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February 2, 2009

The Honorable Vincent J. Poppiti
Blank Rome LLP
1201 Market Street – Suite 800
Wilmington, DE 19801

Via Electronic Filing
Redacted – Public Version

Re: In re Intel Microprocessor Antitrust Litig., CA Nos. 05-MD-1717, 05-441, 05-485 (DM 24)

Dear Judge Poppiti,

Pursuant to Your Honor's teleconference last week with counsel for AMD and Toshiba, Toshiba Corporation ("Toshiba"), a non-party, submits this letter brief to demonstrate that personal jurisdiction does not exist over Toshiba in this litigation.[1] Toshiba is a Japanese corporation that does not transact business in the United States. Personal Computer & Network Company ("PC&NC"), a unit of Toshiba based in Tokyo, is responsible for substantially all CPU purchases, and has procured substantially all Intel CPUs from Intel Kabushiki Kaisha in Japan and substantially all AMD CPUs from AMD Japan Ltd. in Japan. In the United States, an indirectly-held independent U.S. subsidiary operating company, Toshiba America Information Systems, Inc. ("TAIS"), markets and sells substantially all Toshiba PCs. AMD is subpoenaing TAIS for discovery in the present case.

As discussed in its January 23, 2009 letter brief ("Toshiba letter"), Toshiba has clearly and consistently reserved its jurisdictional objections. *Id.* at 2 & n.4. AMD is correct that Toshiba has voluntarily produced a wide scope and large volume of highly sensitive documents to help AMD (a valued supplier toToshiba). Yet through this protracted process, Toshiba has steadfastly preserved all of its rights and privileges, including its right to oppose discovery on jurisdictional grounds. It has done so consistently in communications with AMD and did so in the Voluntary Production Agreement. For AMD to now claim that when Toshiba in good faith agreed to voluntarily produce documents it intended to waive its jurisdictional opposition is incredible. A core purpose of the Voluntary Production Agreement is to preserve those very rights and privileges. As discussed below, personal jurisdiction does not exist over Toshiba in this litigation. For this reason, AMD's motion to compel documents from Toshiba should be denied.[2]

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[1] Toshiba submits this letter as a special appearance without waiving its jurisdictional objections and other opposition.

[2] Additionally, AMD never served Toshiba with a subpoena as it is required to under Rule 45 in order for the subpoena to be enforceable (*see* Toshiba letter at 2). *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1313 (D.C. Cir. 1980) (Rule 45 document subpoena must be personally served on non-party corporation to be enforceable); *Parker v. John Doe # 1*, 2002 WL 32107937 at *2 (E.D. Pa. 2002) (collecting cases) (Exhibit 1); *Fields v. Bucks County*, 2005 WL 1388009 at *1 (E.D. Pa. 2005) ("while non-parties may, of course, voluntarily produce documents, the only other way to obtain such production would be issuing and serving valid subpoenas, whereupon, if the recipient were within this court's jurisdiction, it might be possible

Attached as Exhibit 3 is a sworn declaration of that provides details regarding Toshiba's structure and business operations, including the purchase of substantially all Intel and AMD CPUs from Intel Kabushiki Kaisha and AMD Japan Ltd. in Japan; Toshiba's lack of business presence in Delaware and the United States; and the Toshiba subsidiary corporations that serve the United States. Attached as Exhibit 4 is a sworn declaration of that discusses TAIS's business operations, including TAIS's independence from Toshiba. Given the page limit, we do not repeat these details in this letter, but incorporate the exhibits by reference.

I. The Exercise Of Jurisdiction Over Toshiba Would Violate Due Process.

The due process clause imposes three requirements which apply both to specific and general jurisdiction. First, Toshiba must have sufficient minimum contacts with the forum such that the exercise of jurisdiction over it would not offend "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Super. Court*, 480 U.S. 102, 108-09 (1987). Second, Toshiba must have purposefully directed its activities at the forum, thus invoking the benefits and protections of its laws. *Id.* at 109-12. Third, it must be fair and reasonable under the circumstances to exercise jurisdiction over Toshiba based on its level of contacts with the forum. *Id.* at 112-116.[3] AMD bears the burden of establishing these requirements with reasonable particularity. *Carteret Sav. Bank v. Shushan*, 954 F.2d 141, 146 (3d Cir. 1992).

