Frederick L. Cottrell, III
302-651-7509
Cottrell@rlf.com

RICHARDS LAYTON & FINGER

October 6, 2009

VIA ELECTRONIC FILING AND HAND DELIVERY

The Honorable Vincent J. Poppiti
Special Master
Fox Rothschild LLP
Citizens Bank Center
919 North Market Street, Suite 1300
Wilmington, DE 19899-2323

REDACTED PUBLIC VERSION
FILED OCTOBER 8, 2009

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; Discovery Matter No.

Dear Judge Poppiti:

Pursuant to Federal Rule of Civil Procedure 37, plaintiff AMD hereby moves to compel Intel to produce the unredacted version of the European Commission's ("EC") Final Decision in Case COMP/C-3/37,990-Intel, dated May 13, 2009 (the "Final Decision" or "Decision"). AMD certifies that it has conferred in good faith with Intel in an effort to obtain the unredacted Decision, and that this effort has proved unsuccessful. *See* Fed. R. Civ. P. 37(a)(1).

Evidence is discoverable if the material "bears on, or … reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *McKinney v. Del. County Mem. Hosp.*, 2009 U.S. Dist. LEXIS 23625, at *5 (E.D. Pa. 2009) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). There can be no serious dispute that the Final Decision meets that standard the EC's investigation and 542-page decision involve *the same anticompetitive conduct* that is the gravamen of AMD's complaint, namely, that:

- Intel gave rebates to computer manufacturers on the condition that they buy all, or almost all, their x86 central processing units (CPUs) from Intel;
- Intel made direct payments to computer retailers on the condition that they stock only computers with Intel x86 CPUs; and

- Intel made direct payments to computer manufacturers to halt or delay the launch of specific products containing AMD's x86 CPUs and to limit the sales channels available to these products.

After a nine-year investigation, contacting 141 companies (including all the major computer manufacturers), and reviewing hundreds of thousands of pages of evidence, the EC concluded that Intel abused its dominant market position in violation of Article 82 of the EC Treaty and that "Intel has harmed millions of European consumers by deliberately acting to keep competitors out of the market for computer chips for many years."[1] The EC fined Intel a record-breaking €1.06 billion.

Courts have repeatedly found that the findings of an administrative agency on matters within its expertise and scope of authority "are plainly relevant on the issues found." *Option Resource Group v. Chambers Dev. Co.*, 967 F. Supp. 846, 850 (W.D. Penn. 1996); *In re Nautilus Motor Tanker Co.*, 85 F.3d 105, 112 (3d Cir. 1996) (contents of Coast Guard report setting forth its findings after investigation as to responsibility for oil spill "were directly relevant to the issues before the district court"); *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 269 (3d Cir. 1983) (Treasury Department findings on issue of price disparities are "plainly relevant"), *rev'd on other grounds sub nom Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 471 U.S. 1002 (1986). The EC's factual findings with respect to conduct that predicates AMD's claims in this case are relevant and thus subject to discovery.

The EC has issued a public version of the Final Decision, redacted to protect the confidential business information of Intel and various third parties. But the EC also issued an *unredacted* version of the Final Decision to Intel. Intel has refused to produce the unredacted decision to AMD in this litigation. Intel's refusal is unjustified.

First, AMD has a compelling need for the unredacted Final Decision. Although, as explained below, much of the redacted information is already in AMD's possession, there appears to be a substantial amount of information AMD has not seen. Indeed, some of the redacted information concerns conduct evidence of which AMD has been precluded from developing through discovery. The Final Decision substantially relies on third-party corporate statements, which with few exceptions have not been produced to AMD, and the Decision's redaction of certain portions of those submissions prevents AMD from proving the underlying conduct with any specificity. For example, the Decision discusses the arrangement between Intel and MSH pursuant to which MSH's "Media Markt" and other retail stores stocked only Intel-based PCs. (*See* Decision ¶¶ 580-789.) In rendering its factual findings, the Decision quotes extensively from MSH's submission to the EC regarding the secret deal for exclusivity, but those quotations are largely redacted. (*See id.*) AMD was unable to develop evidence of the Intel-

[1] Statement of Competition Commissioner Neelie Kroes, *Antitrust: Commission imposes fine of E1.06 bn on Intel for abuse of dominant position; orders Intel to cease illegal practices*, *at* http://europa.eu/rapid/pressReleasesAction.do?reference IP/09/745&format HTML&aged 0&language EN&guiLanguage en).

MSH deal because MSH, as a non-U.S. entity, declined to respond to AMD's subpoena. The unredacted decision is therefore AMD's *only* opportunity to prove what MSH disclosed to the EC regarding the anticompetitive arrangement.

Moreover, the redacted Decision discloses information that Intel should have but did not produce to AMD during discovery. Intel has made every conceivable effort to prevent AMD from obtaining relevant information concerning Intel's conduct within the relevant market but outside U.S. borders. The Final Decision shows, as AMD has contended all along, that Intel possesses or has direct access to significant additional evidence of Intel's wrongful conduct that AMD has not been provided. For example, Intel denies that it pressured Acer to delay the launch of products incorporating AMD microprocessors, citing a Letter of Intent it produced that suggests the delay was "per [Acer's] own business discretion." But the Decision cites a January 2003 email from an Acer executive to an Intel executive, which Intel did *not* produce, showing that the delay was "*REQUESTED BY INTEL'S MANAGEMENT*." (Decision ¶ 422.) The email is redacted in the Final Decision, but AMD should not be precluded from relying on it by dint of Intel's inexcusable failure to produce the email and refusal to produce the unredacted decision.

