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September 29, 2008

**Via Email and Hand Delivery**
The Honorable Vincent J. Poppiti
Blank Rome LLP
Chase Manhattan Centre, Suite 800
1201 N. Market Street
Wilmington, DE 19801-4226

Re: *In re Intel Corp. Microprocessor Antitrust Litigation,* MDL No. 05-1717-JJF; *Advanced Micro Devices, Inc. v. Intel Corp.*, Consolidated C.A. No. 05-441-JJF
DM No. ___

Dear Judge Poppiti:

Intel Corporation ("Intel") submits this letter brief in opposition to the motion for protective order filed by Advanced Micro Devices, Inc. and AMD International Sales & Service, Ltd. (together, "AMD") on September 22, 2008 (D.I. 1195 - 05-1777; D.I. 895 - 05-441).

AMD seeks to prevent the deposition of the person(s) most knowledgeable at AMD about the factual basis for its position in the *In re Graphics Processing Units Antitrust Litigation,* MDL No. 07-1826-WHA ("*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. Mot., Ex. D (Depo. Notice). None of AMD's objections to the deposition has merit. Its arguments are erroneous. Its motion for protective order should be denied.

## I. AMD's Burden on Its Motion for Protective Order

In the Third Circuit, "[i]t is well recognized that the federal rules allow broad and liberal discovery." *Pacitti v. Macy's*, 193 F.3d 766, 777-78 (3d Cir. 1999) (Ex. 1). Parties are entitled to discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense" or that "appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1).

To obtain a protective order limiting discovery, the moving party bears the burden of demonstrating "good cause." Fed.R.Civ.P. 26(c); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986) (Ex. 2). When the movant seeks to prohibit a deposition, that burden is a heavy one. *See Naftchi v. New York Univ. Med. Ctr.*, 172 F.R.D. 130, 132 (S.D.N.Y. 1997) ("[I]t is exceedingly difficult to demonstrate an appropriate basis for an order barring the taking of a deposition.") (Ex. 3); *Motsinger v. Flynt*, 119 F.R.D. 373, 378 (M.D.N.C. 1988) ("Absent a strong showing of good cause and extraordinary circumstances, a court should not prohibit altogether the taking of a deposition.") (Ex. 4). Courts regard such protective orders as

"extraordinary measure[s] which should be resorted to only in rare occasions." *Jennings v. Family Mgmt.*, 201 F.R.D. 272, 275 (D.D.C. 2001) (citation omitted) (Ex. 5); *see also Bucher v. Richardson Hosp. Auth.*, 160 F.R.D. 88, 92 (N.D. Tex. 1994) (protective orders prohibiting depositions are "rarely granted" and then only on showing of "particular and compelling need") (Ex. 6). This is not one of those rare occasions.

## II. AMD's Motion Should Be Denied

### A. The Requested Testimony Is Relevant

AMD has not established, as it must, "that the requested discovery does not fall under the scope of relevance as defined by [Rule] 26(b)(1)." *T&H Landscaping LLC v. Colorado Structures, Inc.*, No. 06-00891, 2007 WL 2472056, at *4 (D. Colo. Aug. 28, 2007) (Mot., Ex. F). AMD simply argues that because GPUs are not Central Processing Units (CPUs), facts that were relevant to the *GPU* Litigation, including facts about the way the market for GPUs works, could not possibly lead to the discovery of admissible evidence in this case. AMD is wrong.

The *GPU* Litigation involved the purported class claims of direct and indirect purchasers of GPUs. Like CPUs, GPUs are microprocessors or "chips" that perform computational functions in a computer. *See* Expert Report of Michelle M. Burtis Regarding Indirect Purchaser Pls.' Mot. for Class Certification (Ex. 7), at ¶¶ 11-12. The alleged class of indirect purchasers in the *GPU* case included persons who, like Plaintiffs in this case, bought computers containing microprocessors that were the subject of an alleged overcharge. *Id.*, ¶¶ 4-5, 7.

In opposing plaintiffs' class certification motion, AMD and its expert, Dr. Michelle Burtis, stated that it would be impossible to trace "an increase in the price of a GPU through the various distribution channels to determine whether the price increase affects the price of a computer" containing the GPU. *Id.*, ¶ 7. To support that position, AMD and Dr. Burtis pointed to facts about the relationships and negotiations between the parties within the channels of distribution of computer components and computers as well as the pricing decisions and strategies of the parties involved in the manufacture, distribution and sale of computer components and computers.[1] *See, e.g., id.*, ¶¶ 7, 21, 35-36, 62, 68-83, 87.

AMD and Dr. Burtis were talking about the very same computers, computer distribution channels and parties (OEMs, distributors and retailers in the computer industry) that are at issue in this case.

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[1] In a meet and confer letter to AMD's counsel, Intel generally described these facts as "information about the way the market for GPUs works." Mot., Ex. B at 1. AMD takes issue with this phrase and says it is not the "subject matter" described in Intel's deposition notice. Mot. at 3-4. Nonsense. Facts about the distribution channels for GPUs, the computers containing them and the relationships between the various parties involved (i.e., the way the market for GPUs works) were among the factors Dr. Burtis indicated 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. These topics thus fall squarely within the "subject matter" described in Intel's deposition notice.

The testimony sought is thus reasonably likely to lead to information about the ability, or lack thereof, to trace an increase in the price of a CPU to the price that an ultimate consumer pays for a computer containing the CPU -- a central issue in this case. AMD's relevance objection should be rejected.

