COMMENT

LORAIN, *ASPEN*, AND THE FUTURE OF SECTION 2 ENFORCEMENT

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INTRODUCTION

The Sherman Antitrust Act § 2 makes monopolizing or attempting to monopolize a particular trade or aspects of a trade a federal felony.[1] More specifically, Section 2 of the Act addresses a firm's unilateral conduct.[2] Under the administration of former President George W. Bush, a

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1. 15 U.S.C. § 2 (2010).

2. JOHN H. SHENEFIELD & IRWIN M. STELZER, THE ANTITRUST LAWS: A PRIMER 19 (4th ed. 2001).

comprehensive guideline titled Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act ("Bush Guidelines") was adopted in September of 2008 for enforcing Section 2 violations.[3] Under President Barack Obama's administration, however, the enforcement of antitrust laws is expected to undergo a radical transformation. On May 11, 2009, Christine A. Varney, the Assistant Attorney General for the Department of Justice's Antitrust Division, announced that the Department would withdraw the previous administration's guidelines for antitrust enforcement, and take enforcement of antitrust abuses in a new and more aggressive direction.[4]

Without the Bush Guidelines in place, the Department of Justice ("DOJ") has the freedom to pursue a more aggressive enforcement of antitrust laws than before. Courts can no longer use the Bush Guidelines for guidance or support for their holdings when interpreting Section 2 claims.[5] The Obama administration's approach to antitrust enforcement will likely have a strong impact on firms with a dominant market position. Intel Corporation, the subject of recent concern for relatively aggressive antitrust enforcement institutions, presents a good case in point. In Europe, Intel was fined a record 1.06 billion euros, the equivalent of 1.45 billion US dollars, by the European Union.[6] The European Commission found that Intel had broken European Union competition laws through its abuse of dominance in the computer chip market, such as attempting to exclude rivals like Advanced Micro Devices, Inc. ("AMD") from the chip sales market.[7] Domestically, Intel has been the subject of two major ongoing antitrust lawsuits.[8] Arguably, Intel's business practices might have been treated more leniently under the Bush Guidelines.

Although Varney criticized the Bush Guidelines for its extremely cautious approach in Section 2 enforcements,[9] the Obama administration has yet to produce clear guidelines as to the scope of its enforcement or

3. Press Release, Dep't of Justice, Justice Department Withdraws Report On Antitrust Monopoly Law (May 11, 2009) (on file with author), *available at* http://www.justice.gov/atr/public/press_releases/2009/245710.pdf.

4. *Id.*

5. Christine Varney, Assistant Attorney Gen., Antitrust Div. U.S. Dep't of Justice, Remarks before the Ctr. for Am. Progress, Vigorous Antitrust Enforcement in this Challenging Era (May 11, 2009) [hereinafter Varney Speech] (transcript available at http://www.usdoj.gov/atr/public/speeches/245711.htm).

6. James Kanter, *Europe fines Intel $1.45 billion in Antitrust Case*, N.Y. TIMES, May 13, 2009, http://www.nytimes.com/2009/05/14/business/global/14compete.html.

7. *Id.*

8. *See, e.g.*, Complaint, New York v. Intel Corp., No. 09-CV-00827 (D. Del. Nov. 4, 2009) [hereinafter *Intel N.Y. Complaint]*; In the Matter of Intel Corporation, FTC Dkt. No. 9341 (Dec. 16, 2009) [hereinafter *Intel FTC Complaint]*.

9. Varney Speech, *supra* note 5.

for how courts should interpret Section 2 claims. This Comment thus proposes an approach to Section 2 enforcement and interpretation for the Obama Administration through a closer adherence to Supreme Court precedent. This Comment then compares and applies the proposed approach to Intel's particular case to illustrate the shift in antitrust enforcement actions and how courts are likely to proceed.

Part I summarizes the Sherman Antitrust Act § 2 and the Bush Guidelines for Section 2 enforcement. Part II discusses the antitrust principles articulated by the Supreme Court in two seminal cases, *Lorain Journal v. United States*, and *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*,[10] the limitations to *Lorain* and *Aspen*, and what these cases mean for formulating new antitrust enforcement guidelines. Part III takes Intel's case in point to analyze how such new guidelines may affect the future of antitrust enforcement under the Obama Administration. Part III compares the European Union's treatment of Intel to illustrate where the United States' antitrust policy may be headed. Part III then applies and compares the approach under the Bush Guidelines and the Obama Administration's likely approach from Part II for a specific case analysis on Intel and the personal computer microprocessor industry.

I. BACKGROUND OF U.S. ANTITRUST LAW

> § 2. Monopolizing trade a felony; penalty
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> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.[11]

The Sherman Antitrust Act was promulgated in 1890 and was designed to prohibit "unreasonable" restraints on trade.[12] Section 2 of the Sherman Act was intended specifically to prosecute any single-firm

10. Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).
11. Sherman Antitrust Act, 15 U.S.C. § 2 (2008).
12. WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES (3d ed., West 2002).

conduct that constitutes the act of monopolizing.[13] There are two elements necessary in order to show the act of monopolizing. First, it must be proved that the alleged monopolizing party had the possession of monopoly power in a relevant market.[14] Second, there must be the "willful acquisition or maintenance" of such power apart from the growth and development due to "a superior product, business acumen, or historic accident."[15]

