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

CARNEGIE MELLON UNIVERSITY, Plaintiff, v. MARVELL TECHNOLOGY GROUP, LTD., and MARVELL SEMICONDUCTOR, INC., Defendants.	))))))))))	Civil Action No. 2:09-cv-00290-NBF

PLAINTIFF CARNEGIE MELLON UNIVERSITY'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO SEAL AND FOR LEAVE TO FILE CERTAIN SLIDES AND PHOTOGRAPHS USED BY THE PARTIES DURING TRIAL UNDER SEAL

I. INTRODUCTION

Marvell Technology Group, Ltd. ("MTGL") is a publicly traded company that conducts much of its business through its U.S. operating subsidiary, Marvell Semiconductor, Inc. ("MSI") (collectively, "Marvell"). The jury's verdict in favor of Carnegie Mellon University ("CMU") finding Marvell responsible for a decade of willful infringement, and consequently awarding CMU $1,169,140,271 in damages, is unquestionably an event material to Marvell's business, and Marvell promptly reported the verdict. *See* Ex. A (Marvell 12/27/2012 8-K).

Beginning with that initial report and continuing with additional public statements by Marvell and its senior executives, Marvell has publicly attacked the propriety of the Court's rulings and the jury's verdict, particularly its damages award. *See, e.g.*, Ex. B (Marvell 1/28/2013 updated FAQ);[1] Ex. C. (Marvell 1/8/2013 presentation at JPMorgan Tech Forum at CES Conference). For example, as to damages, Marvell recently told investors and the public-at-large that:

- "CMU's damages expert had no basis . . . to determine the value attributable to [the MNP technology], as opposed to other improvements." Ex. B, at ¶ 7. Marvell's statement simply ignores the evidence (much of which it is trying to seal) that demonstrates that the addition of the MNP was the key difference between old and new chips.[2]

- "[T]he 50 cent per chip [royalty] was derived from information relating to only one historical data point, which was for the sale of a small quantity of sample chips sold to one of Marvell's smallest customers." *Id*. Marvell's statement ignores the facts that CMU's damages expert, Catharine Lawton, used an array of

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[1] Marvell first issued a paper answering "Frequently Asked Questions Concerning the CMU Litigation" on January 7, 2013. *See* Ex. B. The stated purpose of this paper was to "provide additional information to Marvell stakeholders and partners regarding the CMU litigation and to elaborate on Marvell's positions described in the [company's] December 27 press release." *Id*. The existence of this paper and the fact that Marvell has updated this paper on at least one occasion – January 28, 2013 – demonstrate the considerable interest that the general public, including Marvell's current and potential shareholders, have in this litigation. *Id*.

[2] This evidence also includes the fact that Marvell itself twice told its customers that the addition of the MNP (found by the jury to be infringing) was the key difference between old and new chips. *See* P-310, at 2; P-373, at 3.

data points for her price premium analysis and also used an excess profits analysis. Marvell now hopes to seal slides and notes summarizing this data and her analysis.

- CMU's damages expert "fail[ed] to properly apportion damages between the allegedly infringing feature and other non infringing features." *Id*. Again, Marvell is attempting to seal evidence of the fact that Ms. Lawton conducted just such an apportionment analysis and how she did it.

- "[I]f you look at the numbers we're talking about they're not reasonable, right? You look at $0.50 a chip compared to companies that provide the entire core to a solution, and what they're asking for is a number of magnitude higher than that, okay." Ex. C, at 8. Marvell's statement ignores its own characterizations of the circuits found to be infringing as "must have" and "critical," and the agreement by both parties' experts that no other licensed technology (including the core) was comparable to CMU's for purposes of the damages analysis. The reasonableness of Ms. Lawton's damages analysis is evident from the slides and flip board notes that Marvell now seeks to seal.

Marvell makes similar public statements regarding the liability aspects of the jury's verdict. *See, e.g.*, Ex. B.[3]

Now, with its motion, Marvell asks for the Court's help to withdraw from the public domain slides and flip board notes that contain critical data and analysis on which CMU's damages theory and the opinions of CMU's damages expert, Ms. Lawton, are based. Access to this information that Marvell hopes to withdraw from the public domain would help investors

