the relevant issue was the intended scope of a client's letter acknowledging a balance due to a former attorney. After finding the letter sufficiently voluntary to support an account stated in principle, *Gleason* held the scope of the account stated was left ambiguous:

Defendant clearly has at least raised a triable issue of fact as to whether the account stated is limited to the charges for the last three months of services rather than the entire relationship of the parties. . . . Were the trier of fact to resolve this ambiguity in defendant's favor, other amounts involved in the prior statement would still be subject to defense. *Id.* at 790.

Accordingly, *Gleason* reversed the summary judgment for appropriate proceedings.

*Gleason's* main lesson here is that correspondence claimed to create an account stated is subject to the familiar rules of contract interpretation and the limitations of summary judgment motions. In California, for example, *Pacific Gas & Elec. Co. v. Thompson Drayage & Rigging Co., Inc.*, 69 Cal.2d 33 (1968), articulated the familiar rule that if "the language of a contract, in the light of all the circumstances, is fairly susceptible of either one of the two interpretations contended for . . . extrinsic evidence relevant

to prove either of such meanings is admissible.” *Id.* at 40. Accordingly, when correspondence controlling an account stated issue is subject to differing interpretations, the issue must be resolved by trial absent conclusive extrinsic evidence in the summary judgment papers.

In the present case, beginning with Steefel, Plotnicki’s e-mail of December 1, 2001 was not unambiguously limited to a plea of poverty as the district court ruled. For one thing, the court itself acknowledged that “the significance of the statements in the e-mail message on which Astor relies is not entirely clear because the message clearly occurred in the context of an ongoing discussion, much of which was not provided to the Court.” (ER 228, lns. 26-28) Because Steefel had all relevant burdens below, the lack of clarity caused by its incomplete record was sufficient in and of itself to bar its summary judgment motion.

But even considering the text of the e-mail in isolation, it does not state unambiguously that Plotnicki, speaking for the corporate clients, was only requesting a postponement or reduction of fees for want of present funds. As shown previously, the e-mail can be construed reasonably, and

indeed more plausibly, as an objection to Steefel's entitlement to the fees it was claiming. (*Ante*, pp. 28-31)

The same is true of Pascoe. While the district court correctly acknowledged an unambiguous objection on the clients' part to Pascoe's billings, the court incorrectly limited the scope of that objection much the same way the lower court did in the *Gleason* case.

The clients, again speaking through Plotnicki, told Pascoe "I was unhappy to be billed for his unauthorized malpractice." (ER 211, ¶ 9) True, it is possible to construe that language as a limited objection to payment for the minuscule time it took Mr. Pascoe to voice his consent to the confirmation of Thorpe's reorganization plan. But it is also reasonable to construe the language more broadly: as an objection to paying for any and all aspects and consequences of that "unauthorized malpractice." It can be construed to dispute Pascoe's fees litigating the clients' objections to Thorpe's plan before the consent rendered those fees useless, Pascoe's fees necessitated by its unauthorized consent, and any other Pascoe fees to the extent they were offset by damages caused by the consent. Just as in

*Gleason*, therefore, the existence of differing interpretations of Plotnicki's statement, and the lack of extrinsic evidence conclusively supporting Pascoe's interpretation, made it erroneous to grant the firm's summary judgment motion.

While the foregoing analysis is sufficient to compel a reversal of the account stated rulings, we conclude by citing the clients' renewed objections to Steefel and Pascoe's work and invoices in September 2002, through counsel. (ER 193-194, 202-203) The district court, however, ruled that these objections were too late as a matter of law,<sup>7</sup> citing what it perceived to be an absolute six-month deadline for objections in California.

Given the harsh consequences of an account stated, especially as applied to a lay client rather than repeat transactions within a trade or industry, *see Hemenover v. Lynip*, 107 Cal.App. 356, 360, 290 P. 1089 (1st Dist. 1930), it is not surprising that a rigid rule of "six months or else" does

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<sup>7</sup> The court also referred to the possible inadmissibility of the letters as confidential settlement offers, but stated it "declines to rule on this issue, which has not been briefed by the parties in any meaningful way." (ER 229, n. 10)

not obtain in California. *Hemenover* held that the determinative factor is the reasonableness of the timing of objections in the light of all relevant circumstances:

when the facts are clear the question of the effect of acquiescence and the length of time deemed reasonable may be determined by the court as a matter of law. But where a conflict appears, all of the facts should be submitted to the jury under appropriate instructions. As an abstract proposition a delay of four months, if unsatisfactorily explained, might, as a matter of law, be properly held to amount to acquiescence. A delay in replying to a demand might, however, be satisfactorily explained and circumstances shown that would negative any idea or implication of assent. . . . *Id.* at 363 (emphasis added).

