IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE INTEL CORPORATION MICROPROCESSOR ANTITRUST LITIGATION	MDL No. 1717-JJF
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
PHIL PAUL, on behalf of himself and all others similarly situated, Plaintiffs, v. INTEL CORPORATION, Defendants.	C.A. No. 05-485-JJF CONSOLIDATED ACTION

PLAINTIFFS' OPPOSITION TO INTEL'S MOTION, PURSUANT TO RULES 16 AND 56, FOR A PRETRIAL CONFERENCE TO SEEK THE COURT'S DETERMINATION OF KEY ISSUES OF LAW THAT WILL GOVERN COMPLETION OF PREPARATION AND TRIAL

Defendants Intel Corporation and Intel Kabushiki Kaisha (collectively, "Intel") have moved for a pretrial conference under Rule 16 for the purpose of addressing what Intel describes as "basic and purely legal issues of antitrust doctrine." Intel Mot. 4. Plaintiffs Advanced Micro

Devices, Inc. and AMD International Sales & Service, Ltd. (collectively, "AMD") oppose the motion, for the reasons elaborated below.

INTRODUCTION

Intel's motion is, on its face, a premature and distracting effort to litigate issues that will be, should be, and typically are litigated through the standard process of summary judgment, *after* the parties have established the relevant factual context through factual and expert discovery. Contrary to Intel's submission, the issues raised by its motion are far from "purely legal," as Intel well knows. Its own memorandum is filled with contestable factual assertions that cannot be evaluated without reference to the factual record, as well as dubious economic claims about the operation of monopolistic markets that require serious expert economic analysis. Intel itself thus makes abundantly clear that the issues it seeks to raise are inextricably intertwined with the extensive and complicated discovery record still being developed, including the expert discovery that has not yet even commenced.

The false logic underpinning Intel's motion is palpable. Intel claims that its objective is to "seek early resolution of disputed legal issues so the parties may tailor their discovery, expert reports, and subsequent motions to the issues on which the case will turn." Intel Mot. 3. But if that objective ever made sense in the context of this case, then Intel should have filed this motion several years ago, *before* the discovery process commenced, rather than at its tail end, as the parties triple- and quadruple-track depositions worldwide, and exchange massive amounts of written discovery. Of course Intel did not file the motion years ago, because the issues raised in the motion plainly *cannot* be abstracted from the specific facts and rigorous expert economic analysis crucial to understanding the basic issues in this case, i.e., what conduct Intel committed, and whether and how that conduct undermined true competition "on the merits" in the

microprocessor markets. The purpose of the motion is transparently *not* to address legal issues that can be fairly decided without actual facts and expert economic analysis, but to shift the Court's attention *away* from the actual facts and expert economic analysis-no doubt because the developing record is confirming the worst assumptions about Intel's anticompetitive conduct, as illustrated by last week's EC ruling and unprecedented $1.45 billion fine. *See* Press Release, European Commission, *Antitrust: Commission Imposes Fine of €1.06 bn on Intel for Abuse of Dominant Position; Orders Intel to Cease Illegal Practices* (May 13, 2009), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/745&format=HTML&aged=0&language=EN&guiLanguage=en.

The right time and manner for addressing the issues raised in Intel's motion is the standard process of summary judgment, upon conclusion of factual and expert discovery. That is what the repeatedly re-negotiated pretrial order in this case contemplates, and is what this Court's own standing order requires. Intel's brief suggests that this Court is *required* to address immediately the issues Intel raises, but of course the suggestion is false. Courts routinely reject motions like this as premature where, as here, they seek adjudication of abstract issues unmoored from the factual context in which they are being litigated. The Court should follow the same course here. The issues Intel seeks to raise can and will be addressed through the summary judgment process, as the parties and the Court have always anticipated. There is no reason to jump the gun on that process, and every reason *not* to decide fact-intensive questions of antitrust law without any reference to the very facts that make such questions relevant.

