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 Hon. Nora B. Fischer

MARVELL'S OPPOSITION TO CMU'S MOTION AND VERIFIED PETITION FOR SUPPLEMENTAL RELIEF IN AID OF EXECUTION PURSUANT TO PENNSYLVANIA RULE OF CIVIL PROCEDURE 3118

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Defendants Marvell Technology Group, Ltd. and Marvell Semiconductor, Inc. (collectively, "Marvell") respectfully oppose Plaintiff Carnegie Mellon University's ("CMU") motion for supplemental relief in aid of execution (Dkt. 908, "Motion and Verified Petition").

Eleven months after this Court entered judgment on the jury's verdict and on the eve of this Court entering final judgment disposing of all pending post-trial submissions, CMU is requesting that this Court enjoin, on an emergency basis, Marvell's continuation of its longstanding policy of repurchasing shares, issuing quarterly dividends, and other aspects of its orderly business operations. There is no precedent and no warrant for the extraordinary relief CMU seeks. Indeed, CMU cites no case, and we have found no case, in which a publicly traded company in good standing, with assets well in excess of the outstanding judgment, has ever had its operations curtailed in such fashion for the sake of satisfying a monetary award[1]; to the extent such drastic judicial intervention might ever be warranted, it should surely await entry of final judgment that fixes an amount owed in a sum certain. In the meantime, there should be no occasion to execute the judgment or to issue injunctive relief separately in aid thereof.

CMU did not file its instant request or attempt to execute the judgment at any time in the past year since the jury reached its verdict (Dkt. 762), even though it was well aware throughout this period of Marvell's stock repurchases, issuance of dividends, and supposed risk of non-payment. (*See* Dkt. 787, 853, 881). Nor did CMU file its instant requests even after this Court, on September 23, issued its most recent post-trial order, Dkt. 902 – at which point Marvell's

[1] This Court's decision in *Grant Street Group, Inc. v. Realauction.com LLC*, Case No. 09-01407, Dkt. 693 (W.D. Pa. July 31, 2013), which CMU cites in its motion for registration (Dkt. 909, at ¶ 16), is not to the contrary. Unlike here, the defendant (Realauction.com) had no evidence (beyond a conclusory affidavit) that it was in good standing or on sound financial footing, and it in fact filed for bankruptcy during the course of the post-trial proceedings.

quarterly dividends were no less evident. CMU's delay in bringing its latest submissions belies the alleged urgency of its request for extraordinary, emergency relief.

If anything can explain CMU's change in position, it is that the interim judgment has persisted longer than anticipated. Specifically, this case has been in a posture since January in which there is no final, appealable judgment, nor a sum certain that Marvell is finally adjudged to pay.[2] And it has been in a posture since September in which the judgment remains due to be adjusted (to account for pre-judgment interest and supplemental damages in amounts disputed between the parties) and may be substantially reduced (according to Marvell's pending laches defense) or substantially increased (according to CMU's pending enhancement request). This is, admittedly, a peculiar situation. The correct solution to it, however, cannot be to enjoin and disrupt Marvell's continuing business operations in service of a monetary award that is entirely ephemeral. Rather, the situation will be addressed and resolved as soon as this Court issues its forthcoming final judgment.

FACTUAL BACKGROUND

I. MARVELL IS SUSTAINING ITS FINANCIAL STRENGTH

Since the jury's verdict on December 26, 2012, Marvell has remained a profitable company with an enviable cash position. As of November 2, 2013, the date of the end of

[2] The Court's January 2013 judgment postponed any need to post a bond until after the Court resolved post-trial motions. (Dkt. 769, at 2.) Marvell further disputes CMU's assertion that CMU can execute on the judgment at this time. In the Third Circuit, a judgment that is not final under Rule 54(b) "is not subject to execution." *Gerardi v. Pelullo*, 16 F.3d 1363, 1371 n. 13 (3d Cir. 1994). Contrary to CMU's attempts to invoke Rule 62(b) to require a bond at the present time, Rule 62(b)'s provisions are not yet in effect because no final judgment number incorporating laches, enhancement, supplemental damages, and interest adjustments yet exists. *See Veteran Med. Prod., Inc. v. Bionix Dev. Corp.,* No. 1:05-CV-655, 2008 WL 4151353, at *3 (W.D. Mich. Sept. 4, 2008) (court's entering of the jury verdict on a patent case was "not a 'final judgment' under Rule 54(b). ***Because plaintiffs cannot execute or enforce this non-final judgment, defendants' Rule 62(b) motion for stay of execution or enforcement of judgment is premature.***") (emphases added).

Marvell's third financial quarter, Marvell had more than $1.8 billion in cash, cash equivalents, restricted cash and short term investments. (Murakami Decl. at ¶ 6). Although Marvell's cash position fluctuates during any given quarter, Marvell currently expects to generate approximately $125 million in free cash flow during the current quarter. (*Id*.) Its stock price today remains above $13 per share and its market capitalization well above $6 billion. (Milowic Decl. Ex. A.) The portrait CMU paints of a company intent upon dissolving its assets so as to drive them below its liabilities is thus contrary to reality.

