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By Hand

The Honorable Vincent J. Poppiti
Fox Rothschild LLP
919 N. Market Street
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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
Motion to Compel Discovery from Third-Party Glover Park Group**

Dear Judge Poppiti:

Pursuant to Fed. R. Civ. P. 45, Intel moves this Court for an order compelling documents and testimony from Glover Park Group, AMD's public relations consultant. Intel served a subpoena on Glover Park on May 30, 2007 and a supplemental subpoena on April 8, 2009. Exs. A & C. AMD and Glover Park jointly responded to both subpoenas and to date have refused to provide any testimony or documents in connection with this litigation.

A. Background

Intel seeks documents and testimony from Glover Park related to the date on which AMD first reasonably anticipated this litigation. Intel believes Glover Park possesses information regarding the timing of AMD's knowledge of potential claims against Intel. Intel's discovery requests on this issue are narrowly tailored (substantively and temporally).

Intel's May 30, 2007 subpoena. Intel's first subpoena sought documents concerning or relating to:

1. Any litigation proposed or contemplated by AMD against Intel.
2. Any communications with AMD, the law firm of O'Melveny & Myers LLP, and/or any other persons acting on AMD's behalf, concerning or related to any litigation proposed or contemplated by AMD against Intel.
3. Any possible or actual investigation of Intel by the United States or a foreign governmental entity.
4. Any communications with AMD, the [O'Melveny] law firm, and/or any other persons acting on AMD's behalf, concerning or relating to any possible or actual investigation of Intel by the United States or a governmental entity.

In response, Glover Park refused to provide any documents, relying on its and AMD's objections on the basis of privilege, work product, and relevance, among others. Ex. B, 6/18/07 Objections. Intel then sought information from AMD that would allow Intel to evaluate AMD's claims of privilege. Ex. E, at 2-3. AMD responded, asserting: Glover Park was retained by AMD counsel as of January 1, 2005; privilege attached from November 1, 2004, when Glover Park began working on AMD's behalf; and the general purpose of Glover Park's retention is "to provide such services as O'Melveny & Myers LLP may require, including assisting in the testing and development of litigation and jury themes, preparing both AMD's legal and company spokespeople and written materials concerning the litigation; and providing expertise to help make this dispute understandable to legal and non-legal audiences." Ex. F, at 2. Intel did not withdraw the subpoena but opted to wait to see whether related discovery shed more light on Glover Park's involvement in AMD's business. Intel subsequently learned facts, through discovery, which contradicted AMD's representations about the nature and timing of Glover Park's work, and also when AMD reasonably anticipated this litigation. *See, e.g., Ex. N* [REDACTED]

In November 2008, AMD requested that Intel formally withdraw its subpoena, by asserting that Intel had agreed to "stand down in exchange for a representation (1) that O'Melveny hired Glover Park in early 2005, and (2) that Glover had no documents dated prior to its retention by O'Melveny concerning litigation by AMD against Intel." Ex. G. However, this conflicted with O'Melveny's own prior statement that it signed an agreement with Glover Park in January 2005 which was "retroactive" and Glover's work had begun before this date. Ex. Q, Volkmann Tr. 401:3 - 402:12. AMD later renewed its request for withdrawal, but Intel never formally withdrew its subpoena and no agreement between the parties was reached. Ex. H.

Intel became concerned that AMD was taking an artificially narrow view of the subpoena's request for information regarding "litigation proposed or contemplated" against Intel. Intel attempted to contact AMD to address these issues, but was unable to reach AMD's counsel. *See Pickett Decl.* ¶ 11.

Intel's April 8, 2009 subpoena. Intel issued a second subpoena seeking testimony from Glover Park regarding:

1. Any Services provided by Glover Park at the request of, on behalf of, or related to AMD from July 1, 2004 through February 28, 2005, including without limitation Services related to Intel.
2. Glover Park's knowledge of any litigation proposed or contemplated by AMD against Intel.

Intel also supplemented its document requests to include Glover Park documents concerning or relating to:

5. Any services provided by Glover Park for or on behalf of AMD, including without limitation services related to public relations, strategic messaging and/or communications.

6. Any services provided by Glover Park for or on behalf of O'Melveny & Myers LLP, including without limitation services related to AMD and/or Intel.
7. Intel's conduct in the market for x86 Microprocessors.
8. Fair and open competition in the market for x86 Microprocessors.

Glover Park refused to provide any testimony or documents. Ex. D, 4/20/09 Objections. In response to Intel's subsequent subpoena AMD again offered to represent that "all of Glover Park's activities during the relevant timeframe were in relation to AMD's activities designed to influence government or agency action, or are otherwise covered by privilege or attorney work product" in exchange for its withdrawal. Ex. I. Intel responded by pointing to specific AMD deposition testimony and documents which contradicted this representation. Ex. J. AMD disagreed and relied on the parties' inapplicable prior stipulation regarding lobbying discovery.¹ Ex. K. Intel now brings this motion to enforce the subpoenas.

