

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FIVE

INVESTTEK PROPERTIES CO.,
A General Partnership Consisting of
ROBERT GILMARTIN and WILLIAM
TREVOR,
Petitioner and Appellant,

vs.

SAN FRANCISCO COUNTY SUPERIOR
COURT,
Respondent;

MARK TECHNOLOGIES CORP.,
A California Corporation,
Real Party in Interest
and Appellee.

Court of Appeal Case No. A146357

(San Francisco Superior Court No. CGC-
99-306249)

**PETITION FOR WRIT OF
SUPERSEDEAS AND OTHER
EQUITABLE RELIEF**

Appeal from an Order Quashing Petitioner's Writ of Execution
Decided Aug. 14, 2015; Entered Aug. 21, 2015
Honorable Ernest Goldsmith, Dept. 302, San Francisco Sup. Ct.

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Donald Horvath, SB 53777
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Attorneys for Petitioner and Appellant, Investek Properties Company

PETITION FOR WRIT OF SUPERSEDEAS WITH STAY AND OTHER EQUITABLE RELIEF

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.488, the undersigned, counsel for Petitioner and Appellant INVESTEK PROPERTIES COMPANY, a General Partnership consisting of ROBERT GILMARTIN and WILLIAM TREVOR, certifies that he knows of no other entity or person other than the parties to this proceeding and EDF Renewable Energy, Inc. and Earth Construction and Mining, who have financial or other interests in its outcome.

Executed on September _____, 2015 at Los Gatos, California.

REG J. LORMON
Attorney for Petitioners

A SUMMARY OF THIS PETITION

Petitioner Investek Properties Company (“Investek”) held a 26 percent interest in Alta Mesa Wind Partners, whose only asset was a stream of royalties and whose general partner was Real Party in Interest Mark Technologies Corporation (“MTC”). In 1999, Investek sought arbitration of its claims for damages for breach of fiduciary duty and for dissolution and winding up the partnership. In 2010, former Judge Michael Ballachey rendered an arbitration award on both claims against MTC for a total of over \$1.2 million. (Exhibit A.) Investek then obtained a Judgment adopting that award from San Francisco Superior Court Judge Busch. (Exhibit B.)

Judge Busch drafted the Judgment himself, and it was not as clear as it might have been.

Investek recorded an Abstract of Judgment in Riverside County (Exhibit D) and then sought to execute the Judgment against MTC's only sizeable asset: several parcels of undeveloped real property it owns in Riverside County, worth about \$12 million. MTC then moved to quash the writ of execution.

San Francisco Superior Court Judge Goldsmith issued an order quashing the writ, ordering Investek not to attempt to collect the Judgment from any asset other than royalties, and vacating Investek's lien. (Exhibit E.) Judge Goldsmith ruled that the Judgment was for only \$532,733 (rather than \$1.2 million), and that amount is recoverable only from certain royalties, and not from the Riverside County property or other assets. Because MTC has no more royalties due, Judge Goldsmith's order effectively means that Investek's entire Judgment is worthless.

Judge Goldsmith was mistaken. Properly construed in light of the Arbitration Award the Judgment incorporates, the Judgment is for the full \$1.2 million and it is executable for this amount against *any* property owned by MTC. \$532,733 of this amount is *also* executable against certain royalties, if Investek prefers to pursue those royalties.

Investek has filed a notice of appeal of Judge Goldsmith's order. (Exhibit G.) But Investek also needs a stay of the part of the order vacating Investek's lien for the following reason: after Investek recorded its Abstract

of Judgment in Riverside County (thereby creating a lien with top priority against MTC's real properties there), another creditor (Earth Construction and Mining) filed a \$448,916.10 mechanics lien against MTC in Riverside County; then a third creditor (EDF Renewable Energy, Inc.) recorded an attachment lien and then recorded a \$20.8 million lien against MTC in Riverside County. (Exhibit C.)

If Judge Goldsmith's order vacating Investek's lien stands for even a moment, these two subsequent lienholders may at any time execute their liens, the Property will be sold, and the entire proceeds of the sale will go to those subsequent lienholders. And more liens might be filed and executed upon during the appeal. Thus, even if Investek's appeal of Judge Goldsmith's order is ultimately successful, it would be useless, because the only known assets will be gone by then. Indeed, once the Property is sold, Investek's appeal will most likely become moot.

