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VIA ELECTRONIC FILING, BY HAND & E-MAIL

The Honorable Vincent J. Poppiti
Blank Rome LLP
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**Re: *Advanced Micro Devices, Inc. v. Intel Corp.*, C.A. No. 05-441-JJF;
In re Intel Corp., C.A. No. 05-1717-JJF; and *Phil Paul v. Intel Corp.*,
C.A. No. 05-485 (JJF) (DM 4D)**

Dear Judge Poppiti:

In advance of the hearing scheduled for January 9, 2009 at 11:00 a.m. EST, Intel submits this letter, and the Third Declaration of John Ashley, in support of Intel's Rule 30(b)(6) deposition notice and the accompanying document requests.

I. Introduction. The issue presently before the Court is narrow and straightforward. The Federal Rules of Civil Procedure,¹ Judge Farnan² and Your Honor all agree that Intel is entitled to deposition discovery regarding AMD's document preservation plan and data productions. As Your Honor summarized on September 11, 2008:

[O]n Intel's part, there is a willingness to continue to develop as much information as you can informally, understanding that, at some point, you have the perfect right to secure representations under oath in a fashion that gives you the fulsome kind of 30(b)(6) information that I expect Judge Farnan

¹ FRCP (26)(b)(1) provides that parties may obtain discovery regarding "the *existence, description, nature, custody, condition, and location* of any documents." (emphasis added).

² Case Management Order 1 (dated 5/16/06) provides that "[p]rior to or shortly after the deadline for completing document production . . . Intel, AMD and class plaintiffs may depose the document custodian or custodians responsible for the productions to them to inquire into the completeness of document production (including electronic discovery)." Docket #123 at 3-4.

contemplated, that I expect the default rules of e-discovery and the District contemplate, and that I expect that AMD cannot oppose....

See Ex. C [9/11/08 Hearing Tr.] at 10:2-11.

Despite this clear guidance from Your Honor as to Intel's "perfect right," AMD has recently asserted – contrary to law and logic – that Intel is not entitled to *any* deposition testimony about AMD's document preservation and data productions. AMD staked out this position despite having itself already taken over 45 hours of deposition testimony from seven different witnesses, and having received over 750,000 pages of documents, related to Intel's document preservation practices. The time has come for AMD to put its own witnesses "in the 30(b)(6) chair" to provide answers under oath. Ex. C at 71:2-4. This discovery is routinely expected from litigants in cases involving electronic discovery issues, but it is particularly appropriate here, where AMD not only holds its "exemplary" document retention practices up as the standard by which Intel should be judged, but also where Intel continues to uncover additional deficiencies in AMD's productions.

Intel's deposition topics and document requests (attached as Exhibit A) call for information that is relevant to AMD's document preservation plan and data productions, and the subjects are described with reasonable particularity. Nothing more is required. The Court should allow Intel the full Rule 30(b)(6) depositions it was promised and to which it is entitled, and should not permit AMD to block, limit or micromanage Intel's basic discovery rights.

II. Background. During the informal disclosure period, Intel conducted two interviews of Tony Cardine, AMD's electronic discovery consultant, and one interview of Jerry Meeker, a member of AMD's IT department. Intel also received a small production of emails (approximately 1,500) from the electronic files of certain AMD IT employees. These informal disclosures, in combination with Intel's ongoing analysis of AMD's data productions, have resolved some issues.³ However, AMD refused informal disclosures about other topics, including, for example, non-designated AMD custodians, litigation hold notices, AMD's audit(s) of preservation activities and data productions, and certain harvest-related information.⁴ Finally, the informal disclosures revealed additional troubling facts about AMD's data preservation, harvest and productions that will need to be explored in the depositions. The accompanying Third Declaration of John Ashley outlines some of the new problems Intel has uncovered in recent months (at both the macro and custodian levels). Intel continues to believe that AMD has mischaracterized its practices to Intel and the Court – now in multiple ways – and has significantly exaggerated the quality of its self-proclaimed "exemplary" preservation plan. The 30(b)(6) depositions are essential to Intel's and the Court's understanding of AMD's practices.

Based largely on information learned during the interviews and from the AMD IT emails, Intel informally provided a revised Rule 30(b)(6) notice to AMD on December 16. See Ex. D. AMD responded to the notice by letter on December 19. See Ex. E. The parties met and conferred on December 22 but were unable to agree on the appropriate scope of the depositions. In its letter and during the parties' discussion, AMD asserted positions that made it clear the

³ For example, Intel does not intend to pursue deposition testimony on the "Lost Files" and "lost and found" issues referenced in the Court's Summary Chart.

