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 SUR-REPLY IN 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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Although CMU argues as though the injunction it seeks may issue as a matter of course against any judgment debtor with assets, the Federal Reports prove otherwise: CMU does not deny that there is no precedent whatsoever for granting any such injunction against a publicly-traded company in good standing, with assets well in excess of the outstanding judgment, for the sake of satisfying a monetary award. Because CMU fails to provide support for the extraordinary relief it requests, much less for obtaining it on an emergency basis and in the posture of an interim judgment, its request should be denied.[1]

Marvell respectfully notes at the outset that Marvell's dividend is a payable obligation that, in order to be timely paid as declared on November 21, 2013, must be put in motion by the close of business today, December 20, 2013. Thus, unless the dividend is enjoined by the close of business today, Marvell will put payment in motion at the close of business today to fulfill its obligation to pay the dividend as specified.

I. THERE IS NO PRECEDENT FOR CMU'S REQUESTED RELIEF

CMU's Reply (Dkt. 914) does not deny that it would be unprecedented to enjoin a public company in good standing from conducting its orderly business operations based on an outstanding judgment that is not yet final. CMU in fact fails to cite any case granting such relief under *any* standard in *any* jurisdiction. The few cases that CMU does cite (Dkt. 908) have been distinguished (Dkt. 912 ("Opp.")) without rejoinder by CMU.

A. Pennsylvania Rule 3118 Requires A Showing Of Necessity

CMU misconstrues the standard under Pennsylvania Rule 3118, asserting that it is "entitled to relief under Rule 3118" solely because a judgment exists and Marvell has property "subject to execution." (Reply at 1-3.) That is wrong. Because Rule 3118 provides for "supplementary relief in ***aid of execution***," there must be a judgment occasioning ***execution***

[1] CMU concedes that a defendant is entitled to a hearing before the requested injunction can issue. (Dkt. 908 ("Motion") ¶¶ 24, 25; Pa. R. Civ. P. 3118 ("after notice and hearing").) But the timing of CMU's motion has afforded no room for the requisite hearing before Marvell's December 23, 2013 dividend issues.

before supplementary relief may issue in aid thereof.[2] No one could think that mere existence of an interim judgment justifies restraining a company's ordinary business activities. Thus, even CMU concedes there must first be a "failure to satisfy the judgment itself." (Reply at 2 n. 1.) But it cannot be said that Marvell has "fail[ed] to satisfy the judgment"—there is no final, executable judgment, and, even if there were, CMU first sought to register it in recent days (Dkt. 909).

CMU cannot dispute that Pennsylvania courts have granted supplemental relief under Rule 3118 only where it proved necessary. There is no case (CMU cites none and Marvell has found none) where supplemental relief was granted solely because a judgment holder pointed to assets that might satisfy the judgment. To the contrary, the Eastern District of Pennsylvania denied supplemental relief in *Local Union No. 98 v. Garney Morris, Inc.* because it found "no precedent which has interpreted Rule 3118 as authorizing a stay without a showing of a need for such relief." No. 03-CV-5272, 2004 WL 1858056, at *2 (E.D. Pa. Aug. 19, 2004). CMU's only answer to that on-point holding is that it is "not control[ling]." (Reply at 2 n. 1.) It is, however, persuasive, and its observation about the absence of such precedent is only confirmed by CMU's briefing.[3] Review of the cases further confirms that resort to Rule 3118 is premised upon a showing of need.[4] This Court would stand alone were it to endorse CMU's permissive view of

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[2] *See Marks & Sokolov, LLC v. Alexander Finance C.D., Inc.*, No. 02046, 2012 WL 6825413 (Pa. Com. Pl. April 16, 2012) ("[T]he scope of Pa.R.C.P. 3118 allows the court in which a judgment has been entered to enter an order 'against any party or person' granting 'relief as may be ***deemed necessary and appropriate' to aid in execution*** of the judgment." (emphases added)).

[3] In *Gulf Mortgage & Realty Inv. v. Alten*, which CMU cites, supplementary relief was provided only after the plaintiff "discovered" additional stock owned by the defendant "[i]n the course of depositions in aid of execution." 422 A.2d 1090, 1091 (Pa. Super. Ct. 1980). The other cases CMU cites similarly establish that relief may issue under Rule 3118 only once need has been established—particularly because a judgment is being evaded or has gone unsatisfied for an extended period. (*See* Opp. at 20.)

