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February 17, 2009

VIA ELECTRONIC FILING AND HAND DELIVERY

The Honorable Vincent J. Poppiti
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Re: *Advanced Micro Devices, Inc., et al. v. Intel Corporation, et al., C.A. No. 05-441-JJF; In re Intel Corporation, C.A. No. 05-MD-1717-JJF*
Reply to Request for Issuance of Letters Rogatory (DM 26)

Dear Judge Poppiti:

AMD's application for letters rogatory seeks the Court's assistance in obtaining unquestionably relevant OEM documents and factual submissions to the EC that two foreign OEMs (Acer and NECCI) have refused to hand over voluntarily. Relying in part on the facts established by these smoking-gun documents and submissions, the EC issued a Statement of Objections ("SO") against Intel. Intel's assertion of EC comity interests to keep these incriminating materials from coming to light here is unavailing. Neither the fact that these documents were furnished to the EC as part of its investigation of Intel, nor the fact that they came to AMD's attention when Intel produced the SO during discovery is reason to thwart the truth-seeking goals of U.S. discovery.¹

1. Surely, comity with the EC is no basis to deny a request for known evidence of Intel misconduct when the EC has itself only voiced concerns about U.S. discovery of materials furnished to the Commission under the EC's Leniency Program. It is just not the case, as Intel maintains, that the EC "has unequivocally expressed its position that factual submissions prepared for Commission proceedings should not be discoverable in U.S. civil antitrust cases." Opp. at 1. Although Intel never mentions the Leniency Program, it is the central theme of both the European Commission's Submission to the Antitrust Modernisation

¹ Intel tacks on an additional argument that AMD's request is inconsistent with "the spirit of discovery stipulations agreed to between Intel and AMD early in this case." Opp. at 3. The June 2007 Stipulation reflects an early agreement by Intel and AMD not to seek from one another advocacy materials furnished by the other to policy makers. Its intent is mirrored by the second stipulation, by which Intel withdrew subpoenas directed toward AMD's lobbyist and consulting firms. See Ex. E to Opp. In contrast, the instant request concerns materials furnished by *third-parties* in connection with an *adjudicatory proceeding*. Moreover, as Intel admits, the June 2007 stipulation includes a reservation of rights to revisit the issue at a later time.



Commission, and the case Intel cites to support its claim. *See* Ex. A. to Opp. at 5 (“In order to state clearly its position against the discoverability of corporate leniency statements, the Commission has intervened . . .”); *In re: Rubber Chemicals Antitrust Litig.*, 486 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (stating the question presented as whether a plaintiff may discover communications “made pursuant to the Commission’s Leniency Program.”) The EC statement upon which Intel principally relies — that “[s]tatements and submissions other than pre-existing documents specifically prepared by undertakings within the European Commission’s antitrust proceedings should not be deemed discoverable to third parties, including to plaintiffs in a US civil claim proceeding” — is explained in the very next sentence, which Intel omits — “[t]his applies especially to corporate statements made under the European Commission’s leniency program.”

The EC’s concern about disclosure of leniency material is understandable. As it explained to the Modernization Commission, the risk of liability in the U.S. on the basis of voluntary but incriminating leniency application admissions could have a “chilling effect on the EC Leniency programme.” Ex. A to Opp. cover letter. Documents obtained by compulsory process from third-parties, such as those at issue here, however, present no such risks, and Intel points to nothing from the EC suggesting a rationale for withholding them from discovery.²

Dispositive of Intel’s claim are two sentences, omitted from Intel’s discussion, that appear on the very same page Intel quotes. There, the EC writes: “***pre-existing documents that have not been specifically drafted for the purpose of the Leniency application are discoverable. The same applies to documents that have been submitted in response to a formal request for information.***” Ex. A to Opp. at 9.

