

**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

**DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO SEAL AND FOR LEAVE
TO FILE CERTAIN SLIDES AND PHOTOGRAPHS USED
BY THE PARTIES DURING TRIAL UNDER SEAL**

Defendants, Marvell Technology Group, Ltd. and Marvell Semiconductor, Inc. (collectively, "Marvell") by their undersigned counsel, respectfully move this Court for an order permitting Marvell to file under seal certain slides and photographs exchanged and/or used by the parties during trial and to seal certain materials already filed with the Court.¹

Request for Relief

Specifically, Marvell seeks to seal slides and photographs containing Marvell's highly sensitive financial data that are identified in the attached Declaration of Brad Feller, the Acting Chief Financial Officer of Marvell. First, Marvell seeks to file under seal certain slides and photographs subject to the Court's January 18, 2013 request for the parties to file the slides used during trial and photographs of any flip board notes made during trial. These slides and photographs are under Tab A in the materials provided to the Court for in camera

¹ Marvell notes that in the Northern District of California *Apple v. Samsung* case (11-cv-01846-LHK) the Court has considered and denied motions to file confidential financial information under seal. *Apple v. Samsung*, 11-cv-01846-LHK Dkt. 1256 at 3 (N.D. Cal. July 17, 2012); *see also Apple v. Samsung*, 11-cv-01846-LHK Dkt. 1649 (N.D. Cal. Aug. 9, 2012). Those decisions and the propriety of applying the "compelling reason" standard under the circumstances of that case are currently on appeal to the Federal Circuit. Marvell's counsel would be happy to provide copies of the Orders and briefing if the Court would like to review them.

review. Second, Marvell also seeks to seal certain slides and photographs that were filed during trial at the Court's instruction at Docket 708, which included several drafts of Ms. Lawton's demonstrative slides that were stricken by the Court. Each of these slides and photographs is separately identified in the Declaration of Brad Feller and is identical to a slide Marvell seeks to file under seal. These slides are under Tab B in the materials provided to the Court for in camera review.

Compelling reasons support sealing these materials because they identify Marvell's and its customers' sales and production figures, price and profit information, market forecasts, revenue and operating costs for individual business units or product lines, and total shipments. Disclosure of this information would cause Marvell serious competitive harm. If disclosed, the information would allow Marvell's competitors to undercut Marvell's pricing, and allow customers and suppliers to gain leverage against Marvell in business and supply agreement negotiations, or engage in a variety of other behaviors that would damage Marvell's ability to compete. Far more detailed than "financial information" that is generally available to the public and Wall Street experts, the specific data disclosed during trial would provide competitors a strategic and unfair business advantage against Marvell in the marketplace.

Attached hereto in the declaration of Brad D. Feller is a list of documents that Marvell is seeking to file under seal (and to seal), including a description of the sealable information and the good cause for each document to be sealed. The reasons to seal these exceptionally sensitive documents are set out further in this Motion and in the attached Feller declaration.

Procedural Background

On April 26, 2010, this Court entered the Third Amended Protective Order (the "Protective Order"), which permits the parties to designate documents produced in discovery as "Confidential Information," "Confidential Attorney Eyes Only Information," or "Highly

Confidential — Computer Instruction Information.” Paragraph 14 of the Protective Order provides that a party wishing to file or submit any documents that have been designated as “Confidential Information,” “Confidential Attorney Eyes Only Information,” or “Highly Confidential — Computer Instruction Information” must first seek permission to file such documents under seal.

During trial, the parties exchanged numerous slides and used many of them during opening and closing arguments and witness examinations. Both parties also used the courtroom white board (or flip board) during witness presentations. After trial, on January 18, 2013, the Court requested that both CMU and Marvell file with the Court the slides *used* during trial and photographs of any flip board notes made during trial. Many of the slides created and/or used by the parties contain excerpts from the expert report of CMU’s damages expert Catherine M. Lawton (“Lawton Report”) which contains confidential Marvell business information designated “Confidential Attorneys’ Eyes Only.” Many of the slides also contain charts, figures, and tables that rely on, disclose or discuss the confidential data disclosed in the Lawton Report.

During trial, on December 12, 2012, the parties, as instructed by the Court, jointly filed emails and accompanying slide decks that CMU had prepared and hoped to use during the examination of its damages expert, Catherine Lawton. *See* Dkt. 708. As a result, the filings contained slides that Marvell hereby seeks to seal. *See* Feller Decl. at ¶¶70-151.

Good Cause Supports Granting Marvell’s Limited and Specific Request to File Certain Slides and Photographs Under Seal

“A party seeking to seal a court record must demonstrate that ‘good cause’ exists for such an order.” *Pugliano v. Grace Holmes, Inc.*, 2:11-CV-OI562, 2012 WL 1866380, at *2 (W.D. Pa. May 22, 2012) (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)). To demonstrate good cause, the moving party “bears the burden of demonstrating

that ‘disclosure will work a clearly defined and serious injury to the party seeking disclosure.’” *Hart v. Tannery*, 461 Fed. Appx. 79, 81 (3d Cir. 2012) (quoting *Miller v. Ind. Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994)). The Third Circuit has recognized several factors that may be considered in evaluating whether “good cause” exists at the discretion of the Court, including “whether the information is being sought for a legitimate purpose or for an improper purpose.” *Pugliano*, 2012 WL 1866380, at *2 (citing *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995)).

