IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

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

Of Counsel:

Robert E. Cooper, Esq.
Daniel S. Floyd, Esq.
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Joseph Kattan, PC
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

Darren B. Bernhard, Esq.
Howrey LLP
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 783-0800

Richard L. Horwitz, Esq. (#2246)
W. Harding Drane, Jr., Esq. (#1023)
Potter Anderson & Corroon, LLP
Hercules Plaza 6th Floor
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899-0951
(302) 984-6000
rhorwitz@potteranderson.com
wdrane@potteranderson.com

Attorneys for Defendants
Intel Corporation and
Intel Kabushiki Kaisha

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I. INTRODUCTION

Intel opposes AMD's motion to submit Daryl Ostrander's "expert report" in support of AMD's opposition (the "Opposition") to Intel's November 2008 Motion to Dismiss, or in the Alternative, for Summary Judgment on AMD's Export Commerce Claim ("Export Commerce Motion"). The Export Commerce Motion, based on the Foreign Trade Antitrust Improvements Act ("FTAIA"), seeks dismissal of AMD's claim that it would have exported microprocessors from Fab 25 in Austin, Texas, but for Intel's allegedly anticompetitive foreign conduct. In the alternative, the Export Commerce Motion seeks summary judgment on the ground that AMD's Fab 25-related export claims are time-barred. (*See* D.I. 1324.)

When AMD filed its Opposition in January 2009, it chose to submit two fact declarations regarding ancillary issues but none from Dr. Ostrander or any other "expert" witness. (*See* D.I. 1511.) AMD also did not file a Rule 56(f) motion and declaration to seek additional discovery before responding to Intel's Export Commerce Motion. More than seven months later, AMD wishes to submit the unsworn "expert report" of Daryl Ostrander, a former AMD executive who was deposed in this case more than a year ago. The Court should deny AMD's motion.

AMD has no good reason for submitting the Ostrander report at this late date. Dr. Ostrander did not suddenly become available to AMD last month. If his views were relevant to Intel's Export Commerce Motion, AMD should have submitted his declaration when it filed its Opposition. It is too late to do so now, under the guise of submitting a "new" expert report.

Even if AMD's proposed submission were not inexcusably dilatory, the substance of Dr. Ostrander's report is irrelevant and objectionable. While this unsworn report includes speculations and opinions, it does not contain any *evidence*; the report does not contain a single

citation to supporting material.[1] An expert's opinions themselves are not evidence, and the lack of any evidentiary support behind Dr. Ostrander's report means that the report has no relevance to Intel's Export Commerce Motion. *See Pa. Dental Ass'n v. Med. Serv. Ass'n*, 745 F.2d 248, 262 (3d Cir. 1984) (holding that an expert's opinion "did not raise an issue of material fact" and was properly disregarded by the district court because of its "lack of critical factual support").

Dr. Ostrander's speculations also do not offer anything new beyond the claims that AMD already set forth in its Opposition. There is no legitimate reason to require Intel to respond to, and the Court to consider, the same arguments a second time.

A new round of briefing necessarily will extend the time for the Court to render a decision on Intel's Export Commerce Motion, which in turn will complicate efficient pretrial and trial planning in this already-hugely-complicated case. Among other things, because AMD continues to make claims for lost sales to foreign customers based on the claim that it would have continued to produce microprocessors at its U.S. fab in some but-for world, delay in resolving the foreign commerce claims will have a profound effect on future case developments. It will necessarily enlarge the scope of Intel's expert reports, affect the scope and timing of motion practice, and impose a burden on trial preparation given the uncertainty of the admissibility of foreign evidence. There is thus no just cause to delay resolution of Intel's Export Commerce Motion.

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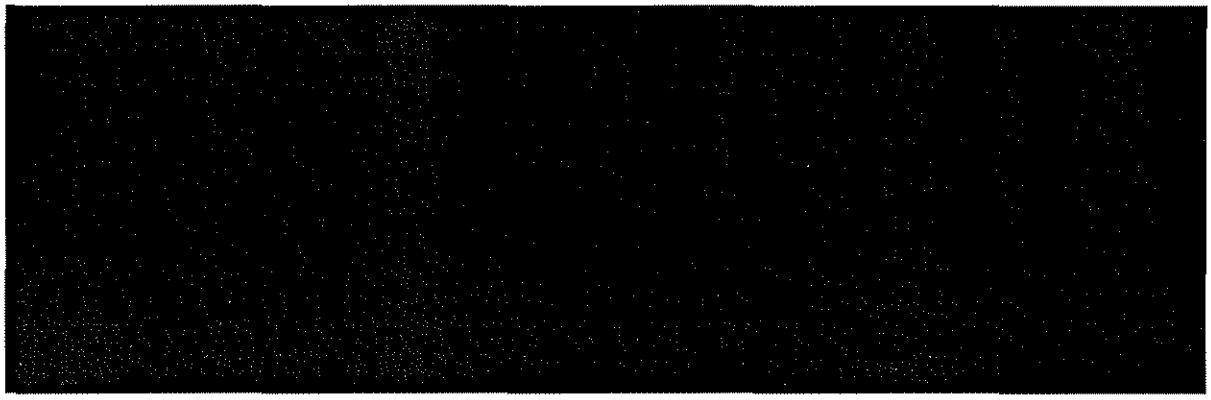
[1] A series of Excel spreadsheets is appended to Dr. Ostrander's report as exhibits. While these spreadsheets include references to AMD documents, they nevertheless do not provide (and AMD has refused to provide) the evidence and methodology supporting Dr. Ostrander's assertions in these exhibits such that they can be verified in any way. In any event, the materials in these exhibits are not relevant to Intel's Export Commerce Motion.

