IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STATE OF NEW YORK, BY ATTORNEY GENERAL ERIC T. SCHNEIDERMAN,	)	
Plaintiff,	)	
v.	)	C.A. No. 09-827 (LPS)
INTEL CORPORATION, a Delaware Corporation,	)	**PUBLIC VERSION** **December 15, 2011**
Defendant.	)	

REPLY BRIEF IN SUPPORT INTEL CORPORATION'S MOTION TO EXCLUDE TESTIMONY OF DR. FREDERICK WARREN-BOULTON

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The Report of Frederick Warren-Boulton ("FWB") posited a novel "exclusionary pricing" theory under which the very act of providing a discount to Intel's customers supposedly produced overcharges on the discounted products. The only support that FWB offered for this implausible theory was a hypothetical example built on the assumption that a dominant supplier faced a rival with twice its own costs. Intel's opening brief ("Br.") showed that this hypothetical example, and thus the theory that it purports to support, has no relevance to this case. FWB has admitted that Intel's and AMD's costs are "not all that different" and that customers are not overcharged where, as here, a rival's cost structure is similar to that of the larger firm. Br. 5.

New York's opposition brief ("Opp.") discards FWB's hypothetical example, claiming that it was merely "illustrative of his theory, and not a substitute for factual analysis." Opp. 7 n.11. By tossing out its expert's sole justification for his theory, however, New York is left bereft of <u>any</u> support for FWB's attempt to transform discounts into overcharges.

New York now argues (*id.* 4) that the real basis for FWB's discounts-into-overcharges alchemy is a list of three features in FWB's Report: (i) the supplier is a "must-carry" seller, (ii) the supplier offers "a 'take-it-or-leave-it' deal" that includes a "90%" market-share condition, and (iii) the cost of this strategy is "low." Decl. of Frank M. Hinman (Oct. 14, 2011) ("Hinman Decl.") Ex. A, Expert Report of FWB ("FWB Rep.") 23–24. FWB's Report, however, states that these features are only "[t]he critical economic features of the [hypothetical] example." *Id.* FWB does not even claim that these features, rather than his hypothetical example, show how discounts turn into overcharges. The three features thus cannot supply the economic analysis needed to turn discounts into overcharges, and New York cites no other analysis in FWB's defense.

New York also claims that the three features represent the "further analysis" of Intel's discounts that FWB admits is required because of his recognition that these discounts "should not be treated as necessarily anticompetitive." *Id.* 22. The three features, however, lack any purported analytical underpinning beyond the discarded hypothetical example; they lack even a meaningful nexus to that example. The features are arbitrary. They offer no means of distinguishing between lawful and unlawful conduct. They fail to explain how discounts turn into overcharges on the discounted products. And they lack support in peer-reviewed economics literature.

Moreover, FWB did not even apply the cited features in this case. For example, one of the three features is the conditioning of a "discount on customers purchasing 90% of their requirements." FWB Rep. 23. FWB, however, treated every alleged market-share condition, regardless of share level, as anticompetitive. Decl. of Daniel S. Floyd (Nov. 30, 2011) (hereinafter "Daubert Reply Decl.") Ex. A, (Deposition of Frederick Warren-Boulton ("FWB Dep.") 215:16–17.

For all the foregoing reasons, FWB's testimony must be excluded under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).[1]

FWB's opinion also should be excluded because his failure to make "complete" disclosure of the basis and reasons for his analysis violates Federal Rule of Civil Procedure 26(a)(2)(B). FWB based his injury and damages analysis on conduct indices that purport to indicate for each of 34 calendar quarters whether Intel engaged in exclusionary conduct vis-à-vis each of eleven OEMs in each of seven market segments. Rather than apply a scientific method to identify anticompetitive conduct, FWB subcontracted the entire analysis to a junior member of

[1] New York maintains that FWB is a respected economist (Opp. 1), but does not take issue with Intel's showing that courts have sharply criticized his opinion on several occasions, including a Seventh Circuit decision that referred to it as "[g]arbage in, garbage out" (Br. 3 & n.2). In any event, an expert's qualifications are the beginning, and not the end, of the admissibility analysis.

his staff, whose work he did not review or meaningfully direct. Br. 11–15. New York justifies this abdication by claiming that FWB offered his staff guidance, but New York's and FWB's explanations of that guidance are inconsistent with each other, with his Report, and with his admissions that neither he nor his staff performed necessary analytical steps. Because FWB himself never performed the analysis and cannot explain how it was conducted, Intel was unable to examine him about the basis for the judgment calls that his staff made in constructing his indices.

