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

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

Defendants Intel Corporation and Intel Kabushiki Kaisha (collectively "Intel") respectfully move this Court pursuant to Rules 16 and 56 of the Federal Rules of Civil Procedure 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. In seeking this relief, Intel seeks only rulings on questions of law, and does not present any issues for which there are any disputed issues of fact. 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.

Federal Rule of Civil Procedure 16(c) affirms this Court's broad authority to "take appropriate action" to streamline litigation by "formulating and simplifying the issues," Fed. R. Civ. P. 16(c)(2)(A), by "avoiding unnecessary proof," Fed. R. Civ. P. 16(c)(2)(D), and by "facilitating in other ways the just, speedy and inexpensive disposition of the action," Fed. R. Civ. P. 16(c)(2)(P). *See also* Fed. R. Civ. P. 16(a) (court may "expedit[e] disposition of the action" and "discourag[e] wasteful pretrial activities"). The court's discretion under this Rule, like its inherent authority to manage its own docket, is expansive. *See, e.g.*, *Smith v. Gulf Oil Co.*, 995 F.2d 638, 642 (6th Cir. 1993) (district court properly precluded theory of liability under Rule 16, given that the Rule confers "broad authority [on the] district courts to distill the issues to be argued at trial"). As the Advisory Committee emphasized, Rule 16(c) "clarif[ies] and confirm[s] the court's power to identify the litigable issues [in the interests of] promoting efficiency and conserving judicial resources by identifying the real issues prior to trial, thereby saving time and expense for everyone." Fed. R. Civ. P. 16(c) (advisory committee's note).[1]

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[1] *See also Meadow Gold Prods. Co. v. Wright*, 278 F.2d 867, 869 (D.C. Cir. 1960) ("primary purpose of pre-trial procedures [under Rule 16] is to define the claims and defenses of the parties for the purpose of eliminating unnecessary proof and issues [and] expediting the trial"); *Pifcho v. Brewer*, 77 F.R.D. 356, 357 (M.D. Pa. 1977) ("Rule 16 is intended as a flexible device to be adapted to the problems of the particular case").

Rule 16 not only affirms the Courts' inherent authority to streamline proceedings by resolving disputed issues of law, but affirmatively "imposes a duty on each party to assist the court in defining the issues for trial." *In re Control Data Corp. Securities Litig.*, 933 F.2d 616, 621 (8th Cir. 1991); *accord Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A. de C.V.*, 384 F. Supp. 2d 1334, 1352 (S.D. Iowa 2005). Accordingly, courts grant Rule 16 motions that seek early resolution of disputed legal questions so that the parties may tailor their discovery, expert reports, and subsequent motions to the issues on which the case will turn. *See, e.g., North Jackson Pharmacy, Inc. v. Caremark Rx, Inc.*, 385 F. Supp. 2d 740 (N.D. Ill. 2005); *National Rifle Ass'n. of America v. Village of Oak Park*, Case No. 08-C-3696, 2008 WL 5111163 (N.D. Ill. Dec. 4, 2008); *see also* Fed. R. Civ. P. 16(c) (Rule 16 procedure keeps "the cost to the litigants" from becoming "unduly expensive given the needs of the case") (advisory committee's note).[2]

Pretrial resolution of disputed questions of law is particularly essential in litigation as unusually complex as this. Antitrust cases rank among the most complicated and expensive

