

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE)
INTEL CORPORATION)
MICROPROCESSOR ANTITRUST)
LITIGATION)
_____)

MDL No. 1717-JJF

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

PHIL PAUL, on behalf of himself)
and all others similarly situated,)

Plaintiffs,)

v.)

INTEL CORPORATION,)
_____)

Defendants)

C.A. No. 05-485-JJF

CONSOLIDATED ACTION

REDACTED
PUBLIC VERSION

**AMD'S BRIEF IN OPPOSITION TO INTEL'S MOTION TO DISMISS, OR IN THE
ALTERNATIVE, FOR SUMMARY JUDGMENT ON AMD'S EXPORT COMMERCE
CLAIM**

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INTRODUCTION

For at least the past decade, Intel has continuously used its overwhelming economic might to coerce customers from doing business with AMD. This coercion suppressed the demand for AMD's products so substantially that AMD was forced to REDACTED cease altogether, the domestic production and exportation of microprocessors.

For purposes of the instant proceedings, Intel does not challenge the unlawfulness of its conduct during the months and years prior to AMD's withdrawal from the export market. Nor does it deny the harmful effects on AMD's efforts to compete in the worldwide microprocessor market. Instead, Intel's motion focuses solely on AMD's "export commerce" claim, *i.e.*, that Intel's anticompetitive acts injured, and eventually destroyed, AMD's exportation of microprocessors manufactured at its fabrication facility – Fab 25 – located in Austin, Texas.

Intel's motion rests on two grounds. First, Intel contends that AMD cannot establish causation as a matter of law, because – says Intel – the undisputed facts establish that AMD was going to cease production of microprocessors at Fab 25 for business reasons having nothing to do with Intel's anticompetitive conduct. Second, Intel contends that AMD's export commerce claim is time barred because Intel's conduct began prior to the limitations period, and that AMD's subsequent harm experienced during the limitations period is only the inertial consequence of that earlier conduct. Neither argument has merit.

Intel's causation argument asserts that, even assuming unlawful conduct by Intel, AMD actually decided to terminate microprocessor production at Fab 25 for three reasons unrelated to that conduct: (1) Fab 25 was obsolete REDACTED; (2) AMD needed to devote Fab 25 exclusively to flash-memory production; and (3) Fab 25 was unnecessary because AMD had sufficient microprocessor capacity in its newer fab, Fab 30, to meet forecasted demand for its products. The record refutes each of those asserted alternative causation theories:

(1) *Fab 25 was not obsolete.*

REDACTED

(2) *AMD did not need Fab 25 to meet flash demand.*

REDACTED

(3) *Fab 30 did not have sufficient capacity to support the market share AMD would have sustained absent Intel's conduct.*

REDACTED

Intel's proposed alternative explanations for AMD's decision to end domestic production are thus wrong in each of their particulars, but they also ignore the most fundamental point: every decision AMD made concerning the most efficient use of Fab 25 was driven by the artificially low demand for microprocessors AMD was facing as a consequence of Intel's marketplace misconduct. The record clearly shows that, as a result of that artificially low demand, AMD could not profitably produce and sell enough microprocessors at Fab 25 to justify continued production there:

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REDACTED

Given the substantial record evidence showing that AMD's business decisions were made in the context of artificially depressed demand created by Intel's conduct, the record amply supports AMD's contention that Intel's conduct had the direct, substantial, and reasonably foreseeable adverse effect on AMD's export business necessary to establish jurisdiction under the FTAIA.

Intel's argument that AMD's export commerce claim is barred by the statute of limitations is also at odds with the record. Intel's theory is that AMD made a "final" decision to phase out domestic production at Fab 25 REDACTED – before the limitations period began – and that any harm AMD suffered from Intel's exclusionary acts after that date was only the consequence of earlier acts. The record shows, however, that AMD's decision about Fab 25 was not final by REDACTED . Intel committed many additional acts within the limitations period, including the execution of new exclusive agreements and the renewal of others during the limitations period, that enabled Intel to continue to suppress AMD's market share, and ultimately to destroy AMD's export commerce . It is uncontroverted that AMD continued its domestic production and export business after the limitations period began; REDACTED

If the demand for AMD products had been higher during the limitations period,

REDACTED

It is clear, in short, that Intel's conduct during the limitations period harmed AMD's export business.