FWB also improperly based his damages regression on a cherry-picked selection from his unreliable indices. Br. 15–20. New York claims that FWB included only the "most destructive" conduct in his regression. But FWB admitted that his indices do not even consider anticompetitive effects, without which he could not judge the "destructiveness" of any discount. His damages analysis is not the product of reliable principles and methods, and must be excluded.

I. ARGUMENT

A. FWB's Liability Opinion Is Inadmissible

1. FWB's Three Features Fail To Distinguish Lawful From Unlawful Conduct

FWB admits that "the vast majority of market share deals and exclusivity," including "first-dollar discounts," "are probably procompetitive." FWB Dep. 251:4–9; FWB Rep. 22 nn.41, 42. An opinion that a class of these deals is anticompetitive must reliably "separate lawful from unlawful conduct." *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055 (8th Cir. 2000); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975).

New York now claims (Opp. 4–5) that FWB's three "features" are the <u>sole</u> basis for distinguishing procompetitive from supposedly anticompetitive discounts. But FWB has never explained how these features turn all discounts into overcharges. He merely claimed that they are the "critical economic features" of the hypothetical example (FWB Rep. 23) that New York now disavows (Opp. 7 n.11) and which he admitted to be counterfactual in any event (*see* Br. 5).

FWB's three features were that (i) a dominant "must carry" supplier (ii) conditions a discount on getting 90% of its customer's purchases on a "take-it-or-leave-it" basis, and (iii) does so at a low cost. FWB Rep. 23. Given FWB's admission that even discounts conditioned on exclusivity are not necessarily anticompetitive, it was incumbent upon FWB to provide economic analysis showing how the existence of these three features automatically produces overcharges. FWB needed to explain what endows the 90% threshold (as opposed to the 80% market share discount that he deemed procompetitive in *Concord Boat*, 207 F.3d at 1056) with the power to elevate prices. FWB also had to explain why his staff classified every alleged market-share discount, including those falling below his 90% threshold, as anticompetitive. And FWB had to explain how this 90% threshold may be reconciled with his admission that "market share discounts that go to 90 or 95 percent" are not necessarily "a problem" and that "[y]ou would have to analyze them." FWB Dep. 159:4–13.[2]

FWB answers none of these questions; his sole explanation for how discounts turn into overcharges is his now-discarded and patently inapposite hypothetical example. As Intel's opening brief showed (Br. 5), FWB could not provide a single instance in which an equally efficient competitor could not profitably meet an above-cost discount. A rival's ability to meet a discount with its own discount eviscerates FWB's overcharge mechanism; the customer, according to FWB, either "break[s] even" or pays less in those circumstances. FWB Dep. 274:3–275:13, 277:7–14, 300:19–24, 333:10–13, 344:13–19. FWB's analysis also does nothing to explain how

[2] New York's opposition abandons FWB's 90% requirement without explanation. *Compare* FWB Rep. 23, *with* Opp. 4–5. New York thus assumes that all market-share discounts by a larger firm are anticompetitive. But that assumption contradicts FWB's admissions that "the vast majority of market share deals and exclusivity," including "first-dollar discounts," "are probably procompetitive." FWB Dep. 251:4–9. Dispensing with the 90% threshold also conflicts with New York's claim that the 80% first-dollar market-share condition that FWB defended in *Concord Boat* was "very low." New York's Opp. to Intel's Motions For Summary Judgment 32 n.13.

discounts turn into overcharges when the two companies have similar cost structures—a circumstance that reflects both the actual facts of this case (FWB Dep. 298:11–20) and the legal standard.[3] In short, FWB's three features cannot serve as the foundation for testimony that turns discounts into overcharges because FWB has never attempted to explain—and cannot explain—how the existence of these features supports his implausible conclusion.

