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BY ELECTRONIC MAIL & HAND DELIVERY
The Honorable Vincent J. Poppiti
Special Master
Blank Rome LLP
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Re: *Advanced Micro Devices, Inc., et al. v. Intel Corporation, et al.*, C.A. 05-441-JJF; MDL No. 05-1717-JJF, Discovery Matter No. ____

Dear Judge Poppiti:

Advanced Micro Devices, Inc. and AMD International Sales & Service, Ltd., (collectively "AMD") hereby objects to Intel Corporation's ("Intel") request in the above-captioned litigation for a deposition of AMD pursuant to Fed. R. Civ. P. 30(b)(6) concerning "positions" that AMD and ATI took in the *In re Graphics Processing Units Antitrust Litig.*, MDL No. 07-1826-WHA ("*GPU* litigation"). AMD objects to Intel's notice of deposition in its entirety and moves for a protective order sustaining such objection.

I. Background

In October 2006, an indirect subsidiary of AMD acquired ATI Technologies Inc. ("ATI") through a cash-and-stock transaction. Prior to this acquisition, AMD had no involvement in the graphics processing unit ("GPU") and graphics card business. When AMD acquired ATI, it inherited not only the business, but the *GPU* litigation, as well. Despite AMD's minimal experience with the GPU market, the plaintiffs in the *GPU* litigation named AMD as a defendant, alleging that AMD is liable as a "successor-in-interest" to ATI.

In the *GPU* litigation, the direct and indirect purchaser plaintiffs allege that ATI and NVIDIA Corporation ("NVIDIA") conspired to fix the prices of GPUs and graphics cards in violation of federal and state antitrust laws. The indirect purchaser plaintiffs moved for certification of a class of persons who purchased GPUs, or discrete graphics cards that use GPUs, or who purchased pre-assembled computers that contain graphics cards, indirectly from ATI, AMD, or NVIDIA. On July 18, 2008, Judge William H. Alsup denied the indirect purchaser plaintiffs' motion for class certification in the *GPU* litigation. *In re Graphics Processing Units Antitrust Litig.*, No. C 06-07416-WHA, MDL No. 1826, 2008 WL 2788089

(N.D. Cal. July 18, 2008) (Ex. A). In so ruling, Judge Alsup relied upon, among other things, the expert reports that Dr. Michelle Burtis submitted on behalf of ATI, AMD, and NVIDIA.

Intel apparently intends to rely upon Judge Alsup's decision, the expert testimony of Dr. Burtis, and the arguments that counsel for AMD and ATI made in the *GPU* litigation, in its opposition to the plaintiffs' motions for class certification in the present litigation. Intel does not contend that it cannot obtain copies of all of the expert reports, briefs, exhibits, and arguments of counsel. The hearing transcript, and all of the materials that the parties submitted in support of, or in opposition to, plaintiffs' motions for class certification in the *GPU* litigation (with very limited redactions) are part of the public court file. Intel already has a copy of Dr. Burtis' expert report. *See* Letter dated August 27, 2008 from Kristen Palumbo to Margaret Zwisler (Ex. B).

Nonetheless, Intel has demanded that AMD produce a witness to testify pursuant to Rule 30(b)(6) concerning the following topic, which relates to the arguments of counsel and the opinions of Dr. Burtis concerning the motions for class certification in the *GPU* litigation:

> The factual basis for ATI's *position* in the case captioned *In re Graphics Processing Units Antitrust Litigation*, Case No. M-07-CV-01826-WHA (N.D. Cal.), regarding the factors one must take into account to trace an increase in the price of a Graphics Processing Unit ('GPU') to the price that an ultimate consumer pays for a computer containing the GPU.

Letter dated August 5, 2008 from Sogol K. Pirnazar to Bernard Barmann (emphasis added) (Ex. C); Notice of Deposition of Advanced Micro Devices, Inc. (served Aug. 12, 2008) (Ex. D). According to Ms. Palumbo's August 27 letter, Intel is <u>not</u> requesting a deposition of ATI. The letter also confirms that Intel is <u>not</u> seeking to take the deposition of Dr. Burtis. Letter dated August 27, 2008 from Kristen A. Palumbo to Margaret M. Zwisler (Ex. B).

Intel contends that it is entitled to depose employees of AMD about the "factual basis for AMD's position" in the *GPU* litigation "regarding the factors one must take into account to trace an increase in the price of a GPU to the price that an ultimate consumer pays for a computer containing the GPU." *Id.* AMD moves for a protective order because Rules 26 and 30(b)(6) do not permit one party to discover information about the "positions" taken by another party in other litigation and because Intel has not demonstrated that the information it seeks about GPUs is reasonably likely to lead to the discovery of admissible evidence in the present litigation.

II. **Discussion**

A. *AMD has no knowledgeable employee to produce for this 30(b)(6) deposition*

First, as AMD has explained previously to Intel, there are no AMD employees who can competently testify about the relationship between GPU prices and the cost of a computer incorporating the GPU. Letter dated August 18, 2008 from Margaret M. Zwisler to Sogol K. Pirnazar (Ex. E). Dr. Burtis, not any of the employees of AMD, determined what facts to consider in reaching the opinions that she offered in the *GPU* litigation. Indeed, the paragraphs of Dr. Burtis' report that Intel cited in Ms. Palumbo's August 27 letter do not indicate that any

AMD employee has any knowledge whatsoever about the alleged relationship (or the lack thereof) between GPU prices and the cost of a computer incorporating the GPU.

