

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

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

**PLAINTIFF CARNEGIE MELLON UNIVERSITY’S REPLY BRIEF IN SUPPORT OF
ITS MOTION FOR ATTORNEYS’ FEES PURSUANT TO 35 U.S.C. § 285**

I. INTRODUCTION

By clear and convincing evidence, the jury found that Marvell's infringement was willful. Dkt. 762 at 6-8. That finding—once confirmed by the Court—makes this case exceptional: “[A] *finding of willful infringement and ‘exceptional case’ go hand in hand.*” *S.C. Johnson & Son., Inc. v. Carter-Wallace, Inc.*, 781 F.2d 198, 200 (Fed. Cir. 1986). Independently, Marvell's litigation misconduct has been extraordinary. *At trial*, nearly every Marvell witness was caught contradicting prior sworn testimony and/or “official” Marvell documents. Marvell also presented a damages theory based on Marvell's purported role in SoC integration, which ignored or misrepresented: (1) almost every Marvell document showing CMU invention was “must have;” (2) the actual history of SoC integration; and (3) the “direct link” between Marvell's use of CMU's invention in the U.S. and all of its (U.S.) sales. *Before trial*, Marvell misrepresented the source code and firmware it possessed and filed summary judgment motions and other pre-trial papers that were duplicative and contradictory and that simply delayed trial and drove up costs. *In post-trial motions*, Marvell mischaracterized the ruling on Marvell's “emergency” damages motion, filed a meritless motion to seal, and pursued a “wild goose chase” for documents years after discovery closed. Marvell's conduct at each stage of the case makes it “exceptional” under 35 U.S.C. § 285, *independent of* Marvell's willful infringement. The Court should award CMU reasonable attorneys' fees using the procedure adopted in *Univ. of Pittsburgh v. Varian Medical Sys.*

II. ARGUMENT

A. Marvell's Willful Infringement Makes This Case “Exceptional”

Marvell's first argument—that it did not willfully infringe CMU's patents despite the jury's careful verdict to the contrary—fails for reasons CMU has fully explained elsewhere. *See* Dkt. 793 at 2-18; Dkt. 827 at 6-11; CMU's Reply Brief in Support of Its Motion for a Finding of Willful Infringement and Enhanced Damages (“Willful Infringement Reply Br.”) (filed concurrently with this brief).

Marvell next argues that willfulness—standing alone—does not “typically result[] in’ an exceptional case finding,” (Dkt. 835 at 4) but the Federal Circuit has held directly to the contrary. It emphasized the “*heavy weight of authority* to the effect that *a finding of willful infringement and ‘exceptional case’ go hand in hand*” and explained that “District courts *have tended to* award attorneys fees when willful infringement has been proven, and this court has uniformly upheld such awards.” *S.C. Johnson*, 781 F.2d at 200 (emphasis added).¹ Indeed, the strong link between willfulness and “exceptional” case status requires trial courts to “explain why the case is *not* ‘exceptional’” when they “den[y] attorneys fees in spite of . . . willful infringement.” *Modine Manuf. Co. v. Allen Group, Inc.*, 917 F.2d 538, 543 (Fed. Cir. 1990).²

Marvell likewise misstates governing authority—and the cases it cites—in arguing that § 285 “operates primarily as a ‘sanction’” and therefore requires proof of “abusive litigation tactics” in addition to willfulness. Dkt. 835 at 5-6. The Federal Circuit explicitly rejected that argument in *Golight, Inc. v. Wal-Mart Stores, Inc.*, 355 F.3d 1327 (Fed. Cir. 2004), ruling that the case was exceptional “due to the willful nature of Wal-Mart’s conduct” and rejecting Wal-Mart’s argument that “more egregious conduct than willful infringement is necessary to hold a case exceptional.” *Id.* at 1340.³

¹ Marvell’s citation to cases in which district courts did not deem a case “exceptional” despite a jury willfulness verdict, *see* Dkt. 835 at 4 nn.2-3, proves only that district courts have discretion. Many more cases use willfulness as the basis for a fee award. *See S.C. Johnson*, 781 F.2d at 200-01 (collecting cases); Chisum on Patents § 20.03[4][c][ii] at 20-474 to 20-478 (collecting cases); Dkt. 792 at 12 n.19 (collecting cases).