FWB's three-feature list is also inadmissible because it is contrary to settled principles of antitrust law. It would deem anticompetitive both above-cost (and hence lawful) pricing conduct and single-firm conduct that does not exclude a competitor. *See* Intel's Reply in Supp. of Its Motions For Summary Judgment. "Expert opinions that are contrary to law are inadmissible." *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 806 (N.D. Ill. 2005).

2. The Three Features Are Not The Product Of Reliable Principles

"[S]ubmission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected." *Daubert*, 509 U.S. at 593. But FWB's three-feature list—New York's only proffered basis for his discounts-into-overcharges alchemy—"ha[s] not been tested, ha[s] not been subjected to peer review, ha[s] no controlling standards, [and] ha[s] no demonstrable showing of support within the scientific community." *Kentucky Speedway, LLC v. Nat'l Ass'n of Stock Car*

[3] New York claims that Intel's argument fails because FWB testified that [redacted] Opp. 17–18. But it cannot dispute his admission that the two companies' cost structures are "not all that different." FWB Dep. 298:16–17. Moreover, New York completely ignores the requirement of basing the antitrust analysis on the capability of an equally efficient competitor. *See* Intel's Mem. in Supp. of Mot. for Summary Judgment Based on the Lawfulness of Its Discounting Practices 6–7, 12–13. New York points to FWB's claim that his hypothetical example "does not depend on whether one firm is more efficient than another." *Id.* 17. But that bare assertion is completely undermined by FWB's inability to come up with a single example in which a discount results in an overcharge when the competitor is equally efficient. Nothing in FWB's Report, his deposition, or New York's opposition demonstrates how discounts turn into overcharges when the rival is equally efficient.

Auto Racing, 588 F.3d 908, 916 (6th Cir. 2009). FWB's testimony thus must be excluded because it is not the product of reliable principles and methods. *See Calhoun v. Yamaha Motor Corp., U.S.A.*, 350 F.3d 316, 321 (3d Cir. 2003).

New York's attempt to give FWB's three-feature list the veneer of scholarly support is meritless. New York relies primarily on FWB's own writings, but these writings do not purport to show that discounted prices are actually overcharges. Indeed, the only peer-reviewed FWB article cited by New York contradicts his opinion here.[4] That article asserts that Intel presented OEMs with an "all-or-nothing" offer by selling "Intel chips at prices significantly below the market-clearing level," forcing rivals to sell at "reduced prices" as a result. *See* Decl. of Richard L. Schwartz (attached to Opp.) ("Schwartz Decl.") Ex. C, at 250, 255 (emphases added). By contrast, FWB claims here that Intel charged higher than market-clearing prices, and that its discounts cause the "market price" charged by both Intel and AMD to "rise." FWB Rep. 20. Had FWB applied his article's "all-or-nothing" feature to this case, he would have had to conclude either that Intel did not overcharge customers (because it sold microprocessors below the market price) or that a necessary element of his article's exclusion test (a sale below the market price) was not satisfied.

New York's two remaining citations fall far short of giving it the support that it seeks. Neither paper articulates anything resembling FWB's three-feature list. The Inderst and Shaffer paper merely argues that market-share discounts could lead to higher prices under certain restrictive assumptions (not claimed to be present here), and identifies none of FWB's three features. Schwartz Decl. Ex. F, at 711–12. The Farrell paper merely concludes summarily that market-

[4] Of three FWB papers on which New York relies, one is an unpublished paper (Schwartz Decl. Ex. D), and one was published in a practitioner-oriented, non-academic law journal (*id.* Ex. B). Only one—a paper summarizing FWB's previous stint as an economist in a case against Intel—was published in a peer-reviewed journal. *Id.* Ex. C.

share discounts can produce "taxes" on competitors and does not set forth anything like FWB's three-feature list. Schwartz Decl. Ex. E, at 269.

