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**BY HAND DELIVERY AND
ELECTRONIC FILING**

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

REDACTED - PUBLIC VERSION

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

Dear Judge Poppiti:

I. Introduction.

Over three years ago, AMD served a document subpoena on nonparty witnesses Fujitsu Limited, Fujitsu Computer Systems Corporation, and Fujitsu America, Inc. (collectively "Fujitsu"). Thereafter, AMD negotiated extensively and in great detail with counsel for Fujitsu and Intel over the identity of the custodians whose electronic documents would be searched, the date ranges of the documents subject to search, and the search terms to be used. In the course of those negotiations, AMD again and again made concessions and narrowed the scope of what it was seeking in order to reduce the burden on Fujitsu of complying. The outcome of those negotiations, which took over two years to complete, was a detailed production agreement and a set of 53 detailed search terms that the parties agreed would be used. (*See Exhibit A.*)

Having made substantial accommodations for Fujitsu's benefit and having worked out the search terms in painstaking detail, AMD reasonably believed that the documents located when the searches were run would be relevant and would be produced. However, Fujitsu refused to produce over 80% of the documents hit by the searches. As its counsel has repeatedly represented, Fujitsu did not withhold documents on the basis of its written objections to AMD's subpoena. Instead, Fujitsu attempts to justify its refusal to produce documents by claiming that its attorneys conducted a responsiveness review of the documents hit – using criteria that they have refused to disclose – and that the vast majority of the documents covered by the search terms were not responsive.

AMD has tried without success to learn from Fujitsu how it decided to eliminate from production such a huge proportion of the documents found by the searches. Fujitsu's counsel's

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continuing refusal to provide these details necessitates this letter brief. Since Fujitsu is not relying on its written objections, the relevance of the documents is not in question. For the reasons stated below, AMD requests that Fujitsu be ordered to provide a disk of the withheld documents, from which the Special Master can choose, at random, documents to review *in camera*. AMD will provide a translator for the Special Master's use. The Special Master should also order Fujitsu to provide a full written explanation of the criteria it used in deciding to withhold documents. If the Special Master agrees with AMD that the documents are responsive, Fujitsu should be ordered to produce the withheld documents immediately.

II. Factual Background.

AMD served a subpoena on Fujitsu on July 11, 2005, and Fujitsu served objections on August 22, 2005. Counsel for AMD, Fujitsu, and Intel then embarked on a lengthy period of extremely detailed negotiations over the scope of what Fujitsu would produce under the subpoena, including the search terms to be used, the dates applicable to the searches, and the list of the Fujitsu custodians whose files would be searched. In the course of e-mail messages and telephone conversations over a period of two and a half years, AMD made numerous concessions to reduce the burden on Fujitsu of producing documents. For example:

- On September 16, 2006, AMD revised its requests for documents from Fujitsu in light of its review of the Fujitsu documents used by the Japanese Federal Trade Commission in its investigation of Intel's anticompetitive practices (which Fujitsu had produced to AMD earlier in 2006). AMD reiterated those revisions in a message on December 22, 2006.
- On February 6, 2007, AMD's counsel informed Fujitsu's counsel that AMD had attempted to "pare back and clarify" its proposal for the scope of documents Fujitsu would produce.
- On April 1, 2007, after receiving input from Intel on changes to the search terms under consideration, AMD sent Fujitsu a list of search terms that had been revised in an effort to make them "clearer and more targeted."
- In May and again in June, 2007, after Fujitsu had asked that three of the Fujitsu custodians be "swapped out," AMD agreed to a revised list of six custodians.
- In July 2007, AMD sent the draft of a production agreement embodying the verbal agreements reached with Fujitsu and Intel over the scope of Fujitsu's production, and on July 27, 2007, sent the "final clean copy" of the 53 detailed search terms agreed to (attached hereto as Exhibit B.) The production agreement went through further revisions at Fujitsu's request. In November, 2007, Fujitsu's counsel finally signed the agreement, which had an effective date of October 8, 2007.

