IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ADVANCED MICRO DEVICES, INC., a Delaware corporation, and AMD INTERNATIONAL SALES & SERVICES, LTD., a Delaware corporation, Plaintiffs, v. INTEL CORPORATION, a Delaware corporation, and INTEL KABUSHIKI KAISHA, a Japanese corporation, Defendants.	C.A. No. 05-441-JJF Public Version March 2, 2009
IN RE INTEL CORPORATION MICROPROCESSOR ANTITRUST LITIGATION	MDL No. 1717-JJF
PHIL PAUL, on behalf of himself And all others similarly situated, Plaintiffs v. INTEL CORPORATION, Defendants.	C.A. No. 05-485-JJF CONSOLIDATED ACTION **CONFIDENTIAL – FILED UNDER SEAL**

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

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I. INTRODUCTION

Intel brought this Motion primarily under Rule 12(b)(1) on the ground that the Court lacks subject matter jurisdiction over AMD's "export" commerce claim – that Intel's foreign conduct caused AMD to exit the microprocessor export business.[1] The parties agree that for this Court to have subject matter jurisdiction over AMD's claim, AMD must establish by a preponderance of the evidence that its [redacted] decision to covert its domestic microprocessor production facility, Fab 25, to the manufacture of flash memory was proximately caused by Intel's alleged anticompetitive conduct.

As this Court previously held, under the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a ("FTAIA") (which governs subject matter jurisdiction here), AMD must show that the harm it alleges was "an 'immediate consequence' of the alleged anticompetitive conduct with no 'intervening developments.'" *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 560 (D. Del. 2006) ("*Intel I*"). The parties also agree that, in ruling on a Rule 12(b)(1) motion such as this one, the Court is free to weigh the evidence, make credibility determinations and rule in favor of the motion even if material facts are in dispute.

Based upon contemporaneous AMD documents, public statements and testimony, Intel's Opening Brief ("Op. Br.") established:

- AMD made the final decision to convert Fab 25 from microprocessor production to flash memory production [redacted]
- AMD decided to convert Fab 25 because (1) it badly needed capacity to satisfy unmet demand for its then highly profitable flash memory products; (2) it believed that it could satisfy its very aggressive microprocessor growth targets by relying solely on its new German-based manufacturing facility, known as Fab 30;

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[1] Intel is also seeking summary judgment on the export claim under Rule 56 based on the statute of limitations, which is discussed in the second part of this Reply.

and (3) it needed to invest [redacted] on upgrades to maintain Fab 25 for microprocessor production, which it considered uneconomical; and,

- Intel's conduct – including its foreign conduct – was not a factor in AMD's decision to convert Fab 25 to flash memory production and exit the microprocessor export business.

This undisputed and persuasive showing by Intel, that AMD's decision [redacted] to cease producing microprocessors domestically was unconnected to Intel's allegedly anticompetitive conduct, defeats any claim of subject matter jurisdiction. Lacking affirmative evidence, AMD seeks to defeat this motion by largely attacking its own admissions. It assails the credibility of the public statements made by its most senior executives, who stated repeatedly that AMD needed more flash memory capacity and that its new German fab had enough microprocessor capacity to meet all of its needs for the foreseeable future. AMD also second guesses its executives' decision to cease making microprocessors in the United States with facts unknown and unknowable to them when they made that decision. AMD also tries to qualify its executives' public statements with caveats they did not make, and to explain admissions in its documents with supposed "context" that the documents do not contain. This approach, which lacks supporting evidence, cannot defeat Intel's motion.

Indeed, apart from a rehash of the unsubstantiated assertions found in the now discredited declaration of its former top manufacturing executive, Dr. William Siegle, AMD's Opposition ("Opp.") does not contain *any* evidence that Intel's conduct proximately caused AMD's decision to convert Fab 25. AMD's continuing reliance on Dr. Siegle is at best unavailing, given Intel's showing that Dr. Siegle's declaration to this Court contained material misrepresentations (in response to which AMD tellingly does not offer a single word in his defense). Even were Dr. Siegle's credibility not in tatters, AMD could not rely on him to show a relationship between its manufacturing decisions [redacted] and Intel's alleged conduct because AMD told this Court in

another context that Dr. Siegle was too ignorant about Intel's sales conduct to "cite Intel or any other reason for . . . inadequate [AMD microprocessor] demand." (Pls.' Joint Resp. to Intel's Preliminary Pretrial Statement, filed May 12, 2008, at p. 34 n.24.) AMD cannot satisfy its evidentiary burden by citing the testimony of an individual whom it previously argued to the Court is too ignorant to address the issue.

