



1313 North Market Sweet
PO Box 951
Wilmington, DE 19899-0951
302 984 6000

www.potteranderson.com

W. Harding Drane, Jr.
Partner
Attorney at Law
wdrane@potteranderson.com
302 984-6019 Direct Phone
302 778-6019 Fax

April 7, 2009
Public version Dated: April 15, 2009

VIA ELECTRONIC FILING

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

Re: Advanced Micro Devices, Inc., et al. v. Intel Corporation, et al., C.A. No. 05-441-J; In re Intel Corporation, C.A. No. 05-MD-1717-JJF Opposition to Request for Issuance of Letters Rogatory (D.M. 26)

Dear Judge Poppiti:

This letter responds to AMD's submission of April 2, 2009, renewing its request for letters rogatory to be issued to judicial authorities in Italy and France. AMD's request comes a mere three days after [REDACTED]

[REDACTED] As reflected in the Court's letter. AMD's continued possession and intended use of the [REDACTED] raise issues of international comity on which the [REDACTED] views are likely to be highly significant. Having requested specific input from the [REDACTED] it would be premature to trigger judicial proceedings in two European countries through letters rogatory without first affording the [REDACTED] an opportunity to be heard.

Intel's March 18, 2009 letter explained that the [REDACTED] regulations clearly prohibit any use of confidential investigatory documents such as the [REDACTED] in any context outside of [REDACTED]

[REDACTED] With respect to the [REDACTED]

[REDACTED] Notably, AMD's letter does not contest any of the facts recited in Intel's March 18 letter and makes no claim that AMD rightfully possesses the [REDACTED]. Instead, AMD now argues that even if it has no legitimate claim to the [REDACTED], it still should be permitted to benefit from Intel's inadvertent production of the document to support its request for issuance of letters rogatory. Because nothing in the case law cited by AMD compels this counterintuitive result, AMD's request should be denied.

AMD relies principally on a single district court case, *SEC v. OKC Corp.*, 474 F. Supp. 1031 (N.D. Tex. 1979), in which the court declined to extend the so-called "fruit of the poisonous tree" exclusionary rule applicable in criminal proceedings to a privileged report obtained by the SEC in the course of an investigation. That doctrine is derived from the Fourth Amendment of the Constitution and exists to protect the privacy interests of criminal defendants. Far from being "a case indistinguishable from ours," as AMD would have it (AMD Letter of April 2, 2009, at page 2), *OKC Corp.* considered the extent to which constitutional protections against unreasonable government searches apply in the context of a civil investigation. That setting, and the issues raised therein, have little or no relevance to the question whether the comity-based deference owed to the ██████ should limit AMD's ability to capitalize on Intel's inadvertent production of the ██████

The issue in *OKC Corp.* related to the disclosure of a party's own privileged document to the SEC, which the SEC then sought to use in its investigation. With respect to a waiver of privilege, however, the only interests at stake are those of the party claiming the privilege. Intel's inadvertent disclosure of the ██████ involves a different issue. The confidentiality associated with the ██████ was imposed by the ██████ pursuant to its own regulations. Because the usage restrictions on the ██████ flow from the ██████ exercise of its authority, Intel was not authorized to disclose it or otherwise lift those confidentiality restrictions. Thus, *OKC Corp.*'s discussion of the balance of interests and incentives relating to a party's disclosure of its own privileged material is not instructive here.

OKC Corp. also does not involve the type of international comity concerns that are inextricably bound up with AMD's attempt to seek immediate issuance of letters rogatory. In requesting the letters rogatory, AMD seeks to initiate judicial proceedings in two ██████ jurisdictions prior to any finding that AMD may legitimately possess the ██████ and prior to any opportunity for the ██████ to provide its views to the Court. There can be no doubt that the ██████ possesses a valid and substantial interest in whether the letters rogatory are issued, not least because the sole basis for AMD's request is the ██████ and because AMD's request seeks materials prepared for the ██████ investigation. AMD's efforts to expedite the issuance of letters rogatory undercuts the entire basis for the Court's consideration of comity issues by calling for this Court to act before evaluating the ██████ interest as a foreign sovereign. Nothing in *OKC Corp.* addresses this issue or provides support for AMD's request.

Nor does AMD's further claim that it "stands in the same 'innocent' shoes as the SEC did in *OKC Corp.*" withstand scrutiny. The relevance of the SEC's standing as an innocent acquiror of the privileged report in *OKC Corp.* was that no deterrence rationale would be served by prohibiting the SEC's use of the report. *See OKC Corp., 474 F.Supp. at 1039.* In this case, however, "deterrence" is not the basis for requiring AMD to discontinue its use of the ██████. The interest to be protected here is that of the ██████ - not Intel - and Intel's inadvertent production of the ██████ is not a reasonable basis on which to override the ██████ legitimate claim to preserving the confidentiality of the ██████. Moreover, AMD's claim of "innocence" is difficult to reconcile with its actual knowledge (as a complainant) of the ██████ ██████. AMD needed no "searching inquiry into comity principles" to

understand that the [REDACTED] could not be used in this proceeding; [REDACTED]
[REDACTED] (Ex. E to Intel March 18 Letter).

To the extent that *OKC Corp.* has any relevance to the issues presented by AMD's request, that case actually cuts against the merits of AMD's claim. The *OKC Corp.* court deferred the SEC's use of the privileged report at issue until *after* the constitutional issues raised in the case were fully aired and adjudicated. *OKC Corp.*, 474 *F.Supp.* at 1034 ("The SEC agreed not to proceed with its use of the report and its investigation of OKC until this court's resolution of the issues presented in [an earlier proceeding reviewing the SEC's actions and defendant's Fourth Amendment claims]."). In other words, the court in *OKC Corp.* considered the merits of the SEC's claim to the document in question before authorizing action based on the document. By contrast, AMD's letter seeks to pre-empt any inquiry into the merits of the comity issues by initiating the letters rogatory before the [REDACTED] has had an opportunity to make its views known.

Finally, AMD's argument that letters rogatory should be issued now because of the approaching deadline for fact discovery is not persuasive. AMD provides no support for the assertion in its letter that the [REDACTED]. To the contrary, the Court's letter clearly identified the date on which discovery is scheduled to close and asked for the [REDACTED]. There is no reason to conclude that the [REDACTED] will delay its response, particularly as the questions posed are straightforward and simply request that the [REDACTED] make its position known to the Court. In terms of timing, it also bears emphasizing that AMD has been in possession of the inadvertently-disclosed [REDACTED] for nearly six months. AMD could have easily avoided any timing issues associated with the close of discovery by raising these issues earlier or informing the [REDACTED] of its planned actions before filing its motion for letters rogatory. Having acted to maximize its advantage from Intel's inadvertent disclosure of the [REDACTED], AMD should not now be able to cite discovery deadlines as a basis for circumventing the significant comity issues raised by its conduct.

Respectfully,

/s/ *W. Harding Drane, Jr.*

W. Harding Drane, Jr.

WHD:cet

cc: Clerk of Court
Counsel of Record (via CM/ECF & Electronic Mail)