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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

JASMINE NETWORKS, INC., Plaintiff and Appellant, v. MARVELL SEMICONDUCTOR, INC., et al., Defendants and Respondents.	H023991 (Santa Clara County Super. Ct. No. CV801411)

Jasmine Networks, Inc. (Jasmine) appeals an order granting a preliminary injunction in favor of Marvell Semiconductor, Inc. (Marvell), restraining use or disclosure of a transcript of a conversation among Marvell's officers and lawyers that was inadvertently left on Jasmine's voicemail system.

Both Jasmine and Marvel are in the semiconductor business, more specifically, the design and manufacture of telecommunications chips. Marvell is a publicly held company, while Jasmine is a smaller, closely held company. Marvell offered to buy a portion of Jasmine's technology, along with some of its engineers. Jasmine accepted the offer with many conditions, including the implementation of a nondisclosure agreement preventing Marvell from obtaining Jasmine's trade secrets or employees without paying for them.

During the course of the parties' negotiations, Jasmine obtained evidence that Marvell did not intend to abide by the terms of the contract, and had or was planning to steal Jasmine's trade secrets and hire away Jasmine's key employees. The evidence was

contained in a transcript of a conversation among Marvell's lawyers and officers that was recorded on Jasmine's voicemail system.

The trial court granted Marvell's request for a preliminary injunction restraining the use or disclosure of the transcript of its employees' conversation. In so doing, the court refused to review the contents of the transcript on the grounds that such conversation was privileged.

Jasmine asserts numerous errors on appeal, including the fact that Evidence Code section 915 did not preclude the trial court from reviewing the content of the voicemail. Jasmine also asserts the conversation is not protected by the attorney-client privilege, because Marvell waived the privilege by disclosing the information on Jasmine's voicemail, and the conversation falls within the crime-fraud exception. Additionally, Jasmine argues the preliminary injunction is an illegal prior restraint in violation of the First Amendment.

We believe the trial court erred in refusing to consider the contents of the voicemail, and in concluding Jasmine failed to establish a prima facie case for the crime-fraud exception to the attorney-client privilege, and for these reasons we reverse. Because we reverse on the grounds stated above, we decline to reach the First Amendment issue.

FACTUAL SETTING FOR THE TRADE SECRET

Marvell sought to acquire a group of Jasmine's engineers, along with certain of Jasmine's intellectual property. During the course of negotiations, Jasmine was careful about preventing the release of its trade secrets. For example, Jasmine's senior director of legal and business affairs told senior Marvell officials, including Matthew Gloss (Gloss), Jasmine's general counsel and vice-president of business affairs, that they were not to make copies of employee information and indeed, went so far as to black out the names of the members of the employee group that Marvell was interested in acquiring, as

well their stock option grants. The record shows that Jasmine did this to prevent Marvell from bidding for these employees if the deal did not go through.

As negotiations progressed, the parties entered into a nondisclosure agreement that protected the secrecy of Jasmine's trade secrets and employee information. To that end, Marvell was given an opportunity to look at the trade secret information, but not to remove it. Patent disclosures, among the most important of Jasmine's intellectual property, could be reviewed but not copied. Enough was to be shown Marvell to demonstrate the value without disclosing the secret.

Moreover, Marvell was not to conduct meetings with the rank and file of the targeted Jasmine engineering group without the presence of a Jasmine human relations representative.

It was as to this latter requirement that the telephone call was made to Jasmine's senior director of legal and business affairs.

The three Marvell employees who participated in the telephone call were Gloss, Marvell's vice-president of business affairs, general counsel, and a Marvell officer; Kaushik Banerjee (Banerjee), vice-president of engineering, and a Marvell officer; and Eric Janofsky (Janofsky), Marvell's in-house patent attorney. Using a speakerphone, the three Marvell executives called Virginia Wei (Wei), Jasmine's senior director of legal and business affairs, and left a message on her voicemail to return their call regarding the requirement that a Jasmine human relations representative be present for meetings with Jasmine engineers. However, after leaving the initial message, the three Marvell executives failed to hang up the speakerphone, and proceeded to have a conversation that was recorded on Wei's voicemail.