That AMD's evidentiary burden is an impossible one is illustrated by a widely circulated contemporaneous communication from an AMD senior executive [redacted] This document, amply reinforced by other documents cited in Intel's Opening Brief, makes clear that AMD cannot establish that its decision to convert Fab 25 to flash memory production was the proximate result of Intel's alleged misconduct.

Finally, with respect to Intel's Rule 56 motion regarding the statute of limitations, Intel showed in its Opening Brief that AMD's fab conversion decision was final in [redacted] In response, AMD fails to raise a genuine issue for trial as to the timing of this decision. Again, AMD seeks only to create a factual issue between what it said in its contemporaneous documents and what it says now. This is not the kind of issue of fact that prevents the entry of summary judgment. Intel therefore submits that the Court should enter judgment against AMD's export commerce claims on this ground as well.

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[2] The exhibits cited in this brief are appended to the Declarations of Daniel S. Floyd. Exhibits 1-43 were attached to the original Declaration of Daniels S. Floyd, filed with Intel's Motion. Exhibits 44-58 are attached to the Second Declaration of Daniel S. Floyd, filed with this Reply.

II. AMD HAS NOT MET ITS BURDEN OF SHOWING THAT THIS COURT HAS SUBJECT MATTER JURISDICTION OVER ITS EXPORT COMMERCE CLAIM.

For this Court to exercise subject matter jurisdiction over AMD's export commerce claim, AMD must show that there was "a direct casual relationship, that is, proximate causation" between Intel's alleged conduct and AMD's decision to exit the microprocessor export business by converting Fab 25 to flash memory production. *Empagran S.A. v. F. Hoffman-Laroche*, 417 F.3d 1267, 1271 (D.C. Cir. 2005). AMD does not appear to dispute that a "mere but-for 'nexus'" fails to meet this proximate causation standard. *Id.*; *Intel I*, 452 F. Supp. 2d at 561.

AMD also does not disagree that "the plaintiff 'must bear the burden of persuasion' and establish that subject matter jurisdiction exists." *Intel I*, 452 F. Supp. 2d at 558 (quoting *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991)).[3] Further, AMD concedes that the Court may "weigh the evidence relevant to certain 'jurisdictional facts' to satisfy itself" that it has subject matter jurisdiction. (*See* Opp. 22 (citing *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000)).) *See also Intel I*, 452 F. Supp. 2d at 557-58.

AMD nevertheless argues that a Rule 12(b)(1) motion for lack of subject matter jurisdiction should be granted only sparingly where the plaintiff has not been given "ample opportunity for discovery." (Opp. 22.) This argument has no application here. Intel's Motion relies on AMD's own admissions of its own reasons for converting Fab 25. AMD requires no discovery to learn what its documents and statements show that AMD already knows. AMD's documents and statements clearly show that AMD did not base its Fab 25 decision on any factor related to Intel conduct, let alone any allegedly anticompetitive conduct, and no additional amount of discovery from Intel or a third party can change this fundamental fact.

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[3] In fact, AMD concedes that its burden here is the same as the preponderance burden it carries to establish "the standard elements of a Sherman Act claim." (Opp. 21 n.15.)

AMD also argues that a Rule 12(b)(1) motion should not be granted where the jurisdictional issues are coterminous with the merits of the underlying Sherman Act claim. (*See* Opp. 22-23.) But that is not the case here. For AMD to prevail on its Sherman Act claim, it must prove that Intel acted anticompetitively and that such conduct resulted in the various harms that AMD alleges. For the limited purpose of this Motion, AMD's allegations of anticompetitive conduct are assumed to be true. The narrow issue here is whether Intel's alleged misconduct had a "direct effect on" AMD's [redacted] decision to convert Fab 25. *See Intel I*, 452 F. Supp. 2d at 562-63 (citing *United Phosphorous Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 944-53 (7th Cir. 2003), and holding that the "FTAIA present[s] jurisdictional questions which are separate from substantive requirements of an antitrust claims").[4] This is not a case where the Court's ruling on this Motion will control the elements of AMD's antitrust claims.

