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October 30, 2009

Redacted Version:
November 17, 2009

By Hand
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
Intel's Opposition re Discovery Matter (DM 35)

Dear Judge Poppiti:

Intel submits this letter in response to AMD's motion to compel further deposition testimony filed on October 23, 2009 (DM 35). AMD's motion is meritless, and it has not shown any direct relationship between the topics on which it moves and the pending sanctions motions. In short, balancing the lack of AMD's need for further answers and the timing of this motion, Intel believes that it is past time to end retention discovery. Although it believes its responses and instructions not to answer were appropriate, in an effort to end that discovery, Intel agreed, during the meet and confer process, to provide supplemental responses and/or clarifications regarding 28 of the 54 deposition questions that are the subject of AMD's motion. Intel has continued to review the deposition transcripts, and will provide supplemental responses and/or clarifications for an additional 15 questions. Attached to this letter is a chart containing Intel's responses and/or clarifications for these 43 questions – the majority of the questions raised by AMD's motion – as well as a brief summary of Intel's position on each of the remaining questions at issue.[1] On this record and particularly given the imminent trial date and this motion's lack of any connection to the pending sanctions motions, there is no justification for additional deposition testimony.

AMD has not demonstrated, nor can it, that these questions are necessary to resolve any issue, let alone worthy of additional motion practice or further depositions. AMD claims it needs further deposition testimony to respond to Intel's sanctions motion. *See* Docket # 2225, 10/23/2009 AMD Ltr. to Court, at 1-2. Notably, AMD does not suggest that the questions relate to its own sanctions motion, but rather that the additional testimony – on marginal issues – will be used solely for defensive purposes. *Id.* However, AMD offers no reasonable explanation why these questions are relevant to its defensive motion. For example, several of AMD's

[1] *See* Ex. A (summary chart). Intel provides these supplemental responses subject to a non-waiver agreement. *See* Ex. B (correspondence confirming non-waiver agreement).

questions focus on when Intel reasonably anticipated this litigation. While Intel's motion for sanctions establishes that AMD reasonably anticipated litigation (and thus had an obligation to retain documents) earlier than AMD admits, it does not follow that the date Intel reasonably anticipated litigation is relevant to that inquiry. The date Intel reasonably anticipated litigation is *not* a defense to AMD's tardy document retention. If AMD believes that Intel reasonably anticipated litigation at a time earlier than Intel states, AMD should have alleged as much in its offensive motion. It did not. Therefore, AMD has no need for this information, and a fishing expedition is not justified at this late stage.

In any case, in an effort to compromise and put the matter behind it, Intel *now answers many of these questions.* In light of Intel's responses, this dispute now boils down to two overarching issues:

First, without seeing Intel's supplemental responses, AMD claims it is entitled to additional deposition time to conduct follow-up questioning about them. As will be evident from the questions and responses at issue (*see* Ex. A), additional deposition time is unnecessary and inappropriate. At this late hour, with both sides' sanctions motions on file and additional briefs to be filed shortly, as well as a looming trial date, additional deposition time should be permitted only if absolutely necessary. AMD has not demonstrated such necessity. Intel has provided straightforward, good faith responses to these questions and the minimal value of additional deposition time, if any, is far outweighed by the burden and expense of scheduling additional depositions for several witnesses relating to responses that, on their face, do not require follow-up. The questions at issue are, at best, tangential to the parties' arguments, and, in light of the additional responses Intel has provided, simply do not warrant a further substantial investment of time and effort.

Second, AMD and Intel disagree as to the propriety of the remaining 11 questions. Intel's objections and/or responses are valid and no additional responses should be ordered. These questions seek to invade the attorney-client privilege and work product doctrine, ask for information beyond the scope of AMD's deposition notice or for which no 30(b)(6) witness could reasonably have been prepared, or some combination thereof. In any case, AMD is not entitled to additional deposition testimony. Furthermore, for many of these questions, AMD has already obtained testimony from other deponents.

1. Intel's Supplemental Responses Are Sufficient

Intel offers supplemental responses to at least three general categories of questions for which AMD seeks additional testimony. These responses satisfy AMD's inquiries and disprove the need for follow up.

a. [redacted]

The first category of questions to which Intel has provided a supplemental response are [redacted] For example: [redacted] (Ex. A, Question 6). Intel has responded that [redacted] (Ex. A) This fully answers AMD's question.

