

No.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

GENERAL NANOTECHNOLOGY LLC,)	First District Court of
METADIGM LLC and VICTOR B.)	Appeal No. A129016 &
KLEY)	A129428 Consolidated
)	
Plaintiffs and Appellants,)	
)	Alameda County Superior
v.)	Court Case No.
)	VG08384523
LAWRENCE LIVERMORE NATIONAL)	
SECURITY, REGENTS OF THE)	
UNIVERSITY OF CALIFORNIA and)	
ROBERT C. COOK)	
)	
Defendants and Respondents.)	
_____)	

PETITION FOR REVIEW

PAUL KLEVEN (SB# 95338)
LAW OFFICE OF PAUL KLEVEN
1604 Solano Avenue
Berkeley, CA. 94707
(510) 528-7347 Telephone
(510) 526-3672 Facsimile
Pkleven@Klevenlaw.com

Attorneys for Appellants
General Nanotechnology LLC,
Metadigm LLC and Victor B. Kley

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TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

General Nanotechnology LLC, Metadigm LLC and Victor B. Kley respectfully petition this court for review following the decision of the Court of Appeal, First Appellate District (per Bruiniers, J.), filed in that court on June 27, 2012, a true copy of which is attached hereto as Exhibit A. (“Opinion”)

ISSUES PRESENTED ON REVIEW

- I. Does mere suspicion trigger the statute of limitations when the potential plaintiff cannot conduct any type of investigation to determine whether there is a factual basis for the claim?
- II. Can a court determine on summary adjudication that a potential plaintiff suspects a claim based on an interpretation of evidence that is contrary to the interpretation given that evidence by the parties?
- III. Does a defendant’s nearly exclusive access to evidence about exclusions to a nondisclosure agreement require a reversal of the normal burden of proof at a trial involving an alleged breach of the agreement?

NECESSITY FOR REVIEW

The Court should grant review because this case presents important questions of law which are of statewide importance. (Calif. Rules of Court, rule 8.500(b)(1).) This case presents the Court with a perfect opportunity to clarify the application of the rule of discovery following *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, because it was undisputed that the potential plaintiffs – like most innovators trying to work with large governmental or commercial facilities – had no means of conducting an investigation to determine whether there were facts to justify filing a claim.

The First Appellate District affirmed the summary dismissal of a claim for misappropriation of trade secrets, determining that petitioners' discovery of a single document provided, not simply sufficient notice of misappropriation to prompt an investigation, but all of the factual basis necessary to file a claim. (Opinion 26-28.) The decision is contrary to the public policy set forth in *Fox*, 35 Cal.4th at 815, because its rationale would require potential plaintiffs, and in particular California innovators, to file misappropriation claims even though they have no means of determining whether there are any facts to support those claims. It is also contrary to the overriding principles governing summary proceedings in California, which preclude courts from dismissing causes of action based on interpretations of evidence that conflict with the parties' own interpretation

of that evidence.

Review is also necessary to ensure that plaintiffs, and in particular California innovators, will not be faced with an insurmountable burden of proof at trial if they are able to survive summary proceedings on any of their causes of action. (Opinion 35-40.)

For decades, the Inertial Confinement Fusion program (“ICF”) at Lawrence Livermore National Laboratory (“LLNS”) has been trying to use various materials to create the tiny, precise capsules that are critical to the production of energy through fusion. Petitioner Victor B. Kley, a lifelong inventor with years of experience working with diamonds on a microscopic scale, contacted LLNS about producing the capsules out of diamond, a material that ICF scientists had considered but never tried, because they had no idea how to make the capsules out of diamond.

Shortly after LLNS entered into a nondisclosure agreement (“NDA”) and began receiving proprietary information from petitioners about how to produce diamond ICF capsules, the head of the ICF program asked another LLNS department to develop diamond capsules. LLNS never disclosed this secret effort to Kley or to the people working with him, but instead advised petitioners in October 2004 that there was no funding for their work. Petitioners did not file suit immediately, but did so after discovering facts in July 2007 that led them to believe that LLNS was using their intellectual

property in an attempt to produce diamond ICF capsules.

The trial court granted summary adjudication against petitioners on their misappropriation and fraud causes of action, finding that the statute of limitations had begun to run in October 2004, based on vague, inconclusive deposition testimony regarding Kley's suspicions of misappropriation. The trial court found it irrelevant that petitioners had no means of conducting a reasonable investigation to discover any facts to support a potential claim of misappropriation against LLNS, a highly secured facility charged with design and maintenance of nuclear weapons for the United States.

The Court of Appeal affirmed, but found that the statute did not begin to run until November 2004, when Kley saw a document from LLNS regarding diamond ICF capsules. The Court of Appeal dismissed as "unreasonable" Kley's testimony that the documents simply concerned LLNS's former plans to develop diamond ICF shells with petitioners, despite testimony from the document's author confirming that Kley's interpretation was correct. The Court of Appeal held that there was no need to consider whether petitioners could have conducted any further investigation into the facts because, using its interpretation, the document by itself provided a sufficient factual basis to file suit. (Opinion 26-28.)

