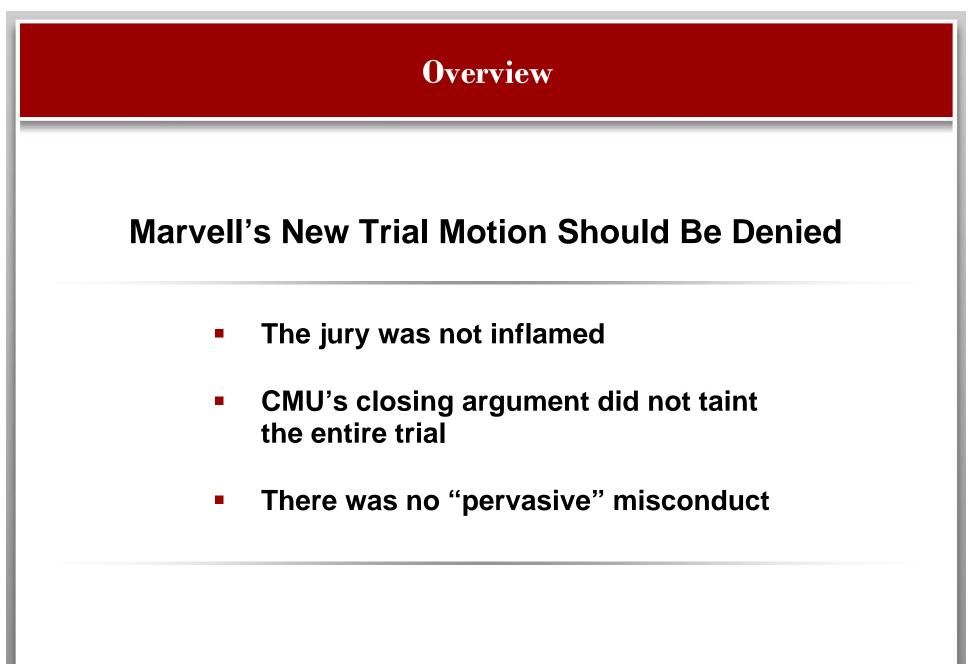
EXHIBIT E

Carnegie Mellon University's Presentation on Marvell's Motion for Mistrial – Dkt. 805

May 1 – 2, 2013









A new trial is warranted only where "the improper statements made it *reasonably probable* that the verdict was influenced by prejudicial statements."

Union Carbide Chem. & Plastics Corp. v. Shell Oil Co., 308 F.3d 1167, 1182 (Fed. Cir. 2002) (quoting Greenleaf v. Garlock, Inc., 174 F.3d 352, 363 (3d Cir. 1999))



The *entire record* should be considered and misconduct must "*extremely pervasive and egregious* before a new trial will be granted."

See Richmond v. Price, No. 99-192, 2006 WL 3760535 at *7 (W.D. Pa Dec. 18, 2006); see also Vandenbraak v. Alfieri, 209 Fed. Appx., 185, 189 (3d. Cir. 2006)



Three allegedly inflammatory statements during closing argument did "not approach the level of attorney misconduct found to prejudice the jury in our precedents."

See Greenleaf v. Garlock, Inc., 174 F.3d 352, 364 (3d Cir. 1999); United States v. Homer, 545 F.2d 864, 868 (3d Cir. 1976)



"[D]isapproval of portions of the closing is not enough to warrant reversal" because "at least for civil trial,... *improper comments during closing arguments rarely rise to the level of reversible error*."

Dunn v. Hovic, 1 F.3d 1371, 1377 (3d Cir. 1993)



"[T]he almost invariable assumption of the law [is] that jurors follow their instructions."

Shannon v. United States, 512 U.S. 573, 585 (1994)



"[O]ur system of justice, particularly in the civil context, ... relies upon the ability of the jury to follow instructions."

Johnson v. Elk Lake Sch. Dist., 283 F.3d 138, 148 (3d Cir. 2002) (internal quotations omitted)

