IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STATE OF NEW YORK, BY ATTORNEY GENERAL ERIC T. SCHNEIDERMAN, Plaintiff, v. INTEL CORPORATION, a Delaware Corporation, Defendant.	)	C. A. No. 09-827 (LPS) **PUBLIC VERSION**

INTEL CORPORATION'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT BASED ON THE LAWFULNESS OF ITS DISCOUNTING PRACTICES

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Intel is entitled to summary judgment on all claims because New York's theory that Intel carried out an "exclusionary pricing" scheme requires proof that Intel engaged in below-cost pricing, which New York cannot provide. The Supreme Court has made clear that when an antitrust plaintiff challenges a defendant's "pricing practices, only predatory [*i.e.*, below-cost] pricing has the requisite anticompetitive effect" to give rise to an antitrust violation. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990); *see, e.g.*, *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109, 1120 (2009); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993). This requirement applies "regardless of the type of antitrust claim involved." *Atl. Richfield*, 495 U.S. at 340; *Brooke Group*, 509 U.S. at 223.

New York's obligation to prove below-cost pricing reflects the fundamental principle that the antitrust laws encourage discounting and other forms of price competition because such conduct generally benefits consumers. As long as the defendant is pricing at or above cost, any equally efficient competitor can compete simply by matching the defendant's discounted prices, and the antitrust laws are not designed to protect inefficient competitors from the rigors of competition.[1] Subjecting companies to a risk of antitrust liability for above-cost discounting would chill vigorous price competition, and thereby discourage the very conduct that the antitrust laws promote. Accordingly, the Supreme Court has consistently held that an antitrust plaintiff challenging a defendant's pricing practices must prove that the defendant has engaged in below-cost pricing.[2]

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[1] Intel does not concede that it conditioned discounts on exclusivity. For purposes of this motion, however, it is immaterial whether Intel did so.

[2] The traditional price-cost test, as adopted and applied repeatedly by the Supreme Court, examines (among other things) whether the price at which a defendant sold its product is below an appropriate measure of cost. *See Brooke Group*, 509 U.S. at 231. The discount-attribution variant of that test has been applied by some courts when a defendant offers "bundled discounts" that tie discounts on one product to the customer's purchases of other products that the plaintiff

New York's economic expert, Dr. Frederick Warren-Boulton ("FWB"), has failed to apply any judicially accepted price-cost test to Intel's pricing conduct, and effectively admitted that Intel priced above cost. *See* Declaration of Daniel S. Floyd (Oct. 14, 2011) (hereinafter "Floyd Decl.") Ex. A, Expert Report of FWB 18 & n.38 (July 25, 2011) (hereinafter "FWB Rep."); *id.* Ex. B, Deposition of FWB 11:10–12:15 (Oct. 4–6, 2011) (hereinafter "FWB Dep."). He justified that failure by claiming that Intel's above-cost discounts actually raised, rather than lowered, prices. *See* FWB Rep. 18–24; FWB Dep. 12:20–13:14, 162:3–10.[3] But his novel "exclusionary pricing" theory of pricing conduct disregards the Supreme Court's repeated admonition that challenges to "pricing practices" must satisfy a price-cost test. *Atl. Richfield Co.*, 495 U.S. at 339. Whether or not antitrust plaintiffs claim that discounts lead to higher prices, the Supreme Court has consistently required them to prove below-cost pricing as an essential part of their monopolization claim. *See, e.g.*, *Brooke Group*, 509 U.S. at 231; *linkLine*, 129 S. Ct. at 1114–15.

New York's inability to show that Intel priced below cost would be fatal to its claims even if FWB had not effectively admitted that Intel priced above cost. At his deposition, however, FWB testified that he had no reason to disagree with the showing by Intel's economic expert that Intel consistently priced above cost, even using a discount-attribution test, which imputes a lower price to Intel's sales than the Supreme Court's price-cost test. *See* FWB Dep. 11:24–12:15. New York's inability to prove below-cost pricing is fatal to its claims under both the Sherman Act and New York law. Because New York's claims are based on Intel's pricing, Intel

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does not produce. That test applies certain discounts to a subset of the defendant's sales, thereby magnifying the discount and lowering the imputed price. *See infra* p. 10 & note 10. This case, however, does not involve "bundled discounts," and New York makes no bundling claim.

[3] Intel is also filing a *Daubert* motion to exclude FWB's report under Fed. R. Evid. 702 because of its fundamental flaws, but the Court need not address the *Daubert* issues to grant summary judgment for Intel on the grounds set forth in the present motion.

is entitled to summary judgment on all claims.[4]

I. STATEMENT OF THE CASE

New York claims that Intel illegally monopolized the market for x86 microprocessors by offering discounts in the form of rebates to its customers—original equipment manufacturers ("OEMs") such as Dell, Hewlett-Packard, and IBM. New York alleges that Intel's discounts harmed competition because some of them were allegedly conditioned on market-share or exclusivity targets. Such agreements are often known as "market-share discount" agreements. *E.g.*, *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1044–45 (8th Cir. 2000). Such discounts are conceptually and legally distinct from bundled discounts, which involve a discount on one product that is available only if the buyer also purchases a different product. *See supra* note 2.

