No. 13-16917

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UTHE TECHNOLOGY CORPORATION,

Plaintiff-Appellant,

v.

AETRIUM, INC.
AND HARRY ALLEN,

Defendants-Respondents.

On Appeal from the United States District Court for the Northern District of California, No. 3:95-CV-02377 (Honorable William H. Alsup, District Judge)

BRIEF FOR PLAINTIFF-APPELLANT

MYRON MOSKOVITZ
ATTORNEY AT LAW
90 Crocker Avenue
Piedmont, CA 94611
(510) 384-0354

JOSHUA R. BENSON
TAYLOR & COMPANY
LAW OFFICES, LLP
One Ferry Building, Suite 355
San Francisco, CA 94111
(415) 788-8200

March 20, 2014

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant certify the following:

1. The full name of every party or amicus represented in this appeal is:

UTHE Technology Corporation.

2. The full name of the real party in interest represented by the undersigned in this appeal is:

UTHE Technology Corporation.

3. The names of all parent corporations and any publicly held companies that own 10 percent of the party represented are: Crestek, Inc.

4. The names of all law firms and the partners or associates that appeared in the district court or are expected to appear in this appeal for Plaintiff-Appellant are:

TAYLOR & COMPANY LAW OFFICES, LLP: Joshua R. Benson

LAW OFFICES OF MYRON MOSKOVITZ: Myron Moskovitz

MORRISON & FOERSTER LLP: Harold J. McElhinny

EDWARDS WILDMAN PALMER LLP: Clifford Judd McCord, Heather H. Harrison and Michael Dockterman

LAW OFFICES OF ROBERT YIN PONG CHAN: Robert Yin Pong Chan

ROPERS MAJESKI KOHN & BENTLEY: Walter C. Kohn

/s/ Joshua R. Benson
Joshua R. Benson

Dated: March 20, 2014

A SUMMARY OF THIS BRIEF

Plaintiff (P) sues D1 and D2 for conspiring to steal P's customers and destroying P's business. P alleges that this constituted racketeering under RICO, and seeks the treble damages allowed by RICO.

Over P's objection, P's case against D2 is stayed while P's case against D1 is sent to arbitration. The arbitrator awards $9 million against D1, to compensate P for his loss. D1 pays the $9 million to P.

P then continues his suit against D2, seeking the remainder ($18 million) of the treble damages provided by RICO. Does D1's payment defeat P's suit against D2 for the additional $18 million?

"Yes," held the district court—because P has already recovered a "vast sum of money," "a remarkably huge sum," "leaving no point in continuing the litigation against the remaining defendants."

That is what happened in this case. But no language in the RICO statute deprives P of his right to treble damages merely because compensatory damages have been paid. And the district court's "Yes" threatens to undermine Congress's intent. If a racketeer manages to have the compensatory damage award paid before the trial on the treble damage claim, the district court's "Yes" would allow him to escape Congress's key deterrent to such racketeering: treble damages.

This is an issue of first impression in this Court, but the weight of authority from other circuits is contrary to the district court's view. That, in a nutshell, is why the district court's ruling should be reversed.

STATEMENT OF RELATED CASES

The undersigned certifies that, as of this date, there are no such related cases to report.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331 and §1332, because the action involves a federal question, and because the parties are diverse and the matter in controversy exceeds $75,000.

The district court granted Appellees' motion for summary judgment on September 9, 2013 (ER 2), and issued judgment on September 13, 2013 (ER 1). That judgment is a final judgment disposing of all the parties' claims.

On September 23, 2013, Plaintiff timely filed notice of appeal from the summary judgment order and final judgment. ER 10. This Court has jurisdiction to hear this appeal under 28 U.S.C.A. § 1291, which provides that: "The courts of appeals … shall have jurisdiction of appeals from all final decisions of the district courts . . . ."

STATEMENT OF ISSUE

Did the district court commit reversible error by granting summary judgment against Plaintiff's treble damage claim under RICO solely on the ground that Plaintiff was paid the compensatory damages award, where the evidence showed a triable issue of fact justifying an award of treble damages under the RICO statute?

PRIMARY AUTHORITY

18 U.S.C. §1964, subsection (c) provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

STATEMENT OF THE CASE

This saga spans two decades and the Pacific Ocean.

A. The Original Complaint

It began in 1993, when Appellant Uthe Technology Corp. (hereafter "Uthe"), then based in Milpitas, California, filed suit against Appellees Harry Allen and Aetrium, Inc., and against their co-defendants Peter Kwan, Y.K. Chow, Francis Chua[1], and Katherine Yip, in the Superior Court for Santa Clara County. The defendants removed the case to the U.S. District Court for the Northern District of California (ER 865 (Trial Docket)), and shortly thereafter Uthe filed an amended complaint. ER 838.

The amended complaint alleged the following. Uthe manufactures and distributes semiconductor products. Its subsidiary Uthe Singapore (called Uthe Singapore Technology Private Limited, or "USTPL") distributed its products and similar products in Asia, out of its principal place of business in Singapore. While Singapore co-defendants Kwan and Chua were working for USTPL, they secretly set up a company to poach USTPL customers and divert orders intended for USTPL to the secret company. Kwan and Chua conspired with one of USTPL's largest suppliers (Appellee Aetrium) and its officer in charge of sales in Asia (Appellee Harry Allen) to effectuate this diversion. The

[1] Most documents in the record say "Chua," but sometimes "Chau." Apparently, "Chua" is correct.

diversion caused Uthe to sell its shares of USTPL in 1992 to Kwan and Chua at distressed prices. The complaint alleges that defendants' acts violated federal securities laws, the federal RICO statute, and state laws against fraud. ER 838 (First Amended Complaint).

B. The Motion to Dismiss and Stay Pending Arbitration

Defendants Kwan and Chua moved to dismiss the case on the ground of *forum non conveniens* or, alternatively, to send the case to arbitration in Singapore pursuant to an arbitration provision in their stock purchase agreement. Docket # 12; ER 799 (Plaintiff's Motion to Reopen Case and Lift Stay) (2:12-15).[2] Defendants Allen and Aetrium (who were not parties to the stock purchase agreement) moved to stay the district court proceedings against them pending resolution of the Singapore arbitration. Docket # 9.[3]

Uthe opposed these motions (Docket # 22), presenting evidence that Uthe could not obtain full relief against Kwan and Chua in Singapore. Singapore courts do not recognize RICO claims. ER 835 (Hock Decl.) (3:3-6).

---

[2] When Uthe moved to reopen the case in 2012, it summarized the lengthy procedural history. ER 799 (Docket # 106). For the convenience of the Court, and to control the size of the record, this Brief occasionally cites this filing to provide certain undisputed and background facts on the history of the case, particularly the foreign proceedings.

[3] For completeness, Uthe occasionally cites certain docket entries that are not relevant to the disposition of this appeal, and hence not included in the Excerpts of Record.

Nor does Singapore law recognize treble damage claims. ER 835 (3:8-10). While Singapore does allow punitive damages, these are rarely awarded, and are awarded mainly in defamation cases. ER 835 (3:10-15).

