IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	
	)	
INTEL CORP. MICROPROCESSOR ANTITRUST LITIGATION	)	MDL No. 05-1717-JJF
	)	
	)	
	)	
ADVANCED MICRO DEVICES, INC., a Delaware corporation, and AMD INTERNATIONAL SALES & SERVICE, LTD., a Delaware corporation,	)	Civil Action No. 05-441-JJF
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
INTEL CORPORATION, a Delaware corporation, and INTEL KABUSHIKI KAISHA, a Japanese corporation,	)	
	)	
Defendants.	)	
	)	
PHIL PAUL, on behalf of himself and all others similarly situated,	)	
	)	
Plaintiffs,	)	Civil Action No. 05-485-JJF
	)	
v.	)	
	)	
INTEL CORPORATION,	)	CONSOLIDATED ACTION
	)	
Defendant.	)	

ACER AMERICA CORPORATION'S OPPOSITION TO AMENDED MOTION TO MODIFY PROTECTIVE ORDER AND APPROVE PROTOCOL FOR UNSEALING DOCUMENTS

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DATED: February 13, 2009

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I. INTRODUCTION

This case has extracted a heavy toll on the non-litigant third parties, including non-party Acer America Corporation ("Acer America"), who have been pinned on the battlefield between two bitter arch-rivals. Despite its non-litigant status, Acer America has spent hundreds of hours since the inception of this case responding to multiple subpoenas; carefully negotiating with AMD and Intel regarding the production of millions of pages of documents; carefully negotiating with AMD, Intel, and the Class Plaintiffs regarding the production of gigabytes of transactional data; and additional time collecting, processing, reviewing, and producing said documents and data – all the while heavily relying upon the terms of the September 26, 2006 Confidentiality Agreement and Protective Order entered in this action ("Protective Order") – which, in unprecedented fashion, Acer America and the other third parties directly participated in crafting. Indeed, Acer America's reliance upon the Protective Order in *this* case is especially heightened given its extremely unique inception. After all, it is far more reasonable for Acer America to rely upon something that it helped craft (the present Protective Order), then to rely on something drafted completely by others (ordinary protective orders).

Now, a consortium of third parties – one of whom participated in the original drafting of the Protective Order (D.I. 139)[1] – seek to alter the provisions of this extraordinary Protective Order – *after* Acer America has relied on the integrity of the Protective Order to strike agreements with the Parties about what it will provide. Indeed, prior to its production of documents and data in this matter, the Court significantly bolstered Acer America's reliance on the integrity of the terms of the present Protective Order when it rejected other third party attempts to modify the Protective Order (D.I. 482, 1276). To alter the terms of the Protective Order at this stage – would amount to a bait and switch.

Acer America is respectfully mindful of the importance of public access to the Courts, and of the equally important role of the media to keep the public informed. However,

[1] Docket References herein shall be pursuant to the numbering in MDL No. 05-1717 JJF.

Acer America is also mindful that a majority of the Movants[2] are commercial for profit entities, and the remaining entities were formed to serve them. As a result, Acer America is respectfully skeptical regarding the proposal to vet the Parties' confidentiality designations through representatives of these commercially interested entities. Moreover, upon examination of the materials that Movants initially seek to review – it is apparent, as it relates to Acer America, that such redacted text is simply discovery information obtained pursuant to the Protective Order and quoted and discussed by the Parties. *See e.g.* D.I. 628, pp. 79-81; D.I. 629, pp. 3, 18, 42-47, 92; D.I. 645, pp. 18-19; D.I. 646, p. 31. Notwithstanding Movants' indication that they are not seeking to review "discovery documents or summaries of documents that might appear as exhibits to said filings" (Amended Motion, ¶ 4) – the reality is that a Parties' quote, excerpt, summary, or argument pertaining to such exhibit contained in any brief would be fair game for review. As a result, practically speaking, the distinction is without a difference.

Non-party Acer America has heavily relied upon the protections meticulously crafted between the Court, the parties, and the third parties. Movants have not provided a compelling reason to disturb such a carefully crafted Protective Order. Accordingly, Acer America respectfully requests the Court to deny the motion.

In filing this Opposition, Acer America does not intend to waive any of its objections to this Court's jurisdiction over Acer America with respect to any of the issues present in this litigation. Indeed, Acer America hereby expressly reserves all of its rights.