In *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, this

Court expressed concern that requiring plaintiffs to file suit when the available evidence did not indicate a cause of action would be “contrary to public policy” (*Fox*, 35 Cal.4th at 815), and held that, even where a “reasonable investigation” disclosed one type of claim, the discovery rule postponed the accrual of related claims until a reasonable investigation would have disclosed such evidence. (*Fox*, 35 Cal.4th at 803, 808-809, 814.) Both of the courts in this case have held, contrary to public policy, that petitioners were required to file suit even though they had no means of discovering the necessary information.

This Court should grant review to ensure that California courts follow *Fox* instead of contrary precedent, such as the Fourth Appellate District’s decision in *Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290, 1300, and the First Appellate District’s decision in *Kleefeld v. Superior Court* (1994) 25 Cal.App.4th 1680, 1682, which require potential plaintiffs to file potentially meritless suits or risk losing on statute of limitation grounds.

Finally, while petitioners were able to obtain a jury trial on their claim that respondents breached the NDA, they had virtually no chance of prevailing due to the imposition on them of the burden of proving that certain exclusions to the NDA did not apply, even though that information was peculiarly within the knowledge of LLNS.

STATEMENT OF THE CASE

Petitioners General Nanotechnology LLC (“GN”), Metadigm LLC (“Metadigm”) and Kley filed suit on April 29, 2008 against respondents Lawrence Livermore National Security LLC dba Lawrence Livermore National Laboratory (“LLNS” or “the Lab”), Regents of the University of California dba Lawrence Livermore National Laboratory (“Regents”), and Robert C. Cook. The First Amended Complaint included claims for: 1) Misappropriation of Trade Secrets; 2) Breach of Written Contract; 3) Breach of Implied Covenant of Good Faith; and 4) Tort of Fraud or Deceit (“FAC”). (Appellants’ Appendix (“AA”) 1.)

The trial court granted respondents’ motion for summary adjudication as to the causes of action for misappropriation of trade secrets and fraud. (AA 63, 527). Petitioners filed a petition for writ of mandate which the Court of Appeal denied. (AA 533.)

All parties proceeded to trial on the causes of action for breach of contract and breach of the implied covenant. The jury returned a verdict in favor of defendants on both causes of action. (AA 747.) The trial Court entered its Judgment on Jury Verdict on May 5, 2010, and petitioners timely appealed on July 2, 2010. (AA 810; First Appellate District Case No. A129016.)

Respondents moved for attorney fees pursuant to Civil Code section

3426.4 (AA 837), and the Court awarded \$189,565.50 in attorney fees, based on petitioners' opposition to the summary adjudication motion and pursuit of the writ petition. (AA 990.) Petitioners timely appealed from the attorney fee award. (AA 999; First Appellate District Case No. A129428.)

On June 27, 2012, the First Appellate District issued its opinion affirming the proceedings below in all respects.

STATEMENT OF FACTS

This litigation involves two separate but overlapping sets of facts – evidence developed at trial regarding the entire course of dealings between the parties as it related to the claim that LLNS breached the NDA, discussed in Section A, and more focused evidence regarding when the statute of limitations began to run, as discussed in Section B, which led to summary adjudication of the misappropriation and fraud claims.

A. Evidence Developed At Trial

The goal of LLNS's Inertial Confinement Fusion program ("ICF") is to produce energy using fusion, a process that utilizes enormous lasers to raise the temperature of hydrogen fuel contained in targets to the extremely high temperatures found on the sun. (RT-1 249-250, RT-2 265-266, 286-287, RT-4 744.) Laser targets were also used in the nuclear weapons

program conducted at the Lab. (RT-2 285-288.)

In early 2004, Robert Cook was the leader of the ICF program's capsules group, which developed the tiny target capsules - also called shells or ablaters – that contained the fuel used in ICF experiments. (RT-1 80-81, RT-2 317.) Cook's group had been trying to develop capsules since the 1980s, and in early 2004 was using only plastic and a metal known as beryllium to make their capsules. (RT-1 81-82, 176-178, 192-198, RT-3 581-582.)

Although there had been some computer simulations based on “hypothetical” diamond capsules, as of March 2004 no one at LLNS had attempted to make capsules out of diamond for use in the ICF program, no one at LLNS knew how to make them, and the head target designer had never met anyone who even claimed to know how to make them. (RT-1 82, 94, 119, 211, 214-215, RT-2 341-343, 355-356, RT-3 581-582, 616-623, 627-631, Exhibits 1144, 1146, 1327-1328.)

Kley, an experienced inventor with substantial expertise in nanodiamond technology, contacted LLNS and, after suggesting that diamond capsules would address some of the problems with beryllium and plastic capsules, was asked to make a presentation about producing diamond capsules. (RT-1 82.) Kley made the presentation, and offered to build a test shell. (RT-2 376-378, Exhibit 1, page LLNS 29237.) Kley did

not provide details of how he was going to make the shells during the presentation, waiting until an NDA was in place. (RT-2 376-377, RT-3 512-517.)