New York's and FWB's invocation of the "raising rivals' costs" theory to support FWB's analysis is also unavailing. As both the seminal article on the subject and the case law recognize, that theory requires, as its name suggests, an increase in a rival's marginal cost. *See* Daubert Reply Decl. Ex. B, Steven C. Salop and David T. Scheffman, *Raising Rivals' Costs*, 73 Am. Econ. Rev. 267 (1983) (cited by FWB Rep. 25 n.45); *Viacom Int'l Inc. v. Tele-Communications, Inc.*, 1994 WL 561377, at *5 (S.D.N.Y. 1994) ("the theory of raising rival's costs" applies "only to increased marginal costs"); *see also Sprint Nextel Corp. v. AT & T Inc.*, 2011 WL 5188081, at *7 n.21 (D.D.C. 2011) ("input costs"). A price reduction is plainly not a marginal cost increase; while the prices charged by Intel when selling microprocessors to OEMs might affect AMD's revenues, they do not affect its costs. Moreover, the raising rivals' costs theory requires a showing of "competitor injury" (Salop and Scheffman, 73 Am. Econ. Rev. at 271), which FWB has expressly disclaimed in this case (FWB Dep. 280:13–14). Nothing in the raising rivals' costs literature suggests anything remotely resembling FWB's three-feature list.[5]

3. FWB Did Not Reliably Apply Any "Method" To The Facts Of This Case

Any opinion based on FWB's three-feature list is also inadmissible because FWB did not reliably apply it to the facts of this case. *See United States v. Downing*, 753 F.2d 1224, 1237 (3d Cir. 1985); Fed. R. Evid. 702. For example, FWB never analyzed whether the conditions of his second feature—discounts linked to a 90% share requirement and offered on a "take-it-or-leave-

[5] FWB and New York also suggest that FWB's three features produce higher prices under a "leveraging" or "taxation" theory. FWB Dep. 269:6–11; Opp. 15. But nothing in FWB's Report or deposition, or in New York's opposition, purports to explain how alleged "leveraging" or "taxation" could lead to higher prices when the large firm faces an equally efficient competitor (or a competitor with a similar cost structure, like AMD) that is able to match the discounts. In fact, FWB admitted that prices would be the same or lower in those circumstances. Br. 5.

it" basis—were satisfied. Instead, he allowed his staff to treat any alleged market share condition as anticompetitive (FWB Dep. 215:16–17), and made no effort to assess whether Intel's allegedly anticompetitive deals involved 90% of the OEMs' requirements.[6] Nor did he analyze whether Intel's deals were "take-it-or-leave it" offers. In his only peer-reviewed article cited by New York, he referred to this requirement as entailing "all-or-nothing" offers that "force[d] [customers] to deal either exclusively or not at all with the dominant firm." Schwartz Decl. Exh. C, at 250 (emphasis added). But FWB admitted that Intel did not refuse to deal (FWB Rep. 22 n.42; FWB Dep. 487:5–11), and he did not purport to find that all or most of Intel's deals entailed "exclusiv[it]y," so this critical feature is clearly absent here.

Nor did FWB apply his third feature—that this so-called "strategy" had low "costs" to Intel (FWB Rep. 23)—to the facts. One searches FWB's report and testimony in vain for any application of this criterion. Instead, FWB simply assumed that discounts are costless because his inapposite hypothetical example says that they can lead to overcharges. But given New York's concession that the example is not a substitute for analysis, FWB may not assume the conclusion on the basis of that example.

The irrelevance of FWB's three-features list is further illustrated by the portion of New York's brief entitled "Dr. Warren-Boulton Performed Factual Analyses Showing That Intel's Conduct Had Exclusionary Effect on Competition," which does not even refer to the list of three features. Opp. 18–19. Rather, it relies on two entirely different factors to support the claim that FWB analyzed Intel's conduct. The first is that FWB "testified that Intel's anticompetitive con-

[6] For example, FWB's conduct indices for NEC, a Japanese OEM, assert that Intel granted NEC market-share discounts that constituted "exclusionary conduct" for several product segments. Daubert Reply Decl. Ex. C, FWB's NEC conduct.xls spreadsheet. But New York claims that the market share target there was only "an 80% share of NEC's overall business." *Id.* Ex. D, at 8, New York's Responses and Objections to Intel's Third Set of Interrogatories.

duct foreclosed sales by AMD to the major OEMs," and thereby "prevented AMD from acquiring the 'validation' it sought." *Id.* 18. But that allegation has nothing to do with FWB's three features, and instead invokes a theory of harm to AMD that FWB explicitly forswore. *See* FWB Dep. 15:12–14 (FWB's "exclusionary pricing" theory has nothing to do with "foreclosure affecting the competitive capability of AMD"). The second is that FWB "performed [a] regression analysis to show [the] effects" and to "estimate the price effect" of Intel's conduct. Opp. 19. But, as FWB admitted, his regression can only measure the relationship between conduct that his staff deemed anticompetitive and some harm (such as a higher price). The regression takes as a necessary input that staff's designation of conduct as anticompetitive; it cannot and does not purport to identify which conduct is anticompetitive to begin with. FWB Dep. 628:5–9.