The investing public knows and confirms as much, as countless market participants independently review Marvell's financial status, including the outstanding verdict, and choose to invest in Marvell and its prospects precisely because those prospects put it in the black. For example, as CMU points out, Kohlberg Kravis Roberts & Co. L.P. ("KKRLP"), a sophisticated private equity firm, recently filed an SEC statement indicating that it holds 22 million shares of Marvell (which amounts to less than 5% of Marvell's outstanding shares). (Murakami Decl. ¶ 7.) The filing shows that Marvell is one of thirty two independent investments within this fund. (*Id.*) Nor, contrary to CMU's suggestion, is it necessary or appropriate under the Generally Accepted Accounting Principles for Marvell to book a reserve for the judgment at this time. (*Id.*¶ 6.) CMU's instant submission is premised upon its dissenting view that the market is all wrong – and that Marvell, in fact, will not ultimately be good for the judgment, the liabilities from which will exceed its assets. That dissenting view is thoroughly misconceived and unsubstantiated.

II. MARVELL IS SIMPLY CONTINUING ITS NORMAL COURSE OF BUSINESS OPERATIONS

Far from dissipating its assets to avoid paying the judgment, Marvell has simply continued its normal course of business operations, which have continued to thrive since the

verdict. (*Id*. ¶¶ 3, 4.) Marvell's programs of share repurchases and dividends were operating just as they are now ***before*** the verdict issued in this case. In particular, Marvell announced in July 2012, well before the jury issued its verdict, that it would be paying quarterly dividends. (*Id*. ¶ 3.) Since that announcement, Marvell's payment of its quarterly dividend has remained consistently set at approximately $30 million per quarter.[3] (Dkt. 907-1.)

Marvell's share repurchase program dates back even further: It has been in place for over three years. (Murakami Decl. ¶ 4.) During the course of the program, Marvell has authorized share repurchases in several tranches, up to a cumulative capacity of $3 billion, with approximately $2.74 billion shares already having been repurchased. (*Id*.) Accordingly, Marvell has less than $259 million remaining authorized under the existing program. (*Id*.) As such, CMU's share repurchase graphic (Motion Ex. A) is misleading, as it incorrectly suggests a trend that is set to continue. Not only does Marvell have no current plans to increase the authorized amount of share repurchases (Murakami Decl. ¶ 4), but it is unrealistic to suppose that this case will remain in its present posture much longer.

Marvell's programs of repurchasing shares and issuing dividends serve to reward its shareholders and are established features of the *status quo*. What is more, they are accepted features of the ordinary course of business for other leading companies – among the companies that employ programs such as those CMU seeks to enjoin are Apple and Microsoft. (*Id*. ¶ 3; *see also* Milowic Decl. Exs. B-E.) Dividends and share repurchases are especially common among

[3] CMU suggests that Bermuda law may require Marvell to stop paying dividends, pointing to the following statement in a Marvell press release that announced the date of an upcoming dividend: "Developments in ongoing litigation could affect Marvell's ability to pay the dividend on December 23, 2013 under Bermuda law, where Marvell is incorporated." (Motion at 2, n. 4.) The purpose of this statement was simply to alert investors to the fact that the dividend (which Marvell is obligated to pay, once declared by the Board) could be delayed if this Court's ruling on enhancement impacts Marvell's ability to pass a statutory test of liquidity before a dividend is paid. (*Id*. ¶ 5.)

leading companies in the semiconductor field, such as Intel, Qualcomm, Texas Instruments, Altera, Infineon, Analog Device, Xilinx, Avago, Maxim, Linear Tech., Microchip, and ST Microelectronics, among others. (Murakami Decl. ¶ 3.) In fact, Marvell took the practices of these other companies into account when it announced in July 2012 that it would initiate a quarterly dividend as part of its business. (*Id.*)

In all other respects, Marvell has likewise continued to operate just as would normally be expected for a successful public company with thousands of employees. CMU tries to suggest otherwise, however, by pointing to turnover in the position of Interim Chief Financial Officer ("CFO"). (Motion ¶ 12.) To be clear, Marvell recently announced the appointment of Michael Rashkin as Interim Chief Financial Officer, to replace Brad Feller, the former Interim Chief Financial Officer who had resigned to pursue other opportunities. (Murakami Decl. ¶ 8.) Rashkin has been with Marvell since 1999; prior to his latest appointment, he served in a variety of important roles involving Marvell's financial operations, including as VP of Tax, VP of Strategic Development, and President of the Marvell Charitable Fund. (*Id*.) Rashkin also served as Interim Chief Financial Officer of Marvell from July 2007 to January 2008. (*Id*.)

Also contrary to CMU's suggestions (Motion ¶ 13), Marvell knows of no lawsuits filed and no associated governmental regulatory or administrative inquiries into Marvell's fiduciary practices. (Murakami Decl. ¶ 9.) According to CMU, an organization called "Shareholders Foundation" announced that a law firm began investigating, on behalf of Marvell's shareholders, potential breaches of fiduciary duties by certain officers and directors at Marvell. (Motion ¶ 13.) Marvell understands that this organization is connected with various plaintiffs class action firms, and regularly issues press releases in fishing for plaintiffs to bring a lawsuit. (Murakami Decl. ¶

9.) In most cases, no such lawsuit results from one of its press releases. Such mere trolling for possible clients provides no support for CMU's claim.

