Advanced Micro Devices, Inc., et al. v.
Intel Corporation and Intel Kabushiki Kaisha

Hearing
April 20, 2006

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE
ADVANCED MICRO DEVICES, INC.,)
and AMD INTERNATIONAL SALES)
AND SERVICE LTD.,)C.A. No. 05-441-JJF
Plaintiffs,)
v.)
INTEL CORPORATION and)
INTEL KABUSHIKI KAISHA,)
Defendants.)
Thursday, April 20, 2006
10:00 a.m.
Courtroom 4B
844 King Street
Wilmington, Delaware
BEFORE: THE HONORABLE JOSEPH J. FARNAN, JR.
United States District Court Judge
APPEARANCES:
RICHARDS, LAYTON & FINGER
BY: FREDERICK L. COTTRELL, III, ESQ.
-and-
O'MELVENY & MYERS
BY: CHUCK DIAMOND, ESQ.
BY: MARK SAMUELS, ESQ.
BY: LINDA SMITH, ESQ.
-and-
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Counsel for the Plaintiffs
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-and-
GIBSON DUNN
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BY: DANIEL FLOYD, ESQ.
-and-
HOWREY
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[1] **THE COURT:** Good morning. Please [2] be seated.

[3] **MR. COTTRELL:** Good morning, Your [4] Honor.

[5] **THE COURT:** Good morning.

[6] **MR. COTTRELL:** Fred Cottrell for [7] AMD. With me at counsel table from O'Melveny & [8] Myers are Chuck Diamond, Mark Samuels and Linda [9] Smith. In-house counsel at AMD, Beth Ozmun. [10] And in the back from the business side of AMD is [11] Lisa Fells.

[12] With Your Honor's permission, [13] we'll sort of split things up from Your Honor's [14] agenda. I think Mr. Diamond will take the lead, [15] and Mr. Samuels may jump in at some point.

[16] Thank you.

[17] **THE COURT:** All right. Thank you.

[18] **MR. HORWITZ:** Good morning, Your [19] Honor. Rich Horwitz from Potter Anderson on [20] behalf of Intel.

[21] With me today, just go right down [22] the line, Bob Cooper from Gibson Dunn, Peter [23] Moll from Howrey, Darren Bernhard from Howrey, [24] and then from the client, Eva Almirantearena,

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[1] in-house counsel. And then Dan Floyd from [2] Gibson Dunn.

[3] **THE COURT:** Good morning.

[4] **MR. HORWITZ:** Thank you, Your [5] Honor.

[6] **THE COURT:** Thank you. All right. [7] The agenda that you suggested was [8] turned into an order. And what I thought would [9] be helpful, both for our present discussion and [10] to go back to later is obviously we have [11] reviewed the pleadings. I'm interested, for [12] purposes of defining the dimensions of [13] discovery, for the breadth of discovery, since [14] that will drive, to some extent, disputes you [15] may have later on, what you understand it is [16] that you want to discover upon, what claims you [17] want to discover upon.

[18] And that's why I have asked for [19] each side to sort of set out — you know, you're [20] not going to be attached to this irrevocably, [21] but pretty closely as you go through, what it is [22] you intend to get discovery about.

[23] And this doesn't have to be a [24] rehash of each and every claim and the detail of

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[1] it, just an idea of where you're going in [2] discovery so we can start with plaintiff.

[3] **MR. DIAMOND:** Thank you, Your [4] Honor. Charles Diamond of O'Melveny Myers on [5] behalf of AMD. I was remarking to Mr. Moll [6] yesterday that typically we deliver our opening [7] statement at the conclusion of discovery.

[8] This is an interesting exercise in [9] doing it before we have conducted discovery. [10] And it, to some extent, puts AMD at a [11] disadvantage because discovery is going to be [12] essential in this case for us to find out a lot [13] of information that we suspect to be the case [14] that we have been told by informed people is the [15] case, but which is under nondisclosure [16] agreement.

[17] So we don't know for sure. We [18] have very good reason to believe in all of the [19] allegations of our complaint, and it basically [20] evolves into a fairly simple story, Your Honor.

[21] I think it was Emerson who came up [22] with the line about the better mousetrap, and [23] the world beating a path to your door. The [24] reason we are here and the essential allegations

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[1] of the complaint are that in AMD's view, it did, [2] in fact, come up with a better mousetrap, but [3] was prevented from selling that mousetrap to the [4] world by conduct undertaken globally by the [5] Intel Corporation to prevent the shared [6] customers of those two companies from dealing [7] with AMD.

[8] I don't want to take you back to [9] ancient history, but suffice it to say that in [10] the mid-1990s, AMD was required to re-invent [11] itself for reasons that you'll learn during the [12] course of the litigation, and basically stand on [13] its own two feet from a technical standpoint.

[14] By most accounts, according to [15] most industry observers and analysts, by 2000 [16] with the introduction of the Athlon [17] microprocessor, AMD had reached technical parody [18] with Intel.

[19] By May of 2003 with the [20] introduction of the Optrum 64-bit chip for [21] servers and in December of 2003 with the [22] introduction of the Athlon 64-bit processor for [23] desk tops and notebooks, virtually everybody in [24] the industry recognized that AMD had leapfrogged

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[1] Intel significantly from a technological [2] standpoint.

[3] Over the past five years, however, [4] those achievements have not translated [5] themselves in any meaningful way as with what we [6] call in Los Angeles at the box office. AMD's [7] market share continues to be around 20 percent [8] of the X-86 industry by volume, ten percent by [9] revenue, roughly where it was a decade ago.

[10] Roughly unchanged, despite the [11] fact that in at least AMD's views and [12] collaborated by validators in the industry, it [13] is offering a superior product and has been for [14] a number of years at a significant discount to [15] what Intel has been offering.

[16] AMD continues to be shut out [17] entirely from being able to deal with major [18] computer companies who are the customers of [19] these two companies. We have never in our [20] history sold a processor to the Dell [21] Corporation.

[22] Since Intel's conduct in the early [23] 2000 period, AMD has been entirely shut out from [24] dealing with Sony and Toshiba. And that's not

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[1] speculation, that information comes to us from [2] the Japanese equivalent of our Federal Trade [3] Commission.

[4] The Japanese Fair Trade [5] Commission, which conducted an investigation in [6] Japan of Intel in 2004, raided Intel's offices, [7] raided the offices of its customers and found [8] out that Intel had paid the Japanese OEMs, [9]

original equipment manufacturers, large sums of [10] money not to deal with AMD, had paid [11] specifically Sony, and Toshiba, and Hitachi [12] which cut off all dealings with AMD, and to a [13] lesser degree entered into exclusive [14] arrangements with the remaining OEMs in Japan.

[15] So that conduct is not limited to, [16] obviously, Asia. It is worldwide, and global, [17] and in reach, and affects the computer [18] manufacturers around the world here in the [19] United States and Europe. It affects [20] distributors of computer parts including [21] microprocessors, and affects retail outlets as [22] well.

[23] The thrust of our complaint, [24] although there are pending claims, is the

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[1] Section 2 Sherman Act claim for unlawful [2] maintenance of a monopoly as set forth in our [3] first cause of action. And the law is not [4] complicated with respect to Section 2, although [5] obviously open to interpretation.

[6] Section 2 makes unlawful conduct [7] by a monopoly that unreasonably excludes rivals [8] or impairs their ability to compete with no [9] pro-competitive justification.

[10] We start with the proposition that [11] Intel is clearly a monopolist. It clearly has [12] market power.

[13] Courts have interpreted that to [14] mean as little as 40-percent market share. [15] We're dealing with a company that has 90 percent [16] of the relevant product market.

[17] The relevant product market, in [18] our view, are microprocessors that execute the [19] X-86 instruction set, X-86 from Intel's original [20] product offering back in the early '80s, the [21] 8086, which morphed into the 8286 and 8386. [22] They share a common instruction set.

[23] AMD also manufactures processors [24] that execute the X-86 instruction set, because

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[1] software written for X-86 will not run on any [2] microprocessor other than an X-86 [3] microprocessor. Fundamentally these two chips [4] are not interchangeable with any other chips, [5] and we view that as circumscribing the role of [6] product market.

[7] They're using applications, [8] low-end desk tops that you can pick up at [9] Circuit City for under $400, up to more [10] sophisticated server processors that sell for [11] 10,000 or $12,000 each. But the core of them is [12] the X-86 instruction set, and that's what these [13] two companies offer.

[14] And that's our view of the [15] relevant product market. Our view of the [16] relevant geographic market is global.

[17] These processors are sold to [18] global computer manufacturers who sell their [19] products throughout the world, including the [20] United States. And I don't think there is any [21] disagreement about the reach of the relevant [22] market.

[23] That's the first element of a [24] Section 2 claim. The second element of a

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[1] Section 2 claim is conduct which unreasonably [2] excludes rivals.

[3] And it's our view, Your Honor, [4] that the conduct that Intel has engaged in which [5] has relegated AMD to such a small corner of the [6] market falls into three categories.

[7] First, I eluded to the first [8] category earlier, Intel pays people not to deal [9] with AMD. We know that's the case in Japan [10] because the JFTC issued a statement of [11] objections reciting that fact, and Intel did not [12] contest those objections. I doubt they'll be [13] able to contest those claims in this litigation [14] either.

