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

REPLY BRIEF IN SUPPORT OF CARNEGIE MELLON UNIVERSITY'S MOTION AND VERIFIED PETITION FOR SUPPLEMENTAL RELIEF IN AID OF EXECUTION PURSUANT TO PENNSYLVANIA RULE OF CIVIL PROCEDURE 3118

I. INTRODUCTION

Marvell in its Opposition attempts to do precisely what courts have time and again admonished against -- transform the "streamlined" proceedings contemplated by Pa. R. Civ. P. 3118 into a wide-ranging inquiry about whether Marvell intends and has the resources to satisfy the judgment. Marvell's arguments miss the mark for the following reasons:

First, the only facts relevant to CMU's entitlement to relief under Rule 3118 are the existence of a judgment and Marvell property subject to execution. Marvell concedes both, so no factual dispute bars CMU's right to relief. Even if they were factually accurate (and they are not), Marvell's arguments that (1) it will be able to satisfy the judgment while continuing to dissipate billions of dollars of corporate assets and (2) no "emergency" or change of circumstances exists are irrelevant under Rule 3118. Despite promising to do so, Marvell has not and either cannot or will not secure a bond to protect CMU's ability to collect its judgment from Marvell's existing assets, so this Court must provide that protection.

Second, Marvell's argument that Rule 3118 is inapplicable here because CMU seeks to change the *status quo* flies in the face of both CMU's actual request and the purpose of the Rule. The Rule exists to preserve the judgment debtor's assets, not to protect its existing course of conduct. Courts repeatedly have rejected attempts like Marvell's to burden Rule 3118 with the procedures traditionally required for injunctive relief. This Court should do likewise.

Finally, CMU's requested relief, which would prohibit share repurchases, dividends and transactions that encumber Marvell assets but also would allow Marvell to conduct business in the ordinary course, is appropriately tailored and indeed lenient compared with the stricter relief available under Rule 3118. Marvell should not be permitted to continue to favor its shareholders over CMU or to otherwise impair CMU's ability to collect on its judgment.

II. ARGUMENT

A. Marvell Does Not Dispute the Only Facts Relevant to the Availability of Relief Under Rule 3118

To obtain relief under Rule 3118, CMU need show only "the existence of an underlying judgment and property of the debtor subject to execution." *Kaplan v. I. Kaplan, Inc.*, 619 A.2d 322, 326 (Pa. Super. Ct. 1993); *Gulf Mortgage v. Alten*, 422 A.2d 1090, 1094 (Pa. Super. Ct.

1980) (affirming Rule 3118 order where "defendant's answer admitted every relevant factual allegation in the petition… specifically, the existence of the judgment and [defendant's] ownership and possession of the shares"). Evidence of financial weakness of the judgment debtor or attempts to conceal assets is not a predicate to relief under Rule 3118. *See*, *e.g.*, *Gulf Mortgage*, 422 A.2d at 1094; *Kaplan*, 619 A.2d at 326.[1] Here, Marvell has not established the existence of a dispute over any relevant fact, so CMU is entitled to relief under Rule 3118.

Specifically, Marvell did not respond paragraph by paragraph to CMU's Verified Petition, and its declarations simply do not address the facts relevant to CMU's entitlement to Rule 3118 relief: (1) a money judgment exists in CMU's favor and (2) Marvell owns assets that are subject to execution to satisfy that judgment. Marvell does not and cannot deny that this Court entered a judgment in the amount of $1,169,140,271 on January 14, 2013 (Dkt. 762).[2] Nor does Marvell

[1] Contrary to Marvell's assertion, Dkt. 912 at 19, Rule 3118 does not require CMU to establish any specific "need" for relief beyond the failure to satisfy the judgment itself. The only case Marvell cites to support that assertion, *Local Union No. 98 v. Garney Morris, Inc.*, No. 03-CV-5272, 2004 WL 1858056 (E.D. Pa. Aug. 19, 2004), does not control and, in any event, there is ample evidence of need here: (1) Marvell has failed to post a bond after promising to do so; and (2) Marvell has been and will continue to dissipate its assets to CMU's prejudice. *See generally* Declaration of C. Lawton attached hereto ("Lawton Dec."); *compare Local Union*, 2004 WL 1858056 at *2 (finding no need shown due to ***absence of any*** "evidence that defendants… [were] dissipating assets").

