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By Hand
The Honorable Vincent J. Poppiti
Fox Rothschild LLP
919 N. Market Street, Suite 1300
Wilmington, DE 19801

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 - Request For *In Camera* Review (DM 33)

Dear Judge Poppiti:

Intel submits this letter in reply to AMD's opposition materials and in support of its Request For *In Camera* Review of Disputed Document (scheduled for hearing on July 20, 2009).

Intel's position is straightforward. First, the disputed document includes highly probative, *factual* information – including what we believe confirms AMD's substantial preparation for this litigation during the first quarter of 2005, several months before AMD claims it reasonably anticipated litigation against Intel. Second, AMD disclosed the disputed document to a third party business consultant, waiving any attorney-client privilege that may have attached. Third, any *factual* information included within the disputed document, such as [redacted] is not attorney work product *at all*, much less attorney mental impressions or opinions.

1. AMD's Q1 2005 Expenditure On This Litigation Is Highly Probative. There is nothing "far-fetched" about the "theory" (Opp. at 5) that AMD reasonably anticipated litigation against Intel several months earlier than AMD acknowledges. The PowerPoint entitled [redacted] was prepared in May 2005 and, among other facts, includes [redacted] undermines AMD's claim that it first reasonably anticipated this litigation months later, on April 20, 2005. To be clear, Intel does not contend that [redacted] an obligation to preserve documents. Intel does contend, however, that [redacted] along with corroborative evidence, reflects the actions of a company actively preparing for litigation.

2. AMD Waived the Attorney-Client Privilege. AMD cannot recast its business consultant, Anil Kumar of the McKinsey firm, as a litigation consultant. Mr. Kumar and his firm played no role in this litigation and did not participate in the Slingshot Project (the subject matter of the PowerPoint presentation at issue). AMD did not send the disputed document to

Mr. Kumar to request his assistance in the provision of legal services. AMD does not and cannot dispute any of those facts.

In the Third Circuit, the privilege only extends to third party consultants who play a critical and direct role in the company's *legal* work. The consultant must "assist[] in the provision of legal services," *Kaminski v. First Union Corp.*, 2001 U.S. Dist. LEXIS 9688, at *12-13 (E.D. Pa. July 9, 2001), or "function[] as an indispensable tool" in the "provision of legal advice," *Swarthmore Radiation Oncology, Inc. v. Lapes*, 1994 U.S. Dist. LEXIS 1970, at *10 (E.D. Pa. Feb. 18, 1994). Mr. Kumar did neither of those things; nor did he "act[] for the corporation and possess[] the information needed by attorneys in rendering legal advice." *In re Bristol-Myers Squibb Sec. Litig.*, 2003 U.S. Dist. LEXIS 26985, at *11 (D.N.J. June 25, 2003).

AMD relies exclusively on the Eighth Circuit's "functional equivalent" test, arguing that Mr. Kumar is an AMD "insider" – *i.e.*, the "functional equivalent" of an AMD employee – and thus the attorney-client privilege protects communications with him. Opp. at 7; *In re Bieter Co.*, 16 F.3d 929, 937-40 (8th Cir. 1994). Noticeably absent from AMD's submission is a declaration from Mr. Kumar or any McKinsey representative supporting AMD's position that Mr. Kumar is the "functional equivalent" of an AMD employee. Instead, AMD submitted self-serving declarations that generally seek to elevate Mr. Kumar's role in the company.[1] Even accepting AMD's description of Mr. Kumar's role as true – which Intel has not had the opportunity to test – under the *Bieter* test, Mr. Kumar cannot be considered an AMD employee.

The consultant in *Bieter* worked out of Bieter Company's office and was "intimately involved" on a "daily basis" in the development of – and litigation surrounding – a parcel that was the "*sine qua non* of [Bieter's] existence." *Bieter*, 16 F.3d at 934, 938. Moreover, in *Bieter* the consultant assumed varied and extensive responsibilities over an almost decade-long relationship, serving as his client's *sole* representative at meetings with counsel, defendants, the media, and city officials. *Id.* The same cannot be said for Mr. Kumar's occasional business consulting for AMD. Moreover, according to AMD's own authority, only if a consultant assumes "the functions and duties of [a] *full-time* employee" will his communications with counsel be protected by the attorney-client privilege. *In re Adelphia Communications Corp.*, 2007 WL 601452, at *7 (S.D.N.Y. Feb. 20, 2007) (emphasis added). AMD does not suggest that Mr. Kumar's commitment to AMD even approached "full-time."

3. *In Camera* Review Is Necessary To Identify Facts. In light of AMD's privilege waiver, the only remaining question is its assertion of "absolute protection" over the entire [redacted] PowerPoint based on the work product doctrine. Contrary to AMD's assertion, as an initial matter, Intel does not seek opinion work product; it seeks all unprotected, underlying facts contained in the document. In addition, to the extent any information in the PowerPoint constitutes fact-based work product, as opposed to mere underlying facts, Intel meets the "substantial need and undue hardship" test, thus mandating production of those facts.

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[1] If Mr. Kumar is as crucial to AMD's business strategy as AMD now contends, then AMD's failure to disclose that during fact discovery requires a thorough explanation, a deposition of Mr. Kumar, and document productions related to (and from) him. Intel reserves all rights.