It is hard to imagine any reasonable follow up questions that could arise in the context of AMD's admittedly defensive discovery. AMD claims that it needs follow up so that it can respond to Intel's sanctions motion by claiming parallels between Intel's retention practices and its own. At this point, AMD knows or should know more about Intel's retention practices than anyone could ever want to, and the level of granularity of these questions is telling. AMD is seeking to ask cumulative questions on trivial topics not necessary to AMD's defense.

b. [redacted]

Intel has also provided supplemental responses to a series of AMD questions [redacted] AMD's request for follow-up ignores the fact that [redacted] There is no reason to think that Intel could offer additional testimony [redacted]

c. [redacted]

The last category of questions for which Intel has provided supplemental responses are those that seek to show – unsuccessfully – [redacted] Intel's supplemental responses make this point crystal clear. The fact that AMD wishes for different answers should not entitle them to additional time. AMD has its answers, and no further deposition time need be allotted.

2. The Remainder of AMD's Questions Are Improper and Intel's Responses and Objections Should Stand.

Intel should not be required to provide a witness for the questions to which it does not now submit a supplemental response. These questions are generally improper for the two reasons addressed below.

a. Outside the Scope and Improper Rule 30(b)(6) Questions.

First, several of AMD's questions (a) are well beyond the scope of AMD's deposition notice and the Court's order allowing testimony on these topics, (b) sought information for which no reasonable 30(b)(6) witness could reasonably have been prepared, and (c) relate to topics for which AMD has already received substantial amounts of testimony. These questions are nothing more than an improper fishing expedition which, at most, could lead to evidence of marginal relevance, while imposing unreasonable burden on Intel and its witnesses. And many of them are repetitive of past AMD fishing expeditions.

For example, Intel's corporate representative for Topic 3, which calls for testimony about the technical specifications of Intel's email system, was asked, [redacted]

[redacted] (Ex. A, Question 14). [redacted] AMD could not reasonably have expected him to have been prepared to answer this question and, unsurprisingly, he responded [redacted] *Id.* AMD should not have expected otherwise, particularly since [redacted] were not within the deposition topics the Court allowed.

Intel should not be forced to provide yet another deponent to answer these questions; AMD has already received testimony on these issues. For example, AMD has already deposed [redacted] regarding [redacted] The fact that AMD wants *different* answers is not a sound basis for renewed deposition time.

b. Attorney-Client Privilege and Attorney Work Product Issues. .

Second, AMD asks questions that relate to the [redacted] These questions directly invade the attorney-client privilege and work product doctrine. For example, AMD asks, [redacted] (Ex. A, Question 66). Such questions invade the communications and thought processes of Intel's counsel and are therefore improper. Intel should not be forced to provide a witness to respond to questions that would invade the privileges.

* * *

At this point in the litigation, AMD has already been allowed many depositions, discovery responses and document productions related to Intel's retention practices. Both parties have filed their sanctions motions, and the trial on the merits is fast approaching. Given these circumstances, discovery should be limited to situations where the requesting party can show compelling need. AMD has identified no such need here, nor has it established how these questions are necessary to its defense of Intel's motion. The Court provided AMD a limited amount of time for these depositions. AMD has used it, and has gotten complete answers to all reasonable and appropriate questions. Now, AMD seeks to engage in "quiz show" discovery, re-asking trivia questions that have already been answered. Enough is, finally, enough.

We look forward to addressing these issues with Your Honor on November 5, 2009.

Respectfully,

/s/ W. Harding Drane, Jr.

W. Harding Drane, Jr. (I.D. No. 1023)

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

Redacted Version: November 17, 2009

Exhibit A

FILED UNDER SEAL

Exhibit B

From: Fowler, Jeffrey
To: 'Dillickrath, Thomas' ; Herron, David ; Pearl, James
Cc: Pickett, Donn; Rocca, Brian; Simmons, Shaun M. ; Wieder, Eric
Sent: Wed Oct 28 17:00:48 2009
Subject: RE: AMD v Intel

Tom -

AMD agrees.

Jeff

From: Dillickrath, Thomas [mailto:DillickrathT@howrey.com]
Sent: Tuesday, October 27, 2009 5:35 PM
To: Fowler, Jeffrey; Herron, David; Pearl, James
Cc: donn.pickett@bingham.com; brian.rocca@bingham.com; Simmons, Shaun M.; Wieder, Eric
Subject: AMD v Intel

Jeff,

As you know, Intel will be providing supplemental responses and/or clarifications to several questions that are the subject of your motion to compel. Can you please confirm AMD's agreement that Intel's production of the amended responses shall not constitute a waiver of any applicable attorney-client privilege or protection relating to the subject matter of the question, or on any other subject matter? Thanks.

Tom

Thomas J. Dillickrath
Partner