IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ADVANCED MICRO DEVICES, INC., a Delaware corporation, and AMD INTERNATIONAL SALES & SERVICES, LTD., a Delaware corporation, Plaintiffs, v. INTEL CORPORATION, a Delaware corporation, and INTEL KABUSHIKI KAISHA, a Japanese corporation, Defendants.	C.A. No. 05-441-JJF
IN RE INTEL CORPORATION MICROPROCESSOR ANTITRUST LITIGATION	MDL No. 1717-JJF
PHIL PAUL, on behalf of himself And all others similarly situated, Plaintiffs v. INTEL CORPORATION, Defendants.	C.A. No. 05-485-JJF CONSOLIDATED ACTION **Public Version** **December 2, 2008**

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ON AMD'S EXPORT COMMERCE CLAIM

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INTRODUCTION

This is a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure or, in the alternative, for summary judgment, on AMD's export commerce claim. By way of background, on September 26, 2006, this Court granted Intel's Motion to Dismiss AMD's foreign commerce claims for lack of subject matter jurisdiction pursuant to the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a ("FTAIA"). *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 563 (D. Del. 2006) ("*Intel I*"). Specifically, the Court eliminated from the case a specific set of claims, by Complaint paragraph number, involving AMD's sales of its German-manufactured microprocessors to foreign customers.

Shortly thereafter, a dispute arose between Intel and AMD as to whether the Court's FTAIA ruling effectively limited the scope of pre-trial discovery to domestic commerce only. Intel argued that it did. AMD claimed that it did not, on two grounds. As one ground, AMD argued that it was pursuing an export commerce claim not addressed in Intel's Motion to Dismiss. AMD further argued, relying principally on the sworn declaration of Dr. William Siegle, AMD's retired Chief Scientist and top manufacturing executive, that Intel's alleged foreign anticompetitive actions suppressed the demand for AMD microprocessors, forcing AMD to abandon production at its only microprocessor manufacturing facility in the United States, Fab 25 in Austin, Texas, and to convert it to the manufacture of less profitable flash memory,[1] thus

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[1] "Flash memory" is a type of semiconductor memory that retains its contents even when powered off and is used in such products as cell phones, digital cameras, and other consumer electronic items. (*See* Declaration of Daniel S. Floyd in Support of Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment on AMD's Export Commerce Claim ("Floyd Decl."), Ex. 1 at 9.)

exiting the export business.[2] Special Master Judge Poppiti granted AMD's motion to compel foreign discovery based on both grounds.[3]

Intel now has had an opportunity to depose Dr. Siegle and to conduct other discovery concerning the export commerce claim that AMD advanced before Judge Poppiti as one of the bases for its right to conduct foreign discovery. [redacted] AMD advanced to Judge Poppiti for its decision to abandon production of microprocessors in the United States. With the benefit of discovery, the tables now have turned. The uncontroverted facts establish that AMD's export commerce claim cannot pass muster, and dismissal for lack of jurisdiction, or summary judgment on statute of limitations grounds, is required.

In its motion to compel foreign discovery, AMD relied on Dr. Siegle's sworn attestation to argue that the company would have continued microprocessor production at Fab 25, but that an unexpected decrease in demand during 2000, which he attributed to anticompetitive Intel conduct, forced it to convert the fab to the manufacture of flash memory. Thus, Dr. Siegle attested that "[i]n the absence of Intel's misconduct . . . we would have continued to manufacture microprocessors in [Fab 25] during 2003 and for at least several years thereafter" and that AMD

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[2] AMD also pointed to the passing mention of "export" in two general paragraphs in its Complaint (¶¶ 127, 129) to argue that it had pled an export commerce claim.

[3] AMD's other argument was that, inasmuch as the relevant geographic market was global, it was entitled to conduct foreign discovery to support its claim that Intel possessed monopoly power and engaged in anticompetitive conduct to maintain that power worldwide.

"had expected to continue operations at [Fab 25] even as [AMD's new Fab 30 in Dresden, Germany] ramped up to capacity" but "ultimately worldwide orders were not sufficient to keep both plants operating at efficient levels." (Declaration of William T. Siegle in Support of Pl.'s Mot. to Compel ("Siegle Decl.") ¶ 4.[4]) And he further swore that AMD's previous expectations of market share growth "gave way to disappointment" in 2000 (*id.* ¶ 16), which in turn led the company to abandon its goal of achieving a 30% market share (*id.*), and instead "settle[] on a plan to convert Fab 25 to produce lower margin flash memory" (*id.* ¶ 18).

These statements are [redacted] for the reasons briefly outlined below and developed in detail in the Statement of Facts, at 5-16, *infra*.

- AMD concluded [redacted] its new Fab 30 in Germany had ample capacity to meet AMD's own aggressive goals for expanding its microprocessor market share from what it reported at the time, 17%, to its desired, ambitious goal of 30%. (*See* pp. 9-11 *infra*.)
- Not only did AMD not need Fab 25 for the manufacture of microprocessors, but Fab 25 would have needed upgrades [redacted] to maintain its suitability as a microprocessor fabrication facility, [redacted] (*See* pp. 11-12 *infra*.)
- Dr. Siegle admitted in his deposition that [redacted] (*See* p. 14 *infra*.)
- Dr. Siegle admitted in his deposition that [redacted] Indeed, Dr. Siegle informed employees in January 2001 [redacted] (*See* pp. 12-13 *infra*.)

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[4] A true and correct copy of the Siegle Declaration is attached as Exhibit 2 to the Floyd Declaration.

- Dr. Siegle confirmed at his deposition [redacted] (*See* pp. 7-9 *infra.*)
- Contrary to his attestation that AMD's flash memory business was [redacted] Dr. Siegle admitted in his deposition that he had no idea whether [redacted] (*See* pp. 8-9 *infra.*)

Under the FTAIA, this Court lacks jurisdiction over AMD's export commerce claim unless AMD can demonstrate that Intel's alleged foreign conduct had a "direct, substantial and foreseeable effect" on AMD's microprocessor export business – here AMD's decision to abandon that business. This effect must be a "direct causal relationship," i.e., "proximate causation," and "is not satisfied by [a] mere but-for nexus." *Empagran S.A. v. F. Hoffman-La-Roche*, 417 F.3d 1267, 1269, 1271 (D.C. Cir. 2005). The uncontroverted facts listed above establish that no alleged unlawful conduct of Intel's, abroad or in the U.S. for that matter, proximately caused AMD's decision to cease manufacturing microprocessors in the United States, and the claim thus must be dismissed under the FTAIA and Rule 12(b)(1).

