IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE INTEL CORPORATION MICROPROCESSOR ANTITRUST LITIGATION	)	MDL No. 05-1717-JJF
ADVANCED MICRO DEVICES, INC., a Delaware corporation, and AMD INTERNATIONAL SALES & SERVICE, 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, Defendant.	)	C.A. No. 05-485-JJF CONSOLIDATED ACTION

MEMORANDUM IN SUPPORT OF 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

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Pursuant to Rules 16 and 56 of the Federal Rules of Civil Procedure and this Court's inherent case-management authority, Intel Corporation and Intel Kabushiki Kaisha (collectively "Intel") ask the Court to simplify this exceptionally complex litigation by clarifying the basic antitrust principles that will govern future proceedings, including trial, and by directing Advanced Micro Devices, Inc. ("AMD") to identify the specific transactions on which it will rely in claiming that Intel engaged in anticompetitive pricing-related conduct. To begin this process, Intel respectfully requests that the Court direct the parties to appear before it for a conference in the near future to address the legal issues presented in this motion.

SUMMARY

This motion is organized around four main legal principles Intel asks this Court to address at an early Rule 16 pretrial conference. We briefly summarize them here.[1]

1. Beneath all its rhetoric, AMD complains principally that Intel made large price concessions—in the form of discounts, rebates, or marketing assistance—to persuade original equipment manufacturers ("OEMs") and other customers to buy as many microprocessors as possible from Intel (and therefore not from AMD). However labeled, such claims are subject to the well-established *Brooke Group* standard, which creates an absolute "safe harbor" for above-cost price concessions, *Pacific Bell Tel. Co. v. LinkLine Commc'ns*, 129 S. Ct. 1109, 1121 (2009)—that is, a bright-line legal principle that above-cost price cutting is *per se* legal, regardless of the form it takes. This safe harbor—the antitrust equivalent of freedom of speech—protects above-cost price concessions no matter what the subjective motivations of the

[1] For purposes of this motion only, we assume that Intel has "monopoly power." In fact, however, the microprocessor market has exhibited none of the characteristics of a monopolized market. To the contrary, microprocessor output has steadily increased, and microprocessor prices have declined dramatically every year, while the industry has maintained a stunning rate of innovation and product improvement—the very antithesis of a stagnant monopoly market controlled by a dominant company wielding monopoly power.

defendant might have been, whether or not any discount is applied to the entire volume of sales in a given transaction ("first-dollar discounts") or only to the last few increments of demand, and whether the price concessions are conditioned on absolute volume or a designated percentage of a buyer's purchases.

As applied here, the *Brooke Group* safe harbor precludes liability unless AMD proves (among other things) that Intel's price levels, taking price concessions into account, fell below cost with respect to *the total number of units* sold in a given transaction. In the teeth of that precedent, AMD proposes an alternative analysis based on a purported distinction between "contestable" and "uncontestable" sales. *See* AMD PCS 78-80.[2] Under AMD's approach, a larger firm would have to determine how much of any given customer's business in each transaction its smaller competitor could realistically capture, and would then have to make sure that its overall discounts (while above-cost) do not give it some sort of "unfair" advantage on that "contestable" portion of the customer's demand. But the main case AMD relies on for this proposition—*LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc)—does not begin to support it. *LePage's* rested on "leveraging" concerns specific to *bundled* discounts applied across *multiple products in distinct markets* where the plaintiff was unable to supply key products within the bundle. The courts of appeals and the leading antitrust treatise have all concluded that the *Brooke Group* rule is appropriate in all single-product cases, even if more complex rules may be appropriate in multiproduct cases.

2. Under any price-cost test, the proper measure of cost is incremental or average variable cost, not any form of average total cost. A strong judicial consensus, which the Third Circuit has endorsed in *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191 (3d Cir.

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[2] "PCS" refers to the parties' preliminary case statements, filed on May 1, 2008. Each party then filed its Response ("Resp.") to the other's PCS on May 12, 2008.

1995), supports the use in this context of "incremental" (or "marginal" or "average variable" or "average avoidable") cost, which is "the cost of producing each incremental unit of output," *id.* at 1198, and excludes all fixed costs. "As long as a firm's prices exceeds its marginal cost, each additional sale decreases losses or increases profits," makes economic sense without regard to its impact on a competitor, and "is presumably not predatory." *Id.*

3. AMD prefers to avoid tying its allegations too closely to any single theory of antitrust liability, particularly any theory that could be analyzed under the bright-line *Brooke Group* standard. AMD thus insists that many of its pricing allegations state claims of "exclusive dealing" as well, in the hope that the law in that area is more favorable to it—or at least less settled—than the law governing pricing-related conduct. But AMD's allegations about Intel's pricing-related conduct do not state a cognizable claim of "exclusive dealing." In antitrust law, "exclusive dealing" does not refer to a defendant's mere success in besting its competitors through lower prices, higher quality, a more respected brand, or the many other criteria that are important to buyers. Instead, particularly in single-product contexts like this, the term is properly confined to (i) long-term exclusivity contracts (such as "Customer shall not buy from Seller's rivals for the next three years") and (ii) a firm's enforcement of exclusivity by withholding needed goods altogether (as opposed to reducing or withholding mere discounts on those goods) from customers that do business with the firm's rivals. The "exclusive dealing" concept does not encompass conduct that falls *outside* those two categories and *within* the *Brooke Group* (or *Cascade Health*) safe harbor for above-cost discounts. A plaintiff therefore cannot remove a case from that safe harbor, and defeat all of the policy reasons underlying it, simply by invoking the words "exclusive dealing" rather than "predatory pricing."

4. The burden of proof rests with AMD to prove each element of any antitrust claim.

Moreover, AMD cannot avoid proving *all* the elements of any *one* theory of liability by combining proof of *some* elements of *different* theories of liability. Finally, to keep this litigation manageable, the Court should direct AMD to identify which transactions it intends to rely upon as evidence of any supposedly anticompetitive pricing practices.

ARGUMENT

AMD's pretrial statement is a litany of claims that Intel engaged in "predatory bid pricing" (AMD PCS 6); that it provided "loyal" OEMs with "slush funds" (*id.*); that it "coerced" loyalty from OEMs by threatening to withhold "rebates" from them otherwise (*id.* at 26); that it placed OEMs in "hammerlocks" through price incentives (*id.* at 13); that it "bribe[d]" OEMs to buy microprocessors from Intel rather than AMD (*id.* at 83); and that it won business through "exclusionary tricks" such as offering deep "discount[s]" to OEMs if they "purchas[ed] very high volumes from Intel," thereby "effectively capp[ing] at a very low level" the amount of business left for AMD (*id.* at 29). AMD evidently hopes that epithets alone, if repeated enough, will add up to an antitrust cause of action. That, however, is not how antitrust claims are properly litigated. At some point, a plaintiff must clearly delineate each legal theory on which it hopes to prevail; specify the elements of liability under each theory without relying on empty buzzwords and sound bites; and begin identifying the evidence it claims will satisfy its burden of proof on each such element. *See* Legal Principle IV, *infra.* That point has arrived here.

LEGAL PRINCIPLE I: **However articulated, all claims that Intel took business from AMD by making price concessions must fail as a matter of law if Intel's prices exceeded its costs.**

Most of AMD's claims can be reduced to a single assertion: that Intel made unlawful price concessions to persuade OEMs and others to buy as many microprocessors as possible from Intel rather than AMD, its main competitor. Such claims about pricing conduct (however

labeled) are subject to the *Brooke Group* analysis, and AMD's proposed distinction between "contestable" and "uncontestable" sales provides no basis for avoiding that analysis.

A. In *Brooke Group* and subsequent decisions, the Supreme Court has firmly entrenched the bright line principle that above-cost price cutting is *per se* legal, regardless of the form it takes, and regardless of the impact it may have on a rival.

Well-established Supreme Court precedent insulates any firm from antitrust liability when it engages in price-related, sales-boosting conduct unless the plaintiff proves that (i) "the prices complained of are below an appropriate measure of [the defendant's] costs" and (ii) the defendant has "a dangerous probability of recouping its investment in below-cost prices." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993). The Court has repeatedly and consistently, including in two cases decided since 2007, held that above-cost price cutting does not violate the antitrust laws, regardless of the form it takes.[3] These decisions create not just a presumption of legality, but an absolute "safe harbor" that assures firms that "they will not incur liability as long as their retail prices are above cost." *LinkLine*, 129 S. Ct. at 1121.

The Supreme Court has repeatedly emphasized the policy rationale for this safe harbor.

