

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

IN RE INTEL CORPORATION )  
MICROPROCESSOR ANTITRUST ) MDL No. 1717-JJF  
LITIGATION )  
\_\_\_\_\_ )

ADVANCED MICRO DEVICES, INC., )  
and AMD INTERNATIONAL SALES )  
AND SERVICE LTD., ) C.A. No. 05-441-JJF  
 )  
Plaintiffs, )

v. )

INTEL CORPORATION and )  
INTEL KABUSHIKI KAISHA, )  
 )  
Defendants. )  
\_\_\_\_\_ )

PHIL PAUL, on behalf of )  
himself and all others )  
similarly situated, )  
 )  
Plaintiff, ) C.A. No. 05-485-JJF  
 )

v. )

INTEL CORPORATION. )  
 )  
Defendant. )

Wednesday, November 29, 2006  
9:55 a.m.  
Courtroom 2A

844 King Street  
Wilmington, Delaware

BEFORE: SPECIAL MASTER VINCENT J. POPPITI

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APPEARANCES:

RICHARDS, LAYTON & FINGER  
BY: FREDERICK L. COTTRELL, III, ESQ.

-and-

O'MELVENY & MYERS  
BY: CHUCK DIAMOND, ESQ.  
BY: LINDA SMITH, ESQ.  
BY: MARK SAMUELS, ESQ.  
BY: HENRY THUMANN, ESQ.

Counsel for the Plaintiffs

POTTER, ANDERSON & CORROON  
BY: RICHARD L. HORWITZ, ESQ.

-and-

GIBSON DUNN  
BY: ROBERT COOPER, ESQ.  
BY: DANIEL FLOYD, ESQ.

Counsel for Defendants

1                   SPECIAL MASTER POPPITI: It's a  
2                   little bit early, but there is no reason to wait  
3                   until ten o'clock unless someone suggest a good  
4                   reason to wait until 10:00, other expected  
5                   either participants and/or observers that are  
6                   important to be here.

7                   MR. DIAMOND: We're not expecting  
8                   anybody else, Your Honor.

9                   MR. HORWITZ: We're not, Your  
10                  Honor.

11                  SPECIAL MASTER POPPITI: Why don't  
12                  we proceed then.

13                  Good morning all.

14                  It may be helpful before you begin  
15                  to discuss with me your respective positions to  
16                  perhaps create some backdrop of some things that  
17                  I'm going to want you to discuss with me. And  
18                  if that backdrop and if you will some of the  
19                  settings on this stage prompt the need for you  
20                  to collect your thoughts before we begin, then  
21                  it may be appropriate for me to say if you need  
22                  fifteen minutes or a half hour, let's go ahead  
23                  and do that.

24                  But let me suggest, then, I think

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1       it's critically important for everyone to  
2       understand what I expect you do understand, and  
3       that is sitting as a special master in this  
4       case, the order of reference is very clear, and  
5       the underpinnings of any order of reference to a  
6       special master are soundly grounded in the  
7       constitution, and what the federal district  
8       court is all about.

9                       There is little, if any question  
10       that the Court can refer to a special master  
11       matters of significant moment in any case. Some  
12       of my colleagues at the Delaware bar know that  
13       I've had the opportunity to actually conduct a  
14       Markman hearing. That's a matter of moment in a  
15       patent case. And in conjunction with that,  
16       suggest to the Court in findings and  
17       recommendations how the Court should rule on  
18       case dispositive motions after Markman.

19                      That referral is not inconsistent  
20       with the underlying constitutional underpinnings  
21       of what special masters are all about.

22                      In the context of this case, and  
23       measured against some of the things that you  
24       have -- I'll say you collectively have suggested

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1 that I consider today and discuss with you  
2 today, I must say that I am not inclined to  
3 engage in that discussion, and I will list those  
4 for you. And I say not engage in that  
5 discussion, I say it respectfully.

6 First for purposes of addressing  
7 the class plaintiffs' motion to compel, I am not  
8 inclined to do what the class plaintiffs have  
9 suggested, and that is to either suggest from my  
10 perspective or speculate on what Judge Farnan  
11 might conclude in deciding that substantive  
12 motion, Intel's substantive motion to dismiss.

13 I think it would be inappropriate  
14 for me to engage in that discussion, and engage  
15 in that dialogue, and engage in a suggestion or  
16 speculation.

17 Second, I am not inclined to do  
18 what Intel suggest, and that is to make some  
19 determinations with respect to the foreign  
20 commerce export claims with respect to both the  
21 viability of the claims and the statute of  
22 limitations arguments.

23 I am convinced to do so would be  
24 overstepping the bounds of the order of

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1 reference and overstepping the bounds of the  
2 underpinnings of what special masters are all  
3 about.

4           It will certainly be important in  
5 the context of your discussion with me, the  
6 foreign commerce export claims, for example, it  
7 will be important for me to have your view, I  
8 think I have it already, but it may be important  
9 for me to discuss that view with you this  
10 morning on the parameters of Judge Farnan's  
11 decision and the impact of that decision. It  
12 seems to me that that's really the crux of the  
13 matter today.

14           And it seems to me yet again for  
15 me to suggest to you for purposes of framing  
16 your remarks that not unlike reading any  
17 decision of a court, it's always important to  
18 understand the reasoning behind the decision,  
19 but the most important part of the decision is  
20 the decision, is the order.

21           Now, it seems to me again, and I  
22 want you to talk to me about this further, it is  
23 inappropriate for me to speculate as to what  
24 Judge Farnan would have done if the matter of

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1 foreign commerce export claims, if that matter  
2 was squarely before him. Please be mindful of  
3 the fact that I have had the opportunity, even  
4 before reading Mr. Drane's correspondence dated  
5 November the 27th, I did take the opportunity to  
6 read rather carefully the motion to dismiss for  
7 purposes of my making some judgment as to what  
8 was before the Court and for purposes of helping  
9 me better understand what Judge Farnan did  
10 against the backdrop of what he said.

11 I would also like for purposes of  
12 focusing on your presentations today, it's  
13 important for me to verify that the parties  
14 agree, or to know if you disagree, that the  
15 categories of documents identified by AMD in its  
16 papers are, in fact, the categories in dispute.  
17 Those categories are identified from AMD's  
18 perspective as documents that might evidence --  
19 and let me go through them even though you  
20 probably know them a lot better than I. The  
21 first is limitations on a customer's freedom to  
22 purchase microprocessors from AMD.

23 The second is requirements that a  
24 customer purchase specific amounts or

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1 percentages from Intel.

2 The third is other coercion  
3 including threats of retaliation and retribution  
4 for doing business with AMD or not doing  
5 sufficient business with Intel.

6 The next is any other quantity  
7 forcing behavior.

8 The next is other foreign conduct  
9 intended to handicap AMD in the marketplace,  
10 make its products less desirable to customers  
11 and consumers, or raise its costs of doing  
12 business.

13 And finally, Intel's internal  
14 communications bearing on any of the foregoing.

15 I'm concerned that if we don't  
16 agree that there are categories, that it may  
17 become our responsibilities to literally go  
18 through request by request. And I don't have  
19 any sense that you all want me to do that, but I  
20 really do need to make sure of that.

21 With that, if you all need a few  
22 moments to gather your thoughts, then I'm happy  
23 to entertain a request.

24 MR. COOPER: Good to go.

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1                   SPECIAL MASTER POPPITI: Okay.

2           Please.

3                   MR. DIAMOND: Good morning, Your

4           Honor. Charles Diamond for AMD --

5                   SPECIAL MASTER POPPITI:

6           Mr. Diamond.

7                   MR. DIAMOND: -- plaintiff and

8           moving party.

9                   You made my morning a little bit  
10           easier than I have anticipated. I have agreed  
11           to divide the argument this morning with my  
12           partner, Mr. Thuman, who is going to address the  
13           implications of AMD's domestic commerce claim  
14           and why we believe that the foreign conduct  
15           discovery that we have asked for is not only  
16           relevant to the domestic commerce claim, i.e.,  
17           proving a Section 2 monopolization claim with  
18           respect to domestic sales of microprocessors.

19                   And I was going to talk about the  
20           export commerce claims, specifically the statute  
21           of limitations and the FTAIA, but I will  
22           abbreviate those comments.

23                   Let me assure you from our  
24           standpoint we think we have identified correctly

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1 the universe of documents that are in dispute,  
2 although we didn't file it with Your Honor, the  
3 categories that you read into the record are if  
4 not a direct quotation, a fair synopsis of a  
5 letter that I sent to Intel's counsel following  
6 our meet and confer prior to filing the motion  
7 to compel.

8 SPECIAL MASTER POPPITI: That's  
9 the way they were characterized in the  
10 submissions.

11 MR. DIAMOND: That's how they were  
12 characterized in the letter to the best of my  
13 recollection. And I don't think there is any  
14 dispute about what is in controversy.

15 I think it probably behooves me to  
16 make some general observations with respect to  
17 our motion, and the significance that we think  
18 it carries. And then respond in whatever  
19 rebuttal time I reserve to what Intel has to say  
20 about your reservations concerning the order of  
21 reference and the constitutional questions  
22 concerning disposing of substantive defenses  
23 that they have raised in their opposition.

24 Our position is set forth in our

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1 papers and I think I can do no better than  
2 simply reply to what Intel may have to say about  
3 that issue.

4 I thought it might be useful,  
5 though, just to start with some first principles  
6 about this case, and what we are complaining  
7 about and how they tie into the discovery that  
8 we've requested, and why we think the line that  
9 Intel has drawn with respect to foreign  
10 discovery is just simply untenable.

11 Intel controls 80 percent of the  
12 X-86 microprocessor market, 80 percent by unit  
13 sales, closer to 90 percent in terms of revenue.  
14 By any characterization, it is beyond a dominant  
15 force in the market, it is a super dominant  
16 force in the market.

17 And its share of customer  
18 businesses, particularly the key customers, the  
19 large OEMs that are generally household names to  
20 us, is even higher than its overall market  
21 share.

22 And there is an enormous degree of  
23 dependency that the computer companies have on  
24 Intel. If you want to do business in the

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1 computer industry, you have to do business with  
2 Intel. That has given Intel remarkable power.

3 And we're not suggesting there is  
4 anything wrong with Intel owning 90 percent of  
5 the market, nor is there anything wrong with  
6 Intel being able to create a situation such as  
7 the one that exist where customers are to a  
8 large degree dependent upon it.

9 What we're complaining about in  
10 this case is the leverage and advantage that  
11 Intel has taken, and how it has used that  
12 dependency to basically bend the computer  
13 companies to its will with respect to its AMD  
14 dealings.

15 Through a whole series of coercive  
16 punishments and rewards, Intel over the past  
17 decade has managed to discipline its customers  
18 and tell them in what volumes they can purchase  
19 from AMD, what lines of machines they can devote  
20 AMD processors to and what machines they can't,  
21 what types of customers they can go after with  
22 AMD powered computers and what types of  
23 customers they can't.

24 And the guts of this case is about

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1 unfair, unlawful use of that market power to the  
2 detriment of competition to the marketplace and  
3 obviously to the detriment of AMD.

4 Intel's offer with respect to  
5 foreign conduct discovery is by no means the  
6 balanced approach that it suggest. What they're  
7 prepared to give us are the number of Pentium  
8 4s, the number of mobile processors, Pentium Ms,  
9 the number of whatever other units they sold to  
10 Fujitsu in any quarter, the price that Fujitsu  
11 may have paid for those processors, any  
12 marketing support, but notably absent from their  
13 offer is anything about the quid pro quos. What  
14 are those? What did Fujitsu have to agree to in  
15 order to get a particular concession? What  
16 penalties might have been imposed on Fujitsu in  
17 the past in order to exact whatever conduct  
18 Intel wanted to exact?

19 That's not going to be in the  
20 materials that they're prepared to turn over  
21 voluntarily. And that's what this case is  
22 about. So the line in the sand that Intel has  
23 drawn has rather breathtaking implications in  
24 terms of our ability to prove our case.

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1                   Just by way of example, Your  
2 Honor, obviously foreign conduct does have  
3 implications in the U.S. market. We have  
4 tendered to you documents which show quite  
5 clearly that in the case of one Japanese OEM,  
6 Intel exacted concessions by offering some  
7 promise of future benefit, and basically wiped  
8 AMD off of the map worldwide with respect to  
9 that Japanese OEM, not only with respect to its  
10 purchases of processors for use in Asia, but  
11 also for the processors that AMD would have sold  
12 to that company's San Diego facility.

13                   We have another example of a  
14 Chinese OEM doing business in North Carolina  
15 that had been pressured with threats of  
16 retaliation, impacting domestic commerce.