In addition, wholly apart from the FTAIA jurisdictional issue, AMD's export commerce claim (and any other claim of injury arising out of AMD's decision to cease using Fab 25 to manufacture microprocessors) also fails for a separate and independent reason: it is barred by the four-year statute of limitations under the Sherman Act. This is the case even assuming *arguendo* that Intel's conduct contributed to AMD's decision to take its manufacturing outside of the United States. It is undisputed that AMD made its decision to convert Fab 25 to flash memory production, and not to invest in upgrading Fab 25 to continue microprocessor manufacturing, [redacted] more than four years before the June 27, 2005 filing of the

Complaint in this case, [redacted] Thus, summary judgment on AMD's export commerce claims should be granted.

STATEMENT OF FACTS

A. In The Late 1990's, Fab 25 Was Reaching The End Of Its Useful Life.

AMD's Fab 25, located in Austin, Texas, began production of microprocessors in 1995. (Siegle Decl. ¶ 7; [redacted][5]) According to Dr. Siegle, Fab 25 was capable of producing 25-30 million microprocessors per year.[6] (Siegle Decl. ¶ 7.) However, Fab 25 employed two key technologies [redacted] an "aluminum interconnect" process[7] and 200-mm silicon wafers.

By the beginning of 2000, AMD had concluded that to continue to produce competitive microprocessors at Fab 25, it would have to replace the fab's aluminum interconnect technology with copper interconnect technology,[8] which would require a costly upgrade to the fab. (*See id.* ¶ 11.) For example, [redacted]

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[5] A true and correct copy of the relevant pages from the Siegle Deposition transcript is attached as Exhibit 3 to the Floyd Declaration.

[6] AMD also had small manufacturing facilities devoted to flash memory, located in Japan and owned by a joint venture in which it was a partner. (Floyd Decl., Ex. 4 at 12.)

[7] The term "aluminum interconnect" refers to the composition of the wires that connect the transistors on the microprocessors. By contrast, copper interconnect technology uses copper wires for the same purpose. [redacted]

[8] Copper interconnect technology generates less heat than aluminum interconnect and was desirable for higher-speed microprocessors, as heat dissipation tends to increase with speed. [redacted]

[redacted] AMD's then President and future Chairman and CEO, Hector Ruiz, echoed this sentiment [redacted]

Moreover, AMD also recognized that Fab 25 was [redacted] to which the industry was migrating at the time to improve operating efficiency. Use of 300-mm wafers offers significant cost advantages over the 200-mm technology used at Fab 25.[9] AMD recognized that [redacted]

[9] AMD has stated that "[u]se of larger wafers can contribute . . . to a decrease in manufacturing costs per unit and increase capacity by yielding more chips per wafer." [redacted] Intel announced its plans to build a 300-mm fab in January 2000. (Floyd Decl., Ex. 10 at 11.)

B. AMD Determined [redacted]

By early 2000, the dramatic increase in demand for flash memory had caught AMD off guard, with the company lacking the capacity to take advantage of the opportunity presented by that growth. In its earnings releases for each of the first three quarters of 2000, AMD stated that it projected "that demand for [AMD] Flash memory products will continue to exceed supply."[10]

[redacted] AMD publicly trumpeted the flash memory business as "[t]he largest contributor to our achievement of record operating income" in 2000 and described flash memory as "the fastest growing major segment of the semiconductor industry."[11] (*Id.*, Ex. 13 at 6.)

AMD's persistent inability to meet flash memory demand was significant enough for the company to publicly report in its Form 10-Ks for both 1999 and 2000 that its shortage of flash memory manufacturing capacity could have a material adverse effect on its business. (*Id.*, Ex.

