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October 20, 2009
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VIA ELECTRONIC FILING
The Honorable Vincent J. Poppiti
Fox Rothschild LLP
Citizens Bank Center
919 North Market Street, Suite 1300
Wilmington, DE 19899-2323

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***
Opposition to Motion to Compel Production of the Confidential Version of the European Commission's Decision in Case COMP/37.990 – Intel

Dear Judge Poppiti:

Intel submits this letter in opposition to AMD's October 6, 2009 letter, moving to compel the production of the confidential version of the European Commission's Decision in Case COMP/37.990 – Intel. Tellingly, nowhere in its letter does AMD assert that it has sought, or will seek, to obtain the confidential Decision from the European Commission (the "Commission"). That is because under the law of the European Community ("EC"), AMD has no right to receive a copy of the confidential Decision, or to access the underlying corporate submissions for use in another proceeding. So instead, AMD asks the Special Master to order Intel to disclose the information that the Commission has determined cannot be disclosed to AMD, and cannot be used outside of EC proceedings. AMD's invitation to this Court to disregard the Commission's determinations ***as to the confidentiality and use of its own Decision*** should be rejected as a matter of international comity, particularly given AMD's failure to establish any compelling need for the information.

1. AMD's Attempt to Circumvent the EC's Restrictions on Access to the Case File Should Be Rejected as a Matter of Comity. The Supreme Court has instructed that "American courts should . . . take care to demonstrate due respect . . . for any sovereign interest expressed by a foreign state." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987). The EC has articulated a strong interest in protecting the confidentiality of information obtained through the Commission's investigative measures. Article 287 of the EC Treaty imposes an obligation on all members of the EC's institutions, "even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components." (*See* Declaration of James S. Venit, ¶ 12.) Secondary legislation requires the Commission to prevent the disclosure of business secrets or other confidential information, even in its final decisions. (*Id.*, ¶¶ 13-15.)

In implementation of these fundamental principles, the EC has imposed strict limits on access to the Commission's case file, which contains submissions by entities and individuals for purposes of the Commission's investigation. These limits apply not only to the public at large, but also "on access by an antitrust complainant to the information that Commission gathers in its investigation." Amicus Br. of the Comm'n of the European Communities, *Intel Corp. v. Advanced Micro Devices, Inc.*, No. 02-572 (U.S. Dec. 23, 2003) ("Comm'n Amicus Brief in *Intel v. AMD*"), 2003 U.S. S. Ct. Briefs LEXIS 1033, at *13. Complainants have no general right to access the case file. (Venit Decl., ¶¶ 20, 37-39.) Complainants may be granted access to the file only if their complaint is rejected (something that has not occurred in the Intel case), but even then, access does not extend to business secrets and other confidential information. (*Id.*, ¶¶ 18, 20.) As the Commission emphasized in its amicus brief to the Supreme Court in *Intel v. AMD*, "[t]he Court of Justice has mandated in no uncertain terms that 'a third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets." 2003 U.S. S. Ct. Briefs LEXIS 1033, at *13.

The Commission has determined, pursuant to detailed rules and procedures, that certain portions of the Decision contain business secrets, and it has redacted those portions from the non-confidential version that AMD received. (*See* Venit Decl., ¶¶ 25-32.) For example, as AMD points out, the Commission redacted sections quoting MSH's submission regarding Media Markt. It is absolutely clear that AMD has no right to access MSH's submission or any other third-party statements specifically prepared in the context of the Commission's investigation. It is that very information, however, that AMD seeks to access by its motion. (*See* AMD's Letter at 2 ("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.").)

The Commission has repeatedly opposed such attempts by U.S. litigants to circumvent the rules on access and subvert the limits that the EC has "lawfully imposed . . . , in the exercise of its sovereign regulatory powers in its territory and pursuant to the public interest." Mem. of Comm'n of the European Communities in Supp. of Novell, Inc.'s Mot. to Quash at 15, *In re Application of Microsoft Corp.*, No. 06-MBD-10061 (MLW) (D. Mass. Apr. 5, 2006), attached as Ex. 3 to Venit Decl.[1] As the Commission has argued, compelled production in violation of those rules would harm the public interest, as it "would undermine [the Commission's] ability to initiate and prosecute future investigations by creating disincentives to cooperate with the Commission and would prejudice future investigations." *In re Rubber Chemicals Antitrust*

