

Chad M. Shandler
Director
302-651-7836
Shandler@rlf.com

January 15, 2009

**BY HAND DELIVERY AND
ELECTRONIC FILING**

REDACTED - PUBLIC VERSION

The Honorable Vincent J. Poppiti
Blank Rome LLP
Chase Manhattan Centre, Suite 800
Wilmington, DE 19801-4226

Re: *In re Intel Microprocessor Antitrust Litigation,*
C.A. Nos. 05-md-1717, 05-441, 05-485 DM

Dear Judge Poppiti:

Advanced Micro Devices, Inc. (“AMD”) and the Class write to Your Honor to compel Toshiba Corporation (“Toshiba”) to produce documents pursuant to its obligations under a Voluntary Document Production Agreement (the “Production Agreement”) (Exhibit A) entered into by and among Toshiba, AMD, Intel and the Class (collectively, the “Parties”). The Parties have attempted to resolve this dispute without success.

A. Introduction

Toshiba’s document production remains incomplete and inadequate in two key respects.

First, in an effort to reduce Toshiba’s burden, the Parties agreed that Toshiba would initially be required to produce documents from only three custodians. At the time the Parties executed the Production Agreement, they recognized that the two most senior Toshiba executives responsible for negotiating and entering into agreements with Intel,

were critical Toshiba witnesses that were intimately involved in the negotiations and discussions with Intel during the relevant periods. Thus, the Parties included a provision in the Production Agreement that obligates Toshiba to produce documents from the files of provided that AMD can show that the documents from the three custodians, all of whom are subordinates to are not sufficient. AMD made such a showing to Toshiba, in a letter dated December 11, 2008, but Toshiba refuses to produce the custodial documents of That Toshiba continues to deny AMD and the Class access to documents from the files of Toshiba’s two most important witnesses is inconsistent with the Production Agreement and makes it difficult for AMD and the Court to reach a complete understanding of the terms of the deals and

■ ■ ■

One Rodney Square ■ 920 North King Street ■ Wilmington, DE 19801 ■ Phone: 302-651-7700 ■ Fax: 302-651-7701

underlying negotiations between Toshiba and Intel that has resulted in

Second, the Production Agreement requires Toshiba -- at least on an initial basis -- to produce responsive documents dated between January 1, 2001 and December 31, 2004. *See* Exhibit A. To allow the Parties access to additional documents under the appropriate circumstances, the Parties negotiated a provision that requires Toshiba to produce documents from January 1, 2000 through December 31, 2000, and from January 1, 2005 through October 31, 2006. This supplemental production is limited to two "events" described by AMD and the Class. In a November 14, 2008 letter to Toshiba, AMD and the Class timely identified these two "events," one of which concerns Toshiba's decision to

See Exhibit B. Despite the obvious importance of such documents, Toshiba has refused to supplement its production. The result is that AMD and the Class have been deprived of crucial evidence.

B. Factual Background

On June 27, 2005, AMD sent a document preservation notice to Toshiba requesting that Toshiba preserve documents relevant to the allegations in this case. Soon thereafter, Toshiba represented that it would preserve the documents identified by AMD in its preservation notice. AMD followed up on its preservation request with a production subpoena, which it served on Toshiba on or about October 5, 2005.

Negotiations over the scope of Toshiba's document production consumed the next two and a half years. Although the Parties reached an interim agreement in June 2006 concerning the production of Toshiba documents seized by Japanese authorities during the JFTC raids, they were not able to reach an agreement on the remainder of documents required to be produced under the subpoena until August 14, 2008, when they executed the Production Agreement. Under the Production Agreement, Toshiba is obligated in the first instance to produce documents dated between January 1, 2001 and December 31, 2004 from the three custodians identified in Paragraph 1. The Production Agreement, however, contains two important provisions that require Toshiba to produce additional documents under certain circumstances.

First, the Parties agreed that if they were not satisfied with the document production from the three subordinate custodians, they would take the following actions:

- a. The parties shall explain to Toshiba why they are not satisfied with such production and may request that Toshiba search for readily accessible responsive documents responsive to Requests 1-15 from the hard copy and electronic files of

b. Upon a reasonable showing by the parties that the documents produced by Toshiba from the files of the individuals identified in paragraph 1(a) through 1(c) above are insufficient to satisfy the parties' document requests, Toshiba agrees that it shall undertake a good faith effort to search for and produce to the parties from the existing files of all readily accessible non-privileged, non-duplicative documents responsive to Requests 1-15, to the extent such documents exist.

Second, the Parties agreed that in addition to the initial production of documents described in the Production Agreement, AMD and the Class could "request that Toshiba produce additional documents dated between January 1, 2000 and January 1, 2001, and/or between January 1, 2005 and October 31, 2006. Such a request for additional documents shall be made on or before November 1, 2008,² and shall be limited to documents involving a collective total of no more than three specific events (each party would be permitted to select one specific event)."