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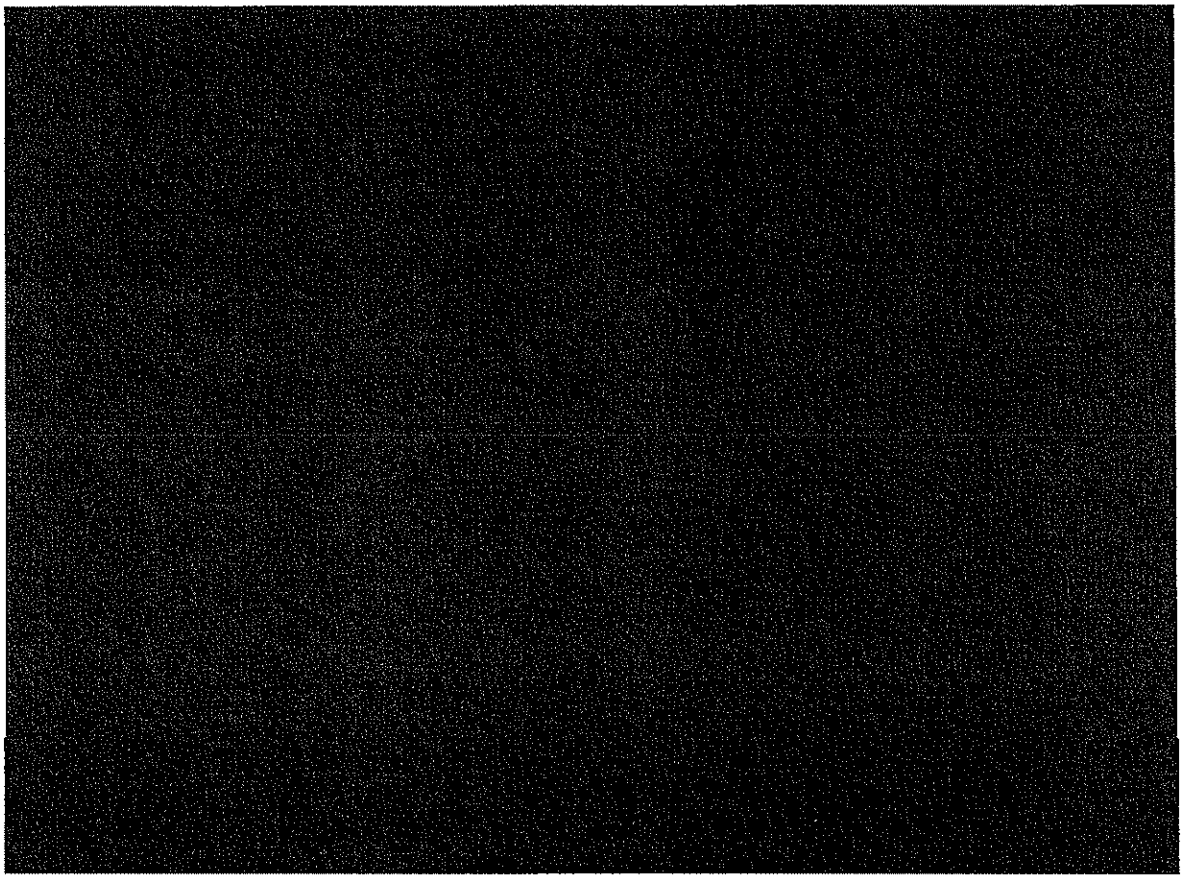
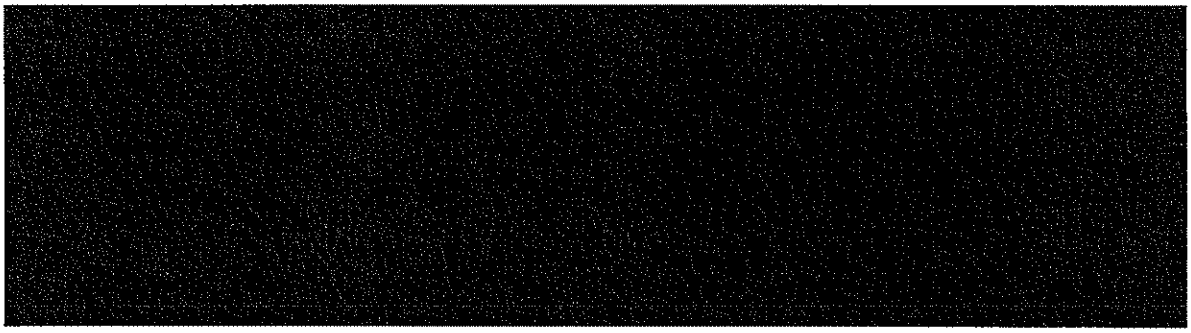
[10] (*See* Floyd Decl., Ex. 14 at 6; Ex. 15 at 7; Ex. 16 at 6.)

[11] In fact, AMD's Memory Products division, particularly flash memory, generated roughly a third of AMD's overall revenue in 2000, with revenue growing rapidly, more than doubling during 2000, to $1.5 billion. (Floyd Decl., Ex. 13 at 5, 9.)

17 at 2; Ex. 1 at 23.) At AMD's April 2001 Annual Shareholder Meeting, its then Chairman, Jerry Sanders, acknowledged that AMD was "capacity constrained" in 2000 with respect to flash memory production. (*Id.*, Ex. 18 at 1.)



AMD's claim, and Dr. Siegle's sworn attestation, that AMD was forced to "settle" for "lower margin" flash memory manufacturing due to Intel's misconduct is



[redacted]

C. AMD Determined That It Could Easily Meet Its Most Ambitious Microprocessor Production Goals Without Fab 25.

Another critical reason behind AMD's decision to shift Fab 25 from microprocessor to flash memory production was AMD's determination that it could meet its most ambitious goals for demand for its microprocessors from production at Fab 30. Indeed, AMD believed that it could nearly double its microprocessor market share by relying on Fab 30 and, if necessary, external foundry support.

In 1997, AMD began constructing a new microprocessor manufacturing facility in Dresden, Germany, which it built with significant financial assistance from the German government. [redacted] This facility, known as "Fab 30," used copper interconnect technology, and for that reason was capable, unlike Fab 25, of manufacturing the latest generation of microprocessors. (Siegle Decl. ¶ 8.) Further, [redacted] Fab 30 was capable of being upgraded to the more cost effective 300-mm wafer technology. [redacted] Fab 30 began microprocessor production in 2000. (Siegle Decl. ¶ 8.)

Soon after Fab 30 began operating, various AMD executives repeatedly claimed, [redacted] publicly [redacted] that Fab 30 was capable of making 50 million microprocessors per year and could single-handedly meet AMD's goal of serving 30% of the microprocessor market. [redacted] For example, during an earnings call with financial analysts to discuss AMD's results for the third quarter of 2001, AMD's Chief Financial Officer Bob Rivet

stated that AMD's capacity at Fab 30 would enable AMD to "produce more than 50 million units a year," which "would be more than the 30% market share that everyone says we will never get to except us." (Floyd Decl., Ex. 24 at AMD-F096-5102323.) AMD's then-Chairman and CEO, Jerry Sanders, likewise stated that "we have a magnificent factory in fab 30 . . . . We think this is our secret weapon if you will. It can produce over 50 million units a year[.]" (*Id.* at AMD-F096-5102321.) [redacted] In 2002, Dr. Siegle himself boasted that "Fab 30 will ship 50 million processors by the end of 2002, just two an[d] a half years after opening." (*Id.*, Ex. 26 at AMD-F096-5102275-76.) In January 2003, Ruiz, now CEO, revised his estimate of Fab 30's capacity upward to 75 million units. (*Id.*, Ex. 27 at AMD-F096-5102290.)

[redacted]

[redacted][12]

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[12] [redacted]

[Footnote continued on next page]

To put these statements in perspective, in 2000, [redacted], AMD produced 26.5 million microprocessors. (Floyd Decl., Ex. 28 at 5.) Accordingly, the 50 million unit capacity that so many AMD executives proclaimed as the capacity of Fab 30 represented a near doubling of AMD's microprocessor production capacity, and the 75 million figure provided to AMD's shareholders by the company's CEO represented a near tripling of that capacity.

