

**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
FILED SEPTEMBER 24, 2009

**AMD'S REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE
SUPPLEMENTAL SUBMISSION IN OPPOSITION TO DEFENDANTS' MOTION TO
DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ON AMD'S
EXPORT COMMERCE CLAIM**

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INTRODUCTION

Intel's opposition to AMD's motion rests entirely on a fundamental mischaracterization of the Ostrander Report that AMD seeks to submit. According to Intel, the expert opinion testimony disclosed in the report is not based on any evidence produced during discovery. From this premise, Intel draws the conclusion that AMD's submission is untimely because AMD could have disclosed Dr. Ostrander's opinions by way of declaration in response to Intel's original motion, and that the Ostrander Report is irrelevant to Intel's motion because it adds nothing to the existing evidentiary record.

The entire premise of Intel's opposition is demonstrably false. The Ostrander Report in fact relies expressly on specific record documents establishing the demand AMD would have faced absent Intel's unlawful, anticompetitive conduct disclosed to Intel in fourteen exhibits explicitly attached to the Ostrander Report¹ as well as other factual record material establishing AMD's supply constraints. Those demand statements, generated by and provided to Dr. Ostrander by another testifying expert, Dr. Mark Watson, in turn derive from an analysis of the record evidence of Intel's exclusionary conduct developed during discovery and cataloged in 2,000 pages of analysis by AMD's testifying competition economist, Dr. Douglas Bernheim. Because this evidence did not exist until the close of discovery on June 12, 2009, none of the experts were in a position to estimate AMD's "but for" demand in a form that Dr. Ostrander or anyone else could have used to determine whether and how AMD would have had the capacity

¹ Electronic copies of the Ostrander Report's exhibits are included as Exhibits A - M on a data CD-ROM submitted with the Declaration of Xin-Yi Zhou ("Zhou Decl."), filed herewith. *See also* August 21, 2009 letter to Intel's counsel (attached to Zhou Decl. as Ex. N), wherein AMD specifically identified the Bates ranges of documents cited by Dr. Ostrander in his expert report's exhibits.

to supply it. These documents and analyses – none of which could have existed prior to June 12, 2009 – collectively establish the factual foundation for Dr. Ostrander’s expert opinions, *viz.*, assuming levels of increased demand projected by Dr. Watson in light of AMD’s production constraints, could AMD have met demand through foreign production alone, and what steps would a reasonable manufacturer in AMD’s position have taken to meet the increased demand (i.e., would it forgo high-margin x86 microprocessor sales in favor of low-margin flash memory sales)?

Try as it might, Intel cannot wish those documents and the manner and timing of their creation out of existence.² The real Ostrander Report explicitly and unambiguously rests on an evidentiary record concerning both expected demand and AMD production constraints that only came together in the last few months. Intel may consider that record to be *inadequate* to give Dr. Ostrander’s opinions probative value, but that is an argument *on the merits* as to the weight the Court should give the Ostrander Report in determining whether Intel has demonstrated the complete absence of any triable issue over the reasons AMD terminated domestic microprocessor production. And Intel does not develop any such substantive argument here, as Intel itself concedes. Intel Opp. 8 n.4. Instead Intel wastes its own time opposing even the submission of the Ostrander Report, even though Intel cannot come close to showing that any of the factors guiding the exercise of discretion to supplement the summary judgment record should compel exclusion of the actual Ostrander Report.

² Intel acknowledges the documents in a single footnote but says they are irrelevant because Intel professes not to understand what they mean. Intel Opp. 2 n.1. (05-1717, D.I. 2106; 05-441, D.I. 1719; 05-485, D.I. 1734). But they are clear and straightforward on their face, *see supra* at 1-2 & n.1, and Intel will have ample opportunity to resolve its alleged confusion during its expert deposition of Dr. Ostrander.

