

**Marvell's Post-Trial Motion for JMOL or, in the
Alternative, New Trial on Non-Damages Issues
(MISTRIAL PORTION)
[Dkt. 806]**

May 1-2, 2013

**United States District Court
Western District of Pennsylvania
Civ. No. 2:09-cv-00290-NBF**

**Marvell Technology Group, Ltd.
Marvell Semiconductor, Inc.**

CMU's Misconduct Mandates a New Trial

- CMU Repeatedly Violated This Court's Clear And Unambiguous Orders In Its Arguments To The Jury
- CMU's Arguments Were Legally Impermissible
- CMU's Arguments Were Completely Contrary To The Evidence
- CMU Improperly Argued:
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 - The Jury Should Make An Adverse Inference From Marvell's Invocation Of The Attorney/Client Privilege And Attorney Work Product Doctrine
 - The Jury Should Award Damages So CMU Could Continue Doing Good Deeds For Pittsburgh, And To Punish Marvell
 - Imagining That They Themselves Were The Victims Of Identity Theft Would Assist The Jury In Their Deliberation
- CMU's Misconduct Was Pervasive And Egregious
- It Is Reasonably Probable—indeed, Likely--that CMU's Misconduct Influenced The Jury's Verdict

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Marvell Had An Internal Policy That Required A Written Legal Opinion Regarding CMU's Patents

12 So, what did Marvell do after it learned of the CMU
13 patent? Well, the evidence in this case is going to show that
14 Marvell actually has a policy about what to do in these
15 circumstances, and that policy requires it to consult with an
16 attorney, and say, to determine whether what they are about to
17 build is going to violate this patent that they have now been
18 given notice of. The evidence will show that Marvell violated
19 this policy, not just once, but at least twice, including with
20 a letter from one of its customers saying, asking
21 specifically, asking Marvell for an opinion, specifically
22 identifying the CMU patents, and specifically identifying two
23 of the accused chips, and saying, please give us an opinion
24 that this is okay. Marvell ignored its own rules, and they
25 never bothered to ask a lawyer whether it could build the MNP
1 and NLD circuits into billions of chips without infringing on
2 CMU's patents.

11/28/12 Tr. (CMU Opening) at 116:12 – 117:2

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14 After Marvell learns about this patent, they begin
15 violating a real policy that they really do have, which is
16 when there's a possibility that you are infringing, a
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18 you're supposed to get an opinion from legal counsel to see if
19 they're okay. You never saw such an opinion in this case.
20 You can go through all the exhibits; you won't find an opinion
21 from anybody either inside of Marvell or outside of Marvell
22 saying: Don't worry, you don't infringe.

23 Here's the policy from Alan Armstrong, who was
24 Marvell's designee on this topic. He said send it to legal to
25 determine what the appropriate next steps would be. They
1 never did this.

12/20/12 Tr. (CMU Closing) at 140:14-141:1

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16 in our chips and let us show you our lab notebooks. They do
17 nothing. They also don't get an opinion of counsel. They
18 don't do what their company policy says they should do.
19 Again, they don't get an opinion of counsel. They just ignore
20 it.

21 MR. MADISON: Your Honor, I object based on the
22 court's order.

23 THE COURT: Sustained.

12/20/12 Tr. at 142:16-23

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12/20/12 Tr. (CMU Closing) at 140:14-141:1

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Q. Does Marvell have a policy with respect to how it deals with information about patents that may cover some of its products?

A. Can you be more specific?

Q. Well, when Marvell identifies a patent that may be relevant to some of its products, for example, it's storage products, does it have a policy as to how it addresses that issue?