[2] Contrary to Marvell's assertions, Dkt. 912 at 2 n. 2, the Court's January 2013 judgment did ***not*** "postpone the need for Marvell to post a bond until after the Court resolved post-trial motions." The judgment merely recognizes what is evident on the face of Fed. R. App. P. 4(a)(4): the filing of post-trial motions would "postpone any obligation ***to file a Notice of Appeal*** under [that rule] or to seek approval of any bond ***pending appeal*** under Fed. R. Civ. P. 62(d) until after the Court resolves such motions." Dkt. 769 at 2 (emphasis added). The judgment does not refer to Fed. R. Civ. P. 62(b), which provides that the court may stay execution ***during the pendency of post-trial motions*** only where the judgment debtor has posted adequate security. CMU's motion concerns execution during the pendency of post-trial motions (***not*** an appeal), so Rule 62(b) applies. Thus, Marvell must post adequate security in order to obtain a stay.

Marvell also is incorrect when it asserts that CMU is not entitled to execute on the judgment at this time for at least two reasons. First, despite the parties' post-trial motions, the entered judgment is "subject to execution." S*ee Gallatin Fuels v. Westchester Fire Ins. Co.*, Civ. No. 02-2116, 2006 WL 952203 (W.D. Pa. April 12, 2006) (entered judgment subject to execution despite outstanding post-trial motions). Indeed, Marvell's argument to the contrary would render meaningless Rule 62(b) and its limits on staying execution while post-trial motions are pending. Second, Rule 54(b) does not apply because the only "claims" or "counterclaims" in this case concern patent infringement and validity, and those claims were adjudicated by the jury's verdict. Marvell's reference to "laches, enhancement, supplemental damages, and interest

deny CMU's assertions (at Dkt. 908 at ¶¶ 15-16) that Marvell has assets that would be subject to execution. To the contrary, the gist of Marvell's Opposition is that Marvell in fact has ample assets to satisfy the judgment. Taking Marvell at its word (for now), CMU is entitled to relief in aid of execution to protect the *status quo*, *i.e.* to ensure that Marvell's current assets remain available to satisfy CMU's judgment. CMU is entitled to that relief unless Marvell secures a stay under Fed. R. Civ. P. 62(b), which authorizes stays of execution pending disposition of post-trial motions if the judgment debtor posts appropriate security. Marvell has not moved for such a stay, which would have to be conditioned upon a bond. *See, e.g.*, *Gallatin*, 2006 WL 952203 at *1.

Unable to dispute the facts upon which Rule 3118 relief is predicated and unwilling or unable to procure a bond, Marvell improperly invites the Court to consider an array of irrelevant facts, such as whether Marvell's intent in dissipating assets is to avoid the judgment and whether circumstances have changed so as to justify Rule 3118 relief now as opposed to some earlier date. Under governing law, none of these facts are relevant. *See, e.g.*, *Kaplan*, 619 A.2d at 326. Even if they were relevant, this Court should reject Marvell's arguments for the following reasons.

First, Marvell concedes its massive prior and ongoing dissipation of assets, all of which commenced during this litigation. Marvell freely admits that -- while it was profiting and continues to profit from its willful infringement -- it distributed enormous amounts of cash to its shareholders (including the CEO and his family). Pursuant to the share repurchase program alone, Marvell disbursed over $2.74 billion to its shareholders ***while this case has been pending***.

