

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ADVANCED MICRO DEVICES,)	
)	
Plaintiffs,)	Civil Action No.
)	05-441-JJF
v.)	
)	
INTEL CORPORATION,)	
)	
Defendant.)	

Teleconference in above matter taken pursuant to notice before Renee A. Meyers, Registered Professional Reporter and Notary Public, in the offices of Blank Rome, LLP, 1201 North Market Street, Wilmington, Delaware, on Tuesday, November 20, 2007, beginning at approximately 1:00 p.m., there being present:

BEFORE:

THE HONORABLE VINCENT J. POPPITI, SPECIAL MASTER

APPEARANCES:

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SPECIAL MASTER POPPITI: Let's go back, for our court reporter's purpose, please, and make a roll call of who's present.

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MR. COTTRELL: Yes, Your Honor. In Wilmington, for AMD, it's Fred Cottrell and Chuck Diamond, Linda Smith, and Bo Pearl from O'Melveny & Myers, also for AMD.

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SPECIAL MASTER POPPITI: Thank you.

MR. COOPER: For Intel, here in L.A. is Bob Cooper, Dan Floyd, Kay Kochenderfer, and Rich Levy.

SPECIAL MASTER POPPITI: Thank you.

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14

MR. HORWITZ: And also for Intel, it's Rich Horwitz in Wilmington.

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MR. BERNHARDT: And Darren Bernhardt in

Washington.

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SPECIAL MASTER POPPITI: Thank you, sir.

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MR. RIPLEY: And Richard Ripley in

Washington.

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SPECIAL MASTER POPPITI: Thank you.

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MR. HOLZMAN: For the Class, Jim Holzman in Wilmington, and I think Dan Small of Cohen, Milstein is on the phone.

24

SPECIAL MASTER POPPITI: Yes. I did hear

1 his voice earlier.

2 MR. DOVE: Tom Dove from The Furth Firm,
3 Your Honor.

4 SPECIAL MASTER POPPITI: Thank you. Is that
5 it, then, please?

6 Okay. I gather that the order of business
7 today is to discuss the proposed order regarding a
8 completion of third-party document production.

9 Who is going to carry the ball on that,
10 please?

11 MR. DIAMOND: Your Honor, Chuck Diamond of
12 O'Melveney on behalf of AMD. Why don't I begin, and I
13 think it might be useful just to give you the current
14 lay of the land with respect to third-party production.

15 SPECIAL MASTER POPPITI: Okay.

16 MR. DIAMOND: We are talking about the
17 production of, by and large, custodian documents,
18 documents from the files of third parties as contrasted
19 with transactional data that we have also requested of
20 third parties. That's proceeding separately on a
21 separate track. We are making reasonably good progress
22 but we didn't want to mix the two issues together.

23 SPECIAL MASTER POPPITI: Okay.

24 MR. DIAMOND: But you should be aware that

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1 production of information is ongoing simultaneously with
2 the document production.

3 MS. SMITH: This is Linda Smith. Your
4 Honor, of course, you would remember this because of the
5 recent Frys hearings.

6 SPECIAL MASTER POPPITI: Yes. I am mindful
7 of that. Thank you.

8 MR. DIAMOND: Collectively, the parties have
9 subpoenaed roughly 70 third parties. I think it's fair
10 to say we are actively approximately pursuing 50 of the
11 70. A number of them have dropped out for
12 jurisdictional reasons or otherwise, but there are 50
13 third parties that we are interested in getting complete
14 document productions from. Of those 50, by our count,
15 18 have already completed their document production so
16 we are talking about a balance of roughly 30.

17 There are eight or so third parties with
18 whom we have no agreement or understanding yet in place,
19 at least an enforceable agreement or understanding,
20 although two or three of them have reached agreements
21 with us on the custodian document but they are holding
22 that hostage until we conclude negotiations on the
23 transactional data side of this.

24 SPECIAL MASTER POPPITI: I understand.

1 MR. DIAMOND: So we are basically talking
2 about five or six that need to be prodded into coming to
3 terms with the parties and probably an additional 25
4 that need to be prodded into completing their
5 productions pursuant to agreements they have already
6 made with us.

7 SPECIAL MASTER POPPITI: Okay.

8 MR. DIAMOND: Obviously, both AMD and Intel
9 are trying to be, you know, sensitive to the burdens
10 that this collision has put on the third parties. By
11 and large, these third parties are all of our customers
12 and no one wants to unduly alienate them by pressing
13 very hard on the litigation front. Yet, at the same
14 time, since this case is all about restrictions,
15 supposedly, imposed on customers' freedom of choice,
16 their document productions are not only integral to the
17 discovery but really a very essential part of it.