Intel's motion for a Rule 16 conference should be denied.[1]

[1] Intel's motion primarily seeks a Rule 16 conference to address the issues Intel raises. In a footnote, Intel "alternatively invokes" the partial summary judgment procedure of Rule 56(d), because that is how "[s]ome litigants have styled their request for a pretrial narrowing of legal

ARGUMENT

1. As Intel essentially admits, while its motion is styled as a request for a Rule 16 conference, it is tantamount in substance to a motion for partial summary judgment. Intel Mot. 3 n.2. But this Court has already established--with the parties' agreement--an orderly timeline that appropriately schedules summary judgment briefing after the conclusion of discovery. Under Case Management Order No. 7, adopted by this Court on April 14, 2009, fact discovery will conclude on June 12, 2009; expert discovery will take place between July 20 and November 27, 2009[2]; and summary judgment motions must be filed by November 2, with summary judgment briefing to be completed by December 14, 2009.

There is no basis for departing from that schedule, and thereby distracting the parties from the demanding task of completing the extensive factual discovery that remains to be accomplished in the next four weeks. The agreed-upon schedule reflects the ordinary procedure--and the procedure adopted in the Court's standing case management order--which is to consider motions for summary judgment only after discovery is completed. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Courts thus have authority to deny or postpone premature summary judgment motions filed before "full discovery," *id.* at 326, and they routinely reject premature requests for partial adjudication, *see, e.g.*, *Cox v. Sadd*, 2007 WL 2874234, at *1 (M.D. Ga. Sept.

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issues" in other cases. Intel Mot. 3 n.2. This response does not address this "alternative[]" Rule 56(d) version of the motion on its merits, because, as explained in the text, the motion is premature and thus cannot be seriously addressed on its merits.

If the Court believes, however, that Intel's motion is properly treated as a Rule 56 motion and that it is appropriate at this time to address the issues Intel raises, AMD requests a reasonable opportunity to respond on the merits, to demonstrate not only the errors in the "legal principles" Intel invokes, but also the many disputed facts implicated in addressing those principles, as well as the substantial factual and expert discovery AMD would need to respond fully to Intel's contentions. *See* Fed. R. Civ. P. 56(f).

[2] The parties' expert witness reports will be served between July 20 and October 1, and expert witness depositions will take place between October 2 and November 27.

26, 2007). The function of partial summary judgment is "not to address premature or hypothetical questions regarding the molding of a verdict that may be rendered." *Ruberto v. Maritrans Operating Partners, L.P.*, 1993 WL 316754, at *2 (E.D. Pa. Aug. 23, 1993). Indeed, rather than simplifying a case, "premature motions for summary judgment waste limited judicial resources in reviewing what is, at best, an incomplete record." *Bogan v. Hawksnet Ski & Snow Tubing, Inc.*, 2005 WL 2588140, at *1 (W.D.N.C. Oct. 12, 2005).

The same principle obtains for Rule 16 conferences. *See* 6A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1525, 251-52 (2nd ed. 1990) ("the pretrial conference is not intended to serve as a substitute for a trial," and should not be used "to determine disputed issues of fact or to render a decision after all the issues have been presented"); *id.* § 1528, at 293 ("the success of the pretrial conference often depends upon the parties having completed their discovery proceedings beforehand"). Local Rule 16.03(a) expressly provides that a party may request a pretrial conference "following the completion of discovery and any scheduled motion practice" (emphasis added). Local Rule 16.03(c) likewise provides that conferences may occur after parties have identified and exchanged all trial exhibits. The Local Rule directly controlling Intel's motion thus refutes the motion's central premise: in this District, the appropriate time for narrowing the issues for trial is understood to be after the parties have completed factual and expert discovery, and thus have a full understanding of what the issues truly are, and how they relate to their factual context. And that is exactly what the parties in this case have contemplated all along--as confirmed by the fact that in discussing the pretrial order, Intel at no time even hinted at the prospect of "narrowing" the litigation through a special round of legal briefing unmoored from the factual record and relevant expert economic analysis.

