

**REQUEST FOR STAY: TRIAL COURT STAY
EXPIRES AUGUST 3, 2009**

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

JASMINE NETWORKS, INC., a Delaware corporation,)	2d Civ. No. _____
)	
Petitioner,)	Santa Clara County Superior Court, Case No.
vs.)	1-01-CV-801411
)	
SUPERIOR COURT FOR THE COUNTY OF SANTA CLARA,)	Honorable Thomas C. Edwards
)	Department 13
Respondent.)	Phone No. (408) 882-2240
_____)	
)	
MARVELL SEMICONDUCTOR, INC., RICHARD SOWELL, AND PATRICK J. MURPHY,)	
)	
Real Parties in Interest.)	
_____)	

**PETITION FOR WRIT OF MANDATE OR OTHER
APPROPRIATE RELIEF; REQUEST FOR STAY OF TRIAL COURT
PROCEEDINGS; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT THEREOF
[EXHIBITS FILED UNDER SEPARATE COVER]**

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**Court of Appeal
State of California
Sixth Appellate District**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: _____

Case Name: Jasmine Networks, Inc. v. Superior Court for the County of Santa Clara (Marvell Semiconductor, Inc. et al.)

Please check the applicable box:

There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
Robert Imhof	49% shareholder
Binder & Malter	22.09% shareholder
John Arrillaga and Richard T. Peery	13.13% shareholders

Please attach additional sheets with Entity or Person Information if necessary.

Signature of Attorney/Party Submitting Form

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ISSUES PRESENTED

- Is there a special standing requirement in trade secrets cases, such that a plaintiff damaged by the misappropriation of its trade secrets loses the right to recover on its accrued cause of action if it sells what is left of the trade secrets, but not the accrued claim, while the lawsuit is pending?
- Under principles of res judicata, does a bankruptcy court's final determination that a bankrupt plaintiff has the right to pursue pending litigation against a defendant preclude that defendant from challenging the plaintiff's standing in the litigation, where the defendant had notice and an opportunity to contest the bankruptcy court's ruling?

INTRODUCTION

Several years ago, the trial court carved critical evidence out of this trade secrets misappropriation case. This Court set aside that order.

(Jasmine Networks, Inc. v. Marvell Semiconductor, Inc. (2004)

No. H023991, review dism. Apr. 23, 2008, S124914 [voicemail left by Marvell executives openly discussing theft of Jasmine's trade secrets fell within the crime-fraud exception to the attorney-client privilege].)

Now, days before trial, a different judge has switched from a carving knife to a chain saw.

This time the trial court has thrown out Jasmine's case altogether—on the basis of an argument never before raised in nearly eight years of litigation. That argument was that Jasmine lacks standing to sue Marvell or its own former employees. According to the trial court, Jasmine lost standing when it sold what was left of its misappropriated trade secrets to a third party— even though it indisputably owned the trade secrets when they were misappropriated and when it filed this action, and even though a long-final bankruptcy court order approved an agreement by which Jasmine retained its right to litigate this suit when it sold the trade secrets. The dismissal was an enormous windfall for Marvell, permitting it to escape liability for a brazen misappropriation.

The trial court got it wrong again. However, recognizing the novelty of the ruling, its impact on a trial on pending cross-complaints, and the importance of immediate appellate review, the trial court stayed proceedings until August 3, 2009 to allow Jasmine to file this petition. Jasmine requests that this Court further stay proceedings until this petition is finally resolved.

Why Writ Relief Is Necessary

The order dismissing Jasmine’s complaint on the eve of trial has deprived Jasmine of the opportunity to present a case eight years in the making. Jasmine cannot appeal the dismissal now because the defendants’ cross-complaints are still pending. (*California Dental Assn. v. California Dental Hygienists’ Assn.* (1990) 222 Cal.App.3d 49, 60.) Instead, absent writ relief, Jasmine will have to try the three pending cross-complaints before this Court can consider whether the trial court erred in dismissing its complaint. If this Court then finds error, the parties will have to go to trial a second time, rehashing much of the same evidence involved in the first trial. (Compare, e.g., 1 Exh. 104-107, 110-111 [Marvell’s allegations that Jasmine had no trade secrets] with 1 Exh. 56-57, 59, 63, 65-66 [Jasmine’s allegations that Marvell misappropriated and used its trade secrets].)¹ Writ relief is necessary to avoid this redundancy, an exercise costly to both the litigants and the court. (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1183 [writ review appropriate where postjudgment appeal would require a second trial “with the attendant waste of judicial resources”]; *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 301, fn. 4 [writ review appropriate to prevent “a needless and expensive trial and reversal” (Citations)].)

Writ relief is also appropriate because the trial court’s dismissal order presents an important question of first impression. (*Barrett v.*

¹ Citations to “Exh.” refer to the bound exhibits filed with this petition; the first number represents the volume in which the exhibit is located and the second number refers to the bound exhibits’ consecutive page numbers. All of the exhibits provided are true and correct copies of documents filed in the trial court, except for tab numbers 11, 20, and 23, which are reporter’s transcripts of trial court proceedings. All of the exhibits are incorporated in this petition by reference.

Superior Court, supra, 222 Cal.App.3d at p. 1183; *Elden v. Superior Court* (1997) 53 Cal.App.4th 1497, 1504.) The question is whether a plaintiff loses standing to sue for a past misappropriation of its trade secrets if it sells what is left of its trade secrets but expressly retains the accrued cause of action. The answer should be no. California permits plaintiffs to pursue an accrued cause of action for property damage even if they no longer own the property. Nothing in the California Uniform Trade Secrets Act dictates a different result when trade secrets are involved. The trial court's contrary decision is clearly erroneous. It should be corrected now. As the trial court itself acknowledged, this issue "must ultimately be resolved by the Court of Appeal" and "now is a better time than later for the Court of Appeal to do so." (5 Exh. 994.)

Why A Stay Is Necessary

The trial court dismissed Jasmine's complaint on the eve of trial. (5 Exh. 1073-1075 [6/3/09 dismissal order showing trial date of 5/11/09].) It granted a 60-day stay, until August 3, 2009, to permit Jasmine to seek relief from this Court. (5 Exh. 1081.) Jasmine respectfully requests that this Court extend the stay of trial court proceedings pending a final ruling on this petition. Otherwise, the trial on defendants' cross-complaints will commence before this Court determines whether the trial should also include Jasmine's claims. That result would undermine the efficacy of writ relief.

PETITION

Petitioner Jasmine Networks, Inc. alleges:

The Parties

1. Petitioner Jasmine Networks, Inc. is the plaintiff and cross-defendant in *Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.*, Santa Clara County Superior Court Case No. 1-01-CV801411 (Marvell Litigation). (1 Exh. 36, 56, 100, 173.) Real parties in interest Marvell Semiconductor, Inc., and former Jasmine employees Richard Sowell and Patrick Murphy, are the defendants and cross-plaintiffs in that action. (1 Exh. 36, 56, 100 173.)