Investek moved the trial court for a stay during the appeal of Judge Goldsmith's order vacating the lien – pointing out the above facts. The court denied that motion, but granted a temporary 10-day stay to give Investek the opportunity to seek a writ of supersedeas from this Court. (Exhibit I.) Therefore, Investek now petitions this Court for a stay and a writ of supersedeas staying the vacating of the lien until its appeal is resolved.

MTC will suffer no prejudice from a stay or writ, because Investek seeks neither a stay nor a writ from the portion of the order barring Investek

from “any attempt to recover against any asset other than the post-judgment royalties,” i.e., executing against the Riverside County property. Investek will challenge that part of the order in its appeal, and if the order is reversed, will then seek to enforce its lien against the Property. For now, however, Investek seeks only to preserve its lien (and the priority of that lien) on property that MTC could not sell or encumber in any event because of the size of the two other liens on the Property.

THE PETITION

1. On June 30, 2010, Petitioner Investek obtained an Arbitration Award totaling \$1,238,379 against Real Party MTC in a proceeding for breach of fiduciary duties and an accounting, and winding up and dissolution of Alta Mesa Wind Partners, a California limited partnership. (See Exhibit A: Arbitration Award.)
2. On July 20, 2011, Investek obtained from Respondent Court (Busch, J.) a Judgment for \$1,238,379 enforcing the Arbitration Award. (See Exhibit B: Judgment.)
3. MTC owns parcels of real property in Riverside County. (See Exhibit C: Declaration of Reg J. Lormon In Support of Reply to Motion for Stay of Enforcement.) On information and belief, the fair market value of the Property is approximately \$12 million.
4. On January 20, 2012, Investek recorded an abstract of that Judgment in Riverside County. (See Exhibit D: Abstract of Judgment.)

5. On July 20, 2012, another creditor (Earth Construction and Mining) of MTC filed a mechanics lien for about \$450,000. On November 18, 2013, EDF Renewable Energy, Inc., another creditor of MTC, recorded an attachment lien in Riverside County for a judgment that became approximately \$20.8 million. (See Exhibit C(b) and (C)(c): Declaration of Reg J. Lormon In Support of Reply to Motion for Stay of Enforcement.)

6. On , 2015, MTC moved Respondent Superior Court for an order recalling and quashing the writ of execution, and vacating Investek's recorded lien. A copy of that motion is attached as Exhibit E. Investek's Opposition is attached as Exhibit F, and MTC's Reply is attached as Exhibit G.

7. On August 14, 2015, Respondent Superior Court (per Goldsmith, J.) held a hearing on that motion. See Exhibit H, Reporter's Transcript, attached. On that same date, the Court issued an "Order Granting Motion to Recall and/or Quash Writ of Execution and Vacate Execution Levy and Liens." The Order was entered on August 21. See Exhibit I: Order Granting Motion to Recall and/or Quash Writ of Execution and Vacate Execution Levy and Liens. The Order provides, "any and all liens on Mark Technology Company's property are hereby vacated and expunged." Exhibit I, p. 105.

8. The order also provides, "any attempt to recover against any asset other than the post-judgment royalties . . . are hereby enjoined." Exhibit I, p. 105. In fact, however, there are no post-judgment royalties. See Exhibit J:

Declaration of Gary R. Kershner, p. 109:16-25.

8. On September 15, 2015, Investek filed in this Court a notice of appeal from Judge Goldsmith's order. See Exhibit K: Notice of Appeal.

9. On August 20, 2015, Investek filed in Respondent Superior Court a motion for stay of Judge Goldsmith's order until this appeal is resolved, presenting the same arguments made in this petition. See Exhibit L, attached. Investek's Opposition is Exhibit M, attached. MTC's Reply is Exhibit N, attached.

