

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

IN RE )  
INTEL CORPORATION )  
MICROPROCESSOR ANTITRUST ) MDL No. 05-1717-JJF  
LITIGATION )  
\_\_\_\_\_ )

ADVANCED MICRO DEVICES, INC., a Delaware )  
corporation, and AMD INTERNATIONAL SALES )  
& SERVICE, LTD., a Delaware corporation, )

Plaintiffs, )

C.A. No. 05-441-JJF )

v. )

INTEL CORPORATION, a Delaware corporation, )  
and INTEL KABUSHIKI KAISHA, a Japanese )  
corporation, )

Defendants. )  
\_\_\_\_\_ )

PHIL PAUL, on behalf of himself )  
and all others similarly situated, )

Plaintiffs, )

C.A. No. 05-485-JJF )

v. )

CONSOLIDATED ACTION )

INTEL CORPORATION, )

Defendant. )  
\_\_\_\_\_ )

**INTEL'S RESPONSE TO PLAINTIFFS'  
JOINT PRELIMINARY CASE STATEMENT**

**PUBLIC VERSION**

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## I. INTRODUCTION

AMD's Preliminary Case Statement resoundingly demonstrates the wisdom of the staged, proportionate discovery plan advanced by Intel.<sup>1</sup> The Special Master recognized the merit of staging depositions and specifically asked the parties to address the extent to which discovery should be staged, and, if so, how: "Because my thought is that, I am thinking in terms of staging discovery, if you will, not necessarily determining the number of stages, but staging discovery in a fashion that may begin to focus on the . . . more significant third parties." (March 27, 2008 Special Master Conference Tr. at 14.)

Intel proposed in its Preliminary Pretrial Statement that the first stage of deposition discovery in this action, through early 2009, focus on key U.S.-based third-party customers, in particular, the three key U.S.-based OEMs: Dell, Hewlett-Packard, and IBM/Lenovo. By contrast, AMD ignored the request for a staging proposal, and proposed a no-holds-barred, worldwide discovery crusade – with no stages, no limits, no plan. AMD proposes taking at least [REDACTED] depositions throughout the world, including [REDACTED] depositions of third parties that AMD either does not mention or references only in passing.

AMD's Statement in fact reinforces that Intel's proposal has the appropriate focus. AMD states, for example, that the major domestic OEMs are Dell, HP, and IBM/Lenovo. In particular, AMD characterizes HP and Dell as "the dominant players" that together control over 30% of the worldwide desktop and mobile PC sales and almost 60% of worldwide server sales. (AMD's Preliminary Case Statement ("PCS") at 18.) Their U.S. share in these product lines is even larger. Moreover, AMD claims that HP, Dell, and IBM/Lenovo "control most of the higher value, enterprise business" (*id.*), which is a focus of AMD's allegations. However, even as to those third parties, the number of depositions AMD seeks is excessive. AMD seeks to depose no

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<sup>1</sup> For convenience, Intel will refer only to AMD in this Response, except in the Section addressing Class Plaintiffs' request for relief.

fewer than [REDACTED] representatives of Dell, HP, and IBM/Lenovo, in contrast to the 14 depositions that Intel seeks from the same third parties. AMD also seeks to depose [REDACTED] Intel witnesses on those three accounts alone, whereas Intel seeks 50 AMD depositions in total. While AMD's numbers are completely unreasonable, AMD's Statement confirms that the first stage of discovery should focus on those accounts.

The number of depositions that AMD requests, which does not even include depositions of witnesses that AMD says that it might add, is staggering, and understates the magnitude of the problems that AMD would create. The count of nearly [REDACTED] depositions (almost half of which involve third-party witnesses) does not include the additional depositions that Intel would require, not only of AMD, but of third parties, to respond. AMD makes precious little showing of the need for [REDACTED] depositions. For many third parties it provides no support for its requested depositions.<sup>2</sup> For others, it wants to take [REDACTED] depositions, even though only a few individuals played a decision making role.

