UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

STC.UNM, Plaintiff, v. INTEL CORPORATION, Defendant.	Civil No. 10-CV-01077-RB-WDS

BRIEF IN SUPPORT OF STC'S MOTION TO COMPEL

Background

STC has charged products made by Intel's "45nm, 32nm, 22nm, 15nm, and 11nm process technologies" with patent infringement.[1] Intel began manufacturing 45nm in 2007, and is currently manufacturing products with 32nm process technology. Exh. A [Intel Form 10-K (2007)], at 8; Exh. B [Intel Form 10-K (2010)], at 6. Intel projects it will begin manufacture of products with its 22nm process technology later this year. *Id.*

Further, the publically available literature suggests that Intel is currently developing its next generation process technologies. In this regard, Intel engineers have given presentations promoting Intel's development activities for products made by its 22nm, 15nm, and 11nm processes. *See* Exh. C [*LithoVision 2009, Lithography*

[1] The numerical name of Intel's process technologies corresponds to the smallest "feature size" that can be made on the chip, *e.g.,* a chip made by Intel's 45nm process technology has features as small as 45nm, and so on.

Technology Trends, S. Sivakumar]; Exh. D [*Lithography 2009, Overview of Opportunities*, Y. Borodovsky]; Exh. E [*Technical and Manufacturing Challenges and the Prospect for HVM using ArF Pitch Division*, S. Sivakumar].

STC's Discovery Requests and Intel's Responses

STC's discovery requests seek Intel's key technical documents for its 45nm, 32nm, 22nm, 15nm and 11nm processes. STC defined the products it is accusing of infringement as:

> Accused Products: Microprocessor semiconductor devices manufactured with Intel's 45nm process technology, 32nm process technology, 22nm process technology, 15nm process technology, or 11nm process technology (as used by Intel in, *e.g.*, 2009 Form 10-K; and/or Lithography 2009, Overview of Opportunities, Borodovsky, Semicon West (July 15, 2009).

Exh. F [STC's First Set of Interrogatories Nos. 1-21], at 1. Intel has generally agreed to produce discovery regarding its 45nm and 32nm process technologies, but has refused to provide discovery for its 22nm, 15nm and 11nm processes.

Instead of fully responding to STC's discovery requests, Intel chose to unilaterally limit STC's definition of Accused Products:

> 9. Intel objects to the definition of "Accused Products" as overly broad, unduly burdensome, and not likely to lead to the discovery of admissible evidence to the extent it seeks information about potential process technologies that have not been developed and that have not been used to manufacture products. ***Accordingly, for purposes of its responses, Intel will construe "Accused Products" as being limited to microprocessor semiconductors manufactured with Intel's 32nm and 45nm technologies.***

Exh. G [Intel Responses to STC's First Set of Interrogatories Nos. 1-21], at 3 (emphases added); *See also*, Exh. H [Intel Responses to STC's First Set of Request for Production Nos. 1-19], at 3-4. By unilaterally changing STC's definition of Accused Products, Intel has refused to provide discovery on its 22nm, 15nm and 11nm process technologies. The following are representative objections:

> REQUEST NO.1: All process flow documents used in the manufacture of each Accused Product.
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> RESPONSE TO REQUEST NO.1: Intel objects to the disclosure of confidential information prior to the entry of an appropriate protective order. Intel also objects that this request seeks is overbroad, unduly burdensome, and seeks information not reasonably calculated to lead to the discovery of admissible evidence. Intel further objects that the term "process flow documents" is vague and ambiguous.
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> Subject to, and without waiving its general and specific objections after entry of such an appropriate protective order, Intel will produce documents sufficient to show where in its 32nm and 45nm manufacturing processes it uses double patterning for representative products.

> REQUEST NO.6: All memoranda, internal or otherwise, regarding the lithography processes, including planned, abandoned, and/or adopted processes, for Intel's 45nm process technology, 32nm process technology, 22nm process technology, 15nm process technology, and 11nm process technology.
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> RESPONSE TO REQUEST NO.6: Intel objects to the extent that this request seeks information protected by the attorney-client privilege or the attorney work product doctrine. Intel also objects to the disclosure of confidential information prior to the entry of an appropriate protective order. Intel also objects that this request seeks is overbroad, unduly burdensome, and seeks information not reasonably calculated to lead to the discovery of admissible evidence.
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> Subject to, and without waiving its general and specific objections after entry of such an appropriate protective order, Intel will produce GDS/GDS II files (or their equivalent) sufficient to show its use of

> double patterning for representative products on its 32nm and 45nm manufacturing processes.

Exh. H (*see also*, Requests for Production 2, 4, 5, and 7); and Exh. G, at Interrogatory Nos. 10, 16, 17, 19, & 20.