10. On September 28, 2015, Respondent Superior Court held a hearing on that motion. No transcript of that hearing is yet available, but what happened at the hearing is summarized in the Supplemental Declaration of Reg J. Lorman, attached as Exhibit O. On that same date, the Court denied Investek's motion for stay during the appeal, but did grant a temporary 10-day stay to give Investek the opportunity to seek a writ of supersedeas from this Court. (See Exhibit P: Register of Actions re: Denying Motion for Stay.) Thus, Investek has exhausted its effort to obtain from the trial court the relief it seeks in this petition.

11. Investek has no adequate remedy at law. Unless a stay and a writ of supersedeas is issued, Investek will suffer serious and irreparable harm because MTC has no significant assets other than the Property in Riverside County, and the other lienholders are likely to execute their liens and have the Property sold before this appeal can be resolved. Therefore, a stay and writ of supersedeas are needed to maintain the status quo and avoid the

possibility that Investek's appeal will become moot.

12. On September 15, 2015, Investek filed in Respondent Superior Court a Motion for Order to Correct Clerical Error In Judgment. (Exhibit Q.) That *nunc pro tunc* motion, however, is set to be heard on October 8, 2015.

Between now and October 8, it is highly likely that the other lienholders will have the Property sold to satisfy their liens – if Judge Goldsmith's order vacating Investek's lien is not stayed. Thus, the need for a stay. (If Investek's *nunc pro tunc* motion is granted, this will moot Investek's appeal, and we will then dismiss it.)

13. MTC will suffer no prejudice from the issuance of a stay and a writ of supersedeas, because the two subsequent liens on the Property will prevent MTC from selling or encumbering that property during this appeal in any event. Therefore, no bond should be required as a condition to the stay or writ. (If this Court disagrees, Investek will provide a bond in a reasonable amount.)

WHEREFORE, Petitioner prays that this Court (1) issue a stay (no later than October 8, 2015) of the portion of the trial court's order vacating Investek's lien, and (2) then issue its writ of supersedeas staying the trial court's order vacating Investek's lien until the conclusion of Petitioner's appeal.

Date: October 5, 2015

MYRON MOSKOVITZ
Attorney for Petitioner

VERIFICATION

I, Reg J. Lormon, declare:

1. I am an attorney admitted to practice before the courts of this state and am counsel representing Petitioner Investek Properties Company. I make this verification because I am familiar with the proceedings giving rise to this Petition.

2. I have read this Petition, and either know its allegations to be true or believe them to be true based on the documents contained in the accompanying Appendix. Further the Appendix contains true and correct copies of documents filed or lodged in Respondent San Francisco County Superior Court relating to the Order in Investek Properties Company, et al. v. Mark Technologies Corporation, et al., San Francisco County Superior Court No. CGC-99-306249, decided on August 14, 2015 and entered on August 21, 2015, quashing Investek's writ of execution, which is the subject of this Petition.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Verification was executed in Los Gatos, California on September _____, 2015.

REG J. LORMON
Attorney for Petitioner

MEMORANDUM OF LAW

I. THE APPEAL RAISES SUBSTANTIAL ISSUES.

To support issuance of a writ of supersedeas, the petition need not show that the appeal will be successful, but only that the appeal raises substantial questions. (*Deepwell Homeowners' Protective Assn. v. City Council of Palm Springs* (1965) 239 Cal.App.2d 63, 67.) This petition shows at least that.

A. Summary of the Material Facts

1. The Arbitration Award

Investek brought a lawsuit that was ordered to binding arbitration proceeding, to recover damages against MTC for breach of fiduciary duty, and to dissolve and wind up Alta Mesa Wind Partners.

Judge Ballachey's Arbitration Award provided that MTC and Alta Mesa are "jointly and severally liable for all damages awarded." (Exhibit A, p. 29.) The award granted Investek the sum of \$1,238,379, in two parts.

First, \$532,733 was awarded for MTC's breach of its fiduciary duties by misappropriating royalties. The award stated that these "damages awarded are the joint and several liabilities" of MTC and Alta Mesa. (Exhibit A, p. 27.) To help Investek recover this award, Judge ballachey

also provided that “One Hundred Per Cent (100%) of all royalty payments are to be paid to [Investek] until such time as the total amount of the \$532,733.00 has been received by [Investek].” (Exhibit A, p. 27; Exhibit B, p. 41.)

Second, \$705,646 was awarded for the accounting and dissolution of Alta Mesa. (Exhibit A, p. 30.)