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[1] *See also* Comm'n Amicus Brief in *Intel v. AMD*, 2003 U.S. S. Ct. Briefs LEXIS 1033, at *13 ("[T]he Commission objects to the potential subversion of limits that the European Union has imposed, in the exercise of its sovereign regulatory powers, on access by an antitrust complainant to the information that the Commission gathers in its investigation . . . ."); *In re Application of Microsoft Corp.*, 2006 U.S. Dist. LEXIS 24970, at *11 n.5 (N.D. Cal. Mar. 29, 2006) (quoting the DG Competition's memorandum opposing Microsoft's subpoenas as "not objectively necessary but rather an attempt to circumvent the established rules on access to file in proceedings before the Commission").

Litig., 486 F. Supp. 2d 1078, 1084 (N.D. Cal. 2007); *see also* Comm'n Amicus Brief in *Intel v. AMD*, 2003 U.S. S. Ct. Briefs LEXIS 1033, at *14-15.

AMD suggests that because a protective order was entered in this case, Intel can freely turn over the confidential Decision, and that "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." (AMD's Letter at 4.) This argument ignores two critical points. First, the restrictions on disclosure were imposed by the EC and the Commission. Intel does not have the authority to unilaterally waive those restrictions. (Venit Decl., ¶¶ 33-35, 47-49.) Second, the protective order in this case governs pretrial discovery, and was entered under the "good cause" standard of Rule 26(c). *See Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1119-20, 1121 (3d Cir. 1986). A more demanding standard must be met to seal documents offered at trial, which are subject to the presumptive right of public access. *See Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988). To protect their confidential information from disclosure at trial, third parties would have to appear (some, like MSH, for the first time) and make a particularized showing that their need for continued secrecy outweighs the presumption of access. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 346 (3d Cir. 1986). Simply put, the protective order is no guarantee that the information that the Commission has determined must be kept confidential will remain so.

2. <u>The EC's Clear Restrictions on Use of the Decision Should Be Respected.</u> AMD's motion implicates another strong interest that the EC has expressed – its interest in ensuring that information gathered by the Commission is used solely for the purpose of applying Article 81 or 82 of the EC Treaty in judicial or administrative proceedings in the EU. Article 15(4) of Regulation 773/2004 explicitly states that "[d]ocuments obtained through access to the file pursuant to this Article shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 81 and 82 of the Treaty." (Venit Decl., ¶¶ 22, 41.) The Commission's Notice on Access to the File reaffirms: "Access to the file in accordance is granted on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue . . . ." (*Id.*, ¶ 23.) Article 8 of Regulation 773/2004 provides that in situations where the complainant has been granted access after rejection of the complaint, "[t]he documents to which the complainant has had access in the context of proceedings conducted by the Commission under Articles 81 and 82 of the Treaty may only be used by the complainant for the purposes of judicial or administrative proceedings for the application of those Treaty provisions." (*Id.*, ¶ 18.)

These restrictions on use continue to apply even after the Commission renders a final decision. The Notice of Access to the File warns that if a person granted access to the file uses the information "for a different purpose, ***at any point in time***, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action." (*Id.*, ¶ 23 (emphasis added).) Even more explicit is the Commission's Staff Working Paper [redacted]

> The Commission's statement of objections ***and the full confidential version of the decision*** are documents prepared specifically for the antitrust proceedings and

> contain confidential information received through investigative measures. Therefore, they and the information contained therein shall also be used only for the purpose of proceedings concerning the application of Articles 81 and 82 EC.

(Venit Decl., ¶ 24, Ex. 1 (emphasis added).) The Staff Working Paper directly refutes AMD's assertion that the Commission's concerns regarding the improper use of confidential information "no longer obtain" once the Commission's investigation is complete. (AMD's Letter at 4.)

AMD's ultimate purpose is to offer the Commission's Decision as evidence at trial – a situation the EC was seeking to prevent by restricting access to the Commission's case files and prohibiting use of the Commission's decisions in other proceedings. Intel intends to move to exclude the Decision, on several independent grounds.[2] If, however, the Decision were to be admitted over Intel's objections, equity and due process would require that Intel be afforded an opportunity to present the third-party submissions and other evidence that the Commission ignored in the Decision, and to challenge and relitigate the Commission's findings, made under EC law. AMD should not be permitted to subvert the EC's rules on non-use and confidentiality—particularly given the absence of any compelling need to do so in this case.

