EXHIBIT E

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

May 1 – 2, 2013

Carnegie Mellon

Overview

Marvell's New Trial Motion Should Be Denied

- **The jury was not inflamed**
- **CMU's closing argument did not taint the entire trial**
- **There was no "pervasive" misconduct**

Marvell's New Trial Motion Should Be Denied

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)

Marvell's New Trial Motion Should Be Denied

"[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)

Marvell's New Trial Motion Should Be Denied

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

There is no evidence the jury was influenced by CMU's alleged trial misconduct

- ☑ The jury did not engage in a rush to judgment
  - ☑ All nine jurors returned after the four-day Christmas weekend to deliberate
- ☑ The jurors asked for markers and highlighters
- ☑ The Court instructed the jury on at least 12 separate occasions that attorney statements are not argument
- ☑ The Court instructed the jury not to be influenced by sympathy, prejudice, or emotion
- ☑ The jury did not reach a compromise verdict, but instead followed the Court's instructions on judging credibility and the evidence
- ☑ The jury did not ask if it could award more than CMU requested or attorneys' fees
- ☑ The Court struck certain statements by counsel and issued curative instructions
  - ☑ No evidence the jurors failed to follow the Court's instructions

Marvell's New Trial Motion Should Be Denied

CMU's closing argument did not taint the entire trial

Marvell complains about three statements during CMU's closing

- **One statement regarding Marvell's failure to get an opinion**
- **An argument regarding "chain of innovation"**
- **An analogy to identity theft**

These statements, individually or collectively, do not justify a new trial

Marvell's New Trial Motion Should Be Denied

No evidence Marvell ever got an opinion

The evidence shows that Marvell had a policy of getting opinions of counsel to assess liability under patents such as CMU's

29. Page 294:14 to 294:21 (00:00:33.104)

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?

30. Page 294:24 to 295:07 (00:00:24.465)

THE WITNESS: 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.

JX-C at 9

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 New Trial Motion Should Be Denied

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)

Marvell's New Trial Motion Should Be Denied

Marvell's lone objection was not proper

During CMU's opening, Marvell did not object to CMU's description of Marvell's policy and repeated failures to get an opinion

- **Marvell objected only once during CMU's closing**
- **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**

Marvell's New Trial Motion Should Be Denied

Even if Marvell's lone objection was proper, no new trial is warranted

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

Marvell's New Trial Motion Should Be Denied

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.

DX – 17 (IBM Agreement)

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 – 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)

Marvell's New Trial Motion Should Be Denied

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.

Dkt. 608 at 8

Marvell's New Trial Motion Should Be Denied

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

- **CMU was entitled to argue its view of how these DSSC Agreements impacted the hypothetical negotiation**
- **Marvell's expert relied on these same DSSC Agreements to opine that CMU would have been satisfied with a one-time royalty payment of $250,000**

> Q. I asked you, or you answered, I've tried to do -- I've not tried to do an apportionment because my opinion is based on a lump sum, which I thought would be appropriate. So I've not undertaken to do that. Question, the lump sum, $250,000 from the DSSC agreement? That's correct.
>
> That was your testimony; correct?
>
> A. Yes.

12/12/12 Tr. at 283:15-21

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)

Marvell's New Trial Motion Should Be Denied

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

Marvell's New Trial Motion Should Be Denied

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

Marvell's New Trial Motion Should Be Denied

Marvell's (waived) "Pittsburgh" argument is baseless

Marvell's citation to Dr. Cohon's reference to Pittsburgh is an act of desperation

- **Dr. Cohon praised Marvell during his testimony**
- **CMU never mentioned "Pittsburgh" during closing**
- **CMU never mentioned Marvell's Bermuda domicile during closing**
- **It was Marvell that sought to bias the jury against Dr. Cohon and CMU based on location**

> You know, in front of the Supreme Court there's a sign that says equal justice under the law. That's what this public justice system of ours is all about. And so I know that as you hear the evidence, that we have an equal footing with CMU, even though we're headquartered in Silicon Valley and they're a local institution that you may have heard about,

11/28/12 Tr. at 142:20-25

> They're also -- and there was another initiative of Dr. Cohon's. They're in the Middle East, in one of the Arab states, a place called Qatar that there is a campus of CMU. And there are graduate programs all over the world, so in Asia, Australia, Europe, Latin America.

11/28/12 Tr. at 146:8-12

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