

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Ba57504

)
In the Matter of)
)
INTEL CORPORATION,)
)
a corporation.)

DOCKET NO. 9288

ORDER RE INTEL'S MOTION TO EXCLUDE EVIDENCE

Respondent Intel Corporation ("Intel") moves to exclude testimony or evidence on competition in non-microprocessor markets, alleged conduct not involving withholding of products or technical information from third parties as a means of obtaining intellectual property rights, and conduct with regard to companies not identified by complaint counsel in discovery responses as adversely affected by Intel's conduct. Intel moves to exclude evidence on non-microprocessor technology, including chip sets¹ and motherboards,² and any alleged effects of Intel's conduct on competition in these products. Respondent argues that these products are used inside a computer but are separate from general purpose microprocessors, the relevant product market in this case.

The motion aims principally at the Preliminary Expert Report of Frederic M. Scherer ("Scherer Report"), complaint counsel's expert witness, which states in part:

The possibility of obtaining state-of-the-art chip sets and motherboards has become increasingly constrained as Intel has expanded to produce roughly three-fourths of new-generation personal computer chip sets. . . . And even under the most favorable circumstances, a computer assembler forced to rely upon third parties for chip sets or motherboards forfeits the opportunity to be a technological

¹ A "chip set" is a semiconductor device that controls access to and from the general-purpose microprocessor and other parts of the computer, including main memory control, cache memory control, and the system bus controller.

² A "motherboard" is a circuit board containing general-purpose microprocessors, chip sets, system bus controls and memory controls, among other semiconductor devices.

innovator with respect to the core of its product design. It becomes not much more than a stylist. . . .

. . . . When there are restrictions on the flow of information to microprocessors customers - i.e., computer, chip set, and motherboard assemblers . . . a regimentation exists that is both unnecessary and detrimental to technological progress. Such customers are inhibited from innovating. . . .

The restricted ability of OEMs to innovate means that product differentiation initiatives flow preponderantly to the microprocessor level leaving OEMs as largely undifferentiated box assemblers. Lack of product differentiation at the OEM level in turn makes it harder for OEMs to use chips (e.g., from Cyrix or AMD) that lack the suitably cultivated "Intel Inside" brand image and hence acts as a further barrier to entry and growth of such microprocessor competitors.

Scherer Report, ¶¶ 34, 37, 38, attached to Intel's motion to exclude as Exhibit O.

The Scherer Report discusses chips,³ chip sets, motherboards and computers. Respondent argues that evidence should be limited solely to the microprocessor market. The United States Supreme Court in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) set forth the elements of monopolization: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* at 570-71. To evaluate such a claim, courts "must examine the nature of the relevant market and [the party's] role in the market, as well as other structural features of the market and submarket, particularly entry barriers or barriers to expansion." *Corsearch, Inc. v. Thomson & Thomson and Dialog Information Services, Inc.*, 792 F. Supp. 305, 323 (S.D.N.Y. 1992). *Accord International Distribution Centers, Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786, 792 (2nd Cir. 1987) (characteristics to be considered in determining whether a firm has monopoly power are strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct and the elasticity of consumer demand). The "market position of the respondent, the structure of the industry, the nature of the conduct on competition" are all relevant in Rule of Reason evaluation of a monopolization claim. *E.I. du Pont de Nemours & Co.*, 96 F.T.C. 653, 729 (1980). Evidence of the nature of the computer industry generally seems

³ I infer that Dr. Scherer's use of "chip" refers to general-purpose microprocessor or "CPU" (central processing unit). Counsel are working on a stipulation of technological terms to be used which may facilitate communication in this case.

to meet this standard.⁴ The competitive dynamics of the microprocessor market cannot be understood without reference to inputs, complementary goods, and finished products.