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adjustments" does not change the analysis because they are simply an "affirmative defense" and "demands for relief." *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 743 n.4 (1976) ("It is sufficient to recognize that a complaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief"); Fed.R.Civ.P. 8(c) (expressly denominating "laches" as an "affirmative defense" - which is precisely how Marvell pled it, Dkt.116 at 6); *Odetics, Inc. v. Storage Tech. Corp.*, 185 F.3d 1259, 1272-73 (Fed. Cir. 1999) ("laches bars ***relief*** on a patentee's [infringement] claim only with respect to damages accrued prior to suit.") (emphasis added); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202–03 (1988) (a pending motion for attorneys' fees does not render a judgment non-appealable). In any event, unless Marvell promptly posts an adequate bond after the Court rules on the outstanding post-trial motions, the Court will still need to decide the merits of this Motion. Furthermore, Marvell should be careful what it wishes for. If, as Marvell appears to assert, the January 14 judgment is not really a judgment, then pre-judgment continues to run.

Dkt. 912-7 (Murakami Dec.) at ¶ 4. On top of that, Marvell paid about $180 million in dividends (about $30 million per quarter starting in July 2012, well after Marvell knew the amount of CMU's claim). The charts and tables attached to Ms. Lawton's declaration vividly illustrate the effect of Marvell's conduct on its ability to satisfy the judgment. *See* Lawton Dec. at Exs. 1-4.

Second, Marvell does not deny that, absent a Rule 3118 order, it is well-positioned to further dissipate or encumber its current assets. Indeed, in addition to the $2.74 billion that it already spent to repurchase shares, Marvell concedes that its Board already has authorized Marvell to spend another $259 million to repurchase more shares. Dkt. 912-7 (Murakami Dec.) at ¶ 4. Although Marvell denies any such "***current***" intent, *see id*. and Dkt. 912 at 9 ("Marvell has no plans to increase the authorized amount of share repurchases ***at this time***") (emphasis added), those carefully crafted statements provide no assurances that Marvell will not authorize additional repurchases (or bigger dividends) before any appeal is completed.[3] Furthermore, Marvell asks this Court to bless continued payment of about $30 million in quarterly dividends, which alone will substantially exceed $100 million before resolution of any appeal.

Critically, Marvell also ducks any substantive discussion of the possibility of an LBO or any other pending or contemplated effort to encumber its assets in a significant manner. Although MSI's Treasurer references CMU's assertion that "Marvell may be considering a leveraged buyout," Dkt. 912-7 (Murakami Dec.) at ¶ 7, Marvell nowhere denies such plans, nor does it disclose whether it has discussed the subject. Marvell's silence gives this Court no assurance that such a transaction is not already underway.

Third, Marvell's intent with respect to the foregoing dissipations is irrelevant. Although Marvell attempts to justify its past and contemplated future conduct with purportedly legitimate business reasons, *see*, *e.g.*, Dkt. 912 at 4-5 (comparing Marvell's conduct to other "leading companies," albeit none facing a judgment exceeding $1 billion), Marvell misses the point. Rule 3118 protects judgment creditors like CMU by allowing streamlined enforcement proceedings where purported business justifications and the like are irrelevant; Marvell cites no authority to

[3] In fact, Marvell increased the original $500 million authorization for share repurchases in five separate $500 million increments. *See* Lawton Dec. at ¶ 11.

the contrary. The Rule is framed as it is to ensure that the Court is not burdened with assessing Marvell's business rationale and preferences. The Court's primary focus is and must be protection of CMU's ability to collect on its judgment, not protection of Marvell's efforts to placate its shareholders.

Fourth, neither a change in circumstances nor an "emergency" is a prerequisite to relief under Rule 3118. Although Marvell devotes considerable effort to arguing that no "emergency" exists or to show that circumstances have not changed since the Court denied most of Marvell's post-trial motions on September 23, 2013, Rule 3118 simply does not require such proof. Marvell's Opposition contains absolutely no authority establishing that it does.