ARGUMENT

A. AMD's Submission Of The Ostrander Report Was Timely Because The Report Relies On Information That Was Not Available When AMD Filed Its Initial Opposition

Intel begins by addressing together the first and third factors relevant to supplementing a summary judgment record while the motion remains pending, i.e., “(1) the moving party’s reasons for not originally submitting the evidence,” and “(3) whether the evidence was available to the non-moving party when it responded to the summary judgment motion.” Intel Opp. 4-5 (quoting *Armstrong v. Jenkins*, No. 02-38913, 2003 Bankr. LEXIS 1267, at *10-11 (Bankr. N.D. Tex. Oct. 7, 2003)). Intel contends that AMD cannot satisfy either factor because the entirety of the Ostrander Report “has always been available to and within the control of AMD,” Intel Opp. 5, and thus AMD could have filed a declaration from Dr. Ostrander attesting to the substance of his Report in January 2009, when AMD filed its opposition to Intel’s motion, *id.* at 6.

Intel’s timeliness argument turns on its blatant mischaracterization of the Ostrander Report as unconnected to the evidentiary record of this case. In fact, in the *very first paragraph* of the Report, Dr. Ostrander explains that he received demand forecasts from Dr. Mark Watson that show what demand would have been for AMD microprocessors without Intel’s anticompetitive conduct.³ Ostrander Report ¶ 1. Later in the Report, Dr. Ostrander again explicitly references the multiple “projections I received from Dr. Watson.” Ostrander Report ¶ 60. There are a total of four demand statements provided by Dr. Watson. Dr. Ostrander expressly relies on all four demand statements in his expert report, and refers to these

³ A copy of the Expert Report of Daryl Ostrander, Ph.D (“Ostrander Report”) was attached as Exhibit 1 to Exhibit A of AMD’s Motion for Leave. (05-1717, D.I. 2083; 05-441, D.I. 1696).

incremental demand levels as: Demand Statement A, Demand Statement B, Demand Statement C, and Demand Statement D. Ostrander Report ¶¶ 41-42.

The demand statements clearly reflect the record and denote the relevant time period (2001Q3 - 2008Q2), name of the relevant AMD microprocessor, and the projected additional units for that microprocessor assuming that Intel's anticompetitive conduct was absent.⁴ Dr. Ostrander explicitly relies upon these four demand statements in addition to other AMD documents identified within the exhibits, and provides an opinion as to what a reasonable AMD capacity planning executive would have implemented if there had been no anticompetitive conduct by Intel. Ostrander Report ¶¶ 41-43.⁵ The Ostrander Expert Report also considers whether AMD would have had the manufacturing capacity to make the projected additional units under two cases for each of the four demand statements: one with Fab 25 and one without Fab 25.⁶ Ostrander Report ¶¶ 93 - 109.⁷ Dr. Ostrander concludes his expert report by quantifying the information in the demand statements and comparing the unit shortfall AMD would have

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Dr. Ostrander also analyzes how other factors would have influenced AMD's decision making, including a discussion relating to additional and accelerated capital expenditure considerations for both front-end and back-end capacity.

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experienced with use of Fab 25 against the unit shortfall AMD would have experienced if it had been unable to use Fab 25. Ostrander Report ¶ 110.

From the perspective of timeliness, the critical point is that the demand forecasts on which Dr. Ostrander's opinions about AMD's production capacity and options rely *were not available to AMD in January 2009*, when AMD filed its initial opposition.⁸ The demand forecasts reflect the demand levels AMD would have faced if Intel had not engaged in anticompetitive conduct. As Intel knows from Dr. Watson's report, his demand projections were the result of regression analyses he performed correlating fluctuations in AMD's revenues and Intel exclusionary conduct. As the Watson report makes clear, the essential input Intel's exclusionary conduct was cataloged by AMD's competition economist, Dr. Douglas Bernheim, who relied on the discovery record in this case.⁹ That record was not complete until the close of

⁸ Intel also argues that AMD's decision not to file a Rule 56(f) motion shows that "[a]ll the relevant evidence . . . was in the record" (Intel Opp. 5) by January 2009. That assertion is belied by Intel's own May 2009 submission of supplemental deposition testimony (without even seeking this Court's approval). Intel Supp. (05-1717, D.I. 1761; 05-441, D.I. 1418; 05-485, D.I. 1505).