[15] As I said, it's not limited to [16] Japan. We are aware of arrangements in Europe, [17] both at the OEM level and ^ although or ^ levels [18] in the chain in which AMD is essentially [19] precluded from dealing with a customer because [20] of arrangements put in place by Intel.

[21] Even with respect to customers who [22] are not under expressed contractual prohibition [23] from dealing with AMD, Intel has been very [24] effective over the past decade in exploiting the

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[1] pressure points that those customers have, and [2] using those pressure points to discourage [3] conduct that Intel views as disloyal. And in [4] that way has been able to dictate to customers, [5] including large global, multibillion dollar [6] corporations what they can buy from AMD, when [7] they can buy it from AMD, how much they can buy [8] it from AMD, and how they can deploy the [9] processors that they buy from AMD.

[10] The pressure points are numerous. [11] These companies — since Intel has a 90-percent [12] market share and since these companies can't [13] turn on a dime and change their purchasing, [14] these processes are not compatible.

[15] You can't pull out an AMD and pop [16] in an Intel. The major computer manufacturers [17] are wedded to Intel over the near term and [18] dependent upon Intel's good graces to stay in [19] business. And the computer business is cut [20] throat and exceedingly low margin.

[21] Intel can, and we believe has, on [22] a regular basis threatened customers who get too [23] cozy with AMD, who start migrating too much of [24] their business towards AMD with delayed

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[1] shipments of critical products, with handicaps [2] in not receiving technical information on a [3] timely basis, not receiving the road map [4] information the computer companies need to be [5] able to offer competitive products and keep [6] abreast of the competition in their industry.

[7] It's coerced customers into [8] engaging in what I believe economists call brand [9] spoiling behavior. For example, it's very [10] important in the computer industry that when a [11] processor company like AMD or Intel launches a [12] new processor, that there be industry-wide [13] support for that product, that it gain momentum [14] right out of the books.

[15] Intel has used its market clout to [16] force companies as large as IBM into humbling [17] positions of having to pull out support for [18] product launches on the eve of product [19] introductions, which basically is done with the [20] purpose of and with the effect of stealing all [21] of the industry thunder out of important new [22] product launches that AMD engaged in.

[23] But probably the most significant [24] category of misconduct is, for want of a better

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[1] term, the use of price to discipline customers [2] into not dealing with AMD or limiting the [3] business they do with AMD.

[4] Antitrust scholars use a variety [5] of terms for this, but most aptly what we're [6] talking about are discounts that begin at the [7] first dollar, that Intel offers its customers, [8] conditioned upon a certain level of loyalty as [9] measured by a percent of the customers's [10] requirements.

[11] For example, it will condition a [12] ten-percent discount on all units purchased so [13] long as the customer buys 90 percent of its [14] requirements from Intel.

[15] There is no descending scale to [16] the discount. If the customer in a particular [17] quarter, and this business is done on a [18] quarterly basis, ends up buying only 89 percent, [19] the discount is reduced to zero.

[20] This presses a crippling burden, [21] Your Honor, on AMD's ability to access customers [22] who are subject to that kind of pricing [23] behavior. As I said

before, the large computer [24] companies can't shift their requirements from

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[1] Intel to AMD overnight.

[2] The only way AMD can grow market [3] share is slowly and incrementally. And that's [4] because the computer manufacturers are basically [5] locked in to a processor selection for the life [6] of a platform.

[7] A platform will survive for two, [8] three, in the server area up to five years. And [9] once they choose Intel for that platform, AMD [10] doesn't have the ability to compete for that [11] business. As a practical matter, AMD can only [12] compete for, say, five, six, seven percent [13] additional business from any particular OEM.

[14] If an OEM chooses to buy from AMD [15] in quantities that would bring it below the [16] threshold necessary to qualify for the discount, [17] AMD has to offer a sufficiently attractive price [18] on the units that it will sell to convince the [19] OEM to do that, But effectively make the [20] customer whole for all of the lost discount to [21] units that Intel will continue to supply that [22] customer.

[23] And if you stop to think about the [24] mathematics, to pick up an additional five

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[1] percent of the business, AMD is in a position [2] where it is forced to basically discount its [3] products sufficiently to put enough dollars back [4] in the customer's pocket for the loss of the [5] ten-percent discount on the 85 percent of the [6] requirements that that customer will continue to [7] purchase from Intel.

[8] The net effect at the end of the [9] day is that AMD can't charge a low enough price [10] in order to convince the customer to shift his [11] purchases from the monopolist to the rival. And [12] this has real world implications.

[13] If you had a chance to read the [14] complaint, you will recall there was an episode, [15] I think in 2004, with HP was desperate to get [16] into the commercial desktop market for large [17] enterprise customers. I know AMD or HP had a [18] million free processors, absolutely free. And [19] according to our information, HP left 850,000 of [20] those on the table.

[21] Now, there is no earthly economic [22] reason why a computer manufacturer wouldn't [23] accept free product, unless it was going to be [24] penalized in some way for using it. And our

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[1] information is, of course, HP was going to be [2] penalized if it took more than the 150,000.

[3] It would have lost the discount on [4] the amount of processors it was going to [5] continue to buy from Intel regardless, and AMD [6] didn't have the money to make HP whole in order [7] to encourage it to take free product.

[8] It is our information that this [9] kind of pricing misbehavior, which although [10] Intel characterizes as discounting, really is [11] threatening customers with retributive price [12] increases on uncontestable portions of their [13] requirements is global.

[14] It is practiced in one form or [15] another with all of the major microprocessor [16] customers in the X-86 base. Be it in the form [17] of express agreements or as in the case of Dell, [18] we believe implicit understanding that favorable [19] treatment only flows to those who do what Intel [20] says.

[21] The result of all of this, Your [22] Honor, we believe we will be able to show that [23] Intel has unjustifiably perpetrated the monopoly [24] in the face of a rival equally efficient, a

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[1] rival offering a superior product at a [2] discounted price, and in this fashion has been [3] able to maintain pricing that is much higher [4] than the competitive levels. The customers, [5] consumers are ultimately bearing the price for [6] this.

[7] And in similar fashion has driven [8] virtually every competitor out of the X-86 [9] industry. AMD now is the last man standing.

[10] There are no other competitors of [11] consequence, and there can't be any because of [12] the IP restrictions that attach to the X-86 [13] product.

[14] In order to stay in this game, a [15] company is required to come up with massive [16] amounts of capital. Every 36 to 48 months a [17] microprocessor company has to build a new [18] manufacturing facility called a FAB.

[19] The current price taking of those [20] runs in excess of $4 billion. In order to stay [21] just even with Intel, AMD has had to come up [22] with a billion dollars a year for research and [23] development funds.

[24] You can't do that with a

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[1] ten-percent market share. The future of the [2] only Intel rival is at stake in this litigation, [3] and is under fire. And we believe given the [4] importance of this industry to not only our [5] economy, but to information economies all over [6] the world, the risk of not having a competitive [7] rival in the X-86 base is a very, very dangerous [8] one, just for fear of what will happen to [9] innovation, pricing, and consumer welfare, if, [10] at the end of the day, Intel is allowed to take [11] over this market lock, stock and barrel. That's [12] our case in a nutshell.

[13] **THE COURT:** All right. Thank you.

[14] **MR. COOPER:** Your Honor, Bob [15] Cooper for Intel. I had not planned on making [16] an opening statement in such depth, but I'm [17] happy to address a number of the issues and try [18] to give Your Honor some perspective of what the [19] discovery will have to look like in this case.

[20] Let me start by saying that what [21] you heard was a lot of folklore mixed with some [22] hard facts about the industry. And that [23] folklore has obviously given rise to this [24] lawsuit, and that folklore is going to require

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[1] as a practical matter, discovery from not only [2] AMD and Intel, but a number of third parties, [3] the purchasers who made the decisions about what [4] to buy, why to buy it, when to buy it, and what [5] to pay for it.

[6] And many of these purchasers are [7] powerful companies, much more powerful than [8] Intel might ever think of being, larger, and [9] they're hard bargainers.

[10] In this lawsuit when you sort out [11] the bottom line, what's happening here is that [12] AMD is accusing Intel of nothing more than [13] vigorous price competition, the very vigorous [14] price competition that benefits consumers. And [15] in so doing, they're really seeking to rewrite [16] the rules of competition as they apply to [17] head-on competition between two competitors [18] selling the same product.

[19] And if they're successful, the [20] result will be to hobble the ability of Intel to [21] respond competitively to meet competition in the [22] marketplace.

[23] There are a number of topics that [24] will need to be developed carefully in the.

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[1] course of discovery. The first basic [2] proposition is that, and you heard Mr. Diamond [3] make this comment, competition in the [4] microprocessor business is fierce.

[5] Intel, we will show, has competed [6] vigorously. What's happened over the years is [7] consumers have benefited from falling prices, [8] dramatically falling prices and stunning [9] advancements in computing power of these [10] microprocessors.

[11] Declining prices and enhanced [12] computing speed are inconsistent with any notion [13] of a monopolized stagnant market.

[14] Why has Intel been successful? [15] Intel invented the microprocessor.

[16] They were the first to the market [17] with it. They had a big head start, as a [18] practical matter, in this really very new [19] industry. It goes back, I think, to 1971.

[20] Why has it been successful? [21] Because of continuing technological innovations, [22] coupled with, and this is very important, a [23] willingness to assume big risks.

