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Under U.S. antitrust laws, above-cost price competition is sacrosanct. Accepting the notion that aggressively discounting prices, even though the discounted prices exceed cost, might expose a company to a possible violation of the antitrust laws would turn the antitrust laws upside down. It would chill the very price competition the antitrust laws are meant to promote. It would disadvantage customers, by compelling competitors to keep prices higher to avoid challenges under the antitrust laws from less successful rivals.

This is precisely what Advanced Micro Devices (AMD) is trying to do in its lawsuit against Intel. AMD is accusing Intel of nothing more than competing, by offering customers attractive, discounted prices to win their business—prices that were always comfortably above any appropriate measure of Intel's costs, and almost always exceeded AMD's price.

What AMD wants is a rule requiring a successful competitor like Intel to pull its punches and not compete aggressively on price when faced with competition from a rival offering lower prices. By seeking to change the rules of the game, AMD runs headlong

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into the teachings of the U.S. Supreme Court that are designed to encourage aggressive price competition by treating it as legally protected competitive conduct.

Above-Cost Price Cutting Is Legally Sacrosanct

In a series of decisions spanning some 20 years, the Supreme Court has treated above-cost price competition as the antitrust equivalent of free speech under First Amendment jurisprudence. The Supreme Court has adhered to the bright line principle that above-cost price cutting is per se lawful because permitting any judicial challenges to such conduct runs too high a risk of chilling the very price competition the antitrust laws encourage.

As early as 1986, in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., the Court announced that "cutting prices in order to increase business is the very essence of competition," and cautioned that "we must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition."[1] The same year the Court reiterated this principle in Cargill v. Monfort.[2]

In 1990, the Court reaffirmed its view in Atlantic Richfield v. USA Petroleum that:

> [I]n the context of pricing practices, only predatory pricing has the requisite anticompetitive effect. […] 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. […] We have adhered to this principle regardless of the type of antitrust claims involved.[3]

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[1] Matsushita Elec. Indus. Co. v. Zenith Radio Corp, 475 U.S. 574, 594 (1986).

[2] Cargill v. Monfort, 479 U.S. 104 (1986).

[3] Atlantic Richfield v. USA Petroleum, 495 U.S. 328, 339 (1990).

And, in 1993, *Brooke Group v. Brown & Williamson Tobacco Corp.*, the Court was even more explicit about why above-cost price cutting was sacrosanct:

> The 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. […] "To hold that the antitrust laws protect competitors from loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result."[4]

Just last year, in *Weyerhaeuser v. Ross-Simmons*, the Court again drove home the principle that above-cost price cutting was sacrosanct.[5] In its decision, the Court reaffirmed the language from *Brooke Group* and *Cargill* that cutting prices is the way firms stimulate competition, that low prices benefit consumers regardless of how they are set, and that above-cost prices cannot threaten competition.

Throughout this 20-year span of cases, the message that the Supreme Court has delivered about the sanctity of above-cost pricing is unmistakable in its clarity and forcefulness.

The Dynamics of the Microprocessor Market

The dynamics of the microprocessor market drive intense competition, making it impossible for Intel or any competitor to exercise market power.

Prices for microprocessors are set through negotiations with major original equipment manufacturers (OEMs) that are sophisticated buyers experienced at driving hard bargains. All have enormous financial muscle, and many, such as IBM, Dell, and

[4] Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993).

[5] Weyerhaeuser v. Ross-Simmons, 127 S. Ct. 1069 (2007).

HP, enjoy much higher annual revenues than Intel. These buyers understand the economic forces that drive the market. In particular they understand that Intel faces vast fixed costs in manufacturing microprocessors, which means that the incremental cost of producing microprocessors is substantially below the average cost level. They know that Intel has a strong incentive to discount its prices to maximize the utilization of its manufacturing facilities. The economic forces driving Intel's pricing are transparent, and OEMs fully exploit this advantage in their negotiations with Intel.

OEMs regularly refresh or update their product ranges of PCs. Consequently OEMs negotiate microprocessor supplies on a frequent basis, typically every three or four months. Indeed, some OEMs negotiate almost constantly and long-term deals are infrequent. The market is in a near constant state of negotiation, which leaves multiple opportunities for AMD to win business.