The Bush Guidelines took a relatively narrow approach to finding Section 2 violations. More specifically, three key features of the Bush Guidelines illustrate its fairly cautious view towards enforcement of antitrust laws.[16] First, the Bush Guidelines placed an emphasis on the negative effects of over-deterrence on the incentive structures which encourage innovation in a competitive market and the efficiency benefits of competitive behavior.[17] Many expert panelists involved with the development of the Bush Guidelines, and even the Supreme Court itself, had stressed the dangers from over-deterrence.[18] Second, in the absence of conduct specific tests, the Bush Guidelines advocated the use of a disproportionality test.[19] Business conduct was found to be anticompetitive under this test if it led to "harm to competition that is disproportionate to consumer benefits . . . ."[20] Third, the Bush Guidelines established a series of safe harbors which companies could follow to avoid being prosecuted for Section 2 violations.[21] Safe harbors were created by bright line tests that determined the legality of particular conduct.[22] For example, in the two-pronged *Brooke Group* test for the particular conduct of predatory pricing, a guilty defendant must have 1) priced below an appropriate measure of cost, and 2) " 'had a reasonable prospect, or . . . a dangerous probability, of recouping its investment in below-cost prices.' "[23] Another example supported by the Bush Guidelines was a market-share safe harbor for monopolies in Section 2 cases. Firms with

13. Chris Bernard, Note, *Shifting and Shrinking Common Ground: Recalibrating the Federal Trade Commission's and Department of Justice's Enforcement Powers of Single-Firm Monopoly Conduct*, 34 DEL. J. CORP. L. 581, 587–88 (2009).

14. U.S. v. Grinnell Corp., 384 U.S. 563, 570 (1966).

15. *Id.* at 570–71.

16. *See* Press Release, Dep't of Justice, *supra* note 3.

17. U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 14 (2008), *available at* http://www.justice.gov/atr/public/reports/236681.pdf [hereinafter Bush Guidelines].

18. *Id.* at 14–15.

19. *Id.* at 45–46.

20. *Id.* at 45 (internal quotation marks omitted).

21. *Id.* at 17.

22. *Id.* at 18.

23. *Id.* at 18 (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224 (1993)).

below fifty percent market share would not be considered to have monopoly power for Section 2 cases.[24]

In her May 11, 2009 speech before the American Center for Progress, Christine Varney withdrew the Bush Guidelines.[25] Her speech signals a departure from the prior Department of Justice's defendant-friendly approach to Section 2 enforcement.[26] First, she argued that the Bush Guidelines reflected an "extreme hesitancy in the face of potential abuses by monopoly firms"—it emphasized preserving efficiency at the expense of "redressing exclusionary and predatory acts" that harm competition, distort markets, and increase barriers to entry.[27] Second, she argued against the Bush Guideline's adoption of safe harbors to shield specific types of business conduct from Section 2 enforcement as an unnecessarily cautious approach to antitrust enforcement.[28] Third, Varney repudiated the use of the disproportionality test to determine enforcement of Section 2 for being an overly lenient approach to antitrust enforcement which gave too much weight to the risk of over-deterrence.[29]

While Varney has not set any new standards for the Obama administration's views on antitrust enforcement, she highlighted a series of cases which may factor prominently in how the Department of Justice is expected to approach antitrust violations. Two such cases are the Supreme Court's holdings in *Lorain Journal v. United States*[30] and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*.[31] These cases represent the "tried and true standards which set forth clear limitations on how monopoly firms are permitted to behave."[32] Thus, it seems likely that the DOJ under the Obama Administration will rely on such Supreme Court holdings to provide the broad guidelines for determining what constitutes a monopolist's exclusionary or predatory conduct and whether they are considered harmful to competition, and ultimately, to consumers. The antitrust principles established in *Lorain* and *Aspen* also represent a significant deviation from the approach to antitrust violations under the Bush Guidelines.

24. *Id.* at 24.
25. Varney Speech, *supra* note 5.
26. Stephen Labaton, *Obama Takes Tougher Antitrust Line*, N.Y. TIMES, May 11, 2009, http://www.nytimes.com/2009/05/12/business/economy/12antitrust.html.
27. Varney Speech, *supra* note 5.
28. *Id.*
29. *Id.*
30. 342 U.S. 143 (1951).
31. 472 U.S. 585 (1985).
32. Varney Speech, *supra* note 5.

II. *LORAIN*, *ASPEN*, AND LIMITATIONS

Together, *Lorain* and *Aspen* establish significant principles that may serve as an important part of this present administration's guidelines for Section 2 antitrust enforcement.

A. *Lorain Journal Co. v. United States*

In *Lorain*, the Court highlighted important points for enforcing Section 2. First, it outlined the general rule that inducing others to boycott a competitor is an unfair means of anticompetitive conduct. A local newspaper publisher was found to have violated Section 2 by refusing to advertise for local businesses who also advertised through a local radio station. The defendant, The Lorain Journal Company, published a newspaper, the *Journal*, in the City of Lorain, Ohio.[33] By 1933, the *Journal* had a daily circulation of 13,000 in the city and reached 99% of the city's families.[34] The Court noted that between 1933 and 1948 the newspaper publisher "enjoyed a substantial monopoly in Lorain of the mass dissemination of news and advertising, both of a local and national character."[35] Using its advantageous position, the publisher then refused to publish advertisements in the *Journal* from businesses who advertised, or were suspected by the publisher to be interested in advertising, with the local radio station (WEOL).[36] Forced to choose, many Lorain County businesses then stopped advertising with WEOL, and thereby reduced WEOL's income.[37] Because of the newspaper publisher's conduct, the radio station's survival was then put in jeopardy.[38]