III. THIS CASE IS IN A UNIQUE PROCEDURAL POSTURE

The verdict in this matter issued on December 26, 2012 (Dkt. 762), after which judgment on the verdict issued on January 14, 2013 (Dkt. 769). Since that time, the parties completed briefing on post-trial motions in April, and the Court then presided over a two-day hearing on May 1 and 2, 2013 to take up all of the pending post-trial submissions. (Dkt. 880, 881.) At that May hearing, the Court announced that it expected to have all motions decided by the end of the summer, adding that the Court was up to its fourth draft resolving two of the relevant motions. (Dkt. 881, at 221:19-25.)

Final judgment has not since issued. Instead, the Court has resolved only certain post-trial submissions, particularly those Marvell filed that would otherwise have obviated execution of the judgment and thereby foreclosed CMU's instant submissions. (Dkt. 900, 902.) Specifically, it issued: (i) a June 26 order denying CMU's motion for attorney fees without prejudice (Dkt. 884); (ii) an August 23 opinion denying Marvell's motion for a mistrial (Dkt. 900); and (iii) a September 23 order denying Marvell's motions for judgment as a matter of law or new trial and granting CMU's motion for a finding of willfulness (Dkt. 901, 902). That left outstanding: (i) Marvell's motion for a judgment on laches (Dkt. 802); CMU's motion for enhancement of damages on the basis of willfulness (Dkt. 790); and (iii) CMU's motions for an injunction, prejudgment interest, and supplemental damages (Dkt. 786, 788).

Now, more than two months later, without any change to Marvell's programs at issue for stock repurchases and quarterly dividends, CMU is suddenly complaining that those programs present an emergency and submitting that Marvell and the Court must race to address it. Of course, the same uncertainty continues to surround the amount of damages Marvell actually

owes: the amount of prejudgment interest and supplemental damages (as disputed between the parties) remains undetermined, and the Court has yet to decide whether the damages award will be substantially reduced (based on Marvell's laches defense) or increased (based on CMU's enhancement request).

After this Court has made its final determination, Marvell expects promptly to file its appeal with the Federal Circuit, as this Court has long anticipated. (12/5/2012 Trial Tr. 300:1-6; 12/11/2012 Trial Tr. 341:9-15.) During the short interim period that remains, however, there is no good reason to disturb the *status quo*, much less to grant the extraordinary (and seemingly unprecedented) relief that CMU seeks by enjoining Marvell's pursuit of its orderly, established, continuing business operations.

ARGUMENT

I. CMU HAS NO BASIS FOR EMERGENCY RELIEF

To begin with, there is no colorable basis for the Court to intercede on an emergency basis. CMU itself waited over eleven months since the Court (in January 2013) entered judgment on the verdict, all while Marvell continued with its programs of stock repurchases and quarterly dividends. Indeed, Marvell's repurchase of shares and payment of quarterly dividends to shareholders were subjects that CMU specifically addressed in briefing since at least early February 2013. (Dkt. 787, at 2, 9.) Since that time, CMU has repeated its critique of these programs in further briefing (*e.g.*, Dkt. 853, at 3; 889, at 1, n. 1) and at the May hearing regarding post-trial motions (Dkt. 881, at 7:8-9:10). At no time did CMU suggest there was any emergency or request any relief akin to what it now seeks.

Nor has the procedural posture changed since September 2013. It has been over two-and-a-half months since the Court issued its last order denying Marvell's motions for judgment as a matter of law and/or new trial. (Dkt. 902 (filed Sept. 23, 2013).) If there was any urgency at that

point, then CMU slept on its rights by not raising any such issue with the Court – not even with respect to Marvell's next quarterly dividend that CMU knew would be forthcoming. After waiting *at least two-and-a-half months* to seek any injunction, CMU has denied itself any good basis for *first* complaining to the Court *in December* that a supposed exigency requires enjoining Marvell's continuation of its established quarterly dividend program, the next installment of which has already been announced for *December 23*.[4] By all indications, CMU's instant submission has been timed to contrive a crisis and thus manufacture leverage. That, of course, is the antithesis of sound basis for emergency relief of this sort.[5]

A. There Has Been No Material Change In Marvell's Financial Position

There has been no material change in Marvell's financial position, including its cash position, since the verdict in this case. In February 2013, CMU stated that Marvell is "***flush with cash*** and short term investments – over $2 billion." (Dkt. 787, at 2 (emphases added).) As of November 2, 2013, the date of the end of Marvell's third financial quarter, Marvell had more

[4] CMU suggests that it delayed because it was engaging with Marvell about a possible bond (Motion ¶ 11, 14), and, to be sure, the parties did so engage. To the extent that CMU perceived urgency, however, it should have raised the issue with the Court well before coming to the Court in a supposedly emergency posture to demand immediate action. Notably, CMU never indicated that it would be urging the Court to suspend Marvell's scheduled quarterly dividend or stock repurchases, much less that it perceived a need to do so on an emergency basis. In sum, CMU is subjecting Marvell and the Court to an emergency schedule that is irreconcilable with the approach CMU itself took, over weeks and months, to arrive at its initial submissions.

