

FREDERICK L. COTTRELL, III
DIRECTOR

RICHARDS, LAYTON & FINGER

A PROFESSIONAL ASSOCIATION
ONE RODNEY SQUARE

920 NORTH KING STREET
WILMINGTON, DELAWARE 19801

(302) 651-7700

FAX: (302) 651-7701

WWW.RLF.COM

Direct Dial
(302) 651-7509
COTTRELL@RLF.COM

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REDACTED
-PUBLIC VERSION-

BY ELECTRONIC MAIL & HAND DELIVERY

The Honorable Vincent J. Poppiti
Special Master
Blank Rome LLP
Chase Manhattan Centre, Suite 800
1201 North Market Street
Wilmington, DE 19801-4226

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; and Phil Paul, et al. v. Intel Corporation, C.A. 05-485-JJF-DM 14

Dear Judge Poppiti:

Advanced Micro Devices, Inc., AMD International Sales & Service, Ltd., and Class Plaintiffs (collectively "Plaintiffs") hereby move for an Order compelling the deposition of Intel's Lenovo China Account Manager, Mr. Edward Ho ("Ho"), on June 18.¹

PRELIMINARY STATEMENT

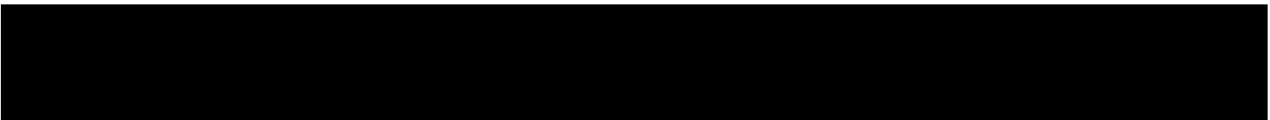
After taking nearly five weeks to respond to AMD's request for a date for Mr. Ho's deposition,² Intel now refuses to make Mr. Ho available at all. It says that Mr. Ho "is not a managing agent of Intel" and therefore not subject to a notice of deposition under Rule 30(b)(1).³

¹ AMD has issued a deposition notice for Mr. Ho to appear on June 18 in Menlo Park, California. Notice of Taking Deposition of Edward Ho (D.I. 650 in C.A. No. 05-441-JJF) (May 16, 2008), attached hereto as Ex. A. Because Ho resides in China, AMD has told Intel that it is open to deposition venues other than the United States, including Hong Kong, which unlike China, permits voluntary, American-style depositions.

² Using the deposition notification procedures agreed to by the parties, AMD notified Intel on April 7 that it intended to depose Mr. Ho. Letter from B. Barmann, Jr. to S. Pirnazar (April 7, 2008), attached hereto as Ex. B. Despite repeated inquiries, Intel did not notify AMD that it intended to refuse to produce Mr. Ho until May 12, 2008. Plaintiff's also met and conferred with Intel in an attempt to reach agreement on this issue. See Certification of James M. Pearl in

In determining whether an employee is a “managing agent” subject to deposition by notice, courts look to whether the employee is vested with some form of authority at the company and whether that employee can be expected to testify loyally and in the corporation’s interests.⁴ Mr. Ho comfortably fits within the definition of managing agent.

Edward Ho is not merely some low-level Intel salesman. He is instead the No. 2 in command of Intel’s *third largest worldwide* OEM account, Lenovo. Mr. Ho is *the* account manager for Lenovo China, supervising a large team of employees while answering only to the executive who manages the global Lenovo account. Before deciding not to produce Mr. Ho, Intel freely admitted that Mr. Ho’s job makes him central to the case. In its Rule 26(a) disclosures, out of Intel’s 86,000 employees, Intel identified Mr. Ho as one of only 73 Intel employees with information relevant to AMD’s allegations and as a potential trial witness.⁵ Then, in June 2006, after a thorough investigation, Intel again confirmed Mr. Ho’s importance by identifying him as one of its 205 “Top 20%” custodians, a distinction reserved for the “most important custodians” and those “likely to be called as witnesses at trial.”⁶ While such Intel admissions alone are enough to overcome the “modest” burden⁷ of showing that he is a managing agent, the documents produced by Intel leave no question that he is.



Support of Plaintiff’s Request to Compel the Deposition of Mr. Edward Ho, attached hereto as Ex. C.

³ Letter from J. Kress to B. Barmann, Jr. (May 12, 2008), attached hereto as Ex. D. Intel also asserts as one of its excuses for not producing Mr. Ho its belief that Mr. Ho’s activities relate only to Lenovo China. [Redacted]

More importantly, Intel’s argument again ignores the Court’s December 15 ruling allowing discovery concerning Intel’s exclusion of AMD from the *worldwide* market. *See* Special Master’s Report and Recommendations on Plaintiffs’ Motion to Compel (D.I. 278 in C.A. No. 05-441-JJF) (Dec. 15, 2006).

⁴ *In re Honda Am. Motor Co. Inc. Dealership Relations Litig.*, 168 F.R.D. 535, 540-41 (D. Md. 1996) (collecting cases).

⁵ *See* Initial Disclosures of Intel Corporation and Intel Kabushiki Kaisha Pursuant to Rule 26(a)(1), at 6 (Oct. 6, 2005), attached hereto as Ex. E.