Nevertheless, in December of 1993, the district court granted the Kwan-Chua motion to dismiss, on the ground of *forum non conveniens*.[4] ER 824 (Order Granting Motion to Dismiss and Motion to Stay) (2:17-23). The court also granted the Allen-Aetrium motion to stay pending resolution of the arbitration, because "the arbitration may narrow or limit the issues raised by the claims alleged against Aetrium and Allen." ER 828 (6:19-25).

Uthe moved for reconsideration, contending that the alleged misconduct occurred prior to and was unrelated to the stock sale (Docket # 47), and for leave to file a second amended complaint (*id*. # 52), but the court denied both motions (*id.* # 59). Uthe filed notice of appeal (*id.* # 60), but the appeal was later dismissed (*id*. # 75). On October 27, 1997, the court entered an order "dismissing case for statistical purposes." Docket # 104.

---

4 The court so ruled because the agreement for sale of USTPL stock was negotiated in Singapore, it contained a "choice of law" provision specifying the application of Singapore law, and it provided for binding arbitration of any dispute arising out of the agreement. ER 807 (Order Granting Motion to Dismiss and Motion to Stay) (2:17-23).

C. The Arbitrator's Findings

In 1998, Uthe sued Singapore defendants Kwan, Chua, and Chow in the High Court of Singapore, which stayed that suit and sent the case to arbitration. ER 800 (Motion to Reopen Case) (3:13-18).

In 2005, the arbitrator (K.S. Rajah) issued a partial award, finding that the arbitration respondents were liable to Uthe. ER 800 (3:19-22); ER 596 (Second Amended Complaint, Exhibit 1, Partial Award). Singapore courts rejected several challenges respondents made to this award. ER 800 (3:23-4:7).

The liability award includes findings that were summarized as follows in the second arbitrator's damage award:

"The first tribunal has found the Respondents guilty of a litany of sins. The acts of the 1st Respondent [Peter Kwan] by which he breached his fiduciary duty were as follows:

> *(a) Diverting the business and revenue of USTPL to United Semiconductor,[5] and procuring the employees of USTPL to provide their services to United Semiconductor, without USTPL receiving any remuneration or benefit from the use of its employees by United Semiconductor;*
>
> *(b) Removing from USTPL confidential information and records which were necessary for the purpose of carrying on the business of USTPL;*

[5] The new corporation was incorporated on July 29, 1992, as "Brenner Investments Pte Ltd." On August 17, 1992, the conspirators changed the name to "United Semiconductors Pte Ltd." ER 611-612 (Partial Award).

(c) Procuring the termination of two distributorship agreements that USTPL had with Aetrium and Microvision;

(d) Causing United Semiconductor to enter into distributorship agreements with Aetrium and Microvision;

(e) Causing United Semiconductor to enter into new distributorship agreements with Aetrium and Microvision on terms less favorable to USTPL compared to the previous agreement . . .;

(f) Procuring the en masse resignations of the employees from the marketing and distribution division of USTPL;

(g) Causing USTPL to agree to the cancellation of various agreements for the purchase of equipment and for such purchasers to subsequently enter into agreements with United Semiconductor;

(h) Persuading various purchasers to place all future orders for equipment with United Semiconductor and not USTPL, thus diverting business from USTPL;

(i) Procuring breaches of USTPL's distributorship agreements with various equipment manufacturers, in particular Aetrium;

(j) Procuring the agreement of various principals to delay payments of commissions earned and due and payable to USTPL;

(k) Rendering the accounts of USTPL false and inaccurate, by failing to take such delays in payment of commissions into account in UTSPL's books;

(l) Concealing the above facts concerning USTPL."

In relation to conspiracy to injure the First Tribunal found:

"The unlawful purpose and the Respondents' intention to injure is established; inter alia, by the following facts:

(a) the setting up of United Semiconductor and directing Geraldine Tan to work there; diversion of USTPL's business and revenue to United Semiconductor;

(b) removal of documents which contained confidential information from USTPL;

(c) the termination of the distributorship agreement which USTPL had with Aetrium and Microvision;

(d) procurement by the Respondents of the en masse resignations of the employees from the marketing and distributorship division of USTPL;

(e) procurement by the Respondents of the cancellation of existing sale and purchase agreements for equipment between USTPL and its customers and persuading customers to place all future orders with United Semiconductor;"

and the "*aim was to destroy (the company) by unlawful means.*" ER 766-768 (Second Amended Complaint, Exhibit 2, Partial Award 2) (italics in original). These findings were included in the documents presented to the trial court with the motion for summary judgment that is the subject of the present appeal. ER 274-276 (Nath Decl., Exhibit D, Partial Award 2).

D. Arbitrator's Findings Relating to Aetrium and Allen

While Aetrium and Allen were not parties to the Singapore arbitration, some of the Arbitrator's findings involved their actions.

The Arbitrator found that co-conspirator Yip "had participated in a conference call with Joe Levesque (President and Chief Executive Office of Aetrium) and other Aetrium executives, together with Peter [Kwan], Francis [Chua], and Yoke Keng. On that occasion Peter had explained his plans to

divert Aetrium's distributorship contract with USTPL." ER 629-630 (Partial Award).

The participants in that conference call also discussed and agreed "(a) that the commissions already earned by USTPL was to be put on hold with Aetrium and paid out only on Peter's or Yok Keng's instructions; (b) that the terms of the existing contract be amended so that the contract would be automatically terminated if there was a change in management (*i.e.*, if Peter and Francis left Uthe Singapore)." ER 614.

The conspirators also sent a fax to Harry Allen stating that "CM Wong, purchasing manager of NSEM has agreed to cancel present order of 8 units 5050S/TCLB to Uthe and re-issue to Aetrium." ER 629-630.

The Arbitrator found that on September 27, 2003, Uthe CEO Michael Goodson wrote to Aetrium CEO Joseph C. Levesque, stating that "we have the facts of your involvement and Aetrium's involvement with Peter Kwan et el's [*sic*] conspiracy to defraud our subsidiary UTHE in 1992. . . ." ER 629-630.

Aetrium participated in the arbitration by submitting an affidavit from its Chief Administrative Officer (Douglas L. Hemer). Aetrium claimed that "it was too costly and inconvenient" to come to Singapore to give evidence. ER 630. However, the Arbitrator found that: "Mr. Hermer did not present himself

for cross-examination although his evidence touched on important matters. I am unable to accept the explanation given for his absence." ER 635.

Regarding future legal actions, the Arbitrator held that:

> Save for this arbitration it was ordered there shall be no further or other actions or proceedings of any nature, either in Singapore or elsewhere by the Claimant [Uthe] against the Respondents or any of them * * * *, without prejudice to Claimant's rights in the U.S. action against the Respondents and the other defendants in the U.S. action or on matters not comprised in the U.S. Action or in [the current arbitration].
> ER 631.