The very authority cited by AMD provides examples of how Your Honor's *in camera* review should proceed. Although AMD relies on *FEC v. Christian Coalition* to contend core work product cannot be discovered, that court repeatedly found that only "portions" of documents it reviewed *in camera* "qualify for protection under the opinion work product privilege," whereas "the remainder" were "not protected" because they "constitute facts." 178 F.R.D. 456, 469 (E.D. Va. 1998). Intel asks Your Honor to engage in that same analysis: separating fact from core work product, allowing discovery of one while protecting the other. Indeed, in connection with the Weil notes dispute, Your Honor concluded that core work product was "*not* so intertwined with fact information that the entirety of the Weil Materials from each interview should be treated as core. Rather, the facts can be easily separated from any core work-product." *In re Intel Corp. Microprocessor Antitrust Litigation*, 2008 WL 2310288, at *16 (D. Del. June 4, 2008) (emphasis added). That same principle applies here.

An *in camera* review will disclose that the document contains pure facts not protected by work product and not revealing attorney impressions or input. As but one example, AMD fails to explain how [redacted] constitutes *core* work product, or how it "reveal[s] litigation strategy and/or the nature of services performed." *Hyman Cos. Inc. v. Brozost,* 1997 WL 535180, at *3 (E.D. Pa. Aug. 8, 1997); Opp. at 3-4. AMD's authorities are either off point or supportive of Intel's position:

-- Unlike the movant in *Hyman*, Intel is not requesting access to attorney bills describing of "the nature of services performed." *Hyman*, 1997 WL 535180, at *3.

-- Unlike the movant in *Linerboard*, Intel is not seeking to mine the memory of AMD's counsel. *In re Linerboard Antitrust Litigation*, 237 F.R.D. 373, 386-90 (E.D. Pa. 2006) (in-house counsel's own "recollection of . . . facts learned during his internal investigation" resulted in inseparably "commingled fact and opinion work product.").

-- Unlike the movant in *Ring*, Intel is not seeking "to examine the [attorney's] bill to find out the nature of the services in order to discover what advice the attorney was providing defendants and to learn other details about defendants' investigation of her claim." *Ring v. Commercial Union Ins. Co.*, 159 F.R.D. 653, 659-60 (M.D.N.C. 1995); Opp. at 3-4. *Ring* never concluded that the aggregate *amount* of the bill was privileged, because that was not even at issue: the plaintiff explicitly did "not wish to know the amount of the bill," which the Court noted "might be discoverable," as "attorney fee information is not ordinarily privileged." *Id.*

AMD also misses the mark with *Simon*. In that case, the Eighth Circuit protected individual case reserve figures for specific cases only because they were *prospective*, reflecting "*anticipated* legal expenses, settlement value," and mental impressions of an attorney evaluating a claim. *Simon v. G.D. Searle & Co.,* 816 F. 2d 397, 400-01 (8th Cir. 1987) (emphasis added). Intel seeks nothing of the sort. [redacted]

[redacted] – and it is directly relevant to the question of when AMD reasonably anticipated litigation. Like the aggregate reserve information that was discoverable in *Simon*, *id.* at 402, AMD's [redacted] are not work product.

Finally, even assuming *arguendo* that [redacted] or other portions of the document, somehow reflected fact-based work product, Intel should still be entitled to the information under Fed. R. Civ. P. 26(b)(3). AMD's own authority compels that conclusion. *See Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997). "[F]act work product" *can* be discovered "upon showing a substantial need for the materials and an undue hardship in acquiring the information any other way." *Id.* When "purely factual material" is "embedded in attorney notes," those facts "may not deserve the super-protection afforded to a lawyer's mental impressions." *Id.* at 1308 (citing *In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997)).

The facts contained in the document at issue are not merely "helpful," as AMD asserts, and the case AMD cites in support of this proposition is inapposite. Opp. at 5-6 (citing *Carey-Canada, Inc. v. California Union Ins. Co.*, 118 F.R.D. 242, 247 (D.D.C. 1986)). In *Carey-Canada*, defendants sought drafts of plaintiff's annual report to see each iteration of counsel's descriptions of ongoing litigation – which, unlike the [redacted] here, is opinion work product and subject to heightened protection. 118 F.R.D. at 246-47. That court found the prior drafts to be "merely potentially helpful" only because defendants already had the final reports. *Id.* at 247. Here, the information is an important part of the factual background to the issue concerning AMD's anticipation of this litigation and Intel's motion for remediation. Moreover, Intel has no alternative source for this data.

Intel is not aware of all the discoverable facts contained in the document – either unprotected facts or work product that is substantially needed for the remediation motion – and relies on an *in camera* review to ferret out that information. Intel does know, however, that at a minimum there is aggregate historical litigation expense information that *is* discoverable.

Conclusion. Intel respectfully requests that Your Honor conduct an *in camera* review of the document and issue an order holding as follows: (1) that by disclosing the document to a third party, AMD waived any applicable privilege; (2) that AMD's redactions include materials not covered by any applicable privilege or doctrine; and (3) AMD must promptly provide a properly redacted version of the document to Intel consistent with Your Honor's instructions following an *in camera* review.

Respectfully,

/s/ W. Harding Drane, Jr.

W. Harding Drane, Jr.

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