We review the actual communication and set it out below.

> "[Janofsky]: I don't think – it doesn't look – Sehat
> [Marvell's CEO] doesn't go to jail, obviously.

"[Gloss]: Sehat doesn't go to jail. Manual [Alba] [Marvell's vice president of business development] might go to jail; Manuel [Abel] gets a black eye.

"[Janofsky]: I don't . . . .

"[Gloss]: Sure, Marvell VP out there promising big option grants in proposed pending acquisitions if technology is transferred in advance to speed development time so time to market goal can be reached. *That's what's going on.*

[¶] . . . [¶]

"[Janofsky]: If we took that IP on the pretense of just evaluating it, and put it in our product . . .

"[Banerjee]: But we don't know that part.

"[Janofsky]: But they gave it to us, you know. We don't know, but it sounded . . . ." (Italics added.)

"[Banerjee]: But it would be okay if we pay [Jasmine] and we close the deal, right?

"[Janofsky]: Once the deal closes, it's fine, but if they realize what they're doing, they could hold out for more. Use it as leverage, use it as blackmail.

"[Banerjee]: Right, but we don't want to talk about it.

"[Janofsky]: No, we don't want to talk about it . . . ."

"[Banerjee]: Yeah, I mean, all I, if you look at it you begin to say hey look it was part of technical due diligence.

"[Janofsky]: No . . . That's, that's, that's fine, I . . . .

"[Banerjee]: I mean that's how . . . .

"[Gloss]: That's, that's that's what it was.

"[Banerjee]: That's right.

"[Gloss]: That's what's going on right now.

[¶] . . . [¶]

"[Banerjee]: So that's how [our project leader] can defend it, and that's how we can defend it."

Upon hearing the message of this conversation, Wei investigated whether Marvell had taken any action to obtain Jasmine's trade secrets, or its employees. Jasmine located notes of a meeting between Richard Stowell (Stowell), a senior Jasmine manager, and Banerjee regarding proprietary patent disclosures that Jasmine had earlier refused to provide to Marvell. Jasmine also discovered that Stowell had secretly e-mailed Banerjee stock option and salary information for Jasmine's engineers, after Jasmine refused to provide Marvell this information.

Jasmine filed suit against Marvell and certain of Jasmine's former employees, including Stowell, alleging trade secret misappropriation and related claims. Marvell filed a motion for a preliminary injunction, enjoining Jasmine from disclosing, disseminating or referring to the contents of the recorded voicemail conversation. Marvell argued that because the conversation involved its attorneys, its contents were subject to the attorney-client privilege.

The trial court granted Marvell's request for the preliminary injunction based on the conclusion that the contents of the voicemail were privileged.[1]

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[1] In its ruling, the trial court granted Marvell's motion to seal the record and strike portions of the voicemail message from Jasmine's complaint. California Rules of Court Rule 12.5(c)(1) provides if a record is sealed by the trial court, "[t]he sealed record must be filed under seal in the reviewing court and remain sealed unless that court orders otherwise. . . ." Consequently, we ordered all the portions of the briefs and appendices that were sealed in the trial court sealed here. Additionally, we ordered the parties to

Jasmine filed a timely notice of appeal.[2]

STANDARD OF REVIEW

This case involves the trial court's issuance of a preliminary injunction, which is reviewed for abuse of discretion. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286-287.) However, our analysis of the case suggests that the trial court's ruling was a classic example of a mixed question of fact and law, as that issue was exhaustively analyzed in *People v. Louis* (1986) 42 Cal.3d 969. In *Louis*, the court was faced with the same threshold issue we encounter: "[W]hat standard we should use in reviewing the [trial court] ruling." (*Id*. at p. 984.) Mixed questions were identified as "those 'in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant legal] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.' [Citation.]" (*Id*. at p. 984, quoting *Pullman-Standard v. Swint* (1982) 456 U.S. 273, 289, fn. 19.)