Intel's motion to dismiss or for summary judgment on AMD's export commerce claim should be denied.

STATEMENT OF FACTS

A. AMD Had An Established History Of Domestic Manufacturing And Exporting

AMD has a history of domestic manufacturing and exporting that spans over three decades. Shortly after AMD's founding in 1969, AMD began producing computer chips in its first Fabrication Plant ("fab") – Fab 1 – in Silicon Valley. *See* Declaration of William T. Siegle in Support of AMD's Mot. To Compel ("Siegle Decl.") ¶ 5.¹ By the 1990s, AMD was an established U.S. semiconductor producer with 30 years of domestic manufacturing and exporting experience. From 1996 to 1999, AMD sold over 50% of its annual production to foreign customers, amounting in over \$1 billion of foreign sales in each year during that period. *See* Ex 3 at 38, Ex. 4 at 47.²

In 1982, AMD entered the x86 microprocessor market. AMD built its microprocessor production base in Austin, Texas, constructing Fab 5 in 1979, Fab 10 in 1982, Fab 14/15 in 1985, and Fab 25 in 1995. Siegle Decl. ¶¶ 5 and 7. Until 2000, AMD produced microprocessors exclusively at facilities located in the United States. *Id.* ¶ 3. AMD continued to export U.S.-

¹ A true and correct copy of the Siegle Declaration is attached as Exhibit 1 to the concurrently filed Declaration of Xin-Yi Zhou ("Zhou Declaration").

² Unless otherwise stated, all citations to exhibits refer to the exhibits attached to the Zhou Declaration.

made microprocessors until 2004. Declaration of Dewey Overholser in Support of AMD's Mot. To Compel ("Overholser Decl.") ¶ 4.³

B. AMD Planned To Expand Capacity By REDACTED

In the late 1990s, AMD embarked on a plan to expand its microprocessor market share to a level that would make AMD competitive with Intel on a sustainable basis. Jerry Sanders, AMD's founder and then CEO, stated in 1998 that AMD needed "about 30 percent market share to pay for the expensive R&D and chip foundries required to compete with Intel in the future." Ex. 5 at 4.

To achieve its goal of reaching long-term sustainability, AMD needed a superior product and additional manufacturing capacity. On the product side, AMD launched the groundbreaking K7 microprocessor in 1999, the first seventh generation x86 microprocessor. Siegle Decl. ¶ 10. The K7's innovative and efficient design allowed AMD to leapfrog Intel in processing power, and become the first x86 microprocessor producer to reach the gigahertz milestone. *Id.* Intel's internal study showed

REDACTED

See Ex.

With Fab 25 as the sole K7 production plant, AMD needed a second plant to reach its market share goal. *See* Siegle Decl ¶¶ 12-13. It was publically known that Intel owned four microprocessor fabs and had a fifth under construction. *See* Ex. 7 at 1-2. To augment its domestic capacity, AMD brought online its first foreign fab – Fab 30 – in 2000. Siegle Decl. ¶ 3.

³ A true and correct copy of the Overholser Declaration is attached as Exhibit 2 to the Zhou Declaration.

In 2000, Fab 25 produced

REDACTED

Intel asserts that

, but Intel

Intel built two 200-mm fabs in 2001 (Fabs 22 and 23), and did not begin copper manufacturing until 2001. *See* Ex. 7 at 1-2; Ex. 9 at 1. As is common in the semiconductor industry, Fab 25 would need an equipment upgrade when its then-current technology became obsolete. Siegle Decl. ¶ 11. Accordingly, AMD

REDACTED

See Siegle Decl. ¶¶ 11, 13-15; REDACTED

Intel's factual statement errs in asserting that Fab 25 was "reaching the end of its useful life" in 2000. Intel Br. 5. It is publicly known that Fab 25, now part of Spansion, *is still in production today*; it has not only been upgraded to 130nm copper-interconnect technology, but has since advanced three more technology generations to 110nm, 90nm, and 65nm. *See* Ex. 11 at 1; Ex. 12 at 1.⁴ The advantages Intel cites for the 300-mm wafer size are greatly exaggerated;

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More importantly, the Fab 25 upgrade plan was economical; the estimated upgrade cost of \$500 million was a fraction of the \$2-3 billion price of a new fab. Siegle Decl. ¶

⁴ Fab 25 became a part of Spansion, an independent public company, when AMD spun off its flash operation in 2006. Siegle Decl. ¶ 18.