2. The Judgment

Judge Busch's Judgment confirmed Judge Ballachey's award, by attaching to the Judgment as Exhibit 1 the award portion of the Arbitration Award. (Exhibit B, pp. 39-43.) In addition, the Judgment began by expressly stating: "[Petitioner] . . . shall have Judgment against . . . Alta Mesa . . . and Mark Technologies Corporation . . . in the amount of \$1,238,379.00 . . . in the form attached hereto as Exhibit 1 which is incorporated herein by this reference." (Exhibit B, pp. 37-38.)

The balance of the language in the Judgment itself is confusing and unclear. But the Judgment must be read to conform to the Arbitration Award, because a court drafting a judgment confirming an arbitration award is required to conform the judgment to the terms of the arbitration award. "If an award is confirmed, judgment shall be entered in conformity therewith." (Code Civ. Proc. § 1287.4.)

Once the Judgment is read together with the Arbitration Award it incorporates, it becomes apparent that the total award is for \$1,238,379, that there are no restrictions on what assets might be the source of recovery for this entire amount, and that Investek was awarded the *additional* right to recover a portion of that award (\$532,733) from certain royalties if it wished.

Below, we will explain how we reach that conclusion.

B. The Order Vacating Investek's Lien Misconstrued the Judgment.

1. The Standard of Review Is *DeNovo*

The standard of review is *de novo*, because Courts of Appeal independently interpret writings, except where parties presented conflicting evidence at trial. *Parsons v. Bristol Develop. Co.* (1965) 62 Cal.2d 861, 865-866. Here, there is no conflicting evidence. The meaning of the judgment is determined by the language of the judgment itself, the Exhibit it incorporates, and (if necessary) the entire Arbitration Award – because the Judgment must be read to conform to the Arbitration Award. A court drafting a judgment confirming an arbitration award is required to conform the judgment to the terms of the arbitration award. “If an award is confirmed, judgment shall be entered in conformity therewith.” (Code Civ. Proc. § 1287.4.) The Arbitration Award itself is interpreted *de novo*. *Hoover v. American Income Life Ins. Co.* (2012) 206 Cal.App.4th 1193, 1202; *Brockwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1670.

2. The Judgment Is For \$1,238,379, And May Be Recovered From Any Of MTC’s Assets.

When read in light of the incorporated Arbitration Award, it seems clear the Judgment was intended to provide *both* that (1) MTC and Alta Mesa are jointly and severally liable for the entire \$1,238,379, with no limits on the assets against which this amount might be executed, and (2) MTC is ordered to establish an escrow account for future royalties, and \$532,733 of this award may be executed against those royalties. The Judgment imposes no requirement that Investek recover any part of the

award *solely* from those royalties.

This conclusion is derived from the language of the Judgment itself, along with the portion of the Arbitration Award that is attached to the Judgment “as Exhibit 1 which is incorporated herein by this reference.”

The Judgment (at 1:23-28) begins by stating that Investek “shall have judgment” against MTC “in the amount of \$1,238,789.” It goes on to provide an unclear explanation regarding how this sum was calculated. At 2:3-7, the Judgment provides that “The net of PLAINTIFF’S judgment after accounting for the DEFENDANTS’ credit is \$460,391. . . . PLAINTIFF is entitled to pre-judgment interest at the statutory rate of 10% in the amount of \$72,342.00” The sum of these two figures is \$532,733.

In the next paragraph, which is *separate* from the above award, the Judgment orders Defendants to establish an escrow account, into which Defendants must deposit royalties received, and pay those royalties to Investek “until such time as the sum of \$532,733,00 has been paid to INVESTEK. . . .” No language in the Judgment says that Investek may recover the \$532,733 *only* from the royalties. Nor does any language in the attached Arbitration Award say this.

Nor may it reasonably be implied. Code of Civil Procedure section 695.010(a) provides that "except as otherwise provided by law, all property of the judgment debtor is subject to enforcement of a money judgment."