The information at issue is extremely confidential, has never been disclosed to the public², and is protected internally within Marvell. The amount it costs Marvell to make a product per unit and how much each product line has earned after expenses is far more sensitive and confidential than company-wide financial information because it informs competitors about the lowest price that Marvell could charge for a particular product and still make a profit. Armed with that information, a competitor can charge a lower price and undercut Marvell’s sales. The information Marvell seeks to seal provides all competitors with a playbook for how to out-price Marvell on many of its product lines. The injury to Marvell would further be compounded by the ability of Marvell’s suppliers and customers who, when armed with the knowledge of Marvell’s costs, prices and profit information, would demand increased share of the profits and lower sale prices respectively. Because of the competitive harm to Marvell from its disclosure, this information is not just exceptionally sensitive, it is among the most confidential information that Marvell possesses. This information does not affect public health and safety and does not concern any public entities or officials – the documents concern only the internal business and financial decision-making within Marvell and its individual customers.

² As noted herein, certain materials subject to this motion were filed pursuant to the Court’s instructions during trial (Dkt. 708).

Even under the higher “compelling reasons” standard, the Ninth Circuit Court of Appeals has held that “compelling reasons” for sealing exists whenever the release of particular “court files might have become a vehicle for improper purposes,” such as the release of a trade secrets. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (quoting *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978)). The Fifth Circuit and various district courts have similarly found that a court may deny access to records if the records become a vehicle for improper purposes. *See Franklin v. Law Firm of Simon, Eddins & Greenstone, L.P.*, 2012 WL 2159219, at *3 (5th Cir. June 14, 2012); *see also Melaleuca Inc. v. Bartholomew*, 2012 WL 5931690, at *1 (D. Idaho Nov. 27, 2012); *Asdale v. Int’l Game Tech.*, 2010 WL 2161930, at *1-2 (D. Nevada May 28, 2010); *Spine Solutions, Inv. v. Medtronic Sofamor Danek, Inc.*, 2009 WL 5205381, at *1-2 (W.D. Tenn. Dec. 23, 2009).

“The most commonly accepted definition of trade secrets,” is found in comment b to section 757 of the First Restatement of Torts. *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 266 (1979). The Restatement defines “trade secret” as “any formula, pattern, device or compilation of information which is used in one’s business, and which gives him *an opportunity* to obtain an advantage over competitors who do not know or use it.” RESTATEMENT OF TORTS § 757, cmt. b (1939) (emphasis added)³. To determine whether a

³ The Third Circuit has recognized a similar definition, note that “trade secret” includes:

information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

United States v. Hsu, 155 F.3d 189, 197 n.10 (3d Cir. 1998) (citing Unif. Trade Secrets Act § 1(4)).

given piece of information is a trade secret, the Restatement suggests considering factors such as:

(1) the extent to which the information is known outside of [the holder's] business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Id.*⁴

These considerations cover all data that “relate[s] to the sale of goods or to other operations in the business,” including information as mundane as a “list of customers” or a “method of bookkeeping or other office management.” *Id.* The information at issue here are trade secrets. The documents containing the information are not publicly available, and the information is walled off even from the vast majority of Marvell employees. These documents are extremely valuable to Marvell as they contain information regarding pricing between different customers, design and production timelines, shipping timelines and the number of chips manufactured and sold. The release of this information would allow competitors to gain an unearned insight into Marvell’s pricing strategies and negotiation positions – insight they could then use to Marvell’s detriment.

⁴ Though it differs in certain respects, the more recent Restatement (Third) of Unfair Competition § 39 (1995) is consistent with the first Restatement regarding the basic definition of “trade secret”: “A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.” The Third Restatement further contemplates that “[a] trade secret can also relate to other aspects of business operations such as pricing and marketing techniques or the identity and requirements of customers.” *Id.* cmt. d. A trade secret warrants protection so long as it “provide[s] an actual *or potential* economic advantage over others who do not possess the information. *The advantage however, need not be great.*” *Id.* cmt. e (emphasis added). One of the most relevant sources of information about the value and secrecy of a piece of information for which protection is sought is the extent to which the holder of a secret takes precautions to maintain its secrecy. *Id.* cmt. g.