2. Intel's own brief demonstrates the importance of facts and economic analysis to the issues Intel raises. Intel's analysis repeatedly cites facts and economic principles as if they were true, when in fact many are hotly contested and are the subject of continuing evidentiary development. For example, Intel asserts that it would be "straightforward" to determine the incremental costs of producing an extra unit, but not to determine the average total cost of manufacturing any given product, Intel Mem. 25, and that its deals with OEMS were "constantly at risk," Intel Mem. 28. By Intel's own account, then, the extent of the truth in those claims is crucial to the disposition of the issues it raises, yet neither claim is necessarily or entirely correct. Intel's memorandum is infused with reliance on similar contested factual and economic claims. *See id.* at 1 (asserting that this case involves "above-cost price concessions"); *id.* at 2-3, 14 (asserting this case is only a single-product context); *id.* at 3 (asserting that Intel's conduct does not involve long-term exclusivity contracts or withholding needed goods from customers); *id.* at 11 (pronouncing categorically that a "market-share discount serves an essential and perfectly valid risk-reducing function for buyer and seller alike"); *id.* (asserting that Intel's discounts are volume discounts, and that, contrary to basic economic theory, there is "no meaningful conceptual difference" between volume and "first-dollar" discounts); *id.* at 24 (asserting that industries most likely to produce Section 2 disputes have high fixed costs and low incremental costs); *id.* at 25 (asserting that AMD's approach would "force efficient manufacturers into wasting [extra] capacity"); *id.* at 28 (acknowledging that there is "some debate" over where to draw the line between short- and long-term exclusivity contracts, but asserting that "most or all of the contracts at issue here fall comfortably on the short-term side of any line that might be drawn"; "Intel's deals with its customers were almost always of very short duration"; "most OEMs bought from both AMD and Intel during any given quarter"); *id.* at 31 (claiming

incorrectly that AMD "does not seriously allege that any of Intel's price-related conduct amounted to a de facto refusal to deal with 'disloyal' OEMS" (emphasis removed)); *id.* at 37 (claiming incorrectly that AMD "does not seriously claim … that Intel priced below cost in thousands of transactions"); *id.* (asserting that voluminous below-cost transactions would contradict "the facts" that "Intel has run a highly profitable microprocessor business throughout the relevant period" and "AMD's market share was substantial and increasing").

More specifically, each of the particular "principles" Intel seeks to raise implicates evidence and expert economic analysis that must be fully developed to evaluate the principle. For instance, the first "principle" Intel raises is the question whether the above-cost pricing safe harbor of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), applies in the context of this case. Intel Mem. 4. But the answer to that question, of course, depends on the facts establishing that context. The consequences of speaking in abstractions and ignoring the concrete record are evident from the face of Intel's memorandum, which simply caricatures AMD's claims as asserting "that Intel won too much business away from AMD by offering customers generous discounts and other price concessions when the purchases met certain volume or percentage thresholds." Intel Mot. 4. As Intel well knows--and as the EC just found as a matter of fact--the conduct exposed in the discovery record goes well beyond pure price discounting. Understanding whether and when *Brooke Group* applies to Intel's conduct, and whether a given price is actually "above cost" within the meaning of *Brooke Group*, requires a complete and accurate understanding of exactly what conduct Intel engaged in, and how that conduct affected competition in the microprocessor markets.

The same is true for the other "principles" Intel invokes. For example, the correct "price-cost" test may well depend on the particular cost structure of the industry. Indeed, Intel

