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BY ELECTRONIC MAIL AND 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

REDACTED - PUBLIC VERSION

Re: *Advanced Micro Devices, Inc., et al. v. Intel Corporation, et al.*, C.A. 05-441-JJF; C.A. 05-485-JJF; MDL No. 05-1717-JJF, Discovery Matter No.

Dear Judge Poppiti:

On Friday, October 10, 2008, Your Honor directed the parties to file simultaneous briefs on two discovery issues: (1) whether, notwithstanding Local Rule 30.6, a party should be able to re-prepare a witnesses when a deposition is continued for more than five days; and (2) whether AMD, as the plaintiff, should be deprived of its right to question third-party witnesses first. Advanced Micro Devices, Inc. and AMD International Sales & Service, Ltd. ("AMD"), joined by Class Plaintiffs, urge that both questions be answered in the negative.

RE-PREPARATION OF WITNESSES IN CONTRAVENTION OF LOCAL RULE 30.6

Intel seeks a standing exception to Local Rule 30.6 that would allow re-preparation of any witness whose deposition is continued for more than five days. In order to maintain the integrity of depositions taken in this case, Intel's request should be denied and Local Rule 30.6 should remain in effect.

Given procedures the Court has put in place for providing time estimates before depositions are scheduled,[1] continuances have been rare. In a few instances, Intel's

[1] *See* Case Management Order Six ("CMO#6"). Case Management Order Three ("CMO#3") requires that documents be TIFFed at least 14 days prior to use at deposition. *See* CMO#3, ¶ 5.d. Because various documents, particularly reharvest documents, continue to be produced by the parties, it is possible that documents that were not TIFFed at least 14 days prior to the first day of a deposition, would be TIFFed at least 14 days prior to the continuation of that deposition. Accordingly, AMD offered to stipulate that a witness could be prepared on any new documents in the event that during an extended continuance the noticing party TIFFed additional

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examinations have exceeded what its counsel anticipated, but in each case AMD's counsel and witnesses have made themselves available for additional days to get the deposition done. Intel's proposed exception to the rule is thus unnecessary. But more importantly, it will just contribute to delay. If a witness' examination can't be completed in the allotted time, defending counsel will always adjourn it and continue it for more than five days. What lawyer wouldn't plot to ensure an opportunity to reprepare his witness? Intel's rule will simply insure that no deposition gets continued for just five or fewer days.

While extended continuations have been rare, when they have occurred the fault lay in the party whose witness was being deposed. For example, AMD sought to question Kristin McCollam, an Intel employee, about spreadsheets that documented rebates paid by Intel to Dell. But it became clear that Intel had not yet produced the final versions of those spreadsheets, so the deposition was continued.[2] Similarly, the deposition of Intel witness Paul Schmisseur adjourned on August 28 despite AMD's offer, rejected by Intel, to continue the next day. AMD's attempts to schedule a quick resumption of Mr. Schmisseur's deposition were stymied by Intel's insistence that it be allowed to reprepare him. Why should a party's delaying conduct be rewarded with an opportunity to reprepare its witness?

Intel's proposed standing exception would also make it more difficult to schedule depositions in the first place. To avoid continuances at all, the noticing party would be inclined to game the system by overestimating the time it needs, lest it be penalized for exceeding a good faith estimate. Given the impossible schedules of most of the executives on the deposition rosters in this case, the Court should be reluctant to adopt any procedures that stand as an obstacle to completing deposition discovery on time.

Most fundamentally, Intel's proposed amendment of Rule 30.6 runs contrary to the rationale underlying the rule. As the Court has previously noted, Local Rule 30.6 finds its origins in Delaware's historical practice and court rules. (Teleconference Tr. 10:11-10:17, 11:14-12:5, June 13, 2008). The Delaware Supreme Court has explained, in the context of coaching during trial, that it is "antithetical to the process of truth-seeking that any witness be permitted to consult with counsel during cross-examination to be 'coached' on what to say, or not say, or how-to-say-it, or how to control or 'put a better face on' testimonial damage already done." *Webb v. State*, 663 A.2d 452, 460 (Del. 1995); *see also In re Asbestos Litig.*, 492 A.2d 256, 258 (Del. Super. 1985) (acknowledging long-standing practice in Delaware to prohibit attorney-witness consultation).

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documents that could be used when the deposition resumed. Intel, however, turned down AMD's offer as inadequate and, as to the limitation, impossible to enforce.