17                   So put aside Judge Farnan's  
18 ruling, because Judge Farnan clearly said AMD is  
19 allowed to pursue claims for lost opportunities  
20 in the domestic market, including foreign  
21 companies that participate in the market here in  
22 the -- or in the segment here in the United  
23 States, it's not a market. If Intel's position  
24 is allowed to stand, we're not going to be able

1 to prove that. If they are not obligated to  
2 produce foreign conduct discovery, we're not  
3 going to be able to produce our --

4 SPECIAL MASTER POPPITI: Simply  
5 focusing on the domestic.

6 MR. DIAMOND: Just simply focusing  
7 on the domestic, I haven't even gotten to the  
8 rest of the claim.

9 SPECIAL MASTER POPPITI: I  
10 understand.

11 MR. DIAMOND: All I'm saying is  
12 the line they have drawn is an untenable one,  
13 because it even exceeds anything reasonable  
14 under Judge Farnan's order.

15 SPECIAL MASTER POPPITI: Talk to  
16 me a little bit, then, about the impact of the  
17 discovery that you are looking for as it relates  
18 to your domestic, please. I know you have done  
19 it in the papers.

20 MR. DIAMOND: Well, you're talking  
21 about domestic versus U.S. export?

22 SPECIAL MASTER POPPITI: Yes.

23 MR. DIAMOND: If I could defer  
24 that because Mr. Thuman is going to address

1       precisely why we believe we need evidence of  
2       foreign conduct in order to prove this Section 2  
3       violation as a prerequisite to recovering  
4       domestically.

5                       SPECIAL MASTER POPPITI:   Okay.

6                       MR. DIAMOND:   But clearly the  
7       discovery that they refuse to make is relevant  
8       just to show lost opportunities in San Diego and  
9       North Carolina, but beyond that, it is clearly  
10      relevant, essential, indispensable to show that  
11      AMD suffered lost opportunities in the U.S.  
12      export market.

13                      I mean by definition the customers  
14      in the export market are not U.S. companies,  
15      they're foreign companies, and if we are  
16      foreclosed from discovering evidence of the  
17      coercive conduct that Intel brought to bear  
18      around the world on potential export customers,  
19      then we're not going to be able to prove that  
20      claim.

21                      That leads me to the question that  
22      you asked, specifically the import of Judge  
23      Farnan's decision on the matters that are before  
24      you.  I'll let Mr. Thuman talk about the



1       implications of Judge Farnan's decision with  
2       respect to proving our domestic customers claim.  
3       But let me say I don't think there is any  
4       disagreement that Judge Farnan did not address  
5       AMD's export claim. I believe Intel in its  
6       opposition states that the very first page, that  
7       the Court did not address AMD's expert claims in  
8       any detail.

9                       Well, the detail was simply to  
10       mention we had one, that's all Judge Farnan  
11       said. And Intel concedes that the second page  
12       of its opposition that AMD's export claims were  
13       not part of the argument to Judge Farnan during  
14       the briefing on jurisdictional issues.

15                      So Judge Farnan's decision with  
16       respect to whether AMD could recover for claims  
17       of lost opportunities to sell German-made  
18       processors to foreign customers has no import on  
19       whether AMD is entitled to assert a claim for  
20       lost export opportunities.

21                      And I don't see any reasonable  
22       construction of Judge Farnan's decision which  
23       gets you to the export claim. As Intel  
24       concedes, they didn't raise it, not in their

1 notice of motion, we didn't deal with it in our  
2 opposition because they're not part of the  
3 motion, the motion concerned the sale of  
4 German-made processors to foreign companies, not  
5 the sale of U.S. made processors to foreign  
6 companies. And that simply was something that  
7 Judge Farnan did not address.

8 SPECIAL MASTER POPPITI: Thank  
9 you.

10 MR. DIAMOND: As I think you can  
11 observe, in terms of establishing a viable  
12 export claim, it would be silliness to argue  
13 that foreign misconduct is not relevant. It is  
14 the only conduct that is relevant since by  
15 definition export customers can't be foreign  
16 concerns. So there is no relevance issue here.  
17 There is no burden issue here.

18 We have negotiated with Intel,  
19 since we both have the capacity to inflict  
20 mutually assured destruction on one another,  
21 reasonable parameters for the discovery. Yes  
22 our discovery requests are broad, so are theirs,  
23 and through the negotiation process we have  
24 narrowed those down. So this is not a question

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1 of putting an unreasonable burden on someone.  
2 And I think as you observed in your opening  
3 comments, the defense to our conduct of foreign  
4 discovery in support of the export, U.S. export  
5 commerce claim really turns on the salt, on the  
6 merits, and for reasons that we've stated in our  
7 brief with all due respect, we don't think that  
8 you have been delegated with the responsibility  
9 to decide dispositive issues such as statute of  
10 limitations, such as the reach of the FTAI on  
11 the export claim, nor do we think Judge Farnan  
12 would have had the ability to delegate that so  
13 he had so chosen, case law is clear that  
14 deciding sort of game ending legal questions or  
15 propositions is for the district court and not  
16 for a special master.

17 But there is another, there is  
18 another problem with the invitation that Intel  
19 extends for you to decide those questions. And  
20 they have got the cart before the horse, Your  
21 Honor. You know, typically, under the federal  
22 rules parties are entitled to pursue claims well  
23 pleaded in the complaint and defenses well  
24 pleaded in the answer. That's what frames

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1 discovery.

2 What Intel would like to do is  
3 tender dispositive motions to you before any  
4 discovery takes place by retailing the issues  
5 in this case to suggest they're not issues.  
6 Well, it's just not the right time. They have  
7 had a year-and-a-half to move to dismiss the  
8 export claim. The export claim is expressly  
9 pleaded in I think paragraph 168 or 169 of the  
10 complaint. They have filed two motions to  
11 dismiss, one against us -- thank you, I stand  
12 corrected.

13 SPECIAL MASTER POPPITI: That's  
14 all right. There are a lot of numbers.

15 MR. DIAMOND: One against us and  
16 one against the class. They haven't. That  
17 claim is part of this case and AMD is entitled  
18 to pursue discovery in support of it until such  
19 time as it's stricken, if that ever happens. It  
20 hasn't been struck. We are entitled to pursue  
21 the claim.

22 The only thing that Intel could  
23 arguably suggest, and I think it would be a  
24 wrong characterization of Judge Farnan's

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1 decision to do so, is that Judge Farnan struck  
2 various specific allegations in the complaint.  
3 You have to read that in the context of what  
4 Intel was asking him to do and why it was asking  
5 him to do it. It made that request in the  
6 context of attacking AMD's right to recover for  
7 the sale of German-made processors to foreign  
8 customers, and as Intel concedes in its  
9 opposition papers, a party is entitled to  
10 conduct discovery on stricken allegations if  
11 they are relevant to some other aspect of the  
12 claim and here clearly that is the case, those  
13 allegations are relevant to our export claim as  
14 well as to the foreign claims that Judge Farnan  
15 disposed of.

16 So I think I would like to invite  
17 Mr. Thuman to address your question with respect  
18 to why foreign conduct discovery is essential to  
19 proving even our domestic customers claim and  
20 then respond to anything that Intel has to say  
21 about the reference issues that you identified.

22 SPECIAL MASTER POPPITI: Thank  
23 you, Mr. Diamond.

24 MR. COOPER: Your Honor, would you

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1 prefer that we respond to the export claim now  
2 or later? I don't care. Just whatever --

3 SPECIAL MASTER POPPITI: Let me  
4 hear AMD's full position.

5 MR. THUMAN: Good morning, Your  
6 Honor. I'm Henry Thuman, Mr. Diamond's partner.

7 SPECIAL MASTER POPPITI: Good  
8 morning, Mr. Thuman.

9 MR. THUMAN: The export claim and  
10 our domestic U.S. commerce claim are distinct  
11 for purposes of our discussion this morning.

12 SPECIAL MASTER POPPITI: I  
13 understand that.

14 MR. THUMAN: In that while Judge  
15 Farnan made no rulings with respect to the  
16 export claim, he did specifically suggest that  
17 he was not dismissing the U.S. commerce claim,  
18 that is to say AMD's exclusion from U.S. sales  
19 to U.S. customers.

20 SPECIAL MASTER POPPITI: Yes.

21 MR. THUMAN: He also in his order  
22 went on to find that the foreign exclusion, that  
23 is exclusion from sales abroad of foreign  
24 customers did not directly give rise to the U.S.

1 AMD claim.

2 So starting with that, the  
3 question then becomes what is the effect of that  
4 order and that ruling with respect to the  
5 discoverability and ultimately the admissibility  
6 of foreign evidence that is relevant to the U.S.  
7 claim.

8 And I suggest there are really two  
9 questions that control the ultimate resolution  
10 of that question. First, is the foreign conduct  
11 relevant to the proof of the U.S. claim? And  
12 secondly, if it is, does the Foreign Trade  
13 Antitrust Improvement Act somehow preclude its  
14 discoverability and admissibility irrespective  
15 of its relevance.

16 Turning to the first of those  
17 questions, which is the relevance, I really  
18 suggest that it is not seriously contested by  
19 Intel. The evidence is relevant on numerous  
20 grounds.

21 First, there is an agreement in  
22 the pleadings in the terms of allegation and  
23 admission in the answer that what we're talking  
24 about here is a unitary single worldwide market.

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1 Thus to prove any claim that domestic customers  
2 is unlawful and a violation of Section 2, AMD is  
3 going to have to prove that Intel has monopoly  
4 power, the very fundamental element of a  
5 monopoly case in the relevant market. And that  
6 relevant market is worldwide.

7 Indeed Intel has all but admitted  
8 the need for that worldwide proof by affording  
9 us very generously their sales statistics and  
10 their revenue statistics worldwide so that we  
11 can calculate and prove its market share in the  
12 worldwide market.

13 SPECIAL MASTER POPPITI: And, in  
14 fact, if I understood your papers correctly,  
15 Intel had agreed to provide broader based  
16 discovery up to the point when Judge Farnan  
17 issued his decision and order.

18 MR. THUMAN: That is correct, Your  
19 Honor.

20 Now, the fact is that evidence of  
21 market power, the pure statistical evidence of  
22 share is only circumstantial evidence of market  
23 power. And the cases are replete, U.S. Supreme  
24 Court cases that monopoly power, actual monopoly



1 power is the power to set prices for the power  
2 to exclude competition.

3 And the evidence that Mr. Diamond  
4 went through with you and that you started this  
5 hearing with in summary has all to do with  
6 exclusion of competition in the relevant market,  
7 thereby being direct proof of market power in  
8 the relevant market.

9 Now, Intel comes back and says  
10 that we don't need that evidence, that somehow  
11 as long as they're giving us the statistical  
12 evidence, we don't need the evidence of direct  
13 market power, i.e., direct exclusion in the  
14 relevant market which establishes market power,  
15 we can have it their way rather than our way.

16 Unfortunately, Your Honor, the  
17 defendant doesn't get to decide what relevant  
18 evidence the plaintiff gets to choose to  
19 introduce into evidence, much less to discovery.  
20 And we are perfectly entitled to introduce and  
21 discover all relevant evidence of its market  
22 power, and thereby to establish an element of  
23 our U.S. domestic antitrust claim.

24 And it is not only market power to

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1       which the foreign conduct evidence is relevant,  
2       we have not heard Intel except our proffers of  
3       stipulation that they did not obtain their  
4       monopoly position through better product or  
5       business acumen or historical --

6                   SPECIAL MASTER POPPITI:  Were you  
7       surprised?

8                   MR. THUMAN:  Not really.  Not  
9       really.

10                  SPECIAL MASTER POPPITI:  Not  
11       really.

12                  MR. THUMAN:  But it does make  
13       plain that we're going to have to prove that  
14       they achieved and maintained that monopoly by  
15       means other than that, mainly by anticompetitive  
16       exclusionary means and that again requires us to  
17       prove that throughout the market, that the  
18       market power in the relevant market, throughout  
19       the relevant market was achieved by unsavory  
20       means, an element we must prove to prevail on  
21       our U.S. domestic claim.

22                  And finally, Your Honor, it is not  
23       every exclusion that establishes violation of  
24       Section 2, it is only when the exclusion

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1 aggregated throughout the available market to  
2 the participants and rivals in the market has  
3 some material outcome, some material preclusion  
4 that maintains the monopoly for the monopolist  
5 and excludes competition of what is here the  
6 sole and single rival that a Section 2 claim is  
7 made out.

8 So if we prove exclusion from one  
9 or another or several U.S. customers, they will  
10 contend we have not proven a Section 2  
11 violation.

12 SPECIAL MASTER POPPITI: Because  
13 it's not substantial.

14 MR. THUMAN: Because that isn't a  
15 sufficient share or sufficiently relevant part  
16 of the total market. So at the end of the day,  
17 the evidence of the foreign exclusion is not  
18 only relevant to the U.S. domestic claim, it is  
19 essential.