11. AMD's analysis projected

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See Siegle Decl. ¶

With a superior product and two capable fabs, AMD founder Jerry Sanders proudly announced at the 2000 AMD shareholder's meeting: "Our long-held goal has been, and remains, to capture a 30 percent unit share of the PC processor market by the end of 2001. With the production capacity of Fab 25 in Austin and Fab 30 in Dresden, by the end of next year we will have in place the production capacity to achieve this goal." Siegle Decl. ¶ 12.

C. Fab 30 Alone Could Not Support AMD's 30% Market Share Goal

Intel's factual statement cites various snippets from AMD statements ostensibly suggesting that AMD ended microprocessor production in Fab 25 because AMD believed Fab 30 alone had sufficient capacity to supply 30% of the microprocessor market. Intel Br. 9-11. Every single statement cited by Intel is taken badly out of context. In fact, Fab 30 alone did not have sufficient capacity to supply 30% of the microprocessor market, and nobody at AMD believed otherwise.

Most of the statements cited by Intel were made for the purpose of

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For

example, Intel cites two statements by AMD executives Bob Rivet and Jerry Sanders – a statement by Mr. Sanders that Fab 30 "can produce over 50 million units a year," and a statement by Mr. Rivet that "[w]e can produce more than 50 million units a year in that fab." Intel Br. 9-

10 But Intel fails to disclose

REDACTED

REDACTED

REDACTED

REDACTED

In short, these statements were made

REDACTED

Intel also misrepresents the statement by then-AMD-President Hector Ruiz that

REDACTED

Intel elsewhere repeats the pattern of omitting underlying assumptions and qualifications associated with statements it cites.

REDACTED

REDACTED

The remaining statement cited by Intel is even more inapposite. When Dr. Siegle wrote in 2002 that

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The sum of the matter is this: none of the statements cited by Intel established that Fab 30 could sustain a 30% market share producing AMD's entire product portfolio. The math simply did not add up --

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Intel relies on the out-of-context snippets described above, but it never mentions the one relevant fact: Fab 30's actual production capacity. Though Fab 30 had reached its planned capacity around 2003 and 2004, *see* Siegle Decl. ¶¶ 8 and 21, Fab 30 did not produce more than REDACTED units in any year between 2000 and 2004, *see* Gueldner Decl. ¶ 3. Meanwhile, the total x86 microprocessor market expanded to 188 million in 2003 and 200

million in 2004. Ex. 18 at 3-3. With one fab, AMD could not possibly have supplied 30% of the microprocessor market, or produced 50 million units, REDACTED

Finally, AMD's long-term goal was not simply to scrape past a 30% market share for a temporary period; it was to reach a sustainable 30% market share, in order to generate enough profits for the R&D and capital investments necessary to continue to sustain that share level with inevitable market expansion. See Ex. 5 at 4; Siegle Decl. ¶¶ 12 and 20.

REDACTED

D. AMD Converted Fab 25 To Flash Because Microprocessor Demand Was Inadequate To Support Full Utilization Of The Facility

Intel's factual statement also asserts that AMD converted Fab 25 to flash because
, but the record shows otherwise.

REDACTED

REDACTED

REDACTED

AMD was hardly “caught . . . off guard” by the growing flash demand as Intel suggests. Intel Br. 7.

REDACTED

Intel falsely states that AMD converted Fab 25 to flash because

In fact,

REDACTED

REDACTED

REDACTED

Finally, Intel's factual statement incorrectly states that

Intel Br. 14. In fact,

REDACTED

After all, Fab 25 had been AMD's primary microprocessor plant up to 2000, and Fab 25 had not shipped any flash products before 2002. Siegle Decl. ¶¶ 7 and 18. AMD was considering other options only because artificially low microprocessor demand

appeared likely to make continued microprocessor production at Fab 25 unsustainable. See Siegle Decl ¶ 19.

E. Low Microprocessor Demand Forced AMD's Decision To End U.S. Microprocessor Production In Fab 25

The actual record shows that it was low demand for AMD's microprocessor products that triggered AMD's decision to end domestic microprocessor production. Siegle Decl. ¶ 19.

