

Excerpt (first three and last three pages of  
proceedings) from Reporter's Transcript of  
Proceedings Held on June 6, 2008 in *Eclipse Aviation  
Corp. v. John Doe, et al.*, No. 1-08-CV-110380,  
California Superior Court, Santa Clara County



1 SAN JOSE, CALIFORNIA

JUNE 6, 2008

2 PROCEEDINGS:

3 THE COURT: Matter of Eclipse Aviation versus John  
4 Doe.

5 MS. STOREY: Good morning, Your Honor. Angela  
6 Storey for Eclipse Aviation.

7 MR. THUMA: David Thuma, co-counsel for Eclipse  
8 Aviation.

9 THE COURT: Hang on. Mr. Thuma, please spell your  
10 name for the Reporter.

11 MR. THUMA: T-h-u-m-a.

12 MR. MALINSKI: Norman Malinski on behalf of the  
13 John Does.

14 MR. PETROFSKY: Alan Petrofsky. I filed a media  
15 request last week.

16 THE COURT: I denied that. Thank you.

17 MR. PETROFSKY: I filed an alternative request on  
18 Wednesday.

19 THE COURT: That's denied, too.

20 MR. PETROFSKY: Okay. Thank you.

21 The Reporter has copies of the transcript that can  
22 be obtained.

23 Okay. I have a few questions on this. Extensive  
24 reference has been made to the *Krinsky* matter and to the  
25 *H.B. Fuller* matter, both of which I have intimate knowledge.  
26 And let me point out, I also am intimately familiar with the  
27 *O'Grady* case, which was Judge Kleinberg's case. I also want  
28 to point out four things that the *Krinsky* case did not

1 mention. A couple of them were addressed in my written  
2 order, a couple. I just assumed was common knowledge or were  
3 common knowledge.

4 First of all, the *Krinsky* case did not mention that  
5 I specifically found that there was some economic damage to  
6 Dr. Krinsky because the e-mails or postings, rather, led to a  
7 devaluation of the publicly traded stock in her company by  
8 two-thirds in a period about a month or two, drove down her  
9 stock price 60, 67, 68 percent.

10 Secondly, *Krinsky* did not mention that the  
11 commission was signed by a judge in Florida, and just as *H.B.*  
12 *Fuller* was, and as was signed in this case, the commission  
13 was signed by Judge Linda Vanzi, V-a-n-z-i, of the Second  
14 Judicial District in New Mexico.

15 Thirdly, the *Krinsky* case did not discuss the  
16 well-accepted doctrine that relevancy of the subject matter  
17 does not depend on a legally sufficient pleading, nor is it  
18 restricted to the issues formally raised in the pleadings,  
19 and that relevancy of the subject matter is determined by the  
20 potential as well as the actual issues in the case. That  
21 goes back to at least 1908 in California.

22 And finally, the epithets in the *Krinsky* case  
23 include the term "cockroach." Justice Rushing -- Presiding  
24 Justice Rushing has a class, teaches a class in law and  
25 literature, which I've taken twice, and one of the  
26 discussions involves John Joseph Kafka, *The Metamorphosis*,  
27 which is the book where Gregor Samsa awakes one morning and  
28 he's on his back as a cockroach. And, actually, the term

1 cockroach was not probably not what Kafka intended because of  
2 an inability to precisely translate German into English.  
3 What he probably meant was something of an utterly monstrous  
4 vermin beyond contempt. That's irrelevant for this purpose.  
5 But that was something I noted.

6 Mr. Malinski, you offered for me to review the  
7 names of the bloggers in camera. What would be gained by  
8 that?

9 MR. MALINSKI: Nothing based on ensuing events.

10 THE COURT: Okay.

11 MR. MALINSKI: The opposition to the motion to  
12 quash relieves a number of the John Does from the subpoena.  
13 Characterizes the subpoena as released and unreleased  
14 posters. The unreleased posters I now can report to the  
15 Court with one exception I represented.

16 THE COURT: So you represent all unreleased  
17 posters?

18 MR. MALINSKI: With one exception, yes. So the  
19 offer is still there, Your Honor, however, I believe it's  
20 necessary based on that information --

21 THE COURT: And can you tell me whether that  
22 unreleased poster that you don't represent has notice of  
23 these proceedings?