With so much capacity for growth at Fab 30, AMD had no need to use Fab 25 for microprocessors, [redacted] Given that AMD estimated its share in 2000 at 17% (Floyd Decl., Ex. 28 at 5), this gave AMD plenty of room for growth.

D. AMD Determined That Upgrading Fab 25 To Support Microprocessor Production Was [redacted].

[redacted]

[redacted]

[13] [redacted]

[redacted] AMD rejected this approach for several [redacted] reasons. First, AMD believed that [redacted] AMD's sales of flash memory "more than doubled" in 2000 (Floyd Decl., Ex. 28 at 6), outpacing even the impressive 68.5% growth in AMD's microprocessor sales that year (*id.*, Ex. 1 at 11).

Second, AMD concluded that [redacted]

Third, as Dr. Siegle explained, [redacted] On the other hand, Fab 30 [redacted] was designed to facilitate conversion to 300-mm wafer technology. [redacted]

E. AMD Converted Fab 25 To The Manufacture Of Flash Memory Despite [redacted]

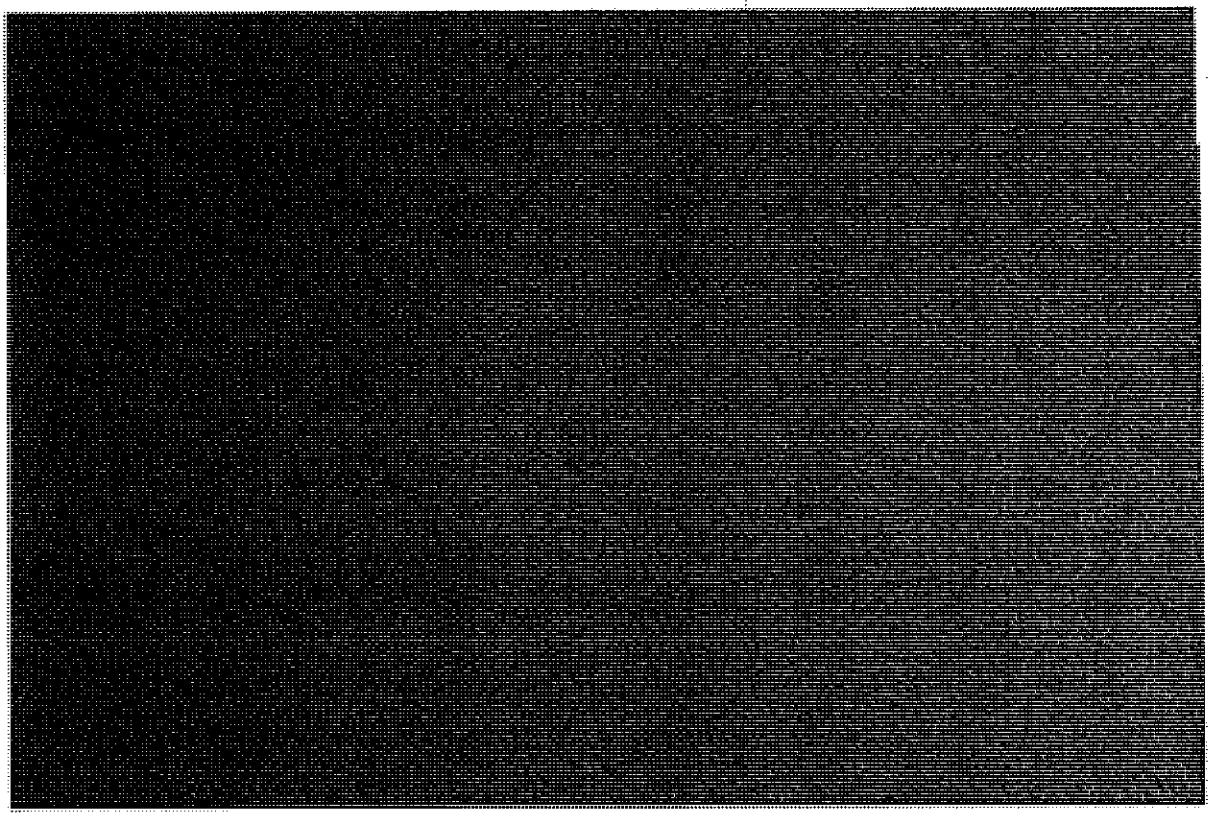
Conspicuously absent from any AMD document or Dr. Siegle's deposition testimony is the claim that Intel's conduct, much less its conduct in foreign markets, had anything to do with AMD's decision regarding Fab 25. Indeed, Dr. Siegle's testimony [redacted] AMD's

contention in its Motion To Compel foreign discovery that "in the absence of Intel's misconduct and the consequent reduction in orders for AMD microprocessors, AMD would not have closed Fab 25 at the end of 2002." (AMD's Mot. to Compel, filed Oct. 30, 2006, at 9.)

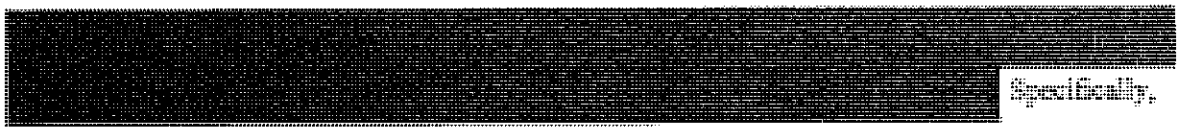
Dr. Siegle testified that [redacted] It could hardly be otherwise. AMD's microprocessor revenues in 2000 grew by 68.5% over the preceding year (*id.*, Ex. 1 at 11), a figure that reflects a booming microprocessor business that stands in stark contrast to the gloom portrayed in Dr. Siegle's declaration and AMD's Motion to Compel foreign discovery.