A. Any information we might get about patents, either externally or internally, ***the policy would be to send that to legal and to have legal analyze the patent and determine what the appropriate next step would be.***

12/5/12 Tr. at 252:2-4 (Dep. Clip: 6/23/10 Armstrong Dep. at 294:14-295:18)

Marvell Had Failed To Obtain A Written Legal Opinion Regarding CMU's Patents

Q. Okay. Back in 2002 when you became aware of Dr. Kavcic's patent, did you review the patent at that time?

A. *I reviewed the patent with our internal patent attorney.*

Q. At Marvell?

A. At Marvell.

Q. And who was that?

THE COURT: Dr. Wu, let me instruct you, to the extent that you talked to the attorney about the patent, ***anything that relates to your communications with the attorney, or his or her to you, is privileged, and you can't talk about it.***

Q. So, you can provide the name of the person?

A. Mr. Eric Janofsky.

12/11/12 Tr. (Wu) at 323:9-24

Marvell Had Failed To Obtain A Written Legal Opinion Regarding CMU's Patents

3 BY MR. GREENSWAG:

4 Q. Thank you.

5 Now, when you first learned of
6 Dr. Kavcic's patent, what did you do?

7 MR. RADULESCU: I'll object as to form,
8 and I'll just caution you not to reveal the
9 substance of any attorney-client privileged
10 communications in connection with responding to the
11 question.

12 THE WITNESS: I reviewed it under the
13 supervision of our patent lawyer.

14 BY MR. GREENSWAG:

15 Q. Was that an in-house attorney --

16 A. Someone --

17 Q. -- or someone outside of Marvell?

18 A. In-house attorney.

19 Q. Did you ever have occasion to review --

20 A. Uh-huh.

21 Q. -- Dr. Kavcic's patent with outside
22 counsel? It's just a "yes" or "no" question.

23 A. No.

7/28/10 Dep. Tr. (Wu) at 23:3-23

Marvell Had Failed To Obtain A Written Legal Opinion Regarding CMU's Patents

5 THE COURT: How about when Mr. Burd sent around an
6 e-mail saying: Hey, this is patented?
7 THE WITNESS: He didn't send to me.
8 THE COURT: He did not send it to you; I heard you
9 say that. And you had no idea — you didn't hear that
10 discussed —
11 THE WITNESS: I didn't.
12 THE COURT: — in your team meetings, cubicle to
13 cubicle.
14 THE WITNESS: The next time it's brought up to me is
15 from our attorney, from Eric Janofsky.
16 THE COURT: Okay, when was that?
17 THE WITNESS: 2002 sometime.
18 THE COURT: 2002 sometime.
19 THE WITNESS: Yeah.
20 THE COURT: Okay. With Eric — so Eric brought it
21 up; and then what?
22 THE WITNESS: So we review it and —
23 THE COURT: And here we are today, how many years
24 later, right? Is this —
25 THE WITNESS: Exactly.

12/13/12 Tr. (Wu *In Camera*) at 67:5-25

Marvell Had Failed To Obtain A Written Legal Opinion Regarding CMU's Patents

21 MR. JOHNSON: Dr. Wu, back in 2002, 2003, did you
22 come to any conclusions about Dr. Kavcic's patents separately
23 from your — any consultation you had with Marvell's in-house
24 lawyer?
25 THE WITNESS: The conclusion basically was formed
1 with our patent — in-house patent lawyer.
2 MR. JOHNSON: Okay. And did you review Dr. Kavcic's
3 patents under the supervision of Marvell's patent lawyer?
4 THE WITNESS: Yes.
5 MR. JOHNSON: And who was that?
6 THE WITNESS: Eric Janofsky.
7 MR. McELHINNY: Your Honor, before we go further
8 here, they did assert a privilege with respect to
9 conversations with Mr. Janofsky and there is a shield issue to
10 the extent Marvell is going to argue anything related to that.
11 So I wanted to make sure we weren't waiving that. We are
12 actually probably going to put together a motion on that
13 front.

12/13/12 Tr. (Wu *In Camera*) at 73:21-74:13

Marvell Had Failed To Obtain A Written Legal Opinion Regarding CMU's Patents

1 THE COURT: Mr. Greenswag, why don't you narrow it
2 up in time.

3 Q. In January, 2002, you kept going with your MNP
4 development; isn't that true, sir?

5 A. Yes, this is correct.

6 Q. And you hadn't read the claims?

7 A. I have submitted this report to my, to my superiors,
8 and you know, we also forwarded the --

9 Q. Just a minute.

10 A. -- the application and the references to Kavcic patent
11 to our counsel, internal patent counsel, right, with clear
12 evidence --

13 MR. GREENSWAG: Your Honor. Sidebar, Your Honor.

14 A. -- that the patent was cited.

15 THE COURT: We're going to take another sidebar.

12/17/12 Tr. (Burd) at 170:1-15

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THE COURT: I read that. Where are we going Mr. Johnson, Mr. DeFranco, Mr. Laufman on this?