[5] *See Kobell v. Suburban Lines, Inc.,* 731 F.2d 1076, 1092 n. 27 (3d Cir. 1984) (A court may legitimately think it suspicious that the party who asks to preserve the status quo through interim injunctive relief has allowed the status quo to change through unexplained delay."); *Dahl v. Swift Distrib., Inc.,* No. 10-CV-00551, 2010 WL 1458957, at *3 (C.D. Cal. April 1, 2010) ("Unexplained delay in seeking 'emergency' injunctive relief undercuts a claim that an injunction is necessary to prevent immediate and irreparable injury.") (citing *Miller v. Cal. Pac. Med. Ctr.,* 991 F.2d 536, 544 (9th Cir. 1993)); *Max-Planck-Gesellschaft Zur Forderung Der Wissenschaften E.V. v. Whitehead Inst. for Biomedical Research*, 650 F. Supp. 2d 114, 123 (D. Mass. 2009) ("A party cannot delay the initiation of litigation and then use an 'emergency' created by its own decisions concerning timing to support a motion for preliminary injunction.").

than $1.8 billion in cash, cash equivalents, restricted cash and short term investments. (Dkt. 907-1.) Notably, Marvell's cash and cash equivalents are more now than they were shortly before the verdict. (*Id.*)

Specifically with respect to Marvell's share repurchases and dividends, those were part of the *status quo* before the jury issued its verdict. (Murakami Decl. ¶¶ 3, 4.) Over the course of three years, Marvell has authorized share repurchases in tranches totaling a cumulative capacity of $3 billion; it now has stock repurchases of less than $259 million remaining in order to reach the amount authorized pursuant to this program. (*Id.* ¶ 4.) Contrary to CMU's misleading graphic which implies a trend of increasing repurchases (Motion Ex. A), Marvell has no plans to increase the authorized amount of share repurchases at this time (Murakami Decl. ¶ 4), and is confident that the interim posture will not persist much longer in any event. Likewise, Marvell has since July 2012 been issuing its quarterly dividends (*id.* ¶ 3), which have remained consistent throughout at approximately $30 million per quarter (Dkt. 907-1).

CMU's purported concerns about Marvell's financial position are further debunked by KKRLP's decision, which CMU itself cites (Motion ¶ 10), to invest in and hold 22 million shares of Marvell (Murakami Decl. ¶ 7). KKRLP is a sophisticated private equity firm that has over $90 billion in assets under management at the end of the third quarter. (Motion Ex. E.) Its decision to invest its money in Marvell at the going market rate affords the best possible evidence that Marvell remains strong and should continue to flourish.[6]

[6] *Cf. Iridium Operating LLC v. Motorola, Inc.*, 373 B.R. 283, 293 (Bankr. S.D.N.Y. 2007) (noting "the public trading market constitutes an impartial gauge of investor confidence and remains the best and most unbiased measure of fair market value and, when available to the Court, is the preferred standard of valuation"); *In re Granite Broad. Corp.*, 369 B.R. 120, 143 (Bankr. S.D.N.Y. 2007) (noting "there is no dispute that in many circumstances the best evidence of value is what a third party is willing to pay in an arm's length transaction . . . [A] third party offer typically trumps all other indications of value") (internal quotation omitted).

Again, CMU's own submission only confirms Marvell's continuing strength. (Motion Ex. E.) Echoing statements made by Marvell, an article invoked by CMU reports that "'[t]he fundamentals at Marvell are some of the best in the semiconductor industry right now'" because of its "ability to generate cash, its lack of debt and ability to borrow cheaply." (*Id*.) The article reports that an analyst at RBC Capital Markets recommends buying Marvell's stock, a recommendation made in light of the existing judgment and all that remains. (*Id*.)

Moreover, CMU identifies no actual, material change in Marvell's financial position. The established programs of stock repurchases and dividends have simply been running their established, orderly course, just as they were prior to the jury's verdict. Contrary to CMU's suggestion, KKRLP's decision to invest in Marvell does not suggest anything untoward. Additionally, CMU's allegations regarding an investigation by the "Shareholders Foundation" do not indicate anything of substance, beyond plaintiffs' firms fishing for possible clients and possible claims – just as such firms routinely do, across a wide swathe of publicly traded companies. Indeed, CMU fails to mention that the vast majority of press releases from "Shareholders Foundation" are not followed by any lawsuit because shareholders prove uninterested. To Marvell's knowledge, no lawsuit has been filed, nor have any regulatory or administrative bodies questioned Marvell's fiduciary practices. (Murakami Decl. ¶ 9.) Finally, although Marvell's former Interim Chief Financial Officer, Brad Feller, did resign to pursue other opportunities, turnover at major companies is commonplace; it in no way impacts Marvell's financial soundness or business prospects. And Marvell has already announced the appointment of Michael Rashkin, whose tenure with Marvell dates back to 1999, as Interim Chief Financial Officer. (*Id.* ¶ 8.) Marvell's prompt replacement for the position of Interim Chief Financial Officer maintains the *status quo*.