Secondly, the case reaffirmed the principle that it is "unreasonable, per se, to foreclose competitors from any substantial market."[39] In this case, the newspaper and radio station operated through two different forms of media. The Court, however, held that a Section 2 violation occurred where "all the newspapers in a city, in order to monopolize the dissemination of news and advertising by eliminating a competing radio station, conspired to accept no advertisements from anyone who advertised over that station."[40] Lorain was thus enjoined from refusing to publish advertisements from businesses or individuals because they had

33. *Lorain*, 342 U.S. at 145.
34. *Id.* at 146.
35. *Id.* at 147.
36. *Id.* at 147–49.
37. *Id.* at 149.
38. *Id.* at 154.
39. *Id.* at 154 n.7 (quoting United States v. Griffith, 334 U.S. 100, 106–07 (1948)).
40. *Id.* at 154.

"proposed or proposes to advertise in or through any other advertising medium."[41]

B. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*

In *Aspen,* the Supreme Court affirmed the principle that a showing of antitrust violation under Sherman Act Section 2 required two elements: 1) the possession of monopoly power in a relevant market, and 2) the willful acquisition, maintenance, or use of that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes.[42] More importantly, commentators have argued that *Aspen* supports that the second element could be shown by proving that the defendant's conduct was "unreasonably exclusionary."[43] The absence of a legitimate business justification would strongly support a showing of "unreasonably exclusionary" conduct.[44] A monopolist firm's refusal to deal with a competitor was deemed to violate Section 2 where it unnecessarily excludes or handicaps competitors and is not itself motivated by valid business reasons.[45]

In this case, the plaintiff, Aspen Highlands Skiing Corporation ("Highlands"), owned the Aspen Highlands downhill skiing facility.[46] In addition to Highlands, there were three other downhill skiing facilities in Aspen: Ajax, Buttermilk, and Snowmass.[47] By 1967, defendant, Aspen Skiing Company ("Ski Co."), owned the latter three.[48] An all-Aspen ticket was used at all four ski facilities.[49] This ticket was first introduced in 1962 by the different owners of the ski resorts as a 6-day all-Aspen ticket.[50] In 1978, this ticket was discontinued after an agreement could not be reached between Highlands and Ski Co.[51] Ski Co. had demanded Highlands accept a share of the revenue below its historic average based on usage.[52] A member of Ski Co.'s board suggested making an offer that Highlands would not be able to accept.[53] Thus, the Court affirmed the lower courts' decisions that a firm with monopoly power over the Aspen

41. *Id.* at 157.
42. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 595–96 (1985).
43. Robert Pitofsky, *Some Predictions About Future Antitrust Enforcement*, 16 GEO. MASON L. REV. 895, 897 (2009).
44. *Id.* at 897–98.
45. *Aspen*, 472 U.S. at 597.
46. *Id.* at 588.
47. *Id.* at 587–88.
48. *Id.* at 589.
49. *Id.*
50. *Id.*
51. *Id.* at 593.
52. *Id.* at 592.
53. *Id.*

ski facility market violated Section 2 by refusing to participate in an all-Aspen ski pass unless its rival made significant financial concessions.[54] Furthermore, Ski Co.'s refusal to deal was not "justified by any normal business purpose."[55]

In summarizing this case, Christine Varney noted in her speech that *Aspen* stood "for the proposition that dominant firms can be expected to deal with their rivals where cooperation is indispensable to effective competition."[56]

In conjunction with each other, *Lorain* and *Aspen* lay down three important principles for Section 2 enforcement. First, inducing third parties to boycott a competitor is anticompetitive conduct in violation of antitrust laws. Second, determining antitrust violations requires looking at a monopolist's conduct not just in its own market but in other relevant markets as well. Thus, a newspaper cannot attempt to foreclose competition from radio stations through anticompetitive means. Third, the determination of what constitutes exclusionary conduct is influenced by the presence or absence of valid business justifications. A broader theme of the rulings in both cases is that the independent businessman's right to refuse to deal with other firms is not unqualified.[57]

C. *Limitations to Lorain and Aspen*

Two Supreme Court cases have had a substantial impact on potentially limiting the reach of *Aspen*. First, in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, L.L.P.*, Justice Scalia wrote in his majority opinion for the Court that *Aspen* "is at or near the outer boundary of Section 2 liability."[58] Justice Scalia conclusively stated that Section 2 does not give "judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."[59] In this case, the respondent alleged that Verizon hurt rival local exchange carriers ("LEC") from entering and competing in the local telephone market by discriminatorily filing their orders for access to operations support systems.[60] Justice Scalia distinguished this case from *Aspen* by stating that Verizon's refusal to interconnect at cost based rate of compensation is different from Ski Co.'s refusal to sell at

54. *Id.* at 611.
55. *Id.* at 608.
56. Varney Speech, *supra* note 5 (quoting Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 377–78 (7th Cir. 1986)).
57. *Aspen*, 472 U.S. at 601.
58. Verizon Commc'ns., Inc. v. Law Offices of Curtis V. Trinko, L.L.P., 540 U.S. 398, 409 (2004).
59. *Id.* at 415–16.
60. *Id.* at 405.