New York alleges that Intel's discounts were conditional in that OEMs were required to purchase some minimum percentage of their supplies from Intel to receive the full discount. FWB asserted that some market-share conditions covered 100% of an OEM's purchases, and others were limited to a lesser percentage or to certain product segments. *See, e.g.*, FWB Rep. 29–30. FWB admitted, however, that Intel never required customers to meet any of those alleged conditions to buy its microprocessors. *See id.* at 22 n.42 ("Intel didn't refuse to deal.").[5]

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[4] New York follows federal law in construing the Donnelly Act. *See RxUSA Wholesale, Inc. v. Alcon Labs., Inc.*, 661 F. Supp. 2d 218, 233–34 (E.D.N.Y. 2009). Accordingly, New York's failure to satisfy a price-cost test requires dismissal of its Donnelly Act claim and its Sherman-Act- and Donnelly-Act-based Executive Law claims as well.

[5] Although New York's complaint occasionally uses the term "threats" in relation to Intel's discounting, that is merely a pejorative way of characterizing any condition of a discount. For discounts that are linked to purchasing targets, the "threat" is merely that the customer will not receive the full level of discounts if it fails to make the required level of purchases. The Third Circuit has recognized that using pejorative terms to describe the prospect of a lower discount for less business does not change the antitrust analysis. *See Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 78–79 (3d Cir. 2010) ("[I]t is no more an act of coercion, collusion, or

New York's theory of the case, as elucidated by FWB, is predicated completely on Intel's pricing of its microprocessors.[6] FWB's theory is that Intel's discounts in fact increased prices for both Intel's microprocessors and the computers containing them. *See* FWB Rep. 18–24; FWB Dep. 12:20–13:14, 162:3–10. FWB theorized that a larger firm can raise its prices through conditional discounting because a smaller rival cannot profitably "compensate the customer for the discounts . . . [the customer] loses" when it fails to purchase the threshold amount for the discount. FWB Rep. 21.[7] FWB based his theory—that cutting prices actually increases prices—on the assumption that the smaller rival's costs are twice as high as the larger firm's costs, and thus that the smaller firm cannot match the discount with its own discount. *See* FWB Rep. 18. He admitted, however, that this assumption did not approximate the conditions of the microprocessor market. FWB Dep. 261:10–13.

Under FWB's theory, the alleged price-elevating mechanism is the discount itself. Each of the categories of conduct that FWB purports to analyze relies on Intel's discounting as the

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improper interference for [a supplier] to offer more money to [its customer pursuant to an exclusive supply arrangement] than it is for such suppliers to offer the lowest . . prices.").

[6] FWB's report makes passing references to "research cooperation," "[s]upply-chain cooperation," "rules about when a salesperson could mention an AMD-based product to a customer," and limiting AMD sales to "direct channels." FWB Rep. 30–32; *see also* Compl. ¶¶ 161, 198. FWB failed to analyze whether that alleged conduct was anticompetitive. Moreover, FWB admitted that he is not asserting that any of Intel's conduct "affected AMD's ability to compete." FWB Dep. 416:5–417:18. Indeed, he admitted that "I don't even have an opinion that AMD was significantly harmed by" Intel's conduct. *Id.* at 280:13–14. FWB's "exclusionary pricing" theory thus forms the entire basis for his assertion that Intel's conduct led to higher prices. *See* FWB Rep. 18–24; FWB Dep. 12:20–13:3. In other words, the alleged non-price conduct was not of such a character as to affect competition in the relevant market. *See Brooke Group*, 509 U.S. at 222–23 ("essence" of monopolization claim is proof that competition was "eliminate[d] or retard[ed]"). New York's case therefore must stand or fall on FWB's "exclusionary pricing" theory.

[7] Elsewhere in his report, FWB makes the opposite claim, stating that so-called "exclusionary pricing" actually "forc[es] rivals to accept . . . lower prices to OEMs." FWB Rep. 24.

driving force.[8] Indeed, FWB's own description of the conduct on which he predicates antitrust liability—"exclusionary pricing"—confirms that New York is attacking Intel's pricing practices. FWB Rep. 28–32. FWB admitted that he "know[s] nothing about Intel's negotiations" with its OEM customers, and thus relied solely on his "exclusionary pricing" theory. FWB Dep. 771:10–11. As discussed below, where "pricing practices" are at issue, the Supreme Court has repeatedly made clear that an antitrust plaintiff must establish that the defendant has priced below cost.

