

Docket No. 22-35652

**In the United States Court of Appeals
For the Ninth Circuit**

In re: INTEL CORP. CPU MARKETING, SALES PRACTICES
AND PRODUCTS LIABILITY LITIGATION:

JIMAYA GOMEZ, RYAN CLARK, LOUISA FERRER, PAMELA GREEN, CARLO GARCIA,
BRUCE BODOFSKY, LINDA PHILLIPS, SCHWARTZ EYE ASSOCIATES, P.A., JUBAL MALAY,
JOSEPH PHILLIPS, KENNETH WOOLSEY, CLAUDE VOGEL, JUSTIN WHIPPO, DAVID
COPELAND, KOTTEMANN ORTHODONTICS, P.L.L.C., ALLIANCE HEALTHCARE SYSTEM, INC.,
KEVIN CRAWFORD, EMILIO RODRIGUEZ, AMY STOREY, GEORGE APPLE, KORY JENO,
ZACHARY RICHARD, CITY OF NEW CASTLE, MARGARITE SAMPSON, CASSANDRA PAYNE,
ALMA JENNINGS, JAMES BRADSHAW, JORDAN ROBBINS, VICTORIA BELLE DUNN,
ROBERT KEY, JAMAL ELAKRAH, KATHLEEN GREER, HIBBITS INSURANCE, JERRY PEACOCK,
CAROL MARZIALE, BLUE PEAKS HOSTING, LLC, MICHAEL NELSON, JACK MEZZELL,
TITI RICAFORT, ANDREW EAST, BARRY WAYNE BROWNING, MICHAEL STRAUB,
ZOG, INC., ARTESIA GENERAL HOSPITAL, and DK SYSTEMS, INC.,

Plaintiffs-Appellants,

v.

INTEL CORPORATION, a Delaware Corporation,

Defendant-Appellee.

*Appeal from a Decision of the United States District Court for the District of Oregon, Portland,
No. 3:18-md-02828-SI · Honorable Michael H. Simon*

APPELLANTS' OPENING BRIEF

CHRISTOPHER A. SEEGER
DIOGENES P. KEKATOS
CHRISTOPHER L. AYERS
SEEGER WEISS LLP
55 Challenger Road, 6th Floor
Ridgefield Park, New Jersey 07660
(212) 584-0700 Telephone
cseeger@seegerweiss.com
dkekatos@seegerweiss.com
cayers@seegerweiss.com

ROSEMARY M. RIVAS
GIBBS LAW GROUP LLP
1111 Broadway, Suite 2100
Oakland, California 94607
(510) 350-9700 Telephone
rnr@classlawgroup.com

Attorneys for Plaintiffs-Appellants

Additional Counsel Listed on Inside cover



COUNSEL PRESS · (213) 680-2300

PRINTED ON RECYCLED PAPER



JENNIFER L. JOOST
KESSLER TOPAZ MELTZER
& CHECK LLP
One Sansome Street, Suite 1850
San Francisco, California 94104
(415) 400-3000 Telephone
jjoost@ktmc.com

STUART A. DAVIDSON
ROBBINS GELLER RUDMAN
& DOWD LLP
120 East Palmetto Park Road, Suite 500
Boca Raton, Florida 33432
(561) 750-3000 Telephone
sdavidson@rgrdlaw.com

CHARLES E. SCHAFFER
LEVIN SEDRAN & BERMAN LLP
510 Walnut Street, Suite 500
Philadelphia, Pennsylvania 19106
(215) 592-1500 Telephone
cschaffer@lfsblaw.com

STEVE D. LARSON
JENNIFER S. WAGNER
STOLL STOLL BERNE LOKTING
& SHLACHTER P.C.
209 SW Oak Street, Fifth Floor
Portland, Oregon 97204
(503) 227-1600 Telephone
slarson@stollberne.com
jwagner@stollberne.com

GAYLE M. BLATT
CASEY GERRY SCHENK FRANCAVILLA
BLATT & PENFIELD LLP
110 Laurel Street
San Diego, California 92101
(619) 238-1811 Telephone
gmb@cglaw.com

ADAM J. LEVITT
DICELLO LEVITT LLC
Ten North Dearborn Street, Sixth Floor
Chicago, Illinois 60602
(312) 214-7900 Telephone
alevitt@dicelloselevitt.com

MICHAEL R. CASHMAN
HELLMUTH & JOHNSON PLLC
8050 West 78th Street
Edina, Minnesota 55439
(952) 941-4005 Telephone
mcashman@hjlawfirm.com

Attorneys for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants Alliance Healthcare System, Inc., Artesia General Hospital, Blue Peaks Hosting, LLC, City of New Castle, DK Systems, Inc., Hibbits Insurance, Kottemann Orthodontics, P.L.L.C., Schwartz Eye Associates, P.A., and Zog, Inc. are not publicly traded corporations and no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iv
INTRODUCTION.....	1
JURISDICTIONAL STATEMENT	4
ISSUES PRESENTED FOR REVIEW	4
STATEMENT OF THE CASE	5
A. Background of the Litigation	5
1. Fundamental Processor Security Requires That Different Users Are “Isolated” from Each Other.....	6
2. Intel Removes Fundamental Security, Thereby Allowing Unauthorized Access	8
3. Intel Conceals the Defects	10
4. The Defects Uniquely Expose Intel CPUs to Numerous Exploits	11
5. Intel Conceals the Exploits	12
6. The Intel CPU Exploits Are Genuine, Not Theoretical.....	13
7. Intel’s Mitigations Do Not Genuinely Fix the Defects.....	14
B. Proceedings in the District Court	16
1. The District Court Contingently Sustains Several of Plaintiffs’ Claims	16
2. On Materially Identical Allegations, the District Court Then Rejects Claims It Had Determined to Be Cognizable	18

3. The District Court Then Upholds Some Claims but Trims Them to Cover Only Seven Plaintiffs Who Purchased Intel-Powered Equipment on or After September 1, 2017.....	19
4. The District Court Again Changes Course and Dismisses Even the Claims That It Had Pared Down	21
STANDARD OF REVIEW	23
SUMMARY OF ARGUMENT	24
ARGUMENT	30
I. PLAINTIFFS AMPLY PLEADED UNFAIR CONDUCT-BASED CLAIMS	30
A. The District Court’s March 2021 About-Face on Plaintiffs’ Unfair Conduct-Based Claims After Having Previously Held That Those Claims Were Viable Was Marred by Legal and Factual Error	31
B. The District Court’s Subsequent Rejection of Plaintiffs’ Unfair Conduct-Based Claims as Overlapping with Their Omission-Based Claims Also Rested on Legal and Factual Error	40
C. At a Minimum, the District Court Abused Its Discretion in Granting Reconsideration and Dismissing the Unfair Conduct-Based Claims That It Had Pared Down	48
II. PLAINTIFFS AMPLY PLEADED OMISSION-BASED CLAIMS	53
A. Applicable Standards	54
B. Plaintiffs Satisfied the <i>LiMandri</i> Test	57
1. Intel Had Knowledge of the Defects as Early as 2006.....	57
2. Plaintiffs Did Not Know About the Defects Before January 2018 and Could Not Reasonably Have Discovered Them.....	64

Explore Litigation Insights



Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.