MR. JOHNSON: I don't have any further questions.

Id. at 74:7-74:23.

III. ARGUMENT

Prior to trial, Marvell prevented CMU from learning about Marvell's consultations with counsel relating to the CMU patents-in-suit, routinely asserting attorney-client privilege and work product protection. Of course, it was Marvell's prerogative either to preserve privilege or

Neither the Court nor the jury will ever know the actual nature of Dr. Wu's consultations with counsel because Marvell made the strategic decision to withhold it from discovery.

be precluded from referring to any consultations with counsel and from arguing that it acted reasonably and with a good faith belief that the CMU patents were invalid and/or not infringed.

Allowing such argument would be highly prejudicial to CMU because it would permit Marvell to suggest to the jury that it acted reasonably when the opposite could be true. Among other things, counsel could have advised Dr. Wu that the CMU patents were valid and that Marvell's products infringed those patents. Neither the Court nor the jury will ever know the actual nature of Dr. Wu's consultations with counsel because Marvell made the strategic decision to withhold it from discovery. Avoiding prejudice and preventing Marvell from taking unfair advantage of its strategic decision is the purpose of this Motion *in Limine*. As a matter of law, all testimony about communications with counsel relating to the CMU patents should be stricken

CMU's Brief On Its MIL To Strike Testimony And To Preclude Argument Relating To Marvell's Pre-suit Communications With Counsel About The Patents-In-Suit at p. 6 (Dkt. 723)

11 MR. GREENSWAG: I have jumped the gun.

12 Mr. Burd should not be talking about communications
13 with lawyers. We have statements on the record by Marvell
14 counsel in the form of Mr. Radulescu who said: We're not
15 going to be asserting an advice of counsel defense.

16 THE COURT: Right, that's what I heard all the way
17 along in this case.

18 MR. GREENSWAG: And, Your Honor, the sword/shield
19 doctrine is essentially that the content -- the fact of
20 consultation with counsel is utterly irrelevant to anything
21 without information about the content. And, as we know,

12/17/12 Tr. (Greenswag) at 18:11-21

9 And, frankly, the reason why we are in the process
10 of pulling this motion together was to prevent Marvell from
11 arguing that in closing. We didn't really expect that they
12 would try to get this evidence in through the back door with
13 Mr. Burd; and now it seems like we're going to try to sneak it
14 in that way as well.

15 So Mr. Burd should not be permitted to talk about
16 the file history, should not be permitted to talk about
17 consultations with counsel regarding prosecution of the
18 patent, none of that; you know, none of that is relevant
19 without having had full disclosure.

12/17/12 Tr. (Greenswag) at 20:9-19

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CMU's Motion is denied to the extent that CMU seeks to strike the testimony of Dr. Wu.

MARVELL TECHNOLOGY GROUP, LTD.)
et al.,)
Civil Action No. 09-290
Judge Nora Barry Fischer

However, CMU's Motion is granted to the extent that CMU seeks to preclude Marvell from arguing that it sought an opinion of counsel and obtained a favorable opinion of counsel

argument from counsel on December 18, 2012, (Docket No. [736]), IT IS HEREBY ORDERED that Plaintiff CMU's Motion [714] is GRANTED IN PART and DENIED IN PART.

Federal Circuit precedent provides that it is improper for the jury to be instructed that it may draw an adverse inference from Marvell's failure to obtain an opinion of counsel or to not rely upon such an opinion at trial.

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25 determine what the appropriate next steps would be. They
1 never did this.

12/20/12 Tr. (CMU Closing) at 140:14-141:1

Mr. Madison: Your Honor, I object based on the court's order.

The Court: Sustained.

