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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. DM 35**

Dear Judge Poppiti:

Pursuant to Federal Rule of Civil Procedure 37(a), AMD moves for an order compelling Intel to provide further Rule 30(b)(6) testimony in response to 54 questions that Intel's witnesses did not answer during recent evidence preservation depositions. Each of these questions falls squarely within the seven Rule 30(b)(6) topics for which Your Honor ordered Intel to produce witnesses. (August 3, 2009 Order, attached to the Declaration of Jeffrey J. Fowler, filed contemporaneously herewith, ("Fowler Decl.") ¶ 4, Exh. B.) Importantly, Intel's so-called "sanctions motion" filed on October 14 resurrects virtually all of its various charges of AMD's purported preservation failure, REDACTED Yet, when asked questions on these precise topics, Intel's witnesses either were unable or instructed not to answer. Intel must not be permitted to accuse AMD of evidence preservation failures and then refuse to answer questions that are necessary for AMD to defend itself.

Time is of the essence because AMD's response to Intel's motion is due on November 23. The parties have met and conferred and have reached impasse.<sup>1</sup> (See Fowler Decl. ¶¶ 5-9.) AMD therefore respectfully requests that Your Honor order an expedited briefing and hearing schedule, grant this motion, and order Intel to produce witnesses to respond to the 54 questions

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<sup>1</sup>During the meet and confer process, Intel offered to respond in writing to Questions 4, 5, 6-10, 15, 18, 21-22, 34-41, 54-62, 64, 67. (Fowler Decl. ¶ 8.) Intel refused, however, to provide a witness to answer any of the remaining questions. (*Id.*) AMD agreed to consider Intel's written responses once it received them but noted that it deserved reasonable follow-up on most, if not all, of the questions. AMD will assess Intel's written responses upon receipt and narrow this motion on reply, if possible.

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and reasonable follow-up no later than November 10. Attached hereto as Exhibit "A" is a table identifying the 54 questions and responses subject to this motion.

**1. Each of the 54 Questions Are Within The Scope of Rule 30(b)(6) Topics For Which This Court Ordered Intel to Submit to Deposition.**

Intel cannot claim that these 54 questions came as a surprise. After all, Intel conducted the exact same discovery; AMD's deposition topics mirrored the topics that Intel propounded. In its motion to compel testimony on these topics, AMD made perfectly clear that each was designed to elicit testimony on the topics Intel had pursued, and that AMD would use the testimony to counter the allegations that it suspected Intel would lodge in its "sanctions" motion. (See AMD's June 12, 2009 Letter Brief at 4, Fowler Decl. ¶ 15, Exh. L.) Your Honor found these topics "appropriate" and "ripe." (See August 3, 2009 Order at 3, Fowler Decl. ¶ 4, Exh. B.)

As AMD predicted, Intel's recently-filed "sanctions motion" includes every preservation theory it conjured up during informal and formal discovery over the last year and a half. This includes several theories on which this Court limited discovery based on Intel's "fishing expeditions." (See Intel's October 14, 2009 Mot. for Order Imposing Sanctions Against AMD ("Intel's October 14, 2009 Motion") at 18, 21-22 REDACTED p. 22-23 REDACTED

Regardless of the merit of these contentions, Intel's assertions place them in issue. AMD is thus obliged to pursue the discovery necessary to demonstrate that Intel seeks to impose a standard on AMD that Intel itself did not meet.

Despite using these purported "retention issues" as a sword -- and despite clear forewarning that AMD would focus on them at deposition -- Intel produced witnesses unprepared to answer 42 questions that are nearly identical to those posed by Intel. Worse yet, contrary to Your Honor's explicit forewarning, Intel improperly instructed its witnesses not to answer an additional six of these questions solely based on a "beyond the scope" objection. (See July 20, 2009 Hrg. Tr. 53:21 - 54:9, Fowler Decl. ¶ 12, Exh. I ("an instruction in this jurisdiction only is appropriate when a privilege is indicated").) Intel fell short of its duties under Rule 30(b)(6). *United States v. Taylor*, 166 F.R.D. 356, 363 (M.D.N.C. 1996) ("producing an unprepared witness is tantamount to a failure to appear") (citing *Resolution Trust Corp. v. Southern Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993)).