retail price.[61] Verizon's refusal did not reflect "dreams of monopoly" while the *Aspen* defendant's actions suggested that it believed its future monopoly retail price would be higher.[62] The majority concluded that this case did not fit into the limited exception by *Aspen* and thus there was no Sherman Act claim based on the set of facts presented.[63]

Second, in *Pacific Bell Telephone Co. v. linkLine Communications*, the Supreme Court further limited the reach of *Aspen* in the context of a vertically integrated firm in competition with non-vertically integrated rival firms. Chief Justice Roberts, writing for the majority, found no price-squeezing claim under Section 2.[64] Plaintiffs, linkLine Communications, compete with defendant, AT&T, in the retail DSL market but must lease DSL transport services from AT&T.[65] It was argued that the vertically integrated firm, AT&T, which has power in the wholesale market, could squeeze competitors' profit margins by raising the wholesale price of inputs sold to competitors and lowering the retail price of the finished good.[66] Chief Justice Roberts noted that under the Sherman Act, when a firm has no "duty to deal in the wholesale market[,]" it thus also "has no obligation to deal under terms and conditions favorable to its competitors."[67]

D. *Varney's Challenges to Formulating New Guidelines*

Because of the holdings in *Trinko* and *linkLine*, Varney faces an upwards battle if she intends to resurrect the rulings from *Lorain* and *Aspen* as the guiding principles for federal antitrust enforcement. *Trinko* and *linkLine* directly limit the reach of *Lorain* or *Aspen*. Both the decisions in *Trinko* and *linkLine* chip away against a broad interpretation of a qualified refusal to deal. In *Trinko*, the Court argued that a refusal to deal violated Section 2 only where defendant refused to sell at retail.[68] In *linkLine*, the Court rejected a price squeezing claim under Section 2 by non-vertically integrated firms against a vertically integrated firm from which the former bought inputs. Thus, to succeed in claims of Section 2 liability based on single–firm conduct, Varney must be able to show why any of the cases she brings falls outside the legitimate bounds of conduct protected by *Trinko* and *linkLine*.

61. *Id.* at 409.
62. *Id.*
63. *Id.* at 409–10, 415.
64. Pac. Bell Tel. Co. v. linkLine Commc'ns., Inc., 129 S.Ct. 1109, 1114–15 (2009).
65. *Id.* at 1115.
66. *Id.* at 1114.
67. *Id.* at 1119.
68. Bernard, *supra* note 13, at 590.

Varney may be able to get around *Trinko* and *linkLine* by distinguishing between regulated and unregulated industries in bringing antitrust enforcement actions. A decade of Supreme Court decisions have created an environment where antitrust laws must defer to regulatory decisions.[69] Thus, one enforcement strategy she may pursue is to distinguish *Trinko* and *linkLine* on the basis that they only apply to cases where there is already an existing regulatory framework to deal with antitrust problems. Varney mentions that these two cases may limit the holding in *Aspen* where it involves "specific sectors subject to significant and specialized regulatory overlay."[70] Both cases, however, still reaffirm *Aspen*'s limits on single-firm predatory or exclusionary conduct.[71] Her argument is not without support. In *Trinko*, Justice Scalia highlights that the structure and circumstances of the industry are important for any antitrust analysis.[72] One such factor to consider would be the existing presence of a regulatory structure "designed to deter and remedy anticompetitive harm."[73] Antitrust enforcement would be superfluous where such regulations exist and the benefit to further antitrust enforcement would be small.[74] In *linkLine*, the concurrence specifically notes that the issue involved a *regulated* firm, and where a regulatory structure exists to address anticompetitive concerns, the "cost of antitrust enforcement are likely to be greater than the benefits."[75] Thus, the holdings in *Trinko* and *linkLine* can be interpreted to limit the application of *Aspen* only when the industry has a regulatory framework to deal with antitrust concerns. In industries where anticompetitive behavior is not adequately covered by regulators or regulations, there still exists an important role for antitrust laws and the courts to play in enforcing Section 2 violations.

The argument that *Trinko* and *linkLine* only limit the reach of *Aspen* on the right of refusal to deal in cases of regulated industries still has some hurdles to overcome. The language in both cases implies that the holdings may extend beyond antitrust actions involving only regulated industries. In *Trinko*, the relevant regulatory framework, the Telecommunications Act of 1996 ("1996 Act"), contains an antitrust savings clause stating "nothing in this Act . . . shall be construed to modify, im-

69. Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685, 685–86 (2009).

70. Varney Speech, *supra* note 5, at n.22.

71. *Id.*

72. Verizon Commc'ns., Inc. v. Law Offices of Curtis V. Trinko, L.L.P., 540 U.S. 398, 411–12 (2004).

73. *Id.* at 412.

74. *Id.*

75. Pac. Bell Tel. Co. v. linkLine Commc'ns Inc., 129 S. Ct. 1109, 1124 (2009) (Breyer, J., concurring).

pair, or supersede the applicability of any of the antitrust laws."[76] This savings clause "preserves those 'claims that satisfy existing antitrust standards'," and thus the 1996 Act should not affect the reach of antitrust laws.[77] Yet, Justice Scalia also notes that in certain circumstances, "regulation[s] significantly diminish[] the likelihood of major antitrust harm."[78] In *linkLine*, the Court held that although the defendant had no antitrust duty to deal with its rivals at the wholesale level under the Sherman Act, the defendant may have such duties under FCC regulations.[79] The Court, however, did not specifically address whether the presence of FCC regulations diminished the need for Sherman Act antitrust enforcement or had no effect. The ambiguity of the two holdings thus gives Varney some wiggle room to push for the DOJ to take an aggressive approach towards antitrust enforcement. She could argue that where there is no regulatory structure to address a particular market, a more active antitrust regime guided by the antitrust laws and the courts is necessary.