[2] "Movants" refers collectively to the moving parties: The New York Times Company, Situation Publishing Ltd., Dow Jones & Company, Inc., The Washington Post, the Reporters Committee for Freedom of the Press, and the Computer & Communications Industry Association.

II. ARGUMENT

A. Because Acer America Relied Heavily On The Current Terms Of the Protective Order In Its Considerations Of Whether Or Not To Produce Highly Confidential Information, Movants' Motion Should Be Denied.

Among the factors that the Court should consider in deciding whether to modify the Protective Order as proposed by Movants, the factor that should weigh heaviest is the reliance by Acer America and the other third parties upon the current form of the Protective Order. *See Pansy* v. *Borough of Stroudsburg*, 23 F.3d 772, 790 (3rd Cir. 1994) ("one of the factors the court should consider in determining whether to modify the order is the reliance by the original parties on the confidentiality order."). Indeed, "[t]he extent to which a party can rely on a protective order should depend on the extent to which the order induced the party to allow discovery…. For instance, reliance would be greater where a trade secret was involved…." *See Pansy*, 23 F.3d at 790, fn. 25. In the present case, Acer America relied heavily on the final terms and conditions of the Protective Order in deciding whether to produce highly confidential electronic information and transactional data to the Parties. See Wang Decl., ¶ 9 (D.I. 1034).[3] As a result, the terms of the Protective Order should not be modified.

In addition, in its negotiations with the Parties, Acer America was asked to produce the documents of its parent corporation Acer, Inc. Notwithstanding the fact that such documents were beyond the custody and control of Acer America and beyond the jurisdiction of this Court - - with the Protective Order in place - - business decisions were made to voluntarily produce documents and data from custodians and databases which included those located in Taiwan. A decision by this Court to grant access to such documents and data may forever erode Acer America's (and its parent's) confidence in the integrity of Protective Orders issued by the United States' court system. Indeed, the decision of this Court on this issue may undermine the future confidence of domestic and foreign corporations in the integrity of protective orders issued by all U.S. courts - - period. Accordingly, the present motion should be denied.

[3] Ms. Wang was unable to submit a current declaration contemporaneous with Acer America's Opposition. Acer America will file a current declaration for Ms. Wang as soon as she is available to execute it.

B. Movants' Motion Should Be Denied Because They Are Seeking Access To Discovery Information.

In *Leucadia, Inc*. v. *Applied Extrusion Techs., Inc*., 998 F.2nd 157, 165 (3d Cir. 1993), the Third Circuit recognized a critical distinction between the right to public access for court submissions of a non-discovery nature and those related to discovery. As applied here, although the submissions sought to be unsealed by Movants in the present case are not discovery motions *per se*, the impetus for such submissions pertained to the Court's management of the discovery process in the present case, and which submissions apparently include quotes and excerpts from discovery materials pertaining to the third parties, including Acer America. Moreover, although highly sensitive to Acer America – and extremely titillating to media interests – the material filed under seal and redacted may be never be entered into evidence in the present case. As a result, the First Amendment rationale pressed by Movants is not present. *Littlejohn* v. *BIC Corp*., 851 F.2d 673, 680 n.14 (3d Cir. 1988). In the present case, it is apparent, as it relates to Acer America, that such redacted text is simply discovery information obtained pursuant to the Protective Order and quoted and discussed by the Parties. *See e.g.* D.I. 628, pp. 79-81; D.I. 629, pp. 3, 18, 42-47, 92; D.I. 645, pp. 18-19; D.I. 646, p. 31. Accordingly, Movants' motion should be denied.

III. CONCLUSION

Acer America respectfully requests that the Court deny Movants' Motion to Modify the Confidentiality Agreement and Protective Order entered in this action on September 26, 2006 (the "Confidentiality Order"), (i) for the purpose of allowing counsel for Movants to review, on an "attorneys' eyes only" basis, documents filed with the Court under seal so that they may determine whether they believe such sealing is justified, and (ii) for approval of a protocol for unsealing documents during the discovery phase of the litigation. In the alternative, if the Court finds a compelling reason to permit alteration of the Protective Order as proposed by Movants, it should: (i) should provide for third party participation and opportunity to object *before* any confidential information is provided to any Movant; and (ii) *only* grant "attorney's eyes only" access to representatives of non-commercial entities.

Respectfully submitted,

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