[24] What does that mean? That means a

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[1] willingness to make guesses going forward as to [2] what the market might demand in the future in [3] the way of microprocessors, volume, and type of [4] units, and then to commit to build these [5] multimillion dollar FABS, which they're called, [6] which are plants to fabricate the [7] microprocessor, and to build enough of them so [8] that they can guarantee these large OEMs to need [9] a lot of them, the capacity to — in effect to [10] make the number of computers that they're [11] planning on producing for the consumer market.

[12] Intel's competitors and AMD, in [13] particular, over the years has been unwilling to [14] make those big investments and to take those [15] risks. Intel, as a result, was rewarded with a [16] large share of microprocessor sales over the [17] years.

[18] If you want to call that a [19] monopoly, there is nothing bad about that word [20] because you're entitled to your success if you [21] get there by innovation, risk taking. And [22] that's exactly what Intel has done.

[23] Now, another important point that [24] we will make in the course of the litigation and

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[1] which will be developed in discovery is that [2] Intel simply does not control the microprocessor [3] market. The reality is that there are very [4] large customers.

[5] The key customers are large [6] multinational corporations. They have immense [7] bargaining power. Intel couldn't bully these [8] companies if it tried, and it didn't try because [9] these are their customers.

[10] What Intel has done over the years [11] has been able to assure these companies of a [12] stable, guaranteed supply, because Intel has [13] committed to have the capacity to make that [14] supply available.

[15] It is true that a few suppliers [16] have chosen, for their own reasons, to use [17] exclusively Intel products. And it makes a lot [18] of sense.

[19] They have a guaranteed supply. It [20] obviously has enormous impact on efficiency. [21] When you try to use two different [22] microprocessors in a product, you have all sorts [23] of issues.

[24] Other companies have used two

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[1] types of microprocessors. The competition has [2] been fierce in that regard.

[3] What's the result? The result of [4] that competition, which is occurring all the [5] time, has been tremendous pressure on Intel to [6] discount the prices that it offers its customers [7] to get to sale. And that's what this case is [8] about.

[9] Intel has offered discount and [10] financial incentives to meet competition. And [11] we have AMD here complaining, on the one hand, [12] that we're a monopoly, and we must be charging [13] high prices. And on the other hand, saying when [14] we discount, somehow that makes it unfair to AMD [15] to meet the commission from Intel when, in fact, [16] it's Intel meeting the lower price of AMD.

[17] That's exactly what the antitrust [18] laws encourage. There is a very important [19] decision, Supreme Court, back in '93, the Brook [20] Group case.

[21] I'm sure Your Honor has bumped up [22] against that case in the course of the cases you [23] have heard where the Supreme Court very clearly [24] set forth the standards. And what it said in

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[1] that case was we encourage aggressive price [2] cutting. And indeed aggressive price cutting is [3] a boon to consumers.

[4] Aggressive price cutting can only [5] raise an issue if it is price cutting below [6] cost. And if by price cutting below cost, the [7] company doing that is able to drive the [8] competition out of the market and then raise [9] prices and recoup coupe the losses it sustained [10] by that below-cost pricing.

[11] You're going to find here that [12] what we have is aggressive competitive prices to [13] meet competitors' prices under Intel, which [14] takes the form of discounts and other financial [15] incentives. And that at all times Intel was [16] selling comfortably above its costs. Consumers [17] benefited enormously.

[18] Another point that we will be [19] developing is that AMD, not Intel, bears the [20] responsibility for its failures and its [21] successes. They have their successes. They're [22] having successes right now.

[23] We are going to talk about that. [24] They have had a lot of massive failures.

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[1] When AMD finally got its act [2] together in the past several years, and you [3] heard Mr. Diamond referring to their new [4] products, the market rewarded it, exactly what [5] you would expect. But prior to that, AMD's [6] inferior performance has marked AMD as a [7] supplier with problems, with a consistent lack [8] of reliability, and an inability to deliver.

[9] And during the 1990s, they failed [10] to execute in a million ways. They have over [11] promised on what their microprocessors would do, [12] and that the microprocessors couldn't perform as [13] they promised.

[14] They couldn't deliver adequate [15] quantities. Their manufacturing execution was, [16] at times, miserable.

[17] Indeed the CEO at one point called [18] their performance horrific. This left AMD with [19] a reputation coming into this new century of an [20] unreliable supplier whose products were [21] unreliable.

[22] Now, starting in 2000 and [23] particularly 2003, AMD's performance improved. [24] They have introduced to the market

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[1] microprocessors that are competitive, and the [2] result is success. They have a strong product [3] and they have executed well.

[4] What's happened? AMD is selling [5] every microprocessor it can produce.

[6] It didn't invest in enough [7] capacity to sell more. They're selling every [8] microprocessor they can produce, and they're [9] here complaining about Intel's price discounting [10] to meet that competition.

[11] So AMD's sales success really [12] belies its claim of any market foreclosure. And [13] if you look outside the courtroom, you're going [14] to see that AMD is trumpeting its success.

[15] There are repeated statements by [16] the new CEO of AMD about how successful they [17] have been and rightly so, because they have been [18] successful. AMD's sales, its sales revenue for [19] the past two years, as these new products are [20] now peeking, was 70 percent greater than its [21] sales for the prior years, same two quarters.

[22] And Intel is out. Intel, let's [23] take a look at Intel. That's what AMD has done.

[24] Intel's revenue is down five

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[1] percent. Intel is being affected by AMD's [2] successes. That's a competitive marketplace.

[3] AMD cannot jump to the top [4] overnight. It has to undo a reputation of [5] unreliability and is in the process of

doing [6] that and with success. And Intel is competing.

[7] Let's look at what AMD is now [8] projecting for this year. They're talking about [9] an increase of revenues for 65 percent for the [10] year 2006. What's Intel saying? Intel is [11] projecting a revenue decrease for the year 2006.

[12] All that gives you a bit of a [13] picture of what the industry looks like. As [14] Your Honor knows, monopoly of power, of course, [15] is the power to charge super competitive high [16] prices. You don't see that here. You see very, [17] very competitive prices. You see price [18] reductions. You see price discounting, the [19] opposite of monopoly.

[20] Now, what we're charged with [21] basically is willfully maintaining our market [22] position, the so-called monopoly position by [23] reducing prices to customers. That's the [24] essence of competition.

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[1] In the absence of proof that there [2] was a full effort to price below costs to run a [3] competitive business, this case fails, and there [4] will be no such proof. The bottom line under [5] the antitrust laws, what the courts will tend to [6] look to is when you look at the pricing, if [7] you're not pricing below costs, then an equally [8] efficient competitor should be able to compete.

[9] And that's exactly what should [10] happen. That's exactly what is happening now [11] and what will continue to happen if AMD [12] continues to execute and deliver quality [13] products.

[14] Another thing that I think you [15] need to appreciate, this is not an industry [16] where AMD is locked out of the possibility of [17] making sales. The reality, this will be [18] developed again through testimony, and through, [19] I'm sure, documents, too, at the OEMs who buy [20] these products, and also at Intel, and I presume [21] AMD, too.

[22] What happens in this industry is [23] that several times a year, the question of whose [24] microprocessors are going to be used by the OEM

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[1] for the next sales phase is up for grabs. They [2] are competed about three times a year on [3] average, sometimes some of them will be competed [4] every — a matter of a couple of months, some — [5] a few may get extended as much as a year long. [6] But there is a constant revolving competition [7] taking place here where a supplier who has the [8] reliability and the confidence of an OEM and can [9] offer a better price is standing there with the [10] opportunity to take that business.

[11] That type of a continuing [12] renegotiation of the deals makes monopolization [13] of the sort that AMD complains about impossible. [14] So those are facts that will need to be [15] developed again at length.

[16] A couple of other comments. Mr. [17] Diamond was talking about the various [18] difficulties that he believes his client has [19] experienced in certain segments of the market. [20] Let's just talk about what the segments might [21] be, what the different areas might be.

[22] Let's start with retail sales of [23] computers in the United States. Mr. Diamond [24] didn't tell you that AMD has now captured more,

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[1] a majority, more than 50 of those sales. And, [2] indeed, they have been trumpeting that fact in [3] their public press releases.

[4] Let's move to another segment. [5] Laptops that are the mobile, the mobile lap [6] tops, here is an area where AMD was very — the [7] evidence will show was very late to the party.

[8] Intel got a big jump on it. As a [9] consequence, AMD is just beginning to make the [10] even roads in that market for reasons that are [11] entirely understandable, because they weren't [12] there competing effectively, didn't have the [13] product they needed. Intel beat them to that [14] market by a substantial period of time.

[15] Corporate business, the big [16] companies that purchase computers that they put [17] — make available to all their employees in the [18] office, there is another business that AMD is [19] beginning to make even roads in, hasn't in the [20] past.

[21] And you know why? The evidence is [22] going to show is very simple. Indeed, AMD has [23] admitted publicly that they did not address the [24] requirements of the managers who are responsible

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[1] for that business, the IT managers.

[2] What are those requirements? The [3] cost, by the way — this is very important. The [4] cost to an IT manager is not the cost of the [5] computer, not the cost of the microprocessor. [6] That's minimal. The real cost is support.

[7] And those IT managers want to be [8] sure that they will have a supplier of the [9] microprocessor who will give them continuity, so [10] they don't have to constantly retrain the [11] support staff.