On March 16, 2004, Kley sent an email to Cook about scheduling a technical presentation that would focus on petitioners' proposed solutions to LLNS's problems. (RT-2 384-385, Exhibit 15.) Cook advised other LLNS personnel that "Vic Kley, the diamond shell guy" had proposed a meeting which, now that the NDA was in place, Cook expected to be a "reveal-all" presentation. (RT-1 128-129, Exhibit 222.)

Kley and Cook then engaged in an exchange of written, technical information that Kley felt comfortable sharing under the NDA. (RT-1 193-195, RT-2 385-387, 402, Exhibits 16-17, 240.) On March 25, 2004, Kley sent Cook representative mandrels, the forms on which plaintiffs were going to be growing the diamond capsules. (RT-1 129-130, 158-159, 203, RT-2 386, Exhibit 17.) Plaintiffs were not allowed to physically bring "anything" into the Lab, so shortly before the date set for the technical presentation Kley forwarded the presentation itself to Cook, in a password-protected format with all of the proprietary information. (RT-2 388-389, Exhibit 2.)

Cook set up the technical presentation, which was ultimately scheduled for April 9, 2004, and advised all attendees of the NDA. (RT-1

92-93, 130-131, RT-2 384-385, 389, Exhibit 18.) Kley and a colleague made a Power Point presentation that included specific, proprietary information about plaintiffs' methods for producing hollow spheres made of nanocrystalline diamonds.. (RT-1 94, RT-2 400-401.) (RT-2 370-372, 390-391, 447.) The LLNS people subsequently visited plaintiffs' laboratory, where they observed the equipment that would be used in producing diamond ICF shells. (RT-1 254, RT-2 407-408, 454-455.)

Petitioners received a request for proposal ("RFP") from LLNS, and in response submitted a September 7, 2004 proposal containing a very detailed, 10-step explanation of the process and equipment that would be used and what petitioners would be able to deliver. (RT-2 417-420, Exhibit 3, pages 2-3 of 15.)

Unbeknownst to petitioners (RT-2 388-389), a separate department at LLNS called Chemistry Material Science ("Chemistry"), had for the first time begun working on diamond ICF shells after receiving a request on March 29, 2004 from ICF chief Bruce Hammel. (RT-2 319-323, 333, RT-6 851-855, 873.) While Hammel denied providing information about petitioners' work to Chemistry, a member of Chemistry who was also a member of Cook's group and was acting as a liaison confirmed that he heard about a "guy from Berkeley" who had talked to Cook's group about diamond capsules, received updates on the project including specific

information about materials and procedures, and provided that information to his colleagues in Chemistry, including his supervisor, Alex Hamza. (RT-2 271-280.)

In June 2004, Hamza asked Juergen Biener, a German national who worked for him, to start working on diamond ICF shells. (RT-4 763-764.) Biener contacted an old friend in Germany, Christoph Wild, who told Biener on July 9, 2004 that he thought the shells were feasible, though he did not know of anyone who had ever tried to make such a shell. (RT-4 700-703, Exhibits 1343-1344.)

Hamza and Biener went to visit Wild in Germany on October 4, 2004. (RT-2 327-328, RT-4 704-708, RT-5 791.) In his subsequent patent application, Hamza claimed October 4, 2004 as the conception date for the invention of a process to make diamond capsules. (RT-2 328, 336-338.) Petitioners had absolutely no knowledge of this collaboration. (RT-2 424.)

On October 13, 2004, Cook advised Kley that they did not have the funds to hire outsiders, and were thinking about having Chemistry build the shells. (RT-2 424.) After Kley strongly objected, Cook backed off and calmed Kley down, saying that they were “not doing anything.” (RT-2 424-425.) Cook advised Kley that there would be no deal in an October 14, 2004 email. (RT-2 425-426, Exhibit 36.) Kley reminded Cook of the NDA (RT-2 428, Exhibit 37), and Cook promised that LLNS would honor it.

(RT-1 141-143, RT-2 429, Exhibit 38.) Kley sent a long email in reply, but heard nothing until the Lab contacted him in December 2005 about terminating the NDA. (RT-1 143, RT-2 429-430, RT-3 668-675, Exhibits 40, 258.)¹

B. Evidence Regarding The Triggering of the Statute of Limitations

1. October 2004

As discussed above, Kley responded angrily when Cook informed him on October 13, 2004, that LLNS's budget would not allow it to pursue diamond ICF shells with plaintiffs, and that LLNS's Chemical Division might pursue diamond ICF shells itself. (Kley Dec. 3:20-26, AA 294; Kley Dep. 352:19-21 352:7-354:20, and 356:1-4, AA 498-500, 502; AA 106-107.) Cook retracted the statement, and assured Kley "that LLNS would not be pursuing diamond ICF technology, that [Kley] didn't have to be that upset or worried about it." (Kley Dep. 353: 1-3, AA 499.)