Since the negotiations culminating in the production agreement had both clearly defined and considerably narrowed the scope of Fujitsu's search obligations, there was no impediment to Fujitsu's promptly performing the specified searches and promptly producing the documents that the searches yielded. Nevertheless, Fujitsu's counsel delayed and missed deadlines for making

the production, so that another 11 months passed before Fujitsu produced any documents to AMD.¹ And when it did finally produce documents, Fujitsu provided only a small proportion of those located by the searches and refused to produce the rest.

The searches that Fujitsu ran using the search terms that the parties had carefully worked out yielded approximately 3,000 documents – a very modest number in the context of this document-intensive case.² Given the detailed nature and number of the search terms, all of those documents are presumptively relevant and responsive, and they should have been produced. However, after the searches had been run, Fujitsu’s counsel purported to engage in an additional review for responsiveness, contending that Fujitsu was entitled to do so under the production agreement. Fujitsu’s counsel, while refusing to disclose the criteria used in this extra review, claimed – implausibly – that over 80% of the documents were not responsive. As a result, Fujitsu ultimately produced only 581 documents out of the approximately 3000 that had been located.³ Under the production agreement, AMD and Intel were responsible for paying the costs of searching for and producing the documents. The cost to AMD of obtaining this paltry production was over \$40,000.00.

III. The Special Master Should Direct Fujitsu To Make Available, For *In Camera* Review, (1) A Disk Containing The Withheld Documents And (2) A Complete Written Explanation Of The Criteria It Used To Determine That Documents Were Not Responsive.

AMD’s position on Fujitsu’s refusal to produce most of the documents it located is simple: given the detailed, comprehensive search terms that the parties worked out, it is not credible that over 80 % of the documents hit by the searches would somehow not be responsive. It would be one thing for Fujitsu to weed out a small number of documents that contain a search term but in fact have nothing to do with the subject matter of this case. It is quite another for Fujitsu to rely on the production agreement as grounds for withholding the vast majority of the documents that the searches yielded. No reasonable construction of the production agreement’s provision giving Fujitsu the right to review document hits for responsiveness supports the massive scale of Fujitsu’s refusal to produce documents.

Under the production agreement, AMD is entitled to a supplemental production of documents from Fujitsu. The parties have recently agreed to the search terms to be used and have agreed to a deadline of February 15, 2009 for Fujitsu to complete this supplemental production. AMD needs all responsive Fujitsu documents in order to prepare for upcoming depositions and for trial. Given the fast-approaching discovery cutoff of April 30, 2009, AMD

¹ For example, the production agreement called for Fujitsu “to use reasonable efforts to begin production of documents within sixty (60) days of the parties’ execution of [the] agreement.” Adherence to this deadline would have resulted in Fujitsu’s beginning to produce documents in early January 2008. However, Fujitsu did not produce any documents until October.

² The estimate of the number of documents yielded by the searches is that of Fujitsu’s counsel.

³ Fujitsu’s counsel has made it clear that Fujitsu withheld documents on the ground that they allegedly were not responsive, not on the basis of any of Fujitsu’s August 2005 objections to the subpoena.

The Honorable Vincent J. Poppiti
January 16, 2009
Page 4

will be severely prejudiced if Fujitsu repeats its behavior and again withholds vast numbers of documents on the ground that they are nonresponsive. Accordingly, AMD respectfully requests an expedited hearing on this matter.

In short, having refused through its counsel to divulge to AMD the criteria it used, Fujitsu should be required to explain to the Special Master in writing why it limited its production to such a drastic extent.⁴ AMD believes that the Special Master will agree with AMD that the documents are responsive and should be produced.

Respectfully,

/s/ Chad M. Shandler

Chad M. Shandler (#3796)

CMS/III

cc: Clerk of the Court (Via Electronic Filing)
James L. Holzman, Esquire (Via Electronic Filing)
Richard L. Horwitz, Esquire (Via Electronic Filing)
Jill D. Neiman, Esquire (Via Electronic Mail)

⁴ AMD will arrange for translations of the documents that Fujitsu provides for *in camera* inspection.

EXHIBIT A

REDACTED IN ITS ENTIRETY

EXHIBIT B

REDACTED IN ITS ENTIRETY