Other examples abound, and the implication is clear: only production of the unredacted Final Decision will ensure that AMD has access to all available information bearing on its claims, including the information deemed material by a respected and expert foreign competition agency in its own analysis of Intel's anticompetitive conduct. Access to this information will be of invaluable assistance to AMD in the preparation of its case, and it should be produced.

Second, the concerns for confidentiality that led to the public redactions are no barrier to production here. To start, a significant portion of the redactions cover material that has already been produced to AMD both by Intel and the third parties under the protective order in this litigation. By way of example, we attach as Exhibit A the portion of the Decision dealing with Intel's HP agreements (¶¶ 325-413), showing in bolded italics the redactions filled in from U.S. discovery sources, and as Exhibit B a side-by-side comparison of an excerpt therefrom, with and without redactions. Intel's refusal to produce the unredacted Final Decision does not protect either its own or any third party's confidential information with respect to these redactions, but as Exhibit B shows the checkerboard redacted decision obscures the import of the EC's findings. Producing the unredacted decision would make the meaning of the Decision plain to the trier of fact without compromising confidentiality.

And as to the redactions of confidential information that is not already known to AMD, such information is not protected from disclosure here. "No privilege . . . exists for confidential business information. Moreover, confidentiality does not constitute grounds to withhold information from discovery." *Youell v. Grimes*, 202 F.R.D. 643, 650 (D. Kan. 2001) (citations and quotations omitted). Indeed, the entire premise of the protective order in this litigation is that confidential material *is* discoverable the point of the order is to ensure that the material remains confidential even after it is produced. *Sonnino v. Univ. of Kan. Hosp. Auth.*, 220 F.R.D. 633, 659 (D. Kan. 2004) (holding that confidentiality was not a basis for redacting private medical information because a protective order ensured continued confidentiality); *Am. Elec.*

Power Co. v. United States, 191 F.R.D. 132, 141 (S.D. Ohio 1999) (holding that a protective order is sufficient to protect the confidentiality of insurance broker's client records). To the extent that Intel has access to relevant information including the information redacted from the EC decision Intel has a duty to produce it regardless of alleged confidentiality concerns.

Finally, comity issues raised with respect to production of the initial "Statement of Objections" do not warrant suppression of the unredacted final Decision. [redacted] But a Statement of Objections differs fundamentally from a Final Decision, and discovery of a Statement of Objections in litigation outside the EU raises policy concerns that have no application to discovery of a Final Decision. A Statement of Objections is "a procedural and preparatory document" that sets forth "purely provisional" factual and legal assessments, which remain undetermined and subject to further investigation and adjudication. (Joined Cases 142 and 156/84, *British Am. Tobacco Co. & RJ Reynolds Indus. v. Comm'n*, 1986 E.C.R. 1899 ¶ 14.) By contrast, a Final Decision constitutes the product of that adjudication and sets forth the evidence, analysis, and rationale both economic and legal on which the Commission's ultimate conclusion is based. It constitutes the final determination of the Commission after a hearing and briefing and can only be overturned by the Court of First Instance.

[redacted] Once the investigation is complete and a Final Decision identifying prohibited conduct is issued, those concerns no longer obtain. [redacted] As discussed above, given the protective order in this case, disclosure of the information redacted from the Final Decision would not be against any cognizable confidentiality interest of the third parties named in those redactions.

---

[2] [redacted]

[3] [redacted]

To be clear, AMD will suffer prejudice from suppression of the unredacted Final Decision regardless whether it is ultimately admitted at trial. This motion thus does not raise or implicate any question concerning the ultimate admissibility of the Decision, redacted or unredacted. Government agency rulings generally are admissible, s*ee* Fed. R. Evid. 803(8)(C) (excepting from hearsay rule "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth … factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness"); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 161, 170, 175 (1988) ("We hold … portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion."), including decisions by foreign agencies, *see In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d at 273-75. But Intel is sure to mount an all-out challenge to the admission of the Final Decision in any form. That inevitable dispute is relevant here only insofar as Intel's refusal to produce the unredacted decision may hinder AMD's ability to later demonstrate its admissibility before the district court. And postponing production of the Decision pending resolution of that dispute would be especially prejudicial to AMD given that the Decision is of critical import *now*, while AMD is getting ready for trial. At minimum, AMD expects that its experts will examine and consult the Decision in their trial preparation.

In any event, the Decision is discoverable, regardless of its admissibility, simply because it is relevant to the development and preparation of AMD's case. For the foregoing reasons, AMD respectfully requests that this Court compel Intel to produce the EC Decision to AMD.

Respectfully,

Frederick L. Cottrell, III (#2555)
Cottrell@rlf.com

FLC, III/ps

cc: Clerk of the Court (By Electronic Filing)
Richard L. Horwitz, Esq. (Via Electronic Mail)
James L. Holzman, Esq. (Via Electronic Mail)