Marvell Misappropriates Jasmine's Trade Secrets

And Plans To Raid Jasmine's Employees

2. Both Jasmine and Marvell were in the semiconductor business. (1 Exh. 57.) In 2001, Marvell offered to buy some of Jasmine's technology and engineers. (1 Exh. 59-60.) During the course of the ensuing negotiations, Jasmine discovered that Marvell had misappropriated its trade secrets. (1 Exh. 56-57, 61.)²

² Marvell executives revealed the misappropriation in a voicemail they left on Jasmine's system by continuing to talk after they apparently believed they had hung up the phone. (*Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.* (2004) No. H023991, review dism. Apr. 23, 2008, S124914.) This Court reversed a preliminary injunction restricting Jasmine's use of the recorded conversation, finding that Marvell had waived the attorney-client privilege and that Jasmine had established a prima facie case that the conversation was within the crime-fraud exception to the attorney-client privilege. (*Ibid.*) The Supreme Court granted, but later dismissed, review. (*Jasmine Networks v. Marvell Semiconductor*, S124914.)

3. Jasmine further discovered that not only had Marvell misappropriated its trade secrets, but Marvell was also planning to raid a group of its engineers. (1 Exh. 61-64.) Jasmine further discovered that several of its employees were already secretly working for Marvell and soliciting their colleagues to work for Marvell in violation of their employment contracts. (*Ibid.*)

**Jasmine Sues; Marvell And Two Former Jasmine
Employees Cross-Complain**

4. In September 2001, Jasmine sued Marvell and others based on the events described above. (1 Exh. 1-25.) The complaint, as amended, includes claims against Marvell and former Jasmine employees Sowell and Murphy for misappropriation of trade secrets, breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing, tortious interference with contract and economic advantage, and unfair business practices. (1 Exh. 56-77.)³

5. Marvell filed a cross-complaint. (1 Exh. 100.) The cross-complaint alleges, among other things, that Jasmine defrauded Marvell by claiming to own confidential intellectual property that it had in fact misappropriated and that Jasmine breached a contract with Marvell by disclosing confidential information about Marvell. (1 Exh. 100-133.)⁴

³ Jasmine voluntarily dismissed additional claims and all defendants other than the three real parties in interest. (1 Exh. 85-99, 169-170.)

⁴ The trial court granted Jasmine's anti-SLAPP motion to strike a claim seeking to permanently enjoin use of the voicemail recording and its motion for summary adjudication on Marvell's declaratory relief claims. (1 Exh. 147, 156-158.)

6. Sowell and Murphy also filed cross-complaints against Jasmine. (1 Exh. 36, 173.) Their cross-complaints allege, among other things, that Jasmine slandered them by accusing them of theft and that Jasmine failed to pay their wages in violation of the Labor Code. (1 Exh. 36-52, 173-181.)

**The Bankruptcy Court Confirms That Jasmine Has The Right
To Pursue The Marvell Litigation**

7. In August 2002, Jasmine filed for bankruptcy protection. (4 Exh. 820.) Marvell was represented in the bankruptcy and requested special notice of all papers filed and served in the proceeding. (2 Exh. 369; 4 Exh. 921.)

8. In December 2002, the bankruptcy court approved the arrangement that Marvell now claims deprived Jasmine of standing to pursue the litigation at issue here:

a. Jasmine moved in the bankruptcy court for permission to sell most of its assets to Teradient Networks, Inc. (3 Exh. 406-444.) The notice of motion clearly stated—in bold, underlined text—that Jasmine would continue litigating its case against Marvell and the individual defendants after the sale. (3 Exh. 407.) It described the substance of the Marvell Litigation and stated Jasmine’s belief that the litigation “represents the most valuable asset” of the bankruptcy estate. (3 Exh. 409-411.) The motion itself stated that the sale would be “of substantially all of [Jasmine’s] assets, with the exception of its litigation rights against Marvell Semiconductor, Inc. . . .” (3 Exh. 443.)

b. Jasmine submitted the proposed Asset Purchase Agreement with its motion. (3 Exh. 417, 436 [indicating that Asset Purchase Agreement was submitted with motion]; 2 Exh. 215-244 [Asset

Purchase Agreement].) The Agreement provided that Teradiant would buy Jasmine’s technology and intellectual property rights but that *Jasmine shall retain “all rights, title, and interest in and to the Pending Litigation,”* defined as the Marvell Litigation. (2 Exh. 216-217, §§ 1.1(1), 2.1, emphasis added; see also 2 Exh. 217, § 2.2 [“the Pending Litigation and all rights and appeals therefrom . . . shall be excluded from the Purchased Assets”].)⁵

c. Jasmine served the notice of motion, including the Asset Purchase Agreement, on Marvell, and Marvell’s counsel was present at the hearing on the motion. (3 Exh. 446-447, 449 [showing service on Marvell], 2 Exh. 369 [declaration that counsel was present].) Marvell did not object to the transaction or express the view that by selling the intellectual property, Jasmine was giving up its right to pursue the Marvell Litigation. (2 Exh. 369.)

d. The bankruptcy court approved the transaction. (3 Exh. 399-402.) It ordered that the Asset Purchase Agreement—which stated that Jasmine was not selling its interest in the Marvell Litigation—“*shall be binding in all respects.*” (3 Exh. 401, emphasis added.) The court also found that all interested parties had “adequate and reasonable notice and opportunity to be heard” and did not object to the transaction. (3 Exh. 400.)

⁵ Jasmine also retained its right to pursue other accrued claims: The Agreement provided that, “[N]otwithstanding any other provision of this Agreement, [Jasmine] shall retain its rights, title and interest in and to any claims, actions, or omissions related to the possible infringement, misuse, or misappropriation of the Purchased Assets that commenced prior to the Closing Date (and the rights to refer such matters to criminal authorities and/or collect damages and seek appropriate relief therefor), including all rights, title, and interest in and to the Pending Litigation,” defined as the Marvell Litigation. (2 Exh. 217, § 2.1.)

9. In September 2007, the bankruptcy court confirmed a Plan of Reorganization premised on Jasmine's continuing to pursue the Marvell Litigation:

a. The court-approved disclosure statement regarding the Plan of Reorganization explained that "[t]he Plan is intended to enable [Jasmine's] creditors to benefit from the value of the Marvell Litigation." (4 Exh. 821.) It reported that under the plan, the Marvell Litigation would be an asset of the reorganized company and that the company would continue to pursue the litigation. (4 Exh. 821, 853-855, 874-875, 877.) It also discussed the substance of the litigation. (4 Exh. 848-853.)

b. The Plan of Reorganization required the litigation to vest in the reorganized company and Jasmine's counsel to continue representing Jasmine's interests in that litigation. (3 Exh. 486 [Marvell Litigation "shall vest in the Reorganized Company" as a condition to the plan's Effective Date], 489 [counsel "will continue to prosecute" the Marvell Litigation], 501-502 [the Marvell Litigation "shall be the property of the Reorganized Company"].) Further confirming that Jasmine would proceed with the litigation, the Plan provided that *Jasmine reserved "any and all [c]laims, rights, causes of action, and/or [c]laims for relief that [it] may have against the Marvell defendants . . . (including all [c]laims stated in the Marvell Litigation) . . ."* (3 Exh. 497-498, emphasis added.) The Plan provided that Jasmine's creditors would receive shares of the reorganized company. (3 Exh. 491-493.) Those shares would enable creditors to be paid from any recovery that Jasmine obtained in the litigation. (*Ibid.*)

c. The disclosure statement describing the plan was served on Marvell. (4 Exh. 916-917 [showing service on Julian Mack], 921-922

[Marvell's request that all bankruptcy filings be served on it care of Julian Mack].)

d. The bankruptcy court confirmed the Plan of Reorganization, demonstrating once again that it understood that Jasmine retained ownership of and an interest in the Marvell Litigation even though it no longer owned the underlying trade secrets. (3 Exh. 527-530.)