B. FWB's Opinions On Injury And Damages Are Inadmissible

1. FWB Based His Analysis Of Consumer Injury On "Conduct Indices" That Are Arbitrary, Untested, Unreliable, And Contrary To The Evidence And To FWB's Unfounded Theory

"In the absence of independent research or peer review, experts must explain the process by which they reached their conclusions and identify some type of objective source demonstrating their adherence to the scientific method." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 289 F. Supp.2d 1230, 1238 (W.D. Wash. 2003). FWB's conduct indices, which served as the basis for his regression that purported to show consumer injury in the form of overcharges, fail this test. The indices reflect adherence to no method whatsoever, let alone a scientific one.

As an initial matter, it is undisputed that FWB is not familiar with the evidence that the conduct indices purport to evaluate. New York does not assert that FWB reviewed the documents on which his staff based the conduct indices, instead claiming merely that he "reviewed all of the documents cited in his report." Opp. 22. But that Report cites few documents; indeed, it cites no documents from seven of the eleven OEMs for which the indices allegedly flag exclusionary conduct (Apple, Gateway, IBM, Samsung, NEC, Sony, and Toshiba). And it cites only two AMD documents, neither of which is cited for exclusionary conduct or any OEM-related issue. FWB was in no position to characterize any of Intel's OEM deals because he knows nothing about virtually any of them (and he knows nothing about any of AMD's OEM deals).

New York's claim that FWB read the "extremely large collections of evidence contained in the expert reports submitted by the opposing experts in the AMD case" (Opp. 22) is contradicted by the very testimony that New York cites. In fact, FWB testified merely that he "tried to read both the original reports." FWB Dep. 235:23. He did not claim to have looked at the supporting evidence, nor could he have done so in the limited time he devoted to his Report. Br. 3.

New York attempts to excuse FWB's ignorance of the facts on which he purports to base his opinion, claiming that he provided directions to his staff to guide their analysis (Opp. 8) and that "the conduct indices are a methodically transparent tool" (Opp. 20). But this "tool" has no coherent or predictable methodology behind it. Although FWB attempted at his deposition to proffer various tests that his staff could have applied, as discussed below, those tests were inconsistent with each other, inconsistent with his Report, and inconsistent with fundamental antitrust principles. Furthermore, FWB did not know whether his staff actually applied the tests.

FWB's purported instructions to his staff were inconsistent with his own analysis. For example, FWB took the position that "the vast majority of market share deals and exclusivity are probably procompetitive" and require "further analysis." FWB Dep. 251:4–6, 251:10–12; FWB Rep. 22 & n.41. His three-feature list purported to treat only discounts linked to market shares of 90% or above as anticompetitive. FWB Rep. 23. But he allowed his staff to deem "anticompetitive" any instance of "exclusivity" or "market share discounts" or "first-dollar lump-sum discount[s]." FWB Dep. 215:16–17; 443:23–25. FWB conceded that "you would have to analyze market share discounts to understand their competitive effects," *i.e.*, "you would have to look at the size of them [and] . . . the effect of them," even when the discounts "go to 90 or 95 percent." FWB Dep. 157:10–159:13 (emphases added). Yet neither he nor his staff examined the effects of any deal. FWB Dep. 445:8–9.[7] Thus, the conduct indices are based on assumptions that neither FWB nor New York can coherently explain. Those assumptions fail to incorporate analytical steps that FWB conceded to be necessary to support his conclusions.

