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FILED UNDER SEAL

By Hand
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-JJF; In re Intel Corporation, C.A. No. 05-MD-1717-JJF

Dear Judge Poppiti:

On April 21, 2009, Intel notified AMD and Your Honor about a document production issue and potential privilege dispute between the parties involving a document – consisting of a cover email and two attached PowerPoint presentations – previously produced by AMD. AMD responded by letter on May 1, 2009 and stated its intention to claw back some unidentified portion(s) of this document. Intel respectfully disagrees with certain factual and legal statements included in AMD's letter and submits this brief letter in response.

First, AMD's letter accuses Intel of violating paragraph 35 of the Second Amended Stipulation Regarding Electronic Discovery and Format of Document Production (the "Stipulation"). That is plainly incorrect. Consistent with the Stipulation, which AMD quotes in its letter, Intel notified AMD of the information at issue, specifically identified it, and ceased further review. Nothing more is required.

Second, AMD suggests that Intel acted improperly by notifying Your Honor of the situation and submitting the document under seal while the parties meet and confer about it. After carefully considering the issue, Intel proceeded in this manner because there are no established procedures addressing the present circumstances. Just as Intel anticipated, AMD disagrees with Intel's position on the document and has now clawed it back in advance of the parties' meet and confer. The claw back creates a challenging, if not impossible, situation for Intel to navigate during the parties' forthcoming discussions and any potential motion practice. If Intel disagrees with the nature and/or extent of AMD's redactions – which seems likely given that the document totals approximately 300 pages – Intel may not be able to reference the actual text of the document without subjecting itself to accusations of improper use or review of a "privileged" document. Without any specific procedures governing this situation – and AMD does not and cannot identify any – Intel believed the proper course was to notify Your Honor in advance of the meet and confer, and to provide the document to Your Honor (under seal) for safekeeping until the matter is ripe for resolution.

Third, Intel does not agree with AMD's summary of the applicable waiver law. In the Third Circuit, when a client voluntarily discloses privileged communications to a third party, the privilege is waived. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1424 (3rd Cir. 1991); *U.S. v. Rockwell Intern.*, 897 F.2d 1255, 1265 (3rd Cir. 1990). Only in narrow circumstances can the privilege be extended to non-lawyers who are employed to assist the lawyer in the rendition of professional legal services. *Westinghouse Elec. Corp.*, 951 F.2d at 1424; *accord Blumenthal v. Drudge*, 186 F.R.D. 236, 243 (D.D.C. 1999). This exception must be strictly construed and should only apply when a confidential communication was made for the purpose of obtaining legal advice from the lawyer. *Westinghouse Elec. Corp.*, 951 F.2d at 1424; *see also Blumenthal*, 186 F.R.D. at 243 (citations omitted).

Here, the text and context of the communication demonstrate that the transmission of the document to the [redacted] consultant was *not* for the purpose of obtaining legal advice. AMD does not argue that it was; instead, it merely states that the consultant who received the communication is a "long-standing" consultant on "important" corporate strategy. [redacted] itself, through counsel, has previously represented that [redacted] was not hired for, and has not provided any consulting services in connection with, the present litigation. These facts do not fall within the "narrow" exception to the waiver rule.

Fourth, AMD's apparent claim of work product protection over portions of the document raises numerous questions. Do the portions of the document at issue subject to the claim actually qualify as work product? If so, are they core or fact-based work product? Under Federal Rule 26(b)(3), can Intel show a "substantial need" for the information and "undue hardship" to obtain it from other means? If necessary, Intel will seek an opportunity to brief these issues, and to request an *in camera* review of the document to the extent necessary and appropriate. We wish to note that AMD previously argued that Your Honor's oversight of a potential work product redaction issue was an appropriate "sanity check." 12/27/07 Hearing Tr. 36:12-23.

Finally, as Intel stated in its original letter, we are prepared to meet and confer regarding the document. Intel attempted to do so on April 30, 2009, the day before AMD submitted its letter to Your Honor. Intel therefore awaits the redacted version of the document, which AMD has promised to produce, so that the parties can meet and confer as soon as possible. If that process is hindered by, for example, AMD's refusal on privilege grounds to discuss the substance of its redactions with Intel, we intend, of necessity, to seek the Court's assistance to resolve the dispute.

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

WHD:cet
cc: Clerk of Court (via Hand Delivery)
Counsel of Record (via CM/ECF & Electronic Mail)
Public Version: 5/22/09

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

I, W. Harding Drane, Jr. hereby certify that on May 22, 2009, 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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