[12] Intel has done this very [13] effectively for many years and has the [14] confidence of those buyers. AMD has not done [15] that and lacks the confidence of those buyers. [16] They've hurdled to overcome. They're overcoming [17] it. They're trying to at this point. These are [18] the facts that will be developed that will be [19] important in the course of the litigation.

[20] That's an overview of issues that [21] we think are important. This case will boil [22] down to one bottom line, that Intel is competing [23] aggressively by discounting. It's competing [24] aggressively by offering financial incentives

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[1] that lowers the prices of its microprocessors to [2] OEMs and others. It is not selling below cost.

[3] AMD is offering their [4] microprocessors at similar values or less. [5] Competition is intense.

[6] I probably should address one [7] other issue, although I think its your second [8] item on the agenda. You had asked for [9] identification of legal issues by the parties [10] that need to be resolved prior to the [11] commencement of discovery.

[12] And there is one issue that is [13] very significant that need not be resolved [14] absolutely prior to the commencement of [15] discovery, but should be resolved very early [16] because it has an enormous impact on the scope [17] of discovery. It's a legal issue.

[18] Let me briefly outline that for [19] you, because we will, with the Court's leave, [20] want to make a motion on this basis very [21] promptly. And indeed, we're prepared to file it [22] within a matter of days.

[23] What Intel plans to do is to file [24] a motion to dismiss AMD's foreign conduct claims

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[1] for lack of subject matter jurisdiction. We'll [2] also include a standing basis for the motion, [3] too.

[4] But let me focus on the lack of [5] subject matter jurisdiction. You heard Mr. [6] Diamond talk about this global market, as he [7] calls it. Well, under the United States [8] antitrust laws, and in particular the Foreign [9] Trade Antitrust Improvement Act, which was [10] passed around 1992 or so, it is clear that the [11] United States antitrust laws do not regulate, [12] are not intended to regulate, should not be used [13] to regulate the competitive conditions of other [14] nation's economies.

[15] Under that act, it's very clear [16] that the U.S. antitrust laws do not reach [17] conduct that directly affects only foreign [18] markets.

[19] So with that background, let me [20] tell you what the underlying facts are that bear [21] on the Court's jurisdiction here. Basically [22] what the AMD complaint is doing is seeking [23] damages under the United States antitrust laws [24]

for alleged sales of microprocessors worldwide.

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[1] AMD's microprocessors now are [2] manufactured in Germany by a German subsidiary, [3] and indeed, they have been for some time. There [4] was a short period of time where there were some [5] manufactured in the United States.

[6] So they're manufactured in Germany [7] by a German subsidiary. I think they're [8] assembled in the final product form in ^ [9] Malayasia, Singapore and China. So as a [10] practical matter, AMD is effectively a foreign [11] corporation.

[12] More than 70 percent of AMD's [13] microprocessors are sold outside the United [14] States. And you'll see that in the complaint. [15] They are sold outside the United States to [16] customers who incorporate the microprocessors [17] into an AMD-powered computer.

[18] So what we have here is AMD is [19] seeking recovery under the United States [20] antitrust laws for the sale of its foreign-made [21] microprocessors to foreign companies that were [22] allegedly affected by Intel's conduct outside [23] the United States.

[24] Take Japan, for example. Japan

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[1] has its own set of laws with respect to what [2] they believe constitutes an antitrust violation. [3] There are proceedings underway there now.

[4] But they are focused on sales made [5] by, in AMD's case, sales made out of Germany, [6] into Japan for people, for companies in Japan [7] that incorporate these products into a computer [8] made in Japan.

[9] That is the area of this [10] complaint, and it's a huge area of the complaint [11] that should be dismissed for lack of [12] jurisdiction. We'll get, obviously, the papers [13] will fully brief this and acquaint Your Honor [14] with the proper legal standard.

[15] And I should point out that the [16] motion, obviously, is not directed to United [17] States sales, so there would be a piece of the [18] case left after the Court acts on the [19] jurisdictional motion.

[20] I raise this now because I want [21] the Court to understand that that's something we [22] plan to file promptly, and because it does have [23] very major implications for the scope of [24] discovery. And I know we're going to discuss

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[1] this whole subject next, and I won't jump the [2] gun on that, but we have been working very [3] cooperatively with counsel for AMD in terms of [4] trying to outline how to proceed with discovery [5] in an efficient manner.

[6] And we're not — that process is [7] going forward, and we're prepared to discuss [8] everything we have done in that regard, so Your [9] Honor will be able to take control of that as [10] you see fit.

[11] But the ruling on this [12] jurisdictional motion would have big [13] implications as to what needs to be produced, [14] what depositions need to be taken, and how fast [15] the whole case consequently can move.

[16] **THE COURT:** All right. Thank you.

[17] **MR. COOPER:** Thank you.

[18] **THE COURT:** We're going to move to [19] that item about identification. We have the [20] issue that defendants wish to identify, which is [21] a motion to dismiss on subject matter [22] jurisdiction.

[23] Does the plaintiff have any legal [24] issues that they believe will prevent the

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[1] commencement of discovery in full?

[2] **MR. DIAMOND:** We do not, Your [3] Honor. If I may just take a couple of minutes [4] just to respond to Mr. Cooper's statement about [5] the motion that they intend to file.

[6] Mr. Cooper has very accurately [7] stated that we have worked very cooperatively [8] with Intel's counsel. I have known Mr. Cooper [9] for close to three decades and practiced law [10] with Mr. Cooper's brother for 25 years.

[11] Mr. Cooper has represented my [12] firm, and I have represented Mr. Cooper's firm. [13] I did not know they were going to raise this [14] subject, nor did we know that they intended to [15] make this motion. But we're certainly prepared [16] to deal with it when the motion is filed.

[17] I will point out that what we are [18] complaining about is conduct by a United States [19] corporation headquartered in Santa Clara, [20] California directing a global program of [21] conditioning its discounts upon its customers [22] obeying certain requirements Intel imposes to [23] their purchases that are imposed worldwide on [24] U.S. companies, Dell, HP.

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[1] Although one can question whether [2] those are — are those U.S. companies or not [3] U.S. companies? But those companies, as well as [4] Sony, Toshiba, major suppliers of computer [5] product into the United States.

[6] And we're perfectly happy to [7] address this in the papers, but there are no [8] cases saying that the Sherman Act no longer [9] applies to misconduct directly out of Santa [10] Clara, California at a company headquartered in [11] Austin, Texas to prevent it from selling product [12] to vendors who ultimately deliver their product [13] to United States' consumers. It will be [14] addressed in the motion.

[15] **THE COURT:** All right. We're [16] going to set a date for that motion to be filed, [17] and we'll make that date May the 2nd.

[18] And then you can either agree to a [19] briefing schedule, if you believe it has to be [20] beyond that allowed by the Federal Rules for the [21] local rules, or you can follow the rules on time [22] frame. But since you get along so well —

[23] **MR. COOPER:** I'm sure we can agree [24] on a reasonable schedule, and we'll submit it to

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[1] Your Honor.

[2] **MR. DIAMOND:** Was that May 2nd or [3] 7th?

[4] **THE COURT:** 2nd Two. May 2. [5] That's a Tuesday. I think it [6] gives them a couple of weekends to get an order. [7] And then you'll have an agreed-upon briefing [8] schedule, and we'll read the papers and see if [9] any argument is necessary. And if not, we'll [10] decide it without argument.

[11] All right. Moving to the fourth [12] item on the agenda, and coordination with the [13] MDL class cases. I understand that you have [14] been working with counsel, and are possibly near [15] some agreements.

[16] The only element that I would like [17] to inject into your discussions with them is [18] that, for purposes of the record, I'm going to [19] consider this, the 441 case, a separate case. [20] And what I don't want, and you'll get a chance [21] with local counsel to work with my staff, is I [22] don't want — if there is a filing beyond what's [23] necessary for this case in the MDL case, I don't [24] want it in this case's record.

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[1] But everything in this case should [2] be cross filed in the MDL case. We can, you [3] know, ^ /SR*ET ^ that for you a little more, but [4] I want this case, the 441 case to have an [5] independent record leading up to trial.

[6] And with what occurs in class [7] actions, there may be more that gets filed there [8] that doesn't have to be filed here is my point. [9] But just, that's the broad outline.

[10] **MR. DIAMOND:** I understand. [11] Anything that pertains to the AMD versus Intel [12] litigation gets filed in this docket. If it [13] also pertains to the class proceedings, it will [14] be filed in two

places.

THE COURT: Yes.

MR. DIAMOND: If it pertains —

THE COURT: For instance, if you're doing joint discovery and the class case is aided by the filing of something from this case over there, that's fine.

MR. DIAMOND: Your Honor, I talked to Mr. Moll about this. It is probably useful to give you some idea of what we're confronting as a discovery challenge on this case and in the

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class cases. Because, number one, you ought to have some appreciation of the numbers that we regrettably are confronting, and we're confronting them with the class lawyers.

And I should say not only the federal class lawyers, but there is a parallel proceeding in Santa Clara Superior Court on behalf of California consumers that we will necessarily have to work with. But just let me throw out some numbers for your consideration.

We have been trying to work toward a process which identifies the Intel employees with relevant information and the AMD employees with relevant information. We have had to do that for discovery preservation purposes anyway. But we were trying to get our arms around the universe of potential witnesses in this case and potential individuals who are harboring documents that we are going to have to review.