[3] For example, in Exhibit B, Marvell makes the following statement under the heading of "Non-infringement:" "While CMU's patents claim a theoretical technique, this technique is so complex that it cannot be implemented in real-world silicon chips." Marvell, however, failed to report in its FAQ that (1) it had abandoned its enablement and written description defenses, and (2) its own expert, Dr. Richard Blahut, admitted that the question of complexity is not part of the test for non-infringement. *See* 12/13/2012 Tr. at 279:7-279:24. Similarly, under the heading of "Invalidity" in Exhibit B, Marvell states that the author of Marvell's sole prior art reference, Mr. Glen Worstell, had communicated to CMU about his work on Viterbi detection in the presence of correlated noise and that CMU had failed to report this communication to the U.S. Patent and Trademark Office. The implication of this statement is that CMU engaged in inequitable conduct in obtaining approval of its patents. Marvell, however, omitted from its FAQ any discussion of the fact that it attempted to withdraw its affirmative defense and counterclaim of inequitable conduct in the face of CMU's motion for partial summary judgment on the issue, s*ee* Dkt. 420, and that the referenced communication was never part of Marvell's inequitable conduct theory. *See* Dkt. 116.

and the general public independently evaluate the propriety of the jury's verdict and assess for themselves the accuracy of Marvell's post-verdict statements.

Marvell's motion is an affront to the public's long-recognized right of access to judicial proceedings and records, which "diminishes possibilities for injustice, incompetence, perjury, and fraud" and "provide[s] the public with a more complete understanding of the judicial system and a better perception of its fairness." *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988). At the pre-trial conference on November 14, 2012, the Court warned the parties that, "once this trial starts, this [confidential and attorney eyes only information] is all out there for the public record." 11/14/12 Tr. at 60:20-61:24. There is no indication in the record that Marvell did not understand this warning. Yet, during the trial, without any request for redaction or sealing, Marvell itself filed several drafts of Ms. Lawton's slides on the public docket. *See* Dkt. 708. Almost two months later, Marvell now seeks to seal many of those very same slides, despite the fact that they have already been viewed by at least one financial analyst who discussed them in an article posted on the Internet evaluating the potential impact of this lawsuit on Marvell's business and recommending that investors avoid Marvell stock. *See* Ex. D ("Marvell Lawsuit: Don't Worry, It gets Worse").[4]

Financial analysts are not the only members of the public combing the docket for information about the case. Legal and business commentators have evaluated the verdict, focusing specifically on the strengths and purported weaknesses of the parties' theories and arguments on the issue of damages. *See, e.g.*, Ex. E ("Anatomy of a Record-Setting $1.17 Billion Patent Verdict"). A commentator has noted that his analysis was limited by the fact that "the record is only partially public." *Id*. at 5. Marvell's request to seal slides found at Docket

[4] Marvell's delay is particularly inexplicable given the Court's comments that third-parties had inquired about purchasing trial transcripts. 12/4/2012 Tr. at 251:23-252:1; 12/20/2012 Tr. at 21:23-22:4.

708 would deprive the public of even more information about this lawsuit and reduce the quality and accuracy of pubic analysis of this high profile case.

Marvell is also seeking permission to file under seal slides used during trial and photographs of flip board notes made during trial, despite the facts that many of those slides and notes were used during the proffer and direct examination of Ms. Lawton in open court and that Marvell never requested that the trial transcripts containing discussion of those slides and notes be redacted or sealed.[5] Even now, Marvell is not asking the Court to redact or seal trial transcripts. *See* Dkt. 773, at 9. Because all of these slides and notes were used in court during a public trial, without any objection whatsoever on confidentiality grounds, Marvell has waived any rights in restricting their future use. Moreover, CMU never agreed – and would not have agreed – to shielding from public view materials used in open court. *See* 7/10/2012 Hearing Tr. at 53:3-56:10.

Ignoring the public's right of access, Marvell argues that it will suffer competitive harm if the slides and notes that it seeks to seal and file under seal are available to the public. *See generally id*. Marvell's speculative and formulaic claims of competitive harm, however, are heavily outweighed by the demonstrably strong interests of investors, legal and business commentators, practicing lawyers, and others to access these damages-related slides and notes. Indeed, Marvell's privacy interest in the slides and notes should be ascribed little or no weight because these materials have already been publicly disclosed.

Finally, if the Court grants Marvell's motion, numerous post-trial motions that address damages issues may need to be filed under seal (at least in part), depriving the public of a meaningful opportunity to understand, analyze, and comment upon this case. In view of

[5] After each day of trial, the Court entered a "Notice of Filing of Official Transcript" on the docket. That docket entry specified that "[t]he parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript." At no time has Marvell sought to redact any aspect of any trial transcript.

Marvell's ongoing, particularized commentary on the verdict, its request to seal data would impair the ability of the public to check Marvell's version of events. Accordingly, the Court should deny Marvell's motion.