C. Toshiba Refuses to Supplement Its Document Production

1. Toshiba Should Be Compelled To Search For And Produce Documents From The Hard And Electronic Files Of

As explained above, the Parties understood that AMD, Intel or the Class might later seek the production of documents from [redacted]. The Parties, in fact, instituted a low threshold for AMD, Intel and the Class to satisfy in requesting that Toshiba produce such documents -- the requesting party must only make a reasonable showing that the production to date is insufficient. AMD and the Class have unquestionably made such a showing, and have apprised Toshiba of the bases therefor. *See* Exhibit D.³

As Your Honor has been made aware through numerous filings and conferences, perhaps the best evidence of Intel's exclusionary conduct exists among Intel senior executives and their counterparts working for Intel's customers. As a result, the communications and documents that tell the entire story of the relationships between Intel and its customers are often possessed by high ranking officers. Toshiba is no exception. [redacted] were personally involved in negotiations between Toshiba and Intel, and did not often delegate such responsibilities to subordinates. Not surprisingly, a review of the documents produced by Intel reflect that [redacted] were directly involved in nearly every key meeting, decision and negotiation relating to Toshiba's purchase of products from Intel, and the terms and conditions of such purchases. For these reasons alone, [redacted] are likely to possess documents that other custodians simply do not have.

² As noted in Toshiba's December 1, 2008 letter attached hereto as Exhibit C, the November 1, 2008 deadline was extended by agreement of the Parties to November 15, 2008.

³ A copy of Toshiba's December 18, 2008 responsive letter is attached as Exhibit E hereto.

were not just passive observers; documents are consistent and clear on the point that were active participants in these negotiations with significant, if not final authority over Toshiba's CPU purchasing decisions. Indeed, it was not unusual for to have private discussions with Intel's most senior executives, including pervasive, personal participation is evidenced by the sampling of documents attached hereto as Exhibit F.⁴

Notwithstanding extensive involvement with Intel (and to a far lesser extent, AMD), the documents produced from the files of the three custodians identified in the Production Agreement contain remarkably few documents authored or received by , particularly with respect to the meetings and negotiations in which they participated. Since these three custodians were not the primary participants in the meetings and did not make final decisions for Toshiba, it is not surprising that the subordinates of do not possess such documents. The far more likely source for such documents, of course, would be

Simply put, the documents produced from the files of the three subordinate custodians identified in the Production Agreement are insufficient to satisfy Toshiba's production obligations. The only fair solution at this point is for the Court to order the immediate production of documents from the files of

2. Toshiba Should Be Compelled To Produce Documents Relating To The Events Identified By AMD And The Class

On November 14, 2008, AMD and the Class wrote to Toshiba and exercised their right under the Production Agreement to have Toshiba produce supplemental documents relating to two specific events -- one identified by AMD and the other by the Class -- as follows:

Event No. 1:

Event No. 2:

Under the Production Agreement, "[t]o the extent that Toshiba is in possession of readily accessible, non-privileged, non-duplicative documents responsive to such additional document

⁴ The documents attached hereto as Exhibit F constitute a non-exhaustive sampling of documents that demonstrate this point. A chart identifying the date, type of document, Bates number and key quotations has been included with the documents.

requests, Toshiba shall produce such documents to the parties upon a reasonable showing by the requesting party that the documents are relevant to the litigation, are not available from a party to the litigation, and have not been previously produced by any of the parties or by another non-party." In its December 1, 2008 letter, Toshiba represented that it had searched for documents responsive to Event No. 1 for the time period January 1, 2000 through December 31, 2000 and was not able to locate any additional documents. *See* Exhibit C. While we believe additional documents exist, AMD and the Class have no choice but to accept this representation. Toshiba was not as forthcoming with respect to Event No. 2. Instead, Toshiba has objected to producing documents because AMD has not demonstrated that such documents are not available from Intel, and offered to produce documents related to a "specific event" such as a meeting. Toshiba's position misses the mark in several respects.

First, the description of Event No. 2 is sufficiently narrow in scope and is, without question, relevant to the issues in dispute in the litigation. Had the Parties intended to limit the supplemental production to a "meeting" or "telephone conversation," they certainly knew how to draft such a provision. But, the Parties chose to utilize the word "event" which, under any common parlance, would include Toshiba's decision more fully described above as Event No. 2. Indeed, Toshiba's position on the event not being specific enough is belied by its admitted search for documents in response to Event No. 1 which is by definition no broader in scope. Second, internal Toshiba communications relating to these events would not be available from any alternative source. Thus, Toshiba's argument as to internal Toshiba documents is without merit. Finally, without knowing what documents Toshiba possesses, it is not possible to state whether Intel has produced similar or identical documents. Since the internal Toshiba documents are not available from Intel, any increased burden on Toshiba to search for non-internal communications from the same custodians for the limited time period described in the Production Agreement for supplemental productions would be quite minimal, particularly when measured against the potential import of documents pertaining to

D. Conclusion

Given the fast-approaching fact discovery cut-off, AMD and the Class respectfully request that Your Honor enter an order requiring Toshiba to produce the documents described herein on or before January 27, 2009.

Respectfully,

/s/ Chad M. Shandler

Chad M. Shandler (#3796)

CMS/III

cc: Clerk of the Court (Via Electronic Filing)
James L. Holzman, Esq. (Via Electronic Filing)
Richard L. Horwitz, Esq. (Via Electronic Filing)
John D. Donaldson, Esq. (Via Electronic Mail)