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

RICHARDS LAYTON & FINGER

October 23, 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

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:

Intel makes no claim that the unredacted Final Decision lacks relevance in this litigation. Nor could it. The Decision's findings go to the heart of AMD's claims, cataloging a striking series of exclusionary acts proving Intel's abuse of monopoly power. As such, the Final Decision is unquestionably relevant and should be produced in its entirety. Nevertheless, Intel refuses to do so, REDACTED Intel's refusal is unjustified.

REDACTED

[1] REDACTED

Since Intel did not *obtain* the Decision *through access to the file*, such provisions are irrelevant here.

In fact, recent U.S. precedent makes clear that production of an unredacted EC decision by a Sherman Act defendant is not only appropriate, but U.S. discovery rules may compel such a defendant to produce even those portions of the EC's underlying investigatory files as are in its possession. In *In re Flat Glass Antitrust Litigation II*, No. 2:08-mc-00180 (W.D. Pa. filed June 20, 2008), the court allowed discovery into documents related to a Commission investigation after the defendant produced an unredacted copy of the Commission decision. (*See Flat Glass,* Order on Motion to Compel, July 29, 2009 at 2.) (Attached as Ex. A hereto). Although the Commission filed motions to constrain the scope of the allowed discovery, it notably has not requested that the unredacted Decision be returned and, to our knowledge, not even intimated that Guardian's production of the Decision violated EC law. (*See generally Flat Glass,* Affidavit of Philip Lowe filed concurrently with Motion for Reconsideration, October 10, 2009 ("Lowe Affidavit").) (Attached hereto as Ex. B).

Further, there simply is no issue of comity with respect to the Commission's redaction of Intel's confidential information. Intel concedes that REDACTED

Intel cannot withhold relevant information from discovery in this litigation on the grounds that the information is confidential. REDACTED

(*See* Lowe Affidavit at 5, fn. 12 ("voluntary cooperation should not act as a shield for companies seeking to conceal information that would otherwise be subject to disclosure/discoverable")).

Nor are there any issues of comity with respect to redactions covering information from pre-existing third party documents. REDACTED

see also Lowe Affidavit at 7 ("The European Commission does not generally oppose the disclosure of company documents that pre-existed its inspection from discovery.").)

The sole remaining issue, then, is the redaction of third party material created specifically for the Commission's investigation. And even that concern is highly circumscribed. REDACTED

The fact that certain material was covered in the redacted version of the Final Decision, which is accessible to the general public, is no guide in this regard. REDACTED

REDACTED

In light of this limited issue, REDACTED

See Minpeco, S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517, 528 (S.D.N.Y. 1987) (finding good faith efforts to provide discovery where the objecting party attested that it was not invoking secrecy laws to withhold any information about its own conduct and that it repeatedly sought to obtain waivers of its customers' bank secrecy rights); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1479 (9th Cir. 1992) (commenting on the need for "a foreign corporation asserting a blocking statute as a defense to make an *affirmative showing* of its good faith in seeking permission to disclose the information").

Intel has made no such showing here. It does not claim that it has sought permission from the Commission or third parties to uncover any of the Decision's redactions. If anything, the opposite is true. REDACTED

This is a far cry from the corporation caught helplessly between the conflicting rules of two different jurisdictions and unable to reconcile them.

Further, there is no merit to REDACTED

AMD does not have a compelling need for the redacted information. As you have already recognized, Intel's foreign conduct *is* relevant to the proof of AMD's export commerce claims in showing "exclusionary conduct on the part of Intel that foreclosed opportunities for AMD to sell its American-made microprocessors to foreign customers;" to AMD's § 2 claim in showing Intel's monopoly power in the global market; and to the § 2 claim in showing that "Intel's alleged exclusionary conduct was sufficiently material to the overall relevant market so as to violate U.S. antitrust laws." (05-441, D.I. 278; 05-1717, D.I. 365: Report on Plaintiffs' Motions to Compel, Dec. 15, 2006, at 14, 16-17, 20.)

The Final Decision addresses a stunning pattern of exclusionary conduct—including conditional rebates and naked restrictions—that is fundamental to AMD's proof of Intel's monopoly power, materiality, and AMD's loss of export opportunities to Intel. In light of Intel's failure to make any good faith efforts to meet its production obligations and AMD's compelling need for the redacted information, AMD respectfully requests that this Court order Intel to uncover the redactions in the Final Decision. [2]

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[2] REDACTED

this merely underscores the difficulties inherent in referencing a redacted Final Decision, where the author of an email is described as "[Acer Senior Executive]" and the recipient as "[Intel executive]."

Respectfully,

/s/ Frederick L. Cottrell, III

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

FLC, III/afg

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