E. The Arbitration Award on Damages

In 2010, arbitrator Rajah resigned due to poor health, and was replaced by Alan J. Thambiayah. ER 801 (Motion to Reopen Case) (4:8-10). In 2012, arbitrator Thambiayah issued a damage award against the respondents, leaving open only an award for costs. ER 801 (4:11-16); ER 709-797 (Partial Award 2). The arbitrator found that, but for respondents' misconduct, USTPL would have been worth more than $14 million in Singapore dollars. ER 769.

Because of respondents' misconduct, Uthe was forced to sell the company to the respondents for just under $3 million in Singapore dollars. Therefore, Uthe's damages were $12,286,350 in Singapore dollars. ER 784 (Partial Award 2). In addition, one respondent was found liable to Uthe for $500,000 for the value of diverted contracts. ER 771; ER 795. Interest at 1.5%

per year was also awarded. ER 778. The arbitrator found Uthe's evidence on further damages not to be convincing. ER 769.

Applying the October 12, 1992, currency conversion factor, the $12,586,350 award in Singapore dollars coverts to $9,180,771 in U.S. dollars. ER 103 (McCord Decl., Exhibit B, Hosfield Expert Report).

F. The Second Amended Complaint

In 2012, soon after the Singapore arbitration award became final, Uthe moved to reopen the case in the Northern District and lift the stay. ER 798. The parties agreed to reopen the matter and allow Uthe to file a second amended complaint, which the court ordered. Docket # 133.

The Second Amended Complaint (ER 576) alleges the following. Uthe established its subsidiary, USTPL, to distribute semiconductors in Asia. In 1988, USTPL contracted with Aetrium for USTPL to be Aetrium's exclusive distributor of semiconductor equipment in Asia for 20 years. This was one of USTPL's largest distribution contracts, accounting for more than 90% of USTPL's revenue in 1992, and was vital to USTPL's financial viability. Harry Allen—an officer and director of Aetrium—knew this. In 1992, Kwan, Chua, and Yip—all officers and directors of USTPL—secretly set up a new Singapore corporation which they, along with Allen and Aetrium, intended to use to take over USTPL's semiconductor business in Asia. Allen and Aetrium helped

establish the secret corporation by providing it with capital, office equipment, and personnel. Allen and Aetrium also helped conceal confidential information and documents that Kwan, Chua, and Yip took from USTPL's offices, including confidential client information. Allen and Aetrium also helped lure USTPL's clients away from USTPL and to the new secret corporation. While the 20-year Uthe-Aetrium agreement provided that it could be terminated only for breach, defendants conspired to replace the agreement with a new agreement that they kept secret from Uthe. The new agreement permitted Aetrium to terminate on 30 days' notice, which Aetrium promptly did—without notifying Uthe. Aetrium then transferred all of its business to the new secret corporation. And Aetrium redirected to the new corporation moneys it owed to USTPL. Allen and Aetrium kept all of these actions secret from Uthe, because they knew that Uthe would take steps to stop these actions if Uthe knew of them. Allen and Aetrium also worked to persuade USTPL's clients to cancel their orders with USTPL and place them with the secret corporation or with Aetrium itself. Before this scheme was effectuated, Aetrium was not the "world leader" in the semiconductor industry, but after the scheme took hold, Aetrium made exactly that claim on its website. Uthe finally learned of the scheme through an anonymous letter. When Uthe tried to find out what happened, Uthe found that

USTPL's documents were missing and all of its employees were gone. The scheme gutted USTPL's business, destroying Uthe's investment. ER 576.

The Second Amended Complaint attached the two Singapore arbitration decisions and alleged that the damage award did not make Uthe whole, and that neither Aetrium nor Allen was a party to the arbitration.

The Second Amended Complaint then stated several causes of action, including Count VI.[6] That Count, for Civil RICO (18 U.S.C. sections 1962(c)

---

[6] The other causes of action were:

> Count I, for fraud by omission, alleges that Aetrium and Allen affirmatively misled Uthe's CEO and concealed from Uthe the fact that they were conspiring to destroy UTSPL by diverting its business to the new corporation.
>
> Court II, for conspiracy to commit fraud, alleges that Aetrium and Allen conspired to commit this fraud.
>
> Count III, for conversion, alleges that Aetrium and Allen diverted payments due from UTSPL's customers to the new corporation.
>
> Count IV, for intentional interference with contract, alleges that by committing the above acts, Aetrium and Allen interfered with Uthe's contract with UTSPL to distribute Uthe's products in Asia.
>
> Count V, for intentional interference with economic relations, alleges that Aetrium and Allen diverted business from UTSPL to the new corporation.
>
> Count VII, for securities fraud, alleges that Aetrium and Allen falsely told Uthe's CEO that they knew nothing of any efforts to divert business from Uthe, and that this was done in order to suppress the market value of UTSPL and enable the conspiring officers to purchase all the stock of UTSPL at a heavy discount. Because Aetrium and Allen assisted those officers in diverting UTSPL's business, Uthe was fraudulently induced to sell its stock in UTSPL to the conspiring officers at a heavy discount.

and (d)), alleges that Aetrium and Allen conspired with the officers and directors of USTPL to divert business from USTPL to the new corporation, to fraudulently amend the contract between Aetrium and USTPL and to conceal the amendment from Uthe, to withhold and divert commissions due to Uthe, and to use false representations to convince Uthe customers in Asia to cancel contracts and orders with Uthe and divert them to the new corporation—all via international phone calls from Aetrium headquarters in Minnesota to UTSPL officers and directors in Singapore. Aetrium and Allen also assisted Kwan in concealing from Uthe the existence of the new corporation. The prayer seeks, on Count VI, "for an award of threefold of actual damages according to proof at trial," as well as reasonable attorneys fees.[7]

Count VIII, for unfair competition, alleges that by committing the above acts, Aetrium and Allen violated California Business & Professions Code section 17200.

[7] Aetrium and Allen moved to dismiss the Second Amended Complaint. The court granted part of the motion and denied part. ER 568.

Aetrium and Allen argued that Counts I through VI and VIII should be dismissed because a prior ruling (by Judge Ware) had held that Uthe's ownership of stock in USTPL gave Uthe no standing to sue for injuries to USTPL, and that this ruling was "law of the case." The court rejected this argument, because the challenged Counts included allegations of direct injuries to Uthe (including loss of sales of Uthe's products to customers in Asia).

The court granted the motion to dismiss Count VII, for securities fraud, because the Singapore arbitration already awarded Uthe damages for its loss on the stock sale. The court denied the motion to dismiss Count III for conversion,

Aetrium and Allen filed an answer to the Second Amended Complaint. ER 555.

G. The First Motion for Summary Judgment

On February 21, 2013, Aetrium and Allen moved for summary judgment on the Second Amended Complaint, arguing that Uthe lacked evidence showing that it suffered direct harm from Aetrium's and Allen's contribution to the destruction of USTPL. Docket # 148. The court denied the motion, holding that Uthe had furnished evidence that USTPL had distributed Uthe's products to National Semiconductor, but these sales were ended by the destruction of USTPL. ER 551 (Order Denying Defendants' Motion for Summary Judgment). The court also rejected defendants' argument that the arbitration award compensated Uthe for all of its direct harm, holding that "defendants fail to establish how an arbitration award that compensated plaintiff for the depressed sale price and the lost profits due to the use of its former subsidiary also compensated plaintiff for reputational harms and the loss of its own customers." ER 553 (3:23-27).