Contrary to New York's claim, Intel is not questioning FWB's ability to rely on his staff for assistance in gathering information to create the indices. Opp. 22. But it is altogether different to subcontract the entire analysis to a junior staff member and describe oral instructions in a manner that is both internally inconsistent and contrary to the analysis that the expert admits must be performed.[8] The sole authority that New York cites on this issue provides no support for FWB's abdication of responsibility. In *Adani Exports Limited v. AMCI (Export) Corp.*, 2008 WL 4925647, *3 (W.D. Pa. Nov. 14, 2008), the court held that the expert did not do "anything unusual in relying upon a research assistant to help gather information to be utilized in his expert report." *Id.* Here, by contrast, a staff member with four years of experience (FWB Dep. 439:10–13) did not merely "gather information" but actually made what FWB described as "subjective" and "difficult" analytical "judgment call[s]" (*id.* 62:11–17, 63:16–21), which FWB never reviewed. It is undisputed that not one of the conduct indices was based on FWB's analysis.

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[7] New York's claim that the conduct indices show that Intel's conduct "foreclosed significant sales opportunities for AMD" (Opp. 9) cannot be squared with FWB's admission that the indices examine only conduct and not the "effects" of that conduct (FWB Dep. 632:19–633:6). New York's assertions also cannot be squared with FWB's admission that "I don't even have an opinion that AMD was significantly harmed by" Intel's conduct or that Intel's conduct "affected AMD's ability to compete." *Id.* 280:13–14, 417:5.

[8] FWB admitted that to test the analysis, he would need to write out his instructions and discuss them to make sure they were read and understood by the person performing the test. FWB Dep. 218:20–23. He did not do that for the junior staffer who actually performed the analysis. *Id.* 214:24–216:21.

FWB's reliance on the intuition of his staff member requires the exclusion of his testimony. An expert may not place "his unblinking reliance on [other] experts' opinions" (*In re TMI Litig.*, 193 F.3d 613, 716 (3d Cir. 1999)), and must have "familiarity with the methods and the reasons" underlying a non-testifying expert's methods (*TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 732 (10th Cir. 1993)). It certainly follows that an expert may not rely upon a staffer's subjective judgment calls with which he is unfamiliar.

Furthermore, because FWB did not analyze any of the conduct at issue, Intel will not be able to cross-examine him effectively at trial about the "subjective" and "difficult" "judgment call[s]" made in declaring Intel's conduct anticompetitive. Allowing FWB to testify about the indices would contravene Rule 26(a)(2)(B)'s requirement of "complete" disclosure of the content and basis of all expert opinions, and frustrate Intel's cross-examination rights. *See McMillan v. Weeks Marine, Inc.*, 478 F. Supp. 2d 651, 659 (D. Del. 2007) (the "purpose" of Rule 26(a)(2)(B) is in part "to give opposing parties a reasonable opportunity to prepare for effective cross examination"). This point is critical because the indices are fundamental to FWB's entire analysis. As FWB demonstrated at the deposition, he cannot explain how these indices were created, what documents were reviewed, or how the evidence in those documents was weighed. Br. 11–13.

2. FWB's Overcharge Regression And Damages Model Are Inadmissible Because They Are Based On Cherry-Picked, Selective Application Of His Unreliable Conduct Indices

FWB based his regression analysis on the unreliable conduct indices, using them to demarcate an exclusionary (damages) period and a benchmark period with which to compare the damages period. His regression fails to meet the scientific standards for admission set out in *Daubert* and the other cases cited in Intel's opening brief. Br. 15–20. As Intel showed in its opening brief, moreover, this is only the tip of the iceberg. For several of the OEMs, FWB's junior staffer who constructed the indices failed to construct any index for the benchmark period, leaving his regression with nothing to compare to the damages period and therefore no basis to find any damages, much less to try to quantify them. Br. 16. For the remaining OEMs, this staffer constructed conduct indices for only the first two quarters of the three-year benchmark period and ignored the remaining two and a half years. *Id.* New York does not dispute that FWB failed to include any conduct indices within his benchmark period for some OEMs, and for 5/6 of that period for the remainder of the OEMs. As FWB admitted (FWB Dep. 400:3–5), a "before" and "after" regression requires a comparison of the "before" and "after" periods. That cannot be done without data for both periods, including the benchmark (here, the "after") period. *See In re Aluminum Phosphate Antitrust Litig.*, 893 F. Supp. 1497, 1502–04 & n.11 (D. Kan. 1995) (rejecting an expert opinion that failed to include data from benchmark period).