On October 14, 2004, Kley and Cook exchanged emails regarding the situation,, with Cook reiterating that ICF could not fund the project, and stating that diamond shells were not ICF's leading option. (Kley Dec. 4:1-6,

¹ Evidence regarding this time period formed the basis for the trial court's grant of summary adjudication on the misappropriation and fraud causes of action, and will be addressed in more detail in section B. The appellate court relied on evidence regarding November 2004, which will also be addressed in section B.

AA 295; AA 325.) Kley responded by stating that petitioners understood that no one at or associated with LLNS would pursue diamond capsules and reminding Cook about the NDA. (Kley Dec. 4:7-13, AA 295; AA 327.) Cook responded that he did not have authority to speak for LLNS or LLNS's Chemical Sciences Division, and could “not say that no-one at LLNS or elsewhere will pursue diamond deposition technologies aimed at ICF shells.... What I will say is that I will honor our non-disclosure agreement and will not reveal your methodology to anyone at this time.” (Kley Dec. 4:14-19, AA 295; AA 327.) Kley wrote a final email the next day regarding the considerable expenses he and his companies had already incurred during the contract negotiation process and warning Cook, “Anyone who is a party to the NDA or their agent is prohibited from using the knowledge including the concept of a polycrystalline diamond capsule in any way without compensation to Metadigm and DiaMems ...” (Kley Dec. 4:20-27, AA 295; AA 329.) Kley believed that his companies would be entitled to compensation if LLNS developed diamond ICF shells in the future. (Kley Dec. 4:20-25, 5:2-5, AA 295-296.)

In granting summary adjudication, the trial court relied heavily on statements that Kley made during a deposition regarding his suspicion in October 2004 that Cook was lying or “misrepresenting statements to [him].” (Kley Dep. 371:12-17, 378:9-11, AA 517, 524; Summary

Adjudication Order 2-4, AA 528-530.) For example, Kley claimed that it was false for Cook to make statements about whether LLNS would pursue diamond ICF shells because “[t]he truth is they were already working on it,” though Kley did not answer a question as to when he suspected that, simply stating that he suspected from the email that he was dealing with someone who was not honest. (Kley Dep. 372:11-373:9, AA 518-519.) When asked about Cook’s statement that the diamond ICF shells were not that important, Kley explained that Cook had previously talked about the importance of the diamond shells, and said that he believed that Cook thought diamond shells were both important and unimportant. (Kley Dep. 375:6-376:11, 377:20-22, 378:9-11, AA 521-524.)

The trial court granted summary adjudication as to plaintiffs’ fraud and misappropriation claims based on its determination that Kley’s statements about his suspicions in October 2004 were conclusive as to when plaintiffs had reason to suspect their causes of action. (Summary Adjudication Order 2-4, AA 528-530.) The court sustained defense objections to other statements regarding Kley’s state of mind contained in a declaration filed in opposition to the motion, and did not consider the issue of whether a reasonable investigation would have revealed information on which to file a meritorious claim. (Summary Adjudication Order 2-4, AA 528-530.)

2. November 2004

In affirming summary adjudication, the First Appellate District focused on a document that Kley first saw in November 2004 while visiting a partner of the Lab's, General Atomics. (Opinion 26-28.) On November 12, 2004, Kley saw a document that General Atomics said it had received from Cook. (Kley Dec. 6:10-15, AA 297.) The document was a timeline, dated October 14, 2004, showing future time periods with the notations, "Develop diamond shells or examine other C-based technologies," and "Determine whether diamond shells or any other C-based technology for shells is viable and offers advantages over CH/CD (LLNS)." (AA 335.)

Kley explained in his declaration opposing summary adjudication that the October 14, 2004 WBS timeline "was LLNS's timeline planner to show when we [petitioners] could begin producing diamond ICF shells" (AA 297, Kley Dec. ¶ 29.) Although initially concerned that this was a violation of the NDA with LLNS, Kley later realized that LLNS had a right under the NDA to provide the timeline to its partner, GA. (Kley Dec. 6:13-21, AA 297.)

The First Appellate District determined that Kley's declaration "rests on an unreasonable reading of both the NDA and the LLNS timeline," because "[b]y October 14, 2004, it was clear that there would be no contract or collaboration" between LLNS and petitioners. (Opinion 27.)

The “only reasonable inference” from the document was that “Kley suspected, or should have suspected, that LLNS had disclosed the diamond shell concept and was continuing to pursue the concept for its own purposes.” (Opinion 27.) The Court specifically rejected petitioners’ contention that, under *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, the statute of limitations did not start to run in October-November 2004 because a reasonable investigation would not have disclosed a factual basis for a misappropriation claim, finding that the timeline by itself “revealed a factual basis for appellants’ misappropriation cause of action.” (Opinion 27.)