Another argument that Varney could make regarding the reach of *Trinko* and *linkLine* is that the two cases are limited to situations where the parties at issue are embarking upon a new business relationship as opposed to discontinuing a prior relationship. In *Aspen*, Ski Co.'s decision to terminate the all-Aspen ticket was a decision by a monopolist "to make an important change in the character of the market."[80] The all-Aspen ticket had been developed by the firms in a competitive market and already used for several years.[81] While not conclusive, this fact weighed against finding that Ski Co.'s conduct was a legitimate right of refusal to deal with a competitor.[82] On the other hand, *Trinko* and *linkLine*, both more recent opinions by the Court, focus on whether an entrenched firm has a duty to provide access to a particular facility to new entrants to the market. *Trinko* involved the obligations by an incumbent LEC under the 1996 Act to share its network and unbundled network elements with new entrants, the competitive LECs.[83] Similarly, *linkLine* involved an incumbent phone company's FCC obligation to sell transmission service to independent DSL providers in order to grow competition in the retail DSL market.[84]

76. *Trinko*, 540 U.S. at 406 (quoting § 601 of the 1996 Act, 47 U.S.C. § 152, Pub. L. No. 104-104, 110 Stat. 143 (1996)) (internal quotation marks omitted).
77. *Id.* at 406.
78. *Id.* at 412 (quoting Concord v. Boston Edison Co., 915 F.2d 17, 25 (1990)).
79. *linkLine*, 129 S.Ct. at 1119.
80. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 604 (1985).
81. *Id.* at 589.
82. *Id.* at 604.
83. *Trinko*, 540 U.S. at 402.
84. *linkLine*, 129 U.S. at 1115.

III. CASE ILLUSTRATION: INTEL CORPORATION

Being the subject of recent antitrust concerns worldwide, Intel Corporation provides a good illustration of how the Obama Administration is likely to continue with Section 2 prosecutions.

A. *Quick Look at the Personal Computer Microprocessor Industry*

One industry that has been a subject of global antitrust concerns today is personal computer microprocessors. Currently, this market is dominated by two companies: Intel Corporation ("Intel")[85] and AMD.[86] Intel, by 2007, controlled about "four-fifths of the market for the central processing units at the heart of the world's one billion personal computers and servers . . . ."[87] AMD controls the remaining nineteen percent of the market for personal computers central processing units.[88] AMD's nineteen percent share by March 2007 is a drop from its market share in 2006, which was twenty-five percent.[89]

B. *The European Union Approach*

The European Union has always been more active in bringing monopolization cases then the United States.[90] The aggressive and proactive sentiments in Varney's speech thus indicate that the DOJ is expected to move towards a more European approach to antitrust enforcement.[91] Thus, before evaluating the current United States antitrust cases against Intel, it may be useful to examine the European Commission's recent finding that Intel had engaged in anticompetitive practices.

The European Commission decided on May 13, 2009 that Intel had violated EC Treaty Article 82 and EEA Agreement Article 54 by "engag-

85. Intel was founded in 1968 by Robert Noyce and Gordon Moore and it is currently headquartered in Santa Clara, California. The company produces an assortment of electronic industry products including microprocessors and motherboards. Encyclopedia Britannica, Intel Corporation, http://www.britannica.com/EBchecked/topic/289747/Intel-Corporation (last visited May 14, 2010).

86. AMD was founded in 1969 by Walter J. Sanders and several partners and is currently headquartered in Sunnyvale, California. The company makes microprocessors, flash memories, and other components used in consumer electronic goods. Encyclopedia Britannica, Advanced Micro Devices, Inc. (AMD), http://www.britannica.com/EBchecked/topic/1017522/Advanced-Micro-Devices-Inc (last visited May 14, 2010).

87. David Lawsky, *Update 4-EU Says Intel Tried to Squeeze Out Advanced Micro*, REUTERS, July 27, 2007, http://www.reuters.com/article/governmentFilingsNews/idUSL2783620520070727?sp=true.

88. *Id.*

89. *Id.*

90. Daniel A. Crane, *Business Regulation: linkLine's Institutional Suspicions*, 2009 CATO SUP. CT. REV. 111, 130.

91. *Id.* at 130.

ing in a single and continuous infringement . . . from October 2002 until December 2007 by implementing a strategy aimed at foreclosing competitors from the x86 CPU market."[92] Article 82 of the EC Treaty says "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States."[93] Intel was fined a record 1.06 billion euros.[94]

Regulators ruled that Intel had broken European Union competition laws in using its dominant market position to try to foreclose AMD from the personal computer microprocessor market.[95] Between 1997 and 2007, Intel had a market share equal to or in excess of seventy percent.[96] The relevant product market was defined as that of the x86 CPUs and the geographic market was worldwide.[97] Intel was also found to have engaged in anticompetitive practices. Intel "gave wholly or partially hidden rebates to computer manufacturers on the condition that they bought all, or almost all, of their x86 CPU's from Intel."[98] Intel also paid a major retailer to stock only computers that used the Intel x86 CPU.[99] Lastly, Intel acted intentionally by making direct payments to computer manufacturers specifically to halt or delay the launch of products with x86 CPUs made by Intel's competitors, and to limit the sales of such products.[100] The European Union reached the conclusion that such practices were an abuse of Intel's dominant market position and harmed consumers.[101]

92. Summary of Commission Decision of 13 May 2009 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA agreement, Case COMP/C-3/37.990—Intel, 2009 O.J. (C 227) 43 [hereinafter Summary of Commission Decision].

93. Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 82. Currently, EC Treaty Article 82 is Article 102 with the words 'common market' changed to 'internal market.' This is part of the revisions from the Lisbon Treaty which was entered into force on December 1, 2009. Jacques Bourgeois et al., *The Lisbon Treaty: The Next Steps Forward For Europe*, WILMER HALE, L.L.P.—PUBL'NS, Dec. 3, 2009, http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9321. Because the decision was rendered in May of 2009, I will refer to the provision as EC Treaty Article 82 to avoid any confusion.

94. Kanter, *supra* note 6.

95. Summary of Commission Decision, *supra* note 92, at 39.

96. *Id.* at 18.

97. *Id.* at 14–16.

98. Press Release, European Commission, Antitrust: Commission Imposes a Fine of €1.06 bn on Intel for Abuse of Dominant Position; Orders Intel to Cease Illegal Practices, U.N. Doc IP/09/745 (May 13, 2009).

99. *Id.*

100. *Id.*

101. *Id.*

C. *Obama Administration's Antitrust Approach to Intel Corporation*

In the United States, Intel has recently come under the radar of the Federal Trade Commission ("FTC") and the New York Attorney General. This section discusses in depth the FTC and New York Attorney General antitrust lawsuits against Intel,[102] and applies the principles from the Supreme Court precedent discussed earlier to gauge how the Obama Administration will likely proceed with Section 2 claims.

In evaluating the Section 2 antitrust claims against Intel, two elements are necessary for finding whether an act of monopolizing has occurred. First is the possession of monopoly power in a relevant market.[103] Second, is it a "willful acquisition or maintenance of that power" that is distinguishable from typical growth related to a superior product, good business judgments, or historical accidents.[104]

Lorain and *Aspen* provide strong legal principles for examining Intel's business practices in terms of the Section 2 and whether such practices constitute an act of monopolizing. Both cases stand for the proposition that there is not an unqualified right of refusal to deal with others firm.[105] It is also important to examine if and how *Trinko* and *linkLine* limitations should apply.[106] One argument to make against applying the latter two cases is that both dealt with regulated industries.[107] Intel's CPU business is not within a regulated industry governed by a market specific federal law or regulation such as telecommunications or high-speed Internet service. Thus, Intel's conduct deserves a careful, full Section 2 analysis for anticompetitive harm, since there is no need to defer to an existing regulatory structure for its particular market.

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102. The FTC suit, especially, may be an excellent indicator of what an aggressive antitrust enforcement strategy from the Obama Administration will look like. Because the two agencies appear to be going in the same direction on antitrust enforcement, the FTC suit may shed light on the DOJ's approach as well. Christine Varney, Assistant Attorney Gen., Antitrust Div. U.S. Dep't of Justice, Remarks as Prepared for the U.S. Chamber of Commerce, Vigorous Antitrust Enforcement in this Challenging Era (May 12, 2009) (transcript available at http://www.justice.gov/atr/public/speeches/245777.htm). Varney said she intended to "renew enforcement collaboration between the Antitrust Division and the FTC". *Id.* Furthermore, she expected to work on reaching greater consensus with the FTC especially with regard to single-firm conduct and Section 2 enforcement. *Id.*

103. U.S. v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

104. *Id. See also supra* Part I.

105. Varney Speech, *supra* note 5. *See also supra* Part II.A-B.

106. *See supra* Part II.C–D.

107. *Trinko* involved whether a firm's duties under the 1996 Act states a claim under the Sherman Act Section 2 as well. Verizon Commc'ns., Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 401 (2004). *linkLine* involved FCC obligations for AT&T to provide DSL transport services to independent DSL providers. Pac. Bell Tel. Co. v. linkLine Commc'ns Inc., 129 S. Ct. 1109, 1115 (2009).

1. Possession of Monopoly Power in a Relevant Market

In *Aspen*, Ski Co. possessed monopoly power where the relevant product market was downhill ski facilities and the geographic submarket was the Aspen area.[108] Monopoly power was defined as "the power to control prices in the relevant market or to exclude competitors."[109] Significant evidence exists that Intel's control over the personal computer microprocessor market reflects similar monopoly power as held by Ski Co. in the *Aspen* case. This evidence is reflected in the two pending federal jurisdiction antitrust litigations against Intel.

In its complaint before the federal district court in *New York v. Intel Corporation*, the New York Attorney General states, in reference to the worldwide x86 CPU market, that an internal document from one of INtel's customers concluded "in this market, Intel dictates the rules of the game . . . and most of their actions can be understood in the context of keeping their distribution outlets (their customers) in line."[110] The FTC, in its complaint, argues that Intel possessed monopoly power in the relevant CPU markets with a unit share in the relevant markets since 1999 in excess of seventy-five percent and a revenue share in excess of eighty percent in the same time period.[111] The FTC defined the relevant product market as CPUs used for desktop, notebook, net-book computers, servers, and narrower relevant markets within this group.[112] Within CPUs, the x86 microprocessor is the industry standard for personal computers and servers.[113] Non-x86 microprocessors thus do not significantly restrain Intel's monopoly power.[114] The relevant geographic market is worldwide.[115] Furthermore, the FTC points out that there are significant barriers to entry into the market including product development, the cost and expertise to develop manufacturing capabilities, intellectual property rights, establishment of product reputation and compatibility, and Intel's "unfair methods of competition and efforts to maintain or obtain a monopoly position in the markets."[116]

108. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 n.20 (1985).