² “The jury’s finding of willfulness satisfies the first step” of § 284, namely “determining that the infringer engaged in culpable conduct.” *Transclean Corp. v. Bridgewood Services, Inc.*, 290 F.3d 1364, 1377-78 (Fed. Cir. 2002). A jury finding that satisfies the first step of § 284 likewise justifies an “exceptional case” finding under § 285. *See Jurgens v. CBK, Ltd.*, 80 F.3d 1566, 1573 n.4 (Fed. Cir. 1996) (“As a general rule, attorneys fees under section 285 may be justified by *any valid basis* for awarding increased damages under section 284.” (emphasis added)). Indeed, courts long have recognized that “[a] case may be considered ‘exceptional’ under the statute when a Court or jury finds willful, deliberate infringement.” *Unidisco, Inc. v. Schattner*, 231 U.S.P.Q. 593, 610, 1986 WL 84363 (D. Md. 1986), *rev’d on other grounds*, 824 F.2d 965; *see also supra* note 1. Marvell is simply wrong in arguing that the “the Section 285 inquiry should focus on the presence or absence of ‘abusive litigation tactics’ and ‘attorney misconduct’ *rather than* the presence or absence of willful infringement.” Dkt. 835 at 5 (emphasis added).

³ None of the cases Marvell cites support its erroneous suggestion that fees under § 285 “operate[] primarily as a ‘sanction.’” Dkt. 835 at 5. In the only Federal Circuit case that Marvell

B. Independently, Marvell’s Extensive Litigation Misconduct Supports the Conclusion That This Case Is “Exceptional” Under § 285

Should the Court find it necessary to consider the issue, Marvell’s litigation misconduct, by itself, more than justifies declaring this case exceptional and awarding CMU its reasonable attorneys’ fees. The “authority” Marvell offers for its contrary argument consists of quotations plucked from different cases, strung together in a way that misrepresents the relevant holdings.⁴ Accordingly, it provides no helpful guidance for the Court. Marvell also tries to justify the specific instances of misconduct CMU cites, but Marvell’s efforts fall flat:

- **Marvell’s own “official” and “accurate” documents contradict its noninfringement arguments, and its invalidity defense rested, in substantial part, on contradicting prior sworn statements.** Marvell argues that it had a legitimate basis for its infringement and invalidity arguments, Dkt. 835 at 6-7, but CMU has demonstrated that Marvell’s own documents and prior sworn statements refute that argument. *See* Dkt. 793 at 2-18; Dkt. 827 at 6-11; Willful Infringement Reply Br.
- **Marvell’s witnesses falsely testified that Marvell was first to offer a SoC.** At trial, Marvell asserted a new damages theory, *i.e.* that it succeeded because it was first to develop a

cites, *Waymark Corp. v. Porta Sys. Corp.*, 334 F.3d 1358, 1362 (Fed. Cir. 2003), the district court held that § 285 is an appropriate vehicle for awarding fees as a sanction, and the Federal Circuit affirmed, but it neither held nor suggested that a fee award under § 285 *requires* sanctionable litigation misconduct. In *Samsung Elecs. Co., Ltd. v. Rambus, Inc.*, 440 F. Supp. 2d 512, 518 (E.D. Va. 2006), the court determined that § 285 and the court’s inherent power are proper vehicles for imposing sanctions, and the Court retained jurisdiction to award sanctions, but did not hold that § 285 requires sanctionable conduct. *Id.* at 518-23. In *Boston Scientific Corp. v. Cordis Corp.*, 838 F. Supp. 2d 259, 279 (D. Del. 2012), Judge Robinson explained she tends to award attorneys’ fees when there are “abusive litigation tactics” rather than “in other circumstances.” *Id.* at 279. She did not hold that courts must follow her preference. Likewise, in *Power Integrations, Inc. v. Fairchild Semiconductor Intern., Inc.*, 762 F. Supp. 2d 710 (D. Del. 2011), Judge Stark doubled compensatory damages due to willfulness but decided not to award fees because his preference is to award fees only in cases involving litigation misconduct. *Id.* at 726. The Federal Circuit subsequently vacated Judge Stark’s damages award. 2013 WL 1200270 (Fed. Cir. 2013).