12/20/12 Tr. at 142:21-23

The Court: I think the argument went overboard in light of the Court's rulings, one. Number two, as everyone knew from the last few days of proceedings in this case and certainly should have known at the outset of this case, this issue of advice of counsel was a sore point from beginning to end; and to the extent that CMU intended to raise this specter in their closing arguments, it should have been previewed with the Court. There was an opportunity here, the Court asked were there slides, et cetera, as there have been throughout this; there was an objection to showing each other slides and the like. So here we are.

Judge Fischer, 12/20/12 Tr. at 225:22 – 226:8

Mr. McElhinny: And that's what Mr. Greenswag said.

The Court: **No, he went beyond that. He basically invited the jurors to go through all of the exhibits and go looking for a written opinion.**

12/20/12 Tr. at 227:16 – 19

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13 And what Marvell did was they broke the chain of
14 innovation by not paying the royalties that they now owe. All
15 these years CMU should have been getting royalties, as the --
16 for the purpose as shown in this 1983 agreement, to fund
17 further research, to lead to further innovation, to fund
18 further research, to lead to further innovation. This is why
19 CMU has been damaged by Marvell's infringement.

20 Don't allow Marvell to break that chain. The
21 actions of Marvell and the steps they took can be summed up --
22 MR. MADISON: Excuse me, Mr. Greenswag; side bar.

12/20/12 Tr. (CMU Closing) at 149:13-22

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seeds at the conclusion of a harvest. *Id.* at 976. The Federal Circuit commented that the consequent reputational harm to Monsanto caused by McFarling's infringement derived from McFarling's planting of the patented seeds in subsequent years without first renewing his license to use them. *Id.* at 979. The Court noted that Monsanto's experts believed that this action by McFarling damaged Monsanto's reputation among its other farmer-licensees which dutifully followed the license and destroyed the seeds at the conclusion of each year's harvest. *Id.* This

the Court will grant Marvell's motion to exclude the evidence of alleged damage to CMU's reputation and standing in the university community as such evidence is not relevant to the hypothetical negotiation, *see* FED. R. EVID. 401 and, if presented at trial, will only tend to confuse the issues and mislead the jury, *see* FED. R. EVID. 403.

evidence to counter Marvell's position that CMU's damages are unreasonable by pointing out that its damages case is twice the size of its endowment. (Docket Nos. 524, 570). CMU has not filed a corresponding motion in limine to exclude Marvell from presenting this evidence at trial (*see* Civ. A. No. 09-290, Docket Report), and Marvell's counsel has proffered that it will not introduce such evidence as trial in order to prevent CMU from possibly putting forth the "harm"

7

11/6/12 Court Order on MIL D12

7 Carnegie Mellon is a great story. It's a great story
8 both in the annals of higher education in America, in the
9 world, and it's a great Pittsburgh story.

11/28/12 Tr. (Cohon) at 187:7-9

3 A When I say it's a great Pittsburgh story, what I have
4 in mind when I say that is the values of Carnegie Mellon, the
5 values on which the university is based. And there are really
6 three, and everybody at Carnegie Mellon knows what they are.
7 They are commitment to hard work, they are commitment
8 to solving real world problems, and a commitment to working
9 together. And the thing I love best about that is that's a

11/28/12 Tr. (Cohon) at 188:3-9

9 And the thing I love best about that is that's a
10 wonderful reflection on what Pittsburgh is. So, in that
11 sense, we're a great local success story of a university based
12 on Pittsburgh values which has become a world leader.

11/28/12 Tr. (Cohon) at 188:9-12

1 You know, we have become quite a global university.
2 Pittsburgh -- and here I mean devoting ourselves to job
3 creation, especially in Pittsburgh; not just jobs at Carnegie
4 Mellon University, but local jobs based on the technology that
5 we invent at Carnegie Mellon University. And of that one
6 we've been especially successful there.

11/28/12 Tr. (Cohon) at 189:1-6

12 THE WITNESS: And I'll wrap it right up.

13 And the final thing is the financial strength of the
14 university. And this one, it's important to appreciate that
15 like almost every not-for-profit university in America we do
16 two things teaching research.