There are three distinct steps in deciding mixed questions of law and fact. The first step is the establishment of the " ' "basic, primary, or historical facts." ' " (*People v. Louis*, *supra*, 42 Cal.3d at p. 985.) The second step is the selection of the applicable rule of law. The third step, and the most troublesome for standard of review purposes, is the application of law to fact. (*Ibid*.) The trial court's resolution of questions of fact is reviewed under the deferential, clearly erroneous standard. However, questions of law are reviewed under the non-deferential, de novo standard. (*Ibid.*)

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filed redacted versions of the briefs and appendices, with only that material that was sealed in the trial court removed from public view.

In light of our ruling in this appeal, we dissolve our previous orders filing portions of the briefs and appendices under seal.

[2] The order granting preliminary injunction in this case is subject to appeal under the Code of Civil Procedure section 904.1, subdivision (a)(6). Contrary to Marvell's assertion, the order was not "simply an evidentiary ruling, **excluding a single piece of evidence**."

The trial court's grant of the preliminary injunction in this case involved mixed questions of law and fact. The court's resolution of the factual issues will be subject to an abuse of discretion review. However, the issues presented by this appeal are questions of law as they relate to undisputed facts: (1) whether a privilege holder may waive the attorney-client privilege by inadvertent disclosure, regardless of the holder's intent; (2) whether Evidence Code section 915 precluded the trial court from reviewing the content of the voicemail to determine if the conversation was subject to the attorney-client privilege, when the content of the voicemail had already been disclosed; and (3) whether the trial court applied the proper standard for a prima facie showing of the crime-fraud exception under Evidence Code section 956. We review de novo the legal questions presented in this case. (See *California Correctional Peace Officers Assn. v. State of California* 82 Cal.App.4th 294, 302.)

PRIVILEGE AND WAIVER, EVIDENCE CODE SECTION 912, SUBDIVISION (A)

In its ruling on the request for preliminary injunction, the trial court concluded, based on undisputed facts, that the attorney-client privilege had not been waived, that the burden shifted to Jasmine to show that the privilege had been expressly or impliedly waived, and that they failed to do so. The trial court also found that Marvell did not intend to disclose the contents of the conversation. The trial court erred in its finding that the privilege had not been waived.

The parties agree that under Evidence Code section 912, subdivision (a),[3] the privilege may be waived in one of two ways: (1) by the privilege holder making an uncoerced disclosure of the information; or (2) by the holder intentionally consenting to disclosure by a third party. The parties dispute the first method of waiver, the privilege holder's uncoerced disclosure of the information. Marvell asserts section 912, subdivision (a) requires intentional disclosure, and such intent did not exist in this case.

[3] All further statutory references are to the Evidence Code.

However, on this point Marvell is incorrect, because the weight of authority supports the conclusion that intent to disclose is not required in order for the holder to waive the privilege through uncoerced disclosure.

The cases Marvell cites for its position that intent to disclose is required to waive the privilege are inapposite. In both *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 211-212, and *F.D.I.C. v. Fidelity & Deposit Co. of Maryland* (S.D.Cal. 2000) 196 F.R.D. 375, 380, the courts considered *counsel's* inadvertent disclosure of information, not the holder's disclosure. In both cases, the courts held that the holder must intend that the information be disclosed in order for the privilege to be waived.

Marvell argues that no waiver occurred in this case, because the inadvertent disclosure was by its counsel, Gloss, and because Marvell did not intend to disclose the information, Gloss's inadvertent disclosure was not sufficient to constitute waiver. Marvell is correct that an attorney's inadvertent disclosure does not waive the privilege absent the privilege holder's intent to waive. (See *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 654 (*State Comp*.) [court concluded, " 'waiver' does not include accidental, inadvertent disclosure of privilege information by the attorney"].)