B. Legal Standard

Under Federal Rule of Civil Procedure 45(c)(2)(B)(i), if a non-party responds to a subpoena with written objections, the requesting party may "move the issuing court for an order compelling production or inspection." The court must protect the non-party from an undue burden or expense. F.R.C.P. 45(c)(1). The court may consider a number of factors, including "relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are requested, and the burden imposed." Ex. R, *Whitlow v. Martin*, 2008 WL 2414830 at *3-4 (C.D. Ill. June 12, 2008) (citing *Morrow v. Air Ride Technologies*, 2006 WL 559288 at *2 (S.D. Ind. Mar. 6 2006)).

C. Argument

1. Intel's discovery does not violate any Intel-AMD "negotiated agreements"

Glover Park and AMD object to the subpoena by incorrectly characterizing Intel's subpoena as "an attempt to circumvent" an alleged agreement between the parties. Ex. D, 4/20/09 Objections ("Objections") at ¶4. No such agreement was reached, and Intel never withdrew either subpoena. AMD and Glover Park can point to no evidence to the contrary.

2. Intel's discovery is not foreclosed by any stipulation or court order

Glover Park and AMD rely on strained interpretations of unrelated court orders. First, AMD misinterprets the parties' Stipulation Withdrawing Subpoena Duces Tecum to Potomac Counsel, LLC, DC Navigators, LLC and Public Strategies, LLC and Restricting Future Discovery from Consultants Retained to Influence Governmental Action dated December 7, 2007 ("Lobbying Stipulation"). The Lobbying Stipulation only applies to discovery "calling for the production of documents or testimony related to activities designed to influence government or agency action." Ex. L, Lobbying Stipulation at 2. No such discovery is sought here, as Intel has advised AMD on multiple occasions. Ex. C, 4/8/09 Subpoena (defining "service" as "any work related to public relations, media relations, strategic messaging, corporate communications,

¹ As discussed in Section (C)(2), the parties agreed to refrain from seeking discovery on lobbying issues, and AMD asserts that Glover Park's work focuses solely on lobbying.

advocacy and/or focus groups”). [REDACTED]

[REDACTED] Further, the Lobbying Stipulation contemplated, and indeed expressly carved out, the reasonable anticipation discovery Intel seeks here. Ex. L, Lobbying Stipulation at 2-3 (“subpoenas are withdrawn save and except that portion of the subpoena served on DC Navigators, LLC . . . requiring production of documents tending to show that AMD reasonably anticipated filing its lawsuit against Intel prior to March 31, 2005.”).

Second, AMD asserts that Intel’s discovery of Glover Park is somehow an “improper attempt to circumvent the Special Master’s orders regarding the scope of Intel’s discovery into AMD’s document preservation activities.” Ex. D, Objections at ¶3. AMD is presumably pointing to the Court’s January 22, 2009 Order granting Intel the right to take a Rule 30(b)(6) deposition of AMD on evidence preservation issues. That Order is plainly not on point; it neither relates to third-party discovery nor limits in any way Intel’s right to seek discovery on the date AMD reasonably anticipated this litigation. Ex. M, 1/22/09 Order.

3. Intel does not seek attorney-client communications or work product

Intel is entitled to Glover Park testimony and documents outside of any alleged privileged or work product material including, for example, [REDACTED]

[REDACTED] Indeed, many courts have held that disclosures made by a client or its attorney to a public relations consultant are *not* protected by the attorney client privilege. “A media campaign is not a litigation strategy. Some attorneys may feel it is desirable at times to conduct a media campaign, but that decision does not transform their coordination of a campaign into legal advice.” Ex. R, *In re New York Renu with Moistureloc Product Liability Litigation*, 2008 WL 2338552 at *8 (May 8, 2008, D.S.C.), (internal citations omitted); *see also*, *Calvin Klein Trademark Trust v. Wachner et al.*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000).

4. Intel’s requests are narrowly tailored and do not impose an undue burden

Intel’s requests are narrowly tailored both as to time and subject matter to allow it to test the accuracy of AMD’s reasonable anticipation assertions without imposing any undue burden on Glover Park. Indeed, the discovery Intel seeks is limited specific types of work Glover Park did for one client (AMD) during an eight-to nine month period.

Relief Requested

Intel respectfully requests an order compelling Glover Park to promptly provide documents and testimony responsive to Intel’s subpoenas.

Respectfully,

/s/ Richard L. Horwitz

Richard L. Horwitz.

WHD:cet

Enclosure

cc: Clerk of Court (via Hand Delivery)
Counsel of Record (via CM/ECF & Electronic Mail)