II. ARGUMENT

A. New York's Inability To Prove Below-Cost Pricing Requires Judgment For Intel.

1. Claims Of Competitive Harm Due To Discounts Must Pass A Price-Cost Test.

In a line of cases that it sweepingly re-affirmed in 2009, the Supreme Court has recognized a broad right of businesses to price their products as they choose—so long as those prices are above cost—even in the face of allegations that the price structure somehow harmed competition through a scheme to raise prices. *See, e.g.*, *linkLine*, 129 S. Ct. at 1118. When an antitrust plaintiff complains about a defendant's "pricing practices, only predatory [*i.e.*, below-cost] pricing has the requisite anticompetitive effect" to establish liability. *Atl. Richfield*, 495 U.S. at 339. A plaintiff challenging a defendant's pricing practices, as New York does with its attack on "exclusionary pricing," must prove that "the prices complained of are below an appropriate measure of [the defendant's] costs." *linkLine*, 129 S. Ct. at 1120; *see Weyerhaeuser Co. v. Ross-Simmons*

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[8] FWB relied on "indices" of alleged misconduct listed in spreadsheets attached to his report, each of which is ultimately based on some form of rebate. Both FWB's report and New York's complaint use the term "payment" to describe some of these rebates. A rebate by a producer to a customer is, economically and legally, no different from a price discount on the products sold. *See E. Food Servs., Inc. v. Pontifical Catholic Univ.*, 357 F.3d 1, 5 n.2 (1st Cir. 2004) ("[w]hether the university is compensated by up-front payments, rent, or royalties . . . affects not the competitive impact but merely the form and amount of compensation for the exclusive contract"); *see also Brooke Group*, 509 U.S. at 239; *NicSand v. 3M Co.*, 507 F.3d 442, 451–52 (6th Cir. 2007) (en banc).

Hardwood Lumber Co., 549 U.S. 312, 325–26 (2007); *Brooke Group*, 509 U.S. at 223; *see also Atl. Richfield*, 495 U.S. at 340; *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 117–18 & n.12 (1986); *Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

This basic antitrust rule reflects the fundamental principle that price competition in the form of discounts, rebates, and price reductions is generally procompetitive. An alleged monopolist's above-cost discounts cannot harm competition in the relevant sense, because any equally efficient competitor can simply match them. *See Brooke Group*, 509 U.S. at 222; *Cargill*, 479 U.S. at 115 & n.10; *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (Breyer, J.) ("Nor will [above-cost] prices have a tendency to exclude or eliminate equally efficient competitors."). And an "equally efficient competitor" is the proper benchmark because any exclusionary effect of above-cost prices "represents competition on the merits," as the antitrust laws exist to protect competition (and hence consumers), not competitors. *Brooke Group*, 509 U.S. at 223, 224. Competition is benefited, not harmed, when a more efficient firm is permitted to offer discounts and rebates to increase its sales, even if it thereby takes business away from a less efficient rival. As the Supreme Court has explained, "cutting prices in order to increase business often is the very essence of competition." *linkLine*, 129 S. Ct. at 1120 (citation omitted); *see Cargill*, 479 U.S. at 116.

The requirement that plaintiffs prove below-cost pricing is further designed to avoid mistakenly condemning legitimate price competition that the antitrust laws encourage. Even though "above-cost predatory pricing schemes" might be theoretically possible (*Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414–15 (2004)), the Supreme Court has concluded that any "exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the [defendant], 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 Atl. Richfield*, 495 U.S. at 338. As then-Judge Breyer observed in *Barry Wright* (which upheld a discount conditioned on exclusivity), "the consequence of a mistake here 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." 724 F.2d at 235.

2. New York's Theories Are Subject To A Price-Cost Test.

Antitrust plaintiffs' obligation to prove below-cost pricing is not limited to any single theory or claim; rather, it applies to all claims of antitrust injury arising from a defendant's pricing practices. As the Supreme Court explicitly held in *Atlantic Richfield*, "in the context of pricing practices, only predatory [*i.e.*, below-cost] pricing has the requisite anticompetitive effect." 495 U.S. at 339. The Court continued: "We have adhered to that principle regardless of the type of antitrust claim involved." *Id.* (emphasis added). "When prices are not predatory," *i.e.*, when an equally efficient competitor could match them without incurring losses, "any losses flowing from [the prices] cannot be said to stem from an anticompetitive aspect of the defendant's conduct." *Id.* at 340–41 (emphasis in original). Thus, every antitrust plaintiff claiming injury from a defendant's discounting practices must prove that the defendant engaged in below-cost pricing. *Id.*; *see linkLine*, 129 S. Ct. at 1120; *Weyerhaeuser*, 549 U.S. at 325–26; *Brooke Group*, 509 U.S. at 222. "Exclusionary pricing" is just another name for "pricing practices," as to which the Supreme Court has left not even a scintilla of doubt that a price-cost test governs.

The Supreme Court has mandated the use of the price-cost test in cases involving a broad range of theories of liability, including classic predatory pricing (*Matsushita* and *Cargill*), maximum resale price maintenance (*Atlantic Richfield*), market manipulation through discounting

(*Brooke Group*), predatory bidding (*Weyerhaeuser*), and price squeezes (*linkLine*). The obligation to prove below-cost pricing cannot be avoided by claiming, as FWB does, that a discount could theoretically produce a higher price. *See* FWB Rep. 18–24. As explained above, the price-cost test provides a safe harbor for discounts that generally benefit consumers, avoids enmeshing courts in the judicially impracticable task of trying to identify cases of anticompetitive above-cost discounting, and minimizes the risk that firms will shy away from beneficial discounting to avoid potential antitrust liability. *See Brooke Group*, 509 U.S. at 223.