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fact discovery on June 12, 2009, with much of the record assembled from depositions (particularly third-party depositions) taken during the second quarter of 2009.¹⁰

Dr. Watson's demand forecasts which are necessarily governed by the extent and nature of Intel's conduct could not have been generated without consideration of the complete discovery record. Because the Ostrander Report relies on Dr. Watson's demand statements, and Dr. Watson relies on Dr. Bernheim's analysis of the discovery record, it would have been impossible for AMD to submit a complete report five months prior to June 2009 and the close of fact discovery. For the same reason, that information also was not available when Dr. Siegle's declaration was filed in October 2006, or when Dr. Ostrander himself was deposed in August 2008. Contrary to Intel's submission (Intel Opp. 5), none of that prior testimony was functionally equivalent or could have been made equivalent at the time to the expert opinions later proffered in the Ostrander Report.

The first and third "prongs" in the *Armstrong* record-supplementation analysis are indeed "related," as Intel notes (Intel Opp. 5), and AMD satisfies them both for the same reason. AMD indisputably had the ultimate "reason[] for not originally submitting" the Ostrander Report: the opinions set forth in the report simply were not "available to [AMD] when it responded to the summary judgment motion." As previously explained, Dr. Watson's demand forecasts could be completed only after Dr. Bernheim evaluated the full factual record. And it is these very demand forecasts, along with other relevant evidence, that Dr. Ostrander appropriately analyzed to

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For confirmation, the Court is invited to review the monthly discovery progress reports the parties submitted to Judge Poppiti at his direction. For January through June, 2009, they are located at 05-1717: D.I. 1497, 1644, 1997; 05-441: D.I. 1169, 1312, 1638; 05-485: D.I. 1284, 1410, 1651, and May 15, 2009 Joint Report (attached as Zhou Decl. Ex. P).

develop his opinions, and to report them in a careful and thorough report.¹¹

B. The Ostrander Report Is Important To The Analysis Of Intel's Export Commerce Motion

Intel next contends that the second *Armstrong* factor “the importance of the omitted evidence to the moving party’s case,” Intel Opp. 7 (quotation omitted) is not satisfied because the Ostrander Report lacks any evidentiary foundation and is merely cumulative of the arguments AMD has already made in opposition to Intel’s motion.

Intel’s argument again depends on its foundational mischaracterization of the Ostrander Report. Its contention that the Report “cites to no evidence” (Intel Opp. 6) is, as shown above, simply wrong—fourteen exhibits of evidence, and citations to record documents, are attached to the Report. What Intel really means (as it confesses in a footnote) is that the Report cites only evidence Intel professes not to understand, *see* Intel Opp. 2 n.1, but that is a far cry from “no

¹¹ Intel’s suggestion that the Report should have been filed immediately after the close of fact discovery in June 2009 (Intel Opp. 6) is baseless. Intel ignores Dr. Ostrander’s need to analyze the data and develop and report his opinions, which he did by the expert deadline agreed to by the parties.

Intel’s related suggestion that AMD submitted the Report too long after the August 3, 2009, expert discovery deadline (*id.*) is equally baseless. Intel itself took two full weeks to submit its own supplemental discovery material. *See* Intel Supp. (submitting deposition testimony two weeks after deposition). AMD similarly sought to submit the Ostrander Report just three weeks after it was disclosed—and after giving Intel notice months ago that the Report would be submitted in connection with Intel’s motion, *see* AMD Response 6 (05-1717, D.I. 1835; 05-441, D.I. 1490; 05-485, D.I. 1563)—and requested Intel’s position on submission of the report. Intel took five full days to respond, and ultimately did so only after AMD prodded Intel a second time to respond. *See* August 2009 email correspondence (attached as Zhou Decl. Ex. Q). In light of Intel’s position, AMD was compelled to prepare a substantive motion for leave to file, adding several more days to the timeline. Any suggestion that Intel suffered prejudice from the timing of the submission is belied by Intel’s own conduct.

evidence.”¹² Thus, while it is true that, as the cases cited by Intel hold, the “factual predicate of an expert’s opinion must find some support in the record,” *Novartis Corp. v. Ben Venue Labs., Inc.* 271 F.3d 1043, 1051 (Fed. Cir. 2001) (citations omitted); *see Shaw v. Strackhouse*, 920 F.2d 1135, 1142 (3d Cir. 1990); *Pa. Dental Ass’n v. Med. Serv. Ass’n*, 745 F.2d 248, 262 (3d Cir. 1984), that unremarkable proposition is no barrier to submission of the Ostrander Report, which depends crucially on record evidence concerning demand forecasts and production constraints to provide the foundation for Dr. Ostrander’s opinions.