F. AMD Made The Final Decision To Stop Making Microprocessors In Fab 25 In [redacted]

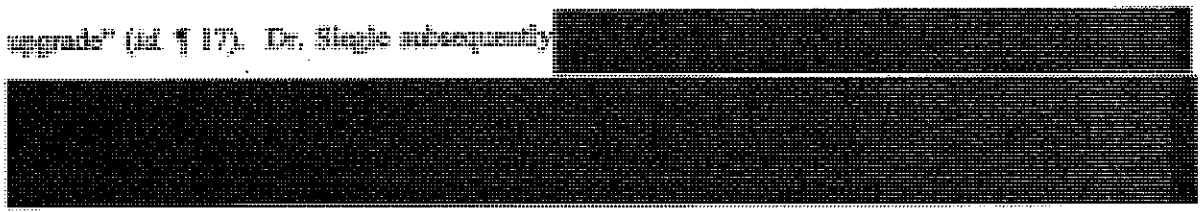
AMD's decision to convert Fab 25 [redacted] announced to the public by April 2001. [redacted]



While AMD briefly considered whether it should make the necessary upgrades to Fab 25 to maintain it as a microprocessor facility, AMD rejected this option in favor of the original plan to convert Fab 25 to flash memory manufacturing. (Siegle Decl. ¶ 18.) Dr. Siegle's testimony

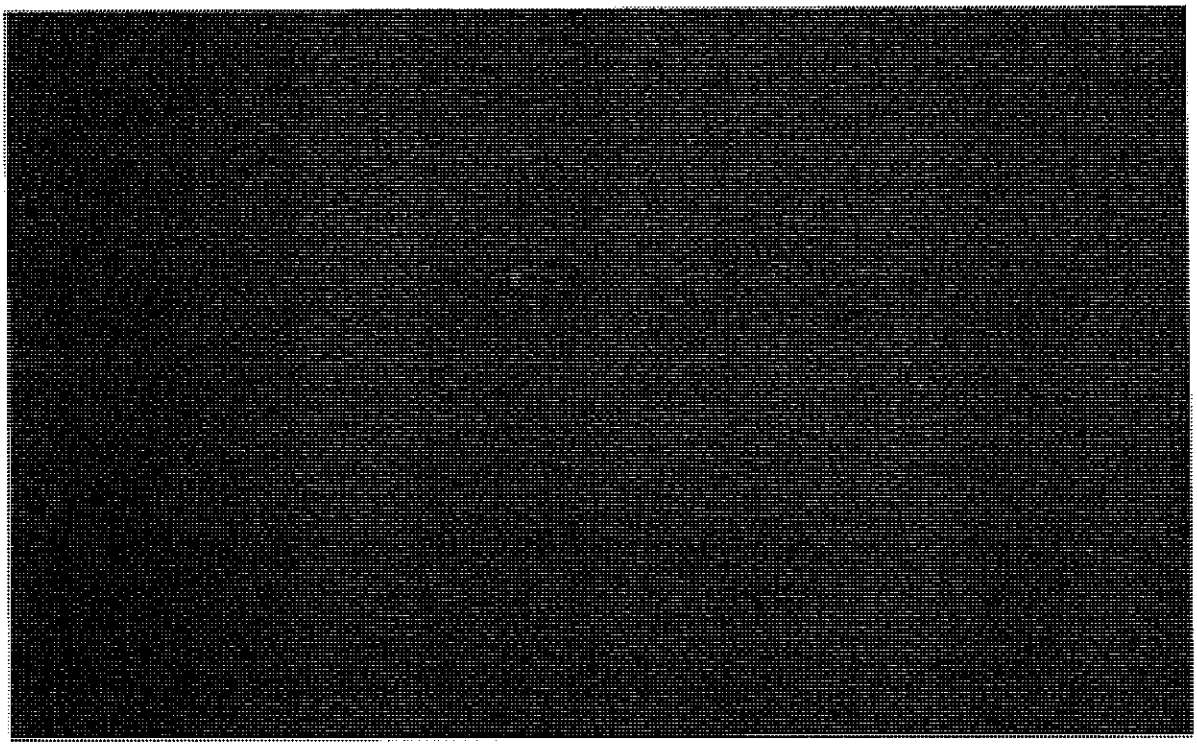


Dr. Siegle had attested that "[p]lans were . . . initiated to upgrade Fab 25" for continued microprocessor production after an October 2000 AMD Executive Council meeting (Siegle Decl. ¶¶ 14-15), but that a subsequent "[r]eassessment" (*id.* ¶ 15) caused AMD to "abandon the Fab25 upgrade" (*id.* ¶ 17). Dr. Siegle subsequently



[redacted]

By [redacted] AMD made the final decision to convert Fab 25 to flash memory production. [redacted]



On April 18, 2001, AMD's Chairman and CEO publicly disclosed this decision during AMD's quarterly earnings conference call, stating that "[t]he overall plan is to migrate Fab 25 into a Flash factory over time."[14] (Floyd Decl., Ex. 39 at AMD-F096-5102312.)

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[14] AMD continued to reaffirm its decision in its public statements. In its Form 10-Q for the second quarter 2001, AMD stated, "[w]e will begin converting Fab 25 to production of our Flash memory devices by the end of 2001." (Floyd Decl., Ex. 40 at 22.) The start of the conversion was reported in AMD's third quarter 2001 Form 10-Q. (*Id.*, Ex. 41 at 22-23.)

[redacted] Dr. Siegle specifically [redacted]

ARGUMENT

I. BECAUSE INTEL'S ALLEGED FOREIGN CONDUCT WAS NOT THE PROXIMATE CAUSE OF AMD'S DECISION TO ABANDON ITS EXPORT BUSINESS, THIS COURT LACKS SUBJECT MATTER JURISDICTION WITH RESPECT TO THAT CLAIM.

A. AMD's Export Commerce Claim Requires A Showing That Intel's Foreign Conduct Had A "Direct, Substantial, And Reasonably Foreseeable" Effect On AMD's Decision To Abandon Its Export Business.