However, Marvell fails to note that its corporate officers, not just its general counsel, disclosed the information on the voicemail. As a result, the fact that Marvell did not intend to waive the privilege through the inadvertent disclosure is immaterial.

Unlike the cases Marvell cites, in the present case, the privilege holder inadvertently disclosed the information. The language of section 912, subdivision (a) is clear that the holder of the privilege, in this case Marvell, may waive it by disclosing the privileged information. Moreover, in *State Comp.*, the court explicitly stated that waiver of the privilege may occur "*either* by disclosing a significant part of the communication *or* by manifesting through words or conduct consent that the communication may be disclosed." (*State Comp., supra,* 70 Cal.App.4th at p. 652, italics added) There is no requirement in the statute itself, nor in the cases interpreting the statute that the privilege

holder intend to disclose the information when that the holder makes an uncoerced disclosure.

Based on the undisputed facts of this case, it is clear Marvell made an uncoerced disclosure of the information. 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.[4] Additionally, through the actions and the words of all three Marvell executives who placed the original call to Wei, it is clear that Gloss was not acting alone, and in fact Banerjee, Gloss and Janofsky all made the call, and were acting on behalf of Marvell.[5] Finally, Marvell ignores the fact that Banerjee, the only one of the three Marvell executives who participated in the conference call and who is not an attorney, did not object, and in fact, participated fully in the conversation with Gloss and Janofsky that was left on Jasmine's voicemail.

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[4] Marvell criticizes the conclusion that because its attorney also served as an officer of the corporation, he was the privilege holder, stating, "if [this] were correct, there would never be an attorney-client privilege where an in-house attorney is also a corporate officer." Marvell goes on to state, "[A] corporation would never have the ability to prevent its in-house attorney from breaching the lawyer-client privilege simply because he was a corporate officer." However, Marvell's interpretation is far too broad. The question is not the existence of the privilege when an in-house attorney also serves as a corporate officer; the privilege most definitely exists. The question this case presents relates to the inadvertent disclosure of privileged information by three corporate officers; the fact that one of them also served as in-house counsel did not affect Marvell's ability to prevent breach of the attorney-client privilege.

[5] The message for Wei was as follows:

> Virginia, hi this [is] Matthew Gloss, Vice President and General Counsel for Marvell. It's a few minutes before six on Thursday, Oct-. . . August 16. I am here with Kaushik Banerjee, our Vice President of our ASIC group, and Eric Janofsky, our General Patent Counsel."

We conclude based on the context of the conference call, Marvell, not just its counsel, disclosed the information to Jasmine, and as such, waived its attorney-client privilege. The fact that Marvell did not intend to disclose the information to Jasmine is of no import; Marvell placed the conference call and left the voicemail message for Wei voluntarily. Marvell was not coerced in any way to make the disclosure, and as such, its disclosure falls squarely within the meaning of section 912, subdivision (a). Indeed, it would be hard to see how the criteria for waiver could be satisfied if they are not satisfied here.

The trial court erred in issuing the injunction based on a finding that the contents of the voicemail were privileged. The undisputed facts of this case demonstrate the privilege was waived by Marvell's uncoerced disclosure of the information on Jasmine's voicemail.

CRIME FRAUD EXCEPTION TO THE ATTORNEY/CLIENT PRIVILEGE EVIDENCE CODE SECTION 956

Even if the attorney-client privilege were not waived in this case, the voicemail is not protected, because it falls within the crime-fraud[6] exception to the attorney-client privilege stated in section 956.[7]

In its ruling granting the preliminary injunction, the trial court not only concluded the privilege had not been waived, but it also held that Jasmine failed to make a prima facie showing that the crime-fraud exception existed in this case. In reaching the conclusion that a prima facie case was not established, the court refused to consider the

[6] Nothing herein shall be construed as a finding that a crime or fraud occurred in this case; rather, we narrowly rule on the issue of a prima facie case of the crime-fraud exception to the attorney-client privilege.

[7] Section 956 provides: "There is no privilege . . . if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud."

contents of the voicemail. The court's refusal was based on an erroneous interpretation of section 915.