Nor is there any basis for Intel’s contention that the Ostrander Report can be disregarded as cumulative of other evidence. Intel bizarrely insists that AMD itself “concedes” that the Report is cumulative, by contending that AMD’s original submission “already demonstrated the legal and factual flaws in Intel’s position.” Intel Opp. 8 (quoting AMD Supp. Br. 2). By that reasoning, a party would be allowed only to submit the absolute minimum of evidence it believes barely necessary to establish its case or defeat its opponent’s. Obviously, the rules of evidence and procedure do not operate that way the fact that AMD had already shown Intel’s motion to be meritless is no reason to prohibit AMD from submitting additional, *different* evidence that *further* establishes the flaws in Intel’s position. Intel, of course, contends that the Ostrander Report is *not* different from evidence and arguments AMD has already submitted, *id.*, but yet again Intel ignores the new demand forecast evidence on which Dr. Ostrander’s opinions are based. *See Czarnecki v. Home Depot USA, Inc.*, No. 07-4384, 2009 U.S. Dist. LEXIS 51637, at *4-6 (E.D. Pa. June 15, 2009) (holding that there was no cumulative testimony where two

¹² Intel notably cites nothing in support of its remarkable position that the appended exhibits and cited record documents should somehow not “count” as evidence. Intel does not even cite or describe the documents, much less explain how they fail to support Dr. Ostrander’s analysis or are “not relevant to Intel’s Export Commerce Motion.” Intel Opp. 2 n.1. Such meaningless, conclusory assertions are no basis for refusing to consider the Ostrander Report.

experts “presented somewhat different theories of causation”); *see Bornstad v. Honey Brook Twp.*, No. 03-CV-3822, 2005 U.S. Dist. LEXIS 19573, at *41 (E.D. Pa. Sept. 9, 2005) (finding no cumulative testimony where two experts “did not rely on precisely the same information” in reaching the same conclusion). Intel has no serious argument, based on the actual Ostrander Report, that the Report is merely cumulative of prior submissions.¹³

C. Intel Would Not Be Prejudiced By Submission Of The Report

Finally, Intel complains that it would be prejudiced by the Court’s consideration of the Ostrander Report. Intel Opp. 9. The only prejudice Intel asserts, however, is that acceptance of AMD’s position “would greatly enlarge the scope of the trial,” thereby affecting “the scope of Intel’s expert reports, the scope of motion practice, and preparation for trial.” *Id.* “This burden might be justifiable,” Intel generously allows, “if AMD had a legal basis for its claims regarding foreign customers, but AMD does not have any such basis.” *Id.* Intel’s prejudice argument, in other words, simply assumes that AMD’s position on the merits is incorrect. But, of course, if evidence could be excluded on the ground that it supports claims the opposing party considers unmeritorious, then no evidence would ever be admitted. The issue here is whether AMD should be allowed to submit the Ostrander Report *in order to help establish the merits of its claims* not whether it should be excluded on the assumption that AMD’s claims have no merit to start with. And Intel has proffered no plausible basis for denying AMD the use of the Report in refuting Intel’s assertion that AMD would have terminated production at Fab 25 even absent Intel’s

¹³ In a footnote Intel suggests but refuses to elaborate, and instead reserves for future briefing one substantive reason the Ostrander Report should be excluded as unimportant to Intel’s export commerce motion: according to Intel, the Report should be excluded because it actually “contradicts” AMD’s opposition to Intel’s motion. Intel Opp. 8 n.4; *see also id.* at 7 n.3. This contention continues the mischaracterization of AMD executives’ testimony that Intel has propagated throughout briefing on its motion, which AMD has already rebutted. *See* AMD Response 2-6. Intel simply repeats and extends that mischaracterization by similarly mischaracterizing Dr. Ostrander’s opinion.

unlawful, anticompetitive conduct.

CONCLUSION

For the foregoing reasons, AMD's motion for leave to file the accompanying supplemental submission should be granted.

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