Intel is moving to dismiss AMD's export commerce claim under Rule 12(b)(1) of the Federal Rules of Civil Procedure on the basis that this Court lacks subject matter jurisdiction over AMD's belatedly asserted claim that Intel's alleged anticompetitive foreign conduct caused AMD to abandon microprocessor production at its U.S.-based Fab 25, and thus its export business.[15]

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[15] Where, as here, a factual attack under Rule 12(b)(1) is made on the Court's jurisdiction over a plaintiff's antitrust claim pursuant to the FTAIA, "the Court may consider evidence outside the pleadings, including affidavits, depositions and testimony, to resolve any factual issues bearing on jurisdiction." *Intel I*, 452 F. Supp at 558 (citing *Gotha v. United States*, 115 F.3d 176, 179 (3d Cir. 1997)); *see Carpet Group Int'l Oriental Rug Importers Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000) ("In such a situation, 'no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.'" (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977))). In a factual attack, "the plaintiff 'must bear the burden of persuasion' and establish that subject matter jurisdiction exists."

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The FTAIA establishes jurisdictional prerequisites for antitrust claims. *See Turicentro v. Am. Airlines*, 303 F.3d 293, 300 (3d Cir. 2002); *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000); *Intel I*, 452 F. Supp. 2d at 562-63. It provides jurisdiction for claims arising from foreign conduct that have allegedly harmed a U.S. export business, but only if such foreign conduct has a "direct, substantial and reasonably foreseeable" effect on the "export trade" of "a person engaged in such trade . . . in the United States." And if such an effect could be shown, then the Sherman Act "shall apply to such conduct *only* for injury to [the] export business in the United States." 15 U.S.C. §6(a) (emphasis added). Thus, the FTAIA carefully circumscribes AMD's export commerce claim – AMD must establish that Intel's foreign conduct had the necessary "direct, substantial and reasonably foreseeable" effect on AMD's export business for the claim to be justiciable in U.S. courts, and the claim is strictly limited to the effect on the export business.[16]

[Footnote continued from previous page]
Intel I, 452 F. Supp. 2d at 558 (quoting *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991)).

[16] The basic legal standards are the same as in Intel's prior motion to dismiss. The Supreme Court has explained that the "FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements . . . , however anticompetitive, as long as those arrangements adversely affect only foreign markets." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004). As the *Empagran* Court explained, the FTAIA:

> initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.*, that it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the "effect" must "giv[e] rise to a [Sherman Act] claim."

[Footnote continued on next page]

Courts have noted that the FTAIA's requirement of a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce from foreign conduct places a high burden on an antitrust plaintiff and can be resolved as a matter of law. The D.C. Circuit, upon the Supreme Court's remand of *Empagran*, held that the FTAIA's language requires "a direct causal relationship, that is, proximate causation, and is not satisfied by [a] mere but-for 'nexus.'" *Empagran S.A. v. F. Hoffmann-La Roche*, 417 F.3d 1267, 1269, 1271 (D.C. Cir. 2005). The Ninth Circuit recently adopted the D.C. Circuit's view in *Empagran*, holding that "the proximate cause standard is consistent with general antitrust principles, which typically require a direct causal link between the anticompetitive practice and plaintiff's damages." *In re Dynamic Random Access Memory Antitrust Litig.*, No. 06-15636, 2008 WL 4509595, at *5 (9th Cir. Aug. 14, 2008, amended Oct. 9, 2008); *accord Monosodium Glutamate Antitrust Litig. Inquivosa SA v. Ajinomoto Co.*, 477 F.3d 535, 538-39 (8th Cir. 2007). A direct effect under the FTAIA is one that is an immediate consequence of the defendant's action, and does not depend on "intervening developments." *United States v. LSL Biotechnologies*, 379 F.3d 672, 681 (9th Cir. 2004).

In ruling that it "lacks jurisdiction over AMD's claims that are based on lost sales of AMD's German-made microprocessors to foreign customers," this Court concluded as a matter of law that there were no "direct, substantial, and foreseeable effects" on U.S. commerce from Intel's alleged foreign conduct. *Intel I*, 452 F. Supp. 2d at 559, 563. In particular, the Court recognized the inherently indirect nature of any claim that Intel's foreign conduct affected AMD's investment or other business decisions in the United States. *Id.* at 560-61 ("More

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Id. at 162 (quoting 15 U.S.C. §§ 6a(1), (2)) (alterations in original); *see also Intel I*, 452 F. Supp. 2d at 563.

generally, however, AMD's primary contention that its lost foreign sales have resulted in . . . missed opportunities to invest . . . is premised on a multitude of speculative and changing factors affecting business and investment decisions.")

Accordingly, for this Court to have subject matter jurisdiction over AMD's purported export commerce claim – specifically AMD's decision to convert Fab 25 and consequently exit the export business – AMD must show that specific and identifiable foreign conduct by Intel proximately caused AMD to make that decision. The uncontroverted facts establish that AMD cannot make this showing.

B. AMD Cannot Satisfy The Requirement That The "Proximate" Cause Of AMD's Decision To Exit The Export Business Was Intel's Foreign Conduct.

As set forth in the Statement of Facts section above, Intel's conduct, foreign or domestic, had nothing to do with, much less proximately caused, AMD's [redacted] decision to convert Fab 25. The uncontroverted evidence shows that AMD made the decision to convert Fab 25 to flash memory manufacturing [redacted][17]

The [redacted] evidence in the record that attempts to contradict this [redacted] is Dr. Siegle's declaration in support of AMD's motion to compel foreign discovery. Dr. Siegle swore in his declaration that "Intel's conduct – both here

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[17] Any argument that AMD was influenced by its foreign sales in making its Fab 25 decision is also undermined by AMD's own submissions to the Court. For example, in its Motion to Compel papers, AMD included a chart showing a steady increase in AMD's Japanese sales from 1999 forward and peaking in the second quarter of 2002. (Pls.' Reply Memo. in Further Support of Its Mot. to Compel, filed Nov. 21, 2006, at 4.)

and abroad – artificially limited customer demand for AMD microprocessors" and in turn contributed to AMD's decision "to withdraw from the U.S. export market." (Siegle Decl. ¶ 4.) But, as discussed above, Dr. Siegle [redacted]

In its Response to Intel's Preliminary Pretrial Statement, AMD tried to neutralize Dr. Siegle's damning admissions by dismissing him as being just a "manufacturing guy" who was not in a position to "cite Intel or any other reason for the inadequate K-7 [AMD microprocessor] demand." (Pls.' Joint Resp. to Intel's Preliminary Pretrial Statement, filed May 12, 2008, at 34 n.24.) Accepting this excuse for the sake of argument would inexorably lead to the conclusion that Dr. Siegle, a mere "manufacturing guy," had no factual foundation on which to base his sworn declaration that Intel's "misconduct" had depressed demand for AMD microprocessors (Siegle Decl. ¶ 4), the subject about which AMD now claims that he had no knowledge. Yet AMD submitted his declaration in which Dr. Siegle does "cite Intel" as the reason for "inadequate" demand for AMD microprocessors.

