

January 23, 2009

Via Hand Delivery & Electronic Filing
The Honorable Vincent J. Poppiti
Blank Rome LLP
1201 Market Street – Suite 800
Wilmington, DE 19801

Redacted – Public Version

Re: In re Intel Microprocessor Antitrust Litig., CA Nos. 05-MD-1717, 05-441, 05-485 (DM 24)

Dear Judge Poppiti:

Toshiba Corporation (“Toshiba”), a non-party based in Tokyo, has worked closely with the parties to provide them with voluminous relevant documents and materials – even though it was never properly served with a document subpoena and is not subject to the jurisdiction of this Court.¹ AMD now seeks to compel Toshiba to undertake burdensome additional searches that will not yield relevant information, but that will disrupt Toshiba’s business operations at an economic time when Toshiba cannot afford to do so. As discussed below, AMD’s request is unreasonable and should be denied. *Cf. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 218 F.R.D. 423, 424 (D. Del. 2003) (“It is incumbent upon counsel in the first instance to order discovery demands, particularly against non-parties, in such a way that the burdens of giving evidence are reasonable, under all of the circumstances presented.”).

During the protracted course of this litigation, Toshiba has cooperated with AMD, Intel, and Class Plaintiffs, although Toshiba does not conduct business in the United States. Toshiba has searched its files, searched custodian files identified by AMD, searched additional custodians Toshiba thought would likely have pertinent information, and worked cooperatively with the parties on an orderly production. Toshiba identified and produced 160,000 pages of relevant documents, including files Toshiba produced to the Japan Fair Trade Commission (“JFTC”) as part of the JFTC’s investigation of Intel’s competitive behavior.

AMD now seeks to require Toshiba to conduct duplicative searches because AMD has failed to unearth the smoking gun it desperately seeks from Toshiba and the dozens of other customers it has attempted to subpoena. AMD fails to admit it has never properly served Toshiba with a subpoena. AMD fails to note that jurisdiction does not exist over Toshiba in this litigation. AMD also fails to note key facts. AMD fails to note it is a very substantial supplier to Toshiba.² AMD also fails to note that if AMD’s allegations are proven true, then Toshiba is a victim and, thus, far from being uncooperative, Toshiba has had every incentive to produce all

¹ Toshiba submits this letter as a special appearance (without waiving its jurisdictional objections and other opposition) to oppose AMD’s January 15, 2009 letter (“AMD letter”).

² The amount of business is highly sensitive, but Toshiba is prepared to disclose it *in camera*.

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information in its possession. Instead, AMD's lawyers have persisted in telling Toshiba that they know Toshiba's business better than Toshiba and seek to impose still more costs upon Toshiba by forcing them to engage in duplicative, unduly burdensome searches.

This Court should reject AMD's demand for three primary reasons. First, Toshiba has never been properly served with a Rule 45 subpoena. Second, Toshiba is not subject to the jurisdiction of this Court. Third, Toshiba has produced all relevant documents it likely possesses and the additional searches sought by AMD are unlikely to lead to additional relevant information but would impose undue burdens on Toshiba.

Some background is necessary to provide context for the instant matter. In October 2005, AMD purported to serve a document subpoena ("subpoena") on Toshiba "c/o" Toshiba America, Inc. ("TAI") and Toshiba America Information Systems, Inc. ("TAIS"), two independent U.S. subsidiary corporations based in New York and California.³ The process server purporting to serve TAI was informed by TAI it was not authorized to accept service on behalf of Toshiba and left with the subpoena. See Exhibit 1 at 2. The process server purporting to serve TAIS was similarly informed by TAIS it was not authorized to accept service on behalf of Toshiba: the process server simply left the subpoena in the lobby of the building, and TAIS's counsel returned it to AMD's counsel. *Id.*; Exhibit 2. Toshiba was never served as required under Rule 45.

In October 2005, Toshiba's counsel served timely written objections to the subpoena, including (in addition to failure of service) lack of jurisdiction over Toshiba, territorial objections for discovery of foreign materials, failure to comply with international treaties and discovery rules, and violations of foreign laws, among other opposition. Exhibit 1 at 1-4. Toshiba has ample support for each ground of opposition, and has reserved all of its rights to enforce those grounds.⁴ Cf. *O.S.C. Corp. v. Toshiba America, Inc.*, 491 F.2d 1064 (9th Cir. 1974) (no jurisdiction over Toshiba where U.S. subsidiary purchases products in Asia and sells them in forum); *Allen v. Toshiba Corp.*, 599 F. Supp. 381 (D.N.M. 1984) (same).

In November 2005, AMD inquired whether Toshiba might be willing, without waiving any of its grounds of opposition, to consider voluntarily producing certain Toshiba documents provided to the JFTC. See Exhibit 3 at 1. AMD said that JFTC documents were of paramount importance to it because OEM documents provided to the JFTC allegedly supported the JFTC's ruling against Intel, which supposedly involved issues similar to those alleged by AMD. Notwithstanding Toshiba's very strong belief that jurisdiction does not exist over it in this litigation and that AMD cannot compel Toshiba to produce documents, *see id.*, Toshiba, in good faith, was willing to discuss such a voluntary production given the claimed importance of the documents to AMD. In April 2006, a voluntary production agreement was reached for Toshiba's

³ Class Plaintiffs never served, and never purported to serve, a document subpoena on Toshiba.