In light of this, applying the comity factors federal courts consider, there is no basis for refusing AMD the letters rogatory it seeks. *See Rubber Chemicals*, 486 F. Supp. 2d at 1081 n.2 (noting that “[i]n *In re Vitamin Antitrust Litig.*, 2002 U.S. Dist. LEXIS 26490 (D.D.C. Jan. 23, 2002) and 25815 (Dec. 18, 2002) the court adopted a special master’s report which recommended that the documents be produced after the master conducted a comity analysis”). Five competing factors must be balanced. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist.*, 482 U.S. 522, 544 n.28 (1987). The first, “the importance to the . . . litigation of the documents or other information requested,” clearly favors AMD. *Id.* Unlike in *Rubber Chemicals*, where the documents sought were innocuous, 486 F. Supp. 2d at 1083 n. 4, the SO references smoking-gun evidence in the possession of purportedly foreign companies that AMD cannot otherwise obtain. The second factor, the degree of specificity of the request, also favors AMD since it has spelled out in detail the materials it seeks. *See Societe Nationale*, 482 U.S. at 544 n.28. So too does the fourth factor, the availability of alternative means of securing the information. Given Acer’s and NECCI’s refusal to agree to voluntary

² The EC has the power to request the production of documents and information from third parties under Article 18 of Regulation 1/2003, the compliance with which is subject to fines of up to as much as 1% of the company’s annual revenue as well as daily penalties until compliance has been completed.

discovery, AMD has no alternative. *See id.* Similarly, the fifth consideration, the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located, also favors AMD. *See id.* As discussed above, no EC interest is at risk, while preventing discovery of the Acer and NECCI documents would risk jeopardizing the enforcement of U.S. antitrust laws. The only consideration favoring Intel is that the materials did not originate within the U.S., *see id.*, a trivial consideration in the context of letters rogatory since that procedure is only necessary to compel the production of offshore documents.

2. AMD came by the SO legitimately. Intel produced it as part of a single document consisting of a copy of the SO attached to a cover or “parent” email with two sets of communications: the first between Intel and its outside counsel, and the second between Intel’s outside counsel and the EC. The privileged communication between Intel and its outside counsel was redacted, but the communication with the EC was produced in its entirety along with the attached SO. Given the partial redaction, an attorney clearly reviewed these communications and made the determination that the former needed to be redacted, whereas the latter did not. As a result, AMD in good faith believed that Intel voluntarily produced the document after privilege review, and its use of the SO in framing the request for letters rogatory was entirely appropriate even if some claim of privilege could now be cobbled together, as Intel attempts to do.³

But the SO is plainly not a privileged document. While Intel may try to “claw it back” as “privileged and/or work product,” it offers no principled basis for the claim. Ex. B to Opp. The SO was drafted by the EC, not by an Intel attorney in anticipation of litigation, or by a client or lawyer for the purpose of seeking or rendering legal advice. Documents created by and received from an unrelated third party and transmitted to an attorney do not thereby become privileged. *See In re Grand Jury Subpoenas*, 959 F.2d 1158, 1165 (2d Cir. 1992). Even to the extent that the SO could be construed as containing third-party communications with the EC made in the spirit of cooperation, the Third Circuit has held that no privilege applies. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1423-31 (3d Cir. 1991).

The most that Intel can argue in favor of the SO’s return, then, is that it contains confidential information. The confidentiality of Acer or NECCI’s information, however, is not something Intel can assert, particularly given the existence of a Protective Order in this case. While Intel may have redacted its own confidential information out of the “public” SO, Intel cannot invoke its own confidentiality as a sword to thwart legitimate discovery. Indeed, just last week it recognized its obligation to turn over copies of confidential JFTC witness statements in

³ Even if the SO was not discoverable Intel’s fruit-of-the-poisonous-tree-like argument would still fail because it was public knowledge that Acer and NEC were included in the SO, and so these companies must have submitted materials. This is made public in the European Court of First Instance’s order. *See* ¶ 3 of the Order at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=T-457/08&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>. The SO merely allowed AMD to target and limit its request to minimize the burden for the third parties.

its possession despite a Japanese court order it had obtained preventing their use outside of Japan.

Surely, no EC interest in preserving confidentiality is at risk that would trump Intel's obligation to turn over so highly relevant a document as the SO. Granted, ordinarily the EC gives complainants like AMD only redacted, non-confidential versions of an SO, as AMD received here. Ex. C to Intel's Opp. at Art. 6(1). But that is because EC regulations require the public SO to be redacted of any "business secrets and other confidential information belonging to other parties involved in the proceedings." *Id.* at Art. 8(1). In this case, the parties are already governed by a Protective Order, which is designed specifically to protect such third party confidential information, so the EC's interest in confidentiality will be maintained.

AMD's request that the Special Master recommend that the District Court issue letters rogatory to judicial authorities in France and Italy should be granted.

Respectfully,

/s/ Chad M. Shandler

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CMS/ps

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