[4] *See Harry R. Defler Corp. v. Kleeman*, 42 Pa. D. & C.2d 307, 308 (Pa. Com. Pl. 1967) (denying supplemental relief because "plaintiff did not prove that the pledge of collateral and its removal from the county ***was for the purpose of avoiding execution***" (emphases added)); *see also Marks & Sokolov*, 2012 WL 6825413 (supplemental relief granted "[a]fter years of collection attempts" where "Defendant dissolved his interest in [a] company and used those

Rule 3118, whereby it could be applied to any judgment, at any stage, against any defendant that holds assets.

B. CMU's Request Cannot Be Justified Under Pennsylvania Rule 3118

There are multiple reasons why CMU's proposed injunction cannot issue under Rule 3118. As an initial matter, Rule 3118 is inapplicable because there is no judgment subject to execution.[5] *Vessells v. Jones*, 13 Pa. D. & C. 5th 170, 185-86 (Pa. Com. Pl. 2010) (denying Rule 3118 relief "due to the lack of an existing judgment" during post-trial briefing), *aff'd in part, vacated in part Vessells v. Dipietro*, No. 2105 C.D. 2010, 2011 WL 10858086 (Pa. Commw. Ct. Dec. 21, 2011). Moreover, Rule 3118 cannot apply for the additional reason that the assets used for dividend payments and share repurchases are not located in Pennsylvania or subject to execution in Pennsylvania, nor has the judgment been registered outside of Pennsylvania. *Cf. Savitsky v. Mazzella*, 93 Fed.Appx. 439, 440 (3d Cir. 2004) (judgment registered in out-of-state districts prior to granting supplemental relief).

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funds to pay for his personal expenses before Plaintiff's judgment could be satisfied"); *Busatto v. A.W.Chesteron, Inc.*, No. 02137, 2010 WL 4974059 (Pa. Com. Pl. Nov. 10, 2010) (supplemental relief granted after "Defendant moved assets to a Delaware bank intending to hinder execution").

[5] Marvell's position that CMU cannot execute on the judgment at this time does not, as CMU argues (Reply at 2 n. 2), render Rule 62(b) meaningless. Rule 62(b) allows for the stay of execution of a judgment when, although a judgment has ***disposed of all substantive claims and defenses*** (***i.e., the judgment is final under Rule 54(b)***), a party files certain enumerated post-trial motions rather than filing a notice of appeal. *See* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2902; *cf. In re Zapata Gulf Marine Corp.*, 941 F.2d 293, 295 (5th Cir. 1991) (Rule 62(b) gave the district court the discretion to stay a final judgment while it considered defendant's Rule 60(b) motions). Here, Rule 62(b) is inapplicable, because there is no final, executable judgment to be stayed. Rather, several of the remaining motions address substantive claims and defenses that have always loomed, just as they continue to loom, and that must be resolved before an amount Marvell is finally adjudged to pay is fixed. Specifically, CMU's motion for a permanent injunction, post-judgment royalties, and supplemental damages was brought under Rule 65(d) (Dkt. 786), CMU's motion for enhanced damages was brought under 35 U.S.C. § 284 (Dkt. 790), and Marvell's motion for judgment on laches was brought under Rule 52(c) (Dkt. 802). Until the Court resolves those substantive claims and defenses as posed, CMU's request that Marvell post a bond under Rule 62(b) is premature. *See Waldorf v. Shuta*, 142 F.3d 601, 611 (3d Cir. 1998); *Veteran Med. Prods., Inc. v. Bionix Dev. Corp.*, No. 1:05-CV-655, 2008 WL 4151353, at *2 (W.D. Mich. Sept. 4, 2008).

Even if Rule 3118 did apply (which it does not), CMU cannot establish requisite need for supplemental relief. CMU does not assert that Marvell is attempting to evade the judgment. Nor does CMU assert that Marvell has insufficient assets to cover the current judgment. To the contrary, 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).) CMU cannot meet even the permissive standard it posits for Rule 3118 (Reply at 2 n. 1)—"failure to satisfy the judgment itself"—because the judgment has not gone unsatisfied, and CMU has just now sought to register it (Dkt. 909).

Still another reason why Rule 3118 cannot apply is that, even accepting CMU's definition of *status quo* (Reply at 6), Marvell's "assets available to satisfy the judgment" have been "maintain[ed]" since the judgment. As of the close of the third quarter, Marvell still maintained more than $1.8 billion in cash, cash equivalents, restricted cash and short term investments; 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. (Dkt. 912-7 ("Murakami Decl.") ¶ 6.) If anything, Marvell's financial position has *improved*—Marvell's cash and cash equivalents now *exceed* what they were shortly before the verdict. (Dkt. 907-1.) And the investing community continues to recognize Marvell's financial strength (*see* Opp. at 3, 9-10), something CMU does not deny.

