IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JASMINE NETWORKS, INC., a Delaware corporation, Petitioner, vs. SUPERIOR COURT FOR THE COUNTY OF SANTA CLARA, Respondent. MARVELL SEMICONDUCTOR, INC., RICHARD SOWELL, AND PATRICK J. MURPHY, Real Parties in Interest.	2d Civ. No. H034441 Santa Clara County Superior Court, Case No. 1-01-CV-801411 Honorable Thomas C. Edwards Department 13 Phone No. (408) 882-2240

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF

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INTRODUCTION

Marvell's Opposition demonstrates that the Court should—as the petition requests—immediately issue a peremptory writ. Further briefing is unnecessary, because the Opposition makes clear that Marvell has nothing to add to its trial court papers. Jasmine's petition thoroughly refutes the points Marvell made there, and the Opposition does not identify any error in Jasmine's presentation.

There is no reason to delay the inevitable. Jasmine has been waiting almost eight years for its day in court. Further delay for no reason would be unconscionable.

I. JASMINE HAS SHOWN THAT THE TRIAL COURT CLEARLY ERRED IN DISMISSING ITS CASE; REAL PARTIES IN INTEREST HAVE NOT SHOWN OTHERWISE.

Jasmine's writ petition showed that the court clearly erred in holding that Jasmine lost standing to pursue its claim for trade secrets misappropriation when it sold its damaged trade secrets but expressly retained its accrued cause of action. (Petition 18-27.) The writ petition further showed that the trial court should not have reached the standing issue in the first place because a prior bankruptcy court order precluded Marvell's standing challenge. (Petition 28-37.)

This Court gave real parties in interest ample opportunity to oppose the writ petition. Richard Sowell and Patrick Murphy did not file any opposition. While Marvell did file an Opposition, that Opposition is so cursory that it is no more effective than Sowell and Murphy's silence.

The Opposition's merits discussion consists of four bullet points that simply refer this Court to Marvell's trial court briefing and the trial court's ruling. It reads as if Jasmine filed no writ petition at all. But Jasmine did file a petition, and its petition anticipated and refuted each of Marvell's points:

- Contrary to Marvell's assertion (Opposition 3), the California Uniform Trade Secrets Act does not require a plaintiff to maintain ownership of its misappropriated trade secrets to retain standing to sue. The Act's text imposes no such requirement, and the uniform jury instruction on which Marvell and the trial court relied requires only that the plaintiff owned the trade secret in the past, not that it still own the secret at the time of trial. (Petition 20-23.)

- Contrary to Marvell's assertion (Opposition 3-4), the trial court's ruling gains no traction from standing requirements in federal intellectual property law. To the extent federal law is relevant at all, it actually permits a suit by a plaintiff in Jasmine's position—that is, by a former intellectual property owner who transferred the damaged property after an act of infringement. (Petition 24-25.) Moreover, Marvell offers no explanation for its related assertion that standing rules regarding damage to personal and real property are irrelevant. (Opposition 3-4.) As Jasmine has shown, those standing rules fully support permitting a former trade secrets owner to sue for accrued damage. (Petition 19-20.)

- Contrary to Marvell's assertion (Opposition 4), the trial court's ruling does not advance the policies behind trade secrets law. Permitting former trade secrets owners to sue for past misappropriations actually fosters the development and protection of trade secrets. (Petition 25-26.)

Any other rule would let misappropriators off the hook for their misdeeds, destroying rather than fostering trade secret protection.

- Contrary to Marvell's assertion (Opposition 4), the bankruptcy court could decide Jasmine's standing in this litigation. A federal bankruptcy court order is preclusive on the issue of standing in a California trial court. (Petition 34-36.) And, contrary to Marvell's assertion (Opposition 4), the bankruptcy court did decide Jasmine's standing. It determined that Jasmine retained its rights, title, and interest in and to this litigation after selling the underlying trade secrets. (Petition 28-34, 36-37.)

In short, the real parties in interest have not refuted Jasmine's showing that the trial court clearly erred in dismissing its case. Marvell concedes that writ review is appropriate. (Opposition 1.) That concession and the trial court's clear errors make it appropriate for this Court to grant the relief that Jasmine seeks.

II. THIS COURT SHOULD ISSUE A PEREMPTORY WRIT NOW.

This Court has authority to order a peremptory writ without first issuing an alternative writ or order to show cause. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180.) It may do so where the affected parties have received notice that the petitioner is seeking, or the court is considering, issuance of peremptory writ, the court has solicited opposition, and the papers on file show "that the additional briefing that would follow issuance of an alternative writ is unnecessary to disposition of the petition." (*Id.* at pp. 178, 180; see also *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1240-1241 [same].) This case meets all of these criteria.

First, the real parties in interest had notice that this Court might grant a peremptory writ in the first instance: Jasmine's writ petition expressly sought one. (Petition 15; cf. *C.C. v. Superior Court* (2008) 166 Cal.App.4th 1019, 1023 [petitioner's request for a peremptory writ in the first instance satisfied procedural prerequisite for granting such relief]; *Lungren v. Superior Court* (1996) 48 Cal.App.4th 435, 443 [same].)