⁴ Marvell argues, for example, that “CMU *must make* a ‘strong showing’ of ‘unethical or unprofessional conduct by [Marvell] or [its] attorneys during the course of the adjudicative proceedings.’” Dkt. 835 at 5 (emphasis added) (citing *MarcTec, LLC v. Johnson & Johnson*, 664 F.3d 907, 916, 919-20 (Fed. Cir. 2012)). The *MarcTec* opinion Marvell cites does not contain the “strong showing” phrase allegedly quoted. Moreover, although *MarcTec* holds that unethical or unprofessional conduct can justify an award of fees, it *does not* say that such a showing is a “*must*.” 664 F.3d at 919. Marvell also cites the district court’s opinion in *Metso Minerals, Inc. v. Powerscreen Int’l Distribution Ltd.*, 833 F. Supp. 2d 333, 343, for the proposition that litigation misconduct must be “egregious,” “flagrant,” or “truly unusual” to justify fees, Dkt. 835 at 5-6, but the word “flagrant” does not appear in *Metso Minerals*, the word “egregious” is not used in conjunction with the discussion of fees, and there is no holding that litigation misconduct “*must*” be egregious or flagrant to justify fees.

SoC for the HDD market. Dkt. 792 at 6.⁵ CMU demonstrated that Dr. Sutardja's and Dr. Wu's testimony in support of this new theory was false. *Id.* In response, Marvell offers a creative reading of their testimony, but the record contradicts Marvell's argument.⁶ Likewise, the trial record refutes Marvell's effort to rehabilitate Mr. Hoffman's false testimony in support of its new damages theory.⁷

- **Dr. Sutardja testified that “must” means exactly the opposite.** Marvell's response to the overwhelming evidence that CMU's invention was “must have” for Marvell rests in large part on Dr. Sutardja's assertion that “must have” means something different at Marvell. Tr. 12/11/12 at 153 (“[T]hings we say is must is not a must”). Marvell defends Dr. Sutardja's testimony as an explanation of Marvell's “culture.” Dkt. 835 at 11. It was nothing of the sort. It was a self-serving, uncorroborated effort to explain away bad documents, which another Marvell witness and Marvell's documents themselves contradicted.⁸
- **Marvell misrepresented the type and extent of source code and firmware it possessed.** Marvell tries to defend its false statements regarding source code by suggesting that CMU asked for source code for Marvell's *chips* and not its *simulators*. Dkt. 835 at 12. That is

⁵ Marvell's “first in the world to develop the SoC” theory is not in Mr. Hoffman's report. Dkt. 372-1; Tr. 12/12/12 at 141.

⁶ The transcript pages cited in Dkt. 792 (at 6) confirm that neither Dr. Sutardja nor Dr. Wu confined their testimony in the manner Marvell now suggests. It is especially illuminating to read the questions Marvell's counsel posed, which demonstrate that Marvell did not merely assert that it was the first to develop a SoC consisting solely of *internally designed components*. For example, Marvell's counsel asked: “Who was *the first company that integrated these different functionalities into an SOC* or system on a chip,” Tr. 12/11/12 at 52 (emphasis added); “[W]hat impact, if any, did the fact that *Marvell was the first to build an SOC* have on the increasing sales of read channel chips . . .,” *id.* (emphasis added); and “[W]ho was *the first* to build the system on a chip that combined all these components into one chip?,” *id.* at 226 (emphasis added).