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3 *See Pacific Bell Tel. Co. v. LinkLine Commc'ns*, 129 S. Ct. 1109, 1120-1121 (2009); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 319 (2007); *see also Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-340 (1990); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 114-116 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). A plaintiff's demonstration that the price of the units sold in a transaction fell below their cost is a necessary but not sufficient condition for antitrust liability. The plaintiff must also prove, among other things, that the defendant's predatory conduct foreclosed sufficient opportunities for rivals as to cause material harm to competition in the relevant market as a whole. This additional element of liability depends not on the impact of a defendant's overall business conduct on the plaintiff, but on whether the *specific instances of anticompetitive conduct*, if any, "harm[ed] the competitive *process* and thereby harm[ed] *consumers*." *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (emphasis added); *see generally Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

"Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 319 (2007) (quoting *Atlantic Richfield*, 495 U.S. at 340). The Court is thus "particularly wary of allowing recovery for above-cost price cutting because allowing such claims could, perversely, 'chil[l] legitimate price cutting,' which directly benefits consumers." *Weyerhaeuser Co.*, 549 U.S at 319 (quoting *Brooke Group*, 509 U.S. at 223-224) (alteration in original). Indeed, as the Court explained in *Brooke Group*, "[t]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because cutting prices in order to increase business often is the very essence of competition . . . mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* at 226 (internal quotation marks omitted).[4]

That concern has prompted the Supreme Court to adopt a bright-line rule insulating defendants from antitrust liability whenever they engage in aggressive but above-cost pricing conduct. "[T]he exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Brooke Group*, 509 U.S. at 223; *see also LinkLine*, 129 S. Ct. at 1120-1121; *Verizon Commc'ns, Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 414 (2004). As the Court has acknowledged, this absolute safe harbor will inevitably protect

[4] *See also Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 414 (2004); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 235 (1st Cir. 1983) (Breyer, J.) ("[T]he consequence of a mistake" in this area of law "is not simply to force a firm to forego legitimate business activity it wishes to pursue; rather, it is to penalize a procompetitive price cut, perhaps the most desirable activity (from an antitrust perspective) that can take place in a concentrated industry where prices typically exceed costs.").

some conduct that might injure consumers in the long term but that could be prohibited only if the courts adopted a less precise rule that, because of its lack of precision, would end up chilling pro-competitive conduct as well. "Even if the ultimate effect of the [price] cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy." *Brooke Group*, 509 U.S. at 223-224.[5]

AMD appears to believe that it can distinguish *Brooke Group* and its progeny simply by casting Intel's price concessions in ominous rhetoric—as efforts to harm (or "exclude" or "foreclose") AMD rather than sell more of its own products. For example, instead of simply alleging that Intel offered large discounts to attract more business, AMD alleges that Intel "paid off" (AMD PCS at 3) or "bribe[d]" (*id.* at 83) its customers "not to purchase AMD chips" (*id.* at 3). *See, e.g., id.* at 34 ("The $50 million payment was structured as a quantity-forcing, 'all-or-nothing' rebate, where payment was dependent upon achieving the prescribed volume target," such that any OEM accepting the rebate would be "preclude[d] . . . from buying from AMD[.]"); *id.* at 81 (Intel made "payments targeted at disadvantaging AMD"). But such rhetoric is just another way of describing the very type of conduct that *Brooke Group* is designed to protect, so long as price—taking all discounts, rebates, and other "payments" into account—remains above cost. Because AMD is Intel's primary competitor, it essentially always loses microprocessor sales when Intel gains them, just as AMD generally wins microprocessor sales when Intel loses

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5 *Accord Weyerhaeuser,* 549 U.S. at 319 (exclusionary conduct acceptable if "'beyond the practical ability of a judicial tribunal to control'" (quoting *Brooke Group*, 509 U.S. at 223)). As now-Justice Breyer explained in his seminal *Barry Wright* opinion for the First Circuit, any above-cost price reduction "is almost certainly moving price in the 'right' direction (towards the level that would be set in a competitive marketplace)," and "[t]he antitrust laws very rarely reject such beneficial 'birds in hand' for the sake of more speculative (future low-price) 'birds in the bush.'" *Barry Wright*, 724 F.2d at 234.

them. Thus, when AMD speaks of Intel's "bribes" or "payoffs" to customers to "exclude" AMD, it is virtually always contending simply that Intel offered to charge customers such an attractive price that they decided to buy more of Intel's chips and thus fewer of AMD's chips.[6]

Such claims fall squarely within the scope of the *Brooke Group* analysis and, if price exceeds cost, squarely within the *Brooke Group* safe harbor as well. The *Brooke Group* test governs any "deliberate use of unilateral pricing measures for [allegedly] anticompetitive purposes," *Weyerhaeuser*, 549 U.S. at 313, "*regardless of the type of antitrust claim involved*," because "[l]ow prices benefit consumers regardless of how those prices are set, . . . so long as they are above predatory levels," *Atlantic Richfield*, 495 U.S. at 340 (emphasis added). It thus makes no difference whether a price cut takes the form of a specified discount on each unit sold as it is sold or a lump-sum, volume-based (or percentage-based) rebate credited to the customer before or after all sales for a given period are completed. "If the up-front payments, when combined with the price terms that [the seller] offered each of these large [buyers], 'are not predatory, any losses flowing from them cannot be said to stem from an *anticompetitive* aspect of defendant's conduct.'" *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 452 (6th Cir. 2007) (en banc) (emphasis in original) (quoting *Atlantic Richfield*, 495 U.S. at 340-341). Indeed, "[r]ather than upsetting the competition-enhancing goals of the antitrust laws, the payments furthered them," because "[t]he 'payments' are nothing more than 'price reductions[,]'" and "'cutting prices in order to increase business often is the very essence of competition.'" *Id.* (quoting *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 45 (1st Cir. 2001), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

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[6] Of course, AMD's claim that Intel "pay[s]" its customers (AMD Resp. to Intel PCS 4) is wrong on its facts, as AMD knows. Intel's customers make substantial net payments to Intel on every transaction, not the other way around, and AMD elsewhere complains that Intel reaps monopoly profits from them. *See, e.g.*, AMD Compl. ¶ 33. AMD cannot have it both ways.

There is likewise no merit to AMD's efforts to avoid the *Brooke Group* analysis by arguing that Intel's executives subjectively wished to "foreclose" AMD. *See, e.g.*, AMD PCS 2-3, 19-20. Desirable procompetitive conduct is inherently designed to "injure" rivals by persuading their customers to shop elsewhere.[7] There is no coherent distinction between (i) intent to win as much market share as possible for oneself through above-cost price reductions, and (ii) intent to take as much market share as possible from a competitor by the same means. As now-Justice Breyer has explained, "virtually *every* contract to buy 'forecloses' or 'excludes' alternative sellers from *some* portion of the market, namely the portion consisting of what was bought," and "'intent to harm' without more offers too vague a standard in a world where executives may think no further than 'Let's get more business.'" *Barry Wright*, 724 F.2d at 236, 232. Indeed, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws[.]" *Brooke Group*, 509 U.S. at 224. In a pricing case, that "more," the Supreme Court has made clear, is pricing below the defendant's cost. The Supreme Court has thus consistently held that a defendant's satisfaction of the price-cost test defeats any claim that its pricing conduct unlawfully "foreclosed" rivals—even when the conduct threatened to put them out of business.[8]

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7 *See, e.g.*, 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 651b at 98-108 (3d ed. 2008); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, C.J.); *Olympia Equipment Leasing Co., v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir.) (Posner, J.), *supplemented on denial of reh'g*, 802 F.2d 217 (1986).

8 These cases involved claims (i) that defendants sought to drive plaintiffs "out of business," *Matsushita*, 475 U.S. at 584, (ii) that plaintiff would be driven out of the market by defendant's conduct, *Cargill*, 479 U.S. at 114, (iii) that defendant's conduct sought to impose painful losses on plaintiff by extending "discriminatory volume rebates directed at [plaintiff's] biggest wholesalers," *Brooke Group*, 509 U.S. at 231, (iv) that defendant's conduct "drove many independent gasoline dealers in California out of business," *Atlantic Richfield*, 495 U.S. at 332, (v) that defendant "drove [plaintiff] out of business," *Weyerhaeuser*, 549 U.S. at 314-315, and

In various other respects as well, AMD tries in vain to portray the challenged price-related conduct as something other than the type of price concessions that are analyzed under the *Brooke Group* standard. For example, AMD often describes Intel's price concessions not in terms of the benefits they bring Intel's customers, but in terms of the supposedly threatened harms their *absence* would bring if Intel withdrew them. *See, e.g.,* AMD PCS 7 (contending that Intel improperly "punish[ed]" or "retaliat[ed]" against customers that gave business to AMD rather than Intel by "withdrawing" price concessions); *id.* at 84 (same); *see also id.* at 4 (discussing "quantity-forcing, all-or-nothing discounts") (capitalization altered); AMD Resp. to Intel PCS 1 (describing "price penalties"). But even if AMD's factual claims were true (and they are not), there is no meaningful distinction between the following two types of conduct by an antitrust defendant: (i) persuading a customer *to purchase more* by offering to reduce per-unit prices if it does so; and (ii) persuading the customer *not to purchase less* by making clear that the customer will pay higher (*i.e.*, less discounted) per-unit prices if it does. Those are just two sides of the same coin. *Whenever* a seller offers price concessions in exchange for greater sales volume, it is necessarily "threatening" *not* to make such a reduction if the purchaser buys less than that volume; otherwise the offer would be meaningless. Such "threats" are thus perfectly acceptable—and are worlds apart from potentially more problematic threats *not to deal at all* with buyers that do business with a defendant's rivals. *See* pp. 26-31, *infra.*

In addition, although AMD suggests otherwise (PCS at 76-77), it is both lawful and common for sellers to condition discounts on a buyer's purchase of a specified percentage of its overall needs from the seller (a "market-share discount") rather than on the buyer's absolute

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(vi) that defendant "'squeeze[d]' the profit margins of its competitors" and thereby "raise[d] competitors' costs," *LinkLine*, 129 S. Ct. at 1118.

volume of purchases.[9] A market-share discount serves an essential and perfectly valid risk-reducing function for buyer and seller alike: *It allows them to share both (i) the risk that the* market for the buyer's products (here, the OEM's computers or servers) will contract (and that the OEM will therefore need to make fewer purchases of microprocessors to satisfy the reduced demand for its products) and (ii) the upside potential that demand for the buyer's products will increase (and that the OEM will need to purchase more microprocessors than it expected).

