ACC Association of Corporate Counsel

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June 3, 2004

The Honorable Ronald M. George, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the State of California
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-4783

Re: Jasmine Networks, Inc. v. Marvell Semiconductor, Inc.,
No. S124914

Dear Chief Justice George, and Honorable Associate Justices of the Supreme Court of the State of California:

This letter is submitted by amicus curiae, the Association of Corporate Counsel, in support of the Petition for Review filed by Marvell Semiconductor, Inc., in the above-entitled case.

The Association of Corporate Counsel ("ACC"), formerly known as the American Corporate Counsel Association, is the in-house bar association serving the professional needs of attorneys who practice in the legal departments of corporations and other private sector organizations worldwide. The association promotes the common interests of its members, contributes to their continuing education, seeks to improve understanding of the role of in-house attorneys, and encourages advancements in standards of corporate legal practice. Since its founding in 1982, the association has grown to 16,000 members in 47 countries who represent 7,000 organizations; over 2,300 of our members practice in California.

ACC and its members have consistently advanced the principle that the privileges and obligations of the legal profession apply equally to all attorneys, regardless of their practice setting. ACC strongly believes that the interests of in-house counsel and their clients, as well as many other interested stakeholders, are enhanced by encouraging the use of in-house lawyers because of their proximity to business decision-makers, which puts them in a unique position to assist companies in complying with the law and in heading off legal problems. While many companies

hire in-house lawyers for their ability to deliver high-quality legal services in a cost-effective manner, they find that their larger value is their ability to focus on preventive and knowledge-based solutions for the client's unique institution. In an era in which the importance of compliance and corporate legal responsibility is paramount, the role of in-house counsel is especially important; indeed, courts, regulators and the public should seek out the means to bolster and support the role of the in-house lawyer, taking care to instill – and not to diminish – their clients' confidence in their capacities.

Confidentiality and trust are central to the establishment and maintenance of a vital and professional attorney-client relationship. For more than half a century, courts have recognized that there are no distinctions between in-house and outside counsel for purposes of the attorney-client privilege. In his landmark opinion in United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950), Judge Wyzanski observed:

> "[T]he apparent factual differences between these house counsel and outside counsel are that the former are paid annual salaries, occupy offices in the corporation's buildings, and are employees rather than independent contractors. These are not sufficient differences to distinguish the two types of counsel for purposes of the attorney-client privilege. And this is apparent when attention is paid to the realities of modern corporate law practice. The type of service performed by house counsel is substantially like that performed by many members of the large urban law firms. The distinction is chiefly that the house counsel gives advice to one regular client, the outside counsel to several regular clients."

89 F. Supp. at 360.

This Court made the same point in General Dynamics Corp. v. Superior Court, 7 Cal. 4th 1164 (1994):

> "We reject any suggestion that the scope of the privilege should be diluted in the context of in-house counsel and their corporate clients."

7 Cal. 4th at 1190.

Viewed against this background, Marvell's petition for review clearly presents important questions of law involving attorney-client privilege—including the scope of the privilege where a general counsel is also a corporate officer, and the effect of an inadvertent disclosure via voicemail or other electronic means. Thus, the petition presents as one important issue:

> "Where the purpose of a communication between a corporation's general counsel and one of its vice presidents is the provision of legal advice, does the corporation lose the right to assert the lawyer-client privilege simply because its general counsel is also an officer of the corporation?"

Petition for Review, p. 1.

The Court of Appeal acknowledges that "an attorney's inadvertent disclosure does not waive the privilege absent the privilege holder's intent to waive." Opinion, p. 8. Nonetheless, the Court of Appeal holds that "Marvell made an uncoerced disclosure of the information." Opinion, p. 9. The Court of Appeal reasons that:

> "Although Marvell makes much of the fact that Gloss, its general counsel was the speaker in the initial message to Wei, and as a result, could not waive Marvell's privilege, this argument ignores the fact that in making the call to Wei, Gloss was acting not only as Marvell's general counsel, but also as the vice-president of business affairs and an officer of the corporation, with authority to speak to Jasmine on issues related to the terms of the agreement."

Opinion, p. 9.

The Court of Appeal's opinion is perplexing. The inadvertent disclosure occurred after Marvell's general counsel, Mr. Gloss, left a voicemail message for Jasmine's in-house counsel, Ms. Wei; Marvell's general counsel said "bye-bye," and hung up the conference room telephone; all Marvell personnel believed the connection with Ms. Wei's voicemail had been terminated, but their subsequent conversation was recorded onto Ms. Wei's machine. Petition for Review, pp. 6-7.

The initial message by Marvell's general counsel concerned due diligence prior to the expected closing of a transaction—according to the Court of Appeal, the message concerned "the requirement that a Jasmine human relations representative be present for meetings with Jasmine engineers." Opinion, p. 3. Yet, the Court of Appeal emphasizes that "in making the call to Wei, Gloss was acting not only as Marvell's general counsel, but also as the vice-president of business affairs and an officer of the corporation." Opinion, p. 9. This finding suggests that in-house lawyers for the company are actually the client themselves by virtue of their corporate title even when providing legal advice, thus finding that they have the unilateral ability to waive the privilege.

The Court of Appeal's opinion creates a dangerous precedent that is a radical departure from established precedent. An inadvertent waiver by a lawyer does not waive a corporation's attorney-client privilege. State Compensation Insurance

Fund v. WPS, Inc., 70 Cal. App. 4th 644, 654 (1999). It was undisputed that the conversation left on the voicemail (after Marvell's general counsel hung up the phone) was privileged and that Marvell's general counsel was engaged in the conversation in his legal capacity as the company's lawyer. The Court of Appeal's opinion, if left standing, means that an in-house lawyer who is providing legal services, but who does so with a corporate title (such as "vice president") attached to his business card, can inadvertently waive the privilege, contrary to the rule for all other attorneys.