The district court below relied on a single passage in *Lacy Mfg. Co. v. Gold Crown Mining Co., Ltd.*, 52 Cal.App.2d 568 (2nd Dist. 1942) for the proposition that six months is the absolute deadline for objections.<sup>8</sup>

Consistent with *Hemenover*, however, *Lacy* dwelt at length on the

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<sup>8</sup> *Lacy* stated: “[i]t has been held that a delay of six months in repudiating the agreement is as a matter of law unreasonable and that, because of it, acquiescence will be presumed and that an account stated is thereby created. *Cusick v. Boyne*, 1 Cal. App. 643 [82 Pac. 985]; *Hendy v. March, supra* [75 Cal. 566]; *Standard Oil Co. v. Van Etten*, 107 U. S. 325 [1 S. Ct. 178, 27 L. Ed. 319].” *Id.* at 577.

circumstances explaining the timing of the objections in that case. Thus, the language the district court relied on is *dictum*.

More fundamentally, though, the *dictum* misstated the rule emerging from the cases *Lacy* cited. The California Supreme Court cited those same three cases in *Crane v. Stansbury*, 173 Cal. 631, 637 (1916), for a materially different rule:

What the court told the jury in effect was that this delay of six months, if unsatisfactorily explained, was as matter of law unreasonable, and that because of it acquiescence would be presumed and the account would become an account stated. Such, we repeat, is the law. *Cusick v. Boyne*, 1 Cal. App. 643, 82 Pac. 985; *Hendy v. March*, 75 Cal. 567, 17 Pac. 702; *Standard Oil Co. v. Van Etten*, 107 U. S. 325. . . . (Emphasis added)

Most likely unintentionally, *Lacy's* statement of that rule omitted the qualifier recognized in both *Crane* and *Hemenover*: a satisfactory explanation of the timing of objections.

In the present case, therefore, it was Steefel and Pascoe's burden as moving parties to establish, as a matter of law, that there was no satisfactory explanation for the timing of the September 2002 objections.

However, Steefel and Pascoe did not even address that issue, let alone carry their burden on it with conclusive evidence.

For all the foregoing reasons, if the Court grants the clients a new trial on either Steefel or Pascoe's claims for unpaid fees, the trial should include the account stated claims as well. Neither firm was entitled to a summary judgment on its claim.

## **II.**

### **THE ERRONEOUS SUMMARY JUDGMENT RULINGS PRODUCED AN INCOMPLETE AND UNFAIR JURY TRIAL, REQUIRING A REVERSAL OF THE PRINCIPAL JUDGMENT AND ANCILLARY AWARDS FOR A NEW TRIAL ON REMAND**

The district court's summary judgment rulings allowed the jury to weigh the entirety of Steefel and Pascoe's fee claims against only a remnant of the clients' defenses to those claims. Because the curtailment of the trial in that manner was erroneous, the question arises whether the

error was sufficiently prejudicial to require a reversal of the ensuing judgment and the dependent ancillary awards. Under this Circuit's precedents the question of prejudice is not a close one.

Last year's decision in *Obrey v. Johnson, supra*, 400 F.3d 691, held it is the appellee's burden in civil cases, not the appellant's, to prove "it is more probable than not that the error did not materially affect the verdict." *Id.* at 701 (emphasis added). As *Obrey* explained: "[t]he party benefitting from the error has the burden of persuasion, and in cases of 'equipoise,' we reverse." *Id.* (cits. and internal quot. marks omitted). At the outset, therefore, it is Steefel and Pascoe's burden to demonstrate that the verdicts they obtained, for the entirety of their fee claims, were not materially affected by the court's exclusion of three major defenses to those claims.

Steefel and Pascoe cannot meet that burden. *Obrey* was a more typical appeal challenging the mere exclusion of evidence. In *Obrey*, an employment discrimination case, the district court "erroneous[ly] exclu[ded] evidence directly probative of the defendant's discriminatory bias and pretext," which involved "the central issues in dispute." *Id.* at

701-702. But suppose the district court in *Obrey* had erroneously excluded not merely evidence supporting the plaintiff's contention on an issue, but *any consideration of that contention at all*. If the mere exclusion of evidence prejudiced the plaintiff's case, it follows *a fortiori* that the exclusion of an entire contention would be prejudicial.

Consider the effect of the exclusion on Steefel and Pascoe's appellate burden to prove the *lack* of prejudice. The district court's rulings caused the lack of any trial record on the defenses it excluded. Accordingly, Steefel and Pascoe can rely on nothing but speculation in an attempt to prove the jury would have rejected these defenses — and rejected them entirely, not just partially — and gone on to render the exact same verdict. In such a vacuum of trial data, Steefel and Pascoe cannot possibly meet their burden under *Obrey* to demonstrate affirmatively a lack of prejudice from the relevant rulings.