OEMs intensify the competition by putting substantial blocks of business up for bid, playing AMD and Intel off against each other. Intel must respond to these negotiating tactics in the fog of competition, without knowing how reliable the OEMs' "threats" might be. Moreover, OEMs can—and do—shift substantial volumes of business to and from a supplier in a short period of time, thus adding to the substantial leverage they exert. Intel knows from past history that if a “threat” is made, it can also be swiftly carried out.

Last, the OEMs themselves sell in a very competitive downstream market. Market forces operating upon the OEMs serve as a powerful incentive for them to exert maximum pressure upstream on their own suppliers.

AMD's Allegations of Exclusive Dealing Fail for Multiple Reasons

Exclusive dealing entails a refusal by a supplier to sell to a customer unless the customer buys exclusively from the supplier. Intel has never refused to sell, or threatened to refuse to sell, microprocessors to a customer unless it agreed to buy only from Intel

So AMD has invented its own version of an exclusive dealing claim, alleging that Intel has coerced customers into buying Intel microprocessors exclusively or near-exclusively by providing greater discounts to OEMs who buy larger quantities from Intel.

Intel, of course, competes for the opportunity to supply as much of its customers' needs as possible, and it competes in many ways, including by offering discounted prices. However, Intel has not refused to provide competitive discounts to customers that also buy from AMD. Indeed, it would be counterproductive for Intel to deny competitive prices to OEMs that also buy from AMD—doing so would only increase the likelihood they would buy even more from AMD.

While most OEMs also buy from AMD, a few OEMs at various times have chosen to buy exclusively from Intel, but that does not mean that Intel and AMD have not been competing to sell to those customers. Major OEMs refresh their computer models several times each year, so any "win" leading to exclusivity is constantly at risk.

When a customer chooses to buy exclusively or almost exclusively from Intel, and does so because Intel's prices are attractive, there is nothing illegal about such sole-sourcing. Providing above-cost discounts to customers that choose to buy more from Intel is not exclusive dealing. It represents nothing more than a win for Intel on the merits, and is immune from challenge under the antitrust laws. Any contrary principle would chill price competition, putting a dominant supplier a risk when it competes by offering discounted but above-cost prices and wins most or all of an OEM's business.

Winners and Losers Are Determined in the Marketplace Based on All Facets of Competition

Intel competes to win customers' business not just on price, but in all aspects of its product including quality, performance, and reliability. In doing so, it has compiled a record of continuing product innovation and a willingness to make risky investments to build the capacity to supply its customers' complete needs, and a long-standing reputation for excellence unmatched by AMD. In contrast, AMD has a long history of product and production problems that it only began to address in the past few years. For many years AMD floundered, introducing products that did not live up to expectations and found itself saddled with a reputation for inconsistent performance and inferior reliability.

When AMD has executed well, however, by introducing competitive products and producing them reliably and in sufficient volume, it has achieved commensurate successes in the marketplace. Ironically, it did so during the very time it is accusing Intel of foreclosing it from the marketplace. By the end of 2006, AMD's worldwide share of the x86 microprocessor market segment had increased significantly, to 25 percent—about double AMD's share four years earlier. AMD's microprocessors revenues also tripled over the same general timeframe. AMD's profitability increases were even more stunning. During 2005, the same year AMD sued Intel, AMD announced record-breaking profits each quarter.

The overall picture that emerges is not one of a competitor hamstrung by anticompetitive conduct. It is a picture of a highly competitive marketplace, where opportunity is always present. AMD—and AMD alone—is responsible for its successes and failures.

Competition Has Led to Stunning Advances in Microprocessor Performance While Prices Have Declined Dramatically

Competition in the microprocessor industry is so intense that it has driven innovation and investment at an unprecedented pace, resulting in declining prices even as quality and performance have increased dramatically. The picture that emerges is the exact opposite of a stagnant monopoly.

According to Bureau of Labor Statistics reports, which reflect a combination of price reductions and product improvements, microprocessor prices have outperformed every one of the 1,200 product categories tracked by the Bureau. Microprocessor prices declined over the period 2000 through 2006 at the *annual* rate of 48.9 percent, outpacing the rate of decline in prices for personal computers (25.6 percent), storage devices (23.1 percent), and software (0.8 percent).

Nothing about the microprocessor industry suggests that it is hobbled by a monopolist living in the past, looking to reap monopoly profits by selling old and staid products while stalling the development of new and better products. Rather, the hallmarks of a highly competitive industry stand out: prices are going down, performance is going up, and innovation is fast-paced.