20 And we are playing a game here of  
21 Catch 22. On the one hand you can't have the  
22 evidence, and on the other hand, summary  
23 judgment must be granted because you haven't  
24 proven a claim. So there really is no serious

1 issue as to the relevance of this conduct with  
2 respect to the domestic claim.

3 So the question arises, and this  
4 is the guts I think of the argument that Intel  
5 is making, that somehow the Foreign Trade  
6 Antitrust Improvement Act itself precludes a  
7 court adjudicating a domestic U.S. Sherman Act  
8 commerce violation from considering any foreign  
9 conduct of the defendant regardless of its  
10 relevance. There is, of course, absolutely no  
11 authority supporting such a reading of the  
12 statute, and Intel cites none. The case law in  
13 analogous situations is directly to the  
14 contrary.

15 And we have cited several Mann Act  
16 cases of all things, Your Honor, where it is  
17 clear that the activity which is the subject of  
18 the statute is not illegal unless a state line  
19 is crossed, but becomes illegal if a state line  
20 is crossed.

21 And the issue has arisen multiple  
22 times as to whether in a prosecution for illicit  
23 transportation across a state line, evidence of  
24 conduct intrastate that does not constitute a

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1 violation is outside of the descriptive  
2 jurisdiction of not only the court, but the  
3 congress is nonetheless admissible where  
4 relevant to prove the crime, the issue that's  
5 actually pending before the court.

6 And the courts have been unanimous  
7 that there is no restriction on the  
8 admissibility of relevant evidence even though  
9 the court has no substantive jurisdiction to  
10 punish the conduct or remedy the conduct that  
11 occurs intrastate.

12 Now, with that as background, the  
13 question then becomes has this basic established  
14 order been superceded by Judge Farnan's order?

15 Let's turn to Judge Farnan's  
16 order. It couldn't be plainer from the order  
17 that Judge Farnan has retained jurisdiction over  
18 our domestic U.S. commerce claims, exclusion  
19 from potential sales to U.S. customers. Indeed  
20 if he had not, we wouldn't be here this morning.  
21 It's the only thing that retains the adjudicate  
22 jurisdiction that Your Honor is exercising as we  
23 all proceed this morning.

24 Secondly, what Judge Farnan did

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1 determine is that as to foreign conduct, as to  
2 its foreign harm, he has no jurisdiction, and  
3 that is -- you know, we're accepting that ruling  
4 for the purposes of this discussion this morning  
5 and are not proceeding to seek the damages  
6 directly resulting from the foreign exclusion.

7 But he certainly did not make any  
8 rulings as to what was discoverable or what was  
9 not discoverable, what was relevant or what was  
10 not relevant to proving the U.S. claims that he  
11 expressly retained jurisdiction of.

12 On the contrary, when this was  
13 raised at the status conference immediately  
14 following this Foreign Trade Antitrust  
15 Improvement Act ruling, what he did was refer  
16 it, asked us to file a motion to compel, to tee  
17 this up to you for the very argument and  
18 discussion and ultimate ruling by you that we're  
19 going to have this morning.

20 If he had decided this, why would  
21 we be here? So clearly he has not. And the  
22 issue that you have to determine is is this  
23 discoverable or is this not discoverable.

24 Now, with respect to Intel's

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1 reading of the statute, they would essentially  
2 present or argue for a reading of the statute  
3 which would make it impossible for U.S. courts  
4 to clearly and completely adjudicate U.S. claims  
5 affecting U.S. commerce because -- where any  
6 kind of foreign conduct was material or  
7 essential to proving the U.S. claim.

8 Let me give you a hypothetical  
9 that I think illustrates it distinctly.

10 Assume that there was an  
11 international cartel that met in the Cayman  
12 Islands and they spent a week negotiating with  
13 each other import quotas for various parts of  
14 the world, and on the first day they agreed on a  
15 quota for the United States, and on the second  
16 day for Europe and on the third day for Asia,  
17 and so on, until the world was encompassed.

18 Now, let's assume that a U.S.  
19 purchaser of the commodity which was the subject  
20 of this conspiracy brought a suit claiming that  
21 they were overcharged because the constraint on  
22 supply to the U.S. established by this quota  
23 raised the price as a simple application of  
24 supply and demand.

1                   Let us assume these defendants did  
2                   not confess to their conspiracy, the evidence of  
3                   their agreement on the first day to limit U.S.  
4                   imports is of course directly relevant to the  
5                   U.S. claim and the U.S. claim arises out of  
6                   that, so there is no question but that all of  
7                   that I have had is discoverable, the plaintiff  
8                   seeks it, the plaintiff tries to prove it, the  
9                   defendants turn, bury some documents, burn other  
10                  documents, perhaps obstruct justice, commit  
11                  perjury, they essentially put in issue whether  
12                  that agreement took place at all.

13                  And as part of their defense in  
14                  arguing that there was no such agreement, they  
15                  contend that such an agreement would be totally  
16                  irrational because if one sought to raise prices  
17                  in the United States through a quota, the  
18                  purchasers would simply turn to the rest of the  
19                  world and buy it cheaper there and the  
20                  conspiracy could never work, so those same  
21                  people would agree to it.

22                  The obvious answer was the price  
23                  was fixed and quotas established across the rest  
24                  of the world so this was not available to the

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1 U.S. consumer. Intel would have that U.S.  
2 consumer denied discovery of what happened on  
3 Tuesday as opposed to Monday and what happened  
4 on Wednesday as opposed to Monday, and have the  
5 U.S. claim rejected on the ground that the  
6 plaintiff had failed to introduce evidence that  
7 negated the defendant's claim that such a  
8 conspiracy would have been irrational. I  
9 suggest, Your Honor, that such an interpretation  
10 of the statute is absurd.

11 It is absurd and totally  
12 unnecessary and inappropriate throughout  
13 application of just common cannons of statute  
14 interpretation.

15 First, nothing could be clearer  
16 than the legislative history which makes plain  
17 that the congress did not intend to restrict  
18 extraterritorial discovery in appropriate cases.  
19 So the interpretation that Intel tenders is  
20 directly contrary to the legislative history.

21 Secondly --

22 SPECIAL MASTER POPPITI: I'm  
23 looking at the language as you speak. What  
24 other case would be appropriate? What could the

1 language "other appropriate cases" mean?

2 MR. THUMAN: I have no idea. I  
3 mean, otherwise appropriate in the context, Your  
4 Honor, of the existing principles of law that  
5 unless there is language in the statute directly  
6 contrary is as a matter of construction commonly  
7 assumed to be part of the background against  
8 which new legislation takes form.

9 SPECIAL MASTER POPPITI: In fact  
10 that language is found under the heading of  
11 effect of legislation and current law.

12 MR. THUMAN: Correct. And the  
13 current law is as I have previously suggested  
14 where there was a clear demarcation between the  
15 jurisdiction of a court to punish or to remedy  
16 on the one hand and to adjudicate claims within  
17 its clear jurisdiction on the other hand.

18 So if one gives effect that there  
19 was congressional intent, if one gives effect to  
20 the purpose, the underlying purpose of the  
21 statute in terms of the principles that were in  
22 effect at the time, and one looks at the statute  
23 and sees that there is an even more plausible  
24 construction and interpretation of the statute

1       which gives full effect to all of this, and  
2       gives full effect to the statutory purpose and  
3       gives full effect to the preservation of  
4       competition or the preservation of jurisdiction,  
5       to adjudicate violations of the Sherman Act and  
6       anticompetitive conduct in the United States,  
7       one interprets the statutes as it naturally  
8       reads which is the court has no jurisdiction to  
9       adjudicate, punish or remedy foreign conduct  
10      having only foreign effects.

11                 But as to conduct in the United  
12      States, the court has full jurisdiction to  
13      adjudicate and remedy and punish conduct that  
14      violates U.S. law and adversely and  
15      anticompetitively effects U.S. commerce.

16                 It's an obvious interpretation of  
17      the statute. Intel proclaims that one of the  
18      purposes, the underlying purpose of the statute  
19      was to free American companies from the  
20      constraints of the Sherman Act and the American  
21      courts when acting abroad. The answer was yes.

22                 But it was also clearly the  
23      purpose of the Foreign Trade Antitrust  
24      Improvement Act to preserve the court's

1 jurisdiction to apply the Sherman Act  
2 domestically, to apply the Sherman Act to  
3 imports and to apply the Sherman Act to exports  
4 all in view as commerce. And the obvious and  
5 reasonable interpretation of the statute is the  
6 one that accommodates both of these.

7 And so the courts cannot punish,  
8 cannot remedy foreign conduct, but at the same  
9 time they are not precluded from fairly,  
10 completely and truly adjudicating U.S. conduct  
11 as to whether or not that U.S. conduct is lawful  
12 or unlawful. That's the gist of it.

13 We think the answer is plain, and  
14 as Mr. Diamond has suggested, we either get this  
15 discovery or we essentially have no way to prove  
16 a domestic U.S. claim.

17 SPECIAL MASTER POPPITI: Thank  
18 you, sir.

19 The class plaintiffs, please.

20 MR. SMALL: Good morning, Your  
21 Honor. Dan Small for the class plaintiffs.

22 SPECIAL MASTER POPPITI:  
23 Mr. Small, good morning.

24 MR. SMALL: Thank you.

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1                   In light of Your Honor's comments  
2                   at the outset, I will be able to abbreviate my  
3                   argument, but I do want to point out to the  
4                   Court that we essentially had two arguments that  
5                   we briefed, one related to the pending motion to  
6                   dismiss on 12(b)(1) grounds of Intel, which went  
7                   in some ways to the merits of that motion, but  
8                   we have a second argument that is completely  
9                   unrelated to that motion because whether or not  
10                  it was granted, our argument would be the same  
11                  and that other argument, of course, relates to  
12                  the implications of the fact that everyone in  
13                  this case agrees that the relevant market is  
14                  worldwide.

15                               And I don't want to repeat  
16                               anything Mr. Thuman just so eloquently argued,  
17                               but I myself thought of an analogy that I  
18                               thought might be helpful to Your Honor, I just  
19                               want to mention that.

20                                       I also before I do that, I want to  
21                                       point out that our claim is only for domestic  
22                                       injury. We are in no way seeking to prove that  
23                                       the foreign conduct in this case had any adverse  
24                                       affect on the class outside the United States

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1       because of course our class is in the United  
2       States, it's suing for purchases made in the  
3       United States and suing for injury incurred in  
4       the United States.

5                       So really, Your Honor, if we are  
6       able to get discovery to prove the unlawful  
7       nature of the U.S. conduct of Intel by being  
8       able to prove the relationship between the  
9       unlawfulness of that U.S. conduct and the  
10      anticompetitive foreign conduct, we can prove  
11      our claim.

12                      And we have no need, really, Your  
13      Honor, to be able to penalize or in any way ask  
14      the Court to declare unlawful the foreign  
15      conduct of Intel. We don't need to do that to  
16      prove our claim.

17                      So effectively if we can get the  
18      discovery of the foreign anticompetitive conduct  
19      of Intel in this case, it essentially moots  
20      Intel's motion to dismiss under the FTAIA.

21                      So now let me get to my analogy if  
22      I can, Your Honor. Instead of thinking about  
23      the worldwide market for X-86 microprocessors  
24      and thinking about Intel and AMD, let's think

1 for a moment if we could about a four-door car  
2 and think about Mr. Diamond and Mr. Cooper.  
3 Mr. Cooper is inside the four-door car and wants  
4 to keep Mr. Diamond out. In order to do that,  
5 Mr. Cooper has to lock all four doors to the car  
6 because if he leaves any one open, that's the  
7 way that Mr. Diamond could get in the car. And  
8 it doesn't matter to Mr. Diamond which door he  
9 goes through, any of the doors gets him into the  
10 car.

11 Now, if Mr. Diamond wants to prove  
12 to someone that he, in fact, was locked out of  
13 the car, he can't do that by just proving that  
14 one door was locked, he has to prove that all  
15 four doors were locked. And that would be his  
16 burden in that situation.

17 Now, I think you can see how this  
18 relates to the case here, if we now move back to  
19 the worldwide X-86 market, let's suppose that  
20 that has four parts, which I think it can be  
21 viewed as having, it has the United States, it  
22 has Europe, it has Asia, and it has the rest of  
23 the world.

24 Now, if instead of Mr. Diamond and

1 Mr. Cooper we have AMD and Intel again and Intel  
2 wants to keep AMD from expanding its sales in  
3 the relevant market, it cannot do that by just  
4 preventing AMD from expanding its sales in one  
5 portion of that market, for instance, the United  
6 States, it would not be sufficient to simply  
7 foreclose AMD from making sales to customers in  
8 the U.S. because if AMD was free to go through  
9 any of the other doors in that market and expand  
10 its sales elsewhere, Intel would not have  
11 accomplished its purpose, it would not have  
12 monopolized the relevant market which is  
13 worldwide.