A. AMD Cannot Demonstrate Specific Jurisdiction Over Toshiba.

In order to be subject to specific jurisdiction, a foreign corporation must have purposefully directed its activities at the forum, and the alleged harm must arise out of those purposeful activities. *In re DaimlerChrysler Sec. Litig.*, 197 F. Supp. 2d 86, 93 (D. Del. 2002). PC&NC, based in Tokyo, is responsible for substantially all purchases of CPUs (Exhibit 3 ¶ 4). PC&NC procures substantially all Intel CPUs from Intel Kabushiki Kaisha in Japan, and procures substantially all AMD CPUs from AMD Japan Ltd. in Japan (*id.*).[4] Substantially all PCs made or sourced by PC&NC are sold by PC&NC to regional Toshiba subsidiary corporations, including TAIS, an indirectly-held independent U.S. subsidiary that markets and sells substantially all Toshiba PCs in the United States (*id.* ¶ 5; Exhibit 4 ¶ 4). AMD's cause of action against Intel does not arise out of any activities of Toshiba purposefully directed at residents of this forum. AMD cannot demonstrate specific jurisdiction over Toshiba. *Cf. Bell Helicopter Textron, Inc. v. C&C Helicopter Sales, Inc.*, 295 F.Supp.2d 400, 406 (D. Del. 2002); *OSC Corp. v. Toshiba America, Inc.*, 491 F.2d 1064 (9th Cir. 1974) (no jurisdiction over Toshiba where wholly-owned U.S. subsidiary purchases products in Asia and sells them in forum); *Allen v. Toshiba Corp.*, 599 F.Supp. 381 (D.N.M. 1984) (same).

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to enforce the subpoena") (Exhibit 2). AMD's failure to properly serve a Rule 45 subpoena on Toshiba, in addition to Toshiba's other grounds of opposition (*see* Toshiba letter at 2), is an independent dispositive ground on which AMD's motion to compel should be denied.

[3] "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115; *Monsanto Co. v. Syngenta Seeds, Inc.*, 443 F.Supp.2d 636, 643 (D. Del. 2006). This especially true for non-parties. *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522, 546 (1987); *Laker Airways, Ltd. v. Pan American World Airways*, 607 F. Supp. 324, 326 (S.D.N.Y. 1985).

[4] Even if PC&NC had procured Intel and/or AMD CPUs in the United States, "purchases of products in the United States are never enough to justify jurisdiction." *Assoc. Trans. Line, Inc. v. Productos Fitosanitarios Profico,* 197 F.3d 1070, 1075 (11th Cir. 1999).

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B. AMD Cannot Demonstrate General Jurisdiction Over Toshiba.

Likewise, no general jurisdiction exists over Toshiba. To support general jurisdiction, AMD must establish that Toshiba engaged in continuous, systematic, and substantial business contacts with this forum. *Bell Helicopter*, 295 F.Supp.2d at 403, 406. AMD must next show that such contacts result from acts undertaken by Toshiba purposefully directed at this forum. *Id.*[5] AMD must also demonstrate that it is fair and reasonable under the circumstances to exercise jurisdiction over Toshiba notwithstanding its lack of purposeful contacts with this forum. *ICT Pharm., Inc. v. Boehringer Ingelheim Pharm., Inc.*, 147 F.Supp.2d 268, 272-73 (D. Del. 2001) (noting unique burdens on foreign companies). It is "extremely rare" for general jurisdiction to exist over a foreign parent for a claim not involving the parent's activities in the forum. *Merck & Co., Inc. v. Barr Labs., Inc.*, 179 F.Supp.2d 368, 375 (D. Del. 2002). Toshiba does not engage in substantial, continuous, and systematic business activities here, nor has it purposefully directed such acts at this forum. *See* Exhibit 3. Toshiba is not found in this forum, nor does it transact business in it. *Id.* General jurisdiction does not exist over Toshiba. *Cf. Toshiba America*, 491 F.2d at 1066-68; *Raza v. Siemens Medical Solutions USA, Inc.*, 2007 WL 2120521 at *2-4 (D. Del. 2007) (Exhibit 5); *Toshiba Corp.*, 599 F. Supp. at 386-87.

II. Jurisdiction Does Not Exist Over Toshiba Under Delaware's Long-Arm Statute.

AMD cannot demonstrate personal jurisdiction over Toshiba under Delaware's long-arm statute, 10 *Del. C.* § 3104, because Toshiba has not performed the requisite acts. Specific jurisdiction does not exist under § 3104(c)(1) because Toshiba does not transact business or perform any character of work or service in Delaware, as all such business is conducted by independent U.S. subsidiary corporations (Exhibit 3 ¶¶ 6, 8-11; Exhibit 4 ¶¶ 4-5). Toshiba has not directed any jurisdictional act at this forum, making it impossible for AMD's claims against Intel to arise from any such act. *Cordis Corp. v. Adv. Cardiovascular Sys., Inc.*, 1999 WL 805284 at *4 (D. Del. 1999) (Exhibit 6). General jurisdiction does not exist over Toshiba under § 3104(c)(4), which applies only when a non-resident has extensive and continuing contacts such that it is "generally present" in the state. *Tristrata Tech., Inc. v. Neoteric Cosmetics, Inc.*, 961 F.Supp. 686, 691 (D. Del. 1997). The "persistent course of conduct" requirement imposes a high standard on AMD, and is often not met. *Id.* Toshiba lacks extensive, substantial, or continuous purposeful contacts with this forum (Exhibit 3 ¶¶ 6, 8-11; Exhibit 4 ¶¶ 4-5). Thus, AMD cannot establish general jurisdiction. *Cf. Raza*, 2007 WL 2120521 at *2-4.