Applicable Legal Principles

The proper scope of discovery is "any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Information sought is relevant "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Federal courts have held that the scope of discovery under rule 26 is broad. *See Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995); *Sanchez v. Matta*, 229 F.R.D. 649, 654 (D.N.M. 2004)("The federal courts have held that the scope of discovery should be broadly and liberally construed to achieve the full disclosure of all potentially relevant information."). The federal discovery rules reflect the courts' and Congress' recognition that "mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 91 L. Ed. 451 (1947). As a result, rule 26 "contemplates discovery into any matter that bears on or that reasonably could lead to other matter[s] that could bear on any issue that is or may be raised in a case." *Anaya v. CBS Broadcasting, Inc.*, 251 F.R.D. 645, 649-650 (D.N.M. 2007).

Additionally, the Federal Circuit, the court that hears all appeals for patent infringement cases, has repeatedly found that research and development activities that are done in connection with normal commercial processes are subject to infringement. *See Roche Prods., Inc. v. Bolar Pharm. Co.*, 733 F.2d 858, 863 (Fed. Cir. 1984) (noting that courts should not "construe the experimental use rule so broadly as to allow a violation of the patent laws in the guise of 'scientific inquiry,' when that inquiry has definite, cognizable, and not insubstantial commercial purposes."); *See also Madey v. Duke Univ.*, 307 F.3d 1351, 1362 (Fed. Cir. 2002); *Embrex, Inc. v. Service Engineering Corp.,* 216 F.3d 1343 (Fed. Cir. 2000). This rule of law is based upon some bedrock principles of patent jurisprudence: "Intent is not an element of direct infringement, whether literal or by equivalents . . . . Infringement is, and should remain, a strict liability offense." *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512, 1527 (Fed. Cir. 1995) (en banc). Finally, there is no *de minimis* infringement defense in patent law. *Abbott Labs. v. Sandoz, Inc.*, 566 F.3d 1282, 1299 (Fed. Cir. 2009). A small quantum of infringement during research and development of new products is still an infringement.

Argument

Intel has advanced essentially two bases of objection to producing discovery for its 22nm, 15nm and 11nm processes, both of which are addressed below.

1. STC's Requests Are Not Overly Broad or Unduly Burdensome

Intel's first basis of objection is that such discovery would be overly broad/unduly burdensome. Intel has agreed to produce discovery on its 45nm and 32nm processes. Intel has further indicated that it will be producing discovery on "representative products" for the 45nm and 32nm processes, which will reduce the burden upon Intel to produce such discovery for all products made by those processes.[2] Since Intel has already culled the necessary documents for its 45nm and 32nm processes, it would certainly not be unreasonably burdensome for it to do the same for its 22nm process, which is slated for production this year, and for existing research and development documents for its 15nm and 11nm processes, which should not be as extensive.

Further, at least a portion of the infringement evidence that STC will be gathering from the discovery process will be produced by Intel in electronic format at a secure site for viewing, and selected printing. The task of installing additional files onto the secure computer is minimal and not properly referred to as "unduly burdensome."[3]

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[2] The parties have been in discussions regarding a stipulation for discovery obligations and infringement proofs for representative products.

[3] The parameters of the production at the secure site will be set forth in the protective order that will later be provided by the parties to the Court for entry.

2. STC's Requests Are Reasonably Calculated to Lead to Admissible Evidence

As discussed above, the publically available literature indicates that Intel is developing its 22nm, 15nm, and 11nm products. The presentations that have been presented by Intel engineers discuss the use of double patterning technology, and contain pictures of products that have presumably been manufactured by Intel's 15nm process. *See*, Exh. D, at 9; Exh. E, at 20. Since commercial development of new products is not an exception to patent infringement, Intel's 22nm, 15nm, and 11nm processes are properly discoverable.

Discovery of Intel's 22nm, 15nm, and 11nm processes is relevant to this case as it will show the scope of Intel's infringement, which will be necessary when assessing damages. Further, Intel's accelerated entry into the market for future products entitles STC to damages for products developed during the '998 patent term. *See Merck & Co., Inc. v. Mediplan Health Cons., Inc.*, 434 F. Supp. 2d 257, 265-66 (S.D.N.Y. 2006); *BIC Leisure Prods., Inc. v. Windsurfing Int'l, Inc.*, 687 F. Supp. 134, 138 (S.D.N.Y. 1988); *THK Am., Inc. v. NSK Ltd.*, 917 F. Supp. 563, 575 (N.D. Ill. 1996); *Amsted Indus. Inc. v. Nat'l Castings, Inc.*, 1990 U.S. Dist. LEXIS 8553, at *56-68 (N.D. Ill. 1990).

Conclusion

STC's motion should be granted, and Intel should be compelled to produce discovery on its 22nm, 15nm and 11nm processes.

Dated: March 22, 2011

Respectfully submitted,

/s/ Steven R. Pedersen

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Certificate of Service: I hereby certify that on March 22, 2011, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing via electronic mail to all counsel of record.

/s/ Steven R. Pedersen