14 So that's exactly the point here,  
15 Your Honor, we need to be able to prove, to show  
16 that Intel acted unlawfully in the United  
17 States, through its U.S. conduct that all the  
18 doors to the market were shut, and that AMD was  
19 kept out of Asia and Europe and the rest of the  
20 world through anticompetitive conduct by Intel.

21 SPECIAL MASTER POPPITI: Talk  
22 about the timing of your request for discovery  
23 and Intel's position that it should wait until  
24 Judge Farnan makes his decision.

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1                   MR. SMALL: Well, as to this first  
2                   issue that I just pointed out to the Court, it's  
3                   totally unrelated to the motion to dismiss.

4                   Let's assume for argument sake  
5                   that Judge Farnan were to grant that motion and  
6                   put us in exactly the same position that AMD  
7                   finds itself in today, we would be making the  
8                   same argument that AMD is making today. So we  
9                   get to benefit, Your Honor, by waiting for the  
10                  resolution of the motion to dismiss as to this  
11                  issue of why foreign discovery is important to  
12                  prove this domestic claim. If we lose we still  
13                  have the domestic claim, we still need that  
14                  foreign discovery.

15                  SPECIAL MASTER POPPITI: Thank  
16                  you.

17                  MR. SMALL: Thank you.

18                  SPECIAL MASTER POPPITI: Let's do  
19                  this, let's take ten minutes.

20                  MR. COOPER: Thank you.

21                  (A brief recess was taken.)

22                  SPECIAL MASTER POPPITI: Please.

23                  MR. COOPER: For the record, I'm  
24                  Bob Cooper representing Intel.

1                   SPECIAL MASTER POPPITI:

2           Mr. Cooper, good morning, sir.

3                   MR. COOPER: Let me start by very  
4           briefly commenting on Your Honor's question of  
5           whether the parties agreed or disagreed with  
6           respect to the categories of documents that are  
7           in dispute.

8                   SPECIAL MASTER POPPITI: Thank  
9           you.

10                  MR. COOPER: And I start with the  
11           disclaimer that my partner sitting there at the  
12           desk, Dan Floyd, has been intimately involved in  
13           this. And if we get into extended details on  
14           these issues, I would like to ask him to speak  
15           to that.

16                  SPECIAL MASTER POPPITI: That's  
17           not a problem at all.

18                  MR. COOPER: Let me just by way of  
19           an overview say that in general what was  
20           presented broadly summarizes categories, I must  
21           say in a very argumentative way.

22                  SPECIAL MASTER POPPITI: I  
23           understand that.

24                  MR. COOPER: If we were to respond

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1 to those, we would say none exist. But it  
2 broadly summarizes the types of documents, but I  
3 think the actual requests are even broader than  
4 those categories in some respects. There are  
5 other -- there are many respects in which  
6 depending on how Your Honor looks at things,  
7 these categories wouldn't be appropriate. Let  
8 me give you one example.

9 I don't believe that AMD certainly  
10 out of its domestic production of  
11 microprocessors was ever supplying servers,  
12 microprocessors for servers, so that would be an  
13 example of something that would be simply not  
14 appropriate to get into I would think in terms  
15 of document discovery. But those are details,  
16 we should come back to that I think after we  
17 talk more broadly about what the issues are here  
18 with respect to this discovery.

19 SPECIAL MASTER POPPITI: I happen  
20 to agree. Let's deal with your view of the  
21 issues and then it will be important to come  
22 back so I can understand if I were to order  
23 discovery of foreign conduct, period, end of  
24 sentence, what does that mean, or am I going to

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1 have to drill down through either categories or  
2 drill down through specific requests at this  
3 juncture.

4 MR. COOPER: I would hope that we  
5 could -- if we reach that point, which I hope we  
6 don't, then I hope we can give you more details  
7 that would be useful.

8 SPECIAL MASTER POPPITI: Thank  
9 you.

10 MR. COOPER: I'm not going to  
11 spend but a moment talking about the merits. I  
12 always say to let Mr. Diamond get a head start  
13 on me on those issues. But to put it very  
14 simply from our view point this is a case about  
15 price discounting and what AMD is complaining  
16 about is aggressive price discounting, never  
17 below cost, in an effort to achieve sales on  
18 Intel's part.

19 And the history also shows that  
20 Intel has been very successful over the years  
21 because it has had leading edge products and it  
22 has produced in the quantities required by the  
23 customers.

24 AMD has not been successful

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1 generally, although it has had burst of success  
2 because it at times executes well, mostly it has  
3 executed poorly. At the moment it has executed  
4 well, and indeed is riding high.

5 With that background, let me move  
6 to what I think are really the issues we need to  
7 address today. Let me start with the issues  
8 that were basically posed by Mr. Thuman's  
9 argument. The question there really put simply  
10 is whether AMD is entitled to discovery of  
11 Intel's foreign conduct to attempt to prove the  
12 merits of its remaining domestic antitrust  
13 claim. Specifically whether that evidence would  
14 go to its claim of monopolization.

15 And I want to start with -- I'm  
16 going to be repeating materials I know Your  
17 Honor is already familiar with, but let me lay  
18 the background. I want to start with the  
19 language of the act itself. It states, and it's  
20 very important, the language of the Sherman Act  
21 shall not apply, shall not apply to conduct  
22 involving trade or commerce with foreign nations  
23 unless it has a direct substantial and  
24 reasonably foreseeable effect on U.S. commerce.

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1                   Now, unless the foreign conduct  
2                   has that requisite effect, the conduct is not  
3                   illegal under the Sherman Act. And the federal  
4                   courts lack jurisdiction to adjudicate claims  
5                   based on it.

6                   In short, the Sherman Act itself  
7                   has been amended, this is part of the Sherman  
8                   Act, to not prevent federal courts to consider  
9                   what happens in the rest of the world absent a  
10                  showing of the requisite direct effect on U.S.  
11                  commerce.

12                  And then we move --

13                  SPECIAL MASTER POPPITI: Let me  
14                  ask you in the framework of the -- of what you  
15                  just suggested to me, how do I read, then, the  
16                  legislative history language that we briefly  
17                  discussed earlier?

18                  MR. COOPER: There is one passage  
19                  that mentions discovery.

20                  SPECIAL MASTER POPPITI: I have  
21                  it.

22                  MR. COOPER: In this report, you  
23                  probably have it, on page 21.

24                  SPECIAL MASTER POPPITI: I do.

1                   MR. COOPER:  If you go to page  
2                   21A, where it starts, the paragraph starts -- I  
3                   don't know what version you have.

4                   SPECIAL MASTER POPPITI:  My isn't  
5                   paginated that way.  I'm looking at the caption  
6                   is effect of legislation and current law.

7                   MR. COOPER:  Right.  And go to the  
8                   second paragraph there, and let's read that  
9                   together.

10                  SPECIAL MASTER POPPITI:  Moreover.

11                  MR. COOPER:  Yes.  Moreover.

12                  SPECIAL MASTER POPPITI:  Not a  
13                  duet I hope.

14                  MR. COOPER:  What?

15                  SPECIAL MASTER POPPITI:  Not a  
16                  duet --

17                  MR. COOPER:  The point I wanted to  
18                  make simply is you should read that, you need to  
19                  read the last sentence which Mr. Thuman focused  
20                  on in context, it makes a point that the bill is  
21                  intended neither to prevent nor to encourage  
22                  additional judicial recognition of the special  
23                  international characteristics of transaction.  
24                  If the court determines that if the requirements

1 for a subject jurisdiction matter are met, this  
2 bill should have no effect on the court's  
3 ability to employ notions of comity, in other  
4 words the court still decides for commodity  
5 reasons not to entertain the claim, or otherwise  
6 to take in account -- to take account of the  
7 international character of the transaction. And  
8 it goes on to say similarly the bill is not  
9 intended to restrict the application of American  
10 laws to extraterritorial conduct where the  
11 requisite effects exist, or to the  
12 extraterritorial pursuit of evidence in  
13 appropriate cases.

14 I read that the first time to  
15 simply say if you can establish you have a  
16 direct effect, then you have the right to the  
17 usual discovery, but you got to have the direct  
18 effect to have discovery.

19 SPECIAL MASTER POPPITI: It says  
20 or does it not?

21 MR. COOPER: It does, but what  
22 does that mean there? Is not intended to  
23 effect -- to restrict the application of  
24 American laws. That's referring to I assume



1 substantive laws, not discovery rules. To  
2 extraterritorial conduct where the requisite  
3 effects exist or to the extraterritorial pursuit  
4 of evidence in appropriate cases I presume where  
5 the requisite effects exist.

6 SPECIAL MASTER POPPITI: I  
7 understand your reading, I guess what struck me  
8 when I first was -- when this legislative  
9 history was first brought to my attention, I was  
10 struck by the fact that the legislative history  
11 specifically focused on evidence. Because  
12 nowhere else in the legislation is there a focus  
13 on evidence.

14 This squarely says that congress  
15 did not intend, it seems to me, to exclude the  
16 opportunity to pursue extraterritorial evidence,  
17 and it says in appropriate cases, that was my  
18 question earlier, what is left then as an  
19 appropriate case?

20 MR. COOPER: Let's also focus on  
21 the word evidence. It doesn't say discovery.

22 SPECIAL MASTER POPPITI: I  
23 understand that.

24 MR. COOPER: It says evidence.

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1                   SPECIAL MASTER POPPITI: But there  
2                   is a premise and then there is an ultimate  
3                   decision as to whether it's admissible.

4                   MR. COOPER: If you move to the  
5                   next proposition and let me move there now  
6                   because I think this will help maybe elucidate  
7                   the point.

8                   Obviously number one Judge Farnan  
9                   has found that the court lacks subject  
10                  jurisdiction over AMD's claims on Intel's  
11                  foreign conduct. And we can argue about what  
12                  the scope of that is in a moment.

13                  SPECIAL MASTER POPPITI: That's  
14                  foreign conduct and the Mann Act, at least  
15                  that's what he said over and over again.

16                  MR. COOPER: Then you need to go  
17                  to the ruling itself which I'll take you to a  
18                  little later.

19                  So then you go to the Supreme  
20                  Court decision in Epigram, and there the court  
21                  said, and I'm going to quote the language  
22                  because I think it's really very important here,  
23                  with a little lead in the Court explains the  
24                  FTAIA makes it clear to U.S. companies doing

1 business abroad that the Sherman Act does not  
2 prevent them from entering into business  
3 arrangements however anticompetitive unless it  
4 has a requisite anticompetitive effect on U.S.  
5 commerce.

6 Basically what's important to  
7 understand here is that the -- that statute  
8 strips extraterritorial conduct that doesn't  
9 have that direct impact, strips it out of the  
10 Sherman Act. It simply doesn't exist. You  
11 cannot call it anticompetitive conduct.

12 That by the way distinguishes the  
13 Mann Act cases where you have affirmative -- an  
14 affirmative Supreme Court decision that confirms  
15 what the statute did, which was to strip that  
16 conduct out of the antitrust laws. It doesn't  
17 exist.

18 We heard a series of  
19 hypotheticals, well two of them, and I would  
20 suggest that what both of those hypotheticals  
21 ignore is the very impact of the FTAIA itself in  
22 the four-door car example. Under the antitrust  
23 laws of the United States, if locking three  
24 doors does not have a direct impact on U.S.

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1 commerce, then it's perfectly legal and no one  
2 can rely on it for any purpose under the Sherman  
3 Act.

4 And that's the problem that I  
5 believe AMD is failing to face up to here. What  
6 Judge Farnan has found is that Intel's foreign  
7 conduct did not have the direct requisite effect  
8 on U.S. commerce, therefore, it doesn't exist as  
9 the basis for an antitrust claim under the  
10 Sherman Act, and yet the plaintiffs want to go  
11 into all of that discovery in an effort they say  
12 to make out a claim domestically.

13 And in so doing they're seeking to  
14 go into conduct that by statute American  
15 companies have a pass on, that is, there is no  
16 basis for a finding of liability based on that  
17 conduct.

18 And think about it for a moment.  
19 Otherwise the action taken under FTAIA would be  
20 meaningless. What congress sought to achieve  
21 would be meaningless. To permit AMD to obtain  
22 discovery on Intel's foreign conduct when the  
23 foreign conduct is not subject to the Sherman  
24 Act would really undermined the very purpose of

1 the act.

2 SPECIAL MASTER POPPITI: I guess  
3 I'm having some difficulty understanding why it  
4 would undermined the purpose of the act.

5 MR. COOPER: Well, to start with  
6 it's going to permit plaintiffs to conduct a  
7 massive and intrusive discovery into foreign  
8 conduct that cannot be the basis of a claim,  
9 that is not illegal under the Sherman Act. It's  
10 going to chill our United States companies from  
11 exercising their right to compete as they see  
12 fit in foreign countries because they will be  
13 subjected to massive intrusive discovery if we  
14 read this statute otherwise under these  
15 circumstances.