AMD pointedly avoids any mention of this Court's dismissal of its foreign commerce claims for lack of subject matter jurisdiction under the FTAIA. Citing *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004), for the proposition that the "'direct effects'" requirement of the FTAIA "means that there must be an 'immediate consequence' of the alleged anticompetitive conduct with no 'intervening developments,'" this Court held that AMD's theory of harm was based on an insufficient "chain of effects [that] is full of twists and turns, which themselves are contingent upon numerous developments."[5] *Intel I*, 452 F. Supp. 2d at 560. In

[4] None of the cases that AMD cites in arguing that the threshold issue of subject matter jurisdiction should be deferred or that the standard should be loosened was decided under the FTAIA. Accordingly, these cases carry no weight in the context of this Motion. *See Intel I*, 452 F. Supp. 2d at 563 ("the Court is not persuaded by AMD's arguments to the extent that they are premised on pre-FTAIA law").

[5] AMD attempts to distinguish *LSL Biotechnologies* on the ground that "Intel does not contend that the facts reveal some 'intervening development' breaking the causal connection" but rather

this Motion, Intel has established with AMD's own documents that its conduct had no effect on AMD's export commerce activities, let alone bringing about an "immediate consequence."

Weighing the evidence presented by the respective parties, as the Court must do in the context of a Rule 12(b)(1) motion for lack of subject matter jurisdiction, leads to the inescapable conclusion that AMD has failed to meet its burden of coming forward with credible evidence that Intel's conduct proximately caused AMD's decision to convert Fab 25. Indeed, AMD failed even to cast any plausible doubt on Intel's showing that AMD made the decision for reasons unrelated to Intel's conduct.

A. AMD Does Not Overcome Intel's Showing That AMD Decided To Convert Fab 25 For Reasons Unrelated To Intel's Conduct.

1. AMD believed that it could satisfy its ambitious microprocessor growth targets with its German fab alone.

A key reason for AMD's decision to convert its Fab 25 to the manufacture of flash memory was the company's determination that it could satisfy the growing demand for its microprocessors without making the costly upgrades that were necessary to enable that facility to continue making microprocessors. In repeated public statements at investor conference calls, AMD's top executives stated that, because of AMD's superior microprocessor design, the company's new German fab could produce two to three times as many microprocessors as AMD sold in 2000, [redacted] and that this capacity would enable AMD to serve its goal of 30% of the market. As Intel explained in its Opening Brief, AMD produced [redacted] microprocessors in 2000. (Ex. 28 at 5.) AMD first told investors that it could produce more than 50 million microprocessors at its German fab, and then upped this figure to 75 million units. With so much capacity for growth, [redacted]

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that "Intel's acts simply 'had nothing to do with' AMD's decision." (Opp. 23 n.16.) AMD cannot contend that lack of any causation can suffice where "but for" causation does not.

[redacted] (Op. Br. 6), AMD believed that it had no use for its outdated U.S. fab as a microprocessor factory.

Intel faithfully quoted the statements of AMD's former Chairman and CEO Jerry Sanders, President (and later Chairman and CEO) Hector Ruiz, and Chief Financial Officer Bob Rivet at investor conferences at which they disclosed AMD's capacity projections for its new German fab, Fab 30. For example, Mr. Sanders told investors in 2001 that "we have a magnificent factory in fab 30 . . . . We think this is our secret weapon if you will. It can produce over 50 million units a year." (Ex. 24 at AMD-F096-5102321.) By 2003, Dr. Ruiz was telling investors that "we're talking in excess of 75 million units that we are capable of producing" at Fab 30. (Ex. 27 at AMD-F096-5102290.) Similar quotations in Intel's Opening Brief were true and correct recitations of what AMD's executives told the investing public.[6]

AMD now takes issue with its own executives' public statements by claiming that the statements, and Intel's faithful recitations of them, should be qualified by information that the executives did not disclose to investors. AMD also seems to argue that the executives' predictions should be disregarded because they did not come true. But there is no dispute that AMD's executives believed, when they told investors as much, that AMD had plenty of capacity in its new German fab to support its very aggressive microprocessor growth targets, and that what they believed – and not what eventually happened – is what is relevant.