---

because Uthe sufficiently alleged that Aetrium and Allen induced Uthe's customers to withhold or redirect payments due to Uthe.

The court denied the motion to dismiss Count VI, the civil RICO claim, holding that Uthe had sufficiently pleaded that Aetrium's and Allen's actions had extended over a substantial period of time.

H. The Second Motion for Summary Judgment

On August 1, 2013, Aetrium and Allen filed their second motion for summary judgment, arguing that there was no triable issue of fact on the following issues: (1) their actions did not cause Uthe to lose profits on sales of generators and transducers, (2) their actions did not cause Uthe to lose profits from head office expense payments, (3) Uthe has no evidence of a viable RICO claim, and (4) prejudgment interest is not awardable. Docket # 176. The motion was accompanied by extensive documents. ER 135 (Nath Decl.). Uthe opposed the motion (Docket # 182), with supporting documents. ER 132 (Goodson Decl.); ER 128 (Yip Decl.); ER 70 (McCord Decl.). Aetrium and Allen then filed a reply memorandum (Docket # 186), with additional documents. ER 68 (Nath Decl.). Uthe filed an objection to the reply evidence. Docket # 188.

I. The Evidence

Documents presented in support of and in opposition to the motion for summary judgment show the following. Many of these facts come from the declaration of co-conspirator Katherine Yip (ER 128).[8] Until 1992, UTSPL distributed semiconductor products provided by Uthe and by Aetrium. Yip was

[8] The summary judgment documents also included Yip's declaration filed in the arbitration (ER 337 (Nath Decl., Exhibit F, Yip Affidavit)), where she makes similar statements. (Yip also went by her Chinese name: Tan Lee Tian.)

the Sales Administration Manager of USTPL and was USTPL's primary contact with Aetrium and Harry Allen. ER 129.

In 1992, Yip developed a plan with other principals of USTPL to divert business away from UTSPL, cutting out Uthe and its principal, Michael Goodson.[9] "As part of this plan, in early July 1992, I [Yip] participated in a phone call with the USTPL officers and Aetrium President Joseph Levesque, and other executives from Aetrium. * * * * [T]he Aetrium persons on the call, including Mr. Levesque, specifically and verbally agreed: (1) that Aetrium would withhold commissions that were earned by and payable to USTPL on the sale of Aetrium products so that they would not show up USTPL's books; (2) to secretly alter the terms of Aetrium's distribution contract with USTPL so that it could be quickly terminated and switched over to a new shell company if necessary; (3) divert orders from customers away from USTPL; (4) conceal everything from Uthe USA and Mr. Goodson." ER 129-130.

The participants hoped their plan would drive business away from Uthe, which would enable them to convince Uthe and Goodson to sell their USTPL

---

[9] The first arbitrator's decision describes an incident that might have precipitated this plan. In early 1992, Respondents proposed to Uthe CEO Michael Goodson "that a secret operation could be set up in Hong Kong to which taxable income could be diverted from Singapore. 50% of the profits would go to Goodson and 50% to Peter, Francis, and Yoke Keng. Goodson turned down the offer"—apparently because such tax evasion was illegal. ER 610 (Partial Award).

stock to them cheaply. But Goodson might refuse to sell. "That is why we set up a secret shell corporation in 1992—to divert USTPL orders to and continue the business of distributing products to USTPL customers in the event that USTPL remained under the control of Uthe USA. Taking over USTPL was never the end goal of the conspiracy, it was simply a step in the plan to profit by keeping all of the business and profits from that company for ourselves." Either way, "The planned partnership with Aetrium, including the servicing of USTPL clients, was intended to continue indefinitely into the future." ER 130.

Carrying out the plan, the conspirators persuaded all employees of USTPL to resign, leading to a mass walkout. ER 351-352 (Nath Decl., Exhibit F, Yip Affidavit). Yip and her colleagues also contacted USTPL customers to persuade them "to cancel the orders and reissue them with a competitor company that we had set up in secret." When some customers balked, Yip "worked with Aetrium and Harry Allen to convince the customers to reissue the orders with Aetrium directly." ER 130.

While this was going on, Uthe CEO Michael Goodson phoned Harry Allen in August of 1992, after Goodson had received an anonymous letter about the secret corporation. ER 357 (Nath Decl., Exhibit G, Goodson Decl.). Goodson testified:

> I point blank asked Mr. Allen if he knew anything about it and he said he was not aware of any effort by UTHE Singapore's officers to create any

> secret corporation. I subsequently learned, through the testimony of one of Aetrium's co-conspirators in the Singapore arbitration, that Mr. Allen's statement was false. Not only was he aware of the effort to create the secret corporation, he and other executives of Aetrium had participated in the effort from the beginning of the conspiracy. ER 357 (2:12-17).

After Yip and her colleagues bought USTPL from Goodson at a steep discount, the conspirators continued to service Aetrium customers and accept payments that would have gone to Uthe. The scheme culminated in the summer of 1993, when Goodson learned of it and filed suit. "If Mr. Goodson had not discovered the conspiracy to divert orders and contracts away from USTPL, we would have kept it secret from him to this day and continued to service customers and withhold payments." ER 131 (Yip Decl.).

When Goodson sent Cooper & Lybrand accountants to Singapore to examine USTPL's records, they found that many of them had been removed. ER 143 (Nath Decl., Exhibit A, Goodson Depo.) (162:2-23). Aetrium would then have had access to that confidential information. ER 143 (164:3-6).

In October of 1992, Goodson again phoned Harry Allen:

> Mr. Allen stated that he was aware of the secret corporation and knew that UTHE Singapore's employees had left to work for it, but claimed that it had all come as a surprise to him. He portrayed himself and Aetrium as surprised, innocent bystanders. He even offered to step in and help resolve the situation. He never said that he and Aetrium CEO Joseph Levesque had been directly involved in the effort to create a secret corporation, divert officers, employees and UTHE business away

for the purpose of crippling UTHE.
ER 357 (2:20-25).

The conspirators changed the name of USTPL to UST Technology Pte Ltd. ("UST"). ER 353 (Nath Decl., Exhibit F, Yip Affidavit). Aetrium kept in close contact with UST regarding the arbitration. ER 123 (McCord Decl., Exhibit C, Koch Depo.) (95:14-19). Aetrium's CEO, Mr. Levesque, sent a note to Peter Kwan stating, "We wish you all good luck on the outcome of the hearing and stand ready to help further if it is requested." ER 126 (McCord Decl., Exhibit E). Daniel Koch, Aetrium's Vice President of Marketing (ER 113 (Koch Depo.) (5:9-12)), testified at the arbitration hearing (ER 121 (82:23-83:7)). UST had asked him to testify (ER 123 (95:20-22)), and UST's lawyer prepared him to testify (ER 123 (96:16-97:8)).