⁷ When asked: “[D]id Ms. Lawton take that factor, SoC integration into account in reaching her amount here,” Mr. Hoffman testified, “I didn't see it in her report or testimony.” Tr. 12/12/12 at 245:9-11. SoC integration is discussed at length within Ms. Lawton's report (Dkt. 367-2 at 525-26, 528, 537-38), which Marvell recognizes. Marvell nonetheless tries to rewrite the question actually posed at trial to argue that Mr. Hoffman's testimony is not false because he was referring to the fact that Ms. Lawton did not explicitly rely on SoC integration as part of her “excess profits” or “profit premium” analyses. Dkt. 835 at 10. That explanation is nonsensical. Marvell's development of a SoC is technology Ms. Lawton specifically apportioned to Marvell and included within the 50% gross margin “credited to Marvell.” Tr. 12/10/12 at 234; *see also id.* at 86-87, 233-35. Marvell also says that Ms. Lawton made “no mention of integration” in her *Georgia-Pacific* analysis at pages 518-45 of her report. That also is false. Ms. Lawton addressed SoC integration at length in her discussion of Factor 8 (pages 525-26), Factor 11 (page 528), and Marvell's bargaining position (page 537-38). Finally, Marvell's suggestion that “Ms. Lawton did not testify about SoC integration at all until CMU's rebuttal case,” Dkt. 835 at 10, is likewise false. Ms. Lawton testified at length on direct regarding the role SoC integration played in Marvell's business situation and why the move to SoCs in the desktop market made CMU's technology “must have” for Marvell. Tr. 12/7/12 at 106-08, 114, 122-32 & P-953.

⁸ Mr. O'Dell, for example, did not testify that “must have” means optional. Tr. 12/17/12 at 226-27. He instead attempted to limit the scope of his “must have” statement to a particular customer. *Id.*

false. In 2009 and 2010, CMU specifically and repeatedly sought Marvell's "simulation" code. Dkt. 794 Ex. 4, at 9-10 (requests 4 & 5), and Marvell told CMU "point blank" that "there is no 'source code' to produce." Dkt. 794 Ex. 6 at 1. Only after being confronted with a Marvell document revealing the existence of a "KavcicPP.cpp" file was the simulation code produced. *Id.* at Ex. 6, 8.

Likewise, with respect to firmware, Marvell admits that its FAE Rajan Pai declared under oath that Marvell "does not . . . possess . . . Drive Firmware." Dkt. 835 at 13. Marvell ultimately conceded it did possess this evidence. Dkt. 792 at 7-8. Marvell tries to downplay the importance of this evidence by saying that Marvell had only "limited information regarding firmware settings," Dkt. 835 at 13, but the firmware Marvell produced demonstrated Marvell's and its customers' infringing use of the patented methods and was important trial evidence. *See, e.g.*, P-1913 (identifying firmware produced, much of which bears "MSI" *Bates* labels); Tr. 12/3/12 at 187-88; P-1916 & P-1917 (evidence with "MSI" *Bates* labels showing use of MNP and NLD with firmware set to enabled modes); Tr. 12/4/12 at 96-98. Marvell's incorrect statements about the documents in its possession caused confusion and unnecessary disputes, leading to further delay and increased costs. In conjunction with the other misconduct in this case, hiding key evidence justifies an award of fees. *See Takeda Chem. Indus., Ltd. v. Mylan Labs., Inc.*, 459 F. Supp. 2d 227, 250-51 (S.D.N.Y. 2006) (actions that made discovery more difficult, when coupled with misconduct such as untimely motions to reconsider and other eve-of-trial misconduct made case exceptional and justified fee award), *aff'd*, 549 F.3d 1381.⁹

- **Marvell wasted judicial resources:**

- **Marvell's inequitable conduct claims were baseless, but Marvell continues to make them.** Marvell attempts to defend its meritless inequitable conduct claim by arguing that it acted responsibly by "dropp[ing]" its claims after the Federal Circuit issued its opinion in *Therasense, Inc. v. Becton, Dickinson, & Co.*, 649 F.3d 1276 (Fed. Cir. 2011) (en banc). *Therasense*, however, was issued on May 25, 2011, and Marvell did not seek to "withdraw" its claim until *after CMU brought a summary judgment motion almost a year later*.¹⁰ Even then, Marvell did not concede that a "substantial[] chang[e in] the law" made its claim even less viable, as it does now, Dkt. 835 at 14, but instead justified its request to "withdraw" it as a way "to streamline the case in anticipation of trial," Dkt. 387 at 2, and ultimately forced CMU to brief (and the Court to address) whether the claim should be