CMU's closing argument did not taint the entire trial

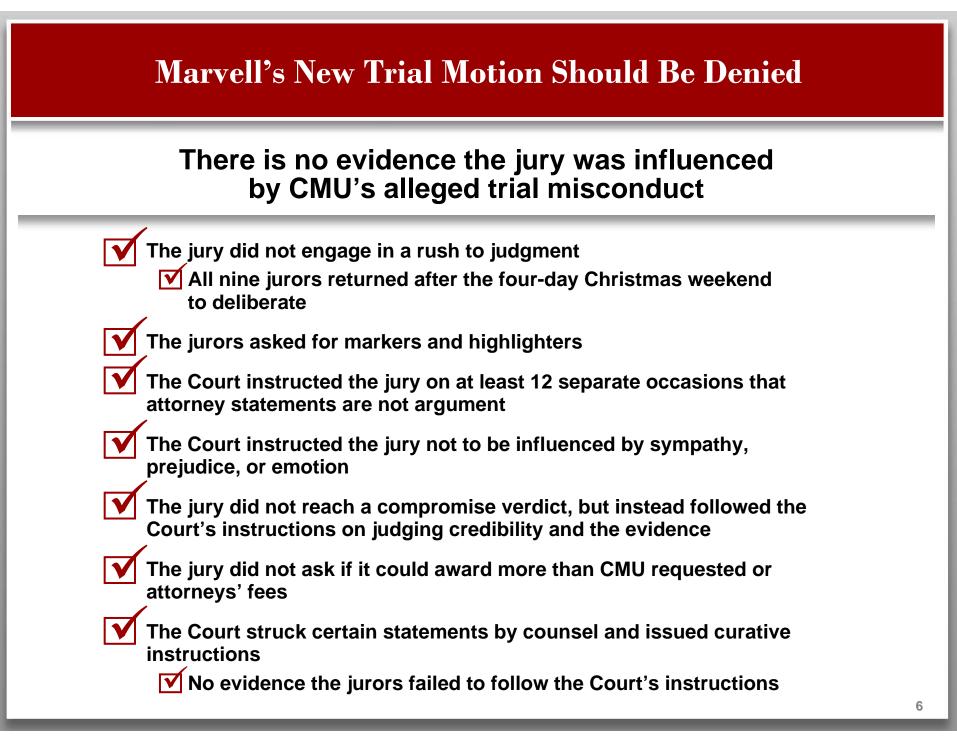
Marvell cannot show *any* reasonable probability that the verdict was influenced by three discreet (stricken) statements during closing

