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 FOR PREJUDGMENT AND POST-JUDGMENT INTEREST

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INTRODUCTION

CMU offers no rationale for its transparent attempt to maximize the award of prejudgment interest in this case. Indeed, in the context of reiterating its positions on Reply, CMU ***ignored*** the very principles that it originally acknowledged should guide this Court in deciding interest-related issues. Those principles support only one outcome here: (i) for pre-suit damages, the denial of prejudgment interest and (ii) for post-suit damages, the computation of prejudgment interest using the T-Bill rate and annual compounding.

I. PREJUDGMENT INTEREST SHOULD BE DENIED HERE

CMU now agrees that "prejudgment interest may be reduced or eliminated" in cases where the plaintiff delayed bringing suit and "the delay caused prejudice to the defendant." (Dkt. 852, hereinafter "Reply," at 3.) This is just such a case, and the Court should exercise its discretion to deny prejudgment interest here.

In its Reply, CMU does not meaningfully dispute that it delayed bringing suit against Marvell for ***at least*** the several years following CMU's review of Marvell's own patent on the accused technology. (*See also* Dkt. 823, at 14.) Instead, CMU argues (Reply 3) that Marvell cannot show prejudice, relying on two cases finding insufficient prejudice in the context of laches. But a court may exercise its discretion to deny prejudgment interest even where the delay and/or prejudice does ***not*** rise to the level required to establish laches. *E.g.*, *Lummus Indus., Inc. v. D.M. & E. Corp.*, 862 F.2d 267, 275 (Fed. Cir. 1998) (remanding for determination of whether delay supports denial of prejudgment interest despite unchallenged district court holding "that the evidence was insufficient to establish laches"). Indeed, permitting the denial of prejudgment interest on the ground of delay only where laches is established would make no sense—a finding of laches would preclude pre-suit damages altogether, thus obviating the need to even consider awarding interest for the period of delay.

The prejudice suffered by Marvell here in any event meets ***any*** standard. Marvell dedicated considerable resources to not only improving the accused technology incrementally over time but also enhancing the accused technology to create more sophisticated and advanced iterations of it (*i.e.*, the EMNP and the NLD)—all while CMU delayed bringing suit. (*See* Dkt. 804, at 16-20; Dkt. 854, at 6-8.) This fact alone establishes any prejudice required for a laches defense and ***more than*** satisfies any predicate required for the denial of prejudgment interest.

Marvell should not be required to "compensate" CMU—in the form of interest or otherwise—for CMU's own lack of diligence. Accordingly, this Court should exercise its discretion to deny prejudgment interest here. *See Gen. Motors Corp. v. Devex Corp.*, 461 U.S. 648, 656-57 (1983); *Crystal Semiconductor Corp. v. TriTech Microelectronics Int'l, Inc.*, 246 F.3d 1336, 1346, 1361-62 (Fed. Cir. 2001).

II. TO THE EXTENT PREJUDGMENT INTEREST IS GRANTED, IT SHOULD BE COMPUTED USING THE T-BILL RATE AND SHOULD BE COMPOUNDED ANNUALLY

CMU is incorrect to contend (Reply 4) that Marvell "*ignore*s" certain cases that CMU cited in seeking the highest possible interest award here. Marvell correctly distilled from those cases the principles that consistently guide district court decisions regarding prejudgment interest, and those principles, when applied here, weigh heavily in favor of computing prejudgment interest using the T-Bill rate compounded annually.

First, as CMU originally acknowledged but ignores in its Reply, federal courts have a strong preference for calculating prejudgment interest using a "consistent benchmark." (*E.g.*, Dkt. 789, hereinafter "Brief," at 2.) This explains why, as CMU implicitly concedes (Reply 5), the vast majority of district courts calculate prejudgment interest using market rates—either the prime rate or the T-Bill rate.

As described in Marvell's Opposition, neither CMU's own rate of return nor the state statutory rate is a "consistent benchmark." (Dkt. 836, hereinafter "Opp.," at 4-9.) The patent cases cited by CMU explicitly ***reject*** using a plaintiff's rate of return to calculate interest in light of the policy favoring the use of a uniform rate. *E.g.*, *Brunswick Corp. v. United States*, 36 Fed. Cl. 204, 219 (1996). And determining interest based on state statutory rates necessarily causes ***inconsistencies*** by making interest awards dependent on a plaintiff's wholly unrelated choice of forum. CMU's request for the application of either its own rate of return or the state statutory rate to calculate interest therefore must be seen as an opportunistic attempt to use the highest possible rates. CMU nowhere argues that there is any principled basis for applying either of those rates—rather than a "consistent" market rate—in this case.