It is for this reason some errors are deemed “structural” and prejudicial per se. As explained in *Arizona v. Fulminante*, 499 U.S. 279 (1991), most errors are “trial errors” — “error[s] which occurred during the

presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless. . . .” *Id.* at 307-308 (opinion for the Court on this issue by the late Chief Justice Rehnquist). By contrast, some errors are “structural defects in the constitution of the trial mechanism, which defy analysis by ‘harmless-error’ standards. . . . [They] affect[] the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Id.* at 309-310.

Here, the absence of any trial record on the excluded defenses makes it impossible to perform a quantitative assessment of prejudice “in the context of other evidence presented. . . .” If appellate courts could nonetheless speculate how an excluded defense would have fared and reject any prejudice on that basis, the appellate process would be substituted for a jury trial in violation of the Seventh Amendment.

Finally, Steefel and Pascoe’s burden runs afoul of common experience. It tells us a jury would more likely than not have reduced the attorneys’ recovery, if not denied one altogether, had it received evidence

and argument about three substantial defenses that the district court had excluded from the trial.

Unless Steefel and Pascoe manage to convince the Court otherwise, the case should be remanded for a new trial on all claims and defenses, not just those erroneously adjudicated by summary judgment. At a minimum, though, the case should be remanded for a trial on the clients' affirmative claims concerning Roski, Pascoe's consent to Thorpe's reorganization plan, and the injury reflected by the Thorpe settlement. In addition, the Court should order a stay of the existing judgment, without bond, pending the outcome of that trial. Only then can the net obligations in this case be determined after all appropriate offsets.

**III.**

**THE LACK OF EVIDENCE SUPPORTING ANY  
AWARDS AGAINST PLOTNICKI INDIVIDUALLY  
COMPELS THE VACATION OF THOSE AWARDS  
AND ENTRY OF JUDGMENT IN HIS FAVOR**

Independent of the other issues on appeal is the imposition of personal liability against the clients' principal, Mr. Plotnicki.<sup>9</sup> As shown previously, the Pascoe firm claimed he had orally agreed not only to pay for his personal representation at the contempt hearing, but also to pay the *entirety* of the firm's outstanding invoices and, on top of that, subject himself to the prevailing-party fee provision in Pascoe's retainer agreement with its corporate client.

That entire overreaching structure rests on Mr. Pascoe's trial testimony, and the testimony simply does not support it. Pascoe testified

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<sup>9</sup> Nor is there any evidence to support a judgment against "Smile/Astor Place Communications" in his stead, or its own right, because there is no evidence of its existence as an entity. See footnote 3, *ante*, p. 10.

unambiguously (and truthfully) that the oral agreement was limited to the firm's *representation* of Plotnicki at the contempt proceeding. The relevant question to Pascoe and his answer bear repetition: "Did he ask you to represent him personally in the defense of that litigation? Yes, he did." (Vol. 4 RT 382, lns. 1-3)

Pascoe argues that a representation agreement necessarily encompasses an obligation to pay for the representation, but the applicable California law is to the contrary. Representation and payment are separate issues. As stated in *Gulf Ins. Co. v. Berger, Kahn, et al.*, 79 Cal.App.4th 114, 126 (2nd Dist. 2000), *review denied*: "[a]n attorney-client relationship can be formed though no retainer is signed or no fees are paid. . . . The absence of an agreement with respect to the fee to be charged does not prevent the relationship from arising." *See also*, 1 *Mallen & Smith, supra*, § 8.3 at p. 955 ("[t]he creation of the relationship does not require payment of a fee").

Here, indeed, only one reasonable inference arises from Pascoe's limited description of the oral agreement, his firm's direction of its invoices

to the corporate client alone, and Plotnicki's refusal to sign a retainer agreement individually. (*Ante*, p. 35) The inescapable conclusion is that everyone understood the corporate client alone would be paying for Plotnicki's personal representation.

Nor is such an arrangement uncommon. Mallen & Smith cite a number of situations in which payment is divorced from representation:

Often, another will pay legal fees for the attorney's services to the client. . . . A corporation may pay the legal fees of the underwriter's counsel. One party to a contract may require that the other pay the legal fees of its lawyer for a title search. An insurer may pay the legal fees of the insured's selected lawyer. 1 Mallen & Smith, *supra*, § 8.3 at p. 955-956 (footnotes omitted).