CMU's complaint that Marvell is "depleting its assets" (Motion ¶ 7) so as to avoid paying the judgment is at odds with the facts. Far from dissolving its assets, as of November 2, 2013, the date of the end of Marvell's third financial quarter, Marvell had more than $1.8 billion in cash, cash equivalents, restricted cash and short term investments. (Murakami Decl. at ¶ 6; . Dkt. 907-1.) That is not the approach of a judgment debtor that is out to dissolve its assets and run. Indeed, few patent defendants are so well positioned to pay a judgment. CMU cites no instance where Marvell has ever sought to evade a judgment in the U.S. or anywhere else. To the contrary, Marvell's CEO has declared his commitment to pay any final damages award that survives appeal. (Dkt. 837-3, ¶ 5.) And all of the above-stated evidence confirms that Marvell is positioned to follow through on that commitment, as investors and the market confirm by continuing to place stock in it.

B. CMU's Request For Emergency Relief Does Not Consider Unintended Consequences

If anything, the drastic relief that CMU seeks threatens only to hurt its ultimate objectives and frustrate Marvell's ability to satisfy any final judgment by interfering with Marvell's existing business operations and proven record of success. *See Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 786 F.2d 794, 799 (7th Cir. 1986) (noting "reluctan[ce]" to allow plaintiff to execute the judgment before appeal because doing so "might not even increase the probability of the plaintiff's collecting the judgment in full"). The emergency relief CMU seeks would compromise Marvell's ability to run its business as it sees fit to maximize its success and meet the expectations of its investors. CMU asks that such relief issue based solely on "summary" proceedings. (Motion ¶ 21.) But the order CMU seeks could very well be counterproductive. CMU takes no account of legal problems that could be posed if Marvell's dividend were to be rescinded at this late stage. Further, CMU offers no analysis of the likely implications the

requested injunction could have for investor confidence and other aspects of Marvell's business operations. Those concerns are obvious and real, however, and are themselves reason why, contrary to CMU's request, the *status quo* should not be hurriedly or lightly disturbed.

C. The Peculiar Procedural Posture Of This Case Further Commends Denial of CMU's Requested Relief

CMU's Motion and Verified Petition comes over eleven months after the judgment on the verdict (Dkt. 769) and seven months after the hearing regarding post-trial motions (Dkt. 880, 881). Four months have passed since the end of the summer, by which time the Court expected to have issued its final judgment resolving all post-trial submissions (Dkt. 881, at 221:19-25) – and two-and-a-half months have passed since the Court issued its last ruling resolving all but one of the post-trial submissions of Marvell (Dkt. 901, 902). Now, as the one-year anniversary of the jury's verdict approaches, there is every indication that final judgment will issue very soon. If there is any exigency apparent at that time, it should be taken up then.

It would be quite odd, however, for this Court now to take the dramatic, and seemingly unprecedented step of reaching out to enjoin the *status quo* of Marvell's continuing business operations on the basis of its *interim* judgment, without taking the natural, noncontroversial, necessary step of simply issuing its *final* judgment. Any differing views about Marvell's ability to pay and CMU's related claim to particular relief could then be considered by this Court and, if necessary, the Federal Circuit on sound procedural footing.[7]

[7] *See Mitchell v. Overman*, 103 U.S. 62, 65-66 (1880) (where "delay in rendering a judgment" has been caused by "intricacy of the questions involved" "it is the duty of the court to see that the parties shall not suffer by the delay"); *see also Barnes v. D.C.*, 924 F. Supp. 2d 103, 110 (D.D.C. 2013) (citing *Mitchell*); *In re Dow Corning Corp.*, 208 B.R. 661, 665 (Bankr. E.D. Mich. 1997).

II. CMU CANNOT SATISFY THE OPERATIVE STANDARD GOVERNING A PRELIMINARY INJUNCTION

CMU's requested relief is unprecedented. CMU cites no case that remotely approaches this one – where a public company in good standing has been enjoined from issuing regular dividends or stock re-purchases based on an outstanding judgment that is not yet final. CMU has no credible proof suggesting that Marvell, simply by continuing its programs that were in place before the jury issued its verdict, is actively seeking to frustrate collection of the judgment. Nor does CMU prove that the relief it requests is necessary, above and beyond all indicia of Marvell's present and continuing financial strength, to preserve its ability to collect on the judgment. Thus, even if CMU's request were procedurally timely (which it is *not*), its request would be substantively foreclosed.

Although CMU invokes Pennsylvania Rule 3118 for supplemental relief as though it should govern here, that Rule finds no purchase because CMU's proposed injunction would *change* the *status quo* as Marvell's December 23 dividend has already been announced by its Board. *Greater Valley Terminal Corp. v. Goodman*, 202 A.2d 89, 94 (Pa. 1964) (cited by CMU) (Rule 3118 "may be used only" "for the purpose of maintaining the status quo").[8] Further, Rule 3118 cannot apply because the assets at issue (dividend payments and share repurchases) are not located in Pennsylvania or subject to execution in Pennsylvania.