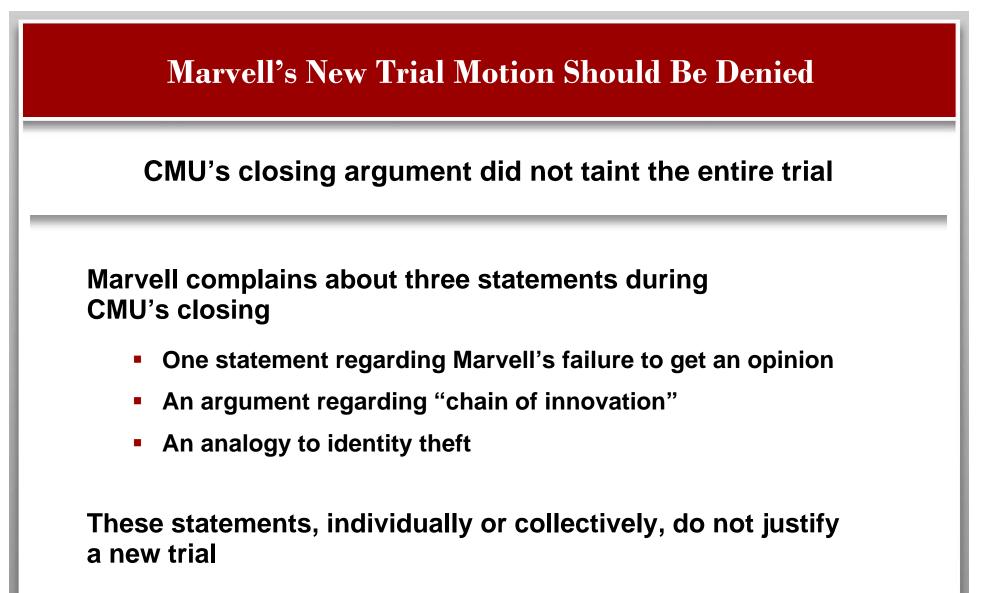


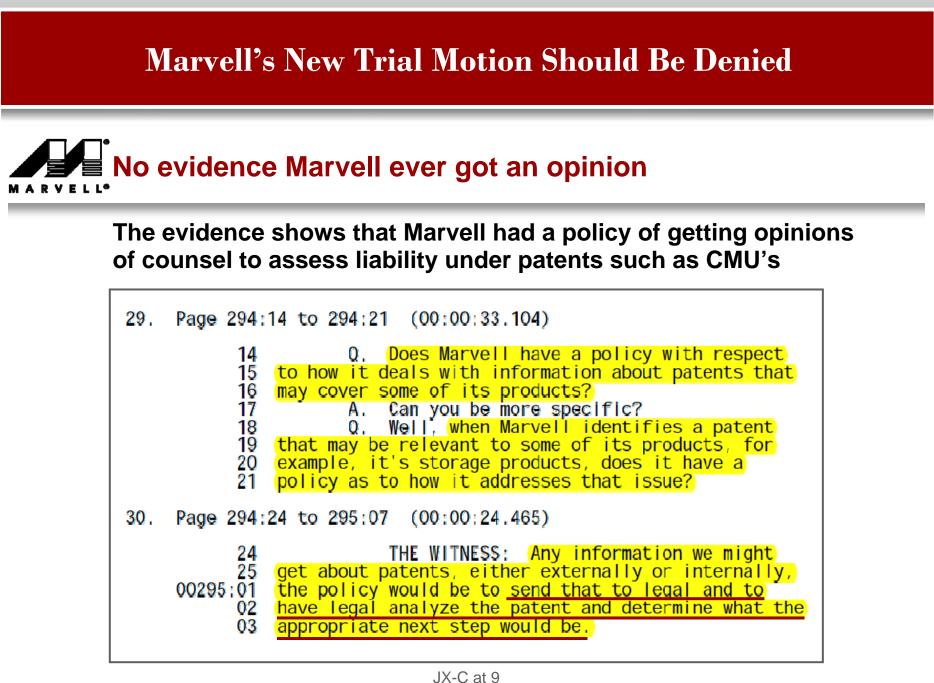
"The Third Circuit has repeatedly stated that a new trial is warranted only upon the showing that the verdict amounted from passion or prejudice, and yet the size of the award alone is not enough to prove prejudice and passion."

See Wade v. Colaner, CIV.A. 06-3715-FLW, 2010 WL 5479629 at *19 (D.N.J. Dec. 28, 2010)

 The jury's award of CMU's requested compensatory damages is not evidence it was inflamed







Marvell's New Trial Motion Should Be Denied No evidence Marvell ever got an opinion In fact, the Court reached precisely this conclusion: the substance of any communications with counsel")). Further, the facts presented at trial through the testimony of Dr. Wu do not establish that he received an opinion of counsel, favorable or unfavorable, with respect to these issues. He merely testified that the "prior art," i.e., the '180 Patent and the '839 Patent, was given to Marvell's patent counsel and that he later obtained his own patents (owned by a Marvell-entity). See 12/11/12 Transcript at 323; see also

Dkt. 753 at 2-3



Marvell's failure to get an opinion is relevant to (1) willfulness and (2) its intent to induce infringement



"Although an infringer's ... *failure to proffer any favorable advice*, is not dispositive of the willfulness inquiry, it *is crucial to the analysis*."

In re Seagate Tech., LLC, 497 F.3d 1360, 1369 (Fed. Cir. 2007) (en banc)



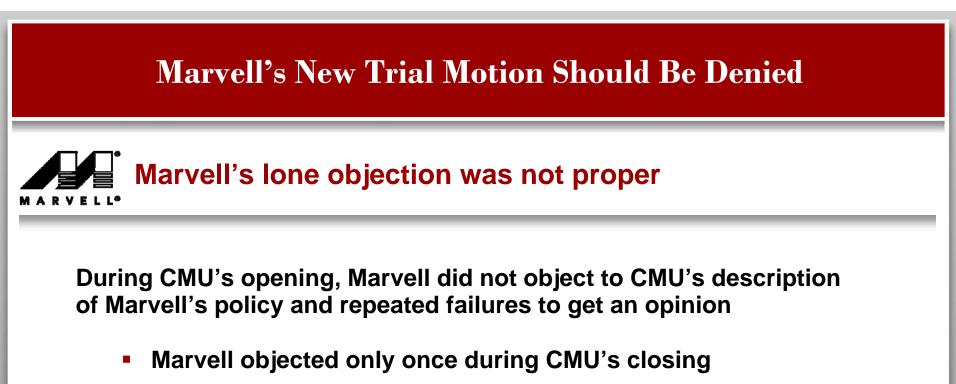
"[T]he failure to obtain an opinion of counsel or otherwise investigate the patent situation can be considered, in the totality of the circumstances."

Spectralytics, Inc. v. Cordis Corp., 649 F.3d 1336, 1348 (Fed. Cir. 2011); see also Aspex Eyewear, Inc. v. Clariti Eyewear, Inc., 605 F.3d 1305, 1313 (Fed. Cir. 2010); Retractable Techs. Inc. v. Becton, Dickenson & Co., 2:07-CV-250, 2009 WL 8725107 at *3-*4 (E.D. Tex. Oct. 8, 2009); Parker-Hannifin Corp. v. Wix Filtration Corp., 1:07 CV 1374, 2011 WL 976559 at *11-*12 (N.D. Ohio Mar. 17, 2011)



"Failure to procure an opinion can be circumstantial evidence of intent to infringe."

Broadcom Corp. v. Qualcomm, Inc., 543 F.3d 683, 699 (Fed. Cir. 2008)



- CMU never argued that:
 - Marvell had failed to disclose an unfavorable opinion
 - Had Marvell received an opinion it would have been unfavorable
- Instead, CMU argued only that Marvell secured no opinion of any kind





New trial *not* warranted where plaintiffs "*merely argued that the advice of counsel is one factor for consideration*" in determining whether infringement was willful and the jury was instructed that they could consider the absence of an opinion but not draw an inference that "the opinion would have been unfavorable."