⁴ AMD asked Intel to defer the issues of hold notices (Topics 10 and 12 on the Court's Summary Chart) and harvesting activities until formal depositions. Ex F at 1; Ex. G. at 5.

parties held radically different views about Intel's deposition rights. After the meet and confer, Intel made minor revisions to the notice, and filed and served it on December 30. *See* Ex. A.

III. Intel's Rule 30(b)(6) Deposition Notice. In prior filings, Intel set forth the legal standards for Rule 30(b)(6) depositions in the electronic discovery context.⁵ The relevant case law overwhelmingly permits the discovery Intel seeks, and Intel will not repeat it here. For the Court's reference, attached as Exhibit B is a chart summarizing Intel's deposition topics. Each topic is unquestionably relevant to AMD's data retention and productions, and each is described with reasonable particularity in the deposition notice (Ex. A). By its notice, Intel seeks to question AMD witnesses on 15 topics for a total of 25 hours. Given the magnitude of the case and AMD's production, as well as the issues uncovered during the informal disclosure period, the 30(b)(6) depositions are more than reasonable. Yet AMD somehow contends that Intel cannot ask a single question at any deposition.

As Your Honor contemplated, Intel should now be granted an opportunity to proceed with 30(b)(6) depositions to explore these 15 issues, and to confirm facts learned during the informal disclosure period, with witnesses under oath. *See* Ex. C at 20:24 (after receiving deposition time, Intel will need to "allocate its time appropriately" among various topics).

IV. Overview of Main Disputes. AMD appears to assert four overarching, but fundamentally flawed, arguments to avoid depositions.

First, AMD acknowledges that the vast majority of Intel's 15 deposition topics are proper subjects of inquiry – however, AMD seeks to block Intel from exploring them through deposition.⁶ Instead, AMD offers to prepare attorney-crafted narratives on some topics and, for others, demands that Intel provide a list of the facts it seeks to establish so that AMD can affirm them – "assuming that Intel does so accurately." *See* Ex. E. While AMD's counsel may prefer to closely control and filter the "under oath" information flowing to Intel, that is no reason to deprive Intel of basic deposition discovery. Unlike other discovery devices, depositions provide the examining party direct access to witnesses and the ability to cross examine with follow-up questions based on answers to prior questions.⁷ A protracted debate between the parties' lawyers about the nature and scope of AMD's admissions – most certainly involving a battery of letters and attorney-driven narratives – is not an efficient or fair substitute for the "fulsome" depositions Your Honor previously referenced. Ex. C at 10:2-11.

Second, AMD seeks to foreclose deposition testimony regarding topics that were already

⁵ *See* Docket # 762 (dated 7/2/08) at 5-8 and Docket #809 (dated 8/8/08) at 2-3.

⁶ These topics include numbers: 1 (vault); 2 (journal); 3(b) (dumpster); 5 (litigation hold notices); 6(a) and (d) (harvest); 7 (IT support of preservation); 8 (data processing); 9 (deduplication); 11 (suspension of document destruction policies); 12 (non-preservation); 13 (custodian-specific issues); and 14 (remedial/supplemental productions). *See* Ex. E.

⁷ *See Cavanaugh v. Wainstein*, No. 05-123, 2007 WL 1601723, *10 (D.D.C. June 4, 2007) (citation omitted) (written statement "not an adequate substitute for live testimony.... such an approach eschews the opportunity for opposing counsel to probe the veracity and contours of the statements" and party is denied "opportunity to ask probative follow-up questions").

the subject of informal disclosure by AMD.⁸ The informal disclosure period, however, was intended to *precede* – not replace – deposition testimony. Your Honor and Mr. Friedberg made this point repeatedly during the September 11 hearing. *See, e.g.*, Ex. C at 20:16-24 (after informal disclosures, Intel will be given an “appropriate amount of time” for depositions and “Intel will allocate its time appropriately”); *id.* at 22:15-23:24 (Intel is “permitted to take a 30(b)(6) deposition on the issues of preservation and location and archiving and any potential lapses”; after informal disclosures, Intel will decide what information to pursue during deposition and how to allocate its time based on its “self-interest in not wasting its time at the 30(b)(6) deposition”); *id.* at 25:23-26:9 (agreeing with Intel that “having [] information before informally is certainly better than not having it at all as you walk into the 30(b)(6) deposition room”). The purpose of the informal disclosure period was to provide Intel with the basic information necessary for an efficient and orderly deposition process. The informal discovery has served this purpose and depositions are now ripe.