But the evidence established that Kley’s interpretation of the document was not only reasonable, but correct.² Cook testified that as of the date of the timeline, October 14, 2004, he had no information that “someone in Lawrence Livermore National Laboratory was going to work on Diamond ICF shells.” (AA 384, Cook Dep 106.) Cook also testified at trial about a later iteration of the timeline, explaining that when he stated in that October 25, 2004 document that “one company” had made a proposal to develop diamond ICF shells, “the one company that I’m talking

² Pursuant to California Rules of Court, rule 8.500(c)(2), petitioners timely filed a Petition for Rehearing to alert the First Appellate District to this factual error, but the Court denied the petition on July 23, 2012.

about there is Vic's company, because that is the only one I knew about.” (RT 1 154.) Cook further testified that as of October 25, 2004, he was still “certainly hoping they would reopen negotiations” with petitioners. (RT 1 155.)

3. LLNS Discloses Misappropriation

Petitioners did not actually learn of the misappropriation until July 2007, when Kley attended a meeting entitled Semicon West and was directed to a paper written by Biener, Hamza and others, with an acknowledgment of “helpful discussions” with Cook. (RT-2 435, RT-5 806-816, 829-833, 840-842, Exhibit 52, page P1144.) The June 2005 paper discussed Kley's invention, including words and terms that Kley had used in the presentations, but referred only to other publications. (RT-2 435-436, Exhibit 52; RA 15-37.) Kley also found a patent application by Alex Hamza for a portion of his invention, including hollow diamond shells and diamond ball bearings. (RT-2 437-438, RT-5 816-818, Exhibit 113.) Kley believed that the patent application included content covered by the NDA. (RT-2 439-440.)

There was no dispute that petitioners filed suit within three years of the paper's publication in June-July 2005.

ARGUMENT

I. Where A Potential Plaintiff At Most Suspects There Is A Claim, Public Policy Requires That The Statute of Limitations Does Not Begin To Run Until A Reasonable Investigation Would Have Disclosed A Factual Basis for Filing Suit

In *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, this Court clarified the law regarding the “rule of discovery” exception to the statute of limitations by explaining that, while potential plaintiffs’ suspicion of one or more generic elements of a cause of action “coupled with knowledge of any remaining elements, will generally trigger the statute of limitations” (*Fox*, 35 Cal.4th at 807), the statute is not triggered unless an inquiry would have disclosed sufficient information to file suit. (*Fox*, 35 Cal.4th at 807-808.) A potential plaintiff who suspects a wrongful injury must conduct a reasonable investigation, and:

If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light.

(*Fox*, 35 Cal.4th at 808-809.)

If the evidence available to the plaintiffs “failed to indicate a cause of action,” requiring them to file a lawsuit “would be contrary to public policy,... Indeed, it would be difficult to describe a cause of action filed by a plaintiff, before that plaintiff reasonably suspects that the cause of action is

a meritorious one, as anything but frivolous.” (*Fox*, 35 Cal.4th at 815 (citations omitted); see also *Grisham v. Philip Morris U.S.A.* (2007) 40 Cal.4th 623, 645.)

It was undisputed in this case that petitioners had no means of investigating LLNS, a highly secured facility conducting research on issues involving national defense. (Kley Dec. 5:14-28, AA 296; Reply to PAF ## 23-24, 34-38, AA 469-472.) This situation confronts many small innovators in California attempting to partner with large governmental or commercial research facilities, all of whom zealously guard their institutional privacy.

Rather than addressing petitioners’ inability to conduct any type of investigation to confirm suspicions of misappropriation, if any, the First Appellate District held that discovery of the LLNS timeline provided not only notice that LLNS was guilty of misappropriation, but also a sufficient evidentiary basis to file suit. (Opinion 26-28.) There was no need to consider whether petitioners could conduct any further investigation under *Fox* because the Court’s:

analysis explicitly considers what a reasonable investigation would have uncovered in November 2004. Simply put, the undisputed facts showed that a reasonable reading of the documents available to Kley in November 2004 revealed a factual basis for appellants’ misappropriation cause of action. (See *Fox, supra*, 35 Cal. 4th at p. 803.)

(Opinion 27.)

As discussed above, the LLNS timeline available in November 2004 referred only to the petitioners' own proposal to develop diamond ICF shells for LLNS, which petitioner obviously knew was not being pursued. Any suit based on that timeline would have been frivolous, and requiring petitioners to file such a suit in the hope that an undiscovered factual basis would materialize is contrary to the public policy discussed in *Fox*, 35 Cal.4th at 815. No reasonable attorney, correctly interpreting the LLNS timeline, would file a misappropriation claim against LLNS unless there was some means of confirming that LLNS was actually continuing to pursue diamond ICF shells, either through its Chemistry division or in conjunction with another outside entity. That confirmation was not available until LLNS published its article in June-July 2005.