**The Trial Court Dismisses Jasmine's Complaint In The Marvell
Litigation For Lack Of Standing**

10. The Marvell Litigation was set for trial in May 2009. (1 Exh. 195 [motion showing trial date of 5/11/09].)

11. On the eve of trial, more than seven years into the litigation, Marvell argued for the first time that Jasmine's entire Second Amended Complaint should be dismissed for lack of standing. (1 Exh. 182, 184-187 [Marvell raising standing issue for first time at a 5/21/09 hearing], 195-210 [motion to dismiss filed 5/26/09].) Relying mainly on language from two form jury instructions, Marvell asserted that only the current owner of a trade secret can sue for misappropriation. (1 Exh. 202-203.) Marvell claimed that Jasmine therefore lost standing to sue when it sold what was left of its trade secrets even though Jasmine expressly did not sell its interest in the litigation. (*Ibid.*)

12. Jasmine opposed dismissal. (2 Exh. 338-367.) Emphasizing that no case law supported Marvell's position and that accrued claims are freely assignable in California, Jasmine argued that it could retain its misappropriation claim when it sold the underlying trade secrets. (2 Exh. 348-350.) Jasmine also asserted that *res judicata* precluded Marvell's motion because the bankruptcy court determined that Jasmine retained its

interest in and right to pursue the lawsuit after the asset sale and that the Marvell Litigation belonged to Jasmine. (2 Exh. 353-367.)

13. Sowell joined in Marvell's motion to dismiss on the day before the motion was heard. (5 Exh. 932-933 [joinder], 945 [Sowell's counsel at hearing: "(w)e filed a joinder yesterday"].) Murphy joined in the motion on the day it was heard. (5 Exh. 936-937 [5/29/09 joinder for motion to be heard on 5/29/09].)

14. The trial court granted the motion to dismiss:

a. The trial court held that the bankruptcy court did not address Jasmine's standing and thus that res judicata did not dispose of the issue. (5 Exh. 1074.) Acknowledging that Marvell's standing theory presented a question of first impression, the trial court found that "there are persuasive arguments and legitimate equities on both sides of the issue" (5 Exh. 1074-1075.) Nonetheless, the court concluded that a former trade secrets owner lacks standing to sue for the past misappropriation of its property "because the former owner no longer has a protectable interest in the property." (5 Exh. 1075.)

b. The court further held that its standing ruling required dismissal of Jasmine's entire Second Amended Complaint. (5 Exh. 1058, 1075.) The court rejected Jasmine's argument that any defect in its standing as a trade secrets misappropriation plaintiff should not impact its other claims, finding that all of Jasmine's causes of action "flow from" the alleged trade secrets misappropriation. (5 Exh. 1058.)

c. The court granted a 60-day stay of the trial, until August 3, 2009, to permit Jasmine to seek writ relief. (5 Exh. 1059, 1081.)

d. The cross-complaints of Marvell, Sowell, and Murphy remain pending. There is thus no final judgment yet. (*California Dental Assn. v. California Dental Hygienists' Assn.*, *supra*, 222 Cal.App.3d at p. 60.)

This Petition Is Timely

15. The trial court entered its order dismissing Jasmine's complaint on June 3, 2009. (5 Exh. 1074-1075.) Jasmine filed this petition fewer than sixty days later. The petition therefore is timely. (*Cal West Nurseries, Inc. v. Superior Court* (2005) 129 Cal.App.4th 1170, 1173.)

Writ Relief Is Necessary And Appropriate To Resolve An Issue Of First Impression And To Prevent Duplicative Proceedings

16. The trial court's rulings will prevent Jasmine from trying its case. Jasmine's remedy at law, an appeal, is not adequate: Jasmine will not be able to appeal until after the trial on Marvell, Sowell, and Murphy's pending cross-complaints. (*California Dental Assn. v. California Dental Hygienists' Assn.*, *supra*, 222 Cal.App.3d at p. 60.) A decision reversing the dismissal at the appeal stage will require a new jury trial on issues closely related to those already tried in connection with the cross-complaints. Writ relief is necessary to avoid that needless and expensive exercise. (*Barrett v. Superior Court*, *supra*, 222 Cal.App.3d at p. 1183 [writ review appropriate where challenged order barred plaintiff from presenting one of its causes of action and reversal on postjudgment appeal would require a second trial "with the attendant waste of judicial resources"]; *Holtz v. Superior Court*, *supra*, 3 Cal.3d at p. 301, fn. 4 [granting writ relief where trial court effectively struck one of plaintiff's causes of action and writ review could prevent "'a needless and expensive trial and reversal' (Citations)"].)

17. The trial court's rulings are clearly erroneous:

a. As the trial court recognized, the question at the heart of this petition—whether a plaintiff loses standing to sue for trade secrets misappropriation when it sells what is left of the trade secrets but expressly retains its interest in the accrued cause of action—is one of first impression. (5 Exh. 1074.) The trial court's ruling that the former trade secrets owner cannot sue imposes a limitation that does not appear in the text of the California Uniform Trade Secrets Act and is unsupported by case law. (See Memorandum of Points and Authorities Section II, *infra*.) It is also contrary to the general California rule that accrued causes of action can be freely assigned and that a former property owner can pursue an accrued damage claim even after selling the underlying property. (See *ibid*.) This Court's guidance is necessary to determine whether the Act in fact dictates that result. (*Elden v. Superior Court, supra*, 53 Cal.App.4th at p. 1504 [writ review appropriate where petition presents novel question of law].) The answer has important consequences not only for Jasmine, but also for any other plaintiff whose trade secrets are misappropriated and who does not want—or cannot afford—to retain ownership of the damaged trade secrets through many years of litigation.

b. The trial court also clearly erred in refusing to apply res judicata to bar the standing challenge. Res judicata precludes the re-litigation of an issue that was decided in a final order arising from a prior adjudication involving the same parties. (*Levy v. Cohen* (1977) 19 Cal.3d 165, 171.) Those requirements are satisfied here as to Marvell because it was a party to the proceeding in which the bankruptcy court issued final orders deciding Jasmine's ability to litigate this case after selling the underlying trade secrets. (See Memorandum of Points and Authorities

Section III.B., *infra*.) The requirements may also be satisfied as to Murphy and Sowell. However, because they did not join in Marvell's motion to dismiss until after it was briefed (5 Exh. 932-937 [joinders], 945 [Sowell's counsel at hearing: "(w)e filed a joinder yesterday"]), Jasmine did not have an opportunity in the trial court to show that they had notice of the relevant proceedings. Jasmine offered at the dismissal hearing to brief the issue. (5 Exh. 948.) That briefing never occurred because the trial court erroneously rejected the res judicata argument for another reason. (5 Exh. 1074 [finding that the bankruptcy court did not decide the issue of Jasmine's standing].) If this Court directs the trial court to vacate its dismissal on the ground that res judicata bars Marvell's challenge, Jasmine should be given an opportunity in the trial court to show that Sowell and Murphy also had notice of the asset sale arrangement and Plan of Reorganization and thus that res judicata precludes their claims as well.