AMD's executives based their public statements on assertions that AMD had a superior microprocessor with a small die size. The die size, the microprocessor's surface area, affects

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[6] Intel accepts AMD's explanation that Dr. Siegle's 2002 statement that AMD expected to ship 50 million microprocessors by the end of 2002 [redacted] (Opp. 11.) But this does not contradict the statements of AMD's Chairman and CEO, President, and CFO that AMD could produce 50 or 75 million microprocessors *per year*. AMD does nothing to rebut their unambiguous statements.

manufacturing capacity because the silicon wafers on which microprocessors are made can hold more units with a small die size and fewer with a larger die. AMD's executives repeatedly bragged about die size, telling investors that AMD had both adequate capacity for sustained growth and a cost advantage over Intel. AMD now attempts to turn their boasts into caveats.

[redacted] Mr. Sanders claimed that this die size gave AMD a competitive advantage over Intel. [redacted] Of course, Mr. Sanders never told investors that his capacity projection was unrealistic, and only one conclusion can reasonably be drawn from that fact – that he believed that the die size was realistic and based his decisions on this belief. Indeed, Mr. Sanders said that AMD had a "secret weapon" in Fab 30, which enabled it to "produce over 50 million units a year." (Ex. 24 at AMD-F096-5102321.) At the same event, Dr. Ruiz emphasized that "we got a real edge on them [Intel] on cost structure here" because of AMD's die size. (*Id.* at AMD-F096-5102323.) He did not tell investors that AMD's [redacted]

AMD also attempts to disown its executives' statements that directly linked its bullish capacity projections to its market share goals. For example, AMD's CFO, Bob Rivet, told investors that "[w]e can produce more than 50 million units a year in that [German] fab," which "would be more than the 30% market share that everyone says we will never get to except us." (*Id.*) AMD ignores Mr. Rivet's unqualified statement that AMD could attain the 30% share

target with its German fab alone and claims that his statement shows that AMD was incapable of producing even 50 million units because he referred to plans for producing beyond the 50-million unit level. (Opp. 9.) Nonsense. Like the other AMD executive statements quoted in Intel's Opening Brief, Mr. Rivet's assertion of AMD's capability of producing 50 million units and meeting its 30% share target was categorical.[7]

AMD also attempts to walk away from Dr. Ruiz's subsequent claim to investors that AMD could make 75 million microprocessors at its German fab, arguing that [redacted] Dr. Ruiz, however, never told investors that his capacity projection was based on [redacted] And AMD ignores Dr. Ruiz's linkage of his 75-million-unit estimate to his bullish statement that "[t]herefore, I don't think we are worried about any lofty goals we would take on marketshare and not be able to meet."[8] (Ex. 27 at AMD-F096-5102290.) Given the substantial penalties for making misrepresentations to investors, the Court may conclude that AMD meant what its executives said, and AMD cannot now disown these unambiguous statements in a vain, after-the-fact attempt to create FTAIA jurisdiction.

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[7] Faced with Mr. Rivet's statement that Fab 30 could "produce more than 50 million units," AMD claims that Mr. Rivet dismissed the question of capacity as "irrelevant." (Opp. 9 n.6.) Not so. Asked what AMD's plans were "after fab 25 is converted to Flash and after fab 30 is ramped up and converted" to a new manufacturing process, Mr. Rivet said that this question was irrelevant precisely *because* AMD "can produce more than 50 million units a year at that fab," which would enable AMD to attain its 30% market share goal. (Ex. 24 at AMD-F096-5102323.)

[8] AMD's Chairman Sanders told investors in 2001 that "what counts is the die cost or the ultimate cost. Our view is with our very small guide [sic – should be die] sizes and moving to a 130-nanometer technology, we have adequate volume for the next several years to achieve our 30% world market share of units." (Ex. 47 at 5.) In other words, AMD told investors that they should believe that it had sufficient capacity to achieve its 30% market share goal precisely because it had a small microprocessor die size.

AMD's newly-minted position also forces AMD to quarrel with its own, internal documents. AMD claims that "Intel also misrepresents the statement by then-AMD-President Hector Ruiz that [redacted] But AMD does not claim that this direct quotation from a document that AMD circulated to all of its employees is inaccurate. [redacted]

AMD also ignores the testimony of Dr. Siegle, who testified [redacted][9] AMD now attempts to disown Dr. Siegle's testimony as well because Dr. Siegle testified that [redacted]

AMD also claims that '[redacted]' (Opp. 11.) But this merely shows that in hindsight [redacted]

[9] A true and correct copy of the pages of the Siegle Deposition transcript cited in this Reply is attached as Exhibit 44 to the Second Declaration of Dan Floyd, submitted with this Reply.