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When AMD compared capacity to demand at the end of 2000, it became obvious that the artificially reduced demand could not support two production fabs. Siegle Decl. ¶ 17.

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AMD was thus left with two choices for Fab 25. It could close the plant, which would result in massive layoffs, or it could gradually move Fab 25 to AMD's second largest business unit – the flash memory group. Siegle Decl. ¶ 18. AMD picked the latter option. *Id.*

REDACTED

But

absent the demand necessary to support production at an additional fab, AMD's only plausible option was to give up Fab 25. Siegle Decl. ¶¶ 16-18. With one brand new fab (Fab 30) and another needing an upgrade (Fab 25), AMD decided to rely solely on the new Fab 30 and cancelled the planned upgrade of Fab 25. *Id.*

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Although AMD was forced into this course because Intel's conduct prevented AMD from achieving its desired 30% market share level,

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Like every AMD statement cited by Intel, those statements do nothing whatsoever to show that AMD ceased microprocessor production at Fab 30 for reasons unrelated to the depressed demand created by Intel's exclusionary conduct.¹¹

¹¹ The question whether unlawful acts by Intel were the actual cause of depressed demand for AMD products is a merits issue not ripe for resolution on this jurisdictional motion. *See pp. 21-23 infra*. Discovery into Intel's misconduct, and its effects on AMD, is far from complete. For purposes of illustration only, we set forth here a few examples of how Intel was able to keep AMD fenced within a marginal share of the market.

A principal Intel tactic was to exploit its scale and already-dominant position to force or bribe customers—especially those in the high-margin commercial segment—into remaining exclusive or nearly exclusive with Intel. For example,

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What is more, AMD could *and would* have reversed its decision to introduce flash production at Fab 25 in 2002, if Intel had not continued to exclude AMD

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unlawfully from the microprocessor market. During 2001 and 2002, AMD produced over 30 million K7-generation microprocessors from Fab 25. Overholser Decl. at ¶ 5.¹² AMD sold over \$400 million domestically-produced microprocessors during 2002 and 2003, with more than half exported to foreign customers. *Id.* at ¶¶ 3-4. AMD continued to export domestically-produced microprocessors until April 2004. *Id.* at ¶ 3. AMD's suppressed overall market share, however, slowed AMD's domestic production and export.

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Overall, Fab 25

produced only 8.6 million microprocessors in 2002, less than 30% of its output of over 30 million units in 2000. *See* Overholser Decl. ¶ 5.

¹² Intel incorrectly states that

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REDACTED

But the decision to convert to flash production at Fab 25 was not irreversible, in fact, until 2004. Siegle Decl. ¶ 18; REDACTED In 2002, Fab 30 was in the middle of the typical ramp-up for a new factory, and Fab 25 was *the only other AMD plant capable of microprocessor production*. Siegle Decl. ¶¶ 18 and 21. If Intel had ceased its exclusionary acts in 2001, 2002 or 2003, AMD's market share would have increased substantially, which would have justified continued production at, and investment in, Fab 25.

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AMD's low market share -- REDACTED -- precluded AMD from revamping domestic production. REDACTED But if demand had been substantially higher in those years, AMD would have turned back to Fab 25 to meet that demand simply because AMD would have had no other practical choice. Fab 30 was AMD's only microprocessor plant during this period, and was producing near its planned capacity in 2003. Siegle Decl. ¶ 8.

REDACTED

Intel's factual statement concludes with the false assertion that

Intel Br. 16

REDACTED

REDACTED

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER AMD'S EXPORT COMMERCE CLAIM

The Foreign Trade Antitrust Improvements Act (“FTAIA”) precludes a court from exercising subject matter jurisdiction over a claim under the Sherman Act involving foreign commerce unless the conduct at issue “has a direct, substantial, and reasonably foreseeable effect” on (as pertinent here) “export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States,” and the effect on export commerce is what “gives rise to a claim” under the Sherman Act. 15 U.S.C. § 6a. As the Third Circuit has held, “the ‘direct, substantial, and reasonably foreseeable effect’ test was intended to serve as a simple and straightforward clarification of existing American law.” *Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 304 (3d Cir. 2002) (internal quotation marks and citation omitted). And when the FTAIA was enacted, it was already “well established” that “the Sherman Act

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applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States” *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993).¹⁵

In this case, AMD alleges, and the still-incomplete discovery record already confirms, that Intel’s exclusionary acts directly, substantially, and foreseeably harmed AMD’s export commerce, because Intel’s acts unlawfully restricted foreign demand for AMD microprocessors manufactured in the United States, limiting AMD’s ability to export microprocessors and ultimately forcing AMD to cease domestic production – and thus export commerce – altogether. *See supra* note 11.