⁴ Toshiba has unambiguously reserved and not waived any of its grounds of opposition. For example, regarding lack of jurisdiction, *see* Exhibit 1 at 1-3; Exhibit 2; Exhibit 3 at 1; Exhibit 4 at 1; D.I. 318; D.I. 348; Exhibit 7 at 1; Exhibit 11 at 1; Exhibit 12 at 1. Toshiba is prepared to provide Your Honor with further briefing and support for Toshiba's opposition, if such additional information would be helpful in resolving this dispute.

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JFTC documents (Exhibit 4).⁵ That agreement likewise reserves all of Toshiba's opposition. *Id.* at 1. The next month, Toshiba voluntarily produced its JFTC documents.

In September 2006, AMD sent revised document requests, purporting to narrow the scope of the subpoena. *See* Exhibit 5 at 1.⁶ AMD limited the time period for its revised requests to documents from 2001 to March 16, 2007. Exhibit 6 at 2.⁷ Thereafter, the parties entered into a Voluntary Production Agreement (Exhibit 7) to resolve their outstanding discovery issues without waiving Toshiba's opposition. Key terms relevant hereto are described below.

Voluntary Production – No Waiver of Toshiba's Opposition. The core purpose of the agreement is to resolve the discovery issues between the parties and Toshiba via a voluntary document production by Toshiba without waiving Toshiba's opposition. The agreement recognizes that "Toshiba has objected to the [document subpoenas] and maintains that (i) jurisdiction does not exist over it in this litigation; (ii) Toshiba has never been properly served with the subpoenas; and (iii) Toshiba is under no obligation to produce any documents or other information in this litigation." *Id.* at 1. It also expressly provides that Toshiba is not waiving its opposition: "Now therefore, without waiving its objections (including lack of jurisdiction over Toshiba)..." *Id.* The agreement thus preserves Toshiba's grounds of opposition in the event that a party (such as AMD here) seeks to compel documents from Toshiba.

Document Custodians. Paragraph 1 incorporates the wide scope of documents sought by AMD in Requests 1-15 from Attachment A to Exhibit 5. In exchange for this wide scope of documents, AMD agreed to limit paragraph 1 to three relevant custodians that were mostly likely to have responsive documents. Toshiba, in further evidence of its good faith, identified a relevant custodian that AMD had never mentioned as a possible custodian. *See* paragraph 1. In light of the wide scope and large volume of documents covered by paragraph 1, paragraphs 2 and 4 provide for the possibility of only limited additional documents under narrow conditions.

Time Periods for Documents. Paragraph 2 provides that the wide scope of documents sought from the relevant custodians mostly likely to have responsive documents identified in paragraph 1 applies to documents dated from January 1, 2001 through December 31, 2004, the key time period identified by the parties. Toshiba has provided documents for this period. As a limited exception to this time period, paragraph 2 provides that a party may request that Toshiba produce additional documents dated between January 1, 2000 and January 1, 2001, or between January 1, 2005 and October 31, 2006, concerning "one specific event," provided that the requesting party make a certain showing (discussed below).

AMD purported to describe two "specific events" (*see* Exhibit 8; Exhibit 9 at 3) to which Toshiba responded (*see* Exhibit 10; Exhibit 11 at 2-3). Presently, AMD seeks production

⁵ AMD's letter (at 2) states this agreement "concerned the production of Toshiba documents seized by Japanese authorities...." This is incorrect. Japanese authorities did not seize Toshiba documents. Toshiba voluntarily produced documents to the JFTC particularly requested by it.

⁶ AMD asked Toshiba to waive service of the revised document requests. Toshiba declined.

⁷ Your Honor may note certain (incorrect) statements, presumably innocently made, in this letter about Toshiba waiving its jurisdictional and service defenses. *Id.* at 1. Toshiba made no such representations, and immediately corrected AMD's counsel. *See, e.g.,* Exhibit 12 at 1.

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regarding one purported "event":

which AMD asserts requires the production of all documents from the paragraph 1 custodians "including but not limited to all documents that are described in Attachment A to the Production Agreement." Exhibit 8 at 1.