16 It will deny U.S. companies  
17 effectively the safe sanctuary, the respite that  
18 the FTAIA was designed to afford them. And it  
19 would deny it for one of the most costly and  
20 intrusive aspect of antitrust litigation. I'm  
21 sure Your Honor appreciates the issue that  
22 you're addressing here is really millions and  
23 millions of dollars of cost and expense and  
24 intrusion. And it's not only millions of

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1 dollars of costs to Intel, but it's an intrusive  
2 effect that extends beyond just Intel and  
3 reaches into its many customers abroad and the  
4 way business is done abroad.

5 SPECIAL MASTER POPPITI: I  
6 understand.

7 MR. COOPER: Basically how a U.S.  
8 company decides to compete abroad when its  
9 activities abroad do not have the requisite  
10 effect on the United States commerce is for  
11 foreign countries to decide.

12 AMD had an obligation to show that  
13 the foreign conduct it alleged had that  
14 requisite effect and the judge found it did not  
15 have that requisite effect. And what it's  
16 trying to do now is to aggregate what it would  
17 say is illegal anticompetitive activities in the  
18 United States with activity abroad which by  
19 definition now is not illegal and is not within  
20 the scope of the Sherman Act, he wants to  
21 aggregate the two together to make his case.  
22 That is flaunting the very purpose of the FTAIA.

23 SPECIAL MASTER POPPITI: Do you  
24 accept AMD's proposition that if they are unable

1 to access foreign conduct for purposes of  
2 discovery that they will ultimately be precluded  
3 from proving their domestic claim? Is it a slam  
4 dunk then on an ultimate motion for summary  
5 judgment?

6 MR. COOPER: I haven't tried to  
7 draft a summary judgment motion, I don't know  
8 the consequences.

9 SPECIAL MASTER POPPITI: But you  
10 haven't thought about it?

11 MR. COOPER: It's not that it  
12 hasn't crossed my mind.

13 SPECIAL MASTER POPPITI: I'm sure.

14 MR. COOPER: The reality is that  
15 they must make out a case based on conduct that  
16 is anticompetitive and illegal under the Sherman  
17 Act. Now they have alleged as to worldwide  
18 monopolization, worldwide market. They cannot  
19 rely on that conduct abroad to make out that  
20 case. They have got to rely on the conduct in  
21 the United States. Is that sufficient for them  
22 to make a prima facie case to get past the  
23 summary judgment? I don't know the answer to  
24 that at this point.

1                   SPECIAL MASTER POPPITI:  So  
2           foreign conduct has absolutely nothing to do  
3           with conduct that may be occurring in the United  
4           States, whether it has -- whether it looks like  
5           the same plan, the same framework, the same  
6           approach has nothing to do with it because it's  
7           not -- it is not conduct that forms the basis of  
8           a claim for foreign injury?

9                   MR. COOPER:  It seems to me there  
10          are two questions there.  Let me first deal with  
11          what is I guess an evidentiary question.  There  
12          are some cases, obviously the plaintiffs have  
13          cited them, they are all conspiracy cases where  
14          there is a single worldwide conspiracy and there  
15          has obviously under those circumstances been  
16          discovery into the single worldwide conspiracy  
17          in order to show that conspiracy affected United  
18          States commerce.  I think all but a couple of  
19          them or one of them really predate Epigram, but  
20          in any event that proposition is not remarkable.

21                         What you have here is quite  
22          different.  What you have here is competition  
23          that takes place on literally on a monthly or  
24          quarterly basis for each customer for their

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1 needs, for the newest computers they're going to  
2 issue. It's aggressive competition. It's  
3 individualized. It takes place from one country  
4 to another country. There is nothing unified  
5 about it.

6 So I don't think there is any  
7 logic that flows from the conspiracy cases that  
8 would suggest that in order to prove their case  
9 in this instance the plaintiff should have the  
10 benefit of all of the various deals and  
11 underlying circumstances of the deals that were  
12 made by Intel abroad.

13 Now, it's important I think to  
14 keep in mind that the antitrust laws require  
15 proof of the existence of monopoly power within  
16 a relevant market. That's sort of the first  
17 proposition. And plaintiffs have alleged a  
18 global market. We have supplied the materials  
19 that they would need to prove market share. You  
20 heard Mr. --

21 SPECIAL MASTER POPPITI: I  
22 understand.

23 MR. COOPER: And under those  
24 circumstances they have the worldwide

1 information they need. They have market share  
2 analysis, they're going to get sales and demand  
3 forecasts, they're going to get competitive  
4 analyses and strategic plans, documents that are  
5 sufficient to show our prices to foreign  
6 customers, including discounts, lump sum  
7 payments, other financial considerations that  
8 would affect price. And they're going to get  
9 documents sufficient to show our market  
10 development funds, you know, the Intel inside  
11 you see in the ads, that kind of thing.

12 So it's not as though we're  
13 withholding information regarding the scope of  
14 Intel's presence in that worldwide market.  
15 They're going to get that and we shouldn't lose  
16 sight of that.

17 But individual acts of what the  
18 plaintiffs say is anticompetitive conduct  
19 abroad, which of course cannot be  
20 anticompetitive conduct under the Sherman Act  
21 because Judge Farnan has already so ruled, they  
22 do not intend to establish monopoly power, they  
23 cannot establish monopoly power by itself. We  
24 think the law is quite clear on that. We

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1 developed that case law in our brief. I can  
2 walk you through it very quickly if you would  
3 like me to.

4 SPECIAL MASTER POPPITI: No, I'm  
5 fine.

6 MR. COOPER: But let me make very  
7 simple point. The fact that someone enters into  
8 a contract that might be deemed exclusionary or  
9 inappropriate or unfair doesn't prove we have  
10 monopoly power. The tailor on the street corner  
11 can enter into a contract that excludes the  
12 other tailor across the street, and there are  
13 probably forty tailors sitting around.

14 You cannot rely on evidence of  
15 anticompetitive conduct to show that there is  
16 monopoly power in a relevant market. You have  
17 to first have monopoly power in a relevant  
18 market, you have to make that showing, and then  
19 you have to show that there was anticompetitive  
20 conduct that was engaged in by the defendant in  
21 order to either achieve or maintain that  
22 monopoly power.

23 And what we have here is the  
24 intersection of the law that strips the Sherman

1 Act of any jurisdiction over acts that are  
2 conducted abroad that do not have the direct  
3 effect on our commerce.

4 I don't know if you have looked at  
5 the Spectrum Sports case. It's maybe  
6 particularly important. It's a Supreme Court  
7 decision.

8 SPECIAL MASTER POPPITI: I have.

9 MR. COOPER: And it involves an  
10 old concept that we struggled with for many  
11 years out on the West Coast where the 9th  
12 Circuit had gone off different from all other  
13 circuits and said gee, if you showed if you did  
14 something bad and intended to do something bad  
15 we are going to infer that you have monopoly  
16 power or were dangerously close to achieving it.  
17 Every other court went the other way and said  
18 no, that's not right, you cannot infer monopoly  
19 power from the fact that you have engaged in  
20 exclusionary conduct. Finally the Supreme Court  
21 corrected all that, I think that was back in the  
22 '90s, and since then that proposition has always  
23 been really very clear.

24 So basically the point I wanted to

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1       emphasize in terms of this particular  
2       proposition is that Judge Farnan has decided and  
3       stricken the paragraphs that reference the  
4       foreign conduct of Intel. That conduct did not  
5       meet the direct effects test, he made that very  
6       clear, and he talked about the fact that it  
7       involved all kinds of twists and turns and so  
8       forth.

9                    Under those circumstances, that  
10       conduct cannot be used to create a violation of  
11       Section 2. I think, therefore, it follows that  
12       it cannot meet either the relevancy test we  
13       ordinarily employ for discovery or that it may  
14       lead to relevant evidence test. It simply  
15       doesn't exist for purposes of the Sherman Act.

16                   Now, let me --

17                   SPECIAL MASTER POPPITI: Let me  
18       just look at the context of the language where  
19       Judge Farnan struck the particular paragraphs,  
20       if I might.

21                   MR. COOPER: Let me grab it here.

22                   SPECIAL MASTER POPPITI: It's at  
23       page 15/16.

24                   SPECIAL MASTER POPPITI: And these

1       allegations taken in the light most favorable  
2       may be described as a foreign effect and a  
3       foreign harm that have had ripple effects for  
4       the domestic market, but have not had any direct  
5       substantial unreasonable effect which would give  
6       rise to an antitrust claim within the  
7       jurisdictional reach of the Sherman Act.

8                       Accordingly, the Court will  
9       dismiss AMD's claims based on alleged lost sales  
10      of AMD's microprocessors to foreign customers  
11      and strike the allegations in the complaint  
12      forming the basis for those claims, namely, and  
13      then he list them.

14                     MR. COOPER:  Yes.

15                     SPECIAL MASTER POPPITI:  He did  
16      leave standing --

17                     MR. COOPER:  129.

18                     SPECIAL MASTER POPPITI:  -- 129.

19                     MR. COOPER:  Yes.  And 129 goes to  
20      the export.  129 is a very conclusionary  
21      allegation.  As a matter of fact --

22                     SPECIAL MASTER POPPITI:  It is.  I  
23      have it.

24                     MR. COOPER:  And 129 by the way is

1       literally the only paragraph as I recall which  
2       mentions export business.  And it is the most  
3       conclusionary allegation one can find.  I can  
4       move to the discussion of the export business if  
5       you would like me to, Your Honor, at this point.  
6       Maybe that would be helpful.

7                       SPECIAL MASTER POPPITI:  I'll  
8       leave you to do what you find helpful.

9                       MR. COOPER:  That is something I  
10       want to discuss, and the opinion, of course,  
11       that goes to the question of what did Judge  
12       Farnan decide, which you asked us to try to give  
13       you our views on.

14                      SPECIAL MASTER POPPITI:  Please.

15                      MR. COOPER:  So let me do that.  
16       Let me move to that point.

17                      There are two issues with respect  
18       to the export business I guess, but really only  
19       one is what I would call the true export  
20       business.

21                      Let me first talk about what I  
22       call the would have should have could have  
23       argument.  That's the question of whether AMD is  
24       entitled to discovery of Intel's foreign conduct

1 to attempt to prove that but for that conduct  
2 abroad, AMD would not have converted its Fab 25  
3 to flash. Flash is a different type of memory  
4 product, rather than a logic product, and  
5 instead would have reinvested in Fab 25 to  
6 produce what would have been newer generation  
7 microprocessors. So I should comment on that  
8 first and then I'll move to the second point.

9 I believe it's pretty clear that  
10 Judge Farnan expressly rejected AMD's Fab 25  
11 claim. Now, what Judge Farnan did was he  
12 recognized that AMD made that basic allegation,  
13 he put it in a more broad sense, but he  
14 explained that AMD was alleging that Intel's  
15 foreign conduct denied AMD what he called, what  
16 he characterized as a competitive opportunity to  
17 achieve minimum levels of efficient scale and he  
18 explained that it was based on lost sales which  
19 were resulted in lost profitability, which  
20 resulted in lost revenues, which would result in  
21 missed opportunities to invest and compete in  
22 the United States. I can probably find that for  
23 you if you want me to in the opinion.

24 SPECIAL MASTER POPPITI: And

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1 before you do that, let me ask you to focus  
2 perhaps on the motion to dismiss, which  
3 necessarily formed the discussion before Judge  
4 Farnan, and I would expect necessarily formed  
5 the backbone of his opinion. Usually courts do  
6 not decide matters that are not in front of  
7 them. And what I would like to do is look at  
8 your motion to dismiss because as I read it, I  
9 read the focus of your motion to dismiss to be  
10 on claims asserted by AMD that relate to foreign  
11 made and foreign assembled microprocessors to  
12 foreign customers.

13 And if I might at page 30 of the  
14 motion to dismiss, it seems to me that you  
15 sought an order dismissing or striking all  
16 claims that are based on alleged lost sales of  
17 AMD German made microprocessors to foreign  
18 customers. And that's a quote except for  
19 sought. And you prevailed.

20 MR. COOPER: Right.

21 SPECIAL MASTER POPPITI: Doesn't  
22 that frame the four corners of what Judge Farnan  
23 did because that is what he did, he granted your  
24 relief.

1                   MR. COOPER: I think that's a fair  
2                   statement, but for purposes of the decision that  
3                   Your Honor has to make here with respect to  
4                   discovery, you have to go back and look at the  
5                   history of this Fab 25 argument. It is a newly  
6                   minted argument raised I believe for the first  
7                   time in the context of the motion to compel  
8                   discovery.

9                   Judge Farnan had no way to address  
10                  that because it's not pleaded. But what you  
11                  have to do instead is look at the reasoning that  
12                  underlies Judge Farnan's decision and that  
13                  reasoning seems to me squarely and clearly  
14                  applies to the would have could have should have  
15                  Fab 25 argument that is being offered here as a,  
16                  as a base for complete discovery of all the  
17                  foreign conduct.