New York's theory of liability calls for precisely the kind of impracticable judicial inquiry that is likely to chill procompetitive price reductions. According to New York, discounts are actually disguised price increases. FWB Rep. 19–24.[9] Indeed, FWB asserts that nearly any form of price reduction can be anticompetitive; at his deposition, he testified that it would be anticompetitive for Intel even to quote a price to a customer in response to a customer's request for a lower price on a large purchase. *See* FWB Dep. 649:25–652:2. Even if there were some remote possibility that a firm could harm competition and raise prices in the way FWB theorizes—and there is not—the Supreme Court's teaching is that such judicial inquiries are so likely to chill beneficial discounting that they are precluded unless the plaintiff first shows below-cost pricing.

The improbable theory of "exclusionary pricing" urged by New York bears close resemblance to the theory that *Brooke Group* subjected to a price-cost test. There the plaintiff alleged a "complex chain of cause and effect" whereby (1) the defendant would "enter the generic [cigarette] segment with list prices matching" the plaintiff's list prices, but (2) offer customers "mas-

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[9] FWB has testified elsewhere that the diametric opposite is true. *See* Floyd Decl. Ex. C, Transcript of Testimony by Frederick R. Warren-Boulton 5756:13–16, *Concord Boat Corp. v. Brunswick Corp.* (E.D. Ark. June 11, 1998) ("Remember discounts are price cuts. So you've got a tough job if you are going to take a price cut and somehow turn it into a price increase. That takes a lot of doing.").

sive . . rebates"; (3) the plaintiff would seek to "defend its market share . . . by matching [defendant's] rebates, but (4) to "avoid further losses, [plaintiff] would raise its list prices on generics or accept price leadership by [defendant]"; (5) these "higher list prices . . . would shrink the percentage gap in retail price between generic and branded cigarettes," and finally (6) "this narrowing of the gap would make generics less appealing to the consumer, thus slowing the growth of the economy [lower-priced] segment." 509 U.S. at 231. FWB alleges a similar complex chain of causation, whereby (1) rival firms start with given market shares; (2) the larger firm adopts a market-share discount to hold on to contested sales; (3) the smaller firm cannot profitably (or chooses not to) compete against the discount without charging a higher price than it did before the discount was instituted; (4) this enables the larger firm to raise its prices; and (5) the firms retain their market shares but sell at a higher price. *See* FWB Rep. 18–24. The alleged price-raising scheme in *Brooke Group* was subject to a price-cost test; the same is true here.

Other Supreme Court decisions applying the price-cost test also involved claims that price reductions either did or would ultimately lead to price increases. *See* Floyd Decl. Ex. D, Br. for Resp., *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, No. 07-512, 2008 WL 4606588, at *4–5 (U.S. Oct. 14, 2008) (plaintiffs alleged that, by defendant's "price squeeze," which reduced retail prices to "end-user customers," those same customers "have been deprived of lower prices"); Floyd Decl. Ex. E, Br. of Resp., *Atl. Richfield Co. v. USA Petroleum Co.*, No. 88-1668, 1989 WL 1127148, at *3 (U.S. Oct. Term 1989) (alleging that price reductions "eliminated the price competitive segment of the industry" by driving out discount retailers, which "led to the stabilization of retail margins"); *Matsushita*, 475 U.S. at 588–89 ("For [a predatory pricing conspiracy] to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered."); *Cargill*, 479 U.S. at 114 (plain-

tiffs alleged that under defendant's "price-cost squeeze," "smaller competitors lacking significant reserves and unable to match [the defendant's] prices would be driven from the market; at this point [the defendant] would raise the price of its [products] to supracompetitive levels, and would more than recoup the profits it lost during the initial phase"). FWB's assertion that it would be "inappropriate" to apply any form of price-cost test to his pricing theory because his theory supposedly "enables the dominant firm to raise the net (*i.e.*, post-discount) price" (FWB Rep. 18, 22) is thus contrary to the Supreme Court's unwavering application of a price-cost test in cases involving pricing conduct.

The courts of appeals have uniformly applied a price-cost test to assess the validity of market-share discounts and analogous conditional discounting practices. In *NicSand*, the Sixth Circuit applied a price-cost test to allegations that the defendant conditioned rebates on agreements to buy exclusively from it. 507 F.3d at 451–52, 458. In *Virgin Atlantic Airways v. British Airways PLC*, 257 F.3d 256, 261 (2d Cir. 2001), the court applied a price-cost test to allegations that "incentive agreements," including "[b]ack-to-dollar-one" "market-share" discounts, were anticompetitive. 69 F. Supp. 2d 571, 574 (S.D.N.Y. 1999). In *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d at 1060–63, the court applied a price-cost test to market-share discounts. In *Barry* Wright, then-Judge Breyer applied a price-cost test to discounts linked to exclusivity. Even outside the single-product area, in *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 892, 901 (9th Cir. 2008), the court applied the discount-attribution test to bundled discounts conditioned on "sole preferred provider" status.[10]