[redacted] does not mean that AMD did not make these projections or base its business decisions on them. The record shows without question that it did.

2. AMD needed Fab 25 to satisfy unmet demand for flash memory products.

Intel's opening brief showed that AMD badly needed the capacity of Fab 25 to increase production of flash memory chips, [redacted] At the same time, AMD's Opposition attempts to raise doubts about the need for flash memory capacity by questioning the profitability of the company's memory business. [redacted] But AMD deliberately, indeed misleadingly, ignores its profits as a joint venture partner on sales of flash memory to end customers. [redacted]

[redacted][10] [redacted] the head of its flash memory business told investors that AMD's "[e]xpansion" in flash was "still far below demand." (Ex. 49 at AMD-F081-00013538, 45.)

Shortly after deciding to convert Fab 25, AMD identified to its Board of Directors as [redacted][11] Why? AMD then viewed flash memory as the [redacted]

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[10] The presentation emphasized that [redacted] In November 2000, Walid Maghribi, who headed AMD's memory business, told investors that these agreements "carr[ied] cancellation penalties" for AMD's customers. (Ex. 49 at AMD-F081-00013538, 46.) His investor presentation made clear that, as AMD was [redacted] it believed that "[s]upply/demand imbalance" would "last for the foreseeable future" and expected that "[f]lash will continue to be the fastest growing product in the semiconductor industry for the next several years." (*Id.* at AMD-F081-00013541, 54.)

[11] AMD argues that Fujitsu closed one of the other fabs, located in Gresham, Oregon, in late 2001. (Opp. 13.) [redacted]

[redacted]

AMD's claim that the company did not need Fab 25 for its flash memory business is impossible to reconcile with the evidence.

3. Upgrading Fab 25 to maintain it as a microprocessor fab would have been costly and unnecessary.

Intel showed that AMD would need to spend [redacted] to keep Fab 25 as a microprocessor fab. [redacted]

Intel also showed that an upgrade to maintain Fab 25 as a microprocessor fab would have made little economic sense because [redacted] AMD claims that the "advantages Intel cites for the 300-mm wafer size are greatly exaggerated." (Opp. 7.) [redacted]

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[12] AMD developed plans for 300-mm manufacturing, first as part of a joint venture and external manufacturing arrangement with the Taiwanese company, UMC, and later at its second German fab. AMD selected UMC to manufacture microprocessors for it in [redacted] but UMC never made microprocessors for volume shipment by AMD [redacted] But instead of acknowledging that it made a strategic error in choosing UMC, AMD blames Intel for this miscalculation, claiming that [redacted] Apparently, there is no AMD mistake, big or small, that cannot be blamed on Intel.

[redacted] Once again, [redacted] is a true and correct recital of AMD's own documents and testimony.

B. AMD Has Not Established With A Preponderance of Credible Evidence That Intel's Conduct Proximately Caused AMD's Decision To Convert Fab 25.

AMD cannot show that Intel's conduct was the proximate cause of its decision to cease manufacturing microprocessors in the United States. Its only "evidence" that Intel's sales conduct contributed to its decision, which is insufficient to demonstrate proximate causation, is Dr. Siegle's declaration. AMD relies exclusively on Dr. Siegle to support its claim that Intel's conduct affected the decision to convert Fab 25, *even though it does not* defend Dr. Siegle's declaration in the face of Intel's showing [redacted]

AMD has placed itself in an untenable position with its tangled story. It claims that Dr. Siegle is a "manufacturing guy" who was in no position "to cite Intel or any other reason for the inadequate [AMD microprocessor] demand." (Pls.' Joint Resp. to Intel's Preliminary Pretrial Statement, filed May 12, 2008, at p. 34 n.24.) Yet it relies exclusively on Dr. Siegle's declaration for the claim that Intel's conduct played a role in the decision to convert Fab 25. Presented with the essential contradiction in its position, [redacted] As Intel pointed out in its Opening Brief, AMD filed a complaint with the European Commission accusing Intel of antitrust violations in October 2000, [redacted] AMD made its final Fab 25 decision. (*See* Op. Br. 25.)

