IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

RESPONSE OF DEFENDANTS INTEL CORPORATION AND INTEL KABUSHIKI KAISHA TO THE COMMENTS AND OBJECTIONS OF THE THIRD PARTIES REGARDING THE PROPOSED PROTECTIVE ORDER

Pursuant to the Stipulation and Order entered by the Court on May 11, 2006, Defendants Intel Corporation and Intel Kabushiki Kaisha (collectively "Intel") respectfully submit the following response to the comments and objections of the third parties regarding the proposed Protective Order in this matter.

I. PRELIMINARY STATEMENT

Intel has reviewed in detail the comments and objections of the third parties regarding the proposed Protective Order. A number of the concerns raised by the third parties were in fact the subject of extensive discussion and substantial compromise between AMD and Intel in negotiating the proposed Protective Order. Intel stands by the Protective Order it negotiated with AMD and believes that the agreement as submitted was a reasonable compromise.

Intel also has met and conferred with AMD and the Class plaintiffs regarding the third party comments and objections and, in light of those comments and objections, has reached agreement with the AMD and Class plaintiffs on a number of proposed modifications to the Protective Order. Those agreed-upon modifications are to be reflected in the revised Protective Order jointly submitted to the Court by the parties on May 31, 2006. The revised Protective Order is acceptable to Intel in all respects.

II. SPECIFIC RESPONSE

Intel sets forth below its specific objections to (1) certain of the proposed third party revisions and (2) AMD's proposals for additional language. As to the other revisions proposed by the third parties, although Intel does not have any particular objections, Intel is not submitting comments because the relevant provisions of the Protective Order, as originally proposed, represented the best overall compromise Intel was able to negotiate with AMD and Class counsel to arrive at a single, reasonable protective order that could be applied to all concerned.

In that regard, it is of paramount importance to Intel that one universal protective order govern the litigation going forward. Intel strongly believes that it would be unworkable to have a separate order or separate standards for third parties. Intel and AMD have in their files hundreds of thousands (and potentially more) documents that either were generated by third parties or

contain confidential third party information that was provided to Intel or AMD under a Non-Disclosure Agreement. It would be a logistical nightmare if third party information was governed under one standard if produced by a third party and another standard if produced by a party. Moreover, it would be incredibly burdensome for Intel and AMD to be required to segregate out all third party information in their files for specific treatment.

A. Paragraph 5 – Designation of Confidential Deposition Testimony

To address certain of the third party comments and objections, the parties will propose in the revised Protective Order to be submitted on May 31, 2006, that Paragraph 5 of the initial proposed order be replaced with the following paragraph:

> "To facilitate discovery, all deposition testimony will be presumed to constitute, and all transcripts shall be treated as, Confidential Discovery Material, unless and until a Designation Request is made by a Receiving Party under Paragraph 16. Accordingly, no deponent may refuse to answer a deposition question on the ground that the answer would disclose confidential information or information subject to a non-disclosure agreement. Should a Receiving Party wish to disclose any deposition testimony to a person other than as permitted by Paragraph 6, it shall first make a Designation Request under the provisions of Paragraph 16. Such a request shall be made to the Party and/or Non-Party it reasonably concludes has the right to protect the information. The provisions of Paragraph 16 shall thereafter apply."

AMD has indicated, however, that it intends to propose that the following language (in bold) be added to Paragraph 5:

> "To facilitate discovery, all deposition testimony will be presumed to constitute, and all transcripts shall be treated as, Confidential Discovery Material, unless and until a Designation Request is made by a Receiving Party under Paragraph 16. Accordingly, no deponent may refuse to answer a deposition question on the ground that the answer would disclose confidential information or information subject to a non-disclosure agreement. Should a Receiving Party wish to disclose any deposition testimony **it could reasonably conclude is or might constitute Confidential Discovery Material under Paragraph R** to a person other than as permitted by Paragraph 6, it shall first make a Designation Request under the provisions of Paragraph 16. Such a request shall be made to the Party and/or Non-Party it reasonably concludes has the right to protect the information. The provisions of Paragraph 16 shall thereafter apply. **This paragraph will not restrict use of deposition testimony that a Receiving Party reasonably concludes contains no Confidential Discovery Material.**"

Intel objects to the inclusion of the bolded language, which is new language that was not part of the previously negotiated Order. It should not be within AMD's or any other Party's discretion to determine whether deposition testimony "might constitute Confidential Discovery Material." That is not how documents and other materials are treated under Paragraph 16. Deposition testimony taken in this case should be treated as Confidential Discovery Material unless and until a Receiving Party makes an appropriate Designation Request under Paragraph 16 to the Party and/or Non-Party whose testimony or information is implicated. The provisions of Paragraph 16 should thereafter apply.