PRAYER

Petitioner Jasmine Networks, Inc. prays that this Court:

1. As to Marvell, either:
 - a. Issue a peremptory writ in the first instance directing the trial court to vacate its June 3, 2009 order dismissing Jasmine's Second Amended Complaint as to Marvell and instead enter a new order denying the motion to dismiss; or
 - b. Issue an alternative writ, order to show cause, or other order directing the trial court to vacate its June 3, 2009 dismissal order as to Marvell and instead enter a new order denying the motion to dismiss or to show cause why it should not do so;
2. As to Sowell and Murphy, either:
 - a. Issue a peremptory writ in the first instance directing the trial court to vacate its June 3, 2009 order dismissing Jasmine's Second Amended Complaint as to Sowell and Murphy and instead enter a new order denying the motion to dismiss; or
 - b. Issue an alternative writ, order to show cause, or other order directing the trial court to vacate its June 3, 2009 dismissal order as to Sowell and Murphy and instead enter a new order denying the motion to dismiss or to show cause why it should not do so; or
 - c. If the Court determines that the dismissal should be vacated as to Marvell solely on res judicata grounds, issue a peremptory writ or alternative writ, order to show cause, or other order directing the trial court to vacate its June 3, 2009 dismissal

order as to Sowell and Murphy and to permit full briefing on whether res judicata precludes their standing challenges as well;

3. Issue a stay pending the final disposition of this petition;
4. Award petitioner its costs in this proceeding; and
5. Grant such other further relief as is just and equitable.

Dated: July 10, 2009

Respectfully submitted,

TREPEL LAW OFFICES
McGRANE GREENFIELD LLP
GREINES, MARTIN, STEIN & RICHLAND LLP

By _____

Alana H. Rotter
Attorneys for Petitioner

VERIFICATION

I, William McGrane, declare:

I am an attorney duly licensed to practice law in California. I am a partner with McGrane Greenfield LLP, attorneys of record in the trial court for petitioner Jasmine Networks, Inc. I have reviewed and am familiar with the records and files that are the basis of this petition. I make this declaration because I am more familiar with the particular facts, i.e., the state of the record, than is my client. This petition's factual allegations are true and correct.

I declare under penalty of perjury that the foregoing is true and correct and that this verification is executed on July 8, 2009 at San Francisco, California.

William McGrane

MEMORANDUM OF POINTS AND AUTHORITIES

I. STANDARD OF REVIEW: DE NOVO.

The trial court dismissed Jasmine's complaint on the grounds that Jasmine lost its standing after commencing this litigation and that prior bankruptcy court orders are not res judicata on that issue. Both rulings involve the application of legal principles to undisputed facts. This Court therefore reviews them de novo. (See *Upland Police Officers Assn. v. City of Upland* (2003) 111 Cal.App.4th 1294, 1301 [reviewing de novo issues of statutory interpretation]; *Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 399 [reviewing de novo the applicability of collateral estoppel to a set of undisputed facts].)

II. THE TRIAL COURT ERRED IN FINDING THAT A TRADE SECRETS OWNER LOSES STANDING TO SUE FOR A PAST MISAPPROPRIATION WHEN IT SELLS WHAT IS LEFT OF ITS TRADE SECRETS, EVEN IF IT EXPRESSLY RETAINS ITS MISAPPROPRIATION CLAIM.

The California Uniform Trade Secrets Act (Act) does not expressly limit standing to sue for a past misappropriation of trade secrets to the current owner of those trade secrets. The trial court nonetheless found, as a matter of first impression, that the Act implicitly includes that limitation. (5 Exh. 1074.) Not so. The only case law on point suggests that trade secrets plaintiffs, like plaintiffs in almost all other cases, may sue for past damages after selling the underlying property so long as they do not sell their claim along with the property. That rule is consistent with general standing principles and with the Act's purpose. It compels reversal here.

There is no dispute that Jasmine had standing to sue for trade secrets misappropriation when it filed this suit. The only question is whether Jasmine's later sale of the trade secrets deprived it of standing, even though the sale agreement expressly provided that Jasmine would retain the claims it asserts in this litigation. (2 Exh. 216-217, §§ 1.1(1), 2.1, 2.2.) Contrary to Marvell's assertions, that arrangement did not deprive Jasmine of standing.

A. California Law Permits A Plaintiff To Pursue Its Accrued Cause Of Action For Damages After Selling The Underlying Property.

The general rule in California is that accrued claims "arising out of the violation of a right of property, or out of an obligation" are freely transferable. (Civ. Code, § 954.) Thus, an entity can transfer its accrued claim without conveying title to, or an interest in, the underlying property. (*Applera Corp. v. MP Biomedicals* (2009) 173 Cal.App.4th 769, 788-789 [assignment of right to collect patent royalties]; *Staley v. McClurken* (1939) 35 Cal.App.2d 622, 626 [assignment of claim for conversion of personal property]; *Stapp v. Madera Canal & Irr. Co.* (1917) 34 Cal.App. 41, 46-47 [assignment of claim for water damage].)

The converse is also true. That is, an entity can keep its standing to pursue an accrued claim when transferring title to the underlying property. *Vaughn v. Dame Construction Co.* (1990) 223 Cal.App.3d 144, is illustrative. There, the plaintiff sued the defendant for defectively constructing her condominium. (*Id.* at p. 146.) A year later, while the litigation was pending, the plaintiff sold the condominium to a third party. (*Ibid.*) The appellate court held that the sale did not destroy the plaintiff's standing. (*Id.* at pp. 148-149.) It explained that "[w]hile ordinarily the owner of the real property is the party entitled to recover for injury to the

property, the essential element of the cause of action is injury to one's interests in the property—ownership of the property is not.” (*Id.* at p. 148.) Since the defendant's defective construction injured the plaintiff, she was the real party in interest and owned the cause of action. (*Id.* at pp. 146, 148.) The plaintiff thus “had the right to convey the real property but retain her cause of action for damages from defendant's defective construction.” (*Id.* at p. 149.)

Just as the *Vaughn* plaintiff's defective construction claim accrued before she sold her condominium, Jasmine's claim for trade secrets misappropriation accrued before it sold what was left of the secrets. (*Cadence Design Systems, Inc. v. Avant! Corp.* (2002) 29 Cal.4th 215, 222-223 [claim for misappropriation arises “at the time of the initial misappropriation”].) Just as in *Vaughn*, then, Jasmine is the real party in interest with standing to sue the wrongdoer. (*Vaughn, supra*, 223 Cal.App.3d at pp. 146, 149.) The subsequent sale of its damaged trade secrets does not make its injury any less concrete or otherwise deprive Jasmine of the standing it indisputably had before the sale to sue for the damage.

B. The California Uniform Trade Secrets Act Does Not Impose A Special Standing Requirement In Trade Secrets Misappropriation Cases.

The trial court appeared to believe that regardless of the rule in other contexts, there is a special requirement in trade secrets cases that only the current owner (or exclusive licensee) of trade secrets can recover for their past misappropriation. (5 Exh. 1074-1075.) The Act does not say anything like that.

The Act defines misappropriation as “[a]cquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.” (Civ. Code, § 3426.1, subd. (b)(1).) Its operative section then provides, “A complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.” (Civ. Code, § 3426.3, subd. (a).)

Jasmine’s claim falls squarely within the statutory text. Jasmine alleged that Marvell acquired its trade secrets by improper means, thereby injuring it. Jasmine thus was a complainant seeking to recover damages for the actual loss caused by the misappropriation. (See Black’s Law Dict. (7th ed. 1999) p. 278 col.2 [a “complainant” is “(t)he party who brings a legal complaint against another; esp., the plaintiff in a civil suit”].) That is all the Act requires. There is no additional requirement that the complainant be the current owner of the trade secrets. (Cf. West’s U. Laws Ann. (2009) U. Trade Secrets Act, §§ 1, 3 [no express requirement that the complainant own the trade secrets at issue].) Absent a clear indication that the Legislature meant something different from what it actually said, courts may not read such a requirement into the statute. (Code Civ. Proc., § 1858 [court’s role in construing a statute “is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted”].)