The evidence also shows that [redacted] contrary to its current claim that it was led to its decision by microprocessor sales that slowed artificially because of Intel misconduct. In 2000,

AMD's microprocessor revenues grew by [redacted]

AMD attempts to disown Dr. Siegle's statement by claiming that it refers to AMD's expectation [redacted] But a bald assertion [redacted] *is not* evidence that AMD would have produced microprocessors at Fab 25 but for an unexpected decrease in demand in 2000 attributable to anticompetitive Intel sales conduct. AMD predictably does not cite a single document in support of its position, which is legally insufficient in any event, and the evidentiary record flatly contradicts AMD's claim.

AMD relies solely on Dr. Siegle to support its claim that it had planned to continue microprocessor production at Fab 25 until "the end of 2000," when "it became obvious that the artificially reduced demand could not support two production fabs." (Opp. 15.) [redacted]

[13] Throughout 2000, AMD submitted regulatory filings to the SEC in which it touted the strong demand for its microprocessors. (*See* Ex. 14 at 5-6; Ex. 15 at 6; Ex. 16 at 5-6; Ex. 28 at 5.) At the conclusion of the year, AMD's Chairman and CEO Sanders declared that in the face of "deterioration of the PC market late in the year," "AMD substantially outperformed the semiconductor industry in a year of extraordinary growth." (Ex. 28 at 5.) Chairman Sanders also declared that AMD achieved "record unit shipments" of microprocessors, and "gained market share in the PC processor arena." (*Id.*)

[redacted][14]

AMD also claims that it decided to convert Fab 25 because its '[redacted]' fell short of "the 30% market share goal its founder set two years earlier." [redacted] AMD predictably fails to present *any* evidence that it had made any plans for making microprocessors at Fab 25 based on a 30% microprocessor market share projection. [redacted] Nothing material to the decision had changed.

AMD alleges that Intel misconduct depressed AMD's sales and kept AMD out of the "high-margin commercial segment." (Opp. 16 n.11.) This claim is both irrelevant and wrong because it is a claim of "but for" causation without supporting evidence. AMD converted Fab 25 in the face of bullish projections for its microprocessor business because it badly needed flash memory capacity. [redacted] AMD's allegations do not even relate to foreign customers.[15]

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[14] [redacted]

[15] AMD cites Intel's decision not to contest a 2005 Japan Fair Trade Commission Recommendation Decision as evidence of wrongdoing. But the JFTC Recommendation does not constitute a formal finding of a violation of Japanese competition laws and has no preclusive

C. AMD Does Not Dispute That It Made A Final Decision To Convert Fab 25

AMD acknowledges that it made the final decision to convert Fab 25 well before the June 27, 2001, start of the limitations period. AMD made the decision public in April 2001. (Ex. 39 at AMD-F096-5102312.)

While AMD admits that it made the decision to cease microprocessor production at Fab 25, it nevertheless claims that this decision ' AMD offers no evidentiary support for the claim that its decision was not final. AMD argues that the decision theoretically could have been reversed, but this claim is irrelevant and lacks any factual support. Once AMD began the Fab 25 conversion, reversing course would have been even less economically sensible than upgrading the fab to microprocessor manufacturing in the first place. To reverse course, AMD would have had to pay the suffer the loss of investment it had incurred to install the flash memory production equipment, and incur the additional cost to remove it, as well as lose production time at a high-fixed-cost facility during the reinstallation.[16]

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effect, even in Japan. It certainly contained no admission of liability. Immediately upon the issuance of the JFTC's Recommendation, Intel immediately and strongly contested the JFTC's factual allegations and interpretation of Japanese law. (Ex. 52.)

[16] AMD cites a email message in which its manufacturing chief, Daryl Ostrander, AMD offers no evidence that anyone ever gave this musing serious consideration, much less that the idea was ever

III. THE UNDISPUTED FACTS SHOW THAT AMD'S FAB 25 CLAIM IS TIME BARRED.

To prevail on this summary judgment argument, Intel must show with undisputed facts that AMD's export commerce claim is time-barred by the Sherman Act's four-year statute of limitations, which began to run on June 27, 2001. As noted above, AMD is not disputing the sole relevant fact at issue, namely, that AMD made its decision to convert Fab 25 and thereby exit the microprocessor export business [redacted] before the beginning of the limitations period. The only dispute now is a legal one relating to the "continuing violation" doctrine, which does not apply in this case.