In any event, an injunction that reaches as far as restraining Marvell's pursuit of its established, ongoing business operations, including its stock repurchases and payment of dividends, must answer to a higher standard. CMU cannot seek to enjoin a public company in

[8] Rule 3118 is also not the appropriate measure to the extent CMU is asserting that Marvell's share purchases and payment of dividends are fraudulent. *Greater Valley*, 202 A.2d at 92 ("voiding of fraudulent transfers is a type of relief which is inconsistent with the specific provisions of Rule 3118"). Instead, CMU would need to make the required showing for a fraudulent conveyance.

good standing from authorizing stock repurchases and issuing dividends without satisfying the standard that governs issuance of a preliminary injunction in federal court, which is a standard that CMU cannot meet.

A. The Standard For A Preliminary Injunction Should Apply To CMU's Request

Other federal courts in Pennsylvania have considered such requests for supplemental relief under their equity powers and the standard governing a preliminary injunction, instead of simply relying on Rule 3118. As the Eastern District of Pennsylvania recently recognized, federal "courts in this district have relied solely upon a court's general equity power to grant the sought relief in lieu of Pennsylvania law [under Rule 3118]." *Tennenbaum Capital Partners, LLC v. Kennedy*, No. 09-mc-00194, 2012 WL 748256, at *2 n. 2 (E.D. Pa. Feb. 10, 2012); *see also Southeast Nat'l Bank of Pa. v. Spectrum Leasing Corp.*, No. 84-3034, 1986 WL 1240, at *2-3 (E.D. Pa. Jan. 27, 1986) (cited by CMU) (applying standard for preliminary injunction to plaintiff's request for supplemental relief relating to out-of-state properties).[9]

Considering the unprecedented and far-reaching nature of CMU's requested relief (which would arrest the *status quo* orderly operations of a publicly traded company in good standing), and the peculiar interim posture of this case and the judgment at issue, there is all the more reason why CMU must meet the standard governing a preliminary injunction, inclusive of all attendant procedural safeguards.[10] The Eastern District of Pennsylvania similarly concluded

[9] Unlike *Tennenbaum*, a preliminary injunction cannot issue here because there is no amount that Marvell has "yet to pay," nor does CMU allege that Marvell has "'engaged in a persistent pattern of diverting resources through fraudulent transfers to avoid paying Plaintiff's unsatisfied judgment.'" *Id.* at *3. Similarly, unlike *Southeast*, a preliminary injunction cannot issue here because there is no "good reason to believe" that Marvell "will attempt to frustrate collection of the judgment." *Id.* at *3.

[10] The court in *Chadwin v. Krouse*, 386 A.2d 33, 37 n. 5 (Pa. Super. Ct. 1978) recognized that the summary provisions of Rule 3118 "certainly do not involve an intrusion upon

that, while "a Rule 3118 summary hearing is not a proper procedure to permit the injunctive relief Plaintiff seeks, this Court's equity powers does include the power to grant injunctive relief in an action to satisfy a damages award." *Ohntrup v. Makina Ve Kimya Endustrisi Kurumu*, No. 76-CV-742, 2012 WL 646030, at *5 (E.D. Pa. Feb. 3, 2012). As the court in *Ohntrup* continued, "[a] full hearing and proof of the necessary elements under the federal standard for injunctive relief will be required." *Id.*

B. CMU Cannot Satisfy The Standard For A Preliminary Injunction

Even if CMU were to move for a preliminary injunction, which it has not done, CMU could not meet the standard for obtaining such an injunction, which it has not even purported to satisfy and would bear the burden of satisfying. In the Third Circuit, a preliminary injunction "to protect a potential future damages remedy by a preliminary injunction encumbering assets" can issue only in "extraordinary circumstances," such as where the defendant faces insolvency at the time of judgment. *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 189, 206 (3d. Cir. 1990) (vacating preliminary injunction). Moreover, the "traditional requirements for obtaining equitable relief must be met," which includes a "showing that without the preliminary injunction, plaintiffs will probably be unable to recover those funds." *Id.* at 197. For example, in *Chicago Title Ins. Co. v. Lexington & Concord Search and Abstract, LLC*, 513 F. Supp. 2d 304, 320 (E.D. Pa. 2007), the court denied a preliminary injunction because the plaintiff "submitted no evidence

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the defendant's property rights as great as that entailed in directing appellant to bring out-of-state stock certificates into Pennsylvania." The same reasoning holds for CMU's requested relief, which would intrude well beyond Pennsylvania and block a public company from conducting business in its ordinary course all throughout the United States.

that Smith liquidated [an] account in order to avoid liability to the plaintiff or to otherwise make funds unavailable to satisfy a judgment rendered on behalf of the plaintiff."[11]

CMU's claimed proof does not come close to fitting that bill. There is no evidence, nor even a credible assertion, that Marvell implemented its pre-verdict programs of stock dividends and repurchases in order to avoid liability to CMU or to otherwise evade any judgment. (*See* Dkt. 837-3 (Sutardja Affidavit) ¶ 2 (Marvell "will not attempt to evade paying a judgment against it").) Moreover, as discussed above, Marvell's dividends and share repurchases are more than offset by its sound financial condition and continuing profitability, complete with ability to generate cash. (Dkt. 907-1.) Disturbing the *status quo* would, at this point, present the greater threat to collection – by strangling the goose that is otherwise continuing to lay its golden eggs. CMU simply has no basis here for obtaining a preliminary injunction.