Lacking any support in the Act’s language, Marvell and the trial court focused on the form jury instructions for trade secrets cases. They relied on two instructions in particular:

- California Civil Jury Instruction 4400, the introductory trade secrets misappropriation instruction, which begins, “[Name of plaintiff] claims that [he/she/it] is the [owner/licensee] of” the alleged trade secrets. (CACI No. 4400.)
- California Civil Jury Instruction 4401, which states that a trade secrets misappropriation plaintiff must prove “That [name of plaintiff] [owned/was a licensee of]” the alleged trade secrets. (CACI No. 4401.)

(See 1 Exh. 202-203; 5 Exh. 1074-1075.) These instructions are neither authoritative nor persuasive.

Jury instructions are not authority in and of themselves. They are only as good as the law that supports them and must give way to that law. (Cal. Rules of Court, rule 2.1050(b) [notwithstanding existence of a form jury instruction, “(t)he articulation and interpretation of California law . . . remains within the purview of the Legislature and the courts of review”]; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1051-1054 [disapproving form jury instruction on proximate causation]; *Casas v. Maulhardt Buick, Inc.* (1968) 258 Cal.App.2d 692, 699 [criticizing form jury instruction on negligent inattentiveness].) To the extent that Instructions 4400 and 4401 purport to impose a limitation not present in the Act, they should be disregarded. (Cf. Wiseman, *The Case for Revision of CACI’s UTSA “Readily Ascertainable” Affirmative Defense Jury Instruction* (2009) No. 5, Bender’s California Labor & Employment Bulletin 165, 165-168 [arguing that another form jury instruction for trade secrets misappropriation cases is contrary to the Act and case law].)

Moreover, the cited instructions do not support Marvell’s claim. Instruction 4400 is merely introductory; it does not purport to state the

elements of a trade secrets claim. As for Instruction 4401, which does address the elements of a trade secrets claim, if anything it *supports* Jasmine’s position: It is framed in the past tense, requiring the plaintiff to show that it “owned” or “was a licensee of” the trade secrets—i.e., that the plaintiff possessed the trade secrets *when they were misappropriated*. (Cf. 3 O’Malley et al., Federal Jury Practice and Instructions (5th ed. 2000) Notes to § 127.10, p. 413 [federal trade secret misappropriation plaintiff must show that “(a) trade secret existed in which the plaintiff had ownership rights when the defendant committed the acts complained of”].) The instruction does not require a plaintiff to show that it *still* owns or licenses the trade secrets, as Marvell claimed in the trial court.

C. The Limited Authorities On Point Demonstrate That A Plaintiff May Sell The Underlying Trade Secrets While Retaining The Right To Pursue A Claim For Past Misappropriation.

As the trial court observed, the standing issue presented here is one of first impression under California law. (5 Exh. 1074.) There are, however, several relevant non-binding authorities. They further indicate that a former trade secrets owner can retain its standing to sue for a misappropriation that occurred while it owned the trade secrets.

International Monetary Exchange, Inc. v. First Data Corp. (D.Colo. 1999) 63 F.Supp.2d 1261, acknowledges that the former owner of trade secrets may sue for a past misappropriation. There, the plaintiff alleged that the defendant misappropriated its trade secrets by inducing it to transfer the trade secrets to a new entity, which the defendant planned to put into bankruptcy and buy cheaply. (*Id.* at p. 1262.) The court held that even though the plaintiff no longer owned the trade secrets, it had standing to sue

for any misappropriation that occurred before the transfer. (*Id.* at pp. 1264-1265.) That is exactly what Jasmine seeks to do here. It too has standing.

Memry Corp. v. Kentucky Oil Technology, N.V. (N.D.Cal., Dec. 18, 2006, No. C-04-03843RMW) 2006 U.S. Dist. Lexis 94393, on which Marvell relied in the trial court (1 Exh. 203), actually supports *Jasmine*'s position. There, a federal district court applying California law addressed who owns a trade secrets claim when an agreement to transfer trade secrets is silent as to whether the transfer includes an accrued cause of action for misappropriation. (*Memry, supra*, 2006 U.S. Dist. Lexis 93493 at pp. *12-13.) The court found that "it makes more sense to allow the current owner to sue for past misappropriation than a prior owner (*assuming that the parties did not agree otherwise when transferring the trade secret*)." (*Id.* at p. *13, emphasis added.) The parties in *Memry* did not agree otherwise, so the new current owner could sue. (*Ibid.*) Here, by contrast, Jasmine and Teradiant *did* agree otherwise: They agreed that former owner Jasmine would be the one to sue. (2 Exh. 217, §§ 2.1, 2.2.) *Memry* indicates that such an agreement is permissible. Otherwise, the parenthetical language would be meaningless.

D. Marvell's Policy Arguments Do Not Justify Its Proposed Rule.

In the trial court, Marvell asserted that analogies to intellectual property law and public policy arguments compel adoption of a rule that only the current owner of trade secrets has standing to sue for their past misappropriation. Its arguments do not stand up to scrutiny.

- Marvell claimed that a former owner of a patent or copyright would not have standing to sue on an accrued claim for infringement of the patent or copyright. (1 Exh. 204-205.) In fact, however, federal law

appears to *permit* a former intellectual property owner to sue for a past infringement even if it no longer owns the property. (See 8-21 Chisum on Patents (2009) Jurisdiction & Procedure In Patent Litigation § 21.03[2][g][i] [“The right to sue for damages for infringement rests in the person who held the appropriate ownership interest in the patent at the time the infringing acts occurred If ownership of the patent is transferred, the transferor retains the right to sue for pre-transfer infringements unless that right is expressly included in the transfer,” fns. omitted]; *ABKCO Music, Inc. v. Harrisongs Music, Ltd.* (2d Cir. 1991) 944 F.2d 971, 980 [former copyright owner “retains the right to bring actions accruing during its ownership of the right” even after an assignment].) While a patent or copyright holder may not be able to do the opposite, that is, keep the intellectual property and sell the accrued claim, that is not the situation here. (*ABKCO Music, supra*, 944 F.2d at p. 980 [copyright owner may pursue accrued claim after assigning copyright but may not assign an accrued claim without the copyright].) Moreover, even if that were the situation here, our Supreme Court has observed that there are “significant differences” between trade secret law and federal intellectual property law (*Cadence Design Systems, Inc. v. Avant! Corp., supra*, 29 Cal.4th at pp. 222, 225-226 [rule in patent cases regarding continuing wrongful use is not applicable in trade secrets cases]), so the federal law is not dispositive.

- Marvell claimed that permitting a former trade secrets owner to sue would be contrary to the purpose of trade secrets law, which is to encourage and protect innovation. (1 Exh. 205.) Exactly the opposite is true. Trade secrets law gave Jasmine an incentive to develop the secrets at issue here and was supposed to protect those secrets. Jasmine alleged that Marvell destroyed the secrets and that as a result, Jasmine had to sell them at a fraction of their prior value. (1 Exh. 56-57; 3 Exh. 414-415; 4 Exh.

836-837.) This suit is the only way Jasmine can recover for the damage Marvell caused. Dismissing the suit sends a message that the consequences for misappropriating trade secrets last only as long as the owner can afford to hold on to its damaged trade secrets and that the misappropriator can escape liability if its misappropriation is devastating enough that the trade secrets owner has to sell its trade secrets at salvage prices or shut its company down altogether. Permitting the suit, by contrast, will deter future misappropriation.