Intel argues that the Scherer Report violates representations by counsel supporting the complaint⁵ which limit complaint counsel's intent to submit evidence of anticompetitive effects to the microprocessor industry. In addition, Intel argues that the Scherer Report violates the stipulation entered by the parties on November 24, 1998:

The parties will bring to trial the case described and the conduct alleged in the Commission's Complaint and Respondent's Answer, and the theories articulated therein. In the trial on the merits, the conduct alleged to violate the antitrust laws shall be the alleged threatened or actual withholding by Intel of products or technical information from Compaq Computer Corporation, Digital Equipment Corporation, and Intergraph Corporation as a means of obtaining intellectual property rights. Nothing herein shall preclude Complaint Counsel from introducing evidence that Intel engaged in similar conduct toward other third parties; provided, however, that no claims shall be based on conduct that does not involve the threatened or actual withholding of products or technical information from third parties as a means of obtaining intellectual property rights from such persons.

Respondent argues that complaint counsel's representations and the stipulation exclude evidence: that "computer, chipset and motherboard assemblers . . . are inhibited from innovating"; that Intel punishes customers that buy from its competitors; that Intel offers promotional allowances to customers in the Intel Inside® advertising program; and that Intel withholds its trade secrets not in connection with intellectual property disputes. Complaint counsel argue that they are limited only in the conduct that they contend violates the antitrust laws, not in the evidence that they may introduce.

The Scherer Report describes Intel's dominant position in the microprocessor market, identifies barriers to entry, outlines three episodes described in the Complaint in which Intel allegedly refused to deal with customers to obtain their licenses to intellectual property, and evaluates the impact of Intel's conduct on the microprocessor market. Dr. Scherer's reference to

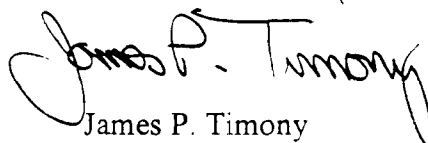
⁴ Paragraph 39 of the Complaint alleges that Intel's exclusionary conduct has an adverse effect on the development by Intel customers of "computer systems based on Intel microprocessors," which entrenches Intel's monopoly of microprocessors. This paragraph seems to provide a basis for much of the Scherer Report.

⁵ The representations, compiled in respondent's supplemental brief dated February 2, 1999, include an agreement not to offer any evidence of adverse competitive effects involving graphic controllers or chip sets, or in any non-microprocessor market.

licensing practices and marketing policies involving chip sets, motherboards, graphics controllers and CPU buses generally describes the context in which the alleged exclusionary conduct occurred, and the lack of elasticity of demand for microprocessors. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the Court noted that the defendant owned three of four downhill ski facilities in Aspen, Colorado, having developed two and purchased a third, and that further development was hindered by the lack of suitable real estate and by the need for financing. 472 U.S. at 588-89. The Court did not find that the acquisition of a competing skiing facility was unlawful; it was a fact used to explain defendant's market power. Evidence of the real estate and capital markets, as well as consumer reaction⁶ to the exclusionary conduct, was admitted to show entry barriers and market power. 472 U.S. at 588-89, 605-08.

Intel also seeks to have excluded testimony or evidence on conduct with regard to companies not identified by complaint counsel in discovery responses as adversely affected by Intel's conduct. The stipulation sets forth "[n]othing herein shall preclude Complaint Counsel from introducing evidence that Intel engaged in similar conduct toward other third parties." Complaint counsel assert they only recently discovered Intel documents indicating Intel's threats to Micron Electronics, Inc. and Silicon Graphics, Inc. Intel has the opportunity to take discovery relating to that conduct.

IT IS HEREBY ORDERED that respondent's broad motion *in limine* is DENIED; specific objections to irrelevant evidence or evidence offered in violation of the stipulation, or complaint counsel's prior representations, will be entertained at trial.


James P. Timony
Administrative Law Judge

Dated: February 5, 1999

⁶ Here, the customers of Intel microprocessors are OEM computer manufacturers, and their reaction to the exclusionary conduct, like the reaction of the skiers in *Aspen*, is admissible evidence of the nature of the alleged conduct. Since the OEM firms integrate the microprocessors into the computer system and resell it, however, extensive evidence of anticompetitive effects on the OEM market goes beyond the relevant market in this case.