Nor has there been any substantive change to Marvell's business operations: Marvell's share repurchases and dividends now remain at the same, or lower, levels as compared to before the judgment. (Dkt. 907-1.) CMU's claim that Marvell is "continuing to dissipate billions of dollars of corporate assets" (Reply at 1) rings false in multiple respects. For one thing, Marvell's share repurchases over the past three years did not "dissipate" corporate assets; instead, they invested Marvell's assets in the company itself so as to fuel further growth, value, and cash. For Marvell to have abandoned its program of stock repurchases would have engendered legal issues and shareholder complaints threatening to hamper the overall business. With a market cap of well above $6 billion (Dkt. 912-2), Marvell continues to sport a healthy balance sheet and ample

cash on hand. Share buybacks and dividend payments are part and parcel of its robust status as a healthy, thriving public company.[6]

Contrary to CMU's claim that Marvell was silent in response to CMU's arguments concerning an LBO, Marvell stated that KKRLP's investment in Marvell has amounted to less than 5% of Marvell's shares. (Opp. at 3; Murakami Decl. ¶ 7.) That Marvell is a leading company with a $6 billion market capitalization whose business prospects continue to attract investors like KKRLP should come as comfort to CMU.

Similarly, as before the verdict, Marvell has an Interim Chief Financial Officer (CFO) while it continues to scout for a permanent CFO. (Murakami Decl. ¶ 8.) If there is any threat to Marvell's ordinary business operations, it is CMU's effort to intrude upon them. The *status quo* reflects Marvell's continuing success and financial soundness. Given that CMU has neither precedent, nor warrant, nor even sober analysis on its side, the prudent course is to leave well enough alone.

C. CMU Cannot Possibly Satisfy The Standard For A Preliminary Injunction

Only by satisfying the standard for a preliminary injunction in federal court might CMU obtain the sort of relief it seeks. Even if Rule 3118 might otherwise obtain, an unprecedented and far-reaching injunction arresting the *status quo* orderly operations of a publicly traded company in good standing must answer to a higher standard and tighter procedural safeguards. Other federal courts in Pennsylvania have insisted upon the standard governing a preliminary injunction, even when confronting more modest requests. In particular, CMU has no answer to *Tennenbaum Capital Partners, LLC v. Kennedy*, where the court could have proceeded under Rule 3118 but instead imposed the standard for a preliminary injunction. No. 09-mc-00194, 2012 WL 748256, at *2 n. 2 (E.D. Pa. Feb. 10, 2012).

[6] CMU has no response to the fact that Marvell has less than $259 million in shares that it is authorized to repurchase under the existing program. (Murakami Decl. ¶ 4.) Marvell has already noted that CMU's chart (Motion Ex. A) was misleading because it suggests a trend that is set to continue, in response to which CMU has now provided more charts that offer the same misimpression of an indefinite trend (*See* Dkt. 914-1).

By all indications, CMU knows it cannot meet the standard. It does not deny as much. It cites no case granting a preliminary injunction under comparable circumstances. And it ignores all of the cases Marvell set forth (Opp. at 15-16) that denied injunctive relief under the federal standard for a preliminary injunction.

II. CMU DOES NOT DENY THAT MARVELL IS PROCEEDING WITHIN THE ORDINARY COURSE OF ITS BUSINESS

Despite calling the "ordinary course of business" standard an "an objective means to evaluate Marvell's business conduct," (Reply at 7-8), CMU does not deny that the standard is limited to the bankruptcy context and reflects premises out of place here. What is more, CMU does not respond to Ms. Murakami's testimony that Marvell's dividends and share repurchases are within the ordinary course of its business. (Murakami Decl. ¶¶ 3, 4.) Nor can CMU dispute that Marvell has been repurchasing shares for more than three years and has been issuing quarterly dividends since July 2012. (*Id.*) All CMU says is that Marvell knew how much CMU sought in damages. (Reply at 4.) But even this Court did not expect a billion-dollar verdict. (12/5/2012 Trial Tr. 299:19–300:6, 340:25-341:4; 12/11/2012 Trial Tr. 341:9-15.) In any event, it is undisputed that Marvell's share repurchases and dividends remain in line with, or less than, those in place before the verdict. (Dkt. 907-1.) By no stretch of the "ordinary course of business" standard is Marvell's continuation *post*-judgment of its *pre*-judgment business programs anything other than ordinary.