II. ARGUMENT

A. The Slides and Notes at Issue Should Not Be Sealed or Filed Under Seal Because the Public's Interest in Accessing Those Materials Outweighs Marvell's Purported Privacy Interest.

1. The Legal Standard for Sealing Judicial Proceedings and Records

It is well-established that the public enjoys a common law right of access to judicial proceedings and records. *See West Penn Allegheny Health Sys., Inc. v. UPMC*, No. 09cv0480, 2012 WL 512681, at *4-*5 (W.D. Pa. Feb. 14, 2012) (citing *Littlejohn v. BIC Corp.*, 851 F.2d 673, 677–78 (3d Cir. 1988)). This right gives rise to a strong presumption in favor of public access. *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1356 (Fed. Cir. 2011); *Publicker Indus. Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984); *United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981). The presumption of public access can be overcome only if the party seeking to seal documents or close proceedings demonstrates "good cause" for doing so – *i.e.*, that public access would cause the party to suffer a "clearly defined and serious injury." *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994). Even if such an injury is shown, the public's right of access may still be preserved where the public's interest in access to particular judicial proceedings and records outweighs the privacy interests involved. *See West Penn*, 2012 WL 512681, at *5 ("Simply stated, the Court of Appeals has, on more than one occasion, directed the district courts to balance the private versus public interests when determining whether documents should be sealed."). Notably, "[a] private interest in secrecy has not been weighed heavily once the information has been used at trial." *Littlejohn v. BIC Corp.*, 851 F.2d 673, 685 (3d Cir. 1988). At all times, the party seeking to seal documents or close proceedings bears the burden of proving that the public should be denied access. *Id*.

The public's right to access is particularly strong where the documents at issue have already been made available to the public, on the docket or elsewhere.[6] *See, e.g.*, *Vietnam Veterans of Am. v. C.I.A.*, No. C 09-0037, 2012 WL 1094360, at *2 (N.D. Cal. Mar. 29, 2012) (denying a motion to file certain documents under seal and noting that "several of the pages that Defendants seek to seal have already been filed on the public docket of this case without redactions"); *Upshaw v. United States*, 754 F. Supp. 2d 24, 29 (D.D.C. 2010) (finding that "the extended history of public access to the documents at issue . . . weighs heavily against" granting the requested sealing); *Zapp v. Zhenli Ye Gon*, 746 F. Supp. 2d 145, 149 (D.D.C. 2010) (in denying motion to seal parts of record, fact that filings had been available on public docket for 140 and 560 days, respectively, weighed in favor of continued public availability). The same is true where the documents a party seeks to seal were presented at trial in open court.[7] *See, e.g.*, *Criden*, 648 F.2d at 824 ("[W]hen the common law right of access is buttressed by the significant interest of the public in observation, participation, and comment on the trial events, we believe that the existence of a presumption of release is undeniable. . . . [W]e hold that there is a strong presumption that material introduced into evidence at trial should be made reasonably accessible in a manner suitable for copying and broader dissemination."). In fact, "the release of information in open court 'is a publication of that information and, if no effort is made to limit its disclosure, operates as a waiver of any rights a party had to restrict its future use.'" *Littlejohn*,

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[6] Here, Marvell relies on a declaration from Marvell's Interim CFO, Brad D. Feller, to support its motion to seal the slides and notes. Inexplicably, however, Mr. Feller states that the information in the slides and notes sought to be sealed "has never been made available outside of the company," Dkt. 773-1, at ¶ 4, even though they were shown in open court during the trial and filed with the Court, as even Marvell admits. *See* Dkt. 773, at 1.

[7] Only two of the cases cited by Marvell in support of its motion actually involved requests to seal trial transcripts or documents presented at trial that were granted. *See Erwin v. Waller Capital Partners LLC*, Civil No. 10–3283, 2012 WL 3528976 (D.N.J. Aug. 14, 2012); *Richardson v. Mylan, Inc.*, No. 09 CV–1041, 2011 WL 837148 (S.D. Cal. Mar. 9, 2011). In both of these cases, the requests to seal, unlike here, were unopposed.

851 F.2d at 680 (quoting *Nat'l Polymer Prods. v. Borg-Warner Corp.*, 641 F.2d 418, 421 (6th Cir. 1981)).

2. Investors, Legal and Business Commentators, Practicing Lawyers, and Others Have a Strong Interest in Accessing the Damages-Related Slides and Notes at Issue, Whereas Marvell's Purported Privacy Interest is Minimal.