AMD also contends that Intel's volume (or market share) discounts are somehow unusual and pernicious because they often apply to all units in a transaction—what AMD calls "first-dollar discounts"—rather than only to the last few units demanded.[10] This argument is perplexing because there is no meaningful conceptual difference between these two types of discounts. For example, suppose that a firm offers to sell 50 widgets for $500 or 100 widgets for $900. Each offer falls within the scope of the *Brooke Group* safe harbor so long as the firm produces the relevant number of widgets in the transaction (50 or 100) at a cost that is equal to or below the corresponding revenues ($500 or $900). It is inconsequential—and purely arbitrary—whether the price concession on the 100-unit offer is characterized as (i) a "first-dollar" discount of $1 for each of the 100 widgets (from $10 per widget for 50 widgets, with a total price of $500, to $9 per widget for 100 widgets, for a total price of $900) or (ii) a more narrowly focused

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[9] *See, e.g., Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000) (rejecting antitrust challenge to market-share discount); *see generally* 3B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 768b4 at 169-170 (3d ed. 2008) (discussing ubiquity and business rationales for market-share discounts); *see also Advo v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1203 (3d Cir. 1995) (defendant's "total quantity discounts" for a single product, "based on the total amount of dollars spent by a customer, offend no antitrust principles").

[10] *See, e.g.,* AMD PCS 6, 54, 78; *compare* AMD Resp. to Intel PCS 1 ("Nor does AMD object to volume discounts whereby ever-increasing purchases earn customers ever-increasing discounts (e.g., 10% off on the first 1000 units, 15% off on the next 1000, etc.).") *with id.* at 8 (condemning "conditional discounting"). Of course, any volume or market-share discount is "conditional" in the sense that a customer can obtain it only by purchasing more from the seller.

discount of $2 per widget just for the additional 50 units ($8 per widget times 50, for a subtotal of $400; plus $500 for the first 50 widgets, for a grand total of $900). No matter which characterization one chooses, the economic substance of the transaction remains the same, and its lawfulness is subject to the *Brooke Group* safe harbor.

Not surprisingly, courts have consistently found that first-dollar discounts, like all other price concessions to increase sales, must be evaluated under the *Brooke Group* standard. In *Virgin Atlantic Airways Ltd. v. British Airways PLC,* 257 F.3d 256 (2d Cir. 2001), for example, the Second Circuit held that a plaintiff alleging harm to competition from what it called "back-to-dollar-one" discounts must prove "(1) 'that the prices complained of are below an appropriate measure of its rival's costs,' and (2) that the predatory rival has a 'dangerous probability' of recouping its investment through a below cost pricing scheme." 257 F.3d at 266 (quoting *Brooke Group*, 509 U.S. at 224). In *Concord Boat*, the Eighth Circuit similarly rejected a challenge to "market share" discounts—which extended to all units sold if the buyer purchased a prescribed percentage of its requirements from the seller—on the ground that "above cost discounting is not anticompetitive." 207 F.3d at 1061.[11] As these courts have found, there is no legal basis for attacking above-cost discounts of any kind on the theory that they disadvantage a competitor, make it harder for the competitor to turn a profit (by forcing it to match a discount), or cause it to lose sales that it had expected to win. All of these are normal—indeed, desirable—

[11] *See also NicSand*, 507 F.3d at 455 (claim that a defendant paid customers for exclusive distribution rejected where the plaintiff "does not allege that 3M was selling below cost"); *Cascade Health*, 515 F.3d at 903 ("In a single product case, we may simply ask whether the defendant has priced its product below its incremental cost of producing that product because a rival that produces the same product as efficiently as the defendant should be able to match any price.").

consequences of price competition.[12]

B. The *Brooke Group* safe harbor applies whenever the average price for all goods sold exceeds their average cost, and permits no different analysis where a plaintiff claims that some portion is "uncontestable."

As discussed, *Brooke Group* precludes AMD from establishing liability unless it proves that Intel's net prices were below Intel's cost with respect to the total number of units in a transaction.[13] AMD apparently has no plans to try to satisfy that standard. Instead, AMD hopes to remove this case from the *Brooke Group* safe harbor by invoking a Third Circuit decision—*LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc)—that addressed the quite different antitrust concerns raised where firms offer *bundled multiproduct* discounts. *See* AMD Resp. to Intel PTS at 4-8. Under *LePage's*, if a monopolist in Product X sells Products X and Y together in a discounted bundle to defeat rivals that sell only Product Y but not Product X, it cannot automatically avoid liability simply by showing that the total of the prices it charges for the two products combined exceeds the overall cost of those two products. *See LePage's*, 324 F.3d at 157 (defendant's "rebates required purchases bridging 3M's extensive product lines" and thus

[12] Courts have similarly rejected the position, repeated by AMD here, that discounts that encourage customer loyalty are inherently anticompetitive; indeed, they have drawn exactly the opposite conclusion. Thus, the Second Circuit held in *Virgin Atlantic* that "[r]ewarding customer loyalty promotes competition on the merits." 257 F.3d at 265. The Eighth Circuit in *Concord Boat* endorsed the defendant's business justification for its market-share discounts—"that it was trying to sell its product"—as "the 'very essence of competition.'" *Id.* (quoting *Matsushita Elec. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). And in *NicSand*, in upholding the dismissal of a complaint challenging 3M's above-cost payments to be the exclusive supplier of certain retailers, the Sixth Circuit emphasized that "[r]ather than upsetting the competition-enhancing goals of the antitrust laws, the payments furthered them." 507 F.3d at 452.

[13] AMD bears the burden of proving that Intel's prices were below cost. *See, e.g., Brooke Group*, 509 U.S. at 222 ("a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs."); *Weyerhaeuser*, 549 U.S. at 324-325; *Advo,* 51 F.3d at 1197-1199 ; *Virgin Atlantic*, 257 F.3d at 266; *see also* Legal Principle IV, *infra*. As discussed in connection with Legal Principle II below, the appropriate measure of "cost" is incremental cost or its proxy, average variable (or avoidable) cost.

"squeeze[d] out" rivals without the same "considerable catalog of products").[14] Citing the Areeda & Hovenkamp treatise, the court found that "[t]he principal anticompetitive effect" of 3M's bundled rebates is that they may foreclose "a potential competitor who does not manufacture an equally diverse group of products." *Id.* at 155. The court specifically distinguished bundled rebates from single-product "volume discounts," which it said are "concededly legal." *Id.* at 154. The *LePage's* court relied in turn on *SmithKline Corp. v. Eli Lilly & Co.,* 575 F.2d 1056 (3d Cir. 1978), where the defendant had likewise "linked a product on which it faced competition [non-patented products] with products on which it faced no competition [patented products]." *LePage's*, 324 F.3d at 156.

By their terms, these cases are inapposite because they address only bundled discounts for *separate products*, where the defendant can be said to have "leveraged" its monopoly in one product market to defeat competition in a *different* market from rivals that do not sell products in both markets. Notably, the Areeda & Hovenkamp treatise itself—upon which the *LePage's* court relied—distinguishes above-cost single-product discounts linked to volume or market share, which *cannot* exclude equally efficient competitors (3A Areeda & Hovenkamp, *Antitrust Law* ¶ 749a at 310 (3d ed. 2008)), from above-cost bundled discounts, which the treatise concludes "can exclude an equally efficient rival who makes only one of the two products" in a hypothetical two-product bundle (*id.*, ¶ 749d at 328).

AMD nonetheless argues that, even though it is complaining about Intel's sales of a single product (microprocessors), those sales should be treated as if they were sales of two separate products, on the theory that microprocessor demand can be divided into two categories:

[14] The defendant in *LePage's*, 3M, systematically linked the sale of its monopoly product (Scotch-brand tape) with a series of distinct, unrelated products—including health care, home care, home improvement, stationery, retail auto, and leisure products—mainly through bundled rebates. 324 F.3d at 154-155.