Third, AMD contends that some topics – such as mailbox size quotas or backup tapes – are out of bounds because they were not identified as issues in the chart the Court provided to the parties in advance of the September 11 hearing (the “Summary Chart”).⁹ Although the Summary Chart helped focus the parties on certain technical issues during the informal disclosure period, it was created at an early stage of Intel’s investigation into AMD’s preservation practices. Given its timing, it was never intended to be, and could not be, a definitive recitation of these issues. The Summary Chart was based largely on the statements included in the first Declaration of John Ashley, submitted by Intel on *July 2, 2008*. Docket #763. In that declaration, Mr. Ashley stated his opinions were “preliminary” and noted that “a fair and complete investigation cannot be conducted without receipt of primary documents and sworn testimony from witnesses competent to address the inquiries in Intel’s formal discovery requests.” ¶10. Intel’s counsel reiterated this point during the September 11 hearing by comparing Intel’s investigation to “peeling an onion” and rejecting any suggestion that Intel had “definitively identified” every issue with AMD’s document preservation. Ex. C at 15:7-21. At the time, with AMD selectively trickling out information and blocking discovery, Intel was “somewhere in the middle” of its investigation, having perhaps only “uncovered 20 percent or 80 percent of the lapses, we just don’t know.” *Id.*

The very nature and purpose of discovery is to *discover* new information. Here, Intel has received new information over the past six months which has narrowed some issues (such as the “lost files” and “lost and found” issues), but has expanded others. *See* Third Declaration of John

⁸ These topics include numbers: 1 (vault); 2 (journal); 3 (email systems); 6 (harvest); 7 (IT support of preservation); 8 (processing); 9 (deduplication); and 10 (backup tapes). Ex. E.

⁹ The majority of Intel’s noticed deposition topics are expressly referenced, or incorporated by reference, in the Summary Chart. To the extent any topics are not expressly identified as “issues” on the Summary Chart, they nonetheless clearly fall under the umbrella of “foundational discovery” – *i.e.*, information that provides Intel a “basic foundational understanding” of AMD’s systems and preservation practices. Ex. C. at 24:22-25:11. Intel stated its need for such information during the 9/11/08 hearing and it was therefore incorporated into the 9/18/08 Stipulation and Order Regarding Intel Discovery Intel AMD Evidence Preservation (Docket # 893) which governed the scope of the informal disclosure period.

Ashley. There is no basis in law or fact to distinguish between relevant issues identified by Intel six months ago (without the benefit of informal disclosures) from those issues developed by Intel during the informal disclosure period. Fed. R. Civ. P. 26(b)(1); *Franklin v. GE Capital Co.*, No. 02-3359, 2004 WL 2567441, *2 (E.D. Pa. Nov. 9, 2004) (the Federal Rules provide for “liberal discovery”; plaintiff failed to meet “heavy burden of establishing that compliance with [discovery request] would be ‘unreasonable and oppressive’”; denying protective order). Nor is there any practical way to allow AMD to carve up Intel’s notice prior to the depositions by declaring relevant topics off limits. As Mr. Friedberg aptly noted on September 11, “it’s very hard to parse it up issue by issue and have an instruction that they shall not be permitted to ask about a particular technical set of circumstances at the deposition.” Ex. C. at 23:2-6; *see also Cabot Corp. v. Yamulla Enterprises, Inc.*, 194 F.R.D. 499, 500 (M.D. Pa. 2000) (requirement that party noticing deposition must “describe with reasonable particularity the matters on which the examination is requested” does not limit scope of the deposition to the contents of the notice; “since the deposition is permitted, it will proceed with its scope limited only by Rule 26(b)(1)”).

Fourth, AMD argues that some topics may inevitably lead to questions that intrude upon the attorney-client or work product privileges.¹⁰ For some topics, and for certain questions, that may be so. But Intel is entitled to discovery of non-privileged information related to these topics. The appropriate way for AMD to handle questions that may call for privileged information is to assert an objection during the deposition, not to preclude a deposition altogether. Intel does not doubt that AMD’s counsel will object when necessary to preserve privilege. In addition, Intel is entitled to identify the contours of the privilege umbrella AMD is asserting, which is a necessary prerequisite to any further motion to compel information that AMD improperly claims is privileged.