We expect that when that list is finalized, there will be somewhere between a thousand and 1,100 Intel employees on it.

We are expecting AMD's list to be between four and 500 individuals. And our

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discussion with the, roughly, 30 nonparties, the computer OEMs, retailers, distributors have identified about 475 people who are likely to be involved in transactions that we will want to find out about.

So we're looking at in excess of 2,000 individuals with potentially relevant information and relevant documents.

We have been told to estimate that each of these individuals is likely the custodian of the between three and five gigabytes of data. If you put all of that together and you try to make some estimates to avoid duplication, we are both braced for an onslaught of discovery that is likely to be in the neighborhood of five plus terabytes of information. To put that in perspective, if we assume it's all Word-type documents, Outlook E-mail material, and if it were printed out on eight-and-a-half-by-eleven paper, we are expecting to receive in exchange somewhere in the neighborhood of a pile 137 miles high.

We don't expect that we're going to be deposing 2,000 people, but it is highly

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likely that we are going to be deposing a significant fraction. So the depositions in this case are likely to number not in the tens, but in the hundreds if the parties are given an opportunity to fully develop the record that needs to be developed.

I say this with respect to coordination, because the task of getting this all done is truly something that we can't do and can't shoulder on an individual basis. We will necessarily have to work with class counsel in order to do it in a fair, and orderly, and reasonable manner.

And quite frankly, the third parties and the parties wouldn't stand for it to be done in any other way. We have already been told by the bulk of the computer industry to whom we have served subpoenas that they are not going to deal with this case, and the MDL case, and the state case seriatim, that they're prepared to open up their files and review them, but they're only going to do that one time. And I wouldn't expect them to say anything differently.

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They are not prepared to produce witnesses for deposition time and time again. They're prepared to produce them for deposition, but one time. And I think that's an understandable request.

So if we are going to be able to deal with this case in an orderly basis, we are going to have to prosecute the claims in both AMD, the federal class claimants, and the state class claimants on a simultaneous and coordinated basis. And that's something we are working toward.

There is one point that is a particular problem for us. We served subpoenas over six months ago.

We have gotten very few responses thus far, Because most of the large companies are saying, We're not going to start reviewing our electronic data or even necessarily collecting it all until we have discovery requests on the table, not only from AMD, but from Intel and from the class claimants, both state and federal.

We have been pressing Intel to

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serve its third-party discovery requests. We've been awaiting the appointment of ^ interim lead ^ in this case, so that we could make sure that those in charge of the MDL proceeding would also have their requests to the third parties in a timely fashion.

We do have lead counsel appointed in the state cases. To a large extent, we work with the computing factions of federal class action lawyers who have competing applications before you. We have rolled in most of their requests into the requests that we served on third parties.

There may be some additional ones. The class claimants, both state and federal, have agreed to get any additional document requests and subpoenas out to the third parties. And these are, not all, but for the most part large companies who are represented by large firms. We can work efficiently with their outside counsel, but we have been promised that the class claimants will get their requests out by the 15th of May.

We would urge the Court to set the

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15th of May as a drop dead date for Intel as well, because until that happens, there is going to be no document flow whatsoever.

With respect to the larger issues of coordination on a going-forward basis, Mr. Moll and I, and Mr. Housefeld and Mr. Addett on the state side have been exchanging a coordination order that would apply to this case as well as the federal MDL and the state case, Which would impose the burden on the plaintiffs to make sure the discovery was done once and once only.

And we're prepared to continue those discussions. We would expect that we'll have an agreement that's suitable for all concerned.

We are balancing certain different state requirements and federal requirements in order to do that. And that's raised some negotiating challenges, but I'm reasonably certain we'll be able to overcome them.

Mr. Samuels, when we get further into your agenda, will address other agreements that we have on the table. We have negotiated

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all of those in a trilateral fashion.

The competing federal class action

lawyers have been on board, And have signed off [4] on the agreements thus far, the ones with the [5] proposals we have made thus far. The same is [6] true with respect to the protective order.

[7] So we think that we are — we will [8] be in a position in reasonably short time to [9] provide you with a reasonably comprehensive set [10] of stipulations and proposed orders for your [11] consideration that will handle the majority of [12] the case management issues that you will [13] probably be considering in the absence of that [14] kind of coordination.

[15] **MR. MOLL:** Good morning, Your [16] Honor, Peter Moll. I have never represented Mr. [17] Diamond or his firm. He's never represented me. [18] And unlike Mr. Cooper, I don't have a brother.

[19] We agree with Mr. Diamond, of [20] course, that the scope of discovery in this case [21] is going to be vast. However, I think as Mr. [22] Cooper pointed out, if we can eliminate from [23] this case those transactions that occur in [24] foreign countries of computers that are sold in

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[1] foreign countries to consumers in foreign [2] countries, that never reach the United States in [3] any way shape or form, we will have gone a long [4] way to reducing this case to the jurisdiction of [5] the Court, the reach of the antitrust laws, and [6] also the trying to get a handle on this [7] discovery.

[8] As far as the recognizing that [9] there has been an enormous amount of documents [10] out there, we have met with counsel for [11] plaintiffs, and we have tried to agree and are [12] very close to an agreement on a custodian [13] stipulation, which we would then present to the [14] Court. When Mr. Diamond talks in terms of [15] custodians, however, and mentions a thousand and [16] 400, what we are really talking about in this [17] stipulation and agreement is then limiting even [18] from that the number of persons from whom [19] documents need to be produced.

[20] So we are talking about a much [21] smaller universe of people from Intel than, for [22] example, a thousand custodians, and the same, of [23] course, from AMD.

[24] As far as the depositions are

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[1] concerned, we share AMD's view that this case is [2] probably not an appropriate case for the [3] ten-deposition limit built into the federal [4] rules. However, we certainly feel that this is [5] not a case where there will be hundreds and [6] hundreds of depositions.

[7] We — quite frankly, if we put [8] aside the class cases, because we don't know how [9] many named class representatives we'll get when [10] we get that consolidated class action complaint [11] that Your Honor has asked for, we were looking [12] at a number of maybe about 75 depositions per [13] side.

[14] So our view of depositions is a [15] little more, far more restrictive than Mr. [16] Diamond.

[17] On the third-party subpoena, we [18] recognize this need for coordination. These are [19] our customers: IBM, Dell, Hewlett Packard.

[20] We do not want to impose a burden [21] on them. We had been hesitant to serve [22] third-party subpoenas on them pending getting a [23] consolidated class action complaint so we could [24] get it altogether.

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[1] Now that Your Honor has ordered [2] that for April 28th, we have absolutely no [3] objection and no problem with getting our [4] discovery out to these third parties that AMD [5] has already served and doing it by the date Mr. [6] Diamond has suggested, May 15th. That's fine [7] with us.

[8] Finally, we do agree, Your Honor, [9] that there is a lot of working pieces that need [10] to get put together here. And we have done a [11] lot of work on some of these basic fundamental [12] things with Mr. Diamond, Mr. Housefeld and some [13] of the plaintiffs in the California state cases.

[14] And we would be asking and seeking [15] an opportunity in the short term to complete [16] that work, so that we can present the Court with [17] a coordination order for the classes here and [18] this AMD case that is agreed to, not only by [19] Intel and AMD, but also by Mr. Housefeld and his [20] committee, and a similar order in the state [21] cases so that we can have truly a coordinated, [22] uniformed discovery when a witness is subpoenaed [23] for a deposition or a notice for a deposition at [24] some point in time, when we get on that phase of

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[1] discovery, then that witness can be deposed by [2] all the various parties on all the various [3] issues at one time, and we can move forward in [4] that way.

[5] And that's what we are trying to [6] accomplish.

[7] **THE COURT:** What was it that you [8] said about April 28th?

[9] **MR. MOLL:** It was my [10] understanding, Your Honor, one of the ^-on-on [11] the ^ third parties, the third parties are [12] sitting there saying, We are fine with reviewing [13] our documents and searching them, but we don't [14] want to go through this more than once, which is [15] perfectly understandable. We want to minimize [16] the burden on them.

[17] And so there are going to be [18] issues for the third parties, not only in this [19] case, but also in the class actions federally [20] and also in the state class actions.

[21] And one of the things that Intel [22] has been waiting for, because when we serve our [23] discovery requests on these third parties, we [24] want that to include not only the issues in this

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[1] AMD case, but also any issues that pertain to [2] the class action. And now that we will have [3] under Your Honor's order, as I read it, [4] appointing the Housefeld firm as interim lead [5] counsel for the class, we will have that [6] consolidated class action complaint from them by [7] April 28th, as I read the order.

[8] We have no problem. We'll have [9] enough time to review that and get subpoenas out [10] or requests out to third parties that cover not [11] only what we need here, but also what we need in [12] that case. So they only have to make one search [13] and they only have to make one production.

[14] **THE COURT:** And you mean you'll [15] have all that by May 15th?

[16] **MR. MOLL:** We will be able to have [17] those subpoenas and requests ready to go by May [18] 15th, the date that Mr. Diamond just requested.

[19] **THE COURT:** Which are the [20] third-party subpoenas for documents?

[21] **MR. MOLL:** For third parties. [22] This is not, again, all third parties, Your [23] Honor.

[24] There are a number of third

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[1] parties. I think AMD has said, approximately, [2] 30, that they have already subpoenaed.