In sum, Pascoe's verdict against Plotnicki finds no support in the trial evidence and should therefore be vacated. And that disposition is sufficient to compel the vacation of the huge ancillary awards against Plotnicki as well, featuring Pascoe's prevailing-party fee award against him in the amount of \$204,919. (ER 281, ln. 14)

But there are two other reasons the prevailing-party award is untenable. First, there is no evidence that Plotnicki ever *agreed* to a prevailing-party fee arrangement with Pascoe, whether by “adopting” the retainer agreement with the corporate client or in any other manner. Because a bare representation agreement does not entail a promise to pay for even the basic fees, it cannot possibly entail a promise to pay prevailing-party fees. Pascoe had to *prove* an enforceable promise to that effect, and it came nowhere near doing so.

Second, even if Pascoe *had* done so, its purported agreement with Plotnicki was admittedly not in writing and therefore violated Section 6148 of California’s Business & Professions Code (“§ 6148”). So when Pascoe overreached so far as to move for a prevailing-party fee award against Plotnicki, he promptly responded by invoking his absolute “option” under § 6148 to void the agreement.<sup>10</sup> While Pascoe argued this came too late,

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<sup>10</sup> The statute provides, in relevant part, that “(c) [f]ailure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee.”

California does not allow its public policies to be evaded so easily. *Lewis & Queen v. N.M. Ball Sons*, 48 Cal.2d 141, 147-148 (1957), held:

Whatever the state of the pleadings, when the evidence shows that the plaintiff in substance seeks to enforce an illegal contract or recover compensation for an illegal act, the court has both the power and duty to ascertain the true facts in order that it may not unwittingly lend its assistance to the consummation or encouragement of what public policy forbids.

Moreover, clients' absolute "option" to void a contract violating § 6148 stands in sharp contrast to the general right of rescission in California. The latter must be exercised "promptly upon discovering the facts which entitle him to rescind. . . ." Cal. Civil Code § 1691. By contrast, the unconditional voidability of contracts violating § 6148 reflects California's special protection of clients in the retention process.

But Plotnicki acted promptly in any event, at least with respect to Pascoe's motion for a prevailing-party fee award. (ER 260) Nor did Pascoe controvert Plotnicki's declaration to the effect he had been lulled to believe the cost of his personal representation was negligible. (ER 262-

263) Mr. Pascoe's responsive declaration was silent on that point (ER 264-266), and it makes a purported waiver of Plotnicki's rights under § 6148 all the more untenable.

Finally, Pascoe's own testimony established that his firm's principal verdict against Plotnicki is excessive to the tune of approximately \$88,000. (*Ante*, p. 36) At a minimum, therefore, the Court should reverse both the principal and prevailing-party fee awards against Plotnicki for further proceedings to determine their appropriate amounts. Both are demonstrably excessive in light of Pascoe's uncontroverted testimony.

## CONCLUSION

Although a well-trimmed trial is no less desirable than a well-trimmed appeal, in this case the district court lopped off major limbs and branches with erroneous summary judgment rulings. At the resulting jury trial, the appellee law firms were allowed to prosecute the entirety of their fee claims without having to face three major defenses. Because the lack of a trial record on those defenses makes it impossible for the law firms to

meet their burden to demonstrate a lack of prejudice to the clients, the judgment below must be reversed for a new trial on all issues, including the attorneys' claims of account stated, and the dependent ancillary awards must be reversed as well.

Independently, the trial record is devoid of evidence supporting the principal and prevailing-party fee awards against Plotnicki individually. They should be vacated outright or, at a minimum, reduced on remand in light of Pascoe's undisputed testimony establishing the excessiveness of both awards.

DATED: August 16, 2006

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE  
WITH RULE 32(a)**

This brief complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because it contains 13,738 words, excluding the parts of the brief the Rule exempts from that limitation.

The brief also complies with the typeface and type style requirements of Rule 32(a)(5) and (6) because it is prepared in a proportionally spaced typeface using WordPerfect 11 with a 14-point Calisto MT serif font.

DATED: August 16, 2006

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ELLIOT L. BIEN

## **STATEMENT OF RELATED CASES**

MHC is aware of no related cases pending in this Court within the meaning of Ninth Circuit Rule 28-2.6.

DATED: August 16, 2006

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ELLIOT L. BIEN

## CERTIFICATE OF SERVICE

The undersigned declares:

I am over the age of 18 years and am not a party to or interested in the above entitled cause. I caused to be served:

BRIEF FOR APPELLANT; EXCERPTS OF RECORD

by enclosing two copies of the brief and one copy of the two-volume excerpts of record in envelopes addressed to:

David W. Evans, Esq.  
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and causing them to be delivered by the United States Postal Service in my usual manner on the date stated below.

The foregoing is true and correct. Executed under penalty of perjury at Novato, California.

DATED: August 16, 2006

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ELLIOT L. BIEN