Under this section, it is not clear that an arbitrator or judge even has the *authority* to prevent a judgment creditor from enforcing the judgment against real property that the law has not exempted from execution (such as a homestead or certain wages). See *Partch v. Adams* (1942) 55 Cal.App.2d 1, 7 "The obvious purpose of the attachment and execution sections is to make *all* property, except that excepted, subject to attachment and execution, and to provide that some person is served who has control over the property so that the property may be reached." Emphasis added.

But even if an arbitrator or judge *could* limit recovery to a specific asset (such as royalties), that intent would have to be clearly expressed, because it would be in derogation of a legal right presumably established by the Legislature (by enacting section 695.010(a)). Here, neither the Arbitrator nor Judge Busch expressed such an intent.

Nothing in the language or reasoning of the Arbitration Award indicates that the Arbitrator intended such a limitation. Judge Ballachey awarded the \$532,733 to compensate Investek for MTC's breach of fiduciary duty by misappropriating royalties. The recovery from royalties was simply Judge Ballachey's attempt to prevent MTC from evading payment of the award by continuing to hide future royalties. Also, Judge Ballachy knew about the royalties (they were part of the dispute), but knew nothing about MTC's other assets. Nowhere did Judge Ballachey's Award say or imply that those royalties would be Investek's *only* source of

recovery, or that he intend to proscribe Investek's right under Code of Civil Procedure section 695.010(a) to collect from *any* of MTC's non-exempt assets.

And *why would* Judge Ballachey deprive Investek of its statutory right to execute on any of MTC's non-exempt assets? His opinion nowhere states or even suggests *a reason* for doing so. Indeed, he repeatedly berated MTC and its general partner Jones for deceitful misconduct. See, e.g., Exhibit A at p. 8 (sale of royalty stream was "completely clandestine"), p. 9 (defendant Jones's testimony at 2 points was a "blatant inconsistency"), p. 9 ("Jones simply stone-walled attempts by Investek to obtain information"), p. 10 (Jones "had an obvious conflict of interest that was exacerbated by the manner in which he proceeded"), and p. 11 (Jones's "manipulation of Respondent was inconsistent with the fiduciary duty of the General Partner"). Why would an arbitrator who found that the defendants committed such egregious acts make it *more* difficult for the injured party to recover its losses? The arbitrator would be more likely to make it *easier*, not harder - and that's exactly what Judge Ballachey did, by ordering MTC to set up an escrow account for the royalties and allowing Investek to recover from that account so MTC could not misappropriate royalties again.

That still leaves a mystery. Why does the Judgment begin by saying the total is \$1,238,379, when the remainder of the Judgment discusses only the \$532,733? The difference - \$705,646 – is nowhere mentioned in the

body of the Judgment. It is, however, included towards the end of the Arbitration Award, which expressly awards Investek the exact amount of the difference: \$705,646. MTC's counsel conceded that Judge Busch wrote the Judgment himself (Exhibit H, at 9:25-28). When Judge Busch did so, he inadvertently omitted this figure from the language of the Judgment he wrote. But he expressly *included* it by (1) incorporating the Arbitration Award into the Judgment, and by (2) beginning his Judgment with the statement that the amount awarded is \$1,238,379 - which happens to be the exact sum (to the penny) of \$532,733 plus \$705,646. We submit that there is no other reasonable way to read these two documents.

Given this conclusion, even if one could read these documents to provide that some sum could be recovered only out of royalties, that sum would be \$532,733, not the entire \$1,238,379. Nothing in the Arbitration Award could possibly be read to say that the remaining \$705,646 could be recovered only out of royalties. To that extent at least, Judge Goldsmith's order was clearly wrong. And, of course, as discussed above, it would also be wrong had he ruled that the \$532,733 could be recovered only out of royalties.

3. Judge Goldsmith's Order Misconstrued The Judgment.

Judge Goldsmith's order of August 14, 2015, vacated Investek's lien on MTC's Riverside County real estate and enjoined Investek from any attempt to collect the judgment "against any asset other than the post-

judgment royalties as provided in the Judgment In Conformity With Arbitration Award. . . ."