III. MARVELL'S ACTIVITIES ARE WITHIN THE ORDINARY COURSE OF ITS BUSINESS

CMU's invocation of the "ordinary course of business" standard does not aid its position. That standard is inapplicable outside of the bankruptcy context. Moreover, it undercuts CMU because Marvell's programs at issue fall within the "ordinary course of business."

A. CMU's Proposed Definition For The "Ordinary Course Of Business" Is Confined To The Bankruptcy Code And Finds No Application Here

CMU "submits that the term 'ordinary course of business' should be construed as it has been and would be under 11 U.S.C. § 363(b) and (c)" (Motion at 1, n. 1), asserting that "Marvell

[11] *See also Accor Franchising N. Am., LLC v. HI Hotel Group, LLC*, No. 1:11–CV–02176, 2013 WL 4539781, at *3, 5 (M.D. Pa. Aug. 27, 2013) (declining to enjoin "any potential sale of the property" because plaintiff failed to prove defendants were seeking to "evade a potential judgment"); *Rahemtulla v. Hassam*, No. Civ. A. 3050198, 2005 WL 2931835, at *2 (M.D. Pa. Nov. 4 2005) ("[W]hile the plaintiffs have shown that defendant Hassam has transferred properties since the inception of this action, they have not demonstrated that he has done so in an attempt to avoid liability to the plaintiffs."); *Local 397 v. Midwest Fasteners, Inc.*, 763 F. Supp. 78, 84 (D.N.J. 1990).

should not be permitted to engage in any transactions outside of the 'ordinary course of business'" (*id.* ¶ 32). But CMU omits to note that Title 11 of the United States Code is limited to ***bankruptcy proceedings***. Marvell has not filed for bankruptcy, nor does it intend to file for bankruptcy. To the contrary, Marvell has sufficient assets to satisfy the current judgment. Because CMU does not even allege that Marvell is intending to file for bankruptcy (and presumably does not want Marvell to file for bankruptcy), CMU's attempt to import the bankruptcy standard fails at the threshold.

Section 363 presupposes that the debtor company is bankrupt, such that its liabilities to creditors outstrip the assets with which it can pay them, thereby necessitating ongoing oversight. Section 363 is thus "designed to allow a trustee (or debtor-in-possession) the flexibility to engage in ordinary transactions without unnecessary creditor and bankruptcy court oversight, while protecting creditors by giving them an opportunity to be heard when transactions are not ordinary." *In re Roth Am., Inc.*, 975 F.2d 949, 952 (3d Cir. 1992).

Further, the definition of "ordinary course of business" itself signals that it is confined to the bankruptcy context. The Third Circuit has set forth a two-prong test to determine whether an asset transaction is in the "ordinary course of business" under 11 U.S.C. § 363. The first prong inquires "whether, from an industry-wide perspective, the transaction is of the sort commonly undertaken by companies in that industry," and the second prong inquires "whether the transaction subjects a creditor to economic risk of a nature different from those he accepted when he decided to extend credit." *Id.* at 953. The second prong could not possibly obtain because it assumes that a creditor voluntarily extended credit, a decision upon which the prospect of intervening bankruptcy is overlaid.

B. Marvell's Dividends And Share Repurchases Are Within The Ordinary Course Of Its Business

In any event, continued operation of Marvell's programs for stock repurchases and dividends clearly falls within the ordinary course of Marvell's business. Marvell has been repurchasing shares for more than three years and has been issuing quarterly dividends since July 2012. (Murakami Decl. ¶¶ 3, 4.) Marvell's share repurchases and dividends remain in line with those that have been established as ordinary. (Dkt. 907-1.)

Even looking beyond the established trajectory of Marvell's ordinary business, these programs are ordinary across a larger field. Marvell took industry norms into account when it announced in July 2012 that it would initiate a quarterly dividend. (Murakami Decl. ¶ 3.) Share repurchases and dividends are part of the ordinary course of business for many other leading companies in the technology sector, including companies in the semiconductor field. (*Id.*)[12]

And there is good reason for these share repurchase programs and dividends. Companies use stock repurchases to convey confidence regarding their growth and to derive benefits from investing in itself rather than in other securities or investments. (*See* Dkt. 837, at 8.) Share repurchases also boost the value and earnings per share so as to benefit investors. (*See id.*) Similarly, companies frequently issue dividends when their financial condition is strong, increasing investor confidence and showing that the company has faith in its future profitability. (*See id.* at 8-9.) Thus, even if CMU were permitted to borrow its standard from the bankruptcy code, it would still lose under it.