Even if the technical definition of trade secrets were not met, the same essential considerations would support sealing the documents at issue. “Compelling reasons” exist where the documents to be sealed are “sources of business information that might harm a litigant’s competitive standing.” *Nixon*, 435 U.S. at 598. The documents in question easily satisfy this standard. Courts have recognized that the cost of goods sold and detailed revenue and profit information present a strong danger of improper use by the company’s competitors and may be sealed, even under a heightened “compelling reasons” standard. For example, various district courts have held that revenues per product, revenue reductions, merchandise costs, royalty costs, promotional costs, personnel costs, and costs of goods sold are sealable when a company’s business competitors could use the information to replicate the company’s business practices. *See Bauer Bros. LLC v. Nike, Inc.*, No. 09cv500-WQH-BGS, 2012 WL 1899838, at *3-4 (S.D. Cal. May 24, 2012) (sealing deposition testimony and documents containing cost analysis relating to sales, advertising and marketing, product development, and profits: “the financial data sought to be sealed by Nike could be used for improper purposes of Nike’s business competitors, as it includes . . . business sales and accounting data . . . and costs analysis”); *see also Bracco Diagnostics, Inc. v. Amersham Health Inc.*, 2007 WL 2085350, at *6 (D.N.J. July 18, 2007) (sealing customer sales information due to the harm defendant would suffer in the marketplace as a result of disclosure); *Erwin v. Waller Capital Partners LLC*, 2012 WL 3528976, at *2 (D.N.J. Aug. 14, 2012) (granting a motion to seal testimony that contained “confidential internal information regarding the [defendant’s] revenue, expenses, profits, [and] losses” because the court was “persuaded that [the defendant] may suffer a competitive disadvantage if such information were disclosed to the public.”); *Bean v. John Wiley & Sons, Inc.*, No CV 11-08028-PCT-FJM, 2012 WL 1078662, at *6-7 (D. Ariz. Mar. 30, 2012) (“precise revenue information results” and “exact sales and

production numbers” which could be used by competitors to calibrate their pricing and distribution methods to undercut defendant also provide compelling reasons for sealing) (sealing charts summarizing defendant’s sales and revenue figures broken out by product); *TriQuint Semiconductor v. Avago Techs., Ltd.*, Case No. CV 09-1531-PHX-JAT, 2011 U.S. Dist. LEXIS 143942, at *10-12 (D. Az. Dec. 13, 2011) (documents showing the volume of the party’s sales, market analysis, capital expenditures, cost, and manufacturing capacity met the “compelling reasons” standard for sealing).

Public disclosure of Marvell and its customers’ sales and production figures, price and profit information, market forecasts, revenue, operating costs and total shipment information presents the same dangers. This includes sales and production figures, price and profit information, market forecasts, revenue, operating costs and total shipments, all of which are subject to the highest level of protection within Marvell. (Feller Decl. at ¶4). While total consolidated revenue and profit information is made publicly available, specific data for individual business units or product lines has never been disclosed to the public and is kept in the strictest confidence within Marvell. (Feller Decl. at ¶4). *See Bean*, 2012 WL 1078662, at *6-7 (finding additional justification to seal “information . . . kept confidential not only from the public, but also from [defendant’s] own employees”).

Marvell offers a broad range of read channel chips targeted to different disk drive manufacturers. Release of the specific type of detailed and confidential financial data for which limited sealing is requested could be devastating to Marvell as it could allow competitors to undercut Marvell’s pricing or gain leverage against Marvell in business negotiations, or engage in a variety of other behaviors that would damage Marvell’s ability to compete. (*See Feller Decl.*). Good cause exists to seal the portion of the documents identified in the Feller Declaration.

Moreover, Marvell proposes to leave unsealed the material that the public has the greatest interest in seeing – namely, Marvell proposes that the overwhelming majority of the over 1400 pages of demonstratives used over the course of the trial and the entire trial transcript enter into the public record unredacted. Marvell does not seek to conceal the parties’ arguments, which will aid the public in understanding the judicial process. Rather, Marvell seeks only to seal material that is highly specific and that which goes well beyond what would aid the public in understanding the parties’ positions and the judicial process. *See, e.g., Richardson v. Mylan Inc.*, Case No. 09-CV-1041-JM (WVG), 2011 U.S. Dist. LEXIS 23969, at *7-8 (S.D. Cal. Mar. 9, 2011) (finding sealable that information “of comparatively little value to the general public in terms of enhancing its understanding of the judicial process”).

Confidential Information in Slides Already Filed Should Similarly Be Sealed

On December 12, 2012, the parties, as instructed by the Court, jointly filed emails and accompanying slide decks that CMU had prepared and hoped to use during the examination of its damages expert, Catherine Lawton. *See* Dkt. 708. As a result, the filings contained slides that Marvell hereby seeks to seal. *See* Feller Decl. at ¶¶70-170. For the same reasons identified above, Marvell requests that these slides, which are separately identified in the Declaration of Brad Feller and which are identical to those slides Marvell seeks to file under seal, be placed under seal.⁵

Conclusion

Because both good cause and compelling reasons in favor of sealing exist, Marvell respectfully requests the Court permit the parties to file under seal the slides and photographs

⁵ The full set of slides Marvell seeks to seal and file under seal will be hand delivered to the Court for review.

identified in the Feller Declaration attached hereto and to seal those slides that have already been filed with the Court. A proposed Order is also attached.

Dated: January 28, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 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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