Although discovery into Intel’s acts and their competitive consequences remains ongoing, Intel has nevertheless moved for judgment on AMD’s export commerce claim under Rule 12(b)(1), asserting that the record already establishes conclusively that the Court lacks jurisdiction over that claim under the FTAIA, because AMD cannot show that Intel’s allegedly unlawful conduct “caused AMD’s decision to cease manufacturing microprocessors in the United States.” Intel Br. 4. To be clear: for purposes of this motion, Intel does *not* contend that the record shows conclusively that its conduct was lawful and non-exclusionary. Rather, Intel’s contention is that, even assuming its conduct violated the Sherman Act and impermissibly restricted AMD’s access to the worldwide microprocessor market, the Court *still* lacks jurisdiction over the export commerce claim because the record already shows that AMD decided to stop the domestic manufacturing and exporting of microprocessors for business

¹⁵ Intel contends that courts have described the “direct, substantial, and reasonably foreseeable effect” test as imposing “a high burden on an antitrust plaintiff,” but the single case cited by Intel refers instead to the separate requirement that the effect “give[] rise to a claim” under the Sherman Act. *See Empagran SA v. F Hoffmann-La Roche, Ltd.*, 417 F.3d 1267, 1269, 1271 (D.C. Cir. 2005). To AMD’s knowledge, no court has suggested that the “direct, substantial, and reasonably foreseeable effect” test is any more difficult to satisfy than the standard elements of a Sherman Act claim; in fact, as noted below, *infra* at 22-23, the test is much *easier* to satisfy in a jurisdictional motion than at later stages.

reasons entirely unrelated to Intel's assertedly unlawful exclusion of AMD from worldwide microprocessor markets.

The Third Circuit has made clear that “dismissals of Sherman Act claims prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly,” *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 896 (3d Cir. 1977), and should only be granted in an “unusual” case where it is clear that plaintiffs would not be able to prevail, *id.* at 892. Although a court adjudicating a “factual attack” on jurisdiction under Rule 12(b)(1) may weigh the evidence relevant to certain “jurisdictional facts” to satisfy itself that it has power to hear the case, *Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 69 (3d Cir. 2000), the Third Circuit has repeatedly admonished that at the preliminary stage, before discovery is complete, “it is incumbent upon the trial judge to demand less in the way of jurisdictional proof than would be appropriate at a trial stage,” *id.* at 72 (quoting *Mortensen*, 549 F.2d at 892). And where a disputed jurisdictional fact is also an essential element of the underlying claim, the court cannot resolve the disputed fact, but must leave its resolution to “a determination of the merits either by the district court on a summary judgment motion or by the fact finder at the trial.” Charles Alan Wright & Arthur Miller, *Fed. Prac. & Procedure* § 1350, at 245-49. “Otherwise, the district court could turn an attack on the merits, against which the party has the procedural protections of a full trial including the right to a jury, into an attack on jurisdiction, which a court may resolve at any time.” *Kulick v. Pocono Downs Racing Ass'n, Inc.*, 816 F.2d 895, 898 (3d Cir. 1987); see *Mortensen*, 549 F.2d at 897-98 (where jurisdictional facts were “intertwined” with merits of Sherman Act claim and “[m]any of the facts were still in dispute,” the “evaluation of them by the court was premature”); see also *Smithers v. Smith*, 204 U.S. 632, 645 (1907) (court cannot resolve facts essential to merits of underlying claim “lest under the guise of

determining jurisdiction the merits of the controversy between the parties be summarily decided without the ordinary incidents of a trial”); *Wade v Rogala*, 270 F.2d 280, 285 (3d Cir. 1959) (“The necessary choice . . . where the jurisdictional issue cannot be decided without the ruling constituting at the same time a ruling on the merits, is to permit the cause to proceed to trial.”).