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[12] Milowic Decl. Ex. B (Apple "increased its share repurchase authorization to $60 billion"; "Apple is among the largest dividend payers in the world, with annual payments of about $11 billion"); Ex. C ("NVIDIA intends to return $1 billion in fiscal 2015 through stock repurchases and quarterly dividend payments."); Ex. D (Intel "ha[s] an ongoing authorization . . . to repurchase up to $45 billion in shares of our common stock in open market or negotiated transactions."); Ex. E (STMicroelectronics adopted a "semi-annual cash dividend per common share of US$0.10 in the second quarter of 2013 and US$0.10 in the third quarter of 2013").)

IV. CMU CANNOT SATISFY THE ALTERNATIVE STANDARD FOR RELIEF UNDER PENNSYLVANIA RULE 3118

Finally, CMU's argument pursuant to Pennsylvania Rule 3118 is inadequate on the merits. If this Court proceeds with this analysis under Pennsylvania Rule 3118 (which Marvell respectfully submits it should not, *infra* Section II), CMU must establish a "***need*** for such relief" in the sense that Marvell is intentionally attempting to "undermine the efforts of the plaintiffs to satisfy the judgments in issue." *Local Union No. 98 v. Garney Morris, Inc.*, No. 03-CV-5272, 2004 WL 1858056, at *2 (E.D. Pa. Aug. 19 2004) (emphasis added) (denying to enjoin assets under Rule 3118 because "plaintiffs presented no evidence that defendants or either of them was dissipating assets or attempting to engage in a transfer or removal of property so as to undermine the efforts of the plaintiffs to satisfy the judgments in issue"). There are ***no*** allegations in CMU's Motion and Verified Petition that Marvell is seeking to evade the judgment. Any such allegations would fly in the face of Marvell's sworn assurance that it will pay any final damages award that survives appeal. (Dkt. 837-3 at ¶ 5.)

Similarly, CMU has not established any ***need*** in the sense that Marvell cannot satisfy the existing judgment. To the contrary, CMU recognized in February that Marvell is "***flush with cash*** and short term investments – over $2 billion." (Dkt. 787, at 2 (emphases added).) As of November 2, 2013, the date of the end of Marvell's third financial quarter, Marvell had more than $1.8 billion in cash, cash equivalents, restricted cash and short term investments. (Murakami Decl. at 6). Although Marvell's cash position fluctuates during any given quarter, Marvell currently expects to generate approximately $125 million in free cash flow during the current quarter. (Id.; Dkt. 907-1.) Similarly, CMU admits that "MTGL and MSI own substantial assets located in the Northern District of California that could satisfy a ***significant portion or all*** of the Judgment." (Dkt. 909 ¶ 13 (emphases added).) Any claim of "need" is thus disproved.

None of the cases cited by CMU indicates that an injunction could issue under these circumstances, nor does CMU claim to have cases on point. The cases CMU cites naturally tend to involve a judgment debtor ***that is intentionally frustrating collection*** by removing assets available to satisfy a judgment. For example, in *Messer v. Mickelson*, 175 A.2d 122, 123 (Pa. Super. Ct. 1961), "the defendant admitted that the money had been deposited under an alias to avoid attachment by the plaintiff or others." The court in *Chadwin* found the appellant's conduct similar to the conduct in *Messer* because it could "be found to be part of a history of evasive action designed to avoid satisfaction of the judgment obtained by his creditor." 386 A.2d at 36. In *Kaplan v. I. Kaplan, Inc.*, 619 A.2d 322, 325-27 (Pa. Super. Ct. 1993), the judgment debtor was attempting to engage in ostensibly fraudulent removal of equipment from a plant.

Nor does any of the cases CMU cites permit supplemental relief when the judgment has yet to go unsatisfied. Instead, in the cases cited by CMU, the judgments were going unsatisfied, often for years. For example, in *Savitsky v. Mazzella*, 93 Fed. Appx. 439, 440 (3d Cir. 2004), the plaintiff obtained a judgment in 1991 and moved in 2002—after judgment had been left unsatisfied for 11 years – for supplementary relief in aid of execution. Similarly, in *Chadwin*, more than two years passed between the judgment and the request for supplementary relief. 386 A.2d at 35. There simply is no basis under Rule 3118, or the authorities construing it, to enjoin Marvell or any publicly traded company that retains its good standing and assets well in excess of its liabilities from continuing with its established and ordinary course of business.[13]

CONCLUSION

Marvell respectfully requests that the Court deny CMU's motion and verified petition.

[13] CMU's proposed injunction (Dkt. 908-2) seeks essentially a broad freeze on all Marvell assets, expanding the relief sought in its Motion. Such an injunction is not supported by CMU's Motion, nor could it be entered for the reasons specified in this opposition. *See also Hoxworth*, 903 F.2d at 198-199 (vacating overbroad preliminary injunction).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2013, the foregoing was filed electronically on ECF. I also hereby certify that on December 16, 2013, this filing will also be served on counsel for CMU by electronic mail.

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