AMD does not explain how those depositions – including of many witnesses located abroad, outside the subpoena power of the Court – can be taken in any reasonable time frame. AMD also does not address Rule 26(b)(2)(C) of the Federal Rules of Civil Procedure, which requires that discovery be planned so that the burden and expense do not outweigh the likely benefit. And the only mention that AMD makes of the Court's FTAIA decision is to hint that it intends to have its experts attempt to circumvent the ruling. (PCS at 94-95.) As discussed in Intel's Statement, the FTAIA ruling should be accounted for in framing deposition discovery,

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<sup>2</sup> [REDACTED]

and its scope properly should be evaluated after key depositions regarding transactions directly affecting U.S. commerce have been conducted.

AMD's contention that it needs almost █████ depositions is premised on a profoundly misguided view of the law, which, contrary to AMD's view, confers a legally protected status on above-cost discounting.<sup>3</sup> AMD's attempts to cast Intel's discounts to its OEM customers as "payments" and "bribes" cannot disguise that AMD is attacking price competition. The "payments" and "bribes" turn out to be no more than discounts granted to win profitable sales, and are the type of discounts or payments that AMD itself routinely offers to customers. Nor do AMD's limitations as a competitor – which according to AMD include "end-user demand that is microprocessor specific" (PCS at 78), an admission that end users prefer Intel – justify restricting Intel's ability to compete on price. As the leading antitrust treatise explains, "[a]ntitrust begins with the premise that all firms, even dominant firms, are permitted to compete aggressively, and that hard competition is a desideratum rather than an evil." 3 Phillip Areeda and Herbert Hovenkamp, ANTITRUST LAW ¶ 735a at 365 (2d ed. 2002).

In an attempt to circumvent the governing legal standards, which encourage price competition, AMD proclaims that Intel is "bundling" its microprocessors, even though the alleged "bundle" is of a single product that AMD also supplies. AMD takes this position in a vain attempt to bring this case within the ambit of *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc), which involved the bundling of unrelated products that only the defendant supplied and the plaintiff could not match. As Intel showed in its Statement, any attempt to extend *LePage's* to unilateral pricing practices and beyond the bundling of disparate, unrelated products addressed in that decision is unsupportable in light of subsequent Supreme Court authority. (Intel's Preliminary Pretrial Statement ("PPS") at 13-22.) Controlling Supreme Court

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<sup>3</sup> AMD's Statement confirms that this case is an attack on Intel's price competition. This can easily be gleaned from AMD's "bullet" points on pages 3-8 that summarize Intel's alleged anticompetitive acts, all but one of which, although phrased pejoratively, involve discounting.

authority, which AMD ignores, requires AMD to show that Intel sold its microprocessors below cost and that there existed a dangerous probability that Intel would thereafter recoup the losses it thereby sustained. *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1074 n.1 (2007); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-27 (1993). The Third Circuit, in line with other circuits, has stated that any sale at prices above marginal cost “decreases losses or increases profits” and therefore is “presumably not predatory.” *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1198 (3d Cir. 1995).

AMD’s discovery approach reflects its untenable legal position. Having ignored any objective price/cost considerations in its proposed legal standard of conduct, AMD wants to depose hundreds of witnesses in a worldwide search for what it seeks to label as “bad acts” – aggressive language, hard negotiations, intense back and forth, and emotional outbursts. But the law marginalizes the relevance of such evidence, *see Advo*, 51 F.3d at 1199, which is no substitute for the essential showing of anticompetitive conduct and does not provide a basis for discovery untethered to such conduct. Here, the alleged wrongful conduct is price discounting, and the decisionmaking authority was concentrated in a few individuals and not in the hands of the hundreds of individuals that AMD seeks to depose.

Rather than propose a rational deposition plan, AMD resorts to selective and often misleading citations to documents and colorful rhetoric to suggest that the written record is incomprehensible and incomplete,<sup>4</sup> that sinister conduct lurks everywhere Intel negotiated a discounted sale, and that the only way to uncover it is to go on a worldwide fishing expedition involving the entire computer industry. Intel has responded and will respond here to as many of AMD’s baseless allegations and mischaracterizations as space permits.<sup>5</sup> But disagreement on

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<sup>4</sup> [REDACTED]

<sup>5</sup> AMD also makes reckless and groundless allegations to support its deposition proposal. [REDACTED]

the interpretation of certain events has no bearing on the discovery needed, which is determined by the scope of material issues under the law.