18                  And what Judge Farnan held was  
19                  that AMD had failed to make the requisite  
20                  showing that the effects were direct, an  
21                  immediate consequence as he put it of Intel's  
22                  foreign conduct. He talked about the fact that  
23                  it was full of twist and turns, it was  
24                  speculative, it had a ripple effect only.

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1 That's exactly what this contention is. It  
2 wasn't pleaded, now it's raised, it's falls  
3 squarely within the reasoning of the opinion.

4 Now, Intel never conceded that AMD  
5 had jurisdiction for such a claim because it  
6 wasn't made, it wasn't specified in the  
7 complaint anywhere. The only point that was  
8 raised was in footnote 22 which I think is on  
9 page 30 of that opinion and that was addressing  
10 this business of export sales. And it did not  
11 address this concept of Fab 25 because no one  
12 was focused on it. It was clearly not in any  
13 effect an element of the complaint.

14 Now, we made a motion to dismiss  
15 the foreign claims and AMD had a burden in the  
16 face of that motion to dismiss to show that  
17 there would be this direct effect, it failed. I  
18 don't see there is any difference in the claim  
19 they now come up with with respect to Fab 25 and  
20 the other claims that were being made in terms  
21 of the reasoning that Judge Farnan engaged in.

22 I don't know what position that  
23 puts Your Honor in frankly in terms of how you  
24 deal with it. I think it would be appropriate

1 for Your Honor acting as a special master to  
2 find that the reasoning of the case clearly is  
3 such that it would have reached these claims had  
4 they been made. But that since these claims had  
5 been made only after the fact in an effort to  
6 justify discovery, under those circumstances  
7 discovery should not be permitted to proceed  
8 unless steps are taken under the circumstances I  
9 think appropriately by the plaintiffs to bring  
10 the issue back to Judge Farnan for his  
11 resolution.

12 SPECIAL MASTER POPPITI: Thank  
13 you.

14 MR. COOPER: Now, that's the Fab  
15 25 issue. Let me now move to the pure export  
16 issue. And the issue there as I see it is  
17 whether AMD is entitled to discovery of foreign  
18 conduct to support its claim that it sold some  
19 -- it would have sold Fab 25 inventory at higher  
20 prices but for the conduct of Intel abroad.

21 I think I just made the point, I  
22 want to emphasize it, this has never been the  
23 gravamen of AMD's complaint. Indeed it is  
24 literally one paragraph, 129, export business,

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1 that's all we have. That is plainly  
2 insufficient for the court to base a  
3 determination that jurisdiction exist for those  
4 claims.

5 Now, to be fair, we expressed in  
6 two footnotes, footnote 2 and footnote 22 of our  
7 motion before Judge Farnan the proposition that  
8 the motion was not directed at export business,  
9 and then we went on to footnote 22, and maybe it  
10 would be worthwhile to look at that  
11 specifically. I don't know if you have that in  
12 front of you.

13 SPECIAL MASTER POPPITI: I do.  
14 Just give me one moment, please.

15 MR. COOPER: Let me read it out  
16 loud and we can talk about that for a moment.  
17 What we said in footnote 22 was --

18 SPECIAL MASTER POPPITI: Which  
19 page is this?

20 MR. COOPER: Its on page 30 of the  
21 motion, the original motion before Judge Farnan  
22 to dismiss.

23 SPECIAL MASTER POPPITI: Just give  
24 me one moment, please. You said page 30?

1                   MR. COOPER:  It's on page 30,  
2                   footnote 22.

3                   SPECIAL MASTER POPPITI:  I have it  
4                   now.  Thank you.

5                   MR. COOPER:  Did you find it?

6                   SPECIAL MASTER POPPITI:  Yes.

7                   MR. COOPER:  About halfway down it  
8                   starts, a sentence starts moreover, Moreover it  
9                   appears that prior to the 2002 closing of its  
10                  microprocessing manufacturing plant in Austin,  
11                  Texas, AMD produced a limited number of its  
12                  microprocessors in the United States at that  
13                  facility.  These microprocessors would have been  
14                  sold in the United States or exported from the  
15                  United States.  This court would likely have  
16                  jurisdiction over claims relating to such sales  
17                  providing the sales occurred within the  
18                  applicable four-year statute of limitations if  
19                  AMD can allege and prove a requisite direct  
20                  domestic effect.

21                  So we threw down the gauntlet  
22                  there saying there may be a claim for that, but  
23                  they have to show that the requisite direct  
24                  domestic effects are present.  It's impossible

1 for us to say whether Judge Farnan meant to  
2 decide that claim or not. You can look at the  
3 opinion I think in two different ways.

4 If you look at the actual final  
5 ruling, it would look like it has been addressed  
6 and excluded. On the other hand we said we were  
7 not expressing moving on that basis and then  
8 footnote 22 explains that they would have to  
9 show the requisite direct effects, they have  
10 only a conclusionary allegation. I can easily  
11 understand why a court may say that  
12 conclusionary allegation is insufficient to  
13 establish jurisdiction, which in turn might  
14 explain why he then chose to just simple strike  
15 all of the foreign conduct allegations. On the  
16 other hand he may not have done that, and I have  
17 no way of knowing. It seems to me --

18 SPECIAL MASTER POPPITI: We are  
19 going to find out at some point.

20 MR. COOPER: I think we are.

21 SPECIAL MASTER POPPITI: I think  
22 we are.

23 MR. COOPER: I think we are. It  
24 seems to me that it may be appropriate before

1 Your Honor, a special master, if you saw it fit  
2 to do so to permit or authorize some very  
3 limited discovery on our part with respect to  
4 this Fab 25 inventory because we frankly do not  
5 know what we're dealing with and what the basis,  
6 whether there is a strong basis or not for a  
7 motion under the FTAIA that there is not the  
8 requisite effect. And let me elaborate on that  
9 a moment.

10 It appears from what we can  
11 discern that AMD sold all of its Fab 25  
12 inventory. They complain that well, they think  
13 they sold it at reduced prices and they suggest  
14 based on some statistics that they sold some  
15 abroad and we don't know what that is.

16 We believe that the inventory they  
17 are talking about is an older generation, not a  
18 leading edge product and it is the case in this  
19 industry that when you -- once an existing  
20 product is leapfrogged by a newer generation,  
21 those products are sold very cheaply, and Intel  
22 suffers the same fate.

23 So we do not have the facts that  
24 would be appropriate to challenge whether or not

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1       there is the necessary direct and substantial  
2       and reasonably foreseeable effect, and those  
3       words are important. I suspect it may -- this  
4       commerce may not be substantial. You're dealing  
5       with I think what is effectively outmoded  
6       inventory, not outmoded in the sense that it  
7       cannot be sold, but certainly not the products  
8       that are at the heart of the competition that is  
9       taking place.

10                        So under those circumstances, what  
11       should be permitted? I think what would be  
12       appropriate would be for Intel to have the  
13       ability to find out exactly what was done in  
14       terms of these export sales. I think the  
15       customers would be very limited for that sort of  
16       a product. I think the customers may be in only  
17       certain jurisdictions. I think there is some  
18       reference in the paper to the possibility that  
19       these were only sold in South America. I don't  
20       know. But if AMD genuinely intends to pursue  
21       this narrow claim which was not pleaded  
22       adequately to justify jurisdiction, then I think  
23       the obligation is to amend its complaint. And  
24       we might be able to get a running start on that

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1 if Your Honor would permit us to have some  
2 running discovery into what the circumstances  
3 are.

4 I think there is a strong argument  
5 that not only is not substantial, but that on  
6 top of it all, it is not reasonably foreseeable,  
7 which is the touchdown under the statute by  
8 Intel that its competition abroad, its foreign  
9 conduct would in any way affect the ultimate  
10 sale of this remaining inventory of older  
11 generation products.

12 So those are sort of my thoughts  
13 on how that issue might be dealt with. Now, it  
14 has big implications for the scope of discovery.  
15 Obviously if there is a claim for export  
16 business skinny as it may be, that discovery  
17 would be very limited and very tailored. For  
18 example, there would be clearly a time cut off,  
19 it wouldn't under any circumstance go to the  
20 present time. I'm not sure what the time cut  
21 off would be. In its opposition originally in a  
22 motion to compel it talked about 2002.

23 Then we have seen some suggestion  
24 there might be some stragglings sales into early

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1 2004. What point, if it is ever substantial,  
2 what point does it become completely  
3 insubstantial, so there is a time dimension.  
4 You need to assess whether there would be  
5 discovery only from the realistic customers for  
6 those products. I would suggest that it is not  
7 possible to even fashion that discovery of Intel  
8 should Your Honor think it's appropriate until  
9 after Intel has had some discovery as to what  
10 exactly we're talking about here.

11 I have jumped around some, but I  
12 think I have sort of covered the primary points  
13 that I wanted to emphasize. We do believe that  
14 the nature of the statute does preclude foreign  
15 conduct discovery under these circumstances and  
16 it is also clear to us that the Fab 25 basis for  
17 discovery which has been introduced in the  
18 context of this motion to compel in an effort to  
19 justify widespread discovery across the boards  
20 of all foreign conduct simply cannot, cannot  
21 play that role given the reasoning, given the  
22 reasoning that is inherent in Judge Farnan's  
23 opinion.

24 SPECIAL MASTER POPPITI: Thank

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1       you, sir.

2                       MR. COOPER: Thank you. Now, I'm  
3       sure that Mr. Ripley would like to comment with  
4       respect to the class plaintiffs discussion and  
5       if we need to get into detailed discussion now  
6       on.

7                       SPECIAL MASTER POPPITI: I think  
8       we should wait for detail until I hear any other  
9       argument.

10                      MR. COOPER: Okay.

11                      MR. RIPLEY: Good morning, Your  
12       Honor. I just wanted to briefly touch on the  
13       timing question that you posed to Mr. Small.  
14       Intel views the class motion to compel as  
15       premature for the reasons set forth in the  
16       brief, but a couple that I want to point out to  
17       Your Honor.

18                      Intel is not going to take the  
19       position that if for whatever reason the foreign  
20       conduct evidence is ruled irrelevant to AMD, but  
21       relevant to the class or some other way that  
22       we're going to ask for some Chinese wall in  
23       discovery. We understand that we have to gather  
24       and produce it, it's going to be there. So the

1 class motion to compel is virtually coextensive  
2 with AMD's.

3           Assuming -- take Mr. Small's  
4 assumption for purposes of this argument today  
5 that the FTAIA would bar Judge Farnan  
6 adjudicating claims based on Intel's sales of  
7 microprocessors to foreign customers that ended  
8 up in computers that were sold into the U.S.,  
9 then what's left is the U.S. sales of  
10 microprocessors to U.S. OEM for PCs that were  
11 then in turn purchased by members of the class.

12           The argument that Mr. Small makes  
13 in his brief and also today I see as two  
14 separate things. One is the argument that they  
15 need to demonstrate the monopoly power and it's  
16 very similar to what Mr. Diamond addressed and  
17 what Mr. Cooper addressed, so I won't go there,  
18 other than to note that right now the way the  
19 first amended consolidated complaint is pled  
20 there is an injunctive relief claim under  
21 Section 2, but that the only state claim that is  
22 pled is a Cartwright Act claim and unfair  
23 competition law claim. The other state law  
24 claims are pled in the alternative which shows

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1 Judge Farnan decided those two California  
2 statutes don't apply nationwide.

3 The Cartwright Act claim doesn't  
4 cover unilateral conduct, so I question why the  
5 monopoly power is at issue with respect to that  
6 claim since the Cartwright Act doesn't cover  
7 that.

8 But I won't address the monopoly  
9 power part, I want to address what was raised  
10 with Mr. Small's four-door car analogy. And  
11 Your Honor may be aware, but Mr. Small's firm  
12 and Mr. Small himself was in the Epigram case  
13 and they were the plaintiff, and I believe they  
14 used the similar hypo in front of the court  
15 there. But what I read, how I view --

16 SPECIAL MASTER POPPITI: Are you  
17 suggesting that they didn't?

18 MR. RIPLEY: They did not.

19 MR. SMALL: My firm was in the  
20 case, but I personally did not work on the case  
21 and I don't know about that hypothetical.

22 MR. RIPLEY: The argument that  
23 they're making is that if the FTAI bars the  
24 foreign made PCs sold to members of the punitive

1 class, bars claims, those claims, then the  
2 conduct surrounding the structure of foreign  
3 microprocessor sales is somehow probative, or is  
4 a door in the car of whether Intel's sales of  
5 the U.S. microprocessors to separate companies  
6 at different times were somehow anticompetitive.