**B. AMD's Claimed Lack of Knowledge Is No Defense**

AMD argues that, even if relevant, the deposition should be prohibited because "there are no AMD employees who can competently testify about the relationship between GPU prices and the cost of a computer incorporating the GPU." Mot. at 2. After making this categorical denial, however, AMD admits that the information Intel seeks "may exist at AMD." *Id.* at 3.

Under Rule 30(b)(6), AMD is obligated to perform a "reasonable inquiry" for the requested information, including reviewing documents and speaking to employees, and to educate and prepare a witness to testify on its behalf "as to matters known or reasonably available to the organization." Fed.R.Civ.P. 30(b)(6); *State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.*, 250 F.R.D. 203, 216-17 (E.D. Pa. 2008) (Ex. 8); *Coleman v. Blockbuster, Inc.*, 238 F.R.D. 167, 171 (E.D. Pa. 2006) (Ex. 9).

The plain language of Dr. Burtis' report in the *GPU* Litigation confirms that she obtained at least some of the factual basis for her opinions from AMD employees. Dr. Burtis identifies seven AMD employee interviews that she conducted and considered and/or relied upon in preparing her report. *See* Ex. 7 (Burtis Report) at Ex. I-2, p. 4.

Intel does not allege and is not required to demonstrate that AMD is "teeming with individuals" with relevant knowledge. Mot. at 3. And it does not matter if the information is "diffuse" or "scattered" within AMD. *Id.* Intel is entitled to discover relevant information from AMD whether that information is known by teams of people or one person at AMD. Indeed, even AMD's professed lack of any knowledgeable employees is not grounds to prohibit the deposition, as Intel is entitled to test AMD's asserted lack of knowledge. *See* Wright, Miller & Marcus, 8 Fed. Prac. & Proc. Civ. 2d § 2037 ("A witness cannot escape examination by claiming that he has no knowledge of any relevant facts, since the party seeking to take the deposition is entitled to test his lack of knowledge . . . .") (Ex. 10); *Naftchi*, 172 F.R.D. at 132 ("Nor, in ordinary circumstances, does it matter that the proposed witness . . . professes lack of knowledge of the matters at issue, as the party seeking discovery is entitled to test the asserted lack of knowledge.").

**C. The Information Intel Seeks Is A Proper Subject For Deposition**

Finally, AMD argues repeatedly that the deposition should be prohibited because Intel seeks to discover AMD's and Dr. Burtis' "positions" or contentions in the *GPU* Litigation, not factual testimony. Mot. at 3-4. That is obviously wrong. As is clear from Intel's deposition notice, Intel seeks to discover the "*factual basis*" for the positions AMD and Dr. Burtis took. Mot., Ex. D (Depo. Notice). In other words, Intel seeks to discover the *facts* upon which Dr. Burtis relied, including the facts regarding the computer industry and the way the market for GPUs works described above.

The two cases upon which AMD relies, *T&H Lanscaping* and *Discovision Assoc. v. Disc. Mfg., Inc.*, C.A. No. 95-21-SLR (D. Del. Dec. 7, 1995), thus do not support entry of a protective order.

*T&H Landscaping* actually supports denial of AMD's motion. There, unlike here, the plaintiff sought the defendant's "position regarding every assertion in Plaintiffs' expert witness report." *T&H Landscaping*, 2007 WL 2472056 at *4. The court held that to the extent the plaintiff sought to depose defendant on its "legal positions and arguments," this was "an improper area of questioning for a 30(b)(6) deposition." *Id.* The court refused to grant a protective order, however, to the extent the plaintiff sought "factual information" and testimony about "the factual statements underlying the [expert] report." *Id.* That is precisely the discovery Intel seeks from AMD.

AMD mischaracterizes *Discovision*, which is inapposite in any event. There, the defendant sought to depose the plaintiff regarding its patent infringement contentions. The Court did not state that it "disfavored such [contention] depositions" altogether or that "contention depositions" never make sense given the availability of contention interrogatories, as AMD suggests. Mot. at 3, 4. Rather, the Court ruled that it was too early in the case for a "contention deposition" to go forward, and ordered plaintiff to instead set forth its contentions in response to "contention interrogatories." *See* Mot., Ex. H (*Discovision* Hg. Tr.) at 11 ("I have never heard of contention depositions . . . *this early on in the litigation*. . . . . [I]t is my practice to allow contention interrogatories to go forward *early on in a case* . . . . "). Unlike the defendant in *Discovision*, Intel does not seek to discover AMD's contentions in the *GPU* Litigation. Even if it did, AMD does not and could not argue that it is *too early* to discover those contentions -- by deposition or interrogatory.

Intel is entitled to obtain the relevant information is seeks, and a Rule 30(b)(6) deposition of AMD is an appropriate vehicle to do so.

## III. Conclusion

Because AMD has failed to carry its burden to demonstrate good cause for a protective order, its motion should be denied. AMD should be ordered to produce one or more deponents for the subjects at issue within 10 days of this Court's order.

Respectfully,

*/s/ Richard L. Horwitz*

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF DELAWARE**

**CERTIFICATE OF SERVICE**

I, Richard L. Horwitz, hereby certify that on September 29, 2008 the attached document was hand delivered to the following persons and was electronically filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following and the document is available for viewing and downloading from CM/ECF:

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