J. The District Court Ruling

The district court ruled that this evidence was not sufficient to permit a reasonable jury to find that Aetrium and Allen violated RICO, because the Singapore conspirators had fully paid the $9+ million arbitration award—"a remarkably huge sum"—that reimbursed Uthe for the amount the conspirators stole from Uthe. "As such, plaintiff cannot now pretend to have been denied its day in court or pretend to need a second run at recovery on the theory that it is entitled to treble damages under RICO, more than twenty years after the fact. The undersigned judge therefore respectfully disagrees with his good friend and

colleague Wallace Tashima (who was then sitting as a district court judge)[10] and now rules that there are no more damages for which plaintiff may be compensated under RICO." ER 8 (Order Granting Defendants' Motion for Summary Judgment) (7:8-21).

On September 9, 2013, the court granted the motion for summary judgment, upholding all four of Aetrium's and Allen's arguments. ER 8. Uthe's motion for reconsideration (Docket # 196) was denied (Docket # 198). Judgment was entered on September 13, 2013. ER 1 (Judgment).

On September 23, 2013, Uthe filed a notice of appeal to this Court, stating that "Plaintiff limits appeal to one portion of the Court's September 9 order, specifically, the Court's ruling on Plaintiff's claim for damages under RICO." ER 10.

[10] The reference is to Judge Tashima's decision in *In re National Mortg. Equity Corp. Mortg. Pool*, 636 F. Supp. 1138, 1151 (C.D. Cal. 1986).

SUMMARY OF THE ARGUMENT

First, the district court's reliance on the "one satisfaction" rule was error, because Uthe's claim for treble damages has never been satisfied.

Second, the district court's decision undermines all three of the recognized purposes of RICO's treble damage remedy: (1) to deter racketeering, (2) to give private parties an incentive to supplement Justice Department efforts to stop racketeering, and (3) to compensate victims for damages that are difficult to prove.

Third, from the U.S. Supreme Court on down, federal courts across the country have almost unanimously ruled that, in order to further legislative intent, statutory multiple damage remedies are not defeated by payments of compensatory damage awards. They have applied this approach to the False Claims Act, to antitrust statutes, to the Economic Recovery Act, to state statutes, and even to RICO itself. The district court gave no sound reason for departing from this dominant rule.

ARGUMENT

A. Standard of Review

An appeal from a summary judgment is reviewed *de novo*. *Travelers Cas. & Sur. Co. of America v. Brenneke*, 551 F.3d 1132, 1137 (9th Cir. 2009). The reviewing court must determine whether, "viewing the evidence in the light

most favorable to the non-moving party, [] there are any genuine issues of material fact and whether the district court correctly applied the relevant [substantive] law." *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 916 (9th Cir. 2002). The district court's interpretation of the underlying legal principles is subject to *de novo* review. *Southwest Voter Registration Ed. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003).

B. Under RICO, Payment Of Compensatory Damages Does Not Defeat A Treble Damage Claim

The documents before the district court would permit a reasonable jury to find that Aetrium and Allen violated RICO, by conspiring with the USTPL defendants to engage in a pattern of racketeering activity involving fraud. *See* 18 U.S.C. §1961(1)(B), §1961(5) and §1962(c) and (d). The district court's ruling does not dispute this.

Nevertheless, the district court ruled that RICO's treble damage remedy was unavailable to Uthe, solely because the compensatory damage award had been paid. This was error. The great weight of authority is to the contrary, because such a rule would undermine the purposes of the statutory remedy.

1. The "One-Satisfaction" Rule Does Not Support The District Court's Ruling.

Uthe seeks from Aetrium and Allen only the portion of treble damages not already covered by the USTPL defendants' payment, *i.e.*, $18 million, not the full $27 million treble damages. The district court disallowed this claim because the UTSPL defendants had paid the $9 million judgment for Uthe's compensatory damages.

The district court relied on the "one-satisfaction" rule: when one defendant satisfies a judgment, plaintiff cannot collect the same amount from a co-defendant. According to the district court, since the USTPL defendants paid the $9 million judgment for compensatory damages, there was nothing left to treble, so Aetrium and Allen are totally off the hook.

But Uthe seeks *only one* satisfaction: $9 million trebled, with the $9 million that Uthe has already received *credited* against a treble damage judgment against Aetrium and Allen. Uthe did *not* receive this satisfaction from the USTPL defendants.

The district court relied on a single California Court of Appeal case: *Fletcher v. California Portland Cement Co.*, 99 Cal. App. 3d 97 (1979). The *Fletcher* opinion is short and straight-forward. Fletcher was working for his railroad employer when he fell through a hole on the premises of a cement

company. He sued both his employer and the cement company in federal court. The cement company was dismissed for lack of jurisdiction. Fletcher went to trial against the railroad. The jury awarded him over $75,000, which the railroad paid. Fletcher then sued the cement company in California superior court, seeking compensation for the same injury arising out of the same incident. The California Court of Appeal held that the action was barred by the "one-satisfaction" rule:

> An injured person is entitled to only one satisfaction of judgment for a single harm, and full payment of a judgment by one tortfeasor discharges all others who may be liable for the same injury. This rule, designed to prevent double recovery and never-ending litigation by dissatisfied claimants, applies whether a single judgment has been obtained against joint or concurrent tortfeasors, whether separate judgments of equivalent or disparate amounts have been obtained against tortfeasors, or whether no other judgment has been obtained against other tortfeasors.
> Id. at 99.[11]

As the district court noted, *Fletcher* and the one-satisfaction rule are designed to prevent double recovery.[12] Fletcher was entitled to only one award

---

[11] *Accord*: *Neubauer v. Goldfarb*, 108 Cal. App. 4th 47, 52 (2003) ("if one joint tortfeasor satisfies a judgment against all joint tortfeasors the judgment creditor cannot obtain a double recovery by collecting the same judgment from another of the tortfeasors"); *Milicevich v. Sacramento Med. Ctr.*, 155 Cal. App. 3d 997, 1003 (1984) (the purpose of the single-satisfaction rule is to "prevent unjust enrichment").