7           And that when you think about it  
8 in that frame of reference, the probity of it is  
9 more dubious, how separate transactions in  
10 different times, different places with different  
11 companies can somehow be probative of whether  
12 Intel's discounted sales in a microprocessors in  
13 the U.S. were anticompetitive, and that's the  
14 issue that we think the court, Your Honor should  
15 await Judge Farnan's finding because as our  
16 papers stated, if Judge Farnan disagrees with us  
17 in any part that the FTAI doesn't bar some, or  
18 doesn't bar all of their claims, their foreign  
19 based claims, then the discovery comes into as  
20 to their claims. Our timing is more judicial  
21 efficiency argument.

22           The Court, Your Honor, does not  
23 need to deal with the four-door car right now  
24 because we hope that this -- we hope that

1 eventually you will, but it could very well be  
2 that Judge Farnan disagrees with our arguments  
3 with regard to the foreign commerce clause and  
4 the supremacy clause, we think he should agree  
5 with us, but in any case there is no reason for  
6 you to deal with it now.

7 In dealing with an AMD motion to  
8 compel, whether or not the ruling is there is  
9 going to have an impact on what the class is  
10 going to see or not see and we understand that,  
11 so your timing piece in our view is more of a  
12 judicial efficiency piece and barring any other  
13 questions, that's all I wanted to say.

14 SPECIAL MASTER POPPITI: No, I  
15 don't have any other questions. Thank you, sir.

16 MR. THUMAN: Your Honor, let me  
17 reply very, very briefly to the points  
18 Mr. Cooper made with respect to our domestic  
19 U.S. commerce claim.

20 As I understood, he made really  
21 three points. The first of which was that the  
22 evidence of exclusion, the foreign exclusion is  
23 somehow not relevant that we have to prove  
24 market power, and that the exclusion doesn't

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1 prove it.

2 And he cited the U.S. Supreme  
3 Court's opinion in Spectrum Sports, and I just  
4 happen to have it with me, and when I turn to  
5 page 456 in the official report pagination, page  
6 eight if you get it off the internet, let me  
7 just read briefly a couple of sentences.

8 SPECIAL MASTER POPPITI: Do you  
9 want me to pull it or are you going to read it?

10 MR. THUMAN: It's quite brief,  
11 Your Honor. I'm reading again from page 456,  
12 quote, The Court's decision in Swift, which is a  
13 seminal Section 2 case, have reflected the view  
14 that the plaintiff charging attempted  
15 monopolization in that case must prove a  
16 dangerous probability of actual monopolization  
17 which has generally required a definition of the  
18 relevant market and examination of market power.

19 Skipping two paragraphs forward,  
20 same page, in order to determine whether there  
21 is a dangerous probability of monopolization,  
22 courts have found it necessary to consider the  
23 relevant market and the defendant's ability to  
24 lessen or destroy competition in that market.

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1                   Now, what we -- what we put  
2                   forward in our reply, we cited cases where the  
3                   sole rival was excluded from the relevant market  
4                   by the alleged monopolist and the court found  
5                   that logically enough to be an exclusion of  
6                   competition if there are barriers to entry and  
7                   there is only one rival.

8                   A second point Mr. Cooper made was  
9                   that somehow conspiracy is different from  
10                  monopolization and that somehow, though  
11                  unexplained in terms of parsing the statute,  
12                  conspiracies that have independent foreign  
13                  effects as opposed to having direct U.S. effects  
14                  somehow my hypothetical about my Cayman Islands  
15                  thing didn't apply to a Section 2 case.

16                  Let me read from the pages in the  
17                  Third Circuit about Section 2 and this is on  
18                  page 162 of the official report. The relevant  
19                  inquiry is the anticompetitive effect of 3M's  
20                  exclusionary practice considered together as the  
21                  Supreme Court recognized in *Continental Ore*, the  
22                  courts must look to the monopolist conduct taken  
23                  as a whole rather than considering each aspect  
24                  in isolation.

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1                   The court stated in a case like  
2                   the one before us, alleging Section 1 and  
3                   Section 2 violations, the duty of the jury was  
4                   to look at the whole picture and not merely at  
5                   the individual figures in it.

6                   So much for the notion that we  
7                   have some kind of nonholistic claim that is  
8                   individual item which item conduct by conduct,  
9                   that's not what we're alleging. We're alleging  
10                  that Intel has been engaged in a pattern and a  
11                  strategy to monopolize the X-86 market worldwide  
12                  including the United States of America.

13                  What Intel is really arguing for,  
14                  Your Honor, is that the FTAIA not only gives  
15                  them immunity for their foreign conduct, but in  
16                  a global market, as everyone knows the world is  
17                  turning to in increasing, increasing proportion,  
18                  that in a global market the FTAIA provides  
19                  domestic immunity as well.

20                  SPECIAL MASTER POPPITI: The word  
21                  was stips.

22                  MR. THUMAN: And they certainly  
23                  have avoided our proffered stipulations.

24                  Nothing could be clearer that it

1 was not the intent of congress to provide  
2 domestic immunity. Nothing could be clearer  
3 that congress intended domestic litigation and  
4 adjudication to go forward as it always had,  
5 including discovery of extraterritorial  
6 evidence.

7 Thank you.

8 SPECIAL MASTER POPPITI: Thank  
9 you, sir.

10 MR. DIAMOND: Your Honor, if I may  
11 address Mr. Cooper's remarks about the export,  
12 U.S. export commerce claim.

13 SPECIAL MASTER POPPITI: Please.

14 MR. DIAMOND: With respect to the  
15 notion that Judge Farnan decided the viability  
16 of our U.S. export claim, and implicitly  
17 considered our arguments about Fab 25 and the  
18 like seems to me to be beyond the stretch and  
19 totally implausible.

20 Judge Farnan to this day I can  
21 assure you knows nothing about this Fab 25.  
22 Judge Farnan knows nothing about the  
23 circumstances under which Fab 25 operated or  
24 ceased to operate. Judge Farnan knows nothing

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1 about where Fab 25 product was sold to or not  
2 sold to.

3 So to suggest that somehow he  
4 decided the issue I think is not an argument  
5 that can be taken seriously. You know, we are  
6 criticized on the one hand for not sufficiently  
7 pleading the export commerce claim. Intel has  
8 shown no reluctance to file motions where  
9 appropriate. There was no Rule 12(b) motion  
10 filed with respect to your export commerce  
11 claim, it is pleaded both in paragraph 129 and  
12 before that in paragraph 127.

13 The complaint doesn't talk about  
14 sources of manufacture generally, but simply the  
15 effects of Intel's conduct on all aspects of  
16 AMD's business. And if Intel thought there was  
17 some sort of pleading deficiency, it had every  
18 opportunity to raise it and it didn't.

19 Ultimately what Mr. Cooper is  
20 suggesting is that although Judge Farnan didn't  
21 decide the export commerce claim, based on what  
22 he did decide, if you were to sit in his place,  
23 you would probably figure out how he would come  
24 out because Mr. Cooper says the connection

1 between Intel's wrongful foreign conduct and the  
2 closure of Fab 25 is as circuitous as what Judge  
3 Farnan determined was the case with respect to  
4 the connection between foreign conduct and lost  
5 sales to, for example, Gateway.

6 Well, there are two problems with  
7 that. I don't want to get into the merits of  
8 their defense, but it's hard to imagine anything  
9 more directly connected than take away  
10 somebody's customers, forbid them from dealing  
11 with a supplier and the supplier shutting down.  
12 I think it's Access Telecom in the 5th Circuit  
13 which we cite to you is exactly what happened  
14 there, the plaintiff went out of business  
15 because he couldn't access his customers and the  
16 court found that to direct, substantial and  
17 reasonably foreseeable.

18 SPECIAL MASTER POPPITI: And your  
19 position is you didn't have the need to argue  
20 what you just argued to Judge Farnan?

21 MR. DIAMOND: That was going to be  
22 my next point. Who is hiding the pea. I mean,  
23 we would have raised that if they had raised it,  
24 but the portions of their motion that you read

1 make it clear that they were just dealing with  
2 the processors, not Austin made processors. We  
3 had no need occasion to get into that issue.

4 There is a notion that we ought to  
5 limit this discovery, Mr. Cooper suggest that  
6 discovery ought to go forward, but it ought to  
7 be their discovery and not our discovery because  
8 we got to get to the true facts of Fab 25.

9 Your Honor, in the first place,  
10 this notion about the Fab 25 closure is but a  
11 part and may well turn out to be but a small  
12 part of the export commerce claim. In the  
13 limitations period, 2001, 2002, right up to the  
14 beginning of 2003, Fab 25 was operating and  
15 selling 75 percent of its output into the export  
16 market. Fab 25 had the capacity to make much  
17 more and as we point out, this case is not about  
18 transactions that we ultimately consummated,  
19 this is about foreclosure, transactions we  
20 didn't, and we would have made more and AMD  
21 would have sold more, a substantial portion of  
22 those going into the export market and we were  
23 in the business from April of 2004, so clearly  
24 this is not a limitations issue and it is not

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1 reasonably susceptible to challenges being too  
2 indirect, when somebody forbids your customers  
3 from dealing with you and you can't sell a  
4 product, that's about as direct as you can get.

5 In any event, in order to make out  
6 our case with respect to Fab 25, bear in mind  
7 what Mr. Siegel said was in if demand was there,  
8 if Intel had not artificially suppressed it and  
9 had there been sufficient demand, we would not  
10 have closed Fab 25, it would have continued to  
11 operate. We need to know the extent of the  
12 foreclosure, how much business did we lose on  
13 account of Intel's wrongful conduct with respect  
14 to our export customers, that implicates, that  
15 necessitates our discovering what they did with  
16 whom and to what effect.

17 If we can only demonstrate it  
18 would have increased our share by one percent,  
19 then you know, then maybe we won't be able to  
20 justify Mr. Siegel's conjecture or prediction  
21 that we would have kept it up, but it turns out  
22 that we were wrongfully foreclosed from another  
23 20 percent of the market. Where was those  
24 processors going to come from, there was only

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1 one place they could have come from and that was  
2 Fab 25.

3 Mr. Cooper also suggested that  
4 because Fab 25 when it was in operation in his  
5 view didn't manufacture server chips. We don't  
6 need to get into server discovery. Well, Your  
7 Honor, there is no server market alleged. We  
8 allege an X-86 market which includes the entire  
9 spectrum and that's because processors are to a  
10 degree interchangeable so long as they're part  
11 of the X-86 family.

12 Intel said our definition of the  
13 X-86 market was too narrow, so there is no  
14 separate segment of the market, separate market  
15 for servers. And with respect to the reasons  
16 that Mr. Thuman discussed as to why we need  
17 foreign conduct discovery to show foreclosure of  
18 the market, that means the whole market, not a  
19 piece of the market, not a low end part of the  
20 market, but the market in its entirety, so there  
21 is no basis with respect to that prong of our  
22 argument to curtail this discovery and exclude  
23 servers or anything else.

24 Beyond that, the record evidence

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1 in the case, Mr. Siegel's declaration was that  
2 if Fab 25 had not shut down but had continued to  
3 operate, it would have produced server  
4 processors. He says in paragraph 20 of his  
5 declaration, had our forecasts been different,  
6 i.e., had we had more market share, we  
7 undoubtedly would have upgraded Fab 25 to 130  
8 nanometer copper technology which would have  
9 enabled it to participate in the production of  
10 not only our K-7 Ethilon product, but also the  
11 K-8 generation of products that would be  
12 introduced beginning in 2003 including the  
13 Opteron 364 and Ethilon 64. The Opteron is the  
14 processor chip.

15 So the evidence is but for their  
16 wrongful conduct we would have been in the  
17 business of making an export going from Austin,  
18 Texas processors across the entire spectrum of  
19 demand.

20 Thank you.

21 MR. SMALL: Very briefly, Your  
22 Honor, for the class. On the timing issue, it  
23 is the case with respect to the world market  
24 argument that we are making the same argument as

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1 AMD. And if the court is going to be ruling on  
2 that issue for this discovery dispute with  
3 respect to AMD, there is absolutely no reason it  
4 shouldn't decide the exact same issue for the  
5 class case. Particularly when as Intel notes to  
6 the Court today that it's not going to erect  
7 some Chinese wall if the documents are going to  
8 go to AMD, they're going to the class so there  
9 would be no reason at all, Your Honor, to  
10 declare a ruling on that issue in our case.

11 MR. COOPER: May I make a few  
12 remarks?

13 SPECIAL MASTER POPPITI: Please.

14 MR. COOPER: Let me turn first to  
15 the Fab 25 point. And does Your Honor have the  
16 opinion in front of you?

17 SPECIAL MASTER POPPITI: I don't  
18 have Judge Farnan's full opinion in front of me.  
19 I have excerpts of it, but I know the opinion.

20 MR. COOPER: I'm sure you read it.

21 SPECIAL MASTER POPPITI: I have, a  
22 number of times. Please.

23 MR. COOPER: I think it's  
24 important to look at the actual language that

1 the Court used.