[3] So they have subpoenas duces tecum [4] from AMD. As those third parties, they're [5] sitting there and saying, Well, wait a minute, [6] you know, we're not a party here, and we're [7] willing to look for relevant documents within [8] reason, but we're not going to look for them two [9] or three times. So we want the totality of [10] everybody's request before we do that.

[11] **THE COURT:** But that's not the [12] universe of third-party subpoenas. That's [13] what's been issued by AMD to date in this case.

[14] **MR. MOLL:** That is correct.

[15] **THE COURT:** And am I also to [16] understand that of the 30 parties, third parties [17] that have received those subpoenas for [18] documents, that all 30

have said that there is no motion practice that they're going to engage in?

MR. MOLL: Well, since we did not serve the subpoenas, and they were served by AMD, I'm not sure I know the answer to that, that I can answer that. You know, AMD may have

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the answer to that.

THE COURT: Because if two or three determine that it's in their interest to engage in some motion practice, somewhere in the 50 states —

MR. MOLL: That will slow things down.

THE COURT: — that will, in my experience, definitely slow things down and possibly develop a line of inconsistency that will generate angst among others even beyond the initial 30, because you have the potential to be in front of very different magistrate judges or Article 3 judges, or whatever, and I'm still not clear on what the state judge in Santa Clara's view of becoming a tail case to two federal cases in Wilmington is.

And although I have had cases actually of some volume with California judges such as in property, asbestos, and they're very helpful, but typically they want some information about where they are in the process. And I guess that requires after you do all the work for the two cases here, the MDL and the 441

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case, you've got to go out to California and get some sort of an approval or consent to let —

MR. MOLL: I will tell you on that what I can report and then Mr. Diamond has something he wanted to add here. But what I can report on that is I was not at the hearing, but the report is the judge in the state cases in California has already had a hearing, an initial hearing.

And at that initial hearing, the Court — the parties, both sides asked the Court to hold on for a while, told the Court that we were talking about and negotiating a coordination with this case, and that we were going to try to get an agreeable order which we hoped would be agreeable to Your Honor, and then also to the California Court.

And so the Court in California, at least on reports, seemed receptive to that. And I know sometimes Your Honor the devil is in the details.

THE COURT: Well, for instance, I don't think — again, I don't want to be a purveyor of bad news early on, because I think

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you're working very hard to get a plan that makes sense, and typically that will occur because of agreement, but there are different — just a little bit of reading I have been able to do quickly, there are differences in the laws that the cases are brought under, and you could have some difficulty in the application of a decision I might make here to the California — I mean, so, you know, I applaud the effort at coordination with the state case as it pertains to third parties, but I'm a little constrained to be elated about the difficulties that you could see a year down the road once you start getting some decisions.

But let me say this, because, again, I don't want to be the purveyor of a lot of issues that may never arise: You know, maybe we all just had bad experiences in the past from time to time, and we're going to avoid them because of our maturity.

Let me start with this motion to dismiss. I certainly want it to be broad, well thought out.

I think for it to be well thought

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out, you have to carefully read the Third Circuit Jurisprudence on dismissal, particularly when there is a factual underpinning. And you may want to take the count that I have taken on how many are reversed when dismissed when there is a factual underpinning, that they then instruct the trial judge to allow some discovery on, even on what some might call clear-cut commercial documents, and others, particularly in the last ten to fifteen years.

Your hurdle to convince me to dismiss anything early on in the case is going to be addressing that jurisprudence.

MR. MOLL: We understand that and appreciate that, Your Honor.

THE COURT: And I think we can do that in the short run and get that decision, one way or the other, in place.

I mean, whatever it is, it is. If it affects favorably Intel's exposure, so be it. If it doesn't, so be it.

But I think that you've really got to address it, get the papers in, and get that decided, which means May 15th, which I know

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plaintiffs would like — plaintiff would like to have as the drop dead date for Intel. It may become June 15th.

Thirty days of caution up front is better than six months of the ^ devil ^ in the detail work down the road. I'm focused on, in my mind, if there was a legal issue that either party thought should be resolved before, as I phrase it, the commencement of discovery, that we would get it done by June 15th, and then we would have pretty much the ability to get into the first phase of discovery, which is document production.

That ought to give you enough time to get either fully agreed upon coordination agreements — and I don't say this because of — I'm very deferential to state courts. They are — we talk about hundreds of cases to judge, they talk about thousands, and I understand that.

So, but I also understand that there is not much I can do to coordinate with a California class action —

MR. MOLL: I understand that, Your

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Honor.

THE COURT: — in terms of what I have to do to move these two cases expeditiously forward.

So I would focus on working on coordination between this case and the MDL case, and if it bears fruit for the state case, and you need some concessions from me, which are available within the constraints of the law, I would be happy to do that.

MR. MOLL: We have been trying to work in a compromise kind of fashion with AMD. We certainly have no objection to holding off until June 15th on the third-party subpoenas, absolutely if that's what the Court wants.

And I think the point the Court made is a very good one, and it probably makes sense to do that.

THE COURT: There is another little piece to that. When we get to the third-party subpoenas, to the extent it's possible, and I don't know because I have no idea of where you want to go with third party, but you'll have a better side after you get a

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decision on the motion to dismiss.

I think it ought to include all third parties, not just the 30 that have been initiated by AMD. I think everybody ought to add to the list what they think is going to be the universe.

So it's 60, or 45, or 110 third parties, whatever that number is. And whatever the disputes are, we get them resolved.

Then all those parties in that

universe know that it has begun, and that they're in the universe. Here is the coordination. We are going to get one shot at you, and we can start scheduling your production, and it can be rolling.

MR. MOLL: Your Honor, that is certainly fine with us, and again, I think makes a lot of sense. It's something we could sit down and work out, and that's perfectly agreeable to us.

Just on that, on the motion, on the jurist prudence, so the Court understands, the Supreme Court said it's an issue that should get resolved up front if it can be, because

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we're talking about subject matter jurisdiction. When we talk about facts, we look at AMD's complaint.

Paragraph 28 of their complaint says only 29 percent of their microprocessors wind up on computers that are sold in the United States. And then paragraph 101 of their complaint talks about alleged discounts we gave to retailers in Germany and Great Britain for sales to consumers in Germany and Great Britain in products that never got here.

THE COURT: I get it, and I get the motion to dismissing against the complaint. I am the expert on motion to dismiss reversal in the Third Circuit. I get it against complaints. I get it on documents. I'm on it.

MR. MOLL: We can improve your record, Your Honor.

THE COURT: I'm not interested in that, believe me. But I do want you to focus, because I don't want you to waste your time.

I understand what the Supreme Court says about judgment as a matter of law and dismissal, and I also understand what the

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circuit says. There is the ability to — we have a thread of consistency if you're very bright.

MR. MOLL: We appreciate that, Your Honor.

THE COURT: And I think you are, so that's what you have to do.

MR. MOLL: It's a motion that we have thought about long and hard.

THE COURT: Don't argue it now.

MR. MOLL: Okay.

THE COURT: So we are going to get that motion in place, and then you're going to work toward a coordination with class counsel which are now appointed interim lead counsel. And you're going to work on, in the first instance, third party, the universe of third parties.

And then as I understand it, the plaintiff's case is conduct driven, pointedly at pricing, so you ought to be able to come up with the information through documents that you seek from each other. And that ought to have tremendous spill over to the classes, to the

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class.

And I think that would put you a long way toward having full document production by when.

MR. MOLL: We hope by December 31, by the end of this year.

THE COURT: Mr. Diamond, is that your thought?

MR. DIAMOND: Certain assumptions.

THE COURT: Okay.

MR. DIAMOND: We are very close to having a custodian agreement, which will alleviate a major Intel concern about having to look through files of 1,200 people.

We are going to do a sampling, so there will be probably no more than 35 to 40 percent of those custodians producing documents.

That hinges on our ability to insure that we get those documents in a form in which we can efficiently process with state of the art electronic discovery tools that we have contracted to use at exceedingly high prices in order to be able to digest that material. We are very close to having a stipulation

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acceptable to the two of us and class counsel on the format in which that format ^ will that, the discovery stipulation ^.

Assuming those pieces come into play, I think it is aggressive. But ^ as speaker racial goal ^ to think that we're going to have our arms around the documents by the end of this year, That is certainly our intent. We are on a schedule to get our outbound documents done by then.

Mr. Samuel is going to address this in more detail, because he's been involved in the negotiations, about how that's going to unfold, assuming those documents ultimately get signed. But I do want to alleviate some of the concerns you have about the vagueness of the discovery disputes and how this is going to work from a state federal standpoint.

I don't know whether you view this as good news or bad news, but as an MDL judge, you are a judge of all districts, for the very express purpose of empowering you to resolve all discovery disputes, regardless of where they arise. So if the Court exercises that power,

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any discovery disputes we have with third parties will be resolved by you or your delegate.

We don't have to worry about a proliferation around the country, go chasing people in various courts.

THE COURT: I have sat in this chair before. There is a variant to that, which I'm sure you're aware of, and I'm not going to discuss it here.

But that's why I said it could happen in two or three instances. But I understand generally it's not an issue. But if you get those two or three instances, as I have had in previous roles as an MDL judge, it's not good.

MR. DIAMOND: We are going to try to avoid those, and we're trying to avoid the state federal conflict. It's my understanding that the discovery subpoenas are going to issue out of the federal court system.