11/28/12 Tr. (Cohon) at 189:12-16

7 Let's go back to 1983, when the DSSC gets started.
8 And CMU -- you heard from Dr. Kryder. Their mission was to
9 help save the hard disk drive industry for the United States,
10 and they did it; and it helped return industry and jobs right
11 here.

12/20/12 Tr. (CMU Closing) at 148:7-11

7 back in, used, and the like. And so to that end, it does
8 become speculative on the record. You've got to argue your
9 closing based on the record, and --

12/20/12 Tr. at 161:7-9

25 There's been no testimony from Kryder, Wooldridge,
1 Jerry Cohon that the fact that Marvell didn't pay a license
2 fee back in 2001 thereon had an impact on the DSSC. There's
3 no direct link. So to that end, that part of your argument is
4 going to be stricken.

12/20/12 Tr. at 161:25-162:4

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 - **Imagining That They Themselves Were The Victims Of Identity Theft Would Assist The Jury In Their Deliberation**
- CMU's Misconduct Was Pervasive And Egregious
- It Is Reasonably Probable—indeed, Likely--that CMU's Misconduct Influenced The Jury's Verdict

21 So, I think I've got an analogy to help you as you
22 deliberate. The invention in this case is like your
23 electronic identity, your credit card numbers, your Social
24 Security number. It's that which are very personal and
25 valuable to you. You devote years to building up your
1 reputation, your credit rating, your standing. One day
2 Marvell sneaks in --

12/20/12 Tr. (CMU Closing) at 167:21-168:4

CMU Improperly Argued: CMU's Misconduct Was Pervasive And Egregious

- Violated this Court's 11/6/12 Order on MIL D12 (Dkt. 608)
- No testimony about this argument
- No nexus to the reasonable royalty
- Violates the golden rule

“I am going to sustain the objection, I am going to strike the argument. **You cannot put this jury in the “Victim’s shoes.” That’s horn book law.”**”

Judge Fischer, 12/20/12 Tr. at 169:15-21

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CMU Improperly Argued: CMU's Misconduct Was Pervasive And Egregious

Re: Opinion of Counsel

21 MR. MADISON: Your Honor, I object based on the
22 court's order.
23 THE COURT: Sustained.

12/20/12 Tr. at 142:21-23

Re: Chain of Innovation

15 THE COURT: Thank you, Mr. Galovich and Ms. Hall.
16 Ladies and gentlemen of the jury, this past argument
17 that you've just heard from Mr. Greenswag about breaking the
18 chain of innovation, that is stricken by the Court. You are
19 to disregard that argument.

12/20/12 Tr. at 167:15-19

Re: Identity Theft

15 THE COURT: I'm going to sustain the objection, I'm
16 going to strike the argument. You cannot put this jury in
17 the, quote, victim's shoes. That's horn book law.

12/20/12 Tr. at 169:15-17

CMU Improperly Argued: CMU's Misconduct Was Pervasive And Egregious

- During the testimony of Dr. Kavcic, CMU admitted that they unilaterally decided to use a previously withdrawn, objectionable, demonstrative slide without warning or notice to Marvell counsel, forcing the Court to admonish CMU counsel for its “stunt” and warning the parties to “give each other fair warning [and] to give [the Court] fair warning.”

11/30/12 Trial Tr. (Kavcic) at 196:1-207:7

- CMU ultimately admitted to this “stunt” but the damage was done:

Mr. Greenswag:

“I mean I did it. I made the choice. I’m not going to say anybody else did it. If you want to get mad at somebody, get mad at me; I did it. I didn’t say: Oh, I better turn it over. I’m not going to try to play some game here.”

Id. at 204:17-21

Mr. Greenswag:

“I’ll be candid. Because I didn’t think about it until after lunch. I said: Hey, I’m going to do this. I’m not making this up. I did it; all right?”

Id. at 205:12-14

Mr. Greenswag:

Your Honor, I’ve got nothing to add. I admit it was me. Did it. I thought: Hey, it’s here, I’ll – I’ll have him be able to illustrate. I mean I could have had him draw it, I guess, and that would have been just fine. Mr. Johnson: No, it wouldn’t.”