Evidence Code Section 915

Section 915 provides, in relevant part: "the presiding officer may not require disclosure of information claimed to be privileged under this division . . . in order to rule on the claim of privilege." While section 915 is particularly applicable to claims of privilege where the information has not been previously disclosed, it has no applicability where the communication has been disclosed. That is, in part, the ruling in *Roe v. Superior Court* (1991) 229 Cal.App.3d 832, where the person claiming the privilege objected to the court reviewing information that was subject to the psychotherapist/patient privilege. The Court of Appeal held that where the "confidential material has already been disclosed . . . [t]he superior court did nothing to force the disclosure of previously undisclosed communications. Accordingly, the superior court did not violate Evidence Code section 915." (*Id*. at p. 843, fn. 9.)

To a similar effect, the court in *Klang v. Shell Oil Co.* (1971) 17 Cal.App.3d 933, 938, rejected the privilege holder's argument that the court could not review the information because the information has already been previously disclosed.

Like the cases of *Klang* and *Roe*, because Marvell disclosed the information to Jasmine in the form of a voicemail message, and the court did not need to compel its disclosure, the prohibition set forth in section 915 did on apply in this case. The trial court erred in refusing to review the contents of the voicemail pursuant to section 915.

The cases Marvell cites for its position that section 915 prevented the trial court from reviewing the contents of the voicemail are inapposite. Specifically, in both *State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625 (*State Farm*), and *Cooke v. Superior Court* (1978) 83 Cal.App.3d 582, the privilege holders did not disclose the information; rather the information was taken from them through improper conduct. Such is not the case here, where Marvell itself disclosed the information,

without any action by Jasmine, or compulsion of the court. We conclude the trial court erred in refusing to review the contents of the voicemail based on Evidence Code section 915.

Prima Facie Evidence of the Crime-Fraud Exception

The crime-fraud exception found in section 956 has been the subject of two important cases, both of which were cited by the trial court in its written order in this case: *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1262 (*BP Alaska*), and *State Farm, supra,* 54 Cal.App.4th at p. 645. Both cases repeated the conclusion that mere assertion of fraud is insufficient to establish the exception; there must be a showing that fraud has some foundation in fact, and in both cases the courts found the crime-fraud exception applied. It is our conclusion that in neither *BP Alaska* nor *State Farm* was the evidence of fraud as robust as it is here.

In relying on both *BP Alaska* and *State Farm*, the trial court concluded that Jasmine had not produced sufficient evidence "that the attorney's services were retained and utilized to commit a crime or fraud" or that a reasonable relationship existed between the voicemail and such crime or fraud. However, Jasmine need only show a prima facie case of Marvell's fraud, and a prima facie case that the voicemail reasonably related to that crime or fraud. (*BP Alaska, supra*, 199 Cal. App. 3d at 1262.)

A prima facie case is one that "suffice[s] for proof of a particular fact until contradicted and overcome . . . by other evidence. In other words, [a prima facie case is made by] evidence from which reasonable inferences can be drawn to establish the fact asserted, i.e., the fraud." (*BP Alaska, supra*, 199 Cal.App.3d at 1262, citing *People v. Van Gorden* (1964) 226 Cal.App.2d 634, 636-637)

In this case, the trial court required more of Jasmine than proof of a prima facie case. By weighing the evidence presented on the issue of a crime or fraud, and determining that Jasmine had failed "to demonstrate that the attorney's services were retained and utilized to commit a crime or fraud," the trial court misapplied the standard

set forth in *BP Alaska*. The trial court should have reviewed the evidence to determine whether *inferences* of both a crime or fraud, and a reasonable relationship between that crime or fraud and the attorney communication could be drawn. The trial court erred by elevating the requirement of a prima facie case of crime or fraud to whether Jasmine produced sufficient evidence to demonstrate that such crime or fraud occurred.