Indeed, Intel's witnesses were not even prepared to answer questions derived directly from the language of the 30(b)(6) topics themselves. For example, Topic 3(a) seeks Intel's efforts to "change, monitor or prevent" the use of certain Outlook settings, including the "automatic emptying of deleted item folders." (AMD's Rule 30(b)(6) Notice, Fowler Decl. ¶ 3, Exh. A.) When AMD asked Intel's designated witness, REDACTED

Intel thus failed to prepare REDACTED on Topic

3(a), even though it moved to compel AMD to provide testimony on this *precise subject*. (See excerpt from Exh. A1 to Intel's April 24, 2009 Mot. Compel Further Depo. Responses, Questions 130-131, at 18-19, Fowler Decl. ¶ 10, Exh. G.)

REDACTED Intel's witness on "anticipation of litigation" (Topic 1), was also unprepared on such essential questions as the timing of Intel's engagement of outside counsel (Question 57), and the subject matter of any discussions about potential antitrust litigation (Question 59, 60) -- questions virtually identical to those Intel posed to AMD's witnesses. Here is just one example:

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Intel moved to compel AMD to answer these very types of questions, arguing their relevance and unprivileged nature and insisting on live testimony to permit reasonable follow up. (See Intel's May 26, 2009 Reply Supp. Mot. Compel Further Depo. Responses ("Reply to Intel Motion to Compel") at 5, Fowler Decl. ¶ 16, Exh. M (citing *Cavanaugh v. Wainstein*, 2007 U.S. Dist. LEXIS 40242, at \*33 (D.D.C. 2007) ("Intel is entitled to unfiltered, sworn testimony, including reasonable follow-up.")) This Court ordered AMD to prepare a witness to answer them, which AMD did. Faced with the exact same questions, Intel pulled an about-face and either produced an unprepared witness or asserted the privilege it previously contended did not apply. The Court should not permit this.

**2. AMD's Questions Are Relevant to Intel's So-Called "Sanctions" Motion.**

Intel cannot in good faith refuse to produce witnesses to answer 54 questions that are designed to undercut the panoply of "preservation issues" Intel alleges in its recent "sanctions" motion against AMD. For example, Intel takes deposition testimony out of context to allege that, REDACTED

-- implying that the mere existence of REDACTED

is *per se* evidence of a failure to monitor custodian compliance. (See Intel's October 14, 2009 Motion at 22.) To defend against this charge, AMD seeks answers to Question 12, Question 13, Questions 15-18, and Question 23, which pointedly inquire into Intel's own REDACTED

REDACTED Similarly, Intel has resurrected its REDACTED innuendo, badly misconstruing the facts around a REDACTED Intel speculates that this REDACTED might have induced AMD custodians to ignore its Law Department's preservation notices, repeated reminders, and REDACTED (See Intel's October 14, 2009 Motion at 21-23.) AMD moves on Questions 15-18 in order to address similar REDACTED that *Intel itself* created to enforce a clear corporate policy that REDACTED AMD believes that answers to these questions will demonstrate that Intel Legal did *nothing* to REDACTED the very basis of Intel's criticism of AMD.

### 3. Intel's Claims of Privilege Are Unfounded.

Intel characterized its own questions on the foregoing topics as seeking "underlying facts" of "fundamental issues that may be subject to future motions . . . ." (See Intel's Mot. Compel Further Depo. Responses ("Intel's Motion to Compel") at 3.) In some instances, Your Honor agreed, observing: "particularly with respect to the issue of document retention . . . you cannot hide . . . behind the shield of attorney/client privilege or the work product doctrine . . . ." (June 15, 2009 Hrg. Tr. 11:21-12:9, Fowler Decl. ¶ 13, Exh. J.) Rather than follow Your Honor's guidance, Intel stonewalled AMD on factual information similar to that it sought from AMD's witnesses. For example, AMD inquired about the "factual circumstances that may have prompted" Intel to REDACTED

(Question 3.) Intel asserted privilege, despite this Court ordering AMD to answer REDACTED

(See Intel's Motion to Compel Chart at 57-58, Fowler Decl. ¶ 11, Exh. H.) Intel bears the burden of establishing that the facts called for by each of the six questions it refuses to answer on privilege grounds is protected against disclosure. (*Smithkline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 472 (E.D. Pa. 2005).) Intel's prior positions on these issues preclude it from doing so.

### 4. Conclusion

For the foregoing reasons, AMD requests that Your Honor: (1) grant this motion and overrule Intel's objections; and (2) order Intel to make its 30(b)(6) witnesses available at AMD's outside counsel's Los Angeles office during the week of November 10, 2009.

Respectfully,

/s/ Frederick L. Cottrell, III

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The Honorable Vincent J. Poppiti

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# **EXHIBIT A**

**REDACTED IN ENTIRETY**