Intel's discovery proposal will allow the parties to focus in the first instance on the major transactions with the major domestic OEMs, which account for a very large share of the U.S. sales of microprocessors and which, according to AMD, are central to its case. AMD has defaulted on its obligation to present a reasonable discovery plan, offering instead an overbroad and overreaching mess. Thus, there is only one real plan before the Court – Intel's.

## **II. AMD'S VIEW OF THE LEGAL STANDARDS FOR ANTICOMPETITIVE CONDUCT IS CONTRADICTED BY SUPREME COURT AUTHORITY**

As set forth in Intel's Statement, a long and consistent line of Supreme Court authority makes clear that any claim of antitrust injury resulting from a firm's pricing practices must be analyzed under *Brooke Group's* predatory pricing test. The Supreme Court has held firmly to this bright-line rule, recognizing that "cutting prices in order to increase business often is the very essence of competition" and that "mistaken inferences" of anticompetitive effects are "especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). The high and unacceptable "cost of false positives counsels against an undue expansion of § 2 liability." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004). AMD disregards this bright-line rule and seeks extended discovery in a quest to show that Intel's above-cost pricing somehow could eventually have led to a "less" competitive world, or somehow was "unfair." This the law does not permit.



**A. AMD's Challenge to Intel's Pricing Practices Is Governed by *Brooke Group***

As Intel showed in its Statement, this case is fundamentally about discounting, and AMD's characterizations of discounts provided by Intel to win profitable sales as "payments" to exclude AMD or even "bribes" cannot alter the discounts' lawful character. *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 453 (6th Cir. 2007) (en banc) ("payments" to customers are "nothing more than 'price reductions'"). Winning sales with above-cost pricing is not anticompetitive. It is, according to the large body of Supreme Court decisions that AMD studiously ignores, precisely what the antitrust laws encourage.

AMD's attempts to characterize discounts as forms of exclusive or near-exclusive dealing are far off the mark both factually and legally. Factually, AMD's exclusivity claims are based on

[REDACTED]

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6 [REDACTED]

7 [REDACTED]

AMD's sweeping claims of broad, market-wide agreements in which discounts are conditioned on exclusivity simply have no factual grounding. For example, AMD claims that "Intel conditions its all-or-nothing rebate on the customer meeting an Intel-established purchase target that reflects all, or virtually all, of the OEM's requirements." (PCS at 78.) Inconvenient facts – such as AMD's "capture [of] nearly 60% of HP's U.S. retail sales," according to AMD's own Complaint (Compl. ¶ 64) – are swept aside to preserve the dramatic effect, as are the factors that contributed to AMD's gains in the segments in which it was successful and the shortcomings that had held AMD back in other market segments. Thus, while AMD harps repeatedly on its alleged exclusion from the commercial segment, and its Complaint alleges that there is "no reason, other than Intel's chokehold on the OEMs," for AMD's lack of success in this sector (*id.* ¶ 62), its own Chairman

*See, e.g.,* Section III.B., *infra.*

Legally, AMD's attempts to avoid the unmistakable message of two decades of Supreme Court jurisprudence, by characterizing discounts as exclusivity payments, are equally unfounded. The Supreme Court has made clear that every firm is entitled to compete for business by offering lower prices. *See Weyerhaeuser*, 127 S. Ct. at 1076; *Trinko*, 540 U.S. at 407. It has affirmed repeatedly that "[l]ow prices benefit consumers *regardless of how those prices are set*, and so long as they are above predatory levels, they do not threaten competition." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) (emphasis added), *quoted in Weyerhaeuser Co.*, 127 S. Ct. at 1074; *Brooke Group*, 509 U.S. at 224-25. The Court has "adhered to this principle regardless of the type of antitrust claim involved." *Id.*, *quoted in Brooke Group*, 509 U.S. at 223.

Whereas the Supreme Court has stressed that above-cost pricing is per se *lawful*, AMD articulates purported rules of per se *illegality*. For example, AMD claims that "leveraging of rebates on sales on which Intel faces no competition to secure sales where it confronts competition constitutes 'an act of willful acquisition and maintenance of monopoly power' and is