New York also does not dispute that FWB included in his regression only three of the six categories of conduct that he deemed anticompetitive. Such cherry-picking was necessary to generate the sharp decline in supposed anticompetitive conduct that FWB needed to distinguish his damages and benchmark periods. New York claims that FWB validly based his regression on "the three most destructive forms of exclusionary conduct" (Opp. 9), but FWB's testimony contradicts that claim. He testified that the excluded "product delay" category was one of the three "most important" (FWB Dep. 461:2–9), but later revised his testimony to state that, as between "product delay" and another category, "I can't tell you which is Number 3 and which is Number 4" (*id.* 467:13–14). New York does not dispute that including "product delay" would eviscerate the regression's demarcation line between the damages and benchmark periods. *See* Br. 17. Moreover, neither New York nor FWB has explained why any of the forms of supposed anticompetitive conduct is more "destructive" than any other, such that it would justify FWB's decision simply to discard half of his own conduct categories. As discussed above (*supra* pp. 9–

11), FWB did not analyze the effects of the alleged conduct, and thus cannot tell which is the "most destructive."

FWB based the regression in his Report on 34 calendar quarters of Intel's gross margin data. In response to criticisms from Intel's experts (which he admitted were valid (FWB Dep. 724:1–19)), FWB supplied a new regression that sought to find a relationship between Intel's conduct and its prices, instead of its gross margins. FWB ran this price regression with data for only 28 of the 34 quarters, believing incorrectly that price data were not available for all 34. Br. 18 n.10. When data for all 34 quarters (which had always been available) were included in the analysis, FWB's regression rebuts his overcharge claim. *See* Br. 18 n.10. Confronted with these results, FWB disavowed his own regression, claiming that the results indicated an "omitted variable" (FWB Dep. 751:1), *i.e.*, a mistake, in his own analysis.

To defend FWB, New York asserts that he actually concluded that it would be a "bad idea" to include the six missing quarters. Opp. 25. This claim is groundless. Asked why he did not include the full 34 quarters in his regression, FWB testified that "I don't have ASP [average selling price data] for that time period." FWB Dep. 747:17–18. He gave this as his <u>sole</u> reason for failing to include the entire 34-quarter period. *Id.* 747:23–748:1. New York cites FWB's Report for the proposition that running the regression for 34 quarters is a "bad idea," but that Report itself employed only a 34-quarter regression.

New York does not dispute that FWB based his alternative damages model on two 2002 documents from a single OEM, which he used to estimate <u>all</u> OEMs' margins over the <u>entire</u> damages period. *Compare* Br. 14 n. 9, *with* Opp. 22 n.30. Moreover, one of the documents provided only a "guesstimate" of even that one OEM's projected margins for a single PC model. FWB Dep. 403:18–22, 404:6–20. This is precisely the kind of dartboard economics that Judge

Robinson excluded in *ZF Meritor LLC v. Eaton Corp.*, 646 F. Supp.2d 663, 667–68 (D. Del. 2009). New York's only attempt to defend this guesswork is to claim that "the documents refer to a significant time period and range of PC models." Opp. 22 n.30. New York provides no citation in support of that claim, which is contradicted by FWB's own testimony cited above.

Finally, New York claims that it was permissible for FWB to assign an identical overcharge to every Intel microprocessor, regardless of price. Opp. 25. The assumption that microprocessors costing $30 and $1,000 would carry the same dollar overcharge ($15.01 to $23.41 depending on the quarter (FWB Rep. Exs. D20–D22)) is emblematic of FWB's junk science approach.

New York fails to dispute the further, and fatal, criticism that FWB admitted that his "exclusionary pricing" theory used a "mechanism" that "had price-elevating effects specific to that transaction in that particular example." Br. 19 (quoting FWB Dep. 579:10–13). Given the transaction-specific nature of FWB's theory of harm, FWB had no basis for assigning overcharges to the tens of thousands of transactions that he and his staff either did not examine or found benign.

II. CONCLUSION

FWB's attempt to show that discounts are overcharges fails at every turn, as does his testimony based on conduct he did not examine. His opinions are at odds with the evidence, the law, and sound economics. They will not help the trier of fact, and they should be excluded.

Intel respectfully requests that the Court hold oral argument on its motion, and if the Court deems appropriate, an evidentiary hearing. *See Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 416–18 (3d Cir. 1999).

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

CERTIFICATE OF SERVICE

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