[12] California courts have further explained how the one-satisfaction rule is meant to prevent double recovery in the following cases: *Jhaveri v. Teitelbaum*, 176 Cal. App. 4th 740, 753-54 (2009); *Neubauer*, 108 Cal. App. 4th at 52; and *McCall v. Four Star Music Co.*, 51 Cal. App. 4th 1394, 1399 (1996).

of compensatory damages, and that is what his employer paid him. His suit against the cement company sought double recovery, and was therefore barred by the one-satisfaction rule. However, if Fletcher's employer had paid him *less* than the amount he properly sought against the cement company, he would have been allowed to seek the difference. *See McCall v. Four Star Music Co*., 51 Cal. App. 4th 1394 (1996): "where fewer than all of the joint tortfeasors satisfy less than the entire judgment, such satisfaction will not relieve the remaining tortfeasors of their obligation under the judgment."[13]

---

[13] In *Yates v. Nimeh*, 486 F. Supp. 2d 1084 (N.D. Cal. 2007), the court held that, under California's single-satisfaction rule, payment of compensatory damages by one defendant did not bar an action to collect punitive damages from a second defendant. The court noted four non-California cases that appear to disagree. *Id*. at 1087, fn. 9. None of the four cases cited involved RICO claims. In one, the court was troubled by the fact that the plaintiff "made a tactical decision not to name [the second defendant] as a defendant in their original action [against the first defendant"]. *Bridgestone/Firestone North America Tire, L.L.C. v. Naranjo*, 206 Ariz. 447, 454 (2003). Nothing of the sort occurred in the present case. In another, the jury in the first case found that the predicate acts for punitive damages had not been committed wantonly or recklessly. This effectively estopped plaintiff from seeking punitive damages against the second defendant. *See Ruiz de Molina v. Merritt & Furman Ins. Agency, Inc.*, 220 F. Supp. 2d 1249, 1252-53 (N.D. Ala. 2002). Again, nothing of that sort occurred in the present case. In *Sprague, Levinson & Thall v. Advest, Inc.*, 623 F. Supp. 11, 13 (D.C. Pa. 1985), the court struck a punitive damages award solely because the jury found no compensatory damages to support it. Again, nothing of the sort occurred here. Only one of the four cases is not so easily distinguishable, but that opinion failed to discuss the policy reasons for allowing punitive damages against the second defendant. The fourth case, *Mike Loehr & Co., Inc. v. Wal–Mart Stores, Inc.*, 919 F. Supp. 244, 248, fn. 8 (E.D. Tex. 1996), concerned compensatory damages, not punitives. The court stated in dicta in a footnote that if plaintiff had sough punitive damages, those too

Uthe does not seek double recovery. Uthe was entitled to an award of compensatory damages—but Uthe was also entitled to have it *trebled*, according to a statute enacted by Congress. Only *part* of that amount—one-third—was paid to Uthe. Therefore, the one-satisfaction rule does not bar the company from seeking the remaining two-thirds from Aetrium and Allen.

The district court refused to follow another district court opinion that had rejected the one-satisfaction argument against treble damages under RICO: *In re Nat'l Mortg. Equity Corp. Mortg. Pool*, 636 F. Supp. 1138 (C.D. Cal. 1986) (hereafter "*National Mortgage*"). There, like here, a party claimed that payment of compensatory damages defeated a RICO claim for treble damages. That court (per then-district judge Tashima) addressed the question: "What constitutes 'full satisfaction' of a treble damages claim?" *Id*. at 1151. The court concluded: "the other two-thirds of the Investor Institutions' potential treble damage awards would remain unaffected by the one-satisfaction rule." *Id*.

National Mortgage found no precedent dealing directly with this issue, but found antitrust cases analogous, because the Sherman Act also provides for treble damages. The court noted, "Without exception, courts hold that the full award to which such plaintiffs are entitled is an amount three times the proven

---

would be barred by the single-satisfaction rule. In any event, the *Yates* court rejected all four cases, holding that in California, "where a claimant's award of compensatory damages was completely offset, he could still receive punitive damages." 486 F. Supp at 1088.

actual damages and that, to ensure that plaintiffs receive complete satisfaction of their claims, settlement payments should be deducted from the award against the non-settling defendant(s) *after* actual damages are trebled." *Id*. The court quoted *Hydrolevel Corp. v. Am. Soc'y of Mech. Eng'rs, Inc*., 635 F.2d 118, 130 (2nd Cir. 1980):

> First, the antitrust laws provide that the plaintiff should receive three times the proven actual damages. If settlement proceeds are deducted before trebling, the plaintiff's total award is less than what the law allows. Since antitrust defendants are joint tortfeasors, each is liable to complete the total deserved damages irrespective of fault. Second, . . . one purpose of the trebling provision is to encourage private plaintiffs to bring suit. Any ultimate recovery totaling less than three times proven damages would weaken the statutory incentive through judicial construction. Third, deduction of settlement proceeds before trebling would discourage settlement by making litigation relatively more profitable for plaintiffs; every dollar received in settlement would cause a three dollar reduction in the judgment at trial.
> *Nat'l Mortgage*, 636 F. Supp. at 1152.

Judge Tashima's approach was later confirmed by this Court in *William Inglis & Sons Baking Co. v. Continental Baking Co*., 981 F.2d 1023 (9th Cir. 1992), an antitrust case where this Court ruled that "under our existing law settlement payments should be deducted from the damages after they have been trebled." *Id*. at 1024.

2. The District Court's Ruling Is Inconsistent With The Three Purposes For Providing Treble Damages for RICO Violations.

The RICO statute provides for treble damages in 18 U.S.C. §1964, subsection (c):

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

No words in this subsection (or in any other RICO statute) say that payment of compensatory damages bars recovery of these "threefold" damages. Reading such words into RICO would undermine each of the three purposes of the treble damages remedy identified by the courts: (1) to deter racketeering, (2) to encourage victims to supplement the Justice Department's limited resources in bringing actions to deter racketeering, and (3) to compensate victims for damages difficult to prove.

(a) Congress Intended The Treble Damage Remedy to Deter Racketeering. The District Court Opinion Undermines This Purpose.

"The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering activity, an object pursued the sooner the better." *Rotella v. Wood*, 528 U.S. 549, 558 (2000). *See also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977) ("treble

damages also play an important role in penalizing wrongdoers and deterring wrongdoing").

The evidence showed that Aetrium and Allen engaged in racketeering activity that should be suppressed "the sooner the better."

In July of 1992, Aetrium President Joseph Levesque and other Aetrium executives agreed with the USTPL conspirators:

- that Aetrium would withhold commissions payable to USTPL on the sale of Aetrium products so that they would not show up USTPL's books;
- that they would secretly alter the terms of Aetrium's distribution contract with UTSPL so it could be quickly terminated and switched over to a new shell company if necessary;
- that they would divert orders from customers away from USTPL; and that they would conceal everything from Uthe and Mr. Goodson. ER 130 (Yip Decl.).

The USTPL conspirators then contacted customers to persuade them "to cancel the orders and reissue them with a competitor company that we had set up in secret." When some customers balked, Aetrium and Allen helped to convince the customers to reissue the orders with Aetrium directly. ER 130.

In August of 1992, when Uthe CEO Michael Goodson phoned Harry Allen and asked him if he knew anything about an alleged secret corporation, Allen falsely stated that "he was not aware of any effort by Uthe Singapore's officers to create any secret corporation." ER 357 (Goodson Decl.) (2:12-17).

In October of 1992, when Goodson again phoned Harry Allen, Mr. Allen admitted that he was aware of the secret corporation and knew that Uthe Singapore's employees had left to work for it, but falsely claimed that it had all come as a surprise to him. ER 357 (Goodson Decl.) (2:20-25).

In 2005, in the Singapore arbitration, Aetrium gave extensive help to the USTPL conspirators, in their effort to deprive Uthe of compensation for its loss. *See* ER 354 (Yip Affidavit); ER 113 (Koch Decl.) (5:9-12; 82:23-83:7; 95:14-96:16-97:8).