At the hearing on MTC's motion for that order, MTC's counsel argued that "On the face of the judgment, the only source of recovery is the collection of post judgment royalties to be held in a constructive trust. If Judge Busch had understood that that to be a straight money judgment, he could have stated that, but he didn't." Exhibit H, at 5:24-28. Of course Judge Busch *didn't need* to state that, because that was already the law - as Code of Civil Procedure section 695.010(a) so provides - and nowhere did Judge Busch state that this statute would *not* apply. But Judge Goldsmith nevertheless accepted MTC's argument.

As explained above, a proper reading of the Judgment - together with the incorporated Arbitration Award and with Code of Civil Procedure section 695.010(a) - shows no such limitation. Thus, the Judgment is inconsistent with Judge Goldsmith's order, and that order should be reversed and set aside.

II. THE BALANCE OF THE HARDSHIPS FAVORS GRANTING THE STAY AND WRIT.

Because the trial court order vacates Investek's lien and enjoins Investek from "any attempt to recover against any asset other than the post-judgment royalties," the trial court's order is prohibitory rather than mandatory. Therefore, it is not automatically stayed by Investek's appeal.

(Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 7:4.) Therefore, a writ of supersedeas is Investek's only remedy. (*Id.* at ¶¶ 7.260 et seq.)

“The purpose of the writ of supersedeas is to maintain the subject of the action in status quo until the final determination of the appeal, in order that the appellant may not lose the fruits of a meritorious appeal.” (*Dry Cleaners and Dyers Institute v. Reiss* (1936) 5 Cal.2d 306, 310, italics omitted.) The writ will issue when necessary to protect appellant from the irreparable injury appellant will sustain if he prevails on appeal, giving due consideration to the injury to respondent if the judgment ultimately is affirmed. (*Food and Grocery Bureau of Southern California v. Garfield* (1941) 18 Cal.2d 174 [appellant merchant would suffer irreparable harm if long standing practice of giving trading stamps is disrupted pending appeal, but no direct harm to respondent if enforcement of prohibitory injunction is delayed]. See also, *Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861 [appellant would suffer irreparable harm if not allowed to collect disputed fees pending appeal, but injury to respondent is minimal because the fees can be refunded]; *Adoption of Shana P.* (1970) 5 Cal.App.3d 316, 319-320 [irreparable harm to father’s relationship with his daughter if his visitation is terminated, but no serious harm to mother if father-daughter relationship continues pending appeal].)

The hardship that Investek will suffer if the stay and writ are not granted is severe. Unless the trial court's order vacating Investek's lien is

stayed, present and subsequent lienors may execute on the Property during Investek's appeal. This would effectively make Investek's entire judgment worthless and nullify Investek's 11 years of litigation to obtain that judgment. It would also probably moot Investek's appeal. So a writ of supersedeas is needed to “preserv[e] appellate jurisdiction.” (*Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861.)

On the other hand, granting the stay and writ would impose no significant hardship on MTC. In its Opposition to Motion for Stay of Enforcement filed in the trial court, MTC argued that a stay would be prejudicial because the notice of appeal had not yet been filed, and an appeal would lack merit. (Exhibit H(2), p. 171.) But the notice of appeal has since been filed (see Exhibit G), and – as shown above – the appeal will have merit.

MTC also noted that maintaining Investek's lien during the appeal would “cloud [its] title.” (Exhibit H(2), p. 171.) But MTC presented no argument that such a cloud would injure it in any way, given the fact that the other liens (including one that dwarfs Investek's lien) will prevent MTC from selling or encumbering the Property anyway. For this reason, no bond should be required as a condition to the stay or writ. If this Court disagrees, Investek will provide a bond in a reasonable amount.

III. INVESTEK AGREES TO AN EXPEDITED APPEAL.

In its order dated October 1, 2015, this Court asked the parties to discuss whether any conditions should be imposed to expedite the appeal, in the event that supersedeas is granted.

Investek not only agrees, but urges this Court to set an expedited briefing schedule and eliminate or limit any extensions of time to file briefs. Investek began this litigation many years ago. MTC has done everything in its power to thwart Investek's effort to recover compensation for the losses caused by the MTC misdeeds spelled out by Judge Ballachey in his full Arbitration Award. Investek would like nothing better than to collect its Judgment soon - and end this dispute once and for all.

Date: October 5, 2015

Respectfully submitted,

MYRON MOSKOVITZ
Attorney for Petitioner