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September 4, 2009

By Electronic Filing and Hand Delivery

The Honorable Vincent J. Poppiti
Fox Rothschild LLP
Citizens Bank Center
919 North Market Street, Suite 1300
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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 AMD's Filing of Sanctions Motion Before Completion of Discovery

Dear Judge Poppiti:

As requested by Your Honor during the August 24, 2009 teleconference, the parties held a meet and confer Wednesday afternoon to discuss the filing dates, briefing schedule and page limits relating to the parties' forthcoming motion practice on preservation issues. In advance of our teleconference scheduled today at 12:30 p.m. EDT, Intel is submitting this letter to advise Your Honor of a threshold issue that arose during the meet and confer that may require Your Honor's guidance.

During the meet and confer, Intel raised questions about the sequencing of AMD's forthcoming motion for sanctions and upcoming discovery related to that motion, specifically additional document production and 30(b)(6) depositions recently ordered by Your Honor largely relating to Intel's document practices.¹ Intel objected to AMD's filing of its motion in advance of its completing discovery on the motion. We suggested that a premature filing of the motion was in violation of local rules and would wreak havoc on any briefing schedule. Accordingly, Intel took the position that AMD had a choice – either complete its discovery and then file the motion *or* file the motion immediately and forego remaining discovery.

AMD rejected Intel's position and stated its intention to file a motion for sanctions imminently.² AMD agreed the pending discovery was related to the motion, but stated it was not

¹ In accordance with Your Honor's Order, Intel has advised AMD that it is preparing to produce documents on or about September 9 and four witnesses on September 23, September 29 and October 7.

² AMD suggested it would file its motion today (9/4/09) or possibly on Tuesday (9/8/09).

essential to it. However, AMD would not guarantee that it would not cite to post-filing discovery in its reply brief.

Given the impasse on timing, Intel informed AMD that it would write Your Honor promptly to seek an opportunity to obtain Your Honor's guidance. During the meet and confer, AMD would not agree to delay its motion on account of this scheduling dispute but, the following day, changed course and agreed that a teleconference should be scheduled with Your Honor to address it. This letter briefly summarizes Intel's position on the implications of AMD's filing of the motion *before* Intel produces documents or witnesses in response to AMD's pending discovery requests.

Intel believes that AMD should not be permitted to file a motion, then take further discovery *related to that motion*, and retain the option to submit supplemental evidence from that discovery in its reply brief in support of the motion. AMD's proposed sequencing is inefficient and would set up – unnecessarily – the need for additional rounds of briefing in the event AMD sought to introduce new evidence following the submission of its opening brief. Intel asked AMD to agree that it will *not* seek to submit new evidence and AMD declined to make that commitment. Indeed, given AMD's claims that the document production and forthcoming depositions are relevant to causation/culpability and remediation discovery, it is difficult to imagine a scenario where AMD would not seek to produce supplemental evidence.³

AMD's plan does not comport with Local Rule 7.1.3(c)(2) (entitled "Reply Briefs") which states that "[t]he party filing the opening brief shall not reserve material for the reply brief which should have been included in a full and fair opening brief." *See, e.g., In re Intel Corp. Microprocessor Antitrust Litigation*, 2008 WL 4861544, 14 (D. Del. Nov. 7, 2008) (Poppiti, J.) (raising new issue and information in reply brief "leaves no opportunity for Intel and/or third parties to weigh in on the issue and thereby perform their advocacy role of informing the Special Master on the issue"); *Advanced Medical Optics, Inc. v. Alcon, Inc.*, 361 F.Supp.2d 404, 418 n.8 (D. Del. 2005) (quoting Local Rule 7.1.3 and rejecting supplemental submission of evidence where moving party failed to present it in opening brief).

Nor would AMD suffer any prejudice from being put to a choice between an immediate filing or filing after its discovery. AMD stated at Wednesday's meet and confer that Intel could take whatever reasonable time it wished to oppose the motion. Nor has AMD specified any

³ In its July 10, 2009 letter to Your Honor (Docket #1623), AMD made it clear that its discovery was related to Intel's culpability for preservation issues: "The issue for decision here is direct and simple: Is AMD entitled to conduct discrete, non-duplicative and timely discovery into topics that are indisputably relevant to Intel's preservation problems and its culpability for them?" AMD's counsel repeated this position during the July 20, 2009 hearing. *See* 7/20/09 Tr. at 52:12-17 (Docket #1651) (AMD's discovery seeks evidence regarding whether Intel, as a matter of e-discovery practice, took "appropriate steps" that show Intel was "adhering to proper preservation measures").

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reason why its motion must be filed immediately as opposed to after the completion of pending discovery. Indeed, at the same meet and confer, the very issue arose in connection with Intel's motion for remediation. As it informed Your Honor during last week's teleconference, Intel is prepared to file that motion but is awaiting AMD's completion of the discovery related to that motion ordered by Your Honor. AMD informed Intel yesterday that it would produce the Glover Park privilege log in thirty days. Thus, Intel will not file its motion until October.

Accordingly, AMD must decide between two reasonable alternatives: either file its motion on its preferred schedule (*i.e.*, Friday or Tuesday) and forgo the right to take the pending discovery directly related to that motion; *or* take its discovery first and then file its motion once the record is complete.

We look forward to discussing these issues at 12:30 p.m. EDT.

Respectfully,

/s/ W. Harding Drane, Jr.

W. Harding Drane, Jr. (#1023)

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