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[10] As noted (*supra* note 2), the discount-attribution form of the price-cost test can be used to "defin[e] the appropriate measure of costs in a bundled discounting case," where measuring costs and discounts is "more complex than in a single product case." *Cascade Health*, 515 F.3d at 903. Under the discount-attribution test, "the full amount of the discounts given by the defen-

The leading antitrust treatise has similarly concluded that an above-cost discount linked to exclusivity or market-share targets is not anticompetitive because "any above-cost discount can be matched by an equally efficient firm." *See* XI Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1807b1 (3d. ed. & Supp. 2011) (hereinafter "Areeda"); *see also* William J. Baumol, Predation and the Logic of the Average Variable Cost Test, 39 J.L. & Econ. 49, 52 (1996). Thus, the Supreme Court, courts of appeals, and leading commentators are all in agreement: antitrust claims (like New York's) based on the allegedly anticompetitive consequences of a defendant's discounting practices are subject to a price-cost test.

3. The Third Circuit's Decision In *LePage's* Is Entirely Consistent With Application Of A Price-Cost Test In This Case.

The Third Circuit's 2003 decision in *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc), which declined to apply the *Brooke Group* test in a case involving multi-product bundled discounts, is entirely consistent with the application of a price-cost test here. *LePage's* held that 3M's bundled discounts—which required customers to meet purchase targets on six different products, such that a failure to meet the target on any product would result in a loss of discounts on all—excluded smaller but equally efficient competitors that did not sell all products in the bundle. 3M did not raise, and the Third Circuit did not address, the question whether (as other courts have subsequently held, *see Cascade Health*, 515 F.3d at 906) the discount-attribution version of the price-cost test should be applied in the bundling context.

Nothing in *LePage's* precludes application of a price-cost test to New York's claims, because the reasoning of *LePage's* makes clear that it is limited to the special case of multi-product bundled discounts. The primary anticompetitive act there was bundling, *i.e.*, conditioning rebates for one product on meeting purchase targets for other products; the court emphasized that

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dant on the [multi-product] bundle are allocated [*i.e.*, attributed entirely] to the competitive product or products [*i.e.*, the part(s) of the bundle that the plaintiff also produces]." *Id.* at 906.

3M's rebates were "conditioned on purchases spanning six of 3M's diverse product lines," such as "transparent tape," "Retail Auto Products," and "Health Care Products." 324 F.3d at 154. Customers that failed to meet a target on any one product stood to lose discounts on the other products as well. *See id.* This bundling was the key form of anticompetitive conduct found by the court: "The principal anticompetitive effect of bundled rebates as offered by 3M is that when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer." *Id.* at 155 (emphasis added). Thus, by its own terms, *LePage's* condemns a multi-product producer's exclusion of single-product producers; it says nothing about cases (like this one) involving competition within a single product market. *See supra* note 2.[11]

This understanding of *LePage's* is confirmed by the court's reliance on the reasoning and analysis expressed in the Areeda treatise. *See* 324 F.3d at 155, 158. When *LePage's* was decided, that treatise recognized, as it does today, that the price-cost test applies in all single-product market-share discounting cases. *See* IIIA Areeda ¶ 768 (2d ed. 2002) (reasoning that, in the context of a single-product discount, "as long as the discounted price is above cost and not predatory, it can be matched by any equally efficient rival"); IIIB Areeda ¶ 768b4 (3d ed. 2008 & Supp. 2011) ("For single-item discounts, no matter how measured or aggregated, exclusion of an equally efficient rival seems implausible, provided that the fully discounted price remains

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[11] The *LePage's* court's discussion of the exclusive-dealing aspect of the challenged agreements confirms this understanding of the decision. That discussion also focused on the practice of bundling discounts across multiple product lines. *See* 324 F.3d at 157–59. In the court's view, the encouragement of exclusivity simply "magnified" the effects of the bundling because "[o]nly by dealing exclusively with 3M in as many product lines as possible could customers enjoy the substantial discounts." *Id.* at 159. Accordingly, the court concluded that "[t]he anticompetitive effect of 3M's exclusive dealing arrangements . . . cannot be separated from the effect of its bundled rebates." *Id.* at 162 (emphasis added). The court's "exclusive dealing" discussion is thus inseparable from the bundled discounting upon which the case turns.

above the seller's costs. . . . [W]e would . . . allow all above-cost single-item discounts.").

LePage's acknowledged the appropriateness of the equally-efficient-competitor standard for determining antitrust liability. In discussing the competitive impact of multi-product bundled discounts, the court explained: "'Depending on the number of products that are aggregated and the customer's relative purchases of each, even an equally efficient rival may find it impossible to compensate for lost discounts on products that it does not produce.'" 324 F.3d at 155 (emphasis added) (quoting IIIA Areeda ¶ 794, at 83–84 (Supp. 2002)). This standard precludes liability for above-cost single-product discounts because "any above-cost discount can be matched by an equally efficient firm." XI Areeda ¶ 1807b1 (3d ed. & Supp. 2011).