Id. at 206:2-7

CMU Improperly Argued: CMU's Misconduct Was Pervasive And Egregious

MS. LAWTON: Those factors related to Marvell's tax strategy and by using MAPL as a foundry.

MS. GAY: Objection, Your Honor.

THE COURT: Side bar.

(At side bar.)

THE COURT: Okay. Mr. McElhinny, she got it back to business and what her expertise might be about talking about the cost of the chips, **but why are we getting into taxes now?** That's going to open a big kettle of fish.

12/7/12 Tr. at 232:1-9

THE COURT: Well, relative to the tax question, it's objectionable. I so ruled; it's out.

...

(In open court.)

MR. MCELHINNY: Your honor, I'll withdraw the **question relating to Marvell's tax issues.**

Id. at 234:12-13

THE COURT: After returning to the lectern, **I was surprised and disappointed** to hear Mr. McElhinny say, and I, quote, quote, Your Honor, I'll withdraw the question relating to Marvell's tax issues, period, end quote. **The comment by Mr. McElhinny and the reference by Miss Lawton were highly improper."**

12/10/12 Tr. at 9:20-25

CMU Improperly Argued: CMU's Misconduct Was Pervasive And Egregious

- Starting during CMU's opening statement, the Court admonished CMU to "[s]tay away from the boogieman argument" after its attorneys inappropriately injected statements more appropriate for a closing arguments."

11/28/12 Trial Tr. at 129:6-7.

- Furthermore, as a sign of things to come, the Court was forced to issue a limiting instruction to compensate for the prejudice suffered by Marvell and remind the jury that opening statements are not evidence:

THE COURT: Just let me remind you that we are in the phase of opening statements. This is a guide to what the evidence may be. Also remind you of my preliminary instructions. Things can change during the course of a trial. So, we're going to let Mr. Greenswag finish up here, and then, he'll finish his opening statement, and both as to his opening statement and Marvell's opening statement, that will be given by Mr. Madison, same rule applies. These opening statements are not evidence. I'm sure, everybody is nodding over there, you've heard this Judge say that now what, three, four times. We've got it; right?

Id. at 129:21-130:7

CMU Improperly Argued: CMU's Misconduct Was Pervasive And Egregious



		Violates Court Order	Contrary to Evidence
"After Marvell learns about this patent, they begin violating a real policy that they really do have..."	12/20/12 Tr. at 140:14-15	✓	✓
"you're supposed to get an opinion from legal counsel... You never saw such an opinion in this case."	12/20/12 Tr. at 140:18-19	✓	✓
"You can go through all the exhibits; you won't find an opinion from anybody either inside of Marvell or outside of Marvell saying: Don't worry, you don't infringe."	12/20/12 Tr. at 140:20-22	✓	✓
"He said send it to legal to determine what the appropriate next steps would be. They never did this"	12/20/12 Tr. at 140:24-141:1	✓	✓
"They do nothing. They also don't get an opinion of counsel."	12/20/12 Tr. at 142:16-17	✓	✓
"They don't do what their company policy says they should do."	12/20/12 Tr. at 142:17-18	✓	✓
"Again, they don't get an opinion of counsel."	12/20/12 Tr. at 142:19	✓	✓
"...jobs right here"	12/20/12 Tr. at 148:10-11	✓	✓
"And what Marvell did was they broke the chain of innovation by not paying the royalties..."	12/20/12 Tr. at 149:13-14	✓	✓
"...to fund further research, to lead to further innovation, to fund further research, to lead to further innovation."	12/20/12 Tr. at 149:16-18	✓	✓
"Don't allow Marvell to break that chain."	12/20/12 Tr. at 149:20	✓	✓
"The invention in this case is like your electronic identity, your credit card numbers, your Social Security number. It's that which are very personal and valuable to you."	12/20/12 Tr. at 167:22-25	✓	✓
"You devote years to building up your reputation, your credit rating, your standing. One day Marvell sneaks in - -"	12/20/12 Tr. at 167:25-168:2	✓	✓

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CEO and Co-Chairman of the Board,
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Gregory Burd
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CMU's Closing Demo at 135