Concurring and Dissenting Statement of Commissioner J. Thomas Rosch
In the Matter of Intel Corporation
Docket No. 9341

I.

I concur in the issuance of a Section 5 complaint challenging an alleged course of conduct by Intel Corporation ("Intel") to maintain monopoly power in the markets for central processing units ("CPUs") in computers and at least near-monopoly power in markets for computer graphics products. In accordance with Section 5, I have concluded that there is reason to believe that the alleged course of conduct occurred and that issuance of a pure Section 5 complaint challenging that alleged conduct would be in the public interest. *See* 15 U.S.C. § 45(b) (authorizing the Commission to file a complaint where (1) it has "reason to believe" an antitrust violation has occurred, and (2) where "it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public"). The Supreme Court has held that Section 5 is broader than the Sherman or Clayton Acts, which can be enforced by both private and public plaintiffs. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972). However, the reach of Section 5, like any other statute, is not unlimited. I think the Commission can and should define those limitations as they apply to this case.

In my view, there are four considerations that warrant the application of Section 5 here. First, this is not a case where harm to competition can easily be segregated from harm to competitors. The markets alleged in this case and Intel's alleged position in those markets are extraordinarily concentrated: the CPU markets are duopoly markets in which Intel and Advanced Micro Devices ("AMD") are the only meaningful participants; the graphics products markets are likewise highly concentrated markets in which Intel, AMD, and Nvidia Corporation ("Nvidia") are the only meaningful competitors. Significantly, Intel has monopoly power in the CPU markets and near-monopoly power in the computer graphics product markets and, judging from the allegations in the complaint, the entry barriers surrounding these markets are remarkably high. Under those unique circumstances, the oft-repeated admonition that the Sherman and Clayton Acts protect competition, not competitors, and the federal courts' attendant disinclination to protect competitors in cases brought under those statutes, do not fit well. If the firm with monopoly or near-monopoly power (here, allegedly Intel) engages in an exclusionary and unjustifiable course of conduct that hurts its only competitor in the CPU markets (here, allegedly AMD) or its only two competitors in the computer graphics product markets (here, allegedly AMD and Nvidia), given the uncommonly high entry barriers, that exclusionary conduct harms competition too, by inhibiting those rivals from constraining the exercise of monopoly power.

Second, although Intel's alleged conduct led to higher prices in the CPU markets, that alleged conduct can still be within the Commission's Section 5 powers even if Intel cannot be said to have caused price increases. To be sure, most conventional Section 2 cases alleging monopoly maintenance or attempted monopolization rise or fall on proof of higher prices – if for no other reason than that kind of injury is easiest to measure. But

that is not the only kind of consumer injury with which a law enforcement agency like the Commission should be concerned. The Commission must also be concerned with whether a course of conduct by a firm with monopoly power reduces consumer choice by reducing alternatives. That is true whether the "consumer" suffering the reduction in choice is an original equipment manufacturer ("OEM") or an end user of computer equipment that buys equipment from the OEM. Thus, if and to the extent that an exclusionary course of conduct by a firm with monopoly power results in that less measurable form of consumer injury, Section 5 is the most appropriate vehicle for the analysis, and the Commission, with its expertise and experience, is the most appropriate plaintiff to make that determination.

Third, the complaint here alleges that Intel engaged in an exclusionary course of conduct. That is a claim with clearly identifiable elements that most logically resides in the Commission's Section 5 authority. Simply put, in my view it is improper to slice and dice each constituent part of the alleged course of conduct to determine whether it, standing alone, had the purpose or effect to hinder competition and injure consumers in violation of Section 2: the constituent parts did not stand alone, and both their effects on Intel's few alleged rivals and their consequent impact on consumer choice can only be assessed by examining the effects of Intel's alleged course of conduct as a whole. Although a number of courts have disparaged "course of conduct" claims made under Section 2 as mere "monopoly broth" claims or claims that "0 plus 0 plus 0 equal 1," that militates in favor of the Commission exercising its discretion and expertise to use Section 5 to reach such a course of conduct. Indeed, under those circumstances, a Section 5 "course of conduct" claim may be viewed much as the "invitation to collude" cases that the Commission has pursued as pure Section 5 cases in order to reach conduct that the Sherman Act may not otherwise reach. Lest there be any misunderstanding, Intel must be given the opportunity to show that any injury to competition or to consumers was offset by efficiencies that it reasonably could have achieved only by engaging in the conduct causing those consequences. But that defense does not justify altogether eschewing a course of conduct claim under Section 5.