If the LLNS timeline at most provided some vague notice of LLNS's misappropriation sufficient to prompt inquiry under *Fox*, the First Appellate District further erred in failing to consider petitioners' inability to conduct any type of inquiry that would have disclosed a factual basis for filing suit. (*Fox*, 35 Cal.4th at 803, 815.) The Court should clarify the effect that *Fox* had on the caselaw in this area, because there are still California precedents, such as *Knowles v. Superior Court* (2004) 118 Cal.App.4th 1290, and *Kleefeld v. Superior Court* (1994) 25 Cal.App.4th 1680, that are

directly contrary to *Fox*, and hold that any investigation conducted after a plaintiff first suspects wrongdoing is simply irrelevant. *Knowles*, 118 Cal.App.4th at 1300, quoting *Kleefeld*, 25 Cal.App.4th at 1684.)

Both *Knowles* and *Kleefeld* rely on a misreading on this Court's earlier decisions in *Jolly v. Eli Lilly and Company* (1988) 44 Cal.3d 1103, and *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, without recognizing the Court's analysis in *Fox*. Contrary to *Knowles* and *Kleefeld*, this Court's "reasonable investigation" requirement is not limited to cases where a plaintiff lacks actual suspicion, and applies equally to "actual suspicion" cases like *Jolly*, and to "reason to suspect" cases like *Norgart*, and would not have changed the result in either case, because:

The court's decisions in *Jolly* and *Norgart* presuppose a situation in which the factual basis for a claim was reasonably discoverable through diligent investigation.

(*Fox*, 35 Cal.4th at 814.)

Petitioners are not suggesting an open extension of the statute of limitations. Well within a year, the publication of LLNS's paper in June-July 2005 provided a factual basis for filing suit, triggering the statute of limitations under *Fox*. (See *Hebrew Academy of San Francisco v. Goldman* (2007) 42 Cal.4th 883.)

The Court should grant review to ensure that *Fox* is properly applied throughout California.

II. A Court Cannot Grant Or Affirm Summary Adjudication Based On An Interpretation Of Evidence Contrary To That Of The Parties

The First Appellate held that the “the only reasonable inference” to be drawn from petitioners’ receipt of the LLNS timeline was that they “suspected, or should have suspected, that LLNS had disclosed the diamond shell concept and was continuing to pursue the concept for its own purposes.” (Opinion 27.) As discussed above, the timeline’s author, Cook, testified that on the date of the timeline he had no knowledge of any pursuit of diamond ICF shells except by petitioners, and when he referred two weeks later to a company that was pursuing diamond ICF shells he was referring to petitioners, with whom he was still hoping to reopen negotiations. (AA 384; RT 1, 150-155.) Kley, of course, also stated that he had understood that the timeline referred to petitioners efforts to produce diamond ICF shells (AA 297), an interpretation that the First Appellate District rejected as unreasonable. (Opinion 26-27.)

The First Appellate District’s holding is contrary to well-known principles requiring courts to interpret the evidence in favor of parties opposing motions for summary adjudication. (*Saelzer v. Advanced Group 400* (2001) 25 Cal.4th 763, 767-768.) Instead of interpreting the evidence in favor of petitioners, the First Appellate District adopted an interpretation of the evidence that is contrary to the interpretation given

that evidence by both parties to the case, including the document's author and recipient.

The First Appellate District's interpretation of the LLNS timeline not only provided the basis for its rejection of the reasonable investigation requirement under *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, but also its refusal to consider that LLNS's fraudulent concealment of the cause of action precluded it from relying on the statute of limitations, under *Bernson v. Browning-Ferris Industries of California, Inc.* (1994) 7 Cal.4th 926, 931. (Opinion 28-29.) The Court also affirmed an award of attorney fees based on its interpretation of the timeline, holding that petitioners "clearly had reason to suspect, by November 2004, a cause of action for misappropriation of their trade secrets," and that their refusal to simply dismiss that claim was objectively specious and in bad faith. (Opinion 34-35.)

III. In A Trial Regarding An Alleged Breach Of A Nondisclosure Agreement, Defendants' Greater Access To Evidence Regarding Purported Exclusions To The NDA Requires Reversal Of The Normal Burden Of Proof

Finally, the First Appellate District affirmed the jury verdict in favor of respondents following the trial of the breach of the NDA claims, determining that even if the trial court erred in allocating the burden of proof at trial, any error was harmless. (Opinion 37-38.) This Court should

grant review to establish that, in intellectual property cases seeking recovery for breach of NDAs, the burden should be placed on defendants to establish any exclusions to the NDA, due to the defendants' greater access to relevant evidence, overruling *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658.

Under the NDA, the Lab had no obligation to keep confidential information that it had not obtained from petitioners or had developed independently. (RT-3 524-525, Exhibit 5, AA 725.) At trial, the Lab introduced expert testimony in an attempt to show that the steps in plaintiffs' September 7th proposal were obvious or known in the public domain, or were different from the steps actually taken by LLNS. (RT-6 892-903-917, 922-923, 927.) The Lab also relied on prior work that had been done in-house regarding diamond ICF shells, though it was admittedly hypothetical. (RT-1 94, RT-2 342-351, 356-357, Exhibit 1019.)