The Supreme Court's intervening decisions in *linkLine* and *Weyerhaeuser* provide further support for the conclusion that the *LePage's* court's refusal to apply *Brooke Group* cannot be extended to cases like this one involving discounting in a single-product market. First, while the *LePage's* court believed that the *Brooke Group* test was inapplicable to monopolization cases brought under Section 2 of the Sherman Act, *see* 324 F.3d at 151, the Supreme Court has since affirmed that the test applies to such cases. *See Weyerhaeuser*, 549 U.S. at 316, 318 n.1, 320; *linkLine*, 129 S. Ct. at 1114, 1123. Second, *LePage's* assumed that the price-cost safe harbor is limited to "predatory pricing" claims, 324 F.3d at 151, but the Supreme Court has subsequently applied the test to other pricing claims as well. *See Weyerhaeuser*, 549 U.S. at 316 ("predatory-bidding"); *linkLine*, 129 S. Ct. at 1120 ("price squeeze"). These recent precedents thus reveal that the Supreme Court meant what it said when it held that pricing practices cannot be challenged as anticompetitive without proof of below-cost pricing "regardless of the type of antitrust claim involved." *Atlantic Richfield*, 495 U.S. at 340 (emphasis added).

LePage's thus applies, at most, only in cases involving multi-product bundles, not single-

product discounts. That is how it has been interpreted by the Sixth and Ninth Circuits, the primary courts of appeals to have considered it in the context of conditional discounts. *See NicSand*, 507 F.3d at 451 (referring to *LePage's* as involving "illegal tying"); *Cascade Health*, 515 F.3d at 897 (primary issue in *LePage's* "was whether 3M unlawfully maintained its monopoly power through the bundled discount program"). As noted above, other courts of appeals have uniformly adhered to the price-cost test in single-product cases. *See supra* pp. 10–11.[12]

4. It Is Undisputed That New York Cannot Prove Below-Cost Pricing.

New York cannot, and does not attempt to, establish that Intel engaged in below-cost pricing under either the traditional price-cost test or the discount-attribution test. Indeed, New York's expert expressly disclaimed any need to meet any such judicially accepted price-cost test. *See* FWB Rep. 18 & n.38. His report implicitly admitted that Intel's sales, net of discounts, were consistently profitable—*i.e.*, that prices were above cost—and he did not dispute the showing by Intel's economic expert that Intel's prices were consistently above cost, even under the discount attribution test. *See, e.g.*, *id.* at 6, 16, 18; FWB Dep. 11:24–12:15. As in *linkLine*, New York's undisputed inability to prove that Intel engaged in actionable below-cost pricing is fatal to its case. *See* 129 S. Ct. at 1120; *see also, e.g.*, *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 531 n.12 (5th Cir. 1999) ("Summary judgment is appropriate when an ill-reasoned expert opinion . . . rests on an error of . . . law.") (citing *Matsushita*, 475 U.S. at 594 n.19). Intel is entitled to summary judgment in its favor on all claims of injury linked to Intel's pricing conduct.

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12 An appeal to the Third Circuit is currently pending in *ZF Meritor LLC v. Eaton Corp.*, 2011 WL 843928 (D. Del. Mar. 10, 2011). *ZF Meritor* is inapposite here; among other reasons, the plaintiffs' theory in the *ZF Meritor* case was exclusive dealing, rather than "exclusionary pricing"; the contracts in that case had five- to seven-year terms, in contrast to the short-term contracts at issue here; and the rival in *ZF Meritor* exited the market, whereas AMD survived and grew during the relevant period (FWB Rep., Ex. L-2).

B. New York Cannot Avoid Application Of A Price-Cost Test By Recharacterizing Its Claims As Involving Exclusive Or "De Facto Exclusive" Dealing.

1. The Mechanism For Alleged Exclusivity Here Is Intel's Pricing Practices Rather Than Any True Exclusivity Or Refusal To Deal.

New York's expert does not assert that Intel engaged in classic "exclusive dealing" by forcing customers to make long-term commitments to buy all of their microprocessors from Intel if they were to buy any Intel microprocessors. He admitted that "Intel didn't refuse to deal." FWB Rep. 22 n.42. Nor is there evidence to support any exclusive dealing claim. In any event, an attempt by New York to recharacterize its claims as resting on an exclusive-dealing theory would fail, because an antitrust plaintiff's choice of words does not change the underlying economic analysis or judicial policy concerns. When the plaintiff's theory of anticompetitive harm is based on the defendant's pricing practices, the plaintiff must satisfy a price-cost test, because basing liability on above-cost pricing would inhibit legitimate price-cutting. That risk is present regardless of the label the plaintiff uses, although in this case the plaintiff's own choice of words to describe the conduct at issue—"exclusionary pricing"—leaves no doubt that the plaintiff's claim is based on pricing conduct.