18 That being said, you know, we had sort of
19 sought out a strategy or procedure by which we could
20 prod these document productions along at a faster clip
21 by establishing an end date or at least a prospective
22 end date that has court endorsement, yet, at the same
23 time, creating a procedure that has a safety valve for
24 those third parties that may well have some exigencies

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1 that would permit compliance with an early completion
2 date.

3 And I think Mr. Floyd and I have gone back
4 and forth in a number drafts and have come up with what
5 we think is sort of a reasonable approach to, you know,
6 the iron fist in the glove hand.

7 There are really only two issues that I
8 think separate us in terms of the content of the order,
9 and that is the target completion date, and, secondly,
10 what the third parties are expected to have done by the
11 completion date.

12 SPECIAL MASTER POPPITI: Right.

13 MR. DIAMOND: We have proposed February 15th
14 because it is in accord with the completion date that
15 the parties have agreed to and the Court has ordered
16 with respect to party production.

17 SPECIAL MASTER POPPITI: Right.

18 MR. DIAMOND: And it, you know, for the
19 reasons I have already explained, getting discovery
20 underway in earnest really is going to require
21 completion of both party discovery as well as
22 third-party discovery.

23 I will let Mr. Floyd or Mr. Cooper speak for
24 themselves. They would have proposed a later date. You

1 know, quite frankly, we are fully prepared to
2 accommodate later dates if the third parties come to us
3 in meet and confers and tell us why they can't, in good
4 faith, achieve a February 15th compliance.

5 On the other hand, I think if we are going
6 to put some teeth into this and really get people to
7 take it seriously, the earlier the completion date, the
8 more likely we are going to get reasonable responses to
9 it. If folks just see something looming out there far
10 on the horizon, it's not really the same incentive as
11 February 15th, and February 15th is in accord with the
12 date that the Court has already set for third-party
13 discovery.

14 SPECIAL MASTER POPPITI: Okay.

15 MR. DIAMOND: The second issue is what the
16 parties will be -- what the third parties will be
17 expected to have done by whatever deadline is set. What
18 we have asked for is substantial completion of their
19 production, and what Intel has counter-proposed is a
20 good faith attempt to comply.

21 I think if we are going to attempt to induce
22 compliance making this subject to a good faith effort is
23 really not -- is not consistent with the objectives of
24 this order.

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1 You know, everybody will make a good faith
2 attempt and claim that their attempts are in good faith.
3 Good faith attempts are not going to get depositions
4 started in this case. Substantial compliance will.

5 And, you know, obviously, if parties are
6 acting in good faith, and, as I have said, they can't
7 comply with the February 15th date, or whatever date the
8 Court would choose instead of February 15th, we have a
9 process by which the parties will meet and confer with
10 third parties and we will establish such later date.

11 So I really don't think that the standard
12 ought to be, you know, make a good faith effort at this,
13 try if you can, but you are not going to be held to it.
14 We really ought to put some teeth to this and have a
15 deadline that, at least facially, is meaningful.

16 SPECIAL MASTER POPPITI: I gather by your
17 comments before, certainly before I hear from the other
18 side, that you would be concerned on the enforcement end
19 if there were an application to me on the issue of
20 either substantial compliance or good faith effort, that
21 the good faith effort standard could result in filings
22 that are much more significant, hearings that are much
23 more complicated than, perhaps, a substantial
24 compliance?

1 MR. DIAMOND: I would be very concerned
2 about that, very concerned about opening this up to
3 really undue litigiousness, and you have already seen a
4 degree of litigiousness on the part of some of our third
5 parties. It, you know, unless we make this bright
6 lined, I think you are just inviting that.

7 SPECIAL MASTER POPPITI: Okay. Please, who
8 am I going to hear from?

9 MR. COOPER: This is Bob Cooper, Your Honor.
10 Very briefly, we focused on the March date primarily
11 because we think the other date is unrealistic. Some of
12 these major OEMs have not really been -- the whole
13 process didn't start until very late so it's not
14 realistic to expect them to make a February 15th date.
15 We have had some differences with AMD over the number of
16 custodians, for example. We have been prepared to back
17 off on the number of custodians that we would be
18 expected to produce on these OEMs to reduce their
19 burden. And, in general, I think it's fair to say that
20 AMD has pushed for a large number of custodians which
21 increases the burden, so under all those circumstances,
22 we think that March 15 is the appropriate date.