The Court of Appeal's opinion has a direct and immediate adverse effect on ACC's members, the in-house segment of the bar in general, and most importantly, their clients. More than 4,000 of ACC's 16,000 members hold a "vice president" title; since ACC's membership is considered demographically representative of the entire in-house profession by statisticians and legal census takers, this number suggests that at least a quarter of all in-house counsel have some kind of corporate office notation attached to their title. This estimate is conservative in that it does not count in-house lawyers whose titles do not include the most obvious office of "vice president," but who may carry other management titles (such as Corporate Secretary, Chief Legal Officer, Compliance Group Leader, etc.).

Attachment of a corporate office or title to an in-house lawyer's business card does not, however, in any way alter the fact that their primary service to the company is as a lawyer. While proud of their recognized abilities to help manage legal affairs for the client in a business-valued manner, in-house lawyers are not hired to provide non-legal services: just the opposite. It is inappropriate to presume, therefore, and without further factual inquiry, that an in-house lawyer who also holds a corporate office is acting as a business decision-maker, rather than as a legal counsel, in any given situation.

The Court of Appeal's opinion raises a concern that a company's decision to employ in-house lawyers places the corporate client at a disadvantage in terms of protection of their privilege rights: they face a greater risk of waiver by inadvertent disclosure. Faced with such risk, corporations may be less likely to hire or consult in-house lawyers who are corporate officers. This could result in a serious erosion of the value and role of in-house counsel, and – more importantly from a public policy perspective – a diminution in the preventive compliance services they provide.

Lawyers who serve as senior members of the corporate management team are ideally situated to give executives and board leaders on-the-spot, highly relevant, and crucially required legal advice to guide the corporation's most sensitive business and management policies. They are the lawyers who are best known to clients, who are most likely to command the client's respect, and whose advice will be heeded most

carefully. They are lawyers who are there when questions arise and before decisions are made.

It is for this reason that clients endow in-house lawyers with leadership titles. A client's decision to offer a lawyer such a title evidences the client's commitment to establishing and maintaining an ethical and compliant corporate culture. Yet, the Court of Appeal's opinion would turn the client's decision to prioritize legal compliance – in the manner that corporations evidence power and authority -- into a questionable choice, perversely punishing the client for elevating legal matters to a high office in the company structure.

At the very least, this Court should depublish the opinion of the Court of Appeal. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." Upjohn Co. v. United States, 449 U.S. 383, 393 (1981). Unless review is granted or depublication is ordered, the Court of Appeal's opinion will create such uncertainty, to the detriment of the attorney-client privilege and the ability of corporations to receive the highest quality of legal advice.

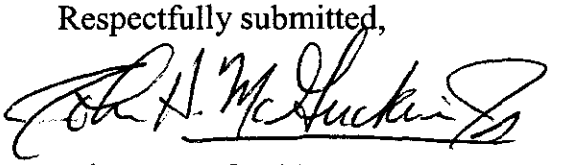
Other issues raised in Marvell's Petition for Review are equally important. The Petition for Review presents an important question of law regarding the ethical duties of a lawyer who receives an attorney-client privileged communication that was inadvertently disclosed via voicemail or other electronic means. In the current age of electronic communications, much of a corporation's communications is via electronic means — whether voicemail, fax, e-mail or other technological means. Given the enormous volume of communication flowing between counsel, clients, and others, there will invariably be occasional inadvertent disclosures of attorney-client communications — by virtue of an errant voicemail, misdirected fax, or misaddressed e-mail, for example. Especially in a non-litigation context, most of these inadvertent disclosures will be simple accidents that can be quickly remedied if the lawyer receiving the communication takes the appropriate steps: refraining from examining the communication in any greater detail than necessary to determine that it is privileged, and immediately notifying the sender that the lawyer has received the potentially privileged communication. See State Compensation Insurance Fund v. WPS, Inc., 70 Cal. App. 4th 644, 656-657 (1999). This Court should clarify the ethical duties of a lawyer in such situations — especially where, as here, the inadvertent disclosure was via an electronic medium.

Marvell's Petition for Review also raises important questions of law concerning the crime/fraud exception to the attorney-client privilege. As discussed in the Petition for Review, the Court of Appeal's opinion erroneously eliminates from the crime/fraud exception any requirement of a showing that the client intended to abuse the attorney-client relationship and further eliminates any requirement that such a showing be

based on admissible evidence. Absent such a showing, clients (both individual and corporate alike) are entitled to privileged communications when they seek and obtain legal counseling and advice from their attorneys. The whole purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn v. United States, 449 U.S. 383, 389 (1981). Exceptions to the privilege must be narrowly defined, consistent with that purpose. This Court should take this opportunity to provide guidance on the scope of the attorney-client privilege, and the exceptions to the privilege.

For the reasons stated above, we respectfully submit that this Court should order review of the Court of Appeal's decision or, in the alternative, this Court should depublish the opinion of the Court of Appeal.

Respectfully submitted,



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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 400 California Street, 16th Floor, San Francisco, California, 94104.

On June 3, 2004, I served the document(s) described as:

ACC AMICUS INADVERTENT DISCOVERY

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

See Attached.

(BY MAIL) I am readily familiar with Union Bank of California, N.A. Legal Division's practice for collection and processing of documents for mailing with the United States Postal Service and that the documents are deposited with the United States Postal Service the same day as the day of collection in the ordinary course of business. The sealed envelope with postage thereon fully prepaid was placed for collection and mailing on the above date following ordinary business practices.

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

Executed on June 3, 2004, at San Francisco, California.

Joan C. Hamedi

Jasmine Networks, Inc. v. Marvell Semiconductor, Inc., et al.
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