24 MR. MALINSKI: Yes, he does.

25 THE COURT: Or she?

26 MR. MALINSKI: Yes.

27 THE COURT: He or she?

28 MR. MALINSKI: It does.

(pages 5 through 27 omitted)

1 the prima facie case that is required to be analyzed in the  
2 *Krinsky* -- everybody knew that we alleged breach of the INDA.  
3 And we attempted to establish a prima facie case, a breach of  
4 the INDA by employees or former employees.

5 THE COURT: I thought that *Krinsky* stated a valid  
6 cause of action under Florida law, and I thought she could  
7 have stated a good cause of action under federal security  
8 law, and the court of appeal said it doesn't matter. So...

9 MS. STOREY: I mean, I think in New Mexico and in  
10 California, the essential elements of a cause of action for  
11 breach of contract are the same, and we have shown that we  
12 have met those elements in our opposition. We've shown that  
13 there was information subject to a confidentiality agreement.  
14 We've shown that the agreement appears to have been breached  
15 and that it was breached by someone who is most likely a  
16 party to that agreement.

17 I don't think the elements or the allegations in  
18 the Complaint, particularly where we don't know the names of  
19 the people, is going to be particularly helpful or relevant.

20 THE COURT: Well, look at *Krinsky*, page 1172:

21 "We therefore agree with those courts that  
22 have compelled the plaintiff to make a prima  
23 facie showing of the elements of libel in  
24 order to overcome a defendant's motion to  
25 quash a subpoena seeking his or her identity."

26 MS. STOREY: Correct. We have made a prima facie  
27 case of breach of contract in regards to the non-disclosure  
28 agreement.

1 THE COURT: You may have, but I haven't seen it,  
2 and I haven't heard Mr. Malinski say he had an opportunity to  
3 squawk about it, since he just saw the Complaint right now.  
4 He says that it isn't that hard to allege that, that the real  
5 issue is in the affirmative defenses, but *Krinsky* doesn't  
6 talk about affirmative defenses. Just talks about a prima  
7 facie showing. And they say here that I'm correct that when  
8 I said that it was a, prima facie burden must have been made,  
9 and Ms. -- Dr. *Krinsky* said that she demonstrated that the  
10 postings were libelous per se, and the court of appeal said  
11 that saying she had a fake medical degree or she had fat  
12 thighs or poor hygiene was not libelous. That's what the  
13 case was. And overlooked completely was the fact that the  
14 stock price got driven down so much. Not important because  
15 it wasn't plead, is what *Krinsky* case said. So there's where  
16 I'm stuck.

17 Okay. I'll give you a 60-day continuance on that.  
18 Can I have a Friday in 60 days, please?

19 August 1st. Friday, August 1st.

20 MS. STOREY: 10 o'clock.

21 THE COURT: 10 o'clock. What I want to see  
22 happen -- I'm just continuing this hearing, and I will be  
23 impressed by some motion practice on the validity of the  
24 Complaint and specific objections, Mr. Malinski, to the  
25 postings to say that this isn't a trade secret. Tell me why.  
26 You file those papers first per code, 21 -- 16 court days  
27 before the hearing. Opposition per code. And the reply, if  
28 any, per code.



1           But I think you know where I'm coming from on this,  
2 that there has to be a valid -- prima facie showing of a  
3 valid claim, that these are indeed trade secrets. And like I  
4 said, I don't think you can do anything anonymously that you  
5 can't do face to face, whether it's breaking a contract or  
6 stealing property or ideas or whatever. So...

7           Anything further, Mr. Malinski?

8           MR. MALINSKI: No. Thank you very much.

9           THE COURT: Mr. Thuma?

10          MR. THUMA: Nothing further.

11          THE COURT: Ms. Storey?

12          MS. STOREY: No, thank you.

13          THE COURT: We'll be in recess.

14          **(Whereupon, the matter was adjourned.)**

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REPORTER'S CERTIFICATE

STATE OF CALIFORNIA     )  
                                      )        SS.  
COUNTY OF SANTA CLARA  )

I, GEORGEANN M. WILES do hereby certify that the foregoing is a full true and correct transcript of the proceedings had in the above-entitled action held on the 6th day of June, 2008;

That I reported the same in stenotype to the best of my ability being the qualified and acting Official Court Reporter of the Superior Court of the State of California, in and for the County of Santa Clara, appointed to said court, and thereafter had the same transcribed into typewriting as herein appears.

I further certify that I have complied with CCP 237(a)(2) and that all personal juror identifying information has been redacted, if applicable.

Dated this 25th day of June, 2008.

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GEORGEANN M. WILES, CSR  
License No. 10339