II. BACKGROUND

The issues raised by Intel's Export Commerce Motion have been under focus for three years, starting with the Court's September 2006 decision granting Intel's motion under the FTAIA to strike portions of AMD's complaint regarding Intel's alleged anticompetitive foreign conduct. (D.I. 279.) Despite that ruling, in October 2006, AMD filed a motion to compel certain foreign discovery from Intel. (D.I. 300.) In support of its motion, AMD submitted a declaration from William Siegle, AMD's former top manufacturing executive, and Dr. Ostrander's immediate predecessor in that position. (D.I. 301 at ¶ 1.) Dr. Siegle claimed, among other things, that [redacted]

In July 2008, Intel deposed Dr. Siegle. The deposition revealed that Dr. Siegle's declaration grossly misstated the relevant facts. In a number of instances, Dr. Siegle's sworn testimony directly contradicted his declaration. (*See, e.g.*, D.I. 1325 at 8-9, 10 n.12, 12-13, 14-15, 19-20.) The following month, in August 2008, Intel also deposed Dr. Ostrander, who ran AMD's manufacturing operations until February 2008.

In November 2008, with AMD's top two manufacturing executives on record, and a host of contemporaneous AMD documents in hand (which Intel did not have when AMD made its discovery motion), Intel promptly filed its Export Commerce Motion. (D.I. 1324.) Intel showed that its allegedly anticompetitive conduct had nothing to do with, much less proximately caused, AMD's decision [redacted]



Although a substantial part of Intel's Export Commerce Motion was devoted to establishing the undisputed facts (contrary to Dr. Siegle's declaration (*see, e.g., id.* at 8-9, 10 n.12, 12-13, 14-15, 19-20)), AMD's January 2009 Opposition did not even try to defend Dr. Siegle. (*See* D.I. 1511.) AMD also did not file a Rule 56(f) motion and declaration to ask the Court for more time to take discovery to oppose Intel's motion. AMD could not have justified such a filing in any event, as all the relevant evidence, including any potential declaration from Dr. Ostrander, was entirely within AMD's control.

III. THE COURT SHOULD DENY AMD'S MOTION FOR LEAVE TO FILE A SUPPLEMENTAL SUBMISSION IN OPPOSITION TO INTEL'S EXPORT COMMERCE MOTION.

AMD cites no authority in the District of Delaware or any other court in the Third Circuit for the criteria governing when a court should grant leave to file a supplemental submission in opposition to a pending motion. Instead, AMD cites to the Bankruptcy Court in the Northern District of Texas, referencing a Fifth Circuit opinion, for the relevant test. (*See* AMD Mtn. 3.) Even under the factors set forth in these two decisions, both of which rejected motions for leave to supplement the record, AMD's proposed submission is improper.

AMD argues that the following four factors are the relevant criteria: "(1) the moving party's reasons for not originally submitting the evidence; (2) the importance of the omitted evidence to the moving party's case; (3) whether the evidence was available to the non-moving

party when it responded to the summary judgment motion; and (4) the likelihood of unfair prejudice to the non-moving party if the evidence is accepted." (AMD Mtn. 3 (citing *Armstrong v. Jenkins*, No. 02-38913, 2003 Bankr. LEXIS 1267, at *10-11 (Bankr. N.D. Tex. Oct. 7, 2003)).) AMD's proposed submission fails every *Armstrong* prong.

A. AMD Cannot Justify Waiting Over Seven Months After Its Opposition Was Due To Seek To File Dr. Ostrander's Views On The Export Commerce Motion.