"contestable" and "uncontestable."[15] According to AMD, it "is only able to compete for a very small share of any customer's business" because of Intel's track record of success, because of the "conservatism which makes corporate purchasing agents favor established brands," and because of what, for loss of better words, AMD calls "just plain Intel market dominance." AMD PCS 5. AMD argues that Intel has in effect "bundled" its discounts across these two categories and has improperly "leverag[ed] its monopoly power over . . . uncontestable demand" to "foreclose[] AMD from any meaningful opportunity to compete for . . . contestable demand." AMD PCS 78.[16] This argument (i) contradicts established precedent; (ii) would drain the *Brooke Group* of doctrinal significance; and (iii) would thwart the antitrust imperative for bright-line rules that juries can be realistically expected to apply and that potential defendants can follow in real time as they make business decisions, free from concern that pro-competitive price-cutting will subject them to treble damages.

First, the courts of appeals that have addressed the issue as well as the leading antitrust treatise have all concluded that, after *LePage's*, the *Brooke Group* safe harbor remains applicable to all *single-product* discounts where the price for all sales exceeds cost. For example, the Ninth Circuit recently reaffirmed that, while more complex rules may be appropriate in a multiproduct case, "[i]n a single product case, we may simply ask whether the defendant has priced its product below its incremental cost of producing that product because a rival that produces the same product as efficiently as the defendant should be able to match any price at or above the defendant's cost." *Cascade Health Solutions v. PeaceHealth,* 515 F.3d 883, 903-904 (9th Cir.

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15 AMD alleges a single relevant product market: "x86 microprocessors." AMD Compl. ¶ 23. Although both Intel and AMD offer a wide range of x86 microprocessors with differing performance characteristics, such microprocessors are a single product, as AMD concedes. *Id.*

16 Notably, despite its use of antitrust terms (such as "leveraging") borrowed from the law of tying, AMD makes no actual tying claim in this case.

2008) (discussing *LePage's*). The Eighth Circuit has likewise held that multi-product bundling rules are inapplicable to allegations about nonlinear single-product discounting where "only one product"—in that case, stern drive engines—"is at issue . . . and there are no allegations of tying or bundling with another product[.]" *Concord Boat Corp.*, 207 F.3d at 1062.[17] And the Areeda and Hovenkamp treatise confirms that, "when a discount is offered on a single product, such as a quantity or a market share discount, the discount is ordinarily lawful if the price after all discounts are taken into account exceeds the defendant's marginal cost or average variable cost. Such discounts . . . *are covered by antitrust's ordinary predatory pricing rule*." 3A Areeda & Hovenkamp, *Antitrust Law* ¶ 749a at 309-310 (3d ed. 2008) (emphasis added).

Significantly, even in *multiproduct* cases after *LePage's* in which courts have rejected the straightforward *Brooke Group* comparison between the price and cost of *all* goods sold in a given transaction, the courts have not adopted the alternative to *Brooke Group* that AMD appears to propose: the abandonment of any price-cost standard in favor of an anything-goes, totality-of-the-circumstances test. *See* AMD PCS 79-80 n.82. Instead, even where the defendant offers a bundled discount over a broader range of products than the plaintiff offers, attacks on those discounts still trigger all the same concerns about the need for clear rules to avoid chilling pro-competitive conduct. In such cases, therefore, courts have applied a modified price-cost test under which a multi-product discount is per se lawful unless the plaintiff "establishe[s] that, after allocating the discount given by the defendant on the entire bundle of products to the competitive

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[17] AMD argues that *Concord Boat* is distinguishable because it involved a "single product market" rather than "the segmented market involved here or the multiple-product market involved in *LePage's*." AMD Resp. to Intel PCS 10 n.14. But the market here indisputably involves a single product, as the market in *Concord Boat* did. AMD claims that this market is "segmented" only in the trivial sense that, as in *Concord Boat*, the defendant could be expected to win a substantial share of sales. Virtually all markets are "segmented" in that sense, and, as discussed below, deeming *Brooke Group* inapplicable to such markets would nullify the *Brooke Group* line of Supreme Court decisions as meaningful antitrust precedents.

product or products, the defendant sold the competitive product or products below its average variable cost of producing them." *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 907, 910 (9th Cir. 2007); *see* 3 Areeda & Hovenkamp, *Antitrust Law*, ¶ 749b2 at 335-336 (2006 Supp.). This standard focuses on how much of a discount a purchaser gives up if it buys the competitive product from another supplier rather than from the defendant, and it protects the ability of any *equally efficient* supplier to compete for the sale of the competitive product even if it does not also sell the other products in the bundle. *See Cascade Health*, 515 F.3d at 907.[18] In any event, because this is a single-product case and AMD sells the same range of microchips as Intel, the appropriate legal standard is the straightforward *Brooke Group* rule, which compares the price of all units sold in a transaction to their cost.

Second, AMD's proposed exception to the *Brooke Group* rule would all but swallow the rule, despite its centrality to the Supreme Court's antitrust jurisprudence. In *most* cases where a smaller firm brings a "predatory" pricing claim against an alleged monopolist, the smaller firm could argue that the defendant will inevitably capture a large share of total customer demand, whether by dint of its stronger brand value, larger manufacturing capacity, greater scale economies, better-established customer relationships, or some other advantage associated with market leadership. If AMD's position here were the law, weaker firms could routinely threaten stronger firms with treble antitrust liability by artificially bifurcating any single-product market into "uncontestable" and "contestable" segments and accusing the stronger firm of "leveraging" its "monopoly" over the former to "foreclose competition" in the latter whenever the stronger firm offered discounts or reduced prices in order to induce more sales.

That result would thwart the core purposes underlying this entire body of Supreme Court

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[18] Neither of the parties in *LePage's* proposed this or any similar test, and the Third Circuit accordingly expressed no view about it.

precedent. The *Brooke Group* rule allows—indeed, encourages—an "alleged predator" with unique efficiencies to exploit its "lower cost structure" in order to undersell its less efficient competitors, so long as it keeps its prices above cost. *Brooke Group*, 509 U.S. at 222. That principle applies with full force where, as in this case, the defendant is alleged to be more efficient than the plaintiff in whole or in part because it has won a larger market share and thus enjoys greater scale economies than its rivals or has earned greater customer goodwill. *See generally United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (monopolists are permitted to capitalize on advantages derived from "superior skill, foresight and industry"). To the extent that Intel's greater market share translates into greater efficiency, Intel is entitled to reduce its prices to reflect that greater efficiency—and thereby win a still greater market share, even though the result may be to keep AMD from selling as much as it would like. "[E]ven with monopoly power, a business entity is not guilty of predatory conduct through excluding its competitors from the market when it is simply exploiting competitive advantages legitimately available to it." *See Virgin Atlantic*, 257 F.3d at 266 (citing *Advanced Health-Care Servs., Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 147 n.14 (4th Cir. 1990)).

This point provides a complete refutation to AMD's claim that Intel somehow violated the antitrust laws by seeking a market share that would "keep AMD's sales from reaching a level that would sustain it as an innovation rival." AMD Resp. to Intel PCS 4; *see also* AMD PCS 11. As the leading treatise explains:

> One can imagine situations in which a discount increases the dominant firm's sales so much that it denies rivals economies of scale because they cannot get their own output high enough. Although that might be true as a matter of fact, any antitrust remedy must be denied on grounds of both principle and administrability. On grounds of principle, there is no way of drawing boundaries around the point. In any industry subject to significant economies of scale in production or distribution, a firm with a high volume of sales may be able to undersell firms that have a lower volume of sales. *But no firm, not even a monopolist, is a trustee for another firm's economies of scale.*

3B Areeda & Hovenkamp, *Antitrust Law* § 768b4 at 168 (3d ed. 2008) (emphasis added). Indeed, "[i]t would be absurd to require the firm to hold a price umbrella over less efficient entrants.... [P]ractices that exclude only less efficient firms . . . are not actionable, because we want to encourage efficiency." Richard A. Posner, *Antitrust Law* 196 (2d ed. 2001); *see LePage's Inc. v. 3M*, 324 F.3d 141, 155 (3d Cir. 2003) (en banc) (citing equally efficient competitor standard with approval); *see also Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 906-909 (9th Cir. 2008); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1061 (8th Cir. 2000); *Barry Wright*, 724 F.2d at 232.