Intel established in its Opening Brief that the continuing violation doctrine has no application in this case. Even if this doctrine were to apply here, which it does not, AMD could recover only for those acts that were *committed within the limitations period.* "[W]here all the damages complained of necessarily result from a pre-limitations act by defendant, no new cause of action accrues for any subsequent acts committed by defendant within the limitations period *because those acts do not injure plaintiff.*" *Imperial Point Colonnades Condominium, Inc. v. Mangurian*, 549 F.2d 1029, 1035 (5th Cir. 1977). "[W]here a defendant commits an act injurious to plaintiff outside the limitations period, and damages continue to result from that act within the limitation period, no new cause of action accrues for the damages occurring within the

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mentioned again. [redacted] Moreover, when AMD needed more microprocessor production capacity, it chose to add capacity in Germany, first at Fab 30 and then at its newer German fab (Fab 36), and not at Fab 25. (Ex. 55 at 1; Ex. 56 at 1.)

limitations period *because no act committed by the defendant within that period caused them.*" *Id.*

Here, any conduct that caused AMD's decision to stop making microprocessors at Fab 25 necessarily had to occur before [redacted] when AMD made that decision. Because AMD made its decision [redacted] before the limitations period, "all the damages complained of [stemming from Intel's alleged conduct in causing AMD to stop exporting microprocessors from the United States] necessarily result from a pre-limitations act by defendant."[17] AMD's claim that its decision was "reversible" is thus legally irrelevant.[18]

It is also factually untrue. AMD fails to cite *any* evidence that it ever seriously considered converting Fab 25 back to microprocessor manufacturing. And the path to any such conversion, even if one had been considered, would have been tortuous in the extreme. The path

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[17] AMD argues that the continuing violation doctrine allows "the cause of action [to] accrue anew whenever the defendant commits an act that inflicts further injury." (Opp. 29.) But as discussed above, this argument misunderstands what is before the Court in this Motion. Intel does not contend in this Motion that the statute of limitations bars AMD's Sherman Act claim outright; rather, it claims that it bars a claim based on alleged harm that was experienced before the limitations period and its inertial consequences. *See Poster Exchange, Inc. v. National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975).

[18] AMD also quibbles with Intel's statement that Fab 25 was [redacted] a statement that Intel supported with both contemporaneous evidence and deposition testimony. (*See* Op. Br. 21-22.) AMD claims that Intel is wrong, but fails to present any evidence to the contrary. [redacted] This leaves AMD with no Fab 25 claim.

to such a conversion would have required AMD to weigh the economics of installing and uninstalling costly equipment for manufacturing flash memory; the cost of installing more modern microprocessor production equipment in its place; the need (or lack thereof) for microprocessor capacity beyond the very short term given AMD's plans for production at a second German fab, a modern 300-mm facility; the demand for flash memory products and alternative facilities for producing flash memory; and the cost of lost production during the process of converting the fab back to microprocessor manufacturing.[19] AMD cannot seriously claim that any decision *not to convert* the fab back to microprocessor production was an "immediate consequence" of Intel's conduct.

IV. CONCLUSION

AMD has not met its burden of showing that its decision to cease microprocessor production in the United States was an "immediate consequence" of Intel's alleged anticompetitive conduct. *Intel I*, 452 F. Supp. 2d at 560. AMD has set out no affirmative evidence in support of its position save for the discredited claims of Dr. Siegle, and its only rebuttal to the strong evidence set forth in Intel's motion is to take issue with the plain meaning of the words of its own senior executives and documents. Intel thus respectfully asks the Court to grant its Motion and dismiss AMD's export commerce claims.

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[19] AMD devotes considerable space to the case law discussing the "abatable but unabated inertial consequences" theory, which modifies the continuing violation doctrine. (*See* Opp. 30-31.) Both parties agree that time-barred conduct that is "by its nature permanent at initiation without further acts" cannot be resurrected by the continuing violation doctrine. (Compare *id.* 30 with Op. Br. 24-25.) Thus, the only dispute in this context is an evidentiary one. Whereas Intel has shown by overwhelming evidence that the conduct resulting in AMD's decision to stop making microprocessors at Fab 25 was "by its nature permanent" and did not require "further acts," AMD simply asserts that its decision to convert Fab 25 was "reversible."

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

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