Fourth, I believe that Intel's intent here is relevant in assessing its liability. The Second Circuit, for example, has held that a respondent's state of mind is not only relevant, but must be taken into account, to determine whether the respondent's conduct constitutes an "unfair method of competition" under Section 5. *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 138-40 (2d Cir. 1984). Properly read, I think that *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), holds that such an intent would be relevant in a Section 2 case. *Id.* at 610-11 (defendant's practices "support[ed] an inference that [the defendant] was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival"). Yet some Section 2 cases have said that an analysis of the defendant's intent is irrelevant in a Section 2 case. Indeed, it can be argued that the Commission's antitrust expertise and experience makes it a more dispassionate and superior judge of that evidence than a lay jury in a Section 2 case.

II.

Although I concur in the issuance of a complaint based on pure Section 5 claims, I respectfully dissent insofar as the complaint also contains Section 2 "tag-along" claims. To be clear, my reasons for doing so are not based on the fact that I lack a "reason to believe" that a Section 2 violation has occurred; instead, I dissent from the addition of the Section 2 claims on public policy grounds.

First, I see no advantage to adding the Section 2 claims. To be sure, there is favorable Section 2 case law that supports each constituent part of the course of conduct that is pled. More specifically, there is Section 2 case law condemning the use of loyalty discounts and kit pricing by a firm with monopoly power, *LePage's Inc. v. 3M*, 324 F.3d 141, 154-57, 162-63 (3d Cir. 2003) (en banc); *Masimo Corp. v. Tyco Health Care Group, L.P.*, 2009 U.S. App. LEXIS 23765, *6-8 (9th Cir. Oct. 28, 2009); the use of deception by such a firm, *United States v. Microsoft Corp.*, 253 F.3d 34, 76-77 (D.C. Cir. 2001) (en banc); refusals to deal, *Aspen Skiing Co.*, 472 U.S. at 603-10, including refusals to license by such a firm, *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1216, 1218-20 (9th Cir. 1997); raising rivals' costs, *United States v. Delta Dental*, 943 F. Supp. 172, 179-82 (D.R.I. 1996) (most favored nations clause case brought under the Sherman Act, albeit Section 1); and product degradation by such a firm, *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1369-72 (Fed. Cir. 1998). Indeed, there is authority in the Section 2 case law for a course of conduct claim. *Microsoft Corp.*, 253 F.3d at 78; *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1318 (D. Utah 1999). But there is no reason why that case law cannot be invoked to support a Section 5 course of conduct claim where the Commission alleges that a course of conduct by a firm with monopoly power constitutes an "unfair method of competition."

Second, it cannot be said that including the Section 2 claims (as opposed to a clearly defined Section 5 course of conduct claim) means that the outcome of this litigation will provide more predictability to the business community by somehow providing better notice of the type of conduct that the antitrust laws preclude. *See Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980) (rejecting the use of Section 5 where it would "blur" Sherman Act distinctions that were "well-forged"); *DuPont*, 729 F.2d at 138-39 (expressing concern that application of Section 5 might upset settled antitrust principles and thus lead to unpredictability); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980) (same). Intel maintains that the Section 2 case law respecting these constituent elements of its alleged course of conduct is favorable to it. If and to the extent that is true, it cannot be said that the relevant Section 2 case law is settled and predictable. A well-defined Section 5 course of conduct claim can provide just as much guidance.

Third, and most importantly, the collateral consequences of including any Section 2 claims are very unfavorable for both Intel and the Commission. Intel currently faces the treble damage suits filed by the New York Attorney General under Section 2 in the United States District Court in Delaware in addition to a number of Section 2 treble damage class actions that have been filed there. The Commission should not enable

those plaintiffs to free ride off of the Commission's work. Nor should it put itself in a position where an unfavorable outcome in those cases may be cited against it. Neither of those consequences can occur if the Commission proceeds solely under Section 5: the Delaware treble damage actions cannot proceed under Section 5 because only the Commission has the power to enforce Section 5. Indeed, it can be argued that where, as here, private litigation is pending under Section 2, as a matter of policy the Commission should not spend public resources on a duplicate claim.

Beyond that, as my colleagues, Chairman Leibowitz and more recently Commissioner Kovacic have pointed out, the Supreme Court has steadily been "shrinking" the ambit of the Sherman Act both procedurally and substantively. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-61 (2007); *Credit Suisse Sec. (USA) v. Billing*, 551 U.S. 264, 281-82 (2007). By all accounts, these changes are, partially at least, due to the Court's concern about the Sherman Act's application by juries and generalist federal district courts. Regardless of whether one shares that concern about private Sherman Act enforcement, it is undeniable that this jurisprudence "slops over" to public enforcement. That is so because insofar as the federal agencies prosecute their cases under the Sherman Act, they must proceed under the same statutes that private plaintiffs invoke. That consequence, however, can be minimized – if not avoided altogether – if the Commission proceeds under Section 5 alone. Thus, although I have also concluded that there is reason to believe that the alleged conduct also violates Section 2 the Sherman Act, I have concluded that insofar as this case proceeds on the basis of any Sherman Act "tag-along" claims, the Commission acts contrary to the public interest.