III. The TAI Subsidiaries (Including TAIS) Are Not Agents Of Toshiba.

Whether an agency relationship exists between two companies depends on the extent of overlap of officers and directors; methods of financing; responsibility for day-to-day management; and the process by which the corporations obtain business. *Bell Helicopter*, 295 F.Supp.2d at 409 (no agency where same person was sole majority shareholder, director and officer of both companies; same person managed day-to-day operations of both businesses; and companies worked together to obtain business). Furthermore, even if the TAI subsidiaries were agents of Toshiba, AMD must demonstrate that the agent's acts were directed or controlled by Toshiba for the acts to be considered jurisdictional acts of Toshiba. *Reach & Assocs., P.C. v. Dencer*, 269 F.Supp.2d 497, 507 (D. Del. 2003). If a subsidiary is present in a forum "primarily for the

[5] This requires "significantly more" than minimum contacts. *Provident Nat'l Bank v. Cal. Fed. S&L Assoc.*, 819 F.2d 434, 437 (3d Cir. 1987).

purpose of carrying on its own business and the subsidiary has preserved some semblance of independence from the parent and is not acting as merely one of its departments, personal jurisdiction over the parent corporation may not be acquired simply on the basis of the local activities of the subsidiary company." Wright & Miller, *Federal Practice & Procedure* § 1069.4 (2005). *Cf. Cannon Mfg. Co. v. Cudahy Co.*, 267 U.S. 333, 336-38 (1925). Toshiba and the TAI subsidiaries have purposefully and deliberately kept the management and operations of the U.S. subsidiary corporations independent from Toshiba (*see* Exhibit 3 ¶¶ 2, 7-13; Exhibit 4 ¶¶ 2-6). They are not agents of Toshiba. *Cf. ICT Pharm.*, 147 F.Supp.2d at 273-74; *Akzona Inc. v. E.I. du Pont de Nemours & Co.*, 607 F. Supp. 227, 237-240 (D. Del. 1984); *Toshiba Corp.*, 599 F. Supp. at 389-92.

IV. The TAI Subsidiaries (Including TAIS) Are Not Alter Egos of Toshiba.

"Delaware courts apply the alter ego theory strictly and...employ a similar analysis when deciding whether it is appropriate to pierce the corporate veil." *Reach,* 269 F.Supp.2d at 505-06. Critical elements are (1) whether the foreign entity over which jurisdiction is sought has no real corporate identity from the entity over which jurisdiction is clear, and (2) the existence of acts in the forum which can be fairly imputed to the foreign entity and which satisfy the long-arm statute and/or federal due process requirements. *Id.* at 506. "Delaware courts have been very cautious about imputing even the acts of wholly-owned Delaware subsidiaries to parent corporations without an analysis of whether the corporate veil should be pierced or whether the parent corporation actively employed the subsidiary as its mere agent or instrumentality." *Greene v. New Drama Perfumes Corp.*, 287 B.R. 328, 343-44 (D. Del. 2002). "Mere dominion and control of the parent over the subsidiary" is not sufficient. *Outokumpu Eng'g Enters., Inc. v. Kvaerner EnviroPower, Inc.*, 685 A.2d 724, 729 (Del. Super. 1996). The degree of control required is such exclusive domination and control that the subsidiary no longer has legal or independent significance of its own. *Id.* As discussed above, Toshiba and the TAI subsidiaries clearly have separate corporate identities, and have legal and independent significance of their own (Exhibit 3 ¶¶ 2, 6-13; Exhibit 4 ¶ 2-7). *Cf. Toshiba Corp.*, 559 F.Supp. at 391 (rejecting alter ego theory). "[T]o reach a parent corporation under the alter ego theory, the party asserting jurisdiction must establish some fraud, injustice, or inequity in the use of the corporate form." *C.R. Bard, Inc. v. Guidant Corp.*, 997 F.Supp. 556, 559 (D. Del. 1998). *See also Bell*, 295 F.Supp.2d at 407-08; *Cruachem,* 772 F.Supp. at 1464. AMD can make no such showing.

V. Toshiba Has Clearly Reserved and Not Waived its Jurisdictional Opposition.

AMD argues that: "By entering into the [Voluntary Production] Agreement, the Parties obviated the need to engage in further discussions regarding service and jurisdiction." AMD reply at 1. Essentially, AMD – after accepting and benefitting from Toshiba's voluntary help with its case against Intel – is now trying to use Toshiba's good faith cooperation against Toshiba. AMD's argument is critically flawed, unbecoming, and should be rejected.