AMD easily satisfies the “less stringent evidentiary standard,” *Carpet Group*, 227 F.3d at 73, applicable to Intel’s jurisdictional motion. *See id.* at 72-73 (reversing jurisdictional dismissal under FTAIA); *Mortensen*, 549 F.2d at 898 (reversing jurisdictional dismissal of Sherman Act claim). As noted above, Intel does not here question the adequacy of AMD’s proof that Intel’s conduct caused harm to AMD by excluding it from worldwide microprocessor markets. Instead Intel asserts that, even assuming unlawful conduct by Intel, the record conclusively establishes that AMD decided to cease producing and exporting microprocessors from Fab 25 for three reasons independent of that conduct: (1) Fab 25 was too outdated to maintain as a microprocessor production facility; (2) AMD needed to devote Fab 25 exclusively to flash-memory production; and (3) Fab 25 was unnecessary because AMD had sufficient microprocessor capacity in Fab 30. The record shows no such thing. Indeed, as elaborated in the sections that follow, the record *affirmatively refutes* each alternative theory of causation posited by Intel. Intel’s motion to dismiss for lack of subject matter jurisdiction should be denied.¹⁶

¹⁶ In framing its factual argument, Intel describes the legal standard for a “direct effect” under the FTAIA as an effect “that is an immediate consequence of the defendant’s action, and does not depend on ‘intervening developments.’” Intel Br. 18 (quoting *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004)). The propriety of that Ninth Circuit standard is not in issue here – Intel does not contend that the facts reveal some “intervening development” breaking the causal connection between Intel’s acts and AMD’s decision to end its export commerce. Instead Intel contends that Intel’s acts simply “had nothing to do with” AMD’s decision (Intel Br. 19), which was motivated all along (says Intel) by entirely independent business reasons.

It bears emphasis, however, that the Ninth Circuit test invoked by Intel has been subject to substantial criticism by commentators, *see, e.g.,* Makan Delrahim, *Drawing the Boundaries of*

A. Fab 25 REDACTED For Continued Microprocessor Production

Intel contends that AMD stopped producing microprocessors at Fab 25 because the facility was “approaching obsolescence.” Intel Br. 5. As shown above, that is manifestly contrary to the record facts. The reality is that

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Fab 25 continued to produce microprocessors and is still producing computer chips using cutting-edge technologies today. *Id.*

Intel’s argument is merely a truism about the fast-paced semiconductor industry – if AMD had discontinued updating its equipment set, then Fab 25 would have *become outdated*.

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the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct, 61 N.Y.U. ANN. SURV. AM. L. 415, 429-30 (2005), and has never been adopted by the Third Circuit. And AMD would satisfy it here in any event. The *LSL Biotechnologies* court held that defendants’ agreement with a foreign company not to develop or market tomatoes in competition with defendants’ patented tomato did not have a direct effect on U.S. commerce because there was no evidence that the foreign company could even produce a competing, nonpatented tomato. 379 F.3d at 681. Because any harm to U.S. commerce depended on the entirely speculative question whether the foreign company would have devised a competing product absent the agreement, there was no “direct effect” on U.S. commerce, which cannot be satisfied by such “uncertain intervening developments.” *Id.* Here there are no such “uncertain intervening developments” – if AMD proves the merits of its underlying claim that Intel unlawfully restricted worldwide demand for AMD products, then it follows directly that Intel’s conduct harmed AMD’s ability to export microprocessors into the worldwide market.

Indeed, the *LSL Biotechnologies* court expressly contemplated cases like this one. A case *would* satisfy the directness requirement, the court explained, where, for example, “the foreign competitor already has the good in hand” or could “demonstrate that its exclusion already has an effect on the American market,” such as demonstrating “that its exclusion is causing existing market players to invest less in the research and development of new products.” *Id.* AMD obviously satisfies both scenarios. First, AMD already has competitive microprocessors “in hand,” so the Court need not speculate as to its ability to compete for export commerce to foreign markets. Second, AMD can “demonstrate that its exclusion already has an effect on the American market.” *Id.* As explained above, Intel’s anticompetitive behavior depressed demand for AMD’s products both in the U.S. and abroad, with clear and direct consequences on AMD’s export commerce and the American market.

REDACTED

simply did not justify the cost of upgrading Fab 25.