Intel points to Dr. Burtis' interviews with seven AMD employees, presumably to support its claim that AMD can and should produce a knowledgeable witness for this deposition. That Dr. Burtis had to collect various details from seven different sources at AMD before having sufficient data to even "consider" for her report is not, however, dispositive evidence that AMD is teeming with individuals who are knowledgeable about the factual basis for that report. Rather, it serves to demonstrate that any information that may exist at AMD is diffuse and was only effectively gathered and culled into a "factual basis" through the efforts and expertise of Dr. Burtis. This type of scattered information, to the extent that it actually exists, is not properly sought or mined through the specificity of a 30(b)(6) "contention" deposition. In similar contexts, this Court has disfavored such depositions. *See Discovision Assoc. v. Disc. Mfg., Inc.*, C.A. No. 95-21-SLR, tr. at 11 (Oral Ruling D. Del. Dec. 7, 1995) Ex. H (denying request for 30(b)(6) deposition in situation where contention interrogatories could provide information).

B. *Intel cannot use a (30)(b)(6) deposition to discover AMD's position in another litigation*

Even if AMD had a knowledgeable witness to produce for this deposition, Intel cannot simply compel testimony regarding "positions" that AMD has taken in other, unrelated litigation. In *T&H Landscaping, LLC v. Colorado Structures, Inc.*, No. 06-00891, 2007 WL 2472056 (D. Colo. Aug. 28, 2007) (Ex. F), the defendant moved for a protective order to vacate those portions of plaintiffs' notice of deposition under Rule 30(b)(6) that sought defendant's "position regarding every assertion in Plaintiff's expert witness report." *Id.*, at *4. The court granted the defendant's motion for a protective order in part. *Id.* It held that the opposing party's "positions" in an expert report is "an improper area of questioning for a 30(b)(6) deposition, unless limited to factual statements within the report, rather than legal conclusions or responses to expert opinions." *Id.* As a result, the court modified the topic to apply to only factual statements underlying the report. *Id.*

T&H Landscaping is instructive here. Intel's requested topic does not pertain to facts (such as pricing or cost data) at all. Instead, Intel only seeks to discover expert opinions and legal arguments about the "ability to trace" increases in the price of GPUs to the final price of a computer. That is clearly an improper use of Rule 30(b)(6).

C. *Intel cannot use a (30)(b)(6) deposition to discover factual information to which it would not otherwise be entitled*

In Ms. Palumbo's August 27 letter, Intel candidly admits that it is actually trying to discover facts about "the way the GPU market works." Letter dated August 27, 2008 from Kristen A. Palumbo to Margaret M. Zwisler (Ex. B). However, that is not the subject matter for examination that Intel described in its August 5 letter requesting a Rule 30(b)(6) deposition (Ex. C), or in the Notice of Deposition that Intel served on August 12 (Ex. D). Instead, Intel only described the proposed deposition topic in terms of the basis for the "positions" that counsel for AMD and its expert witnesses took in the *GPU* litigation. It is improper for Intel to attempt to

use Rule 30(b)(6) to depose an employee of AMD about the "positions" that ATI and AMD's lawyers argued, or the "basis" for ATI and AMD's expert's opinions, in *another* litigation, rather than attempting to properly discover the underlying market facts that Intel believes are relevant to the claims and defenses in the principal litigation. *See, e.g., Discovision Assoc. v. Disc. Mfg., Inc.*, C.A. No. 95-21-SLR, tr. at 11 (Ex. H) (denying request for 30(b)(6) contention deposition because "entitlement to discovery is always limited by good sense" and contention depositions make "no sense" given availability of contention interrogatories).

If Intel believes that it is entitled to discover facts about "the way the GPU market works," it should frame proper discovery requests, and AMD will respond to those requests. Of course, if Intel attempts to propound a new discovery request, it must also articulate a sufficient nexus between the GPU and CPU markets in order to meet its burden to show that discovery of such GPU market facts is reasonably calculated to lead to the discovery of admissible evidence in this case. In that regard, AMD disagrees with Intel's conclusory statement that "the way the GPU market works" necessarily "is reasonably likely to lead to relevant information about the way the market for CPUs works." August 27, 2008 letter from Palumbo to Zwisler (Ex. B).

Intel cannot simply conduct discovery about "the way the market … works" for products that are not the subject of this litigation. As Judge Farnan explained in *Novartis Pharms. Corp. v. Eon Labs Mfg., Inc.*, 206 F.R.D. 392 (D. Del. 2002) (Ex. G), under Fed. R. Civ. P. 26(b)(1), the Court may order discovery for good cause "on any matter relevant to the subject matter involved in the action." 206 F.R.D. at 394. In that case, Novartis sued Eon for patent infringement. Eon moved for a protective order to vacate certain paragraphs of Novartis' 30(b)(6) deposition that pertained to Eon's consideration to market, or to file for FDA approval, products that were "not the subject of this litigation" and not probative of Eon's "decision to market the allegedly infringing product." *Id.* Judge Farnan agreed with Eon and granted its motion for a protective order. The Court found that Novartis' request for a Rule 30(b)(6) deposition did not relate to the allegedly infringing product at issue in the litigation and therefore was not a "'subject matter' within the scope of discovery." *Id.*

Judge Farnan's analysis in *Novartis* applies with equal force to AMD's pending motion. This litigation is about CPUs. Intel has not demonstrated why information about "the way the GPU market works" is a subject matter within the scope of discovery in the present litigation.

III. **Conclusion**

For all of the foregoing reasons, AMD respectfully requests that Your Honor issue an order granting AMD's motion for a protective order and sustaining its objection to Intel's request for a Rule 30(b)(6) deposition concerning positions taken by AMD in the *GPU* litigation.

Respectfully,

/s/ Chad M. Shandler

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CMS/ps
Enclosure

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