B. Paragraphs 6 & 15 – Separate/Side Agreements With Third Parties

Intel understands that AMD intends to propose in its separate submission that the following language be added to the end of Paragraphs 6 and 15:

> Paragraph 6. "The provisions of this Paragraph 6 will not void or supersede any more restrictive agreement reached between a Producing Party and a Receiving Party respecting the Receiving Party's use of Confidential Discovery Material that by its terms survives the entry of a protective order."
>
> Paragraph 15. "Nor should anything in this Order be deemed to void or supersede any agreement reached between a Party or Class Party, on the one hand, and a Third Party, on the other, respecting Confidential Discovery Material that by its terms survives the entry of a protective order."

It is Intel's understanding that AMD's purpose in proposing this language (which is new and was not part of the previously negotiated Order) is to address certain side deals that AMD has struck with several third parties regarding use of their Confidential Discovery Materials.

Intel objects to AMD's proposal for several reasons. Most importantly, there should be a single, uniform order governing discovery in this case. Discovery should not be subject to separate side deals negotiated by AMD, without Intel's input or consent, which AMD claims will supersede the terms of the Court's Protective Order. Presumably AMD could enter into side deals with all of the approximately 50 third parties that have been or will be subpoenaed, rendering the Protective Order a nullity for governing third party discovery, and requiring Intel itself to negotiate side-deals or risk losing access to important information in the case.

Indeed, Intel is uncertain at this time (i) whether it is privy to all of the side agreements that AMD has reached with third parties in this regard, and the exact terms of such agreements, (ii) what documents, if any, have been produced pursuant to any such agreements, and (iii) what effect, if any, these agreements may have on Intel's use of any materials produced pursuant the agreements. These uncertainties demonstrate why a single comprehensive order should govern discovery in this case.

C. General Comment – Japan Litigation/Other Litigation

A number of third parties have objected to the Protective Order in general on the grounds that it provides for the use of Discovery Material outside the AMD Litigation, specifically in the Japan Litigation, the Class Litigation and the California Class Litigation. Fujitsu, NEC, Sony, and Toshiba object to "the inclusion of any State proceeding and of any foreign investigation or proceeding and to disclosure of their Discovery Materials outside the above-titled litigation."[1] Egenera argues that it "has been subpoenaed only in the AMD Litigation, and has not submitted to the jurisdiction of the California or the Japanese courts."[2] Dell objects to the use of its Discovery Material in the Japan Litigation and "asks the Court to modify the Proposed Order to disallow discovery conducted under this Court's protective order to be used in the Japan Litigation."[3] Hitachi, IBM and Lenovo also seek to delete all references to the "Japan Litigation."[4]

Given the plan for coordination of discovery between the AMD Litigation, Class Litigation and California Class Litigation, Intel believes that all three litigations should be covered by the proposed Protective Order. Removing the Class Litigation or California Class

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1 *See* Objections of Fujitsu Limited, NEC Corporation, Sony Corporation, Sony Electronics Inc., and Toshiba Corporation, at p. 14.

2 *See* Objections of Third-Party Egenera, Inc., at p. 6.

3 *See* Dell's Objections and Comments, at p. 6.

4 *See* Comments of Hitachi, Ltd., at pp. 1-2; Non-Party IBM's Objections and Comments, at p. 2; Non-Party Lenovo Group Ltd.'s Objections and Comments, at p. 2.

Litigation from the purview of this Protective Order would only hinder the coordination process and create significant additional burden and expense for the parties and third parties. For many of the same reasons, including the anticipated gains in efficiency and ease of administration, Intel believes that the "Japan Litigation" also should be covered by the Protective Order.

D. Miscellaneous – Cost Shifting

Third Party Acer America Corporation has raised the issue of cost shifting, and has proposed that a provision be added to the Protective Order to address and resolve the issue on a global basis as to all third parties in this case.[5]

This is not an appropriate issue for the Protective Order proposed here – a protective order governing the use of confidential discovery materials. Moreover, the issue of cost shifting or cost sharing cannot be addressed globally. It must be addressed on a case-by-case basis, based on the particular circumstances of each case and each non-party. *See, e.g., United States v. Columbia Broad. Sys., Inc.*, 666 F.2d 364, 371 & n. 9 (9th Cir. 1982) (a court must consider a number of factors in determining whether a particular non-party is entitled to reimbursement of discovery costs, including but not limited to "(1) the scope of the discovery; (2) the invasiveness of the request; (3) the extent to which the producing party must separate responsive information from privileged or irrelevant material; and (4) the reasonableness of the costs of production"). Intel does not support the proposed revision.

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[5] *See* Third Party Acer America Corporation's Comments and Objections, at pp. 2-3.

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CERTIFICATE OF SERVICE

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