Paragraph (4)(a)-(d) of the NDA excluded four types of information from the general definition of Proprietary Information that LLNS was bound to keep confidential. (Exhibit 5, page 1, AA 725.) The Court required petitioners to prove the existence of three of those exclusions by a preponderance of the evidence, requiring them to prove that: "the information was not or did not become available to the public through no fault of Lawrence Livermore" (Jury Instruction No. 23, AA 737); "the

information was not lawfully obtained by Lawrence Livermore and that the information is not subject to an obligation of confidentiality owed to the third party” (Jury Instruction No. 24, AA 738); and “the information was not independently developed by or for Lawrence Livermore independent of any disclosure under the NDA.” (Jury Instruction No. 25, AA 739.)

While Evidence Code section 500 provides generally that a party “has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting,” this Court has acknowledged that “the ordinary rules governing allocation of the burden of proof may be disregarded for policy reasons in exceptional circumstances.”

(Simpson Strong-Tie Company, Inc. v. Gore (2010) 49 Cal.4th 12, 25.)

One frequent exception cited for shifting the burden of proof occurs “when the parties have unequal access to evidence necessary to prove a disputed issue.” *(Amaral v. Cintas Corporation No. 2 (2008) 163 Cal.App.4th 1157, 1189.)*

Burden-shifting is appropriate when essential evidence “lies peculiarly within the knowledge and competence of one of the parties.”

(Sanchez v. Unemployment Insurance Appeals Board (1977) 20 Cal.3d 55, 71.) Other factors considered by the courts include the probability that the evidence exists, and “the most desirable result in terms of public policy in the absence of proof of the particular fact.” *(Lakin v. Watkins Associated*

Industries (1993) 6 Cal.4th 644, 660-661.)

To say that the evidence regarding LLNS's use and development of information regarding ICF capsules was "peculiarly" within its knowledge is to understate the matter considerably. During closing argument, for example, defense counsel referred twice to a 1999 "Dittrich design," Exhibit 1019, and merged all of the exclusions together, arguing that the jurors "can see for yourself why this is about independent development and has nothing to do with Victor Kley." (RT-6 1008-1010.)

But the Lab had designated the Dittrich design "Highly Confidential–Litigation Attorney's Eyes Only" pursuant to a Protective Order (AA 48) and, just days before, had been arguing strenuously that the trial Court should hold Kley in contempt because he had provided a declaration in opposition to a motion for summary judgment that the Lab thought contained too much information about the Dittrich design. (3/15/10 RT 1-26.)

While the court did not hold Kley in contempt (AA 632-636), it was certainly aware of the Lab's zealous efforts to preclude Kley from assisting counsel in the prosecution of this aspect of the case. Defense counsel's discussion of the NDA's exclusions during closing argument in fact cited five additional documents that LLNL had prevented Kley from even seeing by designating them "Highly Confidential–Litigation Attorney's Eyes Only."

(RT-6 1009-1015, Exhibits 1328, 1013, 1330, 1329, and 1146.) As defense counsel argued, “This isn’t publicly known information.” (RT-6 1010.)

Considering LLNS’s convenient epiphany that, for example, the Dittrich design could be discussed in great detail in front of the jury days just after demanding that Kley be jailed for being aware of it (RT-2 345-350), the court should have recognized the gross inequity of requiring petitioners to shoulder the burden of disproving defense claims that the Lab had independently developed diamond ICF capsules, where the defense had capriciously denied them access to critical information, and threatened them with contempt for seeing a document that was more than a decade old. (RT-6 1008-1009.)

In affirming the jury verdict in this case, the First Appellate District relied heavily on the analysis in a misappropriation case, *Sargent Fletcher*. (Opinion 38-39.) In *Sargent Fletcher*, the Second Appellate District refused to shift the burden to defendants to establish either independent derivation or reverse engineering of trade secrets, holding that burden shifting would be appropriate only when “it would be *impossible* for the plaintiff to prove its case otherwise.” (*Sargent Fletcher*, 110 Cal.App.4th at 1670-1671.) *Sargent Fletcher* is an outlier on this issue, taking a position that is contrary to federal courts applying California law, which place the burden on defendants to establish independent invention or reverse

engineering. (*Garter-Bare Co. v. Munsingwear Inc.* (9th Cir. 1984) 723 F.2d 707, 715; *Henry Hope X-Ray Prods., Inc. v. Marron Carrel, Inc.* (9th Cir. 1982) 674 F.2d 1336, 1341.)

The First Appellate District further relied on *Sargent Fletcher* in determining that, even if the trial court had erred in allocating the burden of proof, any error was harmless. (Opinion 39-40, citing *Sargent Fletcher*, 110 Cal.App.4th at 1675.) The Court acknowledged the four factors set forth by this Court for determining harmless error in jury instructions in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, including the critical caveat that, in evaluating the state of the evidence, courts do not apply normal appellate rules but must view the facts most favorably to appellants, and assume that “the jury *might have believed* appellant’s evidence.” (Opinion 38, quoting *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1087 (emphasis added by Court.)