⁹ Marvell relies on the fact that the district courts did not award fees for discovery misconduct in *Power Integrations*, 762 F. Supp. 2d at 726, *Metso Minerals*, 833 F. Supp. 2d at 353, and *Layne Christiensen Co. v. Bro-Tech Corp.*, 871 F. Supp. 2d 1104, 1120-21 (D. Kan. 2012). Dkt. 835 at 12. Those cases did not, however, involve the overall pattern of misconduct—continuing to the present—that exists here.

¹⁰ Although Marvell now claims that CMU cannot refute that there were "material prior art references" not disclosed to the USPTO, Dkt. 835 at 14, it had the opportunity to establish that proposition but failed to do so. The Court dismissed Marvell's inequitable conduct claims with prejudice, so Marvell's assertion flies in the face of the record. Further, a review of CMU's motion for summary judgment and supporting papers reveals that all of the references relied upon by Dr. Proakis for his inequitable conduct opinion were either disclosed to the PTO, identical to references disclosed to the PTO or demonstrably immaterial. Dkt. 347-49.

dismissed with prejudice. Furthermore, Marvell *continues* to claim inequitable conduct in public statements, on grounds never presented to the Court. Dkt. 792 at 10.¹¹

- **Marvell used duplicative summary judgment pleadings to cause delay.** Marvell tries to defend its second summary judgment motion on invalidity by suggesting that it responded to an open question the Court presented. The Court’s question does not excuse Marvell’s attempt to answer it by making arguments Marvell *knew to be squarely at odds with previous positions*. Dkt. 306 at 16-17 n.10. The Court’s question did not entitle Marvell to argue in its initial motion that a particular equation (the “associate bonus functions”) denotes a “set of functions” under the “ordinary meaning” of the term “function” because it contains a “parameter,” and then in its second motion argue that *the very same equation* denotes only a single function *under the exact same definition* of function. Compare Dkt. 298 at 20-21, and Dkt. 301 at 25-26, 33, with Dkt. 327, at 4; see also Dkt. 333-1 (slides from oral argument on Marvell’s second motion demonstrating Marvell’s change in position). Such conduct cannot be justified as an effort to “conserve[] resources,” Dkt. 835 at 15, because it did exactly the opposite. The parties and the Court had to devote substantial resources to briefing, arguing and deciding, e.g., the definition of “function,” which the Court already had determined. Dkt. 337 at 3-19. Marvell compounded its misconduct by filing a motion for reconsideration on the point, Dkt. 339, asserting arguments the Court properly characterized as “disingenuous,” “without merit,” and violative of Fed. R. Civ. P. 1. Dkt. 423 at 3 n.2, 8-10. Marvell does not even try to defend this last motion.
- **Marvell’s filed an “Emergency” damages motion that misrepresented CMU’s damages theory and the Court’s prior order.** Marvell tries to defend its untimely motion for reconsideration on the grounds that CMU has presented a “novel” damages theory seeking compensation for “the *worldwide use* of [the patented] methods.” Dkt. 835 at 15. Marvell’s so-called “emergency” motion was based on a misstatement of CMU’s theory. See 11/26/12 Tr. at 12 (THE COURT: “Mr. McElhinny, just so the record is clear and since we have a number of new counsel who have joined this case since we heard arguments on the summary judgment motion, why don’t you lay out for the record what CMU’s position [regarding damages] is about [Marvell’s] infringing conduct.”). In ruling on the “emergency” motion, the Court correctly held that CMU was seeking damages for Marvell’s and its customers’ *U.S.* infringement (e.g. *Marvell’s U.S. use*), Dkt. 441 at 13-14, and later instructed the jury to award damages arising only from Marvell’s infringement in the U.S. Tr. 12/21/12 at 62-63, 81. Indeed, Marvell’s repeated arguments that CMU was improperly trying to capture damages arising from foreign conduct were utterly unsupported in light of Marvell’s stipulations regarding its U.S. sales cycle.
- **Marvell made other wasteful arguments and baseless requests.** Marvell tries to justify the one-sided “curative” instructions it proposed throughout the case as proper to eliminate purported prejudice regarding, for example, Marvell’s tax strategy. Dkt. 835 at 16. As the Court recognized, however, the inadvertent statement regarding taxes “does not comport