2 SPECIAL MASTER POPPITI: What  
3 page?

4 MR. COOPER: I'm referring to page  
5 ten. And here Judge Farnan says more generally,  
6 however, AMD's primary contention that it lost  
7 foreign sales, that it's lost foreign sales have  
8 resulted in lost profitability which in turn has  
9 resulted in lost revenues to shareholders and  
10 missed opportunity to invest and compete in the  
11 United States is premised on a multitude of  
12 speculative and changing factors affecting  
13 business and market conditions, the cost of  
14 finance, supply and demand, the success or  
15 failure of research and development efforts, the  
16 availability of funds and worldwide economic and  
17 political conditions.

18 So he held very clearly that the  
19 type of claim that they're making with respect  
20 to Fab 25 cannot meet the test of direct,  
21 substantial and reasonably foreseeable conduct  
22 in terms of its effect on the United States.

23 I don't think, I don't think his  
24 reasoning could be clearer. And I do not think

1 that Your Honor should let AMD by raising a  
2 claim never raised before, newly minted for the  
3 purposes of discovery, backdoor foreign  
4 discovery under the circumstances.

5 One other passage I think is  
6 important, Judge Farnan went on to say, While  
7 the Court understands the nature of a global  
8 market, the allegations of foreign conduct here  
9 result in nothing more than what the courts have  
10 termed a ripple effect on the United States  
11 domestic market. And the FTAIA prevents the  
12 Sherman Act from reaching such ripple effects.

13 In a broader sense that's what  
14 we're dealing with when talking about whether  
15 the plaintiffs are entitled to discovery, about  
16 all of the various deals that were entered into,  
17 the terms and conditions of transactions which  
18 we are providing them. But what we're not  
19 providing them is the endless discovery they  
20 seek with respect to our foreign conduct. That  
21 foreign conduct Judge Farnan has ruled cannot  
22 justify jurisdiction by reason of the FTAIA, it  
23 is not only a no jurisdiction, it's not illegal  
24 conduct.

1                   So what Your Honor would have to  
2                   rule I think in order to permit discovery is to  
3                   say that even though it's not within the scope  
4                   of the Sherman Act, even though it is not  
5                   illegal anticompetitive conduct under the  
6                   Sherman Act, nevertheless they get to have  
7                   discovery and go into all of that and I believe  
8                   that really turns things upside down in terms of  
9                   the protection that United States companies were  
10                  entitled to under the FTAIA.

11                  Now, let me move to the pure  
12                  export, the inventory. If you look at our  
13                  motion to compel, I'm sorry, our motion to  
14                  dismiss that was filed before Judge Farnan at  
15                  page nine.

16                  SPECIAL MASTER POPPITI: Yes.

17                  MR. COOPER: Page nine, the  
18                  carryover paragraph that's on page nine, the  
19                  very last sentence, which states this is what we  
20                  told Judge Farnan, although AMD alleges in  
21                  purely conclusionary terms harm to its export  
22                  trade, we refer to complaint 130, I'm not sure  
23                  why that is, it's 129, it does not allege that  
24                  it exports microprocessors manufactured in the

1 United States to customers outside the United  
2 States.

3 The issue simply was never alleged  
4 sufficiently to justify jurisdiction. And this  
5 takes me back to the point I was making earlier  
6 that it seems to me clear that I don't know what  
7 Judge Farnan intended. I can look at the final  
8 ruling and it looks like when he excluded that  
9 conduct, he excluded the conduct across the  
10 board. And one could certainly reason that  
11 under those circumstances, he could have  
12 intended that it reached this particular export  
13 claim because it was never pleaded with any  
14 particularity, with any sufficiency to justify  
15 jurisdiction. But we don't know that that's  
16 what he did. So I would urge Your Honor to  
17 focus on the concept of permitting this issue to  
18 get back to the court in an appropriate manner  
19 so he can address it directly. And that should  
20 be done by an amendment to the complaint or  
21 alternatively, and I think this follows  
22 inevitably anyway, permitting Intel to have  
23 directed discovery concerning Fab, concerning  
24 the export business and that inventory.

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1                   We simply do not know what those  
2 facts are and whether they can meet the test or  
3 not at this juncture. But given the pleadings,  
4 given the pleadings, there is no basis to order  
5 discovery. If they had pleaded this expressly  
6 and the Court had not addressed it, or had  
7 declined and ruled against Intel on it, then I  
8 could understand why there would be a basis to  
9 order appropriate discovery.

10                   But having not been pleaded when  
11 it's jurisdictional, I don't think that Your  
12 Honor should order discovery on the export  
13 claims at this point.

14                   SPECIAL MASTER POPPITI: I guess  
15 part of what troubles me about the suggestion  
16 that I should in some fashion invite the Court  
17 if you will to squarely address the export claim  
18 issue, and I expect that the Court's reaction to  
19 that may very well be the issue is not joined,  
20 what are you doing, you have been brought on to  
21 do certain things but you haven't been brought  
22 up to tee up issues to me other than those  
23 issues that relate to discovery matters,  
24 findings and recommendations. I understand what

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1       you're suggesting, I just -- I'm troubled by the  
2       concept of how to suggest to the Court that we  
3       should be doing something in addition to what  
4       you all served up to him many months ago.

5                   MR. COOPER: I just figured it's  
6       better you than me. You know, I think frankly  
7       given the fact that it was not pleaded with  
8       specificity, the next move is properly AMD's,  
9       they either need to amend the complaint to  
10      allege with specificity, at which point we will  
11      then ask for the discovery that will permit us  
12      to determine whether or not we can, in fact,  
13      show that inventory that they were selling was  
14      not substantial in the overall context, and  
15      certainly not, the impact of the conduct,  
16      foreign conduct on that business was not  
17      reasonably foreseeable, and present it to the  
18      judge and, you know, I don't know whether Your  
19      Honor would feel like you're getting ahead of it  
20      by permitting that type of discovery on that  
21      part from AMD at this juncture as appropriate or  
22      not.

23                   SPECIAL MASTER POPPITI: I  
24      understand your position, your comments, and I

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1 certainly will address whether I would be  
2 getting ahead of the game.

3 Thank you, sir.

4 MR. COOPER: Thank you.

5 MR. DIAMOND: I just wanted to  
6 remind you that Ms. Smith came a long way to  
7 talk about the NDA issue.

8 SPECIAL MASTER POPPITI: Right. I  
9 understand we should do both.

10 MR. DIAMOND: And also Mr. Cooper  
11 and I just wanted to feel you out generally if  
12 we could with respect to timing on resolving  
13 this. We have a status conference scheduled --

14 SPECIAL MASTER POPPITI: Next  
15 Thursday.

16 MR. DIAMOND: Yes. Which we can  
17 use productively if there is going to be a  
18 ruling by next Thursday. If you need more time.

19 SPECIAL MASTER POPPITI: There is  
20 no intervening holiday like Thanksgiving. I  
21 hope you all enjoyed yours. I did mine.

22 MR. DIAMOND: I think we would  
23 prefer -- we know that Judge Farnan is available  
24 on the 7th. We would be prepared to try to push

1 that a week or so to accommodate you if you need  
2 more time, but I think you just --

3 SPECIAL MASTER POPPITI: That's  
4 something that I would like to think about and  
5 we can maybe take a recess and come back and  
6 discuss that. I guess one of the things that I  
7 really do want to make sure that we -- that  
8 there is some focus on are the categories that I  
9 discussed in the beginning and that you both  
10 addressed if you will briefly. Can I be -- can  
11 I expect regardless of how the categories are  
12 couched or argued if you will, that those in  
13 fact are the categories that I should be dealing  
14 with or am I going -- I may ultimately have to  
15 drill down through individual requests, but I'm  
16 not -- I don't think it would serve any purpose  
17 for me to be doing that between now and whether  
18 it's Thursday next or Thursday following that.

19 MR. DIAMOND: And I think it would  
20 be unproductive for you to drill down into  
21 individual requests because we have had a year  
22 plus of negotiations over the those individual  
23 requests, we have had objections, counter  
24 objections, discussions, there now is sort of a

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1 narrow universe of what's being produced.

2 As I said earlier, I paraphrased  
3 it, not directly quoted from my letter to  
4 Mr. Bernhardt and Mr. Floyd after our meet and  
5 confer saying this is what the fight is over, we  
6 talked about and explored ways of trying to  
7 reach a middle ground, but at a minimum we  
8 needed those categories and Intel was not  
9 prepared to produce them, so I believe that's  
10 where we are.

11 MR. FLOYD: This is Dan Floyd. I  
12 would say the only issue, it may depend on how  
13 Your Honor rules and slices the issue because  
14 there are requests that relate to -- a lot of  
15 discussions has been the OEM. Their request has  
16 been foreign retailers, foreign distributors,  
17 what are known as ODMs, players that depending  
18 on the scope of the claim, I think there might  
19 be more nuanced arguments as to relevance of  
20 particular categories.

21 I don't think that it would be  
22 productive to work through all that right now  
23 because we really have to react to where Your  
24 Honor comes out in terms of the relevance.

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1                   SPECIAL MASTER POPPITI: That  
2 makes sense.

3                   MR. FLOYD: I would make a place  
4 mark on that so that depending on the scope, we  
5 may come back then because there would be some  
6 individual issues that could need to be  
7 resolved.

8                   SPECIAL MASTER POPPITI: Okay.  
9 Let's then turn to the discussion which I expect  
10 may be brief on the issue of the modified order  
11 establishing cut off date, please.

12                  MR. SMALL: Your Honor, Linda  
13 Smith for AMD.

14                  SPECIAL MASTER POPPITI: Thank  
15 you, Ms. Smith.

16                  MR. SMALL: I think this will be  
17 extraordinarily brief because I have had a  
18 chance to talk to Intel as well. I just wanted  
19 to make one comment on Mr. Diamond, that I  
20 traveled all the way here for the NDA issue. As  
21 Your Honor well knows, I'm the brains behind the  
22 operation.

23                  SPECIAL MASTER POPPITI: I have  
24 known that right from the beginning.

1 MS. SMITH: Thank you, Your Honor.

2 Both AMD and Intel sent to all NDA  
3 letter recipients the protective order and Your  
4 Honor's procedures for the handling of discovery  
5 disputes. Both AMD and Intel gave all NDA  
6 letter recipients a time period to respond  
7 pursuant to Your Honor's procedures.

8 Out of 400 and something NDA  
9 letter recipients, AMD has one outstanding  
10 dispute and Intel has a handful. And so we and  
11 Intel have sent that handful Your Honor's order  
12 without the modification.

13 What we would like to ask Your  
14 Honor is that we not have to send the order to  
15 600 plus people and just send it to those for  
16 whom we have a dispute. And because we only  
17 have one and they have already sent the order  
18 anyway, I don't think you need to change any of  
19 the time, the dates that you already included in  
20 the first order and are incorporating in the  
21 proposed modification because we just have to  
22 send out one letter and they have done it  
23 already.

24 SPECIAL MASTER POPPITI: Okay.

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1 MR. SMALL: Thank you.

2 SPECIAL MASTER POPPITI: Then the  
3 order that you -- I think what you handed up to  
4 me, and I believe I will return to you your  
5 documents. Let me just hand down.

6 MR. SMALL: The only modification  
7 to --

8 SPECIAL MASTER POPPITI: The  
9 modified order. Thanks. If you'll take a look  
10 at that document and make sure that that's the  
11 document with whatever changes you want me to be  
12 making on that, we'll review that, and I'll make  
13 sure that it gets redone and entered today.

14 MR. SMALL: Just one second, Your  
15 Honor.

16 SPECIAL MASTER POPPITI: Yes,  
17 please.

18 MR. SMALL: It's fine with both  
19 AMD and Intel.

20 SPECIAL MASTER POPPITI: As it is  
21 written?

22 MR. SMALL: As it is written.

23 SPECIAL MASTER POPPITI: I will  
24 sign that and it will be docketed today.

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1 MR. SMALL: Thank you, Your Honor.

2 SPECIAL MASTER POPPITI: Let's  
3 take ten minutes. I don't think when I come  
4 back we need to be on record since we'll be  
5 talking about timing unless anyone disagrees.  
6 We have a court reporter until one o'clock.  
7 Does anyone disagree to that?

8 MR. DIAMOND: No.

9 SPECIAL MASTER POPPITI: Do we all  
10 agree?

11 MR. COOPER: Yes.

12 MR. DIAMOND: Yes.

13 (Hearing ended at 12:23 p.m.)

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CERTIFICATE OF REPORTER

I, Dale C. Hawkins, Registered Merit Reporter and Notary Public, do hereby certify that the foregoing record is a true and accurate transcript of my stenographic notes taken on November 29, 2006, in the above-captioned matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 30th day of November, 2006, at Wilmington.

Dale C. Hawkins, RMR

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