23 We also don't know what "substantial
24 compliance," you know, means.

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1 SPECIAL MASTER POPPITI: Before you get to
2 substantial compliance -- and I certainly would have the
3 same question, but before you get to that, let me focus
4 on the date for a moment -- with respect to those third
5 parties where you have achieved an agreement, has that
6 agreement encompassed a date by which discovery would be
7 complete?

8 MR. COOPER: Well, I mean, the answer is yes
9 and no. I think we reached an agreement ultimately with
10 IBM back in January 2007 that they researched, I think
11 in that case, AMD insisted on 30 custodians and IBM said
12 they would do it in 60 days and they still haven't met
13 that schedule. It's just that we know what a huge
14 undertaking it is, so we suggested the date of March 15
15 just to be acting in good faith and try to come up with
16 a realistic date.

17 Now, our language is a little different. It
18 would require -- it would require the -- a good faith
19 effort to complete production, not just to substantially
20 do so.

21 SPECIAL MASTER POPPITI: Isn't the good
22 faith standard a little more difficult to get a handle
23 on?

24 MR. COOPER: As a practical matter, maybe it

1 is. I don't know how -- I am not sure what
2 "substantial" means either, however --

3 SPECIAL MASTER POPPITI: Well, I mean, put
4 it on my desk, if you would. I mean, look at it from
5 that perspective. I am not wanting to see things that
6 are going to drive you to dispute, but if you put it on
7 my desk and the dispute is over whether there is good
8 faith as opposed to whether there is substantial, and
9 substantial has some degree of relationship to the
10 volume, I would expect, or to the expected volume, at
11 least there is something to measure as opposed to having
12 a hearing that talks about what was done, when was it
13 done, the manner in which it was done, whether more time
14 would have been needed, whether there was communication
15 with respect to the amount of time, and it just seems to
16 me -- and please help me if you think this is not the
17 case -- that the hearing would have a much different
18 character to it.

19 MR. COOPER: That may be right, Your Honor.
20 This is not anything we feel strongly about. We were
21 trying to come up with a more realistic date --

22 SPECIAL MASTER POPPITI: Sure.

23 MR. COOPER: -- and impose an obligation
24 that --

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1 SPECIAL MASTER POPPITI: Maybe my question
2 is for the both of you, then.

3 If what we are looking for is compliance,
4 and I expect that that is everyone's bottom line, you
5 know, let's get the discovery finished in a fashion that
6 is complete, then why would we not want to -- and I
7 understand the need to respect what we are doing here,
8 that these are -- there are business relationships that
9 no one wants to interfere with, and, yet, important
10 business relationships in terms of having access to that
11 information, why wouldn't you want me to be looking at a
12 -- I will pick the date -- March 15 date and say,
13 Complete it by then, and then if there is good reason
14 for it not having been completed, then I would expect
15 there would be some discussion in the nature of meet and
16 confer, and if the discussion didn't result in an
17 amicable resolution of the conflict, then I'd see some
18 paperwork.

19 MR. COOPER: From Intel's viewpoint, Your
20 Honor, that makes perfect sense to us. I think that
21 would be just fine.

22 MR. DIAMOND: I think that would be fine
23 with us as well. I will tell you what I had in mind
24 when we put the qualifying adjective in front of

1 "comply."

2 SPECIAL MASTER POPPITI: Sure.

3 MR. DIAMOND: And this was something that
4 Dan Floyd raised in early discussions with me. But I
5 think we can take care of this in a different way. We
6 do have agreements with various third parties that will
7 allow the parties to the litigation to, so to speak, go
8 back to the well.

9 SPECIAL MASTER POPPITI: Sure. I understand
10 that.

11 MR. DIAMOND: For example, Dell and HP are
12 producing pursuant to an agreed list of search terms,
13 but since those search terms were put together without
14 the benefit of samples of, large samples of their
15 documents, we reserved the right to go back to them with
16 some additional search terms if the documents indicated
17 that was warranted.

18 SPECIAL MASTER POPPITI: Right.

19 MR. DIAMOND: That's going to happen after a
20 completion date. So, that was the reason we said
21 "substantially complete" because some of these
22 agreements actually contemplate later sort of remedial
23 compliance, but I think what we could do is there was a
24 clause here which says "unless otherwise agreed," or

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1 "unless otherwise already agreed, the parties are
2 directed to complete," that would, I think, take care of
3 our Dell situation and our HP situation.