A strong presumption of public access applies to the information at issue here because those materials were either available to the public on the docket for nearly two months and/or presented at trial. *See, e.g.*, *Criden*, 648 F.2d at 824; *Zapp*, 746 F. Supp. 2d at 149. Moreover, Marvell waived any right to object to public access to those materials because it (1) did not object to the Court's warning that information and documents used at trial would become part of the public record; (2) filed certain of the slides at issue on the public docket without requesting that they be sealed or redacted; and (3) failed to request that trial transcripts containing discussion of certain of the slides and notes be sealed or redacted, and has now waived its right to do so. *See Littlejohn*, 851 F.2d at 680; *supra* note 5.

Even if Marvell's delay does not constitute a waiver, its significantly belated motion on this point speaks volumes about the importance of its privacy interest (especially in light of the Court's comments about third-party purchases of the trial transcript). In fact, any privacy interest that arises from Marvell's speculative claim of competitive harm is substantially outweighed by the public's interest in access here. Under the law, Marvell's privacy interest is minimal at best given that all of the slides and notes at issue have already been disclosed publicly. *Littlejohn*, 851 F.2d at 685.

In contrast to Marvell's minimal, if any, privacy interest, the public's right of access is bolstered here by its demonstrated interest in this case. The jury's verdict, especially the financial consequences of Marvell's decade of willful infringement, has been well-publicized

and has inspired a significant amount of public commentary and analysis.[8] The slides and notes identified by Marvell in its motion go to the very core of CMU's damages theories and arguments.[9] Various segments of the public, for different reasons, have an interest in understanding the data and detailed analysis underlying the damages award. For example:

- The public has an interest in these slides and notes in order to monitor the functioning of its court system. *See e.g.*, *Littlejohn*, 851 F.2d at 678.
- Financial analysts and current and potential investors in Marvell have an interest in prompt access to the information contained in the slides and notes to assess whether Marvell's statements maligning the verdict, including the jury's damages award, are accurate and to determine what the implications of the verdict will be for short-term and long-term shareholder value. *See, e.g.*, Ex. D.
- Business and legal commentators have an interest in studying the parties' damages theory and arguments in a case that resulted in one of the largest patent verdicts in history. *See, e.g.*, Ex. E.
- Practicing lawyers and damages experts and consultants have an interest in closely scrutinizing the case as a precedent to better represent their own clients.

Marvell may believe that it is appropriate to censor the information currently available to the public, *see* Dkt. 773, at 9, but full public access advances not only the public's understanding of the judicial process, but also its ability to evaluate the fairness, propriety, and significance of the jury's verdict. Such access is particularly important to Marvell's current and potential investors, who are making decisions daily about whether to buy or sell Marvell's stock.

Notably, in the *Apple v. Samsung* case, ***Judge Koh of the Northern District of California recently rejected the very same types of competitive harm arguments made by Marvell here***

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[8] The Court can take judicial notice of this fact, which is evident based on a simple search for "CMU" and "Marvell" on the Internet. *See, e.g.*, Exs. D & E.

[9] P-Demo 22, which CMU used during closing argument to summarize CMU's damages case, provides a representative example. Certain of the slides found in P-Demo 22 depict Marvell's shipments and sales of infringing versus non-infringing chips over time and summarize some of the evidence establishing that, among other things, the infringing MNP and NLD technology is and has been "must have" for Marvell. One of the slides shows that Marvell's profit margins have increased over time, which supports Ms. Lawton's reasonable royalty analysis. The notes provide a simple summary of CMU's damages calculation.

when, ***prior to trial***, she denied almost all of the parties' requests to seal purportedly confidential financial data pertaining to, among other things, product-specific profits and profit margins, product-specific unit sales and revenue, and costs. *See Apple, Inc. v. Samsung Electronics Co.*, No. 11–CV–01846, 2012 WL 3283478, at *3-*4, *9 (N.D. Cal. Aug. 9, 2012). In addition to finding the competitive harm arguments unpersuasive, ***Judge Koh held that the public has a substantial interest in full disclosure because "the financial information that Apple seeks to seal is essential to each party's damages calculations. For this trial in particular, which involves claims of up to $2.5 billion in damages, this data is extremely important to the public's understanding of the eventual outcome***." *Id*. at *4 (emphasis added). The same is true here. Because of the similarities between the public interest in this case and the *Apple v. Samsung* litigation, sealing of financial data would be just as inappropriate here as it was there.

III. CONCLUSION

For the foregoing reasons, CMU respectfully requests that the Court deny Marvell's motion and require that Marvell file the slides used and photographs of any flip board notes made during trial on the public docket.

Respectfully submitted,

Dated: February 5, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2013 the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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