A. The Voluntary Production Agreement Reserves Toshiba's Opposition.

AMD's argument is belied by the Voluntary Production Agreement itself, which makes Toshiba's reservation of its grounds of opposition a core part of the agreement to try to resolve the discovery disputes between the parties and Toshiba by way of a *voluntary* document production by Toshiba (*see* Toshiba letter at 3). It explicitly recognizes that "Toshiba has objected to the [document subpoenas] and maintains that (i) jurisdiction does not exist over it in this litigation; (ii) Toshiba has never been properly served with the subpoenas; and (iii) Toshiba

is under no obligation to produce any documents or other information in this litigation." Moreover, it clearly and unequivocally provides that Toshiba is *not* waiving its opposition: "Now therefore, without waiving its objections (including lack of jurisdiction over Toshiba)...."

AMD suggests that Toshiba implicitly and intentionally waived its clearly stated opposition to the exercise of personal jurisdiction over Toshiba under the last sentence in paragraph 2, which states: "Depending on the circumstances, Toshiba may produce such documents [dated between January 1, 2000 and January 1, 2001, and/or between January 1, 2005 and October 31, 2006] subject to additional limitations, including, without limitation, limiting access to outside counsel; the parties may apply to the Special Master or the Court to lift those limitations." The rationale behind this sentence was to allay Toshiba's concerns about the potential disclosure of more recent Toshiba documents (*i.e.,* dated between January 1, 2005 and October 31, 2006) containing highly sensitive Toshiba business information. As a result, the language is permissive – Toshiba *may* produce certain documents subject to additional limitations, if it is concerned about the potential disclosure of such recent, highly sensitive business information. If Toshiba does not have such concerns, it would not designate the documents subject to additional limitations. Similarly, if Toshiba does designate documents subject to additional limitations, and the parties want to use those documents in ways beyond the scope of the additional limitations, the parties *may* ask Your Honor or the Court to lift those additional limitations. The sentence deals only with potential "use designations" for certain recent documents that Toshiba would have already voluntarily produced to the parties in the United States. In no way does the sentence waive Toshiba's opposition to the exercise of personal jurisdiction over *Toshiba.*

B. The *Copiers* Case Does Not Support Finding Jurisdiction Over Toshiba Here.

AMD suggests that *Copiers Typewriters Calculators, Inc. v. Toshiba Corp.,* 576 F. Supp. 312 (D. Md. 1983) may be relevant to support a finding of personal jurisdiction over Toshiba here. *See* AMD reply at 2. AMD fails to note that the *Copiers* court only found specific jurisdiction over Toshiba based on the particular facts in that case. Here, PC&NC purchases CPUs from Intel Kabushiki Kaisha and/or AMD Japan Ltd. in Japan (*see* Exhibit 3 ¶ 4). The *Copiers* case is irrelevant to whether specific or general jurisdiction exists over Toshiba in this litigation.

C. A Foreign Parent Company's Involvement in Unrelated Patent Infringement Litigation Does Not Waive Personal Jurisdiction.

AMD suggests that Toshiba waived its jurisdictional opposition by being involved in three unrelated patent infringement suits, including one in Delaware (AMD reply at 2 & Exhibit A), each of which settled. AMD's argument is flawed and should be rejected here. Judge Farnan recently rejected a similar argument in *Raza,* 2007 WL 2120521 at *2-4 (rejecting argument that foreign parent company's participation in four patent infringement actions in Delaware (in addition to other conduct) was sufficient to confer personal jurisdiction over foreign parent).

In conclusion, no personal jurisdiction exists over Toshiba in this litigation. Toshiba, which is not subject to a valid Rule 45 subpoena, has preserved and not waived its opposition to discovery from it. For these reasons, AMD's motion to compel documents from Toshiba should be denied.

Respectfully submitted,

Vernon R. Proctor

Vernon R. Proctor (#1019)

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cc (via electronic filing): Clerk of the Court; James L. Holzman, Esq.; Richard L. Horwitz, Esq.; Chad M. Shandler, Esq.

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Exhibits

1 – *Parker v. John Doe # 1*, 2002 WL 32107937 (E.D. Pa. 2002)

2 – *Fields v. Bucks County*, 2005 WL 1388009 (E.D. Pa. 2005)

3 – Declaration of (Toshiba Corporation)

4 – Declaration of (Toshiba America Information Systems, Inc.)

5 – *Raza v. Siemens Medical Solutions USA, Inc.*, 2007 WL 2120521 (D. Del. 2007)

6 – *Cordis Corp. v. Adv. Cardiovascular Sys., Inc.*, 1999 WL 805284 (D. Del. 1999)