Third, AMD's proposed bifurcation of single-product demand into "contestable" and "uncontestable" categories would also preclude the business certainty afforded by *Brooke Group's* "safe harbor," which the Supreme Court recently reaffirmed precisely because it "encourages" firms to engage in "aggressive price competition," secure in the "know[ledge] [that] they will not incur liability as long as their retail prices are above cost." *LinkLine*, 129 S. Ct. at 1121-1122 (emphasis omitted). As discussed, antitrust courts reject "[r]ules that seek to embody every economic complexity and qualification" because they "may well, through the vagaries of administration, prove counterproductive, undercutting the very economic ends they seek to serve." *Barry Wright*, 724 F.2d at 234 (Breyer, J.).[19] Thus, to preserve incentives to compete aggressively, courts insist on simple, bright-line rules that potential defendants can implement in real time as they make business decisions. For example, in predatory pricing cases, the Supreme Court requires a comparison between a defendant firm's prices and *its own* costs,

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[19] *Accord LinkLine*, 129 S. Ct. at 1120-1121 (noting that "[w]e have repeatedly emphasized the importance of clear rules in antitrust law" and stressing value of *Brooke Group* "safe harbor" in particular); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007) (indeterminate antitrust rules would unacceptably "'chill the very conduct the antitrust laws are designed to protect'") (quoting *Brooke Group*, 509 U.S. at 226).

which it can be expected to know, rather than the costs of its rival, which it cannot.[20] The Supreme Court has embraced bright-line rules regarding pricing conduct even though, as the Court has recognized, they will inevitably protect potentially anticompetitive conduct in some circumstances, because the alternative is worse: unclear rules that would chill *pro*-competitive conduct. *See* p. 19, *supra*.

AMD's proposed approach would defeat this emphasis on predictability because it would require lay juries to make subjective and indeterminate inquiries whose eventual legal outcomes a firm's decisionmakers could not be expected to predict with any accuracy. Foremost among these is AMD's proposed distinction between "contestable" and "uncontestable" categories of demand. Like any company, Intel tries to determine which of its sales opportunities are most susceptible to being lost to a rival, and it competes particularly hard to win those opportunities. But by contrast to multi-product bundles (where apples are plainly not oranges and a supplier knows which its rival sells), Intel can only try to predict before the fact how a jury will draw the line between contestable and uncontestable sales. Such predictions are fraught with uncertainty.[21] At the bargaining table, OEMs often play up their prospects to move business to AMD, and Intel cannot reliably discount such claims, particularly given the large shifts of business in the past to or from AMD. As a result, Intel must compete aggressively even for sales that an omniscient seller might know are in less jeopardy. But if AMD were to succeed in

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20 *Weyerhaeuser,* 549 U.S. at 318; *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 222 (1993); *Matsushita*, 475 U.S. at 594; *Cascade Health,* 515 F.3d at 905 (noting dangers of rule requiring monopolist to govern its conduct based on information outside its control); *Barry Wright Corp.,* 724 F.2d at 234 (antitrust laws should not "discourag[e] legitimate price competition" through pricing rules that the monopolist cannot predictably apply *ex ante*).

21 Indeed, Section 1 of the Sherman Act prohibits efforts by firms to learn from rivals which sales are "contestable" precisely in order to keep firms in the dark about that. *See generally United States v Container Corp. of America*, 393 U.S. 333 (1969).

replacing *Brooke Group's* bright-line rule with an alternative approach based on a case-by-case, jury-drawn distinction between "contestable" and "uncontestable" sales, potential defendants would have no clear idea how to navigate that distinction. Their justifiable fear of treble damages would lead them to pull competitive punches and raise their prices—precisely the outcome the Supreme Court adopted the *Brooke Group* standard to avoid. *See Weyerhaeuser*, 549 U.S. at 312-313; *Brooke Group*, 509 U.S. at 226.[22]

LEGAL PRINCIPLE II: Under any price-cost test, the proper measure of cost is incremental or average variable cost, not any form of average total cost.

A strong judicial consensus has emerged that the appropriate measure of "cost" in any price-cost test is incremental cost or its close proxy, average variable cost, and that is the standard the Court should apply here. Average variable cost is derived from, and closely related to, the more basic concept of "marginal" or "incremental" cost. As the Third Circuit has explained, incremental cost is "the cost of producing each incremental unit of output." *Advo, Inc. v. Philadelphia Newspapers,* 51 F.3d 1191, 1198 (3d Cir. 1995). For example, if a firm has already built a factory to produce widgets and is currently selling fewer widgets than the factory can make, the incremental cost of a widget is low: It will include, for example, the raw-material cost for each new widget, but exclude any fixed costs, such as the costs incurred in building the factory itself. *See generally* William J. Baumol, *Predation and the Logic of the Average Variable Cost Test*, 39 J.L. & Econ. 49, 57 n.13 (1996) ("*[F]ixed costs* are costs that must be incurred in a lump in order for any output at all to be provided, and they do not vary when the

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[22] The "discount attribution" test is contrary to controlling Supreme Court authority in the single-product context, and for good reason, given the risk it would chill the aggressive price competition the antitrust laws encourage. If the court were nonetheless to apply the test here, using the 20-20 hindsight that is unavailable to business executives who must make decisions in real time, Intel's pricing would still remain comfortably above cost.

magnitude of output changes.") (emphasis in original). Because of difficulties in measuring incremental cost directly, average variable cost (or its close cousin, average *avoidable* cost) is ordinarily used as a surrogate for incremental cost. *See Advo,* 51 F.3d at 1198. We thus use the terms "average variable cost" and "incremental cost" interchangeably, and the case law sometimes uses the terms "average avoidable cost" and "marginal cost" to denote essentially the same standard.

Average variable cost is the proper baseline for measuring whether a defendant's pricing could be anticompetitive. The Supreme Court has made clear that, because price reductions create an immediate benefit for consumers, antitrust should encourage even dominant firms to cut prices so long as they do not foreclose competition from an equally efficient rival—*i.e.*, so long as they do not price below their own cost. *See Brooke Group,* 509 U.S. at 223; *see generally* pp. 5-12, *supra*. A price above incremental cost—the cost of producing one extra unit—cannot exclude an equally efficient rival because such a rival can match the monopolist's offer simply by cutting its own prices closer to its own incremental costs, which by hypothesis are no higher than the monopolist's. Similarly, "[a]s long as a firm's prices exceed its marginal cost, each additional sale decreases losses or increases profits," makes economic sense without regard to its impact on a competitor, and "is presumably not predatory." *Advo,* 51 F.3d at 1198. In contrast, the defendant's *fixed* costs are irrelevant to the inquiry because they do not vary depending on whether the sale is made (and typically have already been incurred). Writing for the First Circuit in *Barry Wright*, then-Judge Breyer summarized this rationale for the use of incremental (or average variable) costs:

> When prices exceed incremental costs, one cannot argue that they must rise for the firm to stay in business. Nor will such prices have a tendency to exclude or eliminate equally efficient competitors. Moreover, a price *cut* that leaves prices above incremental costs was probably moving prices in the "right" direction—

> towards the competitive norm. . . . [M]odern antitrust courts look to the relation of price to "avoidable" or "incremental" costs as a way of segregating price cuts that are "suspect" from those that are not.

Barry Wright, 724 F.2d at 232 (emphasis in original); *see also* Philip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 711 (1975).

Under the consensus rule, therefore, "no price equal to or exceeding properly defined and reasonably anticipated marginal cost should be deemed unlawful under the antitrust laws." 3A Areeda & Hovenkamp, ¶ 739a at 177. The overwhelming majority of appellate courts to consider the issue have thus accepted incremental cost or its proxy, average variable cost, as the appropriate measure of cost in assessing claims of anticompetitive price-related conduct. *See, e.g., Cascade Health,* 515 F.3d at 909-910 & n.20; *Schor v. Abbott Labs.*, 457 F.3d 608, 611 (7th Cir. 2006); *United States v. AMR Corp.,* 335 F.3d 1109, 1117 -1118 (10th Cir. 2003); *Stearns Airport Equip. Co.* v. *FMC Corp.,* 170 F.3d 518, 532 (5th Cir. 1999); *Northeastern Tel. Co. v. AT&T Co.,* 651 F.2d 76, 87-88 (2d Cir. 1981); *see also Concord Boat,* 207 F.3d at 1061; *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.,* 998 F.2d 1073, 1080-1081 (1st Cir. 1993). Although the Third Circuit has not definitively ruled on the issue, it has strongly suggested that the proper measure of cost is marginal (*i.e.*, incremental) cost. *See Advo*, 51 F.3d at 1198.

AMD asks this Court to defy that precedent (*see* PCS 82-83 & n.88) but offers no plausible basis for doing so. Insofar as AMD acknowledges the need for a price-cost comparison, it will apparently argue that the microprocessor industry should be governed by a special standard of average *total* cost that includes not just average variable costs, but fixed capital costs as well. AMD tries to justify this exception to the general rule on the ground that the microprocessor industry has "high and continuing research and development costs and

relatively low 'next unit' manufacturing costs." *Id.* at 82-83. This argument has no basis in law or economics.