109. *Id.*

110. *Intel N.Y. Complaint, supra* note 8, at ¶ 41 (internal quotation marks omitted) (parenthetical in original).

111. *Intel FTC Compaint*, *supra* note 8, at ¶ 3.

112. *Id.* at ¶ 32.

113. *Id.* at ¶ 35.

114. *Id.* at ¶ 36.

115. *Id.* at ¶ 40.

116. *Id.* at ¶ 42.

2. Willful Acquisition, Maintenance, or Use of That Power

Both *Lorain* and *Aspen* stand for the principle there is not an unqualified right to refuse to deal with other firms.[117] This holding also stood for two broader implications. First, the Court noted that this was part of broader principle where "[*i]n the absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[118] Second, the Court noted that that the right to refuse to deal with other firms would be characterized as exclusionary depending on the impact on consumers, whether it impaired competition in an unnecessarily restrictive way, and whether there were valid business reasons.[119] Thus the cases establish a basic standard for judging what constitutes exclusionary conduct.

Under this standard, Intel Corp.'s business practices should come under increased scrutiny for antitrust enforcement. In its complaint, the New York Attorney General argues that several of Intel's practices constitute exclusionary conduct. Intel had an agreement with Dell from 2001 to 2006 where Intel paid Dell billions of dollars, gave it a preferred supply of chips over its competitors, and worked with Dell to submit below-cost bids in competition with AMD products.[120] Despite the fact that Dell recognized AMD's superiority in chip design and suffered market loss during this time period, it did not end its agreement with Intel until 2006.[121] Intel had a similar relationship with Hewlett-Packard ("HP"). HP sold some AMD-based products but refused to expand its relationship with AMD due to pressure from Intel—Intel offered payments, threatened to cancel payments and joint ventures.[122] Intel's relationship with IBM reflected a similar effort on the part of Intel to foreclose the latter from expanding its number of AMD products. Intel also threatened to cut subsidies, end joint projects, and offered additional payments to IBM to not launch or limit the purchase of AMD products.[123]

Such practices by Intel Corp should come under scrutiny for violation of Section 2 for two reasons. First, based on *Lorain*, a firm is prohibited from inducing customers to boycott its competitor. In *Aspen*,

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117. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985).

118. *Id.* at 602 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).

119. *Id.* at 605.

120. *Intel N.Y. Complaint*, *supra* note 8, at ¶¶ 40, 79, 82.

121. *Id.* at ¶ 76.

122. *Id.* at ¶ 149. In one example, in 2002, HP imposed a five percent cap on the number of its AMD-based commercial desktop PCs in exchange for $130 million in rebate payments from Intel. *Id.* at ¶ 150.

123. *Id.* at ¶ 202.

the Court further held that a firm's right to dealing with other firms or customers is not unqualified. Here, Intel conditioned payments, rebates, and subsidies to Dell, HP, and IBM on the condition that these companies either not offer AMD products or limit the number of AMD products that they would offer. For example, Intel tied a payment to HP in exchange for HP capping the number of its AMD based desktops to five percent.[124] This is similar to both *Lorain* and *Aspen* where the Court ruled against a monopolist who dealt with its customers in a manner that was harmful to its competitor. Second, in evaluating exclusionary conduct, one must look at the effect of the conduct on the firm itself, consumers, and competitors.[125] The Attorney General complaint notes that Intel's practices have led to higher prices for consumers,[126] and decreased innovation through limiting the availability of choices between competing technologies to businesses and consumers.[127] Intel's practices have affected AMD's ability to expand the market for its products among original equipment manufacturers ("OEMs") such as Dell, HP, and IBM.[128]

Additionally, *Aspen* suggests that the lack of a business justification would weigh strongly towards a finding of unreasonably exclusionary conduct. The Attorney General complaint argues that Intel offered bribes or coerced OEMs to not offer, or otherwise limit the offering of, AMD CPU products.[129] Its actions were not based on legitimate marketing strategies for its own products but rather efforts to limit AMD's ability to gain sales.[130] Furthermore, in its partnership with Dell, Intel satisfied one hundred percent of Dell's demand even at the expense of being unable to satisfy the demand of other OEMs.[131] In another example, of all comparable OEMs, only Dell's rebates were based on its percentage of total CPU purchases from Intel.[132] Internal Dell emails among its executives pointed out that the rebates were incentives "to help AMD get weaker."[133] Such evidence shows that Intel's payments to Dell were not procompetitive acts but rather to keep AMD at bay.[134]

124. *Id*. at ¶ 150
125. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985).
126. *Intel N.Y. Complaint*, *supra* note 8, at ¶ 67.
127. *Id.* at ¶¶ 70–71.
128. *Id.* at ¶¶ 1–2.
129. *Id.* at ¶ 40.
130. *Id.* at ¶ 42.
131. *Id.* at ¶ 79.
132. *Id.* at ¶ 81.
133. *Id.* at ¶ 82.
134. *Id.* at ¶ 81.