In *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (7th Cir. 1987), the defendant had returned to the plaintiff some property defendant had wrongfully obtained. The court held that this return had no effect on plaintiff's claim for treble damages under RICO:

> While the return of the cylinders may compensate Liquid Air for the replacement value of the cylinders, it does not compensate it for rents lost prior to litigation. More importantly, it does not negate the frauds perpetrated by defendants. We conclude that setting-off damages *after* trebling is more likely to effectuate the purposes behind RICO.
> *Id.* at 1310 (and citing *National Mortgage*, 636 F. Supp. at 1151).

Also, the district court's reasoning would allow the following. Plaintiff sues one or several defendants under RICO. The trial is going badly for defendants, and plaintiff presented strong evidence that damages totaled $1 million. So before the verdict comes in, defendants tender $1 million to plaintiff. If the district court's opinion correctly states the law, that offer puts plaintiff in a bind. If plaintiff accepts the $1 million, there is nothing left to treble, so defendants will have defeated plaintiff's right to treble damages. But if plaintiff declines the offer, plaintiff might have serious collection problems later. If defendants offer to settle for slightly more than $1 million, plaintiff's best option might be to agree. Nothing in the RICO legislation suggests that Congress intended to bestow such leverage on racketeers, which would significantly diminish the deterrent effect of the treble damages provision.

(b) Congress Intended The Treble Damage Remedy to Encourage Victims to Supplement The Justice Department's Enforcement Efforts. The District Court Opinion Undermines This Purpose.

In *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987), the Court held:

> Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees. Both statutes bring to bear the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the

> objective in both the Clayton Act and RICO is the carrot of treble damages.

Malley-Duff was followed in *Rotella v. Wood*, 528 U.S. 549 (2000), where the Court held that the enactment of the civil RICO statute was motivated by a "congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the . . . prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." 528 U.S. at 557-558.

The district court's approach would undermine this purpose. The next time a RICO victim recovers a compensatory damage award from one racketeer, will the victim supplement the Justice Department's efforts by seeking to enforce RICO against a co-conspirator? Of course not. The district court's opinion removes any incentive to do so.

(c) Congress Intended The Treble Damage Remedy to Help Compensate Victims For Damages That Are Difficult to Prove. The District Court Opinion Undermines This Purpose.

In *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 240-41 (1987), the Court noted that the legislative history of § 1964(c) shows that Congress intended to emphasize "the remedial role of the treble-damages provision."

This "remedial role" was made more explicit in *Liquid Air Corp. v. Rogers*, *supra*, where the court held, "Although there is some sense in which RICO treble damages are punitive, they are largely compensatory in the special sense that they ensure that wrongs will be redressed in light of the recognized difficulties of itemizing damages." 834 F.2d at 1310, n.8. *See also State Farm Fire & Cas. Co. v. Estate of Caton*, 540 F. Supp. 673, 681 (N.D. Ind. 1982), *overruled in part on other grounds by Ashland Oil v. Arnett*, 656 F. Supp. 950 (N.D. Ind. 1987) ("the treble damages provided by the statute serve to liquidate uncertain actual damages and encourage the victim to bring suit to redress the violation").[14]

---

[14] Antitrust cases recognize a similar purpose. *See Ortho Diagnostic Sys. v. Abbott Labs., Inc.*, 822 F. Supp. 145, 151 (S.D.N.Y. 1993) ("while such damages may be difficult to prove, that difficulty is not insurmountable. Furthermore, the availability of treble damages under the antitrust laws might well counteract this perceived problem"); *Connecticut v. Tobacco Valley Sanitation Serv. Co.*, 818 F. Supp. 504, 508 (D. Conn. 1993) ("In antitrust cases, a non-multiplied recovery may leave a plaintiff lacking because of the difficulty in measuring actual damages. By awarding treble damages, courts guarantee that antitrust plaintiffs receive full recoveries. . . . Multiple damages also help compensate plaintiffs for costs that are not quantifiable."); *Martin Oil Serv., Inc. v. Koch Refining Co.*, 718 F. Supp. 1334, 1363 (N.D. Ill. 1989) ("treble damages in antitrust adjudication are the legislature's attempt to ensure that plaintiffs actually receive all to which they are entitled. Demonstrating what one's business position would have been, absent the defendant's conduct, is no easy task. For example, with respect to an illegal price-fixing conspiracy, damages are measured by subtracting the agreed price from the price that 'would have prevailed in the absence of illegal conduct.' Because the latter determination is fraught with uncertainty, treble damages are utilized to ensure that plaintiff is actually made whole.") (internal citation omitted).

The "difficulties in itemizing damages" played a role in the present case. While the district court viewed the $9+ million compensatory damage award as "vast sum of money" and "a remarkably huge sum," in fact this award might be insufficient to fully compensate Uthe for its loss. In the Singapore arbitration, Uthe was unable to secure the damages Uthe believed were inflicted by the conspirators. The arbitrator:

- Limited Uthe's damages to only the first 4 years after the stock sale—and then subtracted "reasonable remuneration" to the defrauding respondents! ER 771 (Partial Award 2);
- Valued the stock as of the date of the sale, rather than the higher value it would have as of the date of the arbitration, in part because "no relevant evidence appears to be available for any assessment of damages to be made on the basis of a difference between the value of the company today and the Purchase Price." ER 774;
- Declined to award Uthe its losses from diverted contracts with customers. ER 788;
- Awarded Uthe simple interest at only 1.5% per annum—even though "Awarding interest at the rate of 5.33% is Singapore court practice." And the arbitrator rejected Uthe's claim for compound interest. ER 790-791.

Awarding treble damages against Aetrium and Allen would serve the statutory purpose of giving the victim some relief for the difficulties of obtaining full recompense for damages. The district court opinion undermines this goal.

3. Congress Intended RICO's Treble Damage Remedy to Be Implemented The Same Way That *Antitrust* Treble Damage Remedies Are Implemented. The District Court's Rule Is Inconsistent With This Court's Antitrust Decisions On Treble Damages.

The treble-damages remedy of RICO was modeled closely on the treble damages provisions of the antitrust laws, and therefore "courts frequently turn to Clayton Act case law for guidance in construing RICO." Gregory P. Joseph, *Civil RICO: A Definitive Guide*, § 2 at p. 2 (Am. Bar Assoc., 2d ed., 2000); *see also Shearson/American Express*, *supra*, 482 U.S. at 240-41 (noting Clayton Act precedent for treble damages); *Agency Holding Corp.*, 483 U.S. at 151 (construing RICO and antitrust statutes in parallel). Indeed, "[e]verything in RICO's own language and history supports the view that Congress viewed RICO's treble damage remedy as similarly remedial to the Clayton Act provision on which it was so closely patterned." *Epstein v. Epstein*, 966 F. Supp. 260, 262 (S.D.N.Y. 1997) (Rakoff, J.).