Fifth, assuming *arguendo* that CMU must establish a change in circumstances, it has done so. As Marvell acknowledges, circumstances changed on September 23, when the Court denied all but one of Marvell's post-trial motions. CMU promptly initiated discussions with Marvell regarding its obligation to post a bond. Circumstances changed again on November 5, 2013, when the media reported the possibility that Marvell was considering an LBO, and CMU promptly set a deadline for Marvell to post a bond. Although ***Marvell thereafter promised that it would post a $1.5 billion bond in "2 or 3 days,"*** circumstances changed again shortly before CMU filed its motion when it became clear that Marvell is unwilling or unable to post a bond.[4] The circumstances changed yet again when Marvell's interim CFO resigned without explanation. These facts, which Marvell does not dispute, represent a sufficient change in circumstances justifying CMU's decision to take affirmative steps to protect its ability to collect its judgment.

Finally, although Rule 3118 does not require the Court to make determinations about Marvell's financial position, significant warning signs about Marvell's financial position exist. In fact, Marvell's behavior and the size of the award vis-à-vis its liquid assets provide ample reason for CMU to be concerned about its ability to collect on its judgment absent the relief sought here. *See* Lawton Dec. at ¶¶ 6-7, 10, 12, Exs. 1-2 (benchmarking Marvell's accruing liability - without

[4] Marvell, not CMU, designated certain aspects of the discussion regarding the bond as confidential, yet has now publicly put at issue the lapse of time during which the parties discussed a bond. It cannot take one position during those discussions and another on the record.

prejudgment interest - against its liquid assets).

B. Rule 3118 Applies; CMU Seeks Perseveration of the Status Quo

Marvell does not take issue with the Court's authority under Fed. R. Civ. P. 69 to use Rule 3118 to craft appropriate relief. Nonetheless, Marvell asks the Court to require CMU to establish traditional elements of a preliminary injunction, arguing that CMU seeks to "change the *status quo*" not preserve it. Dkt. 912 at 13. This Court should reject Marvell's arguments.

CMU's motion expressly seeks preservation of the *status quo*. Marvell's argument to the contrary employs sleight of hand by focusing on preservation of Marvell's past pattern of conduct instead of focusing on preservation of what Rule 3118 is designed to preserve -- the assets available to satisfy the judgment.

The text of the Rule itself makes clear that maintaining the *status quo* means keeping the assets where they are: with the defendant. The Rule sets forth acts that can be enjoined, such as:

> the negotiation, transfer, assignment or other disposition of any security, document of title, pawn ticket, instrument, mortgage, or document representing any property interest of the defendant subject to execution; …the transfer, removal, conveyance, assignment or other disposition of property of the defendant subject to execution…

Pa. R.C.P. 3118(a)(1), (2).[5] Precedent confirms that the Rule is directed at preservation of the defendant's property, not preservation of defendant's business strategy. *See, e.g., Greater Valley Terminal Corp. v. Goodman*, 202 A.2d 89, 92 (Pa. 1964) ("The first five paragraphs of the Rule enable the judgment creditor to ***preserve the status quo as to the judgment-debtor's… property*** by authorizing the court to enjoin transfers thereof…") (emphasis added). Indeed, the Rule does not carve out exceptions for "the negotiation, transfer, assignment or other disposition of any security, document," etc. or "the transfer… or other disposition of property" done in the ordinary course of business, let alone done to prefer shareholders over a judgment creditor. There is simply no support, and Marvell cites none, for the illogical proposition that "maintaining the *status quo*" means protecting the defendant's pattern of transferring assets out of the reach of the judgment

[5] The Rule also permits the court to direct the defendant "to take such action as the court may direct to ***preserve collateral security for property of the defendant***…." *Id.* at 3118(a)(3) (emphasis added). Courts may issue other orders under Rule 3118 that are similarly focused on the preservation of assets to satisfy the judgment. *See, e.g., id.* at 3118(a)(4), (5).

creditor instead keeping assets where they are – with the defendant.[6]

C. The Scope of Relief Requested is Appropriate

CMU carefully tailored the relief that it seeks to balance the protections to which it is entitled against Marvell's ability to conduct its business. Beyond asserting that "other leading companies" repurchase shares and issue dividends, Marvell describes no adverse consequence of granting the requested relief.[7] Indeed, the declaration by MSI's Treasurer does not even suggest that granting this Motion would impair Marvell's ability to conduct its business. This omission is striking in light of Marvell's claim that the relief "would compromise Marvell's ability to run its business as it sees fit to maximize its success and meet the expectation of its investors." Dkt. 912 at 11. Even if Marvell had supported this claim, Rule 3118 proceedings protect CMU's ability to collect, not Marvell's ability to meet the expectations of its investors.