Moreover, by applying the correct standard to the evidence presented to the trial court, there can be no other conclusion than Jasmine did establish a prima facie case sufficient to satisfy the crime-fraud exception. It is perhaps best at this point to refer to the facts of *BP Alaska, supra,* 199 Cal.App.3d 1240, to show how little was required in that case to invoke the crime-fraud exception. The plaintiff, NWEC, proposed an oil drilling partnership with BP Alaska at a secret site. (*Id*. at p. 1247.) BP Alaska declined the partnership with NWEC, but later agreed with another company to drill at the secret site. After NWEC claimed BP Alaska improperly excluded it from the drilling opportunity, lawyers for BP Alaska conducted an internal investigation of the claim. (*Id*. at pp. 1247-1248.) The slender reed for plaintiff's claim in *BP Alaska* was misstatements in a letter it had received from BP Alaska. (*Id*. at pp. 1264-1265.) The court made it clear that conflicting inferences could be drawn about the statements; nevertheless, it found that the statements could support the inference that the letter was fraudulent and that the plaintiff had established a prima facie case of fraud against BP Alaska. (*Id.* at pp. 1265-1266.)

Here, by contrast, Jasmine presented evidence to the trial court that could raise no conflicting inferences. Specifically, the trial court had evidence that Banerjee called a meeting with Gloss and Janofsky to discuss concerns that Stowell (Jasmine's employee) was transferring "too much information" to Marvell. A portion of this meeting was recorded on Jasmine's voicemail. Gloss admitted at his deposition that at that meeting, he was concerned that Alba, Marvell's vice president of business development, would go to jail for conduct related to the Jasmine/Marvell negotiations. Soon after that meeting,

Banerjee requested from Stowell the information specifically prohibited from disclosure as a term of the parties' agreement: Jasmine's confidential patent disclosures, and personalized information on the salaries and stock option grants of Jasmine's engineers. Stowell emailed Banerjee with the information he requested. Shortly thereafter, Banerjee e-mailed Stowell, thanking him for the information and stating that the information had "helped."

The evidence stated above is far greater than that in *BP Alaska*, where the court found a prima facie case of the crime-fraud exception. Moreover, even if the evidence did create conflicting inferences, the voicemail, which the trial court improperly refused to consider in this case, presents sufficient evidence that not finding a prima facie case of the crime-fraud exception would have been an abuse of discretion. In the voicemail, Marvell's general counsel and corporate officers openly discussed theft of Jasmine's trade secret and the unlawful hiring of the engineering group, as well as the potential consequence of jail for the conduct. As Janofsky, Marvell's in-house patent counsel says, "If we took that IP on the pretense of just evaluating it, and put it in our product . . . ." The use of the word "pretense" shows, at a minimum, that fraud is proposed. Although a crime of theft is implicated at the outset, the statements that follow confirm this. "Once the deal closes, it's fine, but if they realize what they're doing, they could hold out for more. Use it as leverage, use it as blackmail." The words, "what they're doing," refer to stealing the trade secrets, and the reference to possible "blackmail" is a direct admission against interest. Janofsky then adds some more legal advice, "No, we don't want to talk about it . . . ." The contents of the conversation demonstrate the theft of Jasmine's trade secret, the potential consequences and the planned cover up.

The evidence presented to the trial court, as well as the voicemail clearly satisfy the requirements of a prima facie case of fraud, and a reasonable relationship between the crime or fraud and the attorney-client communication as set forth in *BP Alaska*. (*BP Alaska, supra,* 199 Cal.App.3d at pp. 1262, 1268.)

In an era where corporate fraud and boardroom misconduct is front-page news as well as prosecutions of accountants and lawyers in connection with such conduct, our courts are required to ensure that the attorney-client privilege is not used to promote or further any such conduct.

DISPOSITION

The judgment is reversed.

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RUSHING, P.J.

WE CONCUR:

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WUNDERLICH, J.

_____
MIHARA, J.

Trial Court:	Santa Clara County Superior Court Superior Court No.: CV801411
Trial Judge:	The Honorable Thomas Cain
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