- Marvell claimed that Jasmine should not be permitted to sue because California disfavors treating lawsuits as a commodity. (1 Exh. 206-208.) This claim rested on the fact that as part of Jasmine’s reorganization, an investor agreed to contribute funds to pay creditor claims in exchange for acquiring an interest in the company. (*Ibid.*; see 4 Exh. 830-831, 876-877.) That an investor may benefit from a recovery in the Marvell Litigation does not and should not mean that Jasmine has no standing to pursue the suit. This benefit is no different from the benefit Jasmine’s shareholders would have received if Jasmine had been able to pursue its claim without seeking bankruptcy protection. Moreover, Marvell is wrong about California public policy. California law permits parties to freely transfer most causes of action. (See Civ. Code, §§ 953-954; *Goodley v. Wank & Wank, Inc.* (1976) 62 Cal.App.3d 389, 395 [California’s “basic public policy (is) that ‘(a)ssignability of things in action is now the rule; nonassignability the exception’ (Citations)’”].) The only claims that cannot be transferred are “those which are founded upon wrongs of a purely personal nature,” such as personal injury and legal malpractice. (*Goodley, supra*, 62 Cal.App.3d at pp. 393-394.) Jasmine’s misappropriation claim does not fall within the narrow “purely personal” exception.

- Marvell claimed that permitting a former trade secrets owner to sue could lead to multiple overlapping lawsuits. (1 Exh. 206.) There is no such threat where, as here, the former trade secrets owner expressly retains an accrued cause of action and the buyer of the trade secrets holds no interest in the claim. Under the purchase agreement here, Jasmine is the only party that can bring a claim based on Marvell's past misappropriation. (2 Exh. 217, §§ 2.1, 2.2.) A rule that would preclude Jasmine from pursuing its claim would not prevent overlapping lawsuits—it would prevent any lawsuit at all, allowing Marvell to completely escape liability for its wrongdoing.

- Marvell claimed that a former trade secrets owner has an incentive to take extreme litigation positions harmful to the current trade secrets owner. (1 Exh. 206-207.) But this is a matter of concern solely between the seller and the buyer: Teradiant bought the secrets with the understanding that Jasmine would pursue its accrued claims. (2 Exh. 217, §§ 2.1, 2.2.) Parties may contract for such an arrangement if they choose. (Cf. *Vaughn, supra*, 223 Cal.App.3d at p. 148 [former owner could assert that condominium was constructed defectively even after selling the unit].)

In sum, Marvell's arguments have no more support in public policy than they do in the statutory language—that is, none whatsoever. There is no requirement that a plaintiff continue to own trade secrets throughout a suit to recover for past damage from misappropriation of those trade secrets. This Court should not permit the trial court to create one.

III. THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE THAT THE BANKRUPTCY COURT ORDERS PRECLUDED MARVELL FROM CHALLENGING JASMINE’S STANDING.

We have shown that Marvell’s standing argument is wrong on the merits. But it also fails for another reason: The bankruptcy court determined that Jasmine retained its claims against Marvell when it sold its intellectual property. That ruling precluded Marvell from challenging Jasmine’s standing. The trial court erred in concluding otherwise.⁶

A. Res Judicata Precludes The Relitigation Of A Previously Decided Issue.

Res judicata prevents parties from relitigating an issue that has been finally determined by a court of competent jurisdiction. (*Mooney v. Caspari* (2006) 138 Cal.App.4th 704, 717.)⁷ The doctrine rests on the ground that once a party has had an opportunity to litigate a particular issue, it “should not be permitted to litigate it again to the harassment and vexation of his opponent.” (*Ibid.*, citations omitted.)

⁶ As noted above (see Petition ¶ 17(b), *supra*), Jasmine did not have an opportunity in the trial court to show that res judicata also precluded Murphy and Sowell from challenging its standing. If this Court orders the trial court to vacate the dismissal as to Marvell on res judicata grounds, Jasmine should be permitted to show in the trial court that Sowell and Murphy also were bound by the bankruptcy court’s resolution of the standing issue.

⁷ Courts use the term “res judicata” to refer to several related preclusion doctrines including claim preclusion and issue preclusion. (See, e.g., *Levy v. Cohen*, *supra*, 19 Cal.3d at p. 171 [describing res judicata as preventing the relitigation of an issue that has already been decided]; *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, fn.3 [describing issue preclusion as “one aspect of the concept of res judicata”].) In this petition, we use the term res judicata to refer to issue preclusion, also known as collateral estoppel.

The California Supreme Court has adopted a three-part test for determining whether a ruling is res judicata in a subsequent proceeding:

“(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party to or in privity with a party to the prior adjudication?” (*Levy v. Cohen, supra*, 19 Cal.3d at p. 171.)

If these criteria are met, the prior judgment is preclusive. This is true even if the prior judgment was erroneous. (See *id.* at pp. 173-174; *Beverly Hills Nat. Bank v. Glynn* (1971) 16 Cal.App.3d 274, 286 [“a judgment is binding and conclusive against collateral attack though it is harsh and unjust, contrary to the evidence, or based upon errors of law”].)

B. The Bankruptcy Court’s Determination That Jasmine Retained Its Right To Pursue The Marvell Litigation Precluded A Challenge To Jasmine’s Standing.

Jasmine argued below that the bankruptcy court’s orders precluded Marvell from disputing its standing because (1) the bankruptcy court determined that Jasmine had retained its litigation rights against Marvell, (2) the bankruptcy court’s orders were final, and (3) Marvell was a party to the bankruptcy proceeding. (2 Exh. 354-363.) The trial court disagreed on the first point, finding that the bankruptcy court did not adjudicate the issue of Jasmine’s standing. (5 Exh. 1074.) In fact, however, all three criteria were satisfied.

1. There can be no dispute that Marvell was a party to the bankruptcy court proceedings and that the bankruptcy court orders are final.

Jasmine's res judicata argument rests on orders that the bankruptcy court entered in Jasmine's bankruptcy proceedings. Marvell filed a claim in the bankruptcy, making it a party to the proceedings. (*Levy v. Cohen, supra*, 19 Cal.3d at p. 172 ["As an unsecured creditor of the limited partnership, plaintiff (against whom the plea of res judicata is here asserted) was a party to the consolidated proceeding in the bankruptcy court"].) Marvell also was served with bankruptcy notices and filings (4 Exh. 921-922 [Marvell's request that all bankruptcy documents be served on Julian Mack], 916-917 [proof of service for bankruptcy disclosure statement]; 3 Exh. 446-451 [proof of service for motion to sell assets], 527-533 [proof of service for order approving plan of reorganization]) and was represented by counsel at the hearing on Jasmine's motion for approval to sell its assets to Teradient (2 Exh. 369). There thus can be no dispute (and indeed, Marvell has not disputed) that Marvell was a party to the bankruptcy proceedings.

Final orders of the bankruptcy court have res judicata effect in California courts. (See *Levy v. Cohen, supra*, 19 Cal.3d at pp. 172-173.) Whether a bankruptcy court order is final is determined by federal law. (*Martin v. Martin* (1970) 2 Cal.3d 752, 758, 761 [ordinary preclusion rules apply to federal bankruptcy court decisions; federal law controls the issue of finality].) Under that law, there are at least two final orders here.