The state plaintiffs will have access to all that discovery material, at least with respect to all accommodations. They may

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have some unique issues. They may have some unique parties they have to discover from. That will be a state matter.

With respect to common issues, and these are, given the nature of the claims, common issues clearly predominate, this will be a federal discovery case that our discovery referee, should you choose to appoint one, will basically control from soup to nuts. So we don't have to worry about that.

As to the 30, I think the number of subpoenas out is 32, Your Honor, unless we start hitting up the mom and pop white box makers around the country. We have gotten all of the significant customers of Intel and AMD in our cites.

You know, I think it's fine, and I think it's certainly appropriate for Intel to add anybody they think we've missed. But they're not going to be a great number of them, and they're not going to be significant players. They'll be really small, small companies.

I would urge you to hold that May 15th date for getting out the discovery, because

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it's been ten months. Nothing has happened, virtually nothing has hap-

pened on document discovery because of the absence of the complete set of requests.

If we are going to get to December 31, those requests have to go out in the next 15 or 20 days, if we're pushing that back fifty days.

THE COURT: If you agree that's the universe and you agree you can do it by May 15th, I won't bar it.

MR. DIAMOND: As to those 31, all I'm saying is get your requests out to those 31, class can do it. If there are others, obviously that's on a different timetable, but we are going to have —

THE COURT: That's exactly what I don't want. I don't want to have tails that will come up later. We want to have one roll at each effort, because I'm really not going to be able to permit a couple bites at the apple.

MR. DIAMOND: Understood.

THE COURT: And my view is a few weeks at the front end is better than an

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entanglement as you get closer to your ultimate dates.

MR. DIAMOND: I agree, but we do have major companies that are poised to start their document reviews.

THE COURT: I guarantee they are not going to be upset when you tell them it's another three weeks. Let's get through this, because we want to finish.

We are going to have document production targeted from December 31,2006 completion. There can be one agreed upon extension of that date, and you'll agree to it, whether there is going to be an extension and the time limit of the extension. I won't have to interfere.

So if you come back, you will file a stipulation if you want 30, 60, 90 more days. You're not going to get a year, but you're entitled to one agreed upon extension from that date.

And the document production target for December 31st will be subject to a coordination agreement with MDL. Any issues

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that you can't resolve to getting a coordination agreement, you'll bring to me and we'll get them resolved for you in short order.

As to a protective order, I'm assuming the parties are able to reasonably negotiate that. And the question is: Have you done that yet.

MR. DIAMOND: We are very, very close.

MR. MOLL: Yes. I think it's fair to say we are, Your Honor.

MR. DIAMOND: This will be a protective order that pertains to all proceedings, state and federal, and both cases before you. There is one complication, or procedural issue that I would suggest that you may want to think about at this juncture.

We're dealing with major, major corporations, ably represented by the major law firms around the country. The third parties are intensely interested in the terms of the protective order, and want an opportunity to voice their views at the front end, not at the back end.

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And we have told them that we would circulate any proposed protective order that the parties were able to agree upon and afford the third parties, IBM, HP, Gateway, the large companies an opportunity to file any views or objections they may have before you before you enter that order.

I think, and I believe Mr. Moll agrees with me, that that's probably the most efficient way to get this done in a way that avoids a lot of back end squabbling over what's entitled to confidential treatment.

I would propose that you schedule a date now 30 days into the future for entry of the protective order, that you give the parties until the end of next week to submit to you and circulate to the parties presently under subpoena the proposed protective order, that you give the third parties ten days within which to express their views about that, give the parties some opportunity, a week or ten days within which to respond to any objections that may be raised, and then have a hearing, if necessary, or simply enter the order, if necessary.

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THE COURT: We'll make the date May 22nd, that's a Monday, for you to submit the proposed protective order.

MR. DIAMOND: We can do that much earlier than May 22nd. We should be able to do that next week.

THE COURT: I've got to explain something to you. I want to give Mr. Horwitz and Mr. Cottrell the opportunity to explain my speech on the economic collision. I'm not going to bore you with it right now, but there's a professor out of Berkley that has a great graphic about it.

I'll give it to you in the short. There is a funnel. Do you know how narrow the bottom of the funnel is?

MR. DIAMOND: Yes.

THE COURT: Good. Then I won't give you the detail.

May 22nd. And then what you can do is put that in a proposed order and I'll sign it, and you can put the dates that, in your discussion with the third parties, give them enough time to have their ten days' response,

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your ten day, and submit that to me. And I'll agree to it. I'll sign it.

MR. DIAMOND: Okay.

THE COURT: And you should get that order here in the next week or so, so everybody is on notice who may be interested in third-party information —

MR. DIAMOND: Okay.

THE COURT: — coming into the Court.

MR. DIAMOND: There is another confidentiality issue, and I advise you of it. I don't think it requires you to do anything at this point.

We mentioned it in the agenda. There is a problem conducting an investigation in this industry because virtually everybody has been signed up to nondisclosure agreements that are extraordinarily broad and sweeping.

We can't even talk to some of our own employees about experiences they've had in the marketplace when they were employed by other companies because they are under a continuing nondisclosure obligation.

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We have presented Intel with a proposed way of dealing with that which would allow us to interview people under NDA without incurring the risk ourselves or the risk on them that they would be in violation of a nondisclosure agreement by providing notice to the party whose favor that NDA runs, giving them an opportunity to object. And if they don't extend us some immunity from contractual liability for divulging information which we would be required to treat as obviously confidential under the protective order and attorneys eyes only, I don't want to bore you with the details, we're waiting with a response.

But that's —

THE COURT: Let's take an example. There is an employee who is subject to a nondisclosure agreement, and it's clear, it's a binding agreement.

MR. DIAMOND: Right.

THE COURT: What you would have to do is get a Court order to break that agreement. And to get a Court order, you would have to file a motion and

show, depending what standards

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[1] apply, but let's say good cause or need that the [2] information is unavailable elsewhere.

[3] **MR. DIAMOND:** Your Honor, [4] typically this comes up. You can notice the [5] employee for deposition, and there is a body of [6] federal law which says that a party cannot hide [7] behind a nondisclosure agreement and refuse to [8] give testimony, particularly if the testimony is [9] subject to a protective order that is going to [10] render it nondisclosable.

[11] There is no contractual right of a [12] party to have its employee refuse to testify. [13] There is case law in the federal system saying [14] that you can order at the front end a procedure [15] to be put in place to give the party, in whose [16] benefit the NDA runs, an opportunity to come in [17] and object to an interview of an employee.

[18] And if they do, and you say that's [19] fine, and set certain terms for the interview, [20] that's the end of it. If they don't, they can't [21] complain about —

[22] **THE COURT:** I guess I don't [23] understand the issue. We get this all the time [24] in intellectual property cases.

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[1] You're going to have to put a [2] paper in place and tell me what you're talking [3] about and what procedure, if you want to operate [4] under it, because I'm not understanding the [5] facts that you're presenting and what law you [6] would be relying on.

[7] **MR. DIAMOND:** I think that's what [8] we probably ought to do and —

[9] **THE COURT:** And we'll take a look [10] at it. It's not an uncommon experience in the [11] patent cases that you would have those [12] nondisclosure agreements, and I'll take a look [13] at what you have.

[14] **MR. DIAMOND:** Okay.

[15] **THE COURT:** E discovery, obviously [16] when you get down to the completion of document [17] discovery, and I guess there is the possibility [18] that there could be issues about the information [19] available through E discovery. There has been a [20] lot of work done by the ABA on default [21] standards.

[22] **MR. DIAMOND:** Your Honor, we're [23] very close to an agreement. Mr. Samuels will [24] address it, but part of the stipulation I talked

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[1] about before is going to require the production [2] of documents in native format with curve out [3] exceptions that's essential in a case of this [4] magnitude, because the tools that can process [5] that data need to have the data in native [6] format.

[7] There is an agreement. We're very [8] close to an agreement that will govern those [9] standards.

[10] **THE COURT:** And on challenges to [11] the completeness of the production, does your [12] agreement contemplate, under your default [13] standard, a custodian?

[14] **MR. DIAMOND:** I don't know that [15] we've addressed that.

[16] **THE COURT:** You're up, Mr. [17] Samuels.

[18] **MR. SAMUELS:** Good morning, Your [19] Honor. Was Your Honor asking whether we, [20] whether the stipulation under consideration [21] would address having a custodian deposition to [22] address the completeness of E discovery?

[23] **THE COURT:** Yes.

[24] **MR. SAMUELS:** No. But that's a

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[1] very good suggestion, and I think we'll put that [2] on the table as we wrap up that step.

[3] **THE COURT:** Talk about it. That [4] will keep less from coming here, [5] MR. SAMUELS: Less is more.

[6] **THE COURT:** And less is more [7] sometimes. Okay. Thank you. I appreciate [8] that.

[9] All right. Any other E discovery [10] issues that either plaintiff or defendant want [11] to address?

[12] Sounds like you're close to [13] agreement, and you have all the provisions that [14] will be helpful.

[15] Discovery disputes, there will be [16] a special master appointed, and we'll get that [17] done in the short order, and then we'll set out [18] the parameters.

[19] I intend to do some of the issues, [20] but a lot of the document disputes we'll have to [21] go to a Special Master so that there can be a [22] record established, which we just don't have the [23] time to do for you.