[2] Over the course of the past two months, Intel has produced data from those shared drives three times. The first two times the documents were corrupted and unusable. *See, e.g.*, Email from Linda J. Smith to Rod J. Stone (September 8, 2008) and Email from Linda J. Smith to Rob J. Stone (September 17, 2008), collectively attached as exhibit A. AMD has now received a legible production of approximately 3500 documents. With Intel's help, AMD is reviewing Intel's most recent shared drive production to determine if it actually includes the spreadsheets that report the final rebate totals by quarter.

Local Rule 30.6 is unambiguous, and makes no exception for continued depositions. Indeed, at the time this Court adopted Local Rule 30.6 on June 20, 2007, the analogous Delaware Chancery and Superior Court Rules allowed for re-preparation of deponents after a five day continuance. Clearly the judges of this Court (and the members of the Rules Committee) were aware of that and deliberately refused to embrace any exception, including the one Intel proposes.[3]

Clearly, the proposed exception is antithetical to the rule, which is intended to prohibit coaching of any kind. See *Deutschman v. Beneficial Corp.*, No. 86-595 MMS, mem. op. at 3 (D. Del. Feb. 20, 1990) (reasoning that "a blatant request for a recess at trial so that counsel may assist the witness off the record would be improper. Therefore, a deposition witness should not be permitted to consult with his attorney regarding his testimony until it is completed. ") *Id.* at 4. It matters little whether coaching takes place during a lunch-break or during a two week recess. In either case, "[t]he usefulness of depositions as a way to discover facts would be impaired if counsel were allowed to suggest an answer off the record to a question anticipated or already asked." *Id.*

AMD, AS THE PLAINTIFF, BEARS THE BURDEN OF PROOF, AND SHOULD BE PEMITTED TO QUESTION THIRD-PARTY WITNESSES FIRST AT DEPOSITION

For many months, AMD has made clear to Intel its intention to depose key Dell executives.

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Dell's counsel asked that AMD provide estimates of the time needed for each deponent from AMD, Class, and Intel. Accordingly, in an email dated September 8, 2008, AMD notified Intel that it was going to formally notice six Dell employees for deposition, had already provided Dell's outside counsel with informal notice, and requested Intel's time estimates.[4] It took Intel twenty-four days and three requests to respond.[5] On October 3, 2008, AMD formally noticed five current and one former Dell employee for deposition using the procedures set forth by this Court in CMO#6.[6] Three days later, Intel followed suit and noticed three of the six employees for deposition.[7] Intel now claims that it should be entitled to depose these three witnesses first.

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[3] *See* D. DEL., AMENDED LOCAL RULES (effective June 30, 2007); CT. CH. R. 30(d)(1), (amended effective Jan. 1, 2002); SUPER. CT. CIV. R. 30(d)(1) (amended effective Jan. 1, 1995).

[4] *See* Email from Linda J. Smith to Rod J. Stone (September 8, 2008), attached hereto as exhibit A.

[5] *See* Email from Linda J. Smith to Rod J. Stone (September 8, 2008); Email from Linda J. Smith to Rod J. Stone (September 17, 2008); Email from Linda J. Smith to Rod J. Stone (October 1, 2008) attached hereto as exhibit A; Email from Rod J. Stone to Linda J. Smith (October 2, 2008), attached hereto as exhibit B.

[6] Letters and Email to outside counsel for Dell and counsel for Kevin Rollins (October 3, 2008), collectively attached hereto as exhibit C.

[7] Letter from Sogol K. Pirnazar to Bernard Bermann (Oct. 6, 2008), attached hereto as exhibit D.

This is nonsense. AMD, as the plaintiff, bears the burden of proof, and it should be permitted to develop the evidence it needs to satisfy that burden, particularly when it has noticed the witnesses' depositions first. At trial, plaintiff goes first. Given that most of the third party witnesses reside outside the Court's subpoena power, these depositions are necessarily substitutes for live trial testimony. Inverting the normal order of examination by allowing Intel to go first, is simply a cunning and transparent attempt to make it more difficult for AMD to satisfy its burden.

For the reasons stated herein, the Court should deny Intel's request for a standing exception to Local Rule 30.6, and provide that AMD may question first third-party witnesses it has identified as part of its affirmative case.

Respectfully,

/s/ Frederick L. Cottrell, III

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cc: Clerk of the Court (By Electronic Filing)
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