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***Amicus Curiae* Letter In Support of Petition for Review of *Angelin v. Brescia* filed
by Stallone and Arnold**

April 24, 2009

Chief Justice Ronald M. George & Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, California 94102-7303

Re: *Angelin v. Brescia*, Supreme Court No. S172243, Court of Appeal Case
No. B204003

Dear Chief Justice George & Associate Justices:

Pursuant to Rule 8.500 subd. (g)(1), I respectfully urge that the Court accept for review the petition from the opinion of the Second Appellate District, Division Four in *Angelin v. Brescia* (2009) 172 Cal.App.4th 133, 90 Cal.Rptr.3d 842 (“*Angelin*”). I wrote the *Los Angeles Daily Journal* article on this case cited in footnote 7 of the Petition for Review, entitled, “Is the Proof in the Pudding?”

The Interest of the *Amicus Curiae*

I have no legal or financial interest in this matter. My firm engages in trade secrets litigation and more often than not represents defendants who are departing executives or employees alleged to have misappropriated trade secrets. I do not represent directly or indirectly any of the parties to the appeal. I have no affiliation with any of the counsel of record or other counsel for any of the parties to the appeal. I have no similar case pending before any Court of Appeal or the Supreme Court. My interest is in this Court affirming the approach of the Court of Appeal in *Advanced Modular Sputtering, Inc. v. Superior Court* (2005) 132 Cal.App.4th 826, 835 (“*Sputtering*”) and reversing or modifying the judgment in *Angelin*.

Basis for Supporting the Petition for Review of Stallone and Arnold

Angelin v. Brescia omits as a requisite component of a trade secrets designation an element that goes back to the seminal opinion by Justice Shirley Hufstедler in *Diodes Inc. v. Franzen* (1968) 260 Cal.App.2nd 244, 251-252. That element is the requirement that the complainant describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade (“the prior art requirement”). I support the approach and rule of *Sputtering* over the approach and rule of *Angelin*. *Sputtering* follows, and *Angelin* departs from, a line of consistent rulings incorporating the prior art requirement. *Angelin* makes it easier for a plaintiff with a weak or sham case to press her case for a longer period of time and thereby impose greater costs on defendants and the trial courts before the case undergoes a legal stress test.

“The term ‘trade secret’ is one of the most elusive and difficult concepts in the law to define. (footnote).” (*Lear Siegler, Inc. v. Ark-Ell Springs, Inc.* (5th Cir. 1978) 569 F.2d 286, 288-289.) “Perhaps the most contentious issue in California trade secrets litigation is the plaintiff’s identification of its alleged trade secret. Trade secret law differs from copyright, trademark, and patent law in that no federal registration certificate defines the boundaries of the plaintiff’s intellectual property. Most of the time, trade secrets are defined only during litigation.” (L. Anderson, “Litigation Issues,” *Trade Secrets Practice in California*, 2nd ed. 2007, Sec. 11.21 at p. 404.)

The trade secrets identification statute, C.C.P. § 2019.210, is regarded as the codification of Justice Hufstедler’s opinion in *Diodes*. The statute is apparently unique to the California Uniform Trade Secrets Act; the UTSA has now been approved by 47 states. Other jurisdictions require identification of the trade secret with reasonable particularity but based upon case law rather than a particular statute. Some foreign jurisdictions require a distinction from prior art; some do not.

The construction of the statute is, therefore, of importance not only to litigants in California, but also to those in foreign jurisdictions, because of the UTSA’s provision that other jurisdictions’ case law on the subject be considered. (Civ. C. sec. 3426.8)

Angelin represents the tension between two competing areas of law:

1. the trade secrets act, which aims to provide remedies for theft of trade secrets, certainly a salutary goal; and
2. the renowned primacy given employee mobility in our state, as reflected in Bus. & Prof. Code § 16600.

Honest departing executives and employees need protection from misuse of the trade secrets act by plaintiffs who routinely evade identifying their trade secrets, sometimes by “hiding them in plain sight” and producing too many documents and, in other cases, producing too little information to identify them. Case law has applied the identification requirement so as to include the prior art requirement in California cases from *Diodes Inc.* in 1968 to *Sputtering* in 2005 and, in between, federal cases construing California law, such as *IMAX Corp. v. Cinema Technologies, Inc.* (9th Cir.1998) 152 F.3d 1161, 1166. *Angelin* does not explain why the Court is not following established precedent when it omits the prior art requirement. (The prior art requirement is what Judge Easterbrook pithily refers to as “Which aspects are known to the trade, and which are not?”) Even if this Court were to uphold *Angelin*, it would be helpful to litigants and the lower courts for the Supreme Court to explain why *stare decisis* was not being followed in this case.

The Court should reinstate the prior art requirement, because it is necessary to screen out sham cases at an early stage. The prior art requirement enables defendants to know what they are being charged with, which is a basic element of due process, and to enable defendants and the trial court to ascertain what discovery is appropriate during the discovery stage, rather than having to wait until trial. I further suggest that California should adopt the pleading approach of the federal courts recently modified in *Bell Atl. Corp. v. Twombly* (2007) 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (“*Twombly*”). *Twombly* requires plaintiffs to plead “enough facts to state a claim to relief that is plausible on its face.” (*Ibid.*) In *Twombly*, a section one, Sherman Act case, the court concluded: “Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.” (*Id.*; accord, *In re Gilead Sciences Securities Litigation* (9th Cir.2008) 536 F.3d 1049, 1055, quoting *Twombly*.)