[24] Schedule for completion of

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[1] discovery totally, I know this is premature, but [2] I would like to have some idea what you have [3] talked about in terms of discovery being [4] completed and potentially a trial date.

[5] **MR. DIAMOND:** This is a bit of a [6] pig in a poke.

[7] **THE COURT:** Okay.

[8] **MR. DIAMOND:** Because we haven't [9] even really got our hands dirty on which [10] custodians are going to produce documents, let [11] alone look at those documents, let alone make [12] some judgements about who are the important [13] witnesses, and who needs to be deposed, and in [14] what order, and how many of the third parties [15] are going to have to be deposed and getting that [16] done under the Hague Convention and certain [17] circumstances is not the easiest thing to do.

[18] That said, we are in agreement [19] with Intel that we would like to get the trial [20] in 2008. We are not necessarily in agreement as [21] to when in 2008.

[22] We would like to shoot for a trial [23] in the first quarter. That probably would mean [24] a close of discovery, both lay and expert, by

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[1] the end of 2007, Depending on how far we have to [2] back things up.

[3] I'll let Mr. Cooper or Mr. Moll [4] speak for themselves.

[5] **THE COURT:** All right. Thank you.

[6] **MR. COOPER:** We're interested, [7] also, in a trial date in 2008, if that, [8] obviously, meets with Your Honor's schedule, [9] which I know is the first consideration.

[10] We would like it earlier rather [11] than later, but we have gone through the process [12] of looking at what needs to be done. And I [13] think more realistically the date would be [14] September, that is, sometime in the fall.

[15] I think when we finally get to [16] presenting the case, our ideas for a case [17] management plan, the difficulties will become [18] apparent. Obviously, there will be substantial [19] summary judgment motions in this case after [20] discovery is complete, and that will, I think, [21] have some implications for the schedule that [22] Your Honor would want to create.

[23] I don't know what kind of [24] difficulties we are going to experience in

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[1] getting the discovery, the document discovery [2] done. I know from experience that there will [3] probably be some and then — but that trial date [4] really depends on how many depositions are going [5] to be taken.

[6] And if it's in the hundreds, I [7] think it's very unrealistic to talk about early [8] 2008. If we hold the number of depositions down [9] very significantly, then an earlier date becomes [10] more realistic.

[11] **THE COURT:** All right.

[12] **MR. DIAMOND:** Your Honor, in [13] conversations with Intel's counsel, what

we [14] would propose to the Court is we take this in [15] steps. You have already given us a document [16] discovery deadline that we revisit the issue of [17] further scheduling when we're 120, 180 days down [18] the road, and we have some sense of what the [19] deposition universe is going to look like before [20] we set a total discovery cut-off and before you [21] schedule us for trial.

[22] I just think there is too much [23] uncertainty on both sides, you know what our [24] aspirational goals are. Whether we can deliver

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[1] on them remains to be seen.

[2] **THE COURT:** All right. I'm going [3] to set a trial date, but not today, obviously, [4] and I'm going to set the trial date, though, so [5] that there is plenty of notice.

[6] And that way what has to be [7] massaged between that time and the trial date [8] can be massaged to that trial date. I'll set [9] the trial date in September after we go through [10] a good bit of the first round of document [11] production here, and we see how that's going, [12] and we see how the class is working, the class [13] case is working.

[14] So we'll set the trial date in [15] September of 2006 after a meeting with you all. [16] This case will go first, and then the class case [17] would follow.

[18] What we'll do is — this case was [19] filed when.

[20] **MR. DIAMOND:** June 28th of last [21] year.

[22] **THE COURT:** We'll make sure that [23] there is substantial — a time to complete the [24] case dispositive practice as well as what I'm

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[1] sure will be an intense motion in limine [2] practice.

[3] Now, in setting a trial date, I [4] want you to understand that if at any time [5] during your stay here you want to talk about [6] something short of a trial, I'm not the person [7] to talk to, because I don't push settlement. I [8] like being a trial judge.

[9] I like having the trials and [10] that's what I work toward. And I don't like to [11] get confused by hearing, you know, if we just [12] got 60 days, we could talk about something.

[13] But we have a very capable [14] magistrate judge here. If you ever want to talk [15] to her, you can ask me, and your counsel knows [16] how to get that order of reference that will [17] send you there, or you can do it privately.

[18] But I won't be interested in any [19] of that throughout the course of your stay here. [20] So we are going to focus on 2008 as your trial.

[21] Okay. The next item on the agenda [22] was the development of a case management plan [23] and order, Which I think we have talked about.

[24] But is there anything that you

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[1] wanted to bring up additionally?

[2] **MR. DIAMOND:** I don't think so. [3] But what Mr. Moll suggested was that you may [4] want to schedule a hearing in this case [5] simultaneously with the hearing that you already [6] have scheduled two weeks from the day in the [7] class case —

[8] **MR. COOPER:** Let me add to that, [9] if I can. We were talking in the hall actually [10] about the idea of having — I think you have a [11] May 4 trial scheduling date.

[12] **THE COURT:** Correct.

[13] **MR. COOPER:** Maybe trying to [14] combine that and hammer out the case management [15] order at that time with Your Honor. Based on [16] today, I am inclined to think it may be [17] worthwhile to wait a little bit longer than May [18] 4 to accomplish that.

[19] I'm talking about a couple of [20] weeks on or so.

[21] **MR. DIAMOND:** It's my sense that [22] these current stipulations, if we get buttoned [23] up and put to bed along with the rulings that [24] you made this morning really gives us a case

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[1] management plan on a going-forward basis.

[2] There are, obviously, some [3] procedural issues that we need to hammer out in [4] terms of how discovery is going to go forward on [5] a consolidated basis, including class counsel, [6] state and federal. You know, we have begun [7] working on that.

[8] We need to continue working on [9] that. But, you know, I tend to agree that we [10] probably now have enough direction from the [11] Court to get started without any further case [12] management issues being resolved at this point.

[13] **MR. COOPER:** That makes sense to [14] me. And I believe, I'm confident that we'll be [15] able to submit to Your Honor by, what, around [16] May 15 or so, a complete package. And if there [17] are any areas of disagreement, they're very [18] narrow, and Your Honor will be able to resolve [19] it.

[20] **THE COURT:** Here is what I'll do. [21] I actually think May 4th is going to go smoothly [22] because basically they're going to get the same [23] rulings that you have gotten, and they're [24] probably not going to be surprised by any of

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[1] that.

[2] And you'll be working — maybe [3] what would be helpful is if I schedule a date. [4] If you're saying May 15th, that seems to be an [5] operative date for you all. I don't know why [6] that is.

[7] But we'll get a date around that, [8] after it, but around it, where we'll take time [9] on the calendar to bring both cases in for any [10] disputes that exist. And I'll resolve them [11] either at that presentation or shortly [12] thereafter.

[13] And that way it will give you a [14] target both for submission of something, and [15] when you can get disputes resolved.

[16] **MR. COOPER:** That will be very [17] helpful.

[18] **THE COURT:** Do you have your [19] calendars with you? I can get mine.

[20] **MR. COOPER:** Mine is electronic. [21] I couldn't get it through the door. Whatever [22] date you choose, I will be here.

[23] **THE COURT:** All right. We'll have [24] the date of the proposed order as May 15th,

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[1] which is a Monday, 2006 to be filed, and that — [2] I understand that will be the product of both [3] the counsel in the MDL case and this case. And [4] then if there are any disputes presented by [5] what's filed, we'll come here Thursday, May [6] 18th.

[7] And you're traveling from [8] California and you're traveling —

[9] **MR. COOPER:** I'm also in [10] California.

[11] **THE COURT:** California.

[12] **MR. COOPER:** Although the weather [13] is much better here.

[14] **THE COURT:** We can arrange that [15] special hearing. Maybe we could do that by [16] telephone.

[17] I don't like to do things by [18] telephone in cases like this, but I hate to also [19] make you come.

[20] **MR. COOPER:** Why don't we let Your [21] Honor decide. We'll be here.

[22] **MR. DIAMOND:** I do think it [23] depends on the nature of the disputes. There [24] are some things we can submit to you in writing.

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[1] **THE COURT:** Let's put it on then [2] for ten o'clock on the 18th, Thursday the 18th. [3] And then if it's something very perfunctory, [4] I'll just give you a written answer and you'll [5] be off the board.

[6] If not, we will have you come in.

[7] **MR. DIAMOND:** If there are no [8] disputes then that hearing —

[9] **THE COURT:** That hearing is [10] canceled. If there is a complete agreement, we [11] wouldn't have anything. If there is disputes, [12] then we'll hear them on the 18th and get them [13] resolved for you so we can get that moved ahead.

[14] All right. Anything else you want [15] to talk about.

[16] Plaintiff.

[17] **MR. COOPER:** No.

[18] **THE COURT:** Defendant?

[19] **MR. DIAMOND:** No.

[20] **THE COURT:** Thank you.

[21] (Court recessed at 11:46 a.m.)

[23] State of Delaware)

[24] New Castle County)

CERTIFICATE OF REPORTER

I, Dale Hawkins, Registered Merit Reporter, Certified Shorthand Reporter, Registered Merit Reporter, and Notary Public, do hereby certify that the foregoing record is a true and accurate transcript of my stenographic notes taken on April 19, 2006, in the above-captioned matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 20th day of April, 2006, at Wilmington.

Dale C. Hawkins, RPR, RMR, CSR

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Lawyer's Notes