III. CMU FAILS TO PROVIDE ANY MEANINGFUL JUSTIFICATION FOR ITS REQUESTED EMERGENCY RELIEF

CMU continues to request extraordinary relief on an emergency basis without providing any meaningful justification for its delay in requesting such relief or any changed circumstances warranting the relief. The few intervening developments that CMU cites have little to nothing to do with its request—and certainly cannot justify its *emergency* request for relief of *unprecedented* proportions.[7] Critically, the same uncertainty continues to surround the amount

[7] CMU claims (Reply at 2) that Marvell did not respond to CMU's factual allegations. In point of fact, whereas CMU's Motion reflected nothing more than attorney argument adorned by no verified declaration from anyone other than counsel of record (Dkt. 908-5), Marvell's

of damages Marvell actually owes. (*See* Opp. at 6-7.) CMU suggests (Reply at 5) that Marvell broke a "promise" to post a bond. But CMU fails to mention that, after the parties collaborated extensively in November in attempting to reach a bond agreement with the sureties, such bonding proved impossible given the unusual and stringent terms CMU insisted upon, combined with the uncertainty surrounding a final damages tally. That persisting uncertainty, in particular, has complicated the process for putting in place a bond at this stage of the proceedings. (*See* McDonough Decl. (filed herewith) at ¶¶ 4-5.)

The departure of Mr. Feller as Interim CFO (Reply at 5) amounts to a red herring. While CMU insinuates that nefarious motives drove his departure, it does not specify (much less prove) any such motive or any adverse consequence. Nor could CMU plausibly find fault considering that the position of Interim CFO was quickly filled by Mr. Rashkin, whose tenure with Marvell dates back to 1999. (Murakami Decl. ¶ 8.)[8]

While CMU submits a declaration[9] from Ms. Lawton purporting to set forth "warning signs about Marvell's financial position" (Reply at 5; Dkt. 914-1), Ms. Lawton has no answer to the hard, undisputed facts. As of the end of Marvell's third financial quarter, Marvell had on hand more than $1.8 billion in cash, cash equivalents, restricted cash and short term investments. (Murakami Decl. ¶ 6.) And Marvell currently expects to generate approximately $125 million in free cash flow during the current quarter. (*Id.*) To quote the article CMU itself invokes, "'[t]he

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Opposition responded to each "factual" assertion through the sworn declaration of Ms. Murakami (Dkt. 912-7).

[8] CMU seems to have abandoned reliance upon the "investigation" by the Shareholders Foundation that it initially trumpeted in its Motion (¶ 13), failing to deny that it reflects nothing more than plaintiffs' lawyers fishing for clients, as they routinely do. Nor does CMU deny that there is no need under Generally Accepted Accounting Principles for Marvell to book a reserve for the judgment at this time. (*See* Murakami Decl. ¶ 6.)

[9] Ms. Lawton's declaration (Dkt. 914-1) is an improper rebuttal declaration. CMU is required to set forth any affirmative evidence allegedly supporting its position in its opening brief. *Karlo v. Pitt. Glass Works, LLC*, 880 F.Supp.2d 629, 642 (W.D. Pa. 2012) (Fischer, J.) (finding it "improper" for plaintiffs to "introduce expert evidence that could otherwise have been raised in its opening brief"). Ms. Lawton's graphics set forth the same information provided through attorney argument in CMU's opening brief in an apparent attempt to salvage a manufactured and unsupported argument.

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." (Motion Ex. E.) Further, Marvell's stock price today remains above $13 per share (Dkt. 912-2), with the investing community continuing to choose to invest in Marvell (*see* Murakami Decl. ¶ 7). CMU does not dispute that the investing community's decision to invest in Marvell at the going market rate affords the best possible evidence that Marvell remains strong.

Contrary to CMU's self-characterization of its request for extraordinary, emergency relief as "lenient" and "appropriately tailored" (Reply at 1), the request answers to no such description. CMU's proposed injunction (Dkt. 908-2) would, by its terms, impose a broad freeze on all Marvell assets.[10]

CMU seems to agree that we are now on the eve of final judgment and that we can best address the issue of a bond once that final judgment comes. In the present, interim posture, there simply is no good reason to disturb the *status quo*, much less to grant the extraordinary relief that CMU seeks by enjoining Marvell's pursuit of its orderly, established, continuing business operations.

CONCLUSION

Marvell respectfully requests that the Court deny CMU's Motion and Verified Petition.

[10] CMU argues that the relief is not broad (Reply at 8 n. 8) by noting that it "would allow Marvell to design, develop and market integrated circuits." To be sure, CMU seems predictably happy to let Marvell continue making and selling chips so that it might pay the judgment. Yet Marvell's use of assets to satisfy investor expectations and maximize its future prospects is *also* important to the continuing success of its business (which success, again, stands to benefit CMU)—and CMU's proposed injunction would directly curtail that use.

Dated: December 20, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2013, the foregoing was filed electronically on ECF. I also hereby certify that on December 20, 2013, this filing will also be served on counsel for CMU by electronic mail.

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