3. AMD Has Failed to Establish a Compelling Need for the EC's Rules to Be Disregarded in This Case. Where, as here, a motion to compel implicates a foreign state's concerns, an important consideration is whether the information sought is critical to the litigation. *See Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 522 (S.D.N.Y. 1987). "Where the outcome of the litigation 'does not stand or fall on the present discovery order,' or where the evidence sought is cumulative of existing evidence, courts have been unwilling to override foreign secrecy laws." *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992) (quoting *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 999 (10th Cir. 1977)).

AMD admits that "much" of the redacted information would be cumulative to what "is already in AMD's possession." (AMD's Letter at 2.) That is not surprising, given the volume and breadth of documents that Intel has produced in this case. As AMD stipulated in CMO 7, this case has involved "an unprecedented volume of documents, now totaling approximately twenty million party-produced documents and over two million third-party documents." (D.I. 1357.) AMD nevertheless accuses Intel of "mak[ing] every conceivable effort to prevent AMD

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[2] For example, the Commission improperly refused to consider highly relevant evidence in its Decision (which Intel is challenging on appeal on multiple grounds), attempting to justify its refusal on differences between U.S. and EC law: "[T]he Commission is not in the position to follow the legal theory in US law that determined the selection of the specific contemporaneous documents by the AMD counsels carrying out the depositions and that are at the basis of the US depositions in that US litigation, and the Commission cannot, therefore, assess how far that selection would be suitable to give a balanced view for an assessment under EC law." Provisional Non-Confidential Version of Commission Decision of 13 May 2009, ¶ 300, *at* http://ec.europa.eu/competition/sectors/ICT/intel_provisional_decision.pdf.

from obtaining relevant information concerning Intel's conduct within the relevant market but outside U.S. borders," and contends that compelled disclosure of the confidential Decision is necessary to obtain documents that Intel supposedly withheld. (AMD's Letter at 3.) There is no basis for that allegation. Indeed, the one Acer email that AMD cites as an example was in fact produced to AMD ***four*** times, and was actually TIFFed by Intel. (*See* Declaration of Daniel S. Floyd.)[3] AMD has had the benefit of broad discovery under the U.S. rules, and Intel has not withheld any information other than on privilege grounds.

AMD also argues that it needs the confidential Decision because it was unable to develop evidence relating to deals with non-U.S. entities such as Media Markt that declined to respond to AMD's subpoena. (AMD's Letter at 2-3.) But the redacted information relating to Media Markt is irrelevant – and far from critical – to AMD's claims under the Sherman Act. The Court has held that Intel's alleged foreign conduct cannot form the basis of any Sherman Act violation, because it did not have a direct, substantial and foreseeable effect in the United States. *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 563 (D. Del. 2006). The Court accordingly dismissed AMD's claims "based on alleged lost sales of AMD's microprocessors to foreign customers" and struck all the allegations in the complaint relating to foreign entities, including Media Markt. *Id.* Certainly, the outcome of this litigation does not stand or fall on whether AMD can "prove what MSH disclosed to the EC" (AMD's Letter at 3), regarding Intel's alleged arrangement with a European retailer that does not even buy microprocessors.

AMD's motion also comes four months after the close of fact discovery. As a result, Intel would be unable to depose any witnesses regarding any new information. AMD states that at minimum, it "expects that its experts will examine and consult the Decision in their trial preparation." (*Id.* at 5.) But Rule 26 requires that the initial expert report "contain a complete statement of all opinions to be expressed and the basis and reasons therefor; [and] the data or other information considered by the witness in forming the opinions." Fed. R. Civ. P. 26(a)(2)(B). The deadline for serving initial expert reports has passed. Given the already tight schedule for the completion of expert discovery, summary judgment motions, and pretrial preparation, AMD's untimely request for additional discovery should be denied.

Respectfully,

/s/ W. Harding Drane, Jr.

W. Harding Drane, Jr.

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

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[3] Moreover, AMD withdrew its request for international judicial assistance after reaching an agreement with Acer, whereby Acer agreed to produce the factual submissions and other documents that it had provided to the Commission. (D.I. 1668.)

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