Accordingly, rulings that discuss how the single-satisfaction rule applies to antitrust treble damages are persuasive precedent for RICO claims. On this

antitrust issue, the Ninth Circuit's position has long been settled. In *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 397-98 (9th Cir. 1957), the court concluded that the receipt of compensatory damages offsets an antitrust award only after trebling, not before. An alternate rule would "do violence to the clear intent of Congress. . . . The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction." *Id.* The Ninth Circuit reaffirmed this position as recently as 1992, in *William Inglis & Sons Baking Co.*, 981 F. 2d at 1024 ("under our existing law settlement payments should be deducted from the damages after they have been trebled").

There is no sound reason to depart from these rulings and introduce a disparity between RICO and antitrust law on the question of the application of the single-satisfaction rule to claims for treble damages.

4. Other Federal Courts Have Adopted The Approach Taken By Judge Tashima.

Federal courts from around the country have held that payment of compensatory damages does not defeat a claim for treble damages under RICO. In *Pyramid Secur., Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1117, n.3 (D.C. Cir. 1991), the court held that "Under RICO it appears that the proceeds of prior judgments are set off against a recovery only *after* the trebling of damages."

In *Pennsylvania v. Cianfrani*, 600 F. Supp. 1364 (E.D. Pa. 1985), the court held: "Cianfrani's interpretation would enable any person guilty of violating §1962 to avoid the imposition of treble damages by the simple device of making restitution before the injured person brings suit. To adopt such a restrictive reading of § 1964(c) would contravene Congress' mandate that the RICO statute be construed liberally to effectuate its remedial purposes." *Id.* at 1367.

See also Morley v. Cohen, 888 F.2d 1006, 1013 (4th Cir. Md. 1989) ("The deduction here should be made after trebling"); *Liquid Air Corp. v. Rogers*, *supra*, 834 F. 2d 1297; *Lukaszuk v. Sudan*, No. CV 02-5143 (JG)(MDG), 2007 U.S. Dist. LEXIS 95919, *25 (E.D.N.Y. Nov. 27, 2007) ("Even if Freeman is entitled to a credit at some time in the future, where plaintiffs are entitled to trebled damages under federal law, courts have upheld the trebling of damages before crediting settlement payments"); *Robertson v. White*, 113 F.R.D. 20, 28 (W.D. Ark. 1986) ("R.I.C.O. damages, if any, are to be trebled before they are reduced by credits").

In *Commercial Union Assurance Co. PLC v. Milken*, 17 F.3d 608 (2d Cir. 1994), the Second Circuit deviated from this approach. There, the court held that a plaintiff who has been made whole (from whatever source) prior to a RICO judgment is not entitled to trebling. However, a leading treatise has

criticized the *Milken* ruling—and lauded Judge Tashima's opinion. *See* David B. Smith and Terrance G. Reed, *Civil RICO* (2011 ed., Pub. 527), at pp. 10-32.1 to 10-32.4 And *Milken* appears to be an outlier even within the Second Circuit. *See, e.g., Singer v. Olympia Brewing Co.*, 878 F.2d 596 (2d Cir. N.Y. 1989), where the court noted that "we have held that it is proper to treble the damage award before crediting settlement payments." *Id.* at 601.

5. The District Court Opinion Is Inconsistent With Cases From Other Circuits Construing Similar Statutes.

Besides RICO, several other statutes employ multiple damages to discourage egregious acts. When construing these statutes, courts almost never disallow multiple damage claims merely because compensatory damages were paid, and courts almost always *set off* compensatory damage payments against the multiple damages awards. "In cases where plaintiffs are entitled to trebled damages under federal law, courts have generally upheld the trebling of damages before crediting settlement payments." *In re Crazy Eddie Sec. Litig.*, 948 F. Supp. 1154, 1169 (E.D.N.Y. 1996). *See also* Dan B. Dobbs, Law of Remedies: Damages-Equity-Restitution, § 3.12, p. 548 (West Pub., 2d ed. 1993).

Courts have applied this approach to a variety of statutes that impose multiple damages:

The False Claims Act. *See U.S. v. Bornstein*, 423 U.S. 303, 314 (1976), *superceded by statute on other grounds as stated in U.S. v. McGinnis, Inc.*, 1994 U.S. Dist. LEXIS 20953 (S.D. Ohio Oct. 26, 1994) ("We agree that the Government's damages should be doubled before any compensatory payments are deducted, because that method of computation most faithfully conforms to the language and purpose of the Act.")

Antitrust Statutes. *See, e.g., Sciambra v. Graham News Co.*, 841 F.2d 651, 657 (5th Cir. 1988) ("Once the court on remand determines the proper amount of damages, we agree with Sciambra's claim that the court should treble the amount of the damage award against ARA *before* deducting the amount of the Graham settlement."); *Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp*., 995 F.2d 425, 433 (3d Cir. 1993); *Burlington Indus. v. Milliken & Co*., 690 F.2d 380, 393 (4th Cir. 1982); *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 534 (3d Cir. 1976).

The Economic Stabilization Act. *See Vranken v. Atlantic Richfield Co.*, 699 F. Supp. 1420, 1428 (N.D. Cal. 1988) ("The court does agree with the plaintiff class in that the offset should be subtracted from the total amount of damages *after* trebling. In actions like this where treble damages are available, the plaintiff is entitled to full satisfaction of the claim for harm done. The amount awarded as damages is then trebled as punishment to the defendant").

The most significant precedent is *U.S. v. Bornstein, supra*. There, the government brought an action under the False Claims Act, which at the time provided for double damages. Although another wrongdoer had compensated the government for almost 99% of the loss, the Supreme Court ruled that plaintiff was nevertheless entitled to the double damages, and the defendant was only then allowed an offset for the earlier payments. The court found that the doubling was necessary to fully compensate the government for the wrong suffered, and because a defendant should not be able to escape double or treble liability simply by paying actual damages prior to a judgment.

The district court overlooked these authorities and gave no sound reason why it should depart from them.

CONCLUSION

In *Sedima v. Imrex Co*., 473 U.S. 479, 497-498 (1985), the Court held that "RICO is to be read broadly," noting that Congress had expressly admonished that RICO is to "be liberally construed to effectuate its remedial purposes" and that "The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity."

The district court's approach is not consistent with these purposes. Its summary judgment should be reversed, so this case can proceed to trial.

Respectfully submitted,

/s/ Myron Moskovitz

MYRON MOSKOVITZ
ATTORNEY AT LAW
90 Crocker Avenue
Piedmont, CA 94611
(510) 384-0354

Counsel for Plaintiff-Appellant

March 20, 2014

Electronic Filing Attestation

I, Joshua R. Benson, am the ECF user whose ID and password are being used to file the foregoing Brief for Plaintiff-Appellant. I hereby attest that each listed counsel above has concurred in this filing.

/s/ Joshua R. Benson
JOSHUA R. BENSON

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Circuit Rule 32(b), the brief contains 9,421 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Joshua R. Benson
JOSHUA R. BENSON

March 20, 2014

9th Circuit Case Number(s) 13-16917 (UTHE Technology Corp. v. Aetrium, Inc., et al.)

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Mar 20, 2014 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/ Joshua R. Benson

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)