Second, and again as CMU has acknowledged, courts have considered the "risk of non-payment" when considering which "consistent benchmark" to apply as an interest rate. (*E.g.*, Brief at 2.) In its Opposition, Marvell demonstrated that there is no risk of non-payment here, as Marvell has substantial cash reserves to pay the damages award. (Opp. at 5; Dkt. 837-3 at ¶ 5.) CMU does not dispute that there is no risk of non-payment in this case. Nor does CMU contest that, where there is a minimal or non-existent risk of non-payment, prejudgment interest should be computed at a low rate like the T-Bill rate.

Instead CMU contends incorrectly (Reply 5) that "Marvell fails to support its argument regarding a possible supersedeas bond." "The purpose of a supersedeas bond is to preserve the status quo" and "protect[] the non-appealing party's rights pending appeal." *E.g.*, *In re Advanced Elecs., Inc.*, 283 Fed. Appx. 959, 966 (3d Cir. 2008); *Beatrice Foods Co. v. New England Printing & Lithographing Co.*, 930 F.2d 1572, 1574 (Fed. Cir. 1991). Marvell's undisputed ability to post such a bond simply means that ***there will continue to be*** no "risk of

non-payment." And again, it is undisputed that the absence of any such risk counsels in favor of utilizing a low rate—like the T-Bill rate—to calculate interest here.

Third, as CMU now concedes (Reply 3), the U.S. Supreme Court has held that delay is a proper justification for considering whether to "limit" prejudgment damages. *Gen. Motors*, 461 U.S. at 656-67. As discussed above, the delay and prejudice in this case support the denial of prejudgment interest on pre-suit damages altogether. (*Supra* Part I.) The same delay and prejudice also counsel in favor of using the low T-Bill rate to compute any interest awarded here.

Fourth, CMU lacks any principled basis for its approach to the question of whether interest should be compounded. CMU does not dispute that Pennsylvania state courts ***do not compound*** when calculating interest using the state statutory rate (*see* Opp. at 6 (citing cases)). CMU offers no reason why a federal court should not act "consistent[ly] with [] state case law" in this respect. *E.g.*, *Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs., Inc.*, No. CV-03-0597, 2009 WL 920300, at *2 (D. Ariz. Mar. 31, 2009). And CMU offers no explanation why a ***non-market*** interest rate (like the state statutory rate) should be compounded.[1] Thus, to the extent the state statutory rate is used to calculate interest here (which it should not be), only simple interest should be awarded.

Finally, CMU contends that this Court should deny Marvell's request that any compounding be computed annually simply because "the plaintiff seeks more frequent compounding." (Reply at 6.) CMU cites no authority to support its apparent position that it

[1] Rather than offering any such rationale or explanation, CMU simply cites (Reply 4) to three cases in which a federal court compounded interest using a state statutory rate. But there is no indication—in the cited decisions or in the publicly available briefing submitted in those cases—that the district court had been informed or was otherwise aware of the uniform state court practice of ***not*** awarding compound interest when using the state statutory rate. And, in fact, district courts typically do ***not*** award compound interest in the relatively rare instances in which they apply the state statutory rate. (*See* Opp. at 7 (citing cases).)

should receive whatever it requests just because it is the plaintiff. Moreover, as Marvell demonstrated (Opp. 12), it is ***not*** the case that Marvell routinely pays royalties on a quarterly basis, and even the license agreements cited by CMU have varying provisions regarding the timing of royalty payments. And both (i) the absence of any risk of non-payment and (ii) the delay and prejudice present here counsel in favor of compounding less frequently rather than more frequently.

All of the principles guiding district court decisions regarding interest awards thus suggest that the use of the T-Bill rate with annual compounding is the only appropriate methodology for computing prejudgment interest in this case.

CONCLUSION

For the foregoing reasons, (i) CMU should be precluded from recovering prejudgment interest on any pre-suit damages; (ii) any prejudgment interest that is granted should be calculated using the historical T-Bill rate compounded annually; (iii) post-judgment interest should be calculated pursuant to 28 U.S.C. § 1961(a); and (iv) the parties should be directed to submit a joint statement regarding the actual prejudgment and post-judgment interest to be awarded (if any) following this Court's resolution of the parties' post-trial motions.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2013, the foregoing was filed electronically on ECF. I also hereby certify that on April 19, 2013, this filing will also be served on counsel for CMU by electronic mail.

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