4 SPECIAL MASTER POPPITI: Okay.

5 MR. DIAMOND: Or we could just leave it out
6 and deal with it on a meet and confer as was necessary.
7 I think probably --

8 SPECIAL MASTER POPPITI: Either way would
9 fix the --

10 MR. DIAMOND: In the interest of simplicity,
11 I think I would prefer the latter.

12 SPECIAL MASTER POPPITI: Okay.

13 MR. COOPER: That's fine with us.

14 SPECIAL MASTER POPPITI: And then the other
15 thing I would suggest, if this is important for purposes
16 of the parties' reading it this way, certainly, anyone
17 reading this is going to understand, I would anticipate,
18 that -- let me just look at the way the language is
19 written. If it's important to -- give me one second
20 here, please. No, it's not in the form of a
21 stipulation, so maybe it does what you are expecting it
22 to do, and, that is, you had some discussion about it,
23 you brought the matter to me, I have heard your
24 respective views, and by virtue of making some

1 determination or at least making a recommendation that
2 points you in a certain direction, the parties will see
3 that it was Court action as opposed to the Court just
4 simply taking something that you both stipulated to.

5 If it's important to leave it that way,
6 that's fine.

7 MR. DIAMOND: That was our preference.

8 MR. COOPER: That makes sense.

9 SPECIAL MASTER POPPITI: If you have reached
10 a different substantial agreement, then I am certainly
11 prepared to take whatever document you send over and I
12 am happy to be looking at that either later today or
13 through the end of the business day tomorrow.

14 MR. COOPER: Very good, Your Honor.

15 SPECIAL MASTER POPPITI: When would you like
16 me to look for it?

17 MR. DIAMOND: We will have that to you
18 before the end of the day today.

19 SPECIAL MASTER POPPITI: Okay. Any other
20 matters, then, please?

21 MR. COOPER: I wanted to mention one thing
22 just to tee it up. As you know, we are getting ready
23 for depositions of witnesses with respect to the
24 causation culpability issue.

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1 SPECIAL MASTER POPPITI: Yes.

2 MR. COOPER: And in the case of 30(b)(6)
3 witnesses that we have been asked to produce, there will
4 also be witnesses who have extensive knowledge,
5 actually, as percipient witnesses.

6 SPECIAL MASTER POPPITI: Okay.

7 MR. COOPER: And we have had some discussion
8 back and forth about whether AMD is entitled to two
9 depositions or one deposition doing both at the same
10 time, and I think we sort of ended up at a point where I
11 am a little unclear and we may want to submit -- we may
12 want to submit something to you so we can sort this out
13 before we proceed.

14 SPECIAL MASTER POPPITI: Okay.

15 MR. COOPER: But, basically, we took the
16 position that AMD ought to plan to take one deposition
17 of the two witnesses that we would be submitting as
18 30(b)(6) witnesses because they also cover, as
19 percipient witnesses, many of the key facts. And the
20 response we got was something along the lines of, Well,
21 that's sort of our thought, but we didn't get a
22 commitment that they would -- that AMD would strive to
23 achieve that goal, that is, to cover both the facts and
24 the 30(b)(6) issues in the single deposition.

1 So I think we may want to tee that up for
2 Your Honor to weigh in on before we go forward with
3 those.

4 Now, the document production with respect to
5 causation and culpability will be completed in early
6 December, and, therefore, right now, we are talking
7 about these depositions starting sometime roughly mid
8 December.

9 SPECIAL MASTER POPPITI: Okay.

10 MR. COOPER: So that's where we stand. We
11 could submit something in writing, perhaps, if that's
12 okay with you, Chuck?

13 MR. DIAMOND: Your Honor, this is more of a
14 Mark Samuels issue than mine, and he is making his way
15 back from the East Coast today and couldn't be on the
16 call. I don't know that we really have a dispute here.
17 I think the law is pretty clear that you are entitled to
18 conduct 30(b)(6) depositions and if a witness produced
19 pursuant to a 30(b)(6) notice also is a percipient
20 witness, you are entitled to take a deposition of the
21 witness in his individual capacity, and I don't think
22 that Mr. Cooper is disputing that point.