Parker-Hannifin Corp. v. Wix Filtration Corp., 1:07 CV 1374, 2011 WL 976559, at *11-*12 (N.D. Ohio, Mar. 17, 2011) (citing *Broadcom v. Qualcomm*, 543 F.3d 683, 698 (Fed. Cir. 2004))

Here, the argument was stricken the one time Marvell objected

The evidence supported CMU's "chain of innovation" argument and did not run afoul of the Court's order

All of the DSSC Agreements required CMU to reinvest licensing proceeds into the DSSC "to sponsor further research"

application. In the event that the University decides to offer licenses under said Inventions to third parties, said licenses shall be royalty bearing, as decided by the University,

and said royalty income shall be utilized at the Center to

sponsor further research,

In the event that the University decides to offer licenses under said Inventions to third parties, said licenses shall be royalty bearing, as decided by the University, and said royalty shall be utilized at the Center to sponsor further research.

DX – 17 (IBM Agreement)

DX – 39 (Seagate Agreement)

10. The University may grant, on reasonable terms and conditions, non-sublicensable, non-exclusive licenses with entities not having an Associate Member status. Such licenses may be royalty bearing, and royalties derived therefrom shall be utilized to sponsor further research at the Center.

DX - 40 (IBM Agreement)

The evidence supported CMU's "chain of innovation" argument and did not run afoul of the Court's order

The required reinvestment of licensing proceeds represents the "economic circumstances of CMU and the DSSC at the time of the hypothetical negotiation"

IT IS FURTHER ORDERED that Marvell's Motion is granted to the extent that CMU is

precluded from introducing evidence or argument at trial of the prospective harms to CMU (as

set forth in pages 377-79 of Ms. Lawton's expert report) as a result of the alleged failure of

Marvell to enter into a license for the patents-in-suit; and,

IT IS FURTHER ORDERED that Marvell's Motion is denied to the extent that it seeks a

pretrial order precluding all evidence of the economic circumstances of CMU and the DSSC at

the time of the hypothetical negotiation.





The Court cured the harm (if any) by striking the statement and properly instructing the jury about attorney argument

Vandenbraak v. Alfiere, 20 Fed. Appx. 185, 190 (3d Cir. 2006); *Forrest v. Beloit Corp.,* 424 F.3d 344, 352 (3d Cir. 2005)

The Court cured the harm (if any) arising from CMU's identity theft analogy



"Golden rule" arguments are "*rendered harmless either by* an immediate curative instruction" *or by* a "complete final instruction to the jury concerning its proper role in the determination of liability and damages."

Edwards v. City of Phila., 860 F.2d 568, 574 (3d Cir. 1988) (even where *no* immediate curative instruction was given, any prejudice was sufficiently negated by final instructions that jurors must perform their duties without bias or prejudice, only evidence should be considered, and counsel's statements are not evidence)

Here, the Court:

(1) immediately told the jury to disregard the argument, and

(2) properly instructed the jury of its responsibilities in the same manner as *Edwards*

12/20/12 Tr. at 169:20-21 (striking argument); 12/21/12 Tr. at 46:9-11 ("Do not let any bias, sympathy or prejudice ... influence your decision in any way"); *id.* at 54:18 -20 (instructing the jury that "you may only consider evidence" and that attorney statements and argument are not evidence); *id.* at 55:25-56:8

There was no "pervasive" misconduct

Marvell attempted to manufacture (alleged) "pervasive" misconduct – asserting that CMU misused the word "billion" and improperly referenced CMU's presence in "Pittsburgh"



Marvell did not raise these arguments in its initial motion and knowingly waived them

See Murray v. Fairbanks Morse, 610 F. 2d 149, 152 (3d Cir. 1979); see also Bedrock Stone and Stuff, Inc. v. Manufacturers and Traders Trust Co., No. Civ.A. 04-CV-02101, 2006 WL 890993, at *5, *10 (E.D. Pa. March 31, 2006)

Marvell's New Trial Motion Should Be Denied
Marvell's (waived) "billions" argument is baseless
It was Marvell that tried to use the term "billions" to its advantage
61 Number of times Marvell referred to "billions" of dollars or chips
51 Number of times CMU referred to "billions" of dollars or chips
13 Number of times Marvell referred to "billions of dollars" in closing
0 Number of times CMU referred to "billions of dollars" in closing
0 Number of times Marvell objected to CMU's reference to "billions" of chips or dollars during CMU's opening
0 Number of times Marvell objected to CMU's reference to "billions of chips" during CMU's closing



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