Intel's argument essentially reverses the cause and effect of AMD's Fab 25 investment decision. Intel contends that because Fab 25 was technologically obsolete, AMD was going to cease domestic microprocessor production there no matter what effect Intel's conduct had on demand for products manufactured at Fab 25. By contrast, the record facts establish that because demand for AMD's microprocessor products was too low to justify continued domestic production, AMD had to cancel REDACTED Fab 25, which eventually led to Fab 25 becoming obsolete in microprocessor technology. *There is, in short, no record basis for Intel's assertion that Fab 25 would have become obsolete even if Intel's misconduct had not restricted demand for AMD microprocessors.*

B. AMD Did Not Need Fab 25 For Flash Production

Intel next argues that AMD stopped domestic microprocessor production because AMD needed Fab 25 for flash production. Intel Br. 7-9. That contention is also contrary to the record. As Intel tells the story, AMD was always planning to make Fab 25 a flash plant, and simply took a brief detour from plan to consider microprocessor production before returning to its original plans. But when AMD made its decision to end domestic microprocessor production REDACTED

Fab 25 was a microprocessor plant and had been one for its entire history. *See Siegle Decl. ¶ 7. Before AMD decided to convert Fab 25 given its underutilization,*

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AMD would have needed to use Fab 25 for microprocessor production if demand in that market had been as expected.

Nor did REDACTED motivate the use of Fab 25 for flash production.

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There is, again, no factual basis for Intel's contention that AMD converted Fab 25 to flash because REDACTED

C. Fab 30 Alone Could Not Meet AMD's Expected Demand

Finally, Intel argues that AMD ended Fab 25 production because it had sufficient capacity in Fab 30. Intel Br. 9-11. As explained in detail in the Statement of Facts above, none

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of the statements cited by Intel suggests – much less conclusively establishes – that Fab 30 could have sustained a 30% market share

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Furthermore, AMD’s long-term goal was not simply to reach a temporary 30% market share, but to sustain and exceed that share of the market. As AMD founder Jerry Sanders explained in 1998, AMD sought to achieve a minimum of 30% market share, which in turn would allow AMD to generate profits sufficient “to pay for the expensive R&D and chip foundries required to compete with Intel in the future.” Ex. 5 at 4.

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The question whether Intel’s conduct in fact restricted the market and unlawfully depressed AMD’s market share below its long-term 30% goal is, of course, a merits issue that cannot be resolved on this motion. *See supra* at 21-23. But assuming AMD ultimately can prove that disputed merits issue, it would follow inexorably that AMD’s decision to cease domestic production (and hence export commerce) for lack of sufficient demand would be directly attributable to Intel’s unlawful conduct. Because Intel’s jurisdictional motion

necessarily turns on the resolution of that sharply disputed merits issue, the motion is “premature” at best, and should be rejected. *Mortensen*, 549 F.2d at 898.¹⁸

II. AMD’S EXPORT COMMERCE CLAIM IS NOT TIME BARRED

In addition to moving for jurisdictional dismissal of AMD’s export commerce claim, Intel moves for summary judgment as well, asserting that the claim is time barred. Under Federal Rule of Civil Procedure Rule 56(c), summary judgment is only appropriate if there are no genuine issues of material fact, and the movant is entitled to judgment as a matter of law. *Gottshall v. Consol. Rail Corp.*, 56 F.3d 530, 533 (3d Cir. 1995). The Court must view the entire evidentiary record in the light most favorable to AMD, the non-movant, and must draw every reasonable inference in AMD’s favor. *Toledo Mack Sales & Serv. Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 209 (3d Cir. 2008) (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456 (1992)). The Court thus “must disregard all evidence favorable to [Intel] that the jury is not required to believe.” *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 150 (2000).

¹⁸ In a truly bizarre argument, Intel also suggests

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A Sherman Act action for damages must be “commenced within four years after the cause of action accrued.” 15 U.S.C. § 15b. “Generally, [an antitrust claim] accrues and the statute [of limitations] begins to run when a defendant commits an act that injures a plaintiff’s business.” *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). But if the claimed violation consists of a series of acts over a period of time, which reflect a “continuing violation” of the antitrust laws, the cause of action will accrue anew whenever the defendant commits an act that inflicts further injury. *See id.* at 338; *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502, n.15 (1968); *Toledo Mack*, 530 F.3d at 217-18; *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1172 (3d Cir. 1993).