23 The question really is one of convenience of
24 the witnesses, and we have indicated that to the extent

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1 we can do so without compromising, you know, any
2 legitimate interests, we are happy to conduct the
3 30(b)(6) portion of the deposition, and then when that's
4 concluded, go into the percipient portion of the
5 deposition.

6 The issue on the table and the reason that
7 we put our foot in the door a little bit to leave a
8 crack in it is one of production of this -- of timing of
9 the completion of document production.

10 We have been agitating for quite some time
11 to take the 30(b)(6) portions of these -- the 30(b)(6)
12 depositions that we noticed and we are prepared -- have
13 been prepared to do so on the basis of the documents we
14 already have in hand and would like to go forward at the
15 earliest opportunity that these witnesses can be made
16 available.

17 Obviously, the preparation of a witness who
18 is being defended, both in an individual capacity and a
19 30(b)(6) capacity, is more complicated than if it's just
20 30(b)(6), and we didn't want that to delay the 30(b)(6)
21 depositions.

22 Plus, Intel is going back and undoing
23 certain redactions which are not likely to get finished
24 for another couple of weeks, and we didn't want to be

1 put in a position where we suddenly got documents after
2 the completion of a combined 30(b)(6) individual
3 percipient witness deposition where we, you know, we
4 were handed documents concerning that witness and we
5 were foreclosed from conducting an examination on the
6 basis of those documents.

7 So, what we said is we will start, we will
8 do the 30(b)(6) depositions as soon as you can produce
9 the witnesses; we will also depose them in their
10 individual capacities, but if there is later reason for
11 us to ask that the witness be produced in an individual
12 capacity for further examination, we were not
13 stipulating away our right to do that.

14 And I don't know that that should be
15 disagreeable. You know, if that's the case, I don't
16 know that we have a lot of issues on our hands here.

17 MR. COOPER: As a practical matter, you will
18 have the documents before any realistic date on the
19 depositions in any event, and this situation is a bit
20 different than the normal one because we have been
21 engaged in an ongoing, continuous, you know, recitation
22 of underlying facts through informal meetings and all
23 kinds of filings.

24 I think maybe there is no dispute, then,

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1 because if we have these documents to you by the end of
2 November, early December, which I understand we will, I
3 think we are talking about depositions, at the earliest,
4 in mid December, and we can -- if they move to early
5 January, I don't know if that would make any difference
6 in terms of timing.

7 MR. DIAMOND: We really would like to get
8 these depositions done, or at least substantially done,
9 I hate to use that word, in 2007. 2008, we were hoping
10 to focus on merits discovery. But, you know, I don't
11 think there is an issue here. If we get the documents
12 in early December, we will conduct the depositions, both
13 individual and 30(b)(6), in one setting.

14 That's not to say that circumstances won't
15 arise when we get down the road in merits discovery
16 where we have reason to take a 30(b)(6) but we are not
17 yet prepared to conduct an individual deposition of a
18 30(b)(6) representative.

19 MR. COOPER: We have no issue with that
20 proposition.

21 MR. DIAMOND: Okay.

22 SPECIAL MASTER POPPITI: Then the only thing
23 I would say is if there ultimately winds up to be a
24 dispute, please don't hesitate to make the call and do

1 something that may not be in sync with our Thursday
2 calls with as quick a turnaround as makes sense for the
3 process in terms of commencing those depositions, and I
4 commit to making sure that you get turnaround from this
5 end.

6 MR. DIAMOND: Okay.

7 MR. COOPER: Very good.

8 SPECIAL MASTER POPPITI: Any other matters,
9 then, please? All right. Thank you all. I do
10 apologize, again, for the delay at the front end, and
11 everyone have a safe, healthy, and happy Thanksgiving.

12 (The teleconference was concluded at 1:45
13 p.m.)

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1 C E R T I F I C A T E

2 STATE OF DELAWARE:

3 NEW CASTLE COUNTY:

4 I, Renee A. Meyers, a Registered Professional
5 Reporter, within and for the County and State aforesaid,
6 do hereby certify that the foregoing teleconference was
7 taken before me, pursuant to notice, at the time and
8 place indicated; that the teleconference was correctly
9 recorded in machine shorthand by me and thereafter
10 transcribed under my supervision with computer-aided
11 transcription; that the foregoing teleconference is a
12 true record; and that I am neither of counsel nor kin to
13 any party in said action, nor interested in the outcome
14 thereof.

15 WITNESS my hand this 20th day of November A.D.
16 2007.

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REGISTERED PROFESSIONAL REPORTER
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(Expires January 31, 2008)