To begin with, many of the industries most likely to produce antitrust disputes under Section 2 of the Sherman Act—such as the telecommunications and software industries—are characterized by high fixed costs and low incremental costs. *See, e.g., Verizon Commc'ns. Inc. v. Law Offices of Curtis v. Trinko, LLP,* 540 U.S. 398 (2004) (telecommunications); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (software). AMD identifies no reason to treat this or any of those industries differently from the many other industries for which courts have deemed average variable cost the appropriate standard. And deviating from the general average-variable-cost approach on an ad hoc, industry-specific basis would rob the law of the very predictability that the Supreme Court has repeatedly required. *See Brooke Group*, 509 U.S. at 222; *Matsushita*, 475 U.S. at 1360; *see also Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.). A firm that wishes to keep its prices above the relevant measure of "cost" would have no way to know whether a court might later determine that its particular industry is governed by some form of average total cost rather than the usual average variable cost standard. As the Areeda & Hovenkamp treatise explains, "marginal-cost pricing leads to a proper resource allocation and is consistent with competition on the merits, and the exceptions are too factually ambiguous to permit reliable judicial recognition." 3A Areeda & Hovenkamp, *Antitrust Law* ¶ 739c at 182.

AMD's proposal fares no better on its conceptual merits. The fact that incremental costs in this industry are low underscores why it would make *no* sense to increase a firm's risk of antitrust liability when it sells additional units above its incremental costs. It is obviously more profitable for manufacturers—and better for consumers—if antitrust encourages manufacturers

with excess capacity to meet marginal demand by selling additional goods at low prices rather than to let the extra capacity sit idle. AMD's alternative approach would perversely force efficient manufacturers into wasting such capacity by producing fewer goods at higher prices so that less efficient firms with lower scale economies may benefit from the ensuing price umbrella. That approach would thus fly in the face of modern antitrust analysis, which is designed for "the protection of competition not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) (internal quotation marks omitted); *see also* Legal Principle I.A, *supra.*

Finally, AMD's alternative cost analysis would be radically unpredictable in application. It is a relatively straightforward matter for a firm to determine the incremental costs of producing an extra unit; indeed, firms routinely make that calculation to ensure the profitability of their operations. But there would be nothing straightforward about determining the average *total* cost to any large firm of manufacturing any given product. For example, both AMD and Intel produce a wide array of products, and each firm has made substantial investments in assets that support all those products in common. These costs of those assets include, for example, the CEO's salary, real property costs, customer help lines, and the electricity needed to power chip-manufacturing factories. "There is, however, no economically defensible way of dividing such costs up among the firm's various products. As is well known, all methods for the allocation of common fixed costs are arbitrary." Baumol, *supra*, 39 J.L. & Econ. at 59. That is why cost methodologies that incorporate fixed costs are "always manipulated to produce whatever answers are desired by the party that puts them forward." *Id.* Accordingly, incremental cost is properly chosen as the benchmark for measuring anticompetitive price conduct not only because that approach is economically more appropriate, but also because it avoids the profound indeterminacy of any approach that seeks to take fixed costs into account.

LEGAL PRINCIPLE III: Any "exclusive dealing" claim requires AMD to prove (*inter alia*) that Intel either entered into *long-term* contracts that precluded customers from buying products from AMD or enforced exclusivity by threatening not to supply needed products to the customers.

A. Exclusive dealing concerns arise only in narrowly defined circumstances where rivals are for a long period of time deprived of the opportunity to sell their products to potential customers.

AMD's argument that Intel has engaged in "exclusive dealing" is based on a misunderstanding of that term. A firm's success in competing on the merits—in persuading customers, through low prices, high quality, a strong reputation, and so forth, to buy most or all of their needs from it rather than its rivals—is not "exclusive dealing" for purposes of the Sherman Act. "The Sherman Act does not forbid—indeed, it *encourages*—aggressive price competition" by dominant firms to win as much business as they possibly can. *LinkLine*, 129 S. Ct. at 1122 (emphasis in original). Courts have thus rejected attempts to evade the *Brooke Group* framework by invoking "exclusive dealing" rhetoric to attack sales-boosting, above-cost price concessions. The Court's bright line price-cost test applies "regardless of the type of antitrust claim involved." *Brooke Group*, 509 U.S. at 223; *Atlantic Richfield*, 495 U.S. at 340. For example, the Sixth Circuit in *NicSand* and the Eighth Circuit in *Concord Boat* both concluded that the price-cost test applies to claims of "exclusive dealing," *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 467 (6th Cir. 2007), or "de facto exclusive dealing." *Concord Boat*, 207 F.3d at 1054. In *NicSand*, the claim was that 3M "eliminat[ed] its only competitor through a series of exclusive dealing contracts," 507 F.3d at 467, and in *Concord Boat*, the alleged exclusivity was achieved through favorable pricing and market share discounts. 207 F.3d at 1063.

Courts have found antitrust liability for "exclusive dealing" only where the defendant engaged in conduct that deprived an equally efficient rival of the *opportunity* to sell their

products to potential customers.[23] Typically, that conduct consists of *long-term* contractual arrangements under which, if a buyer deals with a rival of the defendant, it "can purchase the good subject to the exclusive agreement [with the defendant] only by breaching its contract [to buy only the defendant's products] or else by giving up something else in which it has made a significant investment," such as a dealership in the defendant's products. Areeda & Hovenkamp, *Antitrust Law* ¶ 1807, at 418-419 (2007 Supp.). Such an arrangement may be anticompetitive because an equally efficient rival may not be able to compete for the buyer's business, given the costs the buyer would incur by breaching its obligations to buy exclusively from the defendant. *See id.* ¶ 749, at 148-149 (2008 Supp.). But that concern does not arise, and exclusive dealing principles do not apply, when the buyer is *not* locked into a long-term exclusivity contract and is thus free to shift purchases to a rival within a reasonable period.[24] Therefore, as many courts have recognized, even complete "exclusivity" agreements are lawful if they are short term or can be terminated by the buyer.[25]

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[23] The discussion below describes these categories in terms of conduct that is a necessary but not sufficient basis for antitrust liability. For example, long-term contracts are lawful if they do not foreclose rivals from sufficient business opportunities that they harm or threaten to harm competition in the market as a whole.

[24] *See Concord Boat*, 207 F.3d at 1063 ("[T]he evidence show[s] that [customers walked away from Brunswick's discounts] when Brunswick's competitors offered better discounts, thus discrediting the boat builders' theory that the discounts created 'golden handcuffs' and entry barriers for other engine manufacturers."); *Western Parcel Express v. United Parcel Serv.*, 190 F.3d 974, 976 (9th Cir. 1999) (volume discount contracts were not exclusive dealing agreements when "[a] company that entered into one of these contracts with UPS could nonetheless contract with another carrier for parcel delivery service"); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) (no exclusive dealing concerns because "dealership agreements in this industry are terminable by either party on short [90 days'] notice"); *Barry Wright*, 724 F.2d at 237-38 (Breyer, J.) (distinguishing between discounted contracts for fixed dollar amounts and exclusive dealing or requirements contracts).

[25] *See CDC Techs., Inc. v. IDEXX Labs., Inc.*, 186 F.3d 74, 80-81 (2d Cir. 1999) (exclusive dealing not unlawful where contracts were for short duration); *Omega Env'tl, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997) (same); *Paddock Publ'ns., Inc. v. Chicago Tribune*

Although there is some debate about exactly where to draw the line between "short-term" and "long-term" exclusivity contracts for these purposes,[26] most or all of the contracts at issue here fall comfortably on the short-term side of any line that might be drawn. "The general consensus is that contracts that can be terminated in a year or less are lawful regardless of foreclosure percentage, and a few decisions so hold for a period of up to three years." 3B Areeda & Hovenkamp, *Antitrust Law* § 768b4 at 170 n.46 (footnote omitted).[27] Here, Intel's deals with its customers were almost always of very short duration. Most lasted no more than 90 days, and a few lasted nominally longer, but invariably any deal struck between Intel and an OEM, whatever the duration, was constantly at risk because OEMs regularly demanded different terms to meet changing competitive conditions and renegotiations were commonplace. Moreover, most OEMs bought from both AMD and Intel during any given quarter. Again, this motion does not ask the Court to resolve any factual disputes AMD may raise on these or other issues. Instead, this motion asks the Court merely to clarify that, as a matter of law, "exclusive dealing"

Co., 103 F.3d 42, 47 (7th Cir. 1996) (continuous contract renewals give all competitors ample opportunities to compete for contracts); *see also Balaklaw v. Lovell*, 14 F.3d 793, 799 (2d Cir. 1994) (noting that exclusive dealing arrangements with reasonable termination provisions "may actually encourage, rather than discourage competition"). In *United States v. Dentsply International, Inc.*, 399 F.3d 181, 194 (3d Cir. 2005), the Third Circuit acknowledged this uniform body of precedent, *id.* at 194 n.2, but found it inapplicable on the facts of that case, where the defendant had engaged in the *other* category of exclusive-dealing conduct: an outright refusal to deal with customers that did business with its rivals. *See* pp. 29-30, *infra.*

[26] *Cf. LePage's*, 324 F.3d at 157-158 & n.11 (concluding that Supreme Court precedent has not established "that a one year exclusive dealing contract should be considered as *per se legal*," while stressing evidence that the defendant had "force[d] [customers] to make an all-or-nothing choice" and had locked the plaintiff's "largest customer" into an exclusive dealing arrangement that effectively forbade it "even to meet with" the plaintiff's representatives "for the next three years") (emphasis added; quotation marks omitted).