The first and third *Armstrong* prongs are related. AMD has no excuse for not submitting Dr. Ostrander's "evidence" with its Opposition, especially because this "evidence" has always been available to and within the control of AMD. In October 2006, when AMD filed Dr. Siegle's discredited declaration, Dr. Ostrander was AMD's head of manufacturing. AMD obviously could have submitted a declaration from him then, and it does not argue to the contrary. At his August 2008 deposition, Dr. Ostrander was still working with AMD and admitted that he spent two full days with AMD's counsel preparing for his deposition. (Deposition of Daryl Ostrander ("Ostrander Dep.") 77:1-5.)[2]

AMD makes two excuses for the tardiness of its submission, neither of which is persuasive. First, AMD claims that it waited until now to file the Ostrander report because "Intel filed its [Export Commerce] motion well before the close of fact discovery[.]" (AMD Mtn. 3.) If AMD truly believed Intel's Export Commerce Motion was premature, it could have filed a Rule 56(f) motion and declaration in response to Intel's motion. AMD did not do so, knowing full well that Intel's motion was ripe for decision. All the relevant evidence regarding AMD's decision to convert Fab 25 to a flash memory facility was in the record before Intel filed its

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[2] A true and correct copy of the relevant pages from the Ostrander Deposition transcript is attached as Exhibit 1 to the Declaration of Jay Srinivasan, filed herewith.

Export Commerce Motion. AMD cannot and does not point to anything in the Ostrander report that is based on evidence discovered, or conduct that took place, after AMD filed its Opposition. Nor does AMD provide any explanation for why it waited almost three months after fact discovery closed (on June 12, 2009) and a full month after serving the Ostrander report (on August 3, 2009) to file this motion.

Second, AMD argues that because the Ostrander report was only recently drafted, it necessarily could not have been submitted in opposition to Intel's Export Commerce Motion at the beginning of this year. (*See* AMD Mtn. 3-4.) The timing of the Ostrander report, however, has nothing to do with whether Dr. Ostrander could have submitted a declaration when the Export Commerce Motion was briefed. By failing to submit an Ostrander declaration then, AMD has forfeited the opportunity to do so. *See Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 455 (3d Cir. 1987) (affirming denial of motion to supplement record where moving party had "at least one opportunity" to submit the evidence earlier).

B. The Ostrander Report Lacks Evidentiary Foundation, Reargues AMD's Previous Opposition and Is Therefore Irrelevant to the Export Commerce Motion.

The Court should deny AMD's motion to submit the Ostrander Report for substantive reasons as well. The report contains no evidence, and it merely reargues the points made in AMD's Opposition to Intel's Export Commerce Motion.

1. Because the Ostrander report cites to no evidence, it cannot create a genuine issue of material fact.

A declaration opposing summary judgment requires evidence, not unsubstantiated opinions. Dr. Ostrander's report does not support a single opinion or assertion with a citation to evidence. Because the report itself is not evidence and it does not cite any evidence in support of Dr. Ostrander's claims, nothing in it can be used to create a genuine issue of material fact. *See Pa. Dental Ass'n*, 745 F.2d at 262 (an expert's opinion "did not raise an issue of material fact"

and was properly disregarded by the district court because of its "lack of critical factual support"); *Shaw v. Strackhouse*, 920 F.2d 1135, 1142 (3d Cir. 1990) ("factual assumptions" made by experts "'must find some support in the record'" and where the factual "assumption has no support in the record, the district court did not err in disregarding the experts' conclusions"). Because Dr. Ostrander did not "set forth the factual foundation for his opinion . . . in sufficient detail for the court to determine whether that factual foundation would" defeat Intel's Export Commerce Motion, the Court should deny AMD's motion. *Novartis Corp. v. Ben Venue Labs., Inc.*, 271 F.3d 1043, 1050-51 (Fed. Cir. 2001) (citations omitted).[3]

2. The Ostrander report raises nothing beyond what AMD already raised in opposition to Intel's Export Commerce Motion.

The second prong of the *Armstrong* analysis looks to the "the importance of the omitted evidence to the moving party's case." 2003 Bankr. LEXIS 1267, at *10-11. The *Armstrong* court also held that the related issue of "whether the evidence to be added would be cumulative" should also be considered in deciding to accept a tardy submission. *Id.*, at *11.

Courts have routinely denied leave when the supplemental submission is cumulative of what is already in the record. *See Edwards v. Pa. Tpk. Comm'n*, 80 Fed. Appx. 261, 265 (3d Cir. 2003) (affirming denial of motion to supplement record because the evidence "sought to [be]

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[3] Insofar as Dr. Ostrander states any facts, rather than opinion, he strikingly contradicts a key argument made by AMD in its Opposition. After Intel showed in its Export Commerce Motion that AMD concluded that [redacted] AMD accused Intel of misrepresenting its executives' statements, which Intel had faithfully quoted. (*See* D.I. 1511 at 10; D.I. 1608 at 7-9.) But Dr. Ostrander's report confirms that AMD based its decision [redacted] What AMD once called a misrepresentation has become AMD's newfound position.

introduce[d] was merely corroborative of evidence already on the record and would not have altered the decision of the district court"); *Duha v. Agrium, Inc.*, 448 F.3d 867, 882 (6th Cir. 2006) (affirming denial of motion to supplement record because the "supplementary materials contained nothing that could have exerted great influence on the underlying . . . motion" and did not add to what "had been established previously"); *Saturn of Denville New Jersey, LP v. General Motors Corp.*, 08-CV-5734, 2009 WL 953012, at *3 (D. N.J. Apr. 7, 2009) (denying motion to supplement where new information "w[ould] not effect the Court's determination").