D. *Applying the Bush Guidelines to Intel*

It is worthwhile, for comparative reasons, to consider what would have happened if the Department of Justice had pursued the Intel case under the withdrawn Bush Guidelines.

The first step in a Section 2 case is to show that the defendant had possession of monopoly power in the relevant market. The Bush Guidelines state that monopoly power is shown by the possession of a high share of the relevant market and the presence of entry barriers.[135] There is a rebuttable presumption that a firm possesses monopoly power when it has a share of the market greater than two thirds for a significant period and its market share is unlikely to be eroded in the near future.[136] For Intel, the FTC argues that Intel possessed monopoly power in the relevant CPU markets with a unit share in the relevant markets since 1999 in excess of seventy-five percent and a revenue share in excess of eighty percent in the same time period.[137] The FTC complaint also noted several barriers to entry into the market, making new entry unlikely.[138]

The second step in a Section 2 analysis is to show the willful acquisition or maintenance of that power.[139] Under the Bush Guidelines, a key issue to look at is the Guideline's position on single-product loyalty discounts. Single-product loyalty discounts include discounts or rebates a seller offers to a buyer(s) on units of a single product conditioned on the level of purchases.[140] This is akin to Intel, which offered rebates and discounts to several computer manufacturers depending on how many units of Intel x86 CPU's they bought. For single-product loyalty discounts, the Bush Guidelines favor the standard predatory-pricing approach.[141] In regards to this approach, the Bush Guidelines cite Professor Hovenkamp's "antitrust's ordinary predatory pricing rule" where the discount is "lawful if the price [on all units sold] after all discounts are taken into account exceeds the defendant's marginal cost or average variable cost."[142] The DOJ under the Bush Administration favored this approach because of its ease of administration and enforcement by courts, clarity for businesses, and low risk of chilling desirable and procompetitive price competition benefiting consumers.[143] The Bush Guidelines clearly

135. Bush Guidelines, *supra* note 17, at 21.
136. *Id.* at 30.
137. *Intel FTC Complaint*, *supra* note 8, at ¶ 2.
138. *Id.* at ¶ 3.
139. U.S. v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).
140. Bush Guidelines, *supra* note 17, at 106.
141. *Id.* at 116.
142. *Id.* at 111 (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 749b (2d ed. 2002)).
143. *Id.* at 116.

support that a standard predatory pricing test would work for most cases involving single-product loyalty discounts.[144]

Applying the Bush Guidelines predatory pricing approach, Intel could *not* have violated Section 2. The Hovenkamp method, described in the Bush Guidelines, compares the price of the post-discounted units to the marginal cost or average variable cost for determining whether there was below cost pricing.[145] On the other hand, the FTC complaint's claim that the volume discounts on CPU purchases are effectively below cost are based on a comparison with the sum of average variable cost and an appropriate level of contribution towards sunk costs.[146] The New York Attorney General's complaint does not mention specifically whether Intel's sales of x86 CPUs to the computer manufacturers was below cost. It only notes that Intel supported Dell in the latter's below cost bids to enterprise customers in competition with AMD based computers and servers.[147] Thus, the arguments made in the FTC and New York Attorney General Complaints may not be enough to support a finding of below cost pricing under the test articulated for analyzing whether a single-product loyalty discount is anticompetitive in the Bush Section 2 Guidelines.

CONCLUSION

The Department of Justice's withdrawal of the Bush Guidelines will mark a significant shift in the type of Section 2 cases brought by the DOJ and the FTC. Christine Varney's speech seems to signal a less sympathetic view of single–firm conduct than the prior administration. However, whether courts will follow her lead remains to be seen. Courts have looked to DOJ guidelines before to support their holdings even though they are not bound by them. Because of the withdrawal of the guidelines, courts can no longer cite the Bush Guidelines for support.

In formulating its new guidelines for antitrust enforcement, the DOJ should consider significantly the implications of *Lorain Journal Co. v. United States* and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* Together these two cases could serve to help the DOJ develop strong, clear, and consistent standards for Section 2 enforcement. This Comment

144. *Id.* However, even the Guidelines themselves note that some scholars believe this approach would fail to identify certain harmful foreclosures. For example, the discount might be structured to induce the customer to buy all or almost all of its needs from the monopolist. It could also be used to "deny a monopolist's rivals the scale necessary to enter or remain in a market." *Id.* at 114.

145. *Id.* at 111.

146. *Intel FTC Complaint*, *supra* note 8, at ¶ 53.

147. *Intel N.Y. Complaint*, *supra* note 8, at ¶ 74.

supports one such approach for the current Administration: First, a firm does not have an unqualified right to deal or not with other firms. For example, one cannot induce third parties to boycott a competitor. Second, in evaluating anticompetitive exclusionary conduct there are three important factors to look at the impact of the action on consumers, competition, and the presence of valid business justifications. While the *Trinko* and *linkLine* holdings limit the application of *Lorain* and *Aspen*, they can be distinguished from implying any broad repudiation of *Lorain* and *Aspen.* Furthermore, *Trinko* and *linkLine* continue to reflect the Supreme Court's concern over excessive antitrust enforcement, including Section 2. In conclusion, careful consideration of all four rulings for future antitrust enforcement should help produce greater competition and benefit for consumers in all industries. Furthermore, the long-standing principles from these cases may have a substantial antitrust role to play especially in evaluating and safeguarding against the dangers from single–firm conduct and abuse of dominance.