[27] *See, e.g., Omega Env'tl*, 127 F.3d at 1163; *Thompson Everett, Inc. v. National Cable Adver., L.P.*, 57 F.3d 1317, 1326 (4th Cir. 1995); *see also NicSand*, 507 F.3d at 455-456 (holding that multi-year exclusivity contracts were not prohibited exclusive dealing) (citing *Indeck Energy Servs. v. Consumers Energy Co.*, 250 F.3d 972 (6th Cir. 2000)); *Roland Mach.*, 749 F.2d at 395.

principles are inapplicable to price-related conduct embodied in contracts of short duration and that such deals are subject instead to the legal rules applicable to pricing conduct.

Some cases and commentary have also referred to a concept of "de facto exclusive dealing," which denotes coercive, non-welfare-enhancing methods a seller might use—*i.e.*, methods *other than* reducing prices and increasing output—to keep purchasers from buying from its rivals. To the extent the notion of de facto exclusive dealing has antitrust significance, it does *not* refer to the decision of a customer to buy all its needs from a single seller because it wishes to avail itself of the low prices offered by that seller. *See Barry Wright,* 724 F.2d. at 236 ("virtually *every* contract to buy 'forecloses' or 'excludes' alternative sellers from *some* portion of the market, namely the portion consisting of what was bought") (emphasis in original). When a seller wins business through the promise of price concessions, its conduct is assessed by the legal rules applicable to pricing conduct, not by different rules applicable to "exclusive dealing." *See, e.g., Western Parcel Express* v. *United Parcel Service,* 190 F.3d 974, 976 (9th Cir. 1999) (volume discount contracts are not exclusive dealing contracts); *see also Advo*, 51 F.3d at 1203; *Concord Boat,* 207 F.3d at 1059, 1063.

Instead, in the prototypical case involving "de facto exclusive dealing," the defendant is alleged to have kept customers from doing business with rivals by subjecting them to an "all-or-nothing choice" (*LePage's*, 324 F.3d at 158 (quotation marks omitted))—threats to withhold needed goods from the buyer altogether unless it deals only with the seller. *See, e.g., Lorain Journal Co. v. United States,* 342 U.S. 143 (1951) (monopoly newspaper told advertisers it would not sell them newspaper advertising space if they did business with radio stations that competed with station owned by newspaper). The all-or-nothing choice at issue in *Dentsply,* 399 F.3d 181, exemplifies this type of arrangement. In *Dentsply*, a monopoly supplier of artificial

teeth adopted an official policy ("Criterion 6") under which it threatened to stop doing business with distributors that also sold artificial teeth manufactured by the monopolist's rivals. Indeed, the monopolist "threatened to sever access not only to its teeth, but to other dental products as well," *id.* at 190, and the distributors predictably stopped doing business with the rivals for "fear of losing the right to sell" the monopolist's products to their own customers, *id.* at 195. This "all-or-nothing choice" (*id.* at 196) allowed the monopolist to impose "aggressive price increases" to the detriment of consumers (*id.* at 190); indeed, "experts for *both* parties testified that . . . prices would fall" if the monopolist stopped threatening to withhold its products from suppliers that did business with other suppliers as well. *Id.* at 190-91 (emphasis added).[28]

Coercing exclusivity by threatening to withhold business in this manner poses two risks to competition that price competition does not present. First, if the seller who makes an all-or-nothing threat has monopoly power, even an equally efficient rival usually does not have a counterstrategy because it cannot respond by offering better or cheaper products and convincing customers to buy from it instead of the monopolist. *See, e.g., Dentsply,* 399 F.3d at 193-196 (finding that rival manufacturers could not persuade dealers to drop monopolist's product line). Second, price-cutting to above-cost levels, unlike a refusal to deal, always has the efficiency-enhancing, procompetitive effects of increasing sales, reducing deadweight loss, and increasing welfare, even if it also excludes a rival. *See, e.g., Barry Wright,* 724 F.2d at 232. By contrast, a refusal to deal does not directly increase sales by the defendant, and it can both reduce welfare and thwart the seller's own interest (apart from exclusion of its rivals).

Apparently hoping to avail itself of this de facto exclusive dealing precedent, AMD

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28 The Court also noted that "[t]his case does not involve a dynamic, volatile market like that that in *Microsoft*, 253 F.3d at 70," and suggested that the result might have been different if it had involved such a market. *Dentsply*, 399 F.3d at 196. The microprocessor market *is* precisely such a market.

describes certain Intel discount practices as "quantity-forcing, all-or-nothing discounts." AMD PCS 4 (capitalization altered). Here, however, AMD is using "all-or-nothing" in a different, trivial and meaningless sense: not (as in *Dentsply*) as a refusal to deal at all with customers that do business with rivals, but as a refusal to give the same level of discounts to customers that purchase more microprocessors from AMD and fewer from Intel. As discussed above, this latter type of "threat" is the flip side of, and is inseparable from, any offer to give a volume discount in the first place. *See* pp. 5-12, *supra.*[29] The term "quantity-forcing" is likewise bereft of antitrust significance. By definition, any volume discount is designed to induce more sales, and *Brooke Group* protects every firm's right to offer such discounts so long as price remains above cost.

AMD also alleges in passing that Intel engaged in various *non-price* conduct to coerce customers to do more business with Intel and less with AMD, such as "withholding critical technical and roadmap information; allocating scarce products away from those seen as disloyal; and generally scaling back the level of customer support." AMD PCS 7. This motion is not meant to address those non-price-related allegations. The important point here is 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. Again, Intel does not ask this Court to resolve any factual dispute on this or any other issue. Instead, it asks the Court to rule that, as a matter of law, AMD may attempt to establish "exclusive dealing" liability only if it proves, among other things, that Intel (i) entered into *long-term* contracts with its customers to exclude AMD from the market or (ii) coerced customers to deal exclusively with it by threatening to withhold needed goods or

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[29] *See* Areeda & Hovenkamp, *Antitrust Law* § 749 at 148-149 (2008 Supp.) (distinguishing between (i) exclusive dealing contracts, where remedy for cheating is loss of dealership or breach of contract and "equally efficient rival . . . may not be able to compensate the dealer . . . for the loss of the dealership" and (ii) market share discount, where penalty is "simply the loss of the discount," which "is not a penalty at all if a rival is willing to match the discounted price").

services if the customers took their business elsewhere.

B. *LePage's* does not create a new category of "exclusive dealing" liability for pricing practices that fall within the *Brooke Group* safe harbor.

As discussed above, the *Brooke Group* line of cases does not merely establish the bounds of liability when plaintiffs challenge discounts using the "predatory pricing" label. Instead, it establishes an absolute "safe harbor" that "encourages" dominant firms "to engage in aggressive price competition" by assuring them that "they will not incur liability as long as their retail prices are above cost." *LinkLine*, 129 S. Ct. at 1121-1122. Simply invoking the words "exclusive dealing," rather than "predatory pricing," therefore does not enable a plaintiff to remove a case from the *Brooke Group* safe harbor for above-cost discounts, expose a defendant to treble-damage liability for above-cost discounts, and thereby undermine all the policy concerns that led the Supreme Court to create that safe harbor in the first place. *See* 3B Areeda & Hovenkamp, *Antitrust Law* § 768b4 at 168-69 ("above-cost discounts on single products should be regarded as lawful" under exclusive-dealing precedent).

AMD nonetheless relies heavily on *LePage's* for the proposition that "conditional discounting" may constitute illegal exclusive dealing even if it meets the relevant price-cost test for claims of predatory pricing. *E.g.*, AMD Resp. to Intel PCS 8.[30] That argument is flawed in two respects. First, as discussed, *LePage's* by its terms addresses only the special concerns that arise when a monopolist in Product X offers multiproduct discounts for the bundle of Products X and Y and thereby excludes equally efficient rivals that make only Y but not X. This case, in contrast, involves discounts for a single product—microprocessors—sold by the plaintiff and the

[30] By "conditional discounting," AMD apparently means nothing more than discounts conditioned on the total volume of a customer's purchases from the seller or on the percentage of a customer's needs. As discussed above, such volume and market-share discounts are ubiquitous and presumptively pro-competitive.

defendant alike. *See* pp. 13-21, *supra.* For that reason alone, even if the Supreme Court had issued no intervening decisions in this area, *LePage's* would supply no basis for ignoring the boundaries that *Brooke Group* places on single-product discounts like these, as other courts of appeals and the leading antitrust treatise have concluded. *See* pp. 5-21, *supra.*

Second, the Supreme Court *has* issued intervening decisions in this area that cast serious doubt on whether the *LePage's* court properly analyzed even the bundled multiproduct discounts at issue in that case—and those decisions, at a minimum, foreclose extending *LePage's* beyond the multiproduct context in which it was decided. In *LePage's*, the defendant had argued that the *Brooke Group* standard applies not just to single-product discounts, but to bundled multiproduct discounts as well, such that a defendant could avoid liability simply by showing that its total price for all the disparate goods in the bundle exceeded the cost of all those goods. (Neither party appears to have proposed the discount-attribution analysis later adopted in *Cascade Health.*) In rejecting the defendant's argument on this point, the *LePage's* court questioned whether *Brooke Group* had any real precedential significance. Among other things, the court stated that *Brooke Group* "was primarily concerned with the Robinson-Patman Act, not § 2 of the Sherman Act"; that the defendants in *Brooke Group* were "oligopolist[s]" rather than monopolists; that "nothing in the [*Brooke Group*] decision suggests that its discussion of the [predatory pricing] issue is applicable to a monopolist"; and that *Brooke Group* was a questionable anomaly within the Supreme Court's antitrust jurisprudence in any event, given that it "ha[d] been cited only four times by the Supreme Court, three times in cases that were not even antitrust cases[.]" 324 F.3d at 151-152.