But in dismissing petitioners’ evidence as “largely contradictory and based on speculative inferences” (Opinion 39), the First Appellate District overlooked the following:

- A. By March 2004, LLNL scientists had been trying for decades to produce ICF capsules and had calculated diamond to be superior to the materials they were using, but they considered diamond ICF capsules to be only “hypothetical” – no one at LLNL knew how to make them, and no one had ever tried (RT-1 81-83, 94, 119, 211, 214-215, RT-2 274, 341-343, 355-356, RT-3 581-582, 616-623, 627-631);

- B. Kley assured attendees at the March 4, 2004 presentation that they could produce diamond ICF shells to LLNL's specifications once an NDA was in place (RT-2 375-378, RT-3 512-517);
- C. Although the terms of the NDA were mandated by LLNL (RT-2 380, 383), LLNL personnel were either confused about what it meant (RT-1 86-92, 102-103), never had it in their possession (RT-1 218, 227, 253), never saw it (RT-2 580, 587-88, 591), or never even heard of it (RT-2 278);
- D. Once the NDA was in place, petitioners provided proprietary, technical information to LLNL about methods of producing diamond ICF capsules, including the creation of nanocrystalline diamond on highly spherical mandrels using chemical vapor deposition (RT-1 94, 129-130, 158-159, 193-195, 203, 254, RT-2 385-394, 400-402, 407-408, 417-420, 447-455, RT-3 517-518, 534-535, 568-573, Exhibits 2-4, 16-17, 240, AA 691-723);
- E. Hammel knew ICF was obtaining the NDA and, two weeks after it was in place, Hammel for the first time directed Hamza in Chemistry to work on diamond capsules, which was immediately funded (RT-1 230-231, RT-2 318-322, 333),
- F. Cook, Hammel and the liaison with Chemistry McElfresh had offices on the same hall and often exchanged information during informal meetings (RT-1 98-99, RT-2 268);
- G. Cook disclosed plaintiffs' proprietary information to members of his group, including the liaison (RT-1 102-104, RT-2 271-272, RT-2 277-280), and the liaison disclosed whatever he learned to Hamza as part of his job (RT-2 228-229, 265-269, 273-276);
- H. In June-July 2004, Hamza told Biener to contact Wild about producing diamond ICF capsules (RT-2 326-328, RT-4 698-699, 727-728, 763-764, 768-769);
- I. Three days after plaintiffs submitted their most detailed proposal on September 7, 2004, Cook attended a meeting about diamond ICF capsules with Chemistry's Biener and a scientist named Mirkarimi; although they denied discussing plaintiffs' work, Mirkarimi later asked Cook to send a sample from plaintiffs (RT-1 104-107, 112-116, 124-125, 235-236, RT-2 325-325, RT-3 602, RT-5 792-795, 827-828 RT-6 874-875, Exhibits 92, 227)
- J. After Hamza and Biener's October 2004 visit to Germany,

LLNL funded the production of sample ICF diamond capsules, using methods disclosed in plaintiffs' proprietary information (RT-2 328-332, 336-338, 437-440, RT-3 568-570, RT-5 816-818, RT-6 936-943.

This leads to the third *Soule* factor, the effect of closing arguments. (8 Cal.4th at 580-581.) Toward the end of defense counsel's closing argument in this case, counsel not only again merged the various exclusions but also stated, "Plaintiffs did not carry their burden. They didn't. We're the defendants in this case. We don't even have the burden of proof and time and again we've put on evidence." (RT-6 1025-1026.) Defense counsel then moved immediately from this argument to the special verdict form, reading the first question to the jury and advising it, "Well, the answer to those is no. And you can check no there." (RT-6 1026.) And they did. (AA 748.)

Counsel then reminded the jury that they had answered affirmatively when he asked them during voir dire, "If plaintiffs fail to meet their burden of proof in this case, can you send them home with no money. And every one of you said you would." (RT-6 1027.) And they did. (AA 748, 751.)

The final *Soule* factor is whether there are any indications that the jury was misled. (*Soule*, 8 Cal.4th at 580-581.) In this case, after a lengthy trial involving complicated, technical testimony from eleven witness and the introduction of dozens of technical exhibits, the jury returned its verdict

after less than an hour, simply following defense counsel’s instructions to “check no” on the special verdict form and send petitioners home with no money. (RT-6 1026-1027, AA 752A.)

This Court should grant review to establish the proper allocation of the burden of proof in cases where evidence regarding defense claims are peculiarly within their knowledge.

CONCLUSION

For all the above reasons, this court should grant review.

DATED: August 6, 2012

LAW OFFICE OF PAUL KLEVEN

by: _____
PAUL KLEVEN
Attorney for Petitioner

CERTIFICATE OF COUNSEL

I certify that this Petition for Review contains 6,850 words, as calculated by my WordPerfect x5 word processing program.

PAUL KLEVEN