Dr. Ostrander's claims about Fab 25 are nothing more than a rehash of the arguments that AMD made in opposition to Intel's Export Commerce Motion and in Dr. Siegle's discredited declaration. AMD's proposed supplemental filing, which is attached as Exhibit A to AMD's motion for leave to file the Ostrander report, concedes as much, claiming that "AMD has already demonstrated the legal and factual flaws in Intel's position." (Prop. Supp. 2.) The proposed supplemental filing establishes that AMD is using the Ostrander report as an excuse to simply repeat the same unfounded speculation and conjecture that AMD raised in its Opposition and that Intel rebutted with evidence from AMD's own files.[4] This *Armstrong* factor thus weighs heavily against AMD.[5]

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[4] Intel has a number of substantive disagreements with the Fab 25-related aspects of the Ostrander report. Should the Court grant AMD's instant motion, Intel will file a full response addressing the merits of the Ostrander report and establishing its irrelevance to the Export Commerce Motion. For the moment, it is sufficient to note that insofar as Dr. Ostrander proffers a factual statement as opposed to speculation, he contradicts one of the pillars of AMD's Opposition to Intel's motion. *See supra* fn. 3.

[5] AMD's proposed submission is in marked contrast to the supplemental submission that Intel made in May 2009. (*See* AMD Mtn. 2.) Intel's submission provided the Court with deposition testimony of AMD's founder and former Chairman and CEO Jerry Sanders that contradicted AMD's characterization of Mr. Sanders' public statements in its Opposition.

C. Intel Would Be Substantially And Unfairly Prejudiced Were AMD Allowed To Submit The Ostrander Report In Opposition To Intel's Export Commerce Motion.

The final *Armstrong* prong looks to whether Intel would be unfairly prejudiced if AMD's motion were granted. Intel would be prejudiced were the Court to wait until the resolution of a motion to strike the Ostrander report, which Intel anticipates filing given the many deficiencies in the Ostrander report, before deciding the Export Commerce Motion. The outcome of Intel's Export Commerce Motion (or the lack of resolution of that motion) will have a cascading effect on the management of subsequent proceedings in this litigation, as AMD persists in making claims regarding sales to foreign OEMs that are based on the speculation that AMD would have continued to produce microprocessors in Fab 25 instead of shifting all microprocessor production to Germany. Because the number of Intel's foreign customers that would be swept into the case if AMD's position were accepted would greatly enlarge the scope of the trial, lack of resolution of the Export Commerce Motion affects the scope of Intel's expert reports, the scope of motion practice, and preparation for trial. This burden might be justified if AMD had a legal basis for its claims regarding the foreign customers, but AMD does not have any such basis.

The Ostrander "report" consists of little more than speculation (or, more accurately, wishful thinking) about what AMD would have done – nothing that would establish that Intel's conduct had a direct, substantial, and reasonably foreseeable effect on export trade as required under the FTAIA. (*See* D.I. 1325; D.I. 1608.) AMD argues that, [redacted]

(D.I. 1761.) It was plainly relevant, and it was equally plainly new material that could not have been submitted earlier, as Intel submitted it as soon as a transcript of Mr. Sanders's testimony became available.

[redacted] These are precisely the kinds of speculative twists and turns that this Court has already held render the link between the alleged conduct and AMD's alleged injury too indirect to satisfy the requirements of the FTAIA. (D.I. 279.)

Resolution of Intel's Export Commerce Motion should not await the filing of the Ostrander report when AMD is attempting an end run around the orderly procedures of this Court on grounds that, charitably speaking, are flimsy.

IV. CONCLUSION

For the reasons set forth above, AMD's motion should be denied.

Of Counsel:

Robert E. Cooper, Esq.
Daniel S. Floyd, Esq.
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Joseph Kattan, PC
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

Darren B. Bernhard, Esq.
Howrey LLP
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 783-0800

POTTER ANDERSON & CORROON, LLP

By: */s/ W. Harding Drane, Jr.*
Richard L. Horwitz, Esq. (#2246)
W. Harding Drane, Jr., Esq. (#1023)
Hercules Plaza 6th Floor
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899-0951
(302) 984-6000
rhorwitz@potteranderson.com
wdrane@potteranderson.com

Attorneys for Defendants
Intel Corporation and
Intel Kabushiki Kaisha

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