My bias is showing. Some former employers have gotten departing employees dead to rights for garden variety theft of trade secrets that is no different than theft of tangible property. But a substantial number of cases in my experience appear to be ones which are brought on the slimmest reeds of evidence and with the intent to artificially raise the barriers to entry for defendants who seek to be competitors.

Such defendants, usually operating at a great financial disadvantage compared to their former employers, are forced to object to vague trade secrets designations, bring motions for a protective order against discovery by plaintiffs who do not adequately designate trade secrets, and, in the process, spend a great deal of money trying to find out just what they are being charged with. If the standard is loosened by taking out the prior art requirement, as *Angelin* provides, then the policy of section 16600 will be thwarted,

the proper and intended policy of the trade secrets act will be subverted, and it will be easier to bring sham trade secrets cases. The Court in *Sputtering* rightfully condemned the factual scenario in that case, which was over the top. The fact pattern in that case depicted a trade secrets designation process that dragged on for years, cost too much money, and overdid the reasonable particularity requirement. In response, the Court reversed, provided some guidance (limited by the technical nature of the secrets), and retained the prior art requirement.

It may seem that, as the court suggested in *Angelin*, simple products like pudding do not need that “more exacting level of particularity” which “may be required to distinguish the alleged trade secrets from matters already known to persons in that field.” Not so. The prior art requirement is critical to all trade secrets cases. *Angelin* gives no explanation why it is too much to ask a plaintiff to say, however simply, how his trade secret is different than prior art. Judge Highberger had it right. “So,” he said, “by its silence it’s doomed to failure, because there’s no attempt even to commence to describe why this formula is unique and not known to others. [¶] It just is a formula. Likewise, it is a cooking or manufacturing process of many steps [, s]ome of which apparently, according to matters of which I believe I can take judicial notice [,] are actually fairly familiar when you are trying to make a comparable product.” (*Angelin*, 172 Cal.App.4th at 142.) How would it impose an onerous burden on a plaintiff seeking to put someone out of business or out of work to say simply how the trade secret differs from prior art? It might take just a sentence or two, or perhaps a paragraph. That is not too much ask.

The Court of Appeal in *Angelin* is perhaps a bit naive when it says that courts can rely on the fact that “credible experts declare that they are capable of understanding the designation and of distinguishing the alleged trade secrets from information already known to persons in the field,” and that in such cases, “the designation should, as a general rule be considered adequate to permit discovery to commence.” (*Id.* at 146)(emphasis added.) These matters are heard on declaration, not by live testimony. So it is impossible to observe the demeanor of the experts and determine whether they are credible or not. (Compare Ev.C. § 780.) One need not be a cynic, moreover, to suggest that some experts can be bought and paid for and will say whatever you want them to say. A neutral principle of law, the prior art distinction, is necessary in order to protect departing executives and employees from unmeritorious cases that clutter the courts and seek to overpower persons of lesser financial stature by exploiting the opportunity to make vague claims of trade secrets misappropriation.

I agree with both *Sputtering* and *Angelin* when they say “the plaintiff must make some showing that is reasonable, i.e., fair, just and rational. . . .” (*Id.* at 145 (quoting *Sputtering* with approval)) But I think that the recent sea change in federal pleading resulting from the 2007 ruling of the United States Supreme Court in *Twombly*, which requires that a pleading be *plausible*, is the way to implement the above standard of “fair, just and rational.” In *Twombly*, the Supreme Court quoted with approval from Judge Easterbrook’s law review article on “Discovery as Abuse,” in which Judge Easterbrook explained how trial judges, despite being invested with the mission of regulating discovery, are in fact “doomed” to fail. (*Twombly, supra*, 550 U.S. at 560 & fn. 6, 127 S.Ct. at 1967 & fn.6.) In replacing the 50 year old rule of *Conley v. Gibson* (1957) 355 U.S. 41, 47, 78 S.Ct. 99, the Supreme Court discussed at length the great expense of a complex business litigation case, there an antitrust case alleging conscious parallelism as the basis for a claim of conspiracy under section one of the Sherman Act. (*Twombly, supra*, 550 U.S. at 557-559, 127 S.Ct. at 1966-1967). Here we have a similar situation, albeit on a smaller scale. Trade secrets litigation costs a lot of money. There is much discovery, now focusing on electronic discovery. Experts are retained. This Court should require a factual pleading and a factual trade secrets designation that meet the plausibility standard of *Twombly*. In that way the Court can best effectuate the *Sputtering/Angelin* standard of a showing that is “fair, just and rational.”

The Court of Appeal had reservations about the way this case was presented for review by appeal rather than writ. Nonetheless, the end result is a rare opportunity for an appellate court and, in particular, for this Supreme appellate court, to provide standards and guidance for applying those standards in the single most critical area of trade secrets law. Now would be an ideal time for this Court to address this issue. Employees rarely have the resources for Petitions on issues of this magnitude, limiting the opportunity for the Supreme Court to review issues with this level of importance.

Respectfully yours,

JASPER & JASPER, P.C.


STUART P. JASPER

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