As shown below, the record in this case shows that, while Intel’s allegedly unlawful acts began harming AMD’s export commerce prior to the triggering of the limitations period, Intel continued to engage in those acts throughout the limitations period, and those acts caused further harm to AMD’s export commerce. Accordingly, AMD’s export commerce claim is not time barred, and Intel’s summary judgment motion should be denied.

This action was filed on June 27, 2005. Accordingly, AMD may recover damages for any Intel act that caused harm to AMD’s export commerce after June 27, 2001. Intel, however, contends that the uncontroverted facts eliminate any entitlement to export commerce damages because REDACTED All claims for export commerce losses thus conclusively accrued on that date, says Intel, and any losses after June 27, 2001, are only the “inertial” consequence of the Intel acts prior to REDACTED that caused AMD’s “final” decision concerning Fab 25.

The argument is meritless. The uncontroverted facts assuredly do *not* show that AMD's decision concerning Fab 25 was "final" as of REDACTED. They show just the opposite: that AMD continued producing microprocessors at Fab 25 after June 27, 2001.

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if Intel had not kept demand artificially depressed through repeated unlawful exclusionary acts during this period.

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If Intel had not continued its unlawful acts into the limitations period,

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Intel's contrary argument not only ignores those record facts, it rests entirely on a legal principle with no application here. Intel contends that 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.*" Intel Br. 25 (quoting *Poster Exchange, Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 128 (5th Cir. 1975)). That unexceptionable principle is patently irrelevant. As Intel itself describes it, the "inertial consequences" standard applies only to an "actionable wrong" that is "*by its nature permanent at initiation without further acts,*" such that "the acts causing damage are unrepeated," requiring that suit be brought within the limitations period "upon the initial act." Intel Br. 25 (quoting *Imperial Point Colonnades Condo., Inc. v. Mangurian*, 549 F.2d 1029, 1035 (5th Cir. 1977)). This rule thus bars the recovery of damages caused by pre-limitations acts such as fully consummated merger or acquisition, as in *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d

1039, 1052 (8th Cir. 2000). In those cases, the defendant's unlawful act is "permanent" and requires no "further acts" to cause further damages, so the limitations period is triggered upon the initial harm from the act, and is not retriggered by additional later damages also traceable directly back to the initial, completed act.¹⁹ By contrast, the same cases make clear that where subsequent damages are caused by *additional* "injurious acts occurring within the limitations period," committed as part of a continuing violation, then the general rule obtains and the new acts and injuries trigger new limitations periods. *Poster Exchange*, 517 F.2d at 127; *see Concord Boat*, 207 F.3d at 1052; *Imperial Point*, 549 F.2d at 1035.

That is the rule that governs here. The record facts show that AMD continued to export microprocessors manufactured at Fab 25 within the limitations period, and that it would have continued to do so throughout the limitations period but for new exclusionary acts by Intel – new deal structures, new threats, new bribes, and the like – that reflected its continuing effort to keep AMD's access to the microprocessor market sharply restricted.

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¹⁹ Intel inexplicably contends that *Concord Boat* "is particularly instructive given its similarity to the facts and issues in this case." Intel Br. 26. The facts Intel cites all involved the plaintiff's Sherman Act § 2 monopolization claim in that case, which did involve exclusionary deals similar to those asserted here. But *Concord Boat*'s limitations analysis was not addressed to that § 2 claim. It was instead addressed to a Clayton Act § 7 claim concerning a previously consummated acquisition of rival manufacturers, which has *nothing to do with this case*. The *Concord Boat* court correctly held that damages from the pre-limitations acquisition were unactionable because they flowed directly from the acquisition, and *not* from any new "overt act" that would "restart the limitations period." 207 F.3d at 1052. The *Concord Boat* court did not suggest that the § 2 claim was time barred because new exclusionary deals – i.e., the deals involving "facts and issues" similar to this case – obviously would constitute acts triggering the limitations period anew.

REDACTED Accordingly, AMD's export commerce claim accrued within the limitations period, and it may pursue damages for losses suffered during that period.

CONCLUSION

For the foregoing reasons, Intel's motion to dismiss on jurisdictional grounds, or in the alternative for summary judgment, should be denied.

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