First, Jasmine asked the bankruptcy court to approve an Asset Purchase Agreement by which Jasmine would sell its intellectual property but not its interest in the Marvell Litigation. (3 Exh. 406-447.) In an order

that “shall be binding in all respects,” the court approved the Agreement, which provided that Jasmine retained “all rights, title, and interest in and to the Pending Litigation” (3 Exh. 399-403 [order approving attached Agreement]; 2 Exh. 217, § 2.1 [Agreement].) That order is final. (1 L. King, *Collier on Bankruptcy* (15th ed. 2008) § 5.07[2] [order approving sale of a bankruptcy estate’s asset is final under federal law].)

Second, the bankruptcy court order confirming Jasmine’s Third Amended Plan of Reorganization is likewise final. (See 1 L. King, *Collier on Bankruptcy*, *supra*, ¶ 5.07[2]; 8 L. King, *Collier on Bankruptcy*, *supra*, ¶ 1141.02[4]; *Levy v. Cohen*, *supra*, 19 Cal.3d at p. 172 [giving res judicata effect to a bankruptcy court order confirming a “plan of arrangement”]; *Trulis v. Barton* (9th Cir. 1995) 107 F.3d 685, 691 [“Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to res judicata effect”].) That plan made clear that Jasmine would retain the right to pursue its claims against Marvell. (3 Exh. 501-502.)

Neither bankruptcy court order was appealed or otherwise set aside. The orders therefore are final for purposes of res judicata. (*Martin v. Martin*, *supra*, 2 Cal.3d at p. 761 [federal rule “is that a judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition”].)

2. The bankruptcy court decided the identical standing issue presented here, a decision that has preclusive effect.

a. The bankruptcy court decided that Jasmine retained an interest in, and the right to pursue, the Marvell Litigation after it sold what was left of its trade secrets.

After filing for bankruptcy, Jasmine arranged to sell most of its assets, including what was left of its trade secrets, to Teradant. (2 Exh. 217, § 2.1.) Jasmine had to obtain bankruptcy court approval of the sale. (2 Exh. 217-218, § 3.) It presented the bankruptcy court with an Asset Purchase Agreement under which Teradant would acquire virtually all of Jasmine’s intellectual property but not “the Pending Litigation,” defined as the Marvell Litigation at issue here. (3 Exh. 406-444 [notice of motion and motion]; 2 Exh. 216-217, §§ 1.1(1), 2.1, 2.2 [Agreement].) The Agreement expressly provided that Jasmine “shall retain . . . all rights, title, and interest in and to the Pending Litigation” (2 Exh. 217, § 2.1.)

The bankruptcy court approved the agreement. It ordered that the agreement’s “terms and provisions . . . shall be binding in all respects” (3 Exh. 401.) This ruling necessarily included a finding that Jasmine could retain its “rights, title, and interest in and to” the Marvell Litigation (a provision of the agreement) despite selling the underlying trade secrets.

The bankruptcy court subsequently confirmed Jasmine’s ongoing interest in, and right to pursue, the Marvell Litigation when it approved Jasmine’s Third Amended Plan of Reorganization. (3 Exh. 527-530.) The confirmed Plan discussed in detail the Marvell Litigation, which it provided “shall be the property of” Jasmine. (3 Exh. 501-502.) The Plan’s central

feature was that Jasmine would continue the litigation, with any recovery to be distributed among Jasmine's creditors who had become shareholders in the reorganized company. (3 Exh. 820-822.) If the bankruptcy court did not believe that Jasmine still had standing to pursue the litigation, it would have made no sense to approve the Plan.

b. A party with an interest in, and the right to pursue, a legal claim has standing.

We have shown that the bankruptcy court actually determined that Jasmine retained its right, title, and interest in and to the Marvell Litigation after selling what was left of its trade secrets. That determination is res judicata on the issue of Jasmine's standing here.

Marvell will likely assert, as it did in the trial court (5 Exh. 926), that the bankruptcy court did not specifically address Jasmine's "standing." But what is standing? Under California law, standing is defined as a "party's right to make a legal claim or seek judicial enforcement." (*Librers v. Black* (2005) 129 Cal.App.4th 114, 124 [quoting Black's Law Dict. (8th ed. 2004) p. 1442, col. 1].) The bankruptcy court approved an Agreement under which Jasmine "shall retain its rights, title, and interest in and to" the Marvell Litigation. (3 Exh. 399-402; 2 Exh. 217, § 2.1.) That is a finding that Jasmine was the real party in interest and thus had standing. (See *Vaughn, supra*, 223 Cal.App.3d at p. 147 ["the real party in interest is the party who has title to the cause of action"].)

If Marvell disagreed with the bankruptcy court's conclusion, it should have objected to the terms of the sale. It did not. (2 Exh. 369 [declaration by Jasmine's counsel]; 3 Exh. 400 [order stating that "(n)o objection to the proposed sale as filed or received].) Six years after the sale closed is far too late. (See, e.g., *Murphy v. Murphy, supra*, 164 Cal.App.4th

at p. 401 [a judgment is preclusive “on issues which were raised, even though some factual matters or legal arguments which could have been presented were not”].)

c. The bankruptcy court’s standing determination is preclusive.

Marvell might also argue, as it did in the trial court (5 Exh. 926), that res judicata never applies to the issue of standing. *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445 belies that claim. There, the court held on res judicata grounds that investors in a county-run trust had standing to sue an investment company that had advised the trust. (*Id.* at p. 452.) The court rejected the investment company’s argument that the investors lacked standing because only a trustee can sue for injury to trust property. (*Id.* at p. 460.) The investors and the county had entered into a bankruptcy court-approved settlement agreement and stipulation that expressly reserved the investors’ right to proceed against third parties such as the investment company. (*Id.* at pp. 453-454.) The appellate court found that “insofar as any provisions in [the bankruptcy court-approved agreement and stipulation] authorize appellants to proceed directly against third parties . . . such provisions must be treated as having received the endorsement and sanction of the bankruptcy court itself.” (*Id.* at p. 476.) Accordingly, the agreements authorizing appellants to proceed were res judicata on the issue of standing. (*Ibid.*) The bankruptcy court orders at issue in this case have the same effect.

Baum v. Duckor, Spradling & Metzger (1999) 72 Cal.App.4th 54, on which Marvell relied in the trial court (1 Exh. 208-209; 5 Exh. 927), is not to the contrary. Marvell relied on *Baum*’s holding that the claim at issue

was not assignable even with bankruptcy court approval. (1 Exh. 209.) That holding is consistent with the rule that unlike most other claims, a legal malpractice claim (the type of claim at issue in *Baum*) is not assignable for public policy reasons. (*Baum, supra*, 72 Cal.App.4th at pp. 64-69.) It has nothing to do with the res judicata effect of a bankruptcy court’s final order that a plaintiff has standing to pursue a claim. *Baum* expressly did not consider that issue. (*Id.* at p. 72.) *Baum* found res judicata “inapplicable” because although the bankruptcy court had approved a general assignment of claims, it had not decided the specific issue at hand, i.e., assignment of the legal malpractice claim. (*Id.* at p. 72, fn. 9.) In other words, the bankruptcy court’s order was not res judicata because it did not decide the identical issue. (See *Levy v. Cohen, supra*, 19 Cal.3d at p. 171.) That conclusion does not mean that a prior decision can never be res judicata on the issue of standing. It can. As *City of Atascadero* demonstrates, a bankruptcy court-approved agreement that expressly preserves a plaintiff’s right and interest in a specific claim precludes a subsequent attack on the plaintiff’s standing. (*City of Atascadero, supra*, 68 Cal.App.4th at p. 476.)⁸