itself characterizes its position as arguing that the "incremental cost" test it favors applies "*in this context*." Intel Mem. 3 (emphasis added). To that end, Intel's memorandum spends multiple pages arguing specific facts about the microprocessor industry that supposedly justify application of that test to "this context." *Id.* at 23-25. Intel's brief thus tacitly concedes that the factual details of a given industry's cost structure are highly relevant to the appropriate price-cost test. The recent decision in *Meijer, Inc. v. Abbott Laboratories*, 544 F. Supp. 2d 995 (N.D. Cal. 2008), confirms the same point, in holding that the use of average variable cost to measure a manufacturer's costs is inappropriate when the antitrust claims involve industries in which "fixed costs in the form of investment in research and development dwarf variable costs." *Id.* at 1004. When applied to such industries (like the pharmaceutical industry in *Meijer* and the microprocessor industry here), the average-variable-cost measure fails to achieve the antitrust goal of "prohibiting pricing that results in the exclusion of equally efficient competitors," because would-be competitors will not enter the market without some prospect of being able to price high enough to recoup fixed as well as variable costs. *Id.* ("An appropriate antitrust rule here should have the effect of prohibiting [the manufacturer's] pricing practices if a hypothetical equally efficient developer of an equally effective [product] would not be able to profit if it introduced that [product] to the market at … the imputed price ….") . In short, Intel's price-cost argument reduces to a contention that the *facts* of the microprocessor industry do not warrant use of a test other than average variable cost, but by its own terms that question is not "purely legal," but instead turns on factual claims about the nature of the industry that are in serious dispute.

Intel's arguments about exclusive dealing "principles" are, if anything, even more explicitly dependent on disputed factual claims. Intel initially contends that only "long-term" exclusive deals can be anticompetitive, but then it promptly admits that there is "some debate"--a

dramatic understatement--"about exactly where to draw the line between 'long-term' and 'short-term' exclusivity contracts for these purposes." Intel Mem. 28. Intel does not even begin to suggest how the Court could draw that line in the abstract, without reference to the factual record and to expert economic analysis of that record. Obviously such abstract line-drawing is impossible--to draw any meaningful line here, the Court will, again, need a full and accurate understanding of how contracts and relationships operate in the microprocessor industry, and how seemingly short-term contracts can become de facto long-term given standard demand schedules and supply constraints.

3. Although a complete understanding of the facts and relevant economic principles is critical to a proper assessment of the issues Intel raises, an enormous amount of the factual and expert discovery necessary for that understanding is yet to be completed. The parties already have more than *sixty* depositions scheduled for the next four weeks, and Intel recently issued ten more subpoenas for depositions of third parties. Intel also just propounded new interrogatories inquiring into minute details of AMD's claims, and supplemented earlier interrogatories seeking information about every act and transaction AMD claims to be anticompetitive. *See* Attachments A and B hereto. And discovery of expert witnesses, including economic and industry experts, has not even commenced. The amount of discovery remaining shows why Intel's motion is premature--there is simply far too much still to be done in the short time remaining for the parties and the Court to provide complete, fact-based, concrete analysis of the issues Intel seeks to raise. The remaining discovery also shows why Intel's motion is the wrong vehicle for addressing those issues: the fourth "principle" Intel seeks to address is simply a specification of the transactions at issue in this case, which is exactly what Intel is already pursuing in its existing discovery.

The correct pretrial procedure for addressing the issues raised by Intel is the standard summary judgment procedure already long contemplated by the pretrial order. That procedure will allow Intel to raise the same issues, but the Court will be able to evaluate those issues in their full factual context, and with the aid of expert economic and industry analysis. The Court therefore should reject Intel's motion as premature, and should adhere to the ordinary case progression reflected in the pretrial schedule the Court and all parties have already agreed upon.

4. As noted above, *supra* note 1, if the Court nevertheless decides that Intel's motion deserves consideration prior to the contemplated summary judgment proceedings, AMD requests a reasonable time period in which to prepare a response on the merits, including a Rule 56(f) declaration detailing the additional discovery necessary to respond fully to Intel's contentions. Given the sizeable demands of AMD's outstanding discovery obligations, including its ongoing preparation of the unusually complex expert reports this suit requires, AMD requests that it be allowed at least until August 3, 2009 (two weeks after its expert reports are due) to file such a response.

CONCLUSION

For the reasons set forth above, Intel's motion for a mid-discovery pretrial conference should be denied.

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Dated: May 22, 2009

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2009, I electronically filed the foregoing document with the Clerk of Court using CM/ECF and have sent by Hand Delivery to the following:

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