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VIA ELECTRONIC FILING AND HAND DELIVERY

The Honorable Vincent J. Poppiti
Special Master
Fox Rothschild LLP
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919 North Market Street, Suite 1300
Wilmington, DE 19899-2323

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, DM

Dear Judge Poppiti:

On April 28, 2009, AMD timely served a Rule 30(b)(6) deposition notice and request for production of documents addressing the precise preservation topics on which Intel has conducted both informal and formal discovery of AMD over the last year.¹ Intel previously argued to Your Honor that discovery on these very topics is “routinely expected from litigants,” and that Intel had a “perfect right” to conduct it. (*See* Intel’s January 5, 2009 Letter Brief at p. 3, Fowler Decl. ¶ 10, Exh. I.) And yet, when Intel is asked to produce what it has -- as a matter of purported “entitlement” -- so vigorously sought and obtained from AMD, Intel responds by refusing to produce a 30(b)(6) witness on all but two of AMD’s 30(b)(6) topics and refusing to produce any documents.²

Not even Intel disputes that Intel’s preservation discovery “got into the details, into the weeds” about aspects of AMD preservation on which AMD has never obtained information from Intel. And Intel has stated its intent to rely on the preservation discovery it conducted -- but which AMD has not -- to seek “remediation” from AMD. AMD fully expects that Intel will support its motions by arguing that AMD should have employed preservation measures that *Intel itself never employed at all*. As a matter of right and certainly fairness, therefore, AMD is entitled to and must obtain discovery from Intel on the same subject matters and issues that Intel has both raised in discovery and will doubtlessly rely on in its forthcoming motions.

¹ Indeed, AMD’s latest 30(b)(6) notice is virtually a mirror image of the relevant parts of the deposition notice Intel served on AMD in December 2008. *See* AMD’s Rule 30(b)(6) Deposition Notice and Request for Production of Documents attached to the Declaration of Jeffrey J. Fowler (“Fowler Decl.”) ¶ 3, Exh. A filed simultaneously herewith.

² Intel only agrees to produce a 30(b)(6) witness on Topic 9, Intel’s “Global Database,” and Topics 7(c) and 7(d) “to the extent that inquiry into [these latter two subtopics] is related to Topic 9.” Pursuant to the agreement of the parties, AMD has withdrawn Topics 7(a) and 7(b) and Document Request 10.

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Notably, Intel does not defend its refusal to submit to discovery by arguing that AMD has already conducted it. Nor does it disavow its intent to use the discovery it has obtained, but not given, offensively in future motions. Instead, Intel duplicitously stonewalls this discovery by wrongly asserting that it is “untimely,” “duplicative” since AMD purportedly had an *opportunity* to conduct this discovery before, “burdensome,” and invades the attorney-client privilege and attorney work product doctrine.

Having met and conferred without success, AMD thus brings this motion to compel. As we show below, none of Intel’s arguments or objections preclude or can preclude the timely discovery AMD served. AMD therefore seeks an order compelling Intel to produce a competent witness (or witnesses) for deposition, and to fully respond to AMD’s document requests. The Court should so order.

1. AMD’s 30(b)(6) Notice is Not Time-Barred, As Intel Asserts.

Intel’s Objections and Responses to AMD’s 30(b)(6) notice begin with a “general objection” that AMD’s discovery is “untimely.” (*See* Intel’s Objections and Responses at p. 5, hereafter “Objections,” Fowler Decl. ¶ 4, Exh. B.) It is principally on this basis that Intel resists any and all discovery. And Intel’s sole basis for this objection and its position is language in the June 20, 2007 Stipulation and Order Bifurcating Discovery into Intel’s Preservation Issues (“Bifurcation Order”). (*See* Fowler Decl. ¶ 9, Exh. H.) Intel’s reliance on that order to preclude timely AMD preservation discovery is specious.

Your Honor will recall that the Bifurcation Order split discovery into Intel’s preservation lapses into two halves: Remediation Discovery and Causation/Culpability Discovery. (*Id.* ¶ 1, pp. 3-4.) The Causation/Culpability phase was to commence “expeditiously” after the completion of Remediation Discovery. (*Id.* ¶ 5, p. 5.) Intel now relies on this phrase to argue that AMD’s current Rule 30(b)(6) notice was not served “expeditiously” and is thus time-barred. Intel’s objection is meritless for three reasons.

First, Causation/Culpability Discovery is not closed, and AMD has never said that its discovery into Intel’s preservation of evidence has been completed. Unlike the Remediation phase, the Bifurcation Order did not specify an end date for Causation/Culpability Discovery. In fact, the origin of the requirement that it proceed “expeditiously” was stipulation language that *AMD proposed* in order to prompt a reluctant Intel to produce deposition witnesses and documents it had been withholding. (*See* Fowler Decl. ¶ 9.) Through Intel’s discovery -- and, certainly, by way of depositions of AMD witnesses Intel conducted in March 2009 -- Intel has interjected as new “preservation issues” the topics covered by AMD’s 30(b)(6) notice. AMD responded by serving its Rule 30(b)(6) notice in April 2009. Thus, if anything, AMD has acted expeditiously to pursue these issues newly-interjected by Intel.

Second, the Bifurcation Order was not intended to foreclose any and all future discovery regarding the parties’ preservation and production of documents -- and there is nothing in it to suggest any such limitation. Instead, discovery is left open until such time as AMD responds to Intel’s massive spoliation of evidence -- which AMD has not yet done. (*See* Bifurcation Order ¶ 5, p. 5, Fowler Decl. ¶ 9, Exh. H.) Intel thus advances a reading of the Bifurcation Order that is at odds with its very terms.

Finally, Intel's proposed discovery limitation is also entirely at odds with the Court's Case Management Order No. 1 -- and Intel's own interpretation of that Order. Case Management Order No. 1 permits Intel, AMD, and/or class plaintiffs to take a deposition, at any time "[p]rior to or shortly after the deadline for completing document production," into "the completeness of document production (including electronic discovery)." (See Fowler Decl ¶ 11, Exh. J.) Intel has repeatedly argued to this Court -- including in its July 2, 2008 and January 5, 2009 letter briefs, that its discovery into AMD's document retention policies and practices was fully justified by the language of Case Management Order No. 1. (See Intel's January 5, 2009 Letter Brief at 1 n.2, Fowler Decl. ¶ 10, Exh. I; Intel's July 2, 2008 Motion at 2, 5 n.3, 7, Fowler Decl. ¶ 12, Exh. K.) That is not a deposition AMD has yet taken. Accordingly, if the Order is a sufficient basis to justify Intel's preservation discovery, it certainly justifies AMD's as well.³

The bottom line is this: AMD timely served its Rule 30(b)(6) deposition notice. No Court order limits or prohibits that new discovery. AMD is therefore entitled to conduct and obtain this discovery in the ordinary course, just as Intel was. The Court should so conclude.

2. AMD's 30(b)(6) Notice Does Not Duplicate Prior Discovery.

Intel also pretends that AMD's Rule 30(b)(6) deposition notice and document requests duplicate prior discovery AMD conducted. (See Intel's Objections at 3-4, Fowler Decl. ¶ 4, Exh. B.) These assertions are also specious. During the parties' meet and confers, AMD requested that Intel identify specific instances in depositions previously taken where AMD had already obtained the information sought by the new discovery propounded. Intel has not tried to and cannot do so