Furthermore, to allow Marvell to conduct its business in the normal course, CMU tailored its requested relief more narrowly than Rule 3118 requires. Marvell misses the mark with its criticism of the "ordinary course of business" ("OCOB") standard that CMU suggested as an appropriate benchmark. The OCOB standard is simply an objective means to evaluate Marvell's

[6] Marvell's other arguments against applying Rule 3118 fare no better. Dkt. 912 at 14-15. "[A] showing of the traditional requirements for an injunction… simply is not required by the rule." *Kaplan*, 619 A.2d at 326. Courts only invoke their general equity power (and thus the traditional injunction standard) ***when the petitioner seeks relief that goes beyond that permitted by the Rule***. *See, e.g., Greater Valley*, 202 A.2d at 93 ("full dress equity proceedings," not "summary" Rule 3118 proceedings, are required to adjudicate title to property or undo an allegedly fraudulent transfer). The cases cited by Marvell are easily distinguished on that basis. *See, e.g.*, Dkt. 912 at 14 (citing *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) (because assets were held as tenancies by the entireties Rule 3118 did not apply, so the court invoked its general equity powers)). Moreover, courts repeatedly have rejected attempts to avoid Rule 3118 on the grounds that the judgment debtor's assets are in a different jurisdiction. *Savitsky v. Mazzella*, 93 Fed. Appx. 439, 440-43 (3d Cir. 2004); *Chadwin v. Krouse*, 386 A.2d 33, 36 (Pa. Super. Ct. 1978). The fact that Marvell devotes only one sentence to this argument speaks volumes about its viability.

[7] While it alludes to ***a single, potential*** adverse consequence if it cannot make the next quarterly dividend payment (the single one already declared), *see* Dkt. 912 at 11 ("[T]he order that CMU seeks ***could 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.")(emphasis added), Marvell itself has anticipated that it may not be able to make even that declared dividend under Bermuda law and has so disclosed that possibility to its shareholders. Dkt. 912 at 4 n. 3.

business conduct. "The touchstone of 'ordinariness' is…the interested parties' reasonable expectations of what transactions the debtor in possession is likely to enter into in the course of its business." *In re Roth American, Inc.*, 975 F.2d 949, 953 (3d Cir. 1992). The application of the OCOB standard would not inhibit Marvell from developing and marketing integrated circuits. It would bar Marvell only from extraordinary sales of assets, financing transactions such as an LBO or other asset leveraging transaction or from transferring company assets to, among others, its shareholders in preference to its obligation to its judgment creditor, CMU.[8]

Finally, this Court should not permit Marvell to continue its $3 billion (or more) stock buyback program (especially because such conduct would make it easier for Marvell to take the company private and encumber its assets in a LBO); nor to continue a dividend payment program that it started well after it was aware of the risk of the judgment it now faces. In the face of Marvell's now-broken promise to obtain a bond to protect CMU, the limitations requested by CMU are reasonable measures to ensure that the $1.8 billion in liquid assets that Marvell possess remain available to satisfy the judgment.

III. CONCLUSION

For the foregoing reasons and those set forth in CMU's Motion and Verified Petition, this Court should grant the Motion and enter the order attached thereto.

Respectfully submitted,

Dated: December 18, 2013

/s/ Christopher M. Verdini

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[8] Under the OCOB standard proposed by CMU, Marvell has far more freedom to operate than it would under a standard Rule 3118 order. Indeed, the proposed order would allow Marvell to design, develop and market integrated circuits, even though doing so would include the "transfer… of property… subject to execution" that can be blocked under Rule 3118(a)(1), (2).

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 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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