V. Length and Timing of Depositions. Intel requests 25 hours to conduct its depositions, with depositions to be scheduled between January 29 and February 4. The below chart sets forth Intel’s best estimates of how the deposition topics could be divided among potential witnesses, and includes Intel’s estimated time limitations.¹¹ Intel recognizes that Rule 30 allows AMD to designate the one or more persons that it deems appropriate for the topics. Intel expects, however, that more than one witness will be required. Your Honor acknowledged this point during the September 11 hearing. Ex. C at 71:2-4 (“I understand when I say a ‘30(b)(6),’ I expect you are going to have more than one individual in the 30(b)(6) chair.”).

¹⁰ These topics include numbers: 4 (reasonable anticipation of litigation); 5(b) (meaning of litigation hold notices); and 16 (audits and investigations). Ex. E.

¹¹ Some of the topics are listed for multiple witnesses because more than one individual (or entity) carried out activities related to that topic. In addition, the actual breakdown of topics and hours depends on the identity of the individuals AMD designates, and also on the responses given during the depositions. Intel therefore reserves the right to revise the breakdown of topics and time among the witnesses, and intends to ask foundational questions during the depositions to confirm the appropriate scope of inquiry.

PROPOSED WITNESS	DEPOSITION TOPIC #	HOURS
Jerry Meeker, AMD IT Employee, Sr. Mgr. for Special Projects	1 - Vault 2 - Journal 3 - Configuration of Email Systems 6 - Data Harvests 7 - IT Support of Custodian Preservation 9(c) - Deduplication 10 - Backup Tapes 11 - Suspension of retention/destruction policy 12 - Non-preservation 13 - Custodian-specific issues 14 - Remedial/Supplemental Productions 15 - Audits	Seven (7)
Manoj Uppal, AMD IT Employee, Internal Exchange expert and head of email support team	1 - Vault 3 - Configuration of Email Systems 6 - Data Harvests 9(c) - Deduplication 12 - Non-preservation	Three (3)
Norman Fontenou, AMD IT Security Employee	6 - Data Harvests 12 - Non-preservation 13 - Custodian-specific issues	Two (2)
Tony Cardine, FCS Project Manager	6 - Data Harvests 8 - Data Processing 9 - Deduplication 12 - Non-preservation 13 - Custodian-specific issues 14 - Remedial/Supplemental Productions 15 - Audits	Seven (7)
TBD	European and Asia Practices/Issues	Two (2)
TBD	4 - Reasonable Anticipation of Litigation 5 - Litigation Hold Notice 12 - Non-preservation 13 - Custodian-specific issues 14 - Remedial/Supplemental Productions 15 - Audits	Four (4)
		25

VI. Intel's Accompanying Document Requests. Consistent with Rules 30(b) and 34, Intel served eight document requests along with its deposition notice. *See* Ex. A at 9-10. For the Court's reference, as with the deposition topics, Exhibit B also includes a summary chart explaining the relevance, source of, and minimal burden imposed by, these requests. *See* Ex. B

The Honorable Vincent J. Poppiti

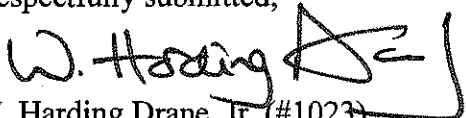
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at 5-7. The requested documents are directly relevant to the issues Intel intends to explore during deposition. To be clear, none of the requests seeks additional email productions from AMD custodians (although Intel questions the sufficiency of AMD's paltry production to date). Instead, the requests are narrowly tailored and simply require: (1) certain summary charts and lists from AMD, such as harvest dates; (2) technical logs automatically created and stored during certain processes; and (3) a few overview documents regarding AMD's vault and journaling systems. The Court should order AMD to comply with these requests.

We look forward to discussing these issues on January 9.

Respectfully submitted,


W. Harding Drane, Jr. (#1023)

WHD:cet

cc: Clerk of the Court (via CM/ECF and Hand Delivery)
Counsel of Record (via CM/ECF and Electronic Mail)

897243/29282

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

CERTIFICATE OF SERVICE

I, W. Harding Drane, Jr., hereby certify that on January 5, 2009, the attached document was hand delivered to the following persons and was electronically filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following and the document is available for viewing and downloading from CM/ECF:

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Dated: January 5, 2009