¹¹ Marvell continues to publicly maintain that its ‘585 and ‘660 patents constitute a defense to infringement when it knows that not to be the law. Dkt. 827 at 10 & n.23. Marvell also publicly relies on the Court’s description of its first summary judgment motion as a “close call,” Dkt. 794-1 at 69-73, despite the fact that, at trial, it abandoned both theories asserted in that motion. Tr. 12/17/12 at 51-122.

with the proposed limiting instruction.” Tr. 12/10/12 at 11. Moreover, as the Court noted, it took nothing more than “common sense” for the jury to understand that taxation issues might be at play.

In sum, Marvell has failed to justify any of its misconduct. That misconduct, standing alone, makes this case exceptional and justifies an award of CMU’s fees.

C. Marvell’s “Good Faith” Arguments Are Irrelevant

Marvell’s arguments that this case “was clearly close,” and that it litigated in “good faith,” are not supported by the record and, in any event, are irrelevant to the issue presented. Dkt. 835 at 16-17. CMU already has refuted Marvell’s “close case” arguments,¹² and the conduct above shows an absence of good faith. Moreover, CMU need not prove “bad faith” to support its request for fees. *Gillette*, 1990 WL 36143, at *6 (awarding fees even where trial conduct by counsel was honorable), *aff’d*, 91 F.2d 720.¹³

III. CONCLUSION

For the foregoing reasons, CMU respectfully requests that the Court declare this case exceptional and award CMU reasonable attorneys’ fees.

¹² Marvell’s arguments regarding Worstell and the Group II claims, Dkt. 835 at 16-17, are addressed in CMU’s briefing demonstrating that Marvell’s infringement was objectively willful. Dkt. 827 at 8. Marvell also alleges that it “prevailed on various motions *in limine*,” Dkt. 835 at 17, but Marvell takes substantial liberties in characterizing the motions and their outcomes. Many of Marvell’s *thirteen* motions in limine were unnecessary and were withdrawn, and many were denied and/or resolved through a ruling that the parties should provide joint limiting instructions. *See* Dkt. 612 (denying D1); Dkt. 602 (granting D2 in part on grounds CMU did not contest); Dkt. 601 (requiring joint instructions in response to D3); Dkt. 578 (D4 withdrawn); Dkt. 610 (resolving D5 and D6 by requiring joint limiting instructions); Dkt. 611 (denying D7); Dkt. 605 (denying in substantial part D8); Dkt. 604 (denying D9 because issue was already resolved); Dkt. 607 (denying D10); Dkt. 595 (D11 withdrawn regarding the ‘180 patent); Dkt. 577 (D14 withdrawn).

¹³ Marvell’s final argument is that CMU’s fees are excessive, but Marvell does not identify any excessive fees. It simply “reserves the right” to challenge the fees sought. Any legitimate challenge to CMU’s fees can be adjudicated through the procedure used in *Univ. of Pittsburgh v. Varian Med. Sys.* (including mutual discovery), which CMU has proposed using and which Marvell has not opposed. Dkt. 792 at 15-16. Marvell also argues that CMU did not link its fee request to particular instances of misconduct, but Marvell’s willful infringement and extensive misconduct each justify an award of all reasonable fees. Dkt. 792 at 12 (citing *Beckman Instr., Inc. v. LKB Produkter AB*, 892 F.2d 1547, 1551-52 (Fed. Cir. 1989)). To the extent the Court determines that segregation is necessary, the parties can use the procedure CMU proposed to segregate fees as necessary.

Respectfully submitted,

Dated: April 12, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 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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