⁶ *See* Custodian Designations of Intel Corporation and Intel Kabushiki Kaisha Pursuant to the Stipulation and Order Regarding Document Production (June 1, 2006); Stipulation and Proposed Order Regarding Document Production, at 3 (D.I. 122 in C.A. No. 05-441-JJF) (May 17, 2006), collectively attached hereto as Ex. F.

⁷ *See Dubai Islamic Bank v. Citibank, N.A.*, No. 99 Civ. 1930, 2002 WL 1159699, at *4 (S.D.N.Y. May 31, 2002) (explaining that “the burden is ‘modest,’ and all doubts are to be resolved in favor of the examining party”) (internal citations omitted).

⁸ *See, e.g.*, [Redacted] attached hereto as Ex. G.

⁹ *See* [Redacted] attached hereto as Ex. H.

¹⁰ *See* [Redacted]

[REDACTED]

[REDACTED] These documents, coupled with Intel’s earlier designation of Mr. Ho as one of its key witnesses, surpass the minimal showing required to meet the managing agent standard.

DISCUSSION

Determining whether an employee is a managing agent requires a fact-specific inquiry that emphasizes three factors. First and most important, is whether the deponent’s interests are aligned with the corporation’s; then the Court looks to whether the deponent has been vested with some sort of authority and discretion; and, finally, whether the deponent can be relied upon to give testimony at his employer’s request in response to the demands of the examining party. *See In re Honda Am. Motor Co., Inc. Dealership Relations Litig.*, 168 F.R.D. at 540; *see also* 8A WRIGHT, MILLER, & MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL §2103 (2d ed. 1994) (citing identical factors). In *In re Honda*, the Court found that Honda Japan’s general manager of public relations satisfied the “paramount test” that his interests were consistent with and loyal to those of the corporation and, although he did not have authority to bind Honda, he was imbued with “general powers to exercise his judgment and discretion in a position of trust.” *Id.* at 541.

Here, Mr. Ho’s mission is accomplishing Intel’s goal of the total exclusion of AMD from the Lenovo account. [REDACTED]

[REDACTED] There is no

[REDACTED] attached hereto as Ex. I.

¹¹ See [REDACTED] attached hereto as Ex. J.

¹² Lenovo China is not simply an offshoot of Lenovo International; instead it is where the company was founded, where many of its senior executives (including its Chairman) reside, and also one of the fastest growing markets in the world.

¹³ See [REDACTED] attached hereto as Ex. K.

¹⁴ See [REDACTED] attached hereto as Ex. L.

¹⁵ [REDACTED] attached hereto as Ex. H.

¹⁶ [REDACTED] collectively attached hereto as Ex. M.

reason to expect Mr. Ho will do anything but vigorously and loyally defend Intel's position at deposition the same way he fiercely defends Intel's chokehold on the Lenovo account.

Mr. Ho is not merely a foot soldier in Intel's war with AMD. He has risen through the ranks over ten years at Intel to a leadership role as *the* Lenovo China account manager with supervising authority over a large team of employees. In this role, he works not only in China where much of Lenovo's management team is located, but also frequently travels to the United States [REDACTED]¹⁷ Asking Mr. Ho therefore to travel to Menlo Park for a deposition would be wholly consistent with what is often asked of him in connection with his roles as an account manager.

Finally, Mr. Ho's job functions and core responsibilities are in sharp contrast to the cases where courts have determined that an employee was not a managing agent.¹⁸ For example, in *Dubai Islamic Bank*, the court analyzed whether ten bank employees were managing agents. 2002 WL 1159699, at *5-11. The court found that of those ten, the eight who had *at least some* supervisory authority over areas of the bank implicated by the fraud at issue were managing agents. *Id.* The court noted that the two employees who were not found to be managing agents held purely clerical positions and lacked any decision-making power. *Id.* at *6, *9. Here, Mr. Ho answers to only one superior on the Lenovo account, Mr. Neil Green, Intel's Lenovo global account manager. Deposing only Mr. Green on the many issues relating to Lenovo would be patently insufficient. [REDACTED] and Intel cannot reasonably expect that AMD's investigation of Intel's dealings with the world's third largest OEM should be limited to a single deposition. *See Malletier v. Dooney & Bourke, Inc.* 2006 WL 3476735, at *15 (S.D.N.Y. Nov. 30, 2006) (noting that even though the plaintiff could depose a person of superior authority about a similar or even the same subject, that fact was "not dispositive" in determining whether a proposed deponent was a managing agent); *see also Rubin v. Gen. Tire & Rubber Co.*, 18 F.R.D. 51, 55-56 (S.D.N.Y. 1955) (discussing the absurdity of defendant's position where the only people who would come within the category of "managing agent" are those "whose rank in the corporate hierarchy was so exalted that they would be extremely unlikely to have any knowledge of the day to day dealings of the corporation with its customers and suppliers.").

For the reasons stated herein, the Court should order Mr. Ho to appear for deposition on June 18.

¹⁷ *See, e.g.*, [REDACTED] attached hereto as Ex. N [REDACTED]
[REDACTED]

¹⁸ In contrast to Mr. Ho's situation, the most common cases where courts hold a witness is not a managing agent are when the witness is no longer employed by the named party. *See, e.g., Boss Mfg. Co. v. Hugo Boss AG*, No. 97 Civ. 8495, 1999 WL 20828, *2 (S.D.N.Y. Jan. 13, 1999).

Respectfully,

/s/ Frederick L. Cottrell, III

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

FLC,III/afg
Attachment

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