AMD's request is clearly objectionable and critically flawed for several reasons. First, initially, its description of purported specific event # 2 is lacking in foundation, argumentative, vague and overbroad. See Exhibit 10 at 1-2. Second, moreover, the request is patently duplicative. AMD is not certain whether the purported "decision" was entered into in late 2003 or 2004. AMD letter at 2 n.1 ("This agreement may have been executed in late 2003, however, we cannot be certain..."). However, Toshiba has already produced paragraph 1 documents for *all of 2003 and 2004*. Third, AMD's request would grossly and impermissibly expand the paragraph 2 time period by almost two additional years for documents covered under the wide scope of paragraph 1 (*i.e.*, those described in Attachment A to the Voluntary Production Agreement). This broad request clearly conflicts with paragraph 2's "one specific event" standard. AMD states that the term "event" should be understood in its "common parlance." AMD letter at 5. In common parlance, an "event" is "Something that takes place; an occurrence." *American Heritage Dictionary of the English Language* (4th ed. 2000). Moreover, AMD ignores that the Voluntary Production Agreement explicitly uses the term "specific event," rather than an unspecified "event," let alone AMD's tortured broad asserted meaning. Paragraph 2 is plain on its face: it applies a "specific event" or – in common parlance – a "specific occurrence" standard. Fourth, AMD has failed to carry its burden of making a "reasonable showing...that the documents...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." For example, AMD has made no showing that requested documents (such as Intel-Toshiba communications) are not available from Intel. AMD has not shown that it has even requested such documents from Intel, let alone that Intel has advised that such documents cannot be made available. Moreover, AMD has made no showing that such documents have not already been produced. Notwithstanding the above, Toshiba was and still is amenable to voluntarily searching for and producing documents, if any, of the paragraph 1 custodians dated from January 1, 2005 through October 31, 2006 concerning *one specific event or occurrence* from this time period identified with reasonable particularity, such as a meeting between Mr. A and Mr. Z in June 2005 regarding CPU purchase terms, or the launch of laptop X by Toshiba in April 2006.

Additional Potential Custodians. AMD makes several faulty arguments about its need for, the availability of, and likely utility of further burdensome searches for additional documents of

At the outset, AMD suggests that the broad additional discovery it seeks may somehow be warranted from Toshiba in order to depose

"Toshiba's two most important witnesses," about purported deals and negotiations between Toshiba and Intel. AMD letter at 1-2. This "deposition need" argument is a clear red herring. The Voluntary Production Agreement (at 1) plainly states: "The parties agree that the production of such documents, subject to the terms set forth in this Agreement, would *constitute full and complete satisfaction of the [document subpoenas] and any and all other subpoenas and/or discovery requests in this litigation.*" There will be no depositions of

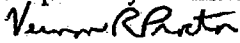
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AMD next argues that, because [redacted] were supposedly personally involved in negotiations between Toshiba and Intel, *ipso facto* they “are likely to possess documents that other custodians simply do not have.” AMD letter at 3. This is also incorrect. In fact, as AMD is aware, the paragraph 1 custodians are the individuals most likely to maintain responsive documents on behalf of [redacted]. See Exhibit 11 at 3. AMD has failed to make the showing that Toshiba’s broad and voluminous paragraph 1 production is insufficient. Moreover, Toshiba has conducted a preliminary investigation and believes that all or almost all responsive documents of [redacted] were produced as part of the paragraph 1 production or as JFTC documents.⁸ It would be unfair to inflict the additional burden AMD seeks as there is little or nothing to gain from it.

AMD claims Toshiba’s paragraph 1 production “contain[s] remarkably few documents authored or received by [redacted] particularly with respect to the meetings and negotiations in which they participated.” AMD letter at 4. This, too, is incorrect. For example, we estimate that Toshiba produced close to six thousand pages of responsive e-mails to, from or copying [redacted] in addition to several hundred pages of responsive e-mails to, from or copying [redacted].⁹ Furthermore, Toshiba produced hundreds of documents comparing Intel and AMD CPUs and discussing meetings and negotiations between Toshiba and Intel or AMD. Samples of such responsive documents are provided in Exhibit 13. Tellingly, each of the communications between Toshiba and Intel (*i.e.*, letters from [redacted] between 2001 and 2004 identified in AMD’s Exhibit F were also already produced by Toshiba from the paragraph 1 custodians.¹⁰ Furthermore, AMD has failed to show that such documents are not available from Intel or some other source. See Exhibit 11 at 4.

Notwithstanding the above, Toshiba in good faith was and still is amenable to voluntarily searching for, and producing to the parties, readily accessible non-privileged, non-duplicative documents of [redacted] dated from January 1, 2001 through December 31, 2004 responsive to Requests 1-15 concerning no more than three specific meetings (identified with reasonable particularity) in which they participated, to the extent that such documents exist. See Exhibit 11 at 4. Toshiba, however, thinks there would likely be few, if any, additional documents beyond those already produced. See *id.*

Lastly, AMD’s request that Toshiba produce documents “on or before January 27, 2009” is unreasonable. AMD letter at 5. Toshiba in good faith is amenable to voluntarily producing additional documents along the lines proposed above without delay, without waiving its jurisdictional objections and other opposition.

Respectfully submitted,

Vernon R. Proctor (#1019)

⁸ In June 2005, [redacted] Virtually all responsive documents from his prior position in Toshiba’s Personal Computer and Network Company were produced.

⁹ These figures are conservative in that they do not include documents in Japanese.

¹⁰ Document 8 (66039DOC0001687) was produced by Toshiba as TOSH-0127052; document 20 (67972DOC5000246-47) was produced as TOSH-0127046-47. Document 24 is from 2005 and thus was not part of the paragraph 1 production.

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cc (via electronic filing): Clerk of the Court; James L. Holzman; Esq., Richard L. Horwitz; Esq.,
Chad M. Shandler, Esq.