The Supreme Court has subsequently rejected each of the reasons that the *LePage's* court gave for narrowly construing *Brooke Group*. In both *Weyerhaeuser* and *LinkLine*, the Court held

that the *Brooke Group* rule governs not just claims under the Robinson-Patman Act, but claims "under § 2 of the Sherman Act." *Weyerhaeuser*, 549 U.S. at 318 n.1; *accord LinkLine*, 129 S. Ct. at 1121.[31] Both *Weyerhaeuser* and *LinkLine* held that *Brooke Group* extends not just to the conduct of "oligopolists," but also to the conduct of monopolists and other firms with unconstrained market power. *See LinkLine*, 129 S. Ct. at 1121-1122 (monopolists); *see also Weyerhaeuser*, 549 U.S. at 325 (monopsonists). And both decisions make clear that *Brooke Group* is not a forgotten anomaly, but a foundational precedent of modern antitrust law. In particular, *LinkLine* holds that *Brooke Group*'s endorsement of above-cost discounts is not just one factor among others for an antitrust court to consider, but an absolute and indispensable "safe harbor" that assures all firms that "they will not incur liability as long as their retail prices are above cost." *LinkLine*, 129 S. Ct. at 1121.

Where a court of appeals decision has been "obviously undermined by more recent opinions of the Supreme Court, the district court has an obligation to recognize the former as overruled." *Pappas v. City of Lebanon*, 331 F. Supp. 2d 311, 319 (M.D. Pa. 2004); *accord Finch v. Hercules, Inc.*, 865 F. Supp. 1104, 1120-1121 (D. Del. 2004); *see also E.I. DuPont de Nemours & Co. v. United States*, 508 F.3d 126, 132 (3d Cir. 2007) ("Notwithstanding this court's strict adherence to our precedents, we have made clear that those precedents may be reevaluated when there has been intervening authority."). This Court need not decide whether *LePage's* has been overruled because this case does not present concerns about bundled multi-

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[31] *See also Brooke Group*, 509 U.S. at 221-222 ("primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act. . . . Accordingly, whether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act, two prerequisites to recovery remain the same. First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs.").

product discounts. But the Supreme Court's intervening precedent does provide a compelling additional reason, if one were needed, to confine *LePage's* narrowly to its quite different factual setting.

LEGAL PRINCIPLE IV: AMD bears the burden of proving every element of any given theory of antitrust liability and of identifying the transactions it will rely upon in trying to meet that burden.

As in all civil litigation, *see Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005), "the burden of proof rests" on "the plaintiff," *Microsoft*, 253 F.3d at 58, to prove each element of any antitrust claim. *See United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 374 n.5 (1967), *overruled on other grounds*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Rambus Inc. v. FTC*, 522 F.3d 456, 463 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1318 (Feb. 23, 2009); *Concord Boat*, 207 F.3d at 1054; *Ungar v. Dunkin' Donuts of America*, 531 F.2d 1211, 1225 (3d Cir. 1976). AMD's burden of proof extends to every disputed fact that might arise under the legal standards discussed in this memorandum. For example, if the Court analyzes plaintiffs' price-related claims under the *Brooke Group* standard, AMD must identify each transaction in which it claims that Intel engaged in below-cost pricing; it must prove the relevant prices and incremental costs involved in that transaction; and it must prove that the incremental cost exceeded price.[32]

In addition, it would not be enough for AMD to identify narrow instances in which isolated prices may have slipped below incremental cost; instead, AMD must prove that Intel's "*overall* price structure was predatory" with respect to a given customer. *International Travel Arrangers v. NWA, Inc.*, 991 F.2d 1389, 1396 (8th Cir. 1993) (citation omitted) (emphasis in

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[32] If the Court were to treat this as if it were a multi-product case and thus adopt the *Cascade Health* standard, AMD would further bear the burden of proving (i) what portion of each sales transaction Intel should have regarded as "uncontestable" at the time of the transaction and (ii) what the price of that uncontestable portion of the sale would have been but for the sale of the contested units by Intel.

original).[33] Similarly, AMD could not prevail under any theory of antitrust liability unless it also carried the burden of proving that specific anticompetitive acts caused harm to competition in the market as a whole. *See* note 3, *supra*.

More generally, AMD must prove *all* of the established elements of *any* given antitrust claim in order to prevail under that claim—or any other. Antitrust litigation is not a mix-and-match game, under which plaintiffs can avoid proving *all* the elements of any one theory of liability by combining proof of *some* elements of *different* theories of liability. As the Supreme Court recently explained, "[t]wo wrong claims do not make one that is right," and antitrust plaintiffs therefore may not "join [one] claim that cannot succeed with [another] claim that cannot succeed, and alchemize them into a new form of antitrust liability never before recognized by this Court." *LinkLine*, 129 S. Ct. at 1123; *accord City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 928-29 (2d Cir. 1981) (courts "reject the notion that if there is a fraction of validity to each of the basic claims and the sum of the fractions is one or more, the plaintiffs have proved a violation of . . . section 2 of the Sherman Act"); *see also Taylor Publ'g Co. v. Jostens Inc.*, 216 F.3d 465, 484 (5th Cir. 2000) (conduct found not be exclusionary cannot be combined with other conduct that was "more consistent with individual competitive decisions than with an overall plan to compete on grounds other than the merits").

Finally, to keep this litigation from becoming unmanageably complex, the Court should direct AMD to *identify which transactions* it intends to rely on as evidence of any supposedly

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[33] *See also Stearns Airport Equip. Co.* v. *FMC Corp.*, 170 F.3d 518, 533 n.15 (5th Cir. 1999) ("A threshold problem with this allegation is that even if part C was bid below-cost, Stearns has not alleged that the project as a whole was unprofitable."); *American Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1320-1321 (7th Cir. 1991); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 613-614 (6th Cir. 1987); *see generally* American Bar Ass'n, Antitrust Law Developments (Sixth) at 274 (2007) ("Courts generally have held that the price-cost comparison should be made across entire product lines, rather than on a product-by-product basis.").

anticompetitive pricing practices. Because Intel entered into thousands of transactions involving discounted prices during the period covered by AMD's claims, conducting any price-cost test could theoretically involve an evaluation of thousands of individual price agreements. AMD does not seriously claim, however, that Intel priced below cost in thousands of transactions, and for good reason: Any such claim would contradict the facts that (i) Intel has run a highly profitable microprocessor business throughout the relevant period and (ii) AMD's market share was substantial and increasing before and after the filing of this complaint. But unless AMD promptly identifies the specific transactions that it will argue are anticompetitive, the parties would have to perform expert analyses of thousands of microprocessor transactions even though only a very small subset will ultimately be at issue. While AMD has the burden of proof to show below-cost pricing, Intel must prepare its own cost studies so that it can respond to AMD's claims within the very tight schedule established by Case Management Order #5, which gives Intel only seven weeks to prepare rebuttal reports. Case Management Order #5, ¶¶ 3-4. Intel cannot reasonably be expected to prepare anticipatory but ultimately needless studies regarding thousands of individual transactions. Similarly, this Court can keep the summary judgment briefing manageable only if AMD acts now to narrow the universe of transactions potentially in dispute. In short, any further delay in AMD's identification of the transactions it wishes to challenge would inflict an immense and needless burden on Intel, the Court, and ultimately the jury.[34]

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[34] Indeed, it will be challenging enough to expect a jury, in a trial of finite duration, to apply the relevant price-cost test to even a limited, representative number of the complex transactions at issue. Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 Den. U. L. Rev. 51, 54 (1995) (empirical study revealing that, in predatory pricing litigation, "jurors were overwhelmed, frustrated, and confused by testimony well beyond their comprehension" and that "at no time did any juror grasp—even at the margins—the law, the economics or any other testimony relating to the allegations or the defense").

CONCLUSION

This Court should order a pretrial conference in June 2009 to consider the issues raised above and should issue an order confirming that the Legal Principles set forth above will govern future proceedings in this case.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

I, Richard L. Horwitz, hereby certify that on May 8, 2009, the attached document was hand delivered to the following persons and was electronically filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following and the document is available for viewing and downloading from CM/ECF:

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