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[2] Some litigants have styled their request for a pretrial narrowing of legal issues as a motion for partial summary judgment under Fed. R. Civ. P. 56(d), and Intel alternatively invokes that provision as the basis for the relief requested here. In this context, "[t]he partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case; [it] is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact." Fed. R. Civ. P. 56(d) (advisory committee's note); *see, e.g., Leonard v. Socony-Vacuum Oil Co.*, 130 F.2d 535, 536 (7th Cir. 1942) ("drafters expressly indicated that the same purpose lay behind both [Rule 56(d) and] Rule 16 concerning pretrial procedure for formulation of issues by the court"); *In re HealthSouth Corp.*, 308 F. Supp. 2d 1253, 1267 (N.D. Ala. 2004) (holding that court has authority to address legal issues on motions for partial summary judgment pursuant to Rule 16); *Merriman v. Convergent Business Systems, Inc.*, Case No. 90-30138, 1993 WL 989418 (N.D. Fla. June 23, 1993) (granting partial summary judgment with respect to choice of law because, pursuant to Rule 16, court may resolve questions of law posed by Rule 56 motions); *cf. W.A. Taylor & Co. v. Griswold & Bateman Warehouse Co.*, 719 F. Supp. 697, 699 (N.D. Ill. 1989) (after determining that defendant's motion pursuant to Rule 56 was improper, court "opted (as it could do as a matter of discretion) to treat the motion as one for the narrowing of issues," citing Rule 16(c)).

forms of litigation in American law, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007), and this case is no exception. Indeed, it may well be one of the most complex cases ever litigated in the federal courts, involving thousands of commercial transactions and hundreds of millions of documents. Even so, this litigation has become *unnecessarily* unwieldy and diffuse because the parties disagree about basic and purely legal issues of antitrust doctrine.

As further discussed in the accompanying memorandum of law, for example, the parties disagree about whether the predatory pricing standards adopted in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), and subsequent cases govern AMD's claims that Intel won too much business away from AMD by offering customers generous discounts and other price concessions when their purchases met certain volume or percentage thresholds. Under any price-cost test, moreover, the Court must choose a definition of "cost," and the parties dispute which definition is appropriate—incremental (or average variable) cost, which excludes fixed costs from the analysis, or some variant of average total cost, which would include a substantial portion of fixed costs. And although AMD liberally suffuses its pleadings with "exclusive dealing" language, the parties disagree sharply about how to define that concept and about the limiting principles needed to help firms, in the heat of battle, distinguish in real time between (i) aggressive but permissible competitive behavior that serves consumer interests and (ii) Sherman Act violations that might subject the firm to ruinous treble damages. Until the Court resolves those issues, the parties will have to devote continued time and attention to every factual dispute that might be relevant to any view of the governing law this Court might someday adopt. If those legal issues are not resolved soon, the parties will incur enormous but needless costs during expert discovery; and, when the summary judgment phase begins this fall, they will have no alternative but to submit sprawling, potentially unfocused briefs that address many

irrelevant issues along with the handful of ultimately relevant ones.

In cases like this, it is "not only within the court's *power* under Rule 16," but also "the *duty* of the court to narrow the issues." *Package Machinery Co. v. Hayssen Mfg. Co.*, 164 F. Supp. 904, 910 (E.D. Wis. 1958) (emphasis added), *aff'd,* 266 F.2d 56 (7th Cir. 1959). *See also* Fed. R. Civ. P. 16(c)(2)(L) (courts have enhanced responsibility to "manag[e] potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems"). Intel accordingly asks the Court to simplify and streamline this litigation to avoid waste—not by resolving any disputed factual issues at this stage, but by resolving the key questions of pure antitrust law the parties currently dispute.

In addition, the Court should require AMD to identify the transactions that it claims were anticompetitive and that will be subject to a price-cost analysis. The millions of documents produced in this massive litigation show that Intel engaged in nearly daily microprocessor-related negotiations and transactions. Obviously, AMD cannot place all of those transactions at issue at trial. Rather, it must focus only on a subset of those transactions to attempt to prove its case, and because discovery is nearly over, AMD knows what those transactions are. It should be required to identify them now with specificity, so that the expert reports and the motions yet to be filed can focus on the transactions that are genuinely at issue.

Intel describes the controlling legal issues that it believes the Court should resolve now and sets forth its views about those issues in the accompanying memorandum of law. A proposed Order is attached.[3]

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[3] Pursuant to Local Rule 7.1.1, Intel certifies that its counsel has contacted counsel for AMD about this motion and that AMD is opposed to the relief sought in the motion.

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Dated: May 8, 2009

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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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