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18 [redacted]

Dr. Siegle [redacted] With AMD reporting its market share at 17% and producing 26.5 million units in 2000 (Floyd Decl., Ex. 28 at 5), these are critical admissions.

Finally, for several reasons, AMD cannot satisfy the FTAIA standards for any claim based on alleged lost export sales after the decision was made to convert Fab 25. First, AMD's claim was that the damage from the lost sales was loss of its export business, i.e., that "Intel's foreign misconduct artificially depressed the demand for AMD's products, preventing export sales of Austin-made microprocessors and ultimately leading to AMD's withdrawal from the U.S. export business." (AMD's Mot. to Compel, filed Oct. 30, 2006, at 10.) Intel has established that AMD's "withdrawal from the U.S. export business" was not caused by Intel's alleged foreign conduct. Second, AMD has never alleged, much less offered any evidence, that any alleged Intel misconduct cost AMD specific export sales during the transition period when Fab 25 was being converted to flash memory. This is not surprising. [redacted]

[redacted] While the Athlon, Athlon64, and Opteron microprocessors are repeatedly referenced in the complaint as the AMD generation of products that were the focus of Intel's alleged anticompetitive conduct, the complaint makes no mention of Durons. (Compl. ¶¶ 4, 17-18, 20, 40, 52, 53, 79-84, 88, 129.) It is AMD's burden to establish the factual predicate for any separate claim for Fab 25 sales (which would be limited to the specific affected sales), and it cannot do so. *See Intel I*, 452 F. Supp. 2d at 558.

AMD thus cannot establish that Intel's foreign conduct was the proximate cause of AMD's claimed "harm," *i.e.*, the decision to convert Fab 25 to flash memory production. Accordingly, the FTAIA and Supreme Court precedent make clear that this Court lacks subject matter jurisdiction over this export commerce claim, and it should be dismissed.

II. ALTERNATIVELY, THE COURT SHOULD GRANT SUMMARY JUDGMENT TO INTEL ON AMD'S CLAIMS ARISING OUT OF ITS LOST MICROPROCESSOR SALES AT FAB 25 FOR THE INDEPENDENT REASON THAT THEY ARE TIME BARRED.

Any claim – whether linked to export commerce or otherwise – that is based on AMD's decision to convert Fab 25 to flash memory manufacturing in the United States fails for the independent reason that it is time barred. As discussed above, AMD made the final decision to cease making microprocessors in the United States in [redacted]. To recover damages relating to that decision, AMD was required to bring this action within four years of that event, the statute of limitations period for Sherman Act claims. *See* 15 U.S.C. § 15(b). Because AMD did not file this lawsuit until after the statute of limitations had run, the Court should grant summary judgment for Intel on AMD's claims that arise from AMD's decision not to upgrade Fab 25 for continued microprocessor production.

A. The Standard For Summary Judgment

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 530 (3d Cir. 2006). Under Rule 56, the Court "view[s] the facts in a light most favorable to the nonmoving party." *AT&T Corp.*, 470 F.3d at 530. A party opposing a motion for summary judgment must establish that there is a *material* issue for trial, which requires "more than simply show[ing] that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Thus, "factual specificity is required of the party opposing the motion." *Egolf v. Witmer*, 421 F. Supp. 2d 858, 861 (E.D. Pa. 2006).[19]

B. The Uncontroverted Facts Establish That AMD's Decision To Convert Fab 25 To Flash Memory Manufacturing Was Final By [redacted] More Than Four Years Prior To The Filing Of This Action.

Damages are recoverable for a federal antitrust violation only if a suit is "commenced within four years after the cause of action accrued." 15 U.S.C. § 15(b). An antitrust "cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 339 (1971); *see*

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[19] The Special Master's ruling in his December 15, 2006 Report and Recommendations that AMD is entitled to take foreign discovery has no bearing on this motion. The Special Master repeatedly stated in his Report that his conclusions were limited to discovery matters and did not constitute merits determinations. (*See, e.g.*, Special Master's Report and Recommendations on Pls.' Mot. to Compel, entered Dec. 15, 2006, at 8 ("the Special Master does not have the authority to address the substantive law matters raised by the parties").) Indeed, the Special Master made clear that his conclusions should not be taken as a reflection on "the ultimate admissibility of any Foreign Conduct Discoverability Material for purposes of trial." (*Id.* at 23.)

also Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1051 (8th Cir. 2000) (The "normal antitrust accrual rule" is that the "limitations period thus starts to run at 'the point the act *first* causes injury.'" (citing *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 190-91 (1997)) (emphasis added)). Here, AMD claims that Intel's alleged anticompetitive acts "suppressed" demand for AMD's microprocessors, which led to a decision, made final by [redacted] and publicly announced in April 2001, to convert Fab 25 to flash memory manufacturing. Thus, the only acts that could have caused that decision occurred earlier than June 27, 2001 – the start of the statute of limitations period.

AMD's claim that Intel continued to engage in anticompetitive conduct does not "revive" the Fab 25 claim. A "separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." *Klehr*, 521 U.S. at 189; *see also Imperial Point Colonnades Condominium, Inc. v. Mangurian*, 549 F.2d 1029, 1035 (5th Cir. 1977) ("[W]here all the damages complained of necessarily result from a pre-limitations act by defendant, no new cause of action accrues for any subsequent acts committed by defendant within the limitations period *because those acts do not injure plaintiff*."); *Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 126 n.14 (5th Cir. 1975) ("Where the injury sued for is caused by a mere repetition or continuation of acts of the same class as that for which the suit was brought, the plaintiff's recovery is limited to the damages resulting from such of those acts as were done before the bringing of the suit.").