As discussed above, *see supra* pp. 7–8, the Supreme Court has applied the price-cost test regardless of how the plaintiff's theory was denominated. For example, plaintiffs in *linkLine* brought "price squeeze" claims, and argued to the trial court that the price-cost test should not apply because they were "not contending that low prices [we]re the crux of the offense." Floyd Decl. Ex. F, Pls.' Opp'n to Def.'s Mot. for J. on the Pleadings at 3, *In-Reach Internet LLC v. Pac. Bell Tel. Co.*, No. CV 03-5265 SWV (SHx), 2004 WL 5627659 (C.D. Cal. Aug. 6, 2004). The Supreme Court held nonetheless that plaintiffs could not state a "price squeeze" claim without satisfying a price-cost test, for all of the same reasons that led to the creation of the test in the first place. *See linkLine*, 129 S. Ct. at 1120.

Similarly, the courts of appeals that have addressed discounting linked to exclusivity or market share have looked beyond the plaintiffs' choice of words, and have applied the price-cost test whenever the theory of injury was linked to the defendant's pricing. Thus, in *NicSand*, the Sixth Circuit applied a price-cost test to "up-front payments" (*i.e.*, rebates) offered in exchange for "the exclusive right to supply a set of stores," even though the plaintiff expressly disclaimed a "predatory pricing" theory. 507 F.3d at 451–52, 458. In *Virgin Atlantic*, the Second Circuit applied a price-cost test to the plaintiff's "predatory foreclosure" theory, which involved allegations of "[b]ack-to-dollar-one provisions" that conditioned discounts on the attainment of market-share targets—identical to the "first-dollar" market-share rebates emphasized by FWB (*see* FWB Rep. 31)—"[that] allow the discount or rebate to apply retroactively to all sales under the agreement once a [purchase] performance target is met." 257 F.3d at 261. In *Concord Boat*, the Eighth Circuit applied the price-cost test to "first dollar" market-share discounts that were alleged to amount to "de facto exclusive dealing," even though plaintiffs never alleged "predatory pricing." 207 F.3d at 1060–63 & n.13. And in *Barry Wright*, then Judge Breyer applied a price-cost test in upholding discounts linked to a requirements contract. *See* 724 F.2d at 232.

As these cases show, FWB's references to "*de facto* exclusive dealing" and his disclaimer of a "predatory pricing" theory (FWB Rep. 18, 27, 29) do not eliminate New York's obligation to satisfy a price-cost test with respect to all claims that are linked to Intel's rebates or discounts.

2. New York's Claims Fail Even If Analyzed Under An "Exclusive Dealing" Rubric.

New York's expert neither asserts that AMD was foreclosed by exclusive dealing contracts nor argues that Intel engaged in conduct that would be actionable under an exclusive dealing framework. Instead, he relies on his novel theory of "exclusionary pricing." FWB Rep. 18–24. This theory, according to FWB, does not depend on the exclusion of the smaller competitor.

See id; FWB Dep. 280:13–14, 281:13–15. Given New York's failure to establish true "exclusive dealing," it has no exclusive dealing claim here.

In any event, an exclusive dealing claim would fail as a matter of law. The *sine qua non* of "exclusive dealing" is that the rival literally cannot compete for the sales in question because of a "contract between [the defendant] manufacturer and a buyer that forbids the buyer from purchasing the contracted good from any other seller or that requires the buyer to take all of its needs in the contracted good from that manufacturer." XI Areeda ¶ 1800a. No such transactions are at issue here.

As a threshold issue, even true exclusive dealing contracts (which Intel's arrangements were not) are generally legal. *See, e.g., Race Tires*, 614 F.3d at 83 ("It is well established that competition among businesses to serve as an exclusive supplier should actually be encouraged."); *see also Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 996 (9th Cir. 2010) (even "[e]xclusive dealing, [which] involves an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor" creates "well-recognized economic benefits"). For exclusive dealing to violate the law, "the opportunities for other traders to enter into or remain in th[e] market must be significantly limited." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961). This condition cannot be satisfied here. FWB does not even assert that Intel's conduct "significantly harmed" AMD or "affected AMD's ability to compete." FWB Dep. 280:13-14, 416:5–417:18.[13] *A fortiori*, Intel's alleged market-share discount agreements (which did not obligate OEMs to buy only from Intel)

[13] Indeed, according to FWB, AMD's success and prospects were such that it had sufficient resources to "continue[] to invest in R[esearch] & D[evelopment] and chip-making capacity," and "AMD's continued investment implies that it expected a return sufficient to cover an appropriately risk-adjusted cost of capital." FWB Rep. at 16. Moreover, AMD's market share actually increased during the alleged injury period ("2001 Q4 through 2006 Q2"), according to FWB's report and deposition testimony. *See* FWB Rep. 64 & Ex. L-2; FWB Dep. 27:3–5, 349:16–18.

are presumptively legal under exclusive dealing doctrine. *See, e.g., Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984).