Second, this Court solicited opposition from the real parties in interest. The Court's July 16, 2009 stay order invited them to file "points & authorities in preliminary opposition to the petition." (See Stay Order filed July 16, 2009.) The Court's operating procedures indicate the Court may issue a peremptory writ after taking this step. (See Sixth District Outline of Original Proceedings and Relief Ancillary to Appeal 8-9.) It makes no difference that the Court sought "preliminary opposition" rather than "formal" briefing. (See *Palma, supra*, 36 Cal.3d at p. 180 [Supreme Court "strongly approve(d)" the practice of courts "request(ing) informal opposition prior to the issuance of an alternative or peremptory writ" to ensure that the real party has an opportunity to be heard, emphasis omitted].) The real parties in interest had the opportunity to present their substantive position to the Court, which is all that is required.

Finally, the papers on file show that additional briefing is unnecessary. Jasmine's writ petition demonstrated that the trial court clearly erred in applying the law to the undisputed facts. (See Petition 18-39.) Marvell's response is that even a quick review of its trial court briefing and the dismissal order will show that the trial court was right and that "[p]rotracted review on the merits would not alter that showing." (Opposition 2.) Consistent with that position, Marvell asserts based only on its own trial court briefing that the dismissal order was correct.

(Opposition 3-4.) If Marvell believes that its own trial court briefing adequately addresses the issues raised by Jasmine's petition, what is the point of additional briefing?

The Opposition does not answer that question. Instead, it argues that this Court should issue an alternative writ or order to show cause because there is no temporal urgency or clear error under well-settled principles of law. (Opposition 1, 4-5.) In fact, however, both are present.

- The trial court's preclusion ruling conflicts with basic principles of res judicata. (Petition 28-37.) Its standing ruling, although presenting an issue of first impression, is erroneous under long-established standing rules in related contexts. (Petition 18-27.) A peremptory writ therefore is appropriate. (See *Wasti v. Superior Court* (2006) 140 Cal.App.4th 667, 670 ["We issue a peremptory writ in the first instance because the trial court's error is clear and the statutory language is plain"].)

- Time is of the essence. This litigation has been pending for almost eight years. It has been before this Court multiple times and even before the Supreme Court, where it sat for four years before review was dismissed. Then, just when it looked like the case would finally proceed to trial, Marvell's last minute motion erroneously convinced the trial court to dismiss Jasmine's entire complaint, triggering this writ petition and leaving the pending cross-complaints in limbo. The result is that Jasmine is once again left waiting for its day in court.

Marvell's approach to this writ petition has needlessly extended that wait. In a July 16, 2009 letter to this Court, Marvell agreed that writ review is appropriate and suggested that the Court issue an alternative writ or order to show cause setting a briefing schedule. That same day, the Court invited the real parties in interest to file points and authorities in preliminary

opposition to the petition. If Marvell had a substantive response to Jasmine's writ petition arguments, that was its chance to provide it. Instead, despite agreeing that this Court should consider the merits of the writ petition, Marvell took the full time allowed by the Court and then filed an Opposition that repeated the message of its letter and simply referred the Court to its trial court pleadings.

Enough is enough. Jasmine's long wait to go to trial, together with the clear error in the trial court's briefing and the lack of any benefit from further briefing, make a peremptory writ appropriate in the first instance. (See *Maldonado v. Superior Court* (1996) 45 Cal.App.4th 397, 400 [granting peremptory writ where "(i)ssuance of an alternative writ would not assist our resolution of this matter"]; *General Motors Corp. v. Superior Court* (1993) 12 Cal.App.4th 435, 444 [granting peremptory writ where court erred in applying well-established principles to a novel set of facts and "an alternative writ would add nothing to the presentation already made and would cause undue delay in bringing the action to trial"].)

CONCLUSION

Writ relief is necessary in this case because the trial court clearly erred in dismissing Jasmine's Second Amended Complaint for lack of standing. As discussed above, a peremptory writ is appropriate based on the record and briefing currently before the Court. If this Court nonetheless feels that additional briefing is necessary, Jasmine respectfully requests that the Court issue an alternative writ directing the trial court to vacate its order or to show cause why it should not do so on an expedited briefing schedule.

Dated: August 6, 2009 Respectfully submitted,

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By _____ _____
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), the attached Reply In Support Of Petition For Writ Of Mandate Or Other Appropriate Relief was produced using 13-point Times New Roman type style and contains 1,618 words not including the tables of contents and authorities, caption page, or this Certification page, as counted by the word processing program used to generate it.

Dated: August 6, 2009

Alana H. Rotter

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On **August 6, 2009**, I served the foregoing document described as: **Reply In Support Of Petition For Writ Of Mandate Or Other Appropriate Relief** on the parties in this action by serving:

BY MAIL

I mailed a copy of the document identified above as follows:

I placed the envelope(s) for collection and mailing on the date stated above, at Los Angeles, California, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.

The envelope was or envelopes were addressed as follows:

SEE ATTACHED SERVICE LIST

Executed on **August 6, 2009**, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/Rebecca E. Nieto

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