Marvell’s challenge would be no more persuasive if its theory were that the bankruptcy court lacked jurisdiction to determine Jasmine’s standing. The bankruptcy court implicitly found that it had jurisdiction for

⁸ If, as Marvell claims, *Baum* in fact holds that a bankruptcy court’s erroneous but final determination that a party has standing is not preclusive, *Baum* was wrongly decided. It is well established that a final decision is preclusive even if it is incorrect. (*Levy v. Cohen, supra*, 19 Cal.3d at pp. 173-174; *Beverly Hills Nat. Bank v. Glynn, supra*, 16 Cal.App.3d at p. 286.) To the extent that *Baum* holds otherwise, this Court is under no obligation to, and should not, follow it. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 498, p. 558 [“A decision of a Court of Appeal is not binding in the Courts of Appeal”].)

its orders. (*Stoll v. Gottlieb* (1938) 305 U.S. 165, 171-172 [“Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter”].) That determination is also res judicata in this proceeding. (*Ibid.* [subsequent court may not revisit prior court’s jurisdictional findings]; *Travelers Indemnity Co. v. Bailey* (2009) 557 U.S. ___, ___ [129 S.Ct. 2195, 2205] [final bankruptcy court orders “are not any the less preclusive because the attack is on the [court’s] conformity with its subject-matter jurisdiction, for ‘[e]ven subject-matter jurisdiction . . . may not be attacked collaterally’ (Citations)”].)

C. Applying Res Judicata In This Case Is Consistent With The Policies Underlying The Doctrine.

Some case law suggests that even where the criteria for issue preclusion are satisfied, a court also must consider whether its application “will advance the public policies which underlie the doctrine.” (*Younan v. Caruso* (1996) 51 Cal.App.4th 401, 407.) To the extent that a public policy analysis is appropriate here, it further supports treating the bankruptcy court’s orders as preclusive on Jasmine’s standing.

First, applying res judicata is necessary to prevent inconsistent judgments that undermine the integrity of the judicial system. (*Ibid.*) A trial court determination that Jasmine lost standing to pursue the Marvell Litigation when it sold its trade secrets would conflict with the bankruptcy court’s order confirming that Jasmine retained all rights, title, and interest in and to that litigation. (3 Exh. 401 [order approving Agreement]; 2 Exh. 217, § 2.1 [Agreement].) It would similarly conflict with—indeed, would completely undermine—the bankruptcy court’s confirmation of a Plan of Reorganization that provided that the Marvell Litigation was Jasmine’s property and tied creditors’ recovery to the outcome of the litigation.

(3 Exh. 527-530 [confirmation], 489-493, 501-502 [Plan of Reorganization]; 4 Exh. 820-823 [disclosure statement].) Failing to give preclusive effect to the bankruptcy court's standing determination would render that court's rulings nonsensical. What would it mean for Jasmine to retain all rights to the litigation that it had no standing to pursue?

Second, applying *res judicata* here advances the principle that because there must be an end of litigation, a party who has had an opportunity to litigate the same matter in a former action “should not be permitted to litigate it again to the harassment and vexation of his opponent.” (*Mooney v. Caspari, supra*, 138 Cal.App.4th at p. 717, citations omitted.) The bankruptcy court determined Jasmine's interest in the Marvell Litigation. Marvell had an opportunity to challenge the determination but chose not to do so. As a result, the bankruptcy court approved the Asset Purchase Agreement and Plan of Reorganization on the premise that Jasmine would continue to pursue the litigation for the benefit of the estate and its creditors. Marvell should not be able to reopen the issue of Jasmine's standing now based on events that occurred more than six years ago.

IV. THE RELIEF JASMINE SEEKS IS NECESSARY AND APPROPRIATE.

A. Writ Relief Is Necessary Because This Petition Presents An Issue Of First Impression, The Trial Court Clearly Erred And Jasmine Has No Adequate Remedy At Law.

The trial court dismissed Jasmine's entire Second Amended Complaint with prejudice for lack of standing. It never should have considered the standing issue in the first place in light of the bankruptcy court's determination that Jasmine had an ongoing interest in the suit—i.e.,

standing. (See Memorandum of Points and Authorities Section III.B., *supra.*)

The court compounded its error by reaching the wrong decision on the merits: It grafted a new standing requirement onto the California Uniform Trade Secrets Act, a requirement that is not in the statute and that is unsupported by public policy. (See Memorandum of Points and Authorities Section II., *supra.*)

Together, these errors mean that Jasmine will not get to present its case to the jury. Instead, it will have to go to trial on three cross-complaints before it has an opportunity to appeal the erroneous dismissal. (*California Dental Assn. v. California Dental Hygienists' Assn.*, *supra*, 222 Cal.App.3d at p. 60.)

This situation cries out for writ relief. The trial court's clear errors will deprive Jasmine of an opportunity to present its case and one of the errors involves an issue of first impression. Such errors merit writ review. (See *Barrett v. Superior Court*, *supra*, 222 Cal.App.3d at p. 1183 [writ relief appropriate where challenged ruling involves a matter of first impression and "effectively bars a substantial portion of plaintiffs' case from being heard on the merits"].)

Jasmine's only remedy at law—to appeal the dismissal after a trial on the cross-complaints—is inadequate. If this Court finds error then, the parties will have to go to trial a second time, before a second jury, where they will rehash much of the same evidence involved in the first trial. (Compare, e.g., 1 Exh. 104-107, 110-111 [Marvell's allegations that Jasmine had no trade secrets] with 1 Exh. 56-57, 59, 63, 65-66 [Jasmine's allegations that Marvell misappropriated and used its trade secrets].) Writ relief is the only way to avoid this costly and needless redundancy. (*Barrett*

v. Superior Court, supra, 222 Cal.App.3d at p. 1183 [granting writ where postjudgment appeal would require a second trial “with the attendant waste of judicial resources”].)

B. A Temporary Stay Is Necessary To Delay The Start Of The Trial On The Cross-Complaints.

The trial court dismissed Jasmine’s Second Amended Complaint on the eve of trial. (5 Exh. 1073-1075 [6/3/09 dismissal order showing trial date of 5/11/09].) It stayed further proceedings until August 3, 2009 to permit Jasmine to seek relief from this Court. (5 Exh. 1081.) Jasmine respectfully requests that this Court extend the stay pending its final ruling on this petition. Otherwise, the trial on the cross-complaints will commence before this Court determines whether the trial should also include Jasmine’s claims. That result would undermine the efficacy of writ relief.

CONCLUSION

The trial court’s finding that Jasmine lost standing to pursue its trade secrets claims is contrary both to the governing statute and to the doctrine of res judicata. Writ relief and a stay of trial court proceedings pending a final decision on this petition are necessary to remedy the court’s errors and to reinstate Jasmine’s complaint before the trial begins on the pending cross-complaints.

Dated: July 10, 2009

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), the attached Petition For Writ Of Mandate Or Other Appropriate Relief; Request For Stay Of Trial Court Proceedings; Memorandum Of Points And Authorities In Support Thereof was produced using 13-point Times New Roman type style and contains 9,993 words not including the Certificate of Interested Entities Or Persons, tables of contents and authorities, list of exhibits, caption page, or this Certification page, as counted by the word processing program used to generate it.

Dated: July 10, 2009

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