To address the circumstance where alleged conduct "constitute[s] a continuing violation of the Sherman Act and which inflict[s] continuing and accumulating harm," courts have fashioned the so-called "continuing violation" doctrine to determine which claims and injuries are actionable and which are time barred. *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S.

481, 502 n.15 (1968). In the Third Circuit, a "newly accruing claim for damages must be based on some injurious act actually occurring during the limitations period, *not merely the abatable but unabated inertial consequences of some pre-limitations action.*" *Poster Exchange*, 517 F.2d at 128 (emphasis added), *cited with approval in Harold Friedman, Inc. v. Thorofare Markets Inc.*, 587 F.2d 127, 139 & n.44 (3d Cir. 1978) ("The position of the Fifth Circuit is well-reasoned, and we adopt it."). Indeed, "[w]here the violation is final at its impact, for example, where the plaintiff's business is immediately and permanently destroyed, *or where an actionable wrong is by its nature permanent at initiation without further acts*, then the acts causing damage are unrepeated, and suit must be brought within the limitations period and upon the initial act." *Imperial Point*, 549 F.2d at 1035 (quoting *Poster Exchange*, 517 F.2d at 126-27) (emphasis added), *quoted in Harold Friedman*, 587 F.2d at 139 n.45.

AMD began discussing [redacted] These discussions continued in earnest [redacted] AMD claims that alleged Intel misconduct forced its decision. If so, AMD cannot credibly claim that it was not aware of Intel's conduct at the time of its decision in [redacted] to convert Fab 25 to flash memory manufacturing, or of any alleged connection between the conduct and its decision. Indeed, [redacted] on October 23, 2000, AMD had filed a formal complaint with the European Commission accusing Intel of committing antitrust violations.[20] In this litigation, AMD has already affirmatively argued the business

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[20] *See* AMD's Application For Order Directing Intel To Produce Documents Pursuant To 28 U.S.C. § 1782 For Use In European Commission, Case No. Comp/C3-37,990 – AMD/Intel, Case No. 01-7033 MISC WA, United States District Court, Northern District of California at 2. (Floyd Decl., Ex. 43.)

importance of the underlying decision concerning Fab 25. [redacted]

The Eighth Circuit's decision in *Concord Boat* is particularly instructive given its similarity to the facts and issues in this case.[21] In *Concord Boat*, defendant Brunswick, a manufacturer of boat engines, was accused of "us[ing] its market share discounts, volume discounts, and long term discounts and contracts, coupled with the market power it had achieved in purchasing Bayliner and Sea Ray [both boat manufacturers], to restrain trade and to monopolize the market in violation of Sections 1 and 2 of the Sherman Act." 207 F.3d at 1045-46. Plaintiffs, all of which were boat manufacturers, also asserted a claim for violation of Section 7 of the Clayton Act based on Brunswick's acquisition of two boat manufacturers, which were rivals to plaintiffs. *Id.* at 1045.

The Eighth Circuit reversed the jury verdict for the plaintiffs, dismissed their antitrust claims under Section 7 because the acquisitions were time barred, and held that the statute of limitations period expired four years after the plaintiffs were on clear notice that "violations of the antitrust laws might have been committed." *Id.* at 1051. The court further held that the continuing violation doctrine did not apply to the limitations period for two primary reasons. First, the court noted that "[c]ontinuing violations typically arise in the context of the Sherman Act or RICO claims where multiple defendants are alleged to be part of an ongoing conspiracy." *Id.* at 1052 (footnotes omitted). As in *Concord Boat*, this action does not include a conspiracy

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[21] While the *Concord Boat* decision addressed the statute of limitations argument in the context of Section 7 of the Clayton Act, the court made clear that it was discussing and applying "the normal antitrust accrual rule" for purposes of determining when the statute of limitations period should begin to run. 207 F.3d at 1051.

claim. Second, the *Concord Boat* court determined that all of the continuing actions following Brunswick's allegedly unlawful acquisition of the two boat builders were "merely unabated inertial consequences" of the initial acquisition and did not trigger a new statute of limitations period. *Id.* at 1052 (citing *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462, 467-68 (6th Cir. 1996)).

Even if AMD continued to be injured in other ways as a result of Intel's alleged continuing misconduct after the limitations cut-off, any harm resulting from the decision not to upgrade Fab 25 was "merely the abatable but unabated inertial consequences of some pre-limitations action." *Poster Exchange*, 517 F.2d at 128. While AMD hints that it might have reconsidered its decision to convert Fab 25 into a flash manufacturing facility had Intel's conduct not continued, there is no legal support for the proposition that a continuing harm can result from simply continuing on a path set in motion prior to the limitations period – a path allegedly caused by anticompetitive conduct in violation of Section 2.

In other words, AMD cannot "re-start" the statute of limitations period with the semantic argument that each day following AMD's initial decision to withdraw from U.S. microprocessor production, AMD might have reconsidered its decision to convert, thus triggering the limitations period anew. *See International Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp.*, 518 F.2d 913, 929 (9th Cir. 1975) ("[T]he four-year limitation of Clayton Act § 4B for private antitrust actions for damages is long enough to enable potential plaintiffs to observe the actual effects of a possible antitrust violation and to calculate its potential effects. The abuses which would occur if plaintiffs were permitted to search the history of other firms and challenge at their pleasure any possible violations, no matter how old, seem apparent."), *overruled on other grounds by California v. Am. Stores Co.*, 495 U.S. 271 (1990). AMD's argument rings particularly hollow

in this case given that AMD [redacted] despite needing additional microprocessor production capacity at various junctures in the ensuing years and satisfying these needs through other means (such as building entirely new fabs in Germany and entering into various foundry relationships with third parties in Asia).

[redacted]

CONCLUSION

For the above reasons, this Court should dismiss AMD's export commerce claim for lack of jurisdiction, or alternatively, grant Intel summary judgment on that claim.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

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