Here, of course, Intel at most provided financial incentives to OEMs to buy more from it. But mere incentives do not give rise to exclusive dealing claims at all. In *Allied Orthopedic*, for example, the Ninth Circuit rejected a claim of exclusive dealing based on the defendant's "market-share discount and sole-source agreements," which provided "substantial discounts to customers that actually purchased a high percentage of their . . . requirements from" the defendant. 592 F.3d at 996. The court reasoned that "[a]ny customer subject to one of [the] market-share discount agreements could choose at any time to forego the discount . . . and purchase from a . . . competitor." *Id.* at 997. Thus, "[t]he market-share discount agreements . . . did not foreclose [the defendant's] customers from competition because 'a competing manufacturer need[ed] only offer a better product or a better deal to acquire their [business].'" *Id.* at 997 (citation omitted). *Accord, e.g., Se. Mo. Hosp. v. C.R. Bard Inc.*, 642 F.3d 608, 612–13 (8th Cir. 2011) (rejecting claim that market-share discounts constituted "exclusionary dealing" where "discount agreements [did not] contractually obligate hospitals to purchase anything"; "[i]f a [customer] purchased less than the agreed upon percent, it simply lost its negotiated discount"); *see also* XI Areeda ¶ 1800a.

Similarly here, New York has not claimed that OEMs were obligated to buy anything from Intel. Rather, it claims that OEMs had to buy certain volumes of microprocessors to qualify for some discounts. As in *Allied Orthopedic*, AMD only needed to offer a better product or a better deal to acquire the OEMs' business. AMD could and did compete with Intel at all times.

Furthermore, the Complaint alleges, and the undisputed evidence shows, that any allegedly exclusive or market-share discount agreements with OEMs were usually only three months in

duration, and generally less than a year or terminable on short notice. *See, e.g.*, Compl. ¶ 66; FWB Rep. 16 (Intel's "contracts typically allow either party to terminate without cause in 30 days"). Even true exclusivity agreements of such short durations are presumptively lawful. *See, e.g.*, *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 111 (2d Cir. 2002) (dismissing claims where challenged "exclusive distributorships [we]re short in duration and terminable at will"); *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163–64 (9th Cir. 1997) (one-year exclusive agreements terminable on 60-day notice are lawful); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir. 1993) (exclusivity agreement terminable on 30-day notice is lawful). The "easy terminability" of an agreement "negates substantially its potential to foreclose competition." *Allied Orthopedic*, 592 F.3d at 997 (citation and alteration omitted).[14]

As the leading antitrust treatise recognizes, moreover, a conditional discounting arrangement alleged to be de facto "exclusive dealing" is even less likely to harm competition than a genuine exclusive dealing contract for the same duration. *See* XI Areeda ¶ 1807b, at 131 (2d ed. 2005); *see also id.* ¶ 1821d3. If truly exclusive contracts terminable in a year or less raise no antitrust concern, it follows *a fortiori* that Intel's agreements—which generally lasted a year or less, were terminable on short notice, and were not truly exclusive—raise no concerns either.

C. New York's Claims Also Fail Under A "Monopoly Broth" Approach.

New York cannot avoid summary judgment by pointing to FWB's passing allegations involving conduct that was allegedly unrelated to Intel's pricing practices or unrelated to market-

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[14] Although the Third Circuit in *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (2005), found a Section 2 violation where exclusive dealing contracts were theoretically terminable, the exclusive dealing there was backed up by the defendant's refusal to deal with retailers at all if they carried competitors' products, which on the facts of that case effectively locked customers into long-term exclusivity. *Id.* at 194. On that basis, the court distinguished other cases that had found exclusive dealing contracts of short duration to be lawful. *See id.* n.2. There is no evidence of such a refusal to deal here, as FWB admits. FWB Rep. 22 n.42.

share conditions. As noted above, *see supra* note 6, FWB never attempts to show that any of the alleged non-price, non-market share conduct was improper or anticompetitive, nor does he opine that it could have produced any of the harms he identifies as the basis for liability. Indeed, he testified that "I have no opinion as to whether AMD was better or worse off as a result of" Intel's conduct (FWB Dep. 546:13–15), and that AMD—the allegedly excluded party—"could well have been worse off" absent that challenged conduct. FWB Dep. 281:12–19. As noted earlier, he also admitted that he is not asserting that Intel's conduct affected AMD's ability to compete. *Id.* at 417:5–18. Particularly in light of those admissions, these passing allegations of conduct allegedly unrelated to price do not raise any genuine issues of material fact.

Nor may New York cobble together an antitrust claim based on a "broth" of individually nonviable theories. The Supreme Court expressly rejected such an approach in *linkLine*, where a meritless "insufficient assistance" claim combined with a meritless "predatory pricing" claim could not create a viable claim. *See* 129 S. Ct. at 1120; *see also John Doe I v. Abbott Labs.*, 571 F.3d 930, 934–35 (9th Cir. 2009) (relying on *linkLine* to reject plaintiff's "monopoly leveraging" theory as a combination of two other meritless theories). As Judge Becker once wrote, "[n]othing plus nothing times nothing still equals nothing." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1311 (E.D. Pa. 1981) (citation omitted), *rev'd in pertinent part*, 723 F.2d 238 (3d Cir. 1983), *rev'd in pertinent part*, 475 U.S. 574 (1986). *linkLine* precludes New York from surviving summary judgment based on any amalgamation of a meritless "exclusionary pricing" theory with a meritless claim based on non-price conduct.

III. CONCLUSION

Because New York was obligated to prove below-cost pricing as a threshold issue, and it is undisputed that New York cannot do so, Intel is entitled to summary judgment on all claims.

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