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October 10, 2008

BY ELECTRONIC MAIL
AND HAND DELIVERY
The Honorable Vincent J. Poppiti
Blank Rome LLP
Chase Manhattan Centre, Suite 800
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Wilmington, DE 19801-4226

Re: *Advanced Micro Devices, Inc., et al. v. Intel Corporation, et al.*, C.A. No. 05-441-JJF; and *In re Intel Corporation*, C.A. No. 05-MD-1717-JJF

Dear Judge Poppiti:

Let's be perfectly blunt about what is going on here. Intel is not seeking to better understand the CPU market by collecting information about "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." Opp. at 1. Instead, it is seeking to pit one plaintiff against another. It is trying to harness AMD's expert testimony in a completely unrelated litigation, and use it to defeat the position Class Plaintiffs are taking here. In a word, it's a stunt, and AMD should not be forced to literally *manufacture* a witness just to help Intel pull it off.

I. Requiring A Party To Produce A Witness Out Of Thin Air To Testify On Subjects As To Which The Company Has No Information Constitutes An Undue Burden.

Consistent with the Federal Rules of Civil Procedure, the Third Circuit has held that "[a]lthough the scope of discovery under the Federal Rules is unquestionably broad, this right is not unlimited and may be circumscribed." *Bayer AG v. Betachem, Inc.*, 173 F.3d 188, 191 (3d Cir. 1999) (Ex. 1). Pressing for Rule 30(b)(6) testimony that a party can't possibly provide is clearly an excess that the Court can prevent. *See, e.g., In re: Independent Service Organizations Antitrust Litigation*, 168 F.R.D. 651, 654 (D. Kan. 1996) (Ex. 2) (granting defendant's motion for a protective order preventing a 30(b)(6) deposition on the basis that it is "unreasonable" and "burdensome" to "have counsel 'marshal all of its factual proof' and prepare a witness to be able to testify on a given defense or counterclaim.")

A. AMD Has No Witness Knowledgeable Of The Basis Of Its Expert's Opinion Other Than The Expert Herself.

As AMD has stated to Intel -- at many times, in many ways -- there is no AMD employee knowledgeable about "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.)." [1] We simply cannot be any more direct than that. ATI's position in that litigation reduced to the proposition that Class Plaintiffs there had failed to demonstrate pass-through, and ATI relied entirely on the expert opinion of Dr. Michelle Burtis to establish it. Rather than elucidate a list of "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," her expert report concludes only that the GPU Class Plaintiffs "failed to offer a methodology showing that common, class-wide proof can be used to establish the fact of injury or impact or to measure damages." Expert Report of Michelle M. Burtis Regarding Indirect Purchase Pls.' Mot. for Class Certification (Ex. 3), at ¶ 6.

Dr. Burtis reviewed Class Plaintiffs' methodology in great detail, including their economic models, empirical estimates of pass-on and their regression methods. The basis of Dr. Burtis' conclusion (and, consequently, ATI's position) was her analysis of the accuracy of this methodology, which she summarized in a series of economic arguments explaining why the opposing experts got it wrong. As economic analysis and arguments, these are purely Dr. Burtis' expert opinions, not anything ATI was capable of providing. Of course, ATI provided Dr. Burtis background information concerning the workings of ATI. But as Dr. Burtis makes clear in the attached declaration, ATI's information served just as a backdrop and did not form a "basis" for her opinion.[2] *See* Declaration of Dr. Michelle Burtis (Ex. 4).

Short of producing Dr. Burtis as a 30(b)(6) witness, AMD has no one it can offer who can knowledgeably testify as to the basis of Dr. Burtis' opinion or the Company's view that she was right. And clearly, Rule 30(b)(6) does not require that AMD provide and pay for Intel's expert testimony. If Intel wants to prove in this case that Class Plaintiffs in the GPU case failed

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[1] If, as Intel claims, it is really seeking information about "the way the market for GPUs works," one might wonder why Intel didn't simply notice a Rule 30(b)(6) deposition for "information about the way the market for GPUs works." The answer, of course, is that a Rule 30(b)(6) notice structured in that manner would be struck as overbroad and could not be defended as seeking relevant information.

[2] In its opposition, Intel points to facts about the GPU business contained in twenty-five paragraphs of Dr. Burtis' report that presumably were supplied by ATI employees, and it says this proves that AMD is capable of supplying a witness to talk about the Company's position. Intel's claim that Dr. Burtis relied on ATI is wildly overblown. She did not cite her interviews with AMD employees as the source for her information in *any* of these paragraphs. In fact, in the entirety of her publicly available report, Dr. Burtis referenced only two AMD employee interviews, citing both of them in a single reference as confirming her method of identifying GPU naming conventions. *See* Expert Report of Michelle M. Burtis Regarding Indirect Purchase Pls.' Mot. for Class Certification (Ex. 3), at ¶ 13.

to offer a viable methodology for proving pass-through damages -- a proposition of very questionable relevance -- it can hire its own expert.

B. AMD Does Not Know What Factors One Would Have To Take Into Account To Establish Pass-Through In The GPU Market, And Rule 30(b)(6) Can Not Be Used To Impose On It The Burden Of Testifying To That Which It Doesn't Know.

Because ATI successfully argued its opponents had failed to prove pass-through in the GPU case, Intel simply assumes that it is entitled to a Rule 30(b)(6) deposition of the Company "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." But there is no one at AMD who can knowledgeably address that subject. AMD is not in the business of pricing computers, nor is AMD in the business of tracking its GPU prices through to computers purchased by end users.

Intel argues that AMD is obligated by Rule 30(b)(6) to "educate and prepare a witness to testify on its behalf" and that Intel should be allowed to test any claim of ignorance. Opp. at 3. But it fails to acknowledge that a corporation's role under Rule 30(b)(6) is not the same as the role of an individual deponent in traditional discovery.[3] Rule 30(b)(6) only requires a corporate party to prepare a witness "as to matters known or reasonably available to the organization." Fed.R.Civ.P. 30(b)(6). If the noticed party "does not possess such knowledge so as to so prepare [a witness], then its obligations under Rule 30(b)(6) obviously cease, since the rule requires testimony only as to 'matters known or reasonably available to the organization.'" *Dravo Corp. v. Liberty Mutual Ins. Co.,* 164 F.R.D. 70, 76 (D. Neb. 1995) (Ex. 5); *see also Banks v. Office of the Senate Sergeant-at-Arms,* 214 F.R.D. 370, 373 (D.D.C. 2007) (Ex. 6) (rejecting plaintiff's argument that defendant need "investigate not just facts reasonably known to the corporation, but *any* fact potentially relevant to the described topic known by any employee of the corporation" because "[o]bviously a rule of reason applies"). As stated, AMD does not possess knowledge of the factual bases supporting any position regarding the factors properly utilized in a pass-through pricing model in the GPU market. Further, AMD is neither able nor required - by the very terms of Rule 30(b)(6) itself - to fabricate such knowledge and pass it on to a witness.

II. Intel's Request Is An Improper Use Of Rule 30(b)(6).

Rule 30(b)(6) was designed as a *supplement* to existing discovery practice, meant to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it." Advisory Committee Note to Rule 30(b)(6) (Ex. 7); *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000) (Ex. 8). By requiring a corporation to prepare a witness on its behalf and by binding a corporation to its selected witness's testimony, Rule 30(b)(6) prevents parties from "sandbagging" each other with information at trial. *See, e.g., United States v. Taylor*, 166

[3] The cases cited by Intel for the proposition that it should be allowed to test AMD's asserted lack of knowledge involved depositions of individuals, not corporations. Opp. at 3.

F.R.D. 356, 362 (M.D.N.C. 1996). (Ex. 9) (Rule 30(b)(6) "is necessary to prevent the 'sandbagging' of an opponent by conducting a halfhearted inquiry before the deposition but a thorough and vigorous one before the trial.")

In this situation, the only party that could be accused of sandbagging is Intel. AMD does not seek to take a position in this litigation regarding the tracing of GPU pricing through to computers purchased by end users. AMD does not seek to take a position on GPUs at all. AMD doesn't even seek to take a position on the ability "to trace an increase in the price of a CPU to the price that an ultimate consumer pays for a computer containing the CPU." Opp. at 3. Notably, this alleged "central issue" isn't an issue for AMD in this litigation. It is an issue for Class Plaintiffs. Binding AMD to testimony regarding its expert report in litigation involving GPUs does not prevent Intel from being surprised by subsequent AMD testimony; it simply allows Intel to get expert testimony into the record without paying an expert and allows Intel to wield AMD's position in an unrelated litigation as a rhetorical weapon against Class Plaintiffs in this litigation. Rule 30(b)(6) was not intended to provide parties with an opportunity to free ride, nor was it intended to allow a party to rifle through the annals of its opponent's expert positions assumed in all prior litigation, searching for a "gotcha" opportunity.

III. Conclusion

Because AMD does not have a witness knowledgeable about "the factual basis" for Dr. Burtis' opinion, other than Dr. Burtis, or one capable of testifying as to "the factors one must take into account to trace [pass-though]" in the GPU market, AMD's motion for protective order should be granted and Intel's 30(b)(6) notice should be quashed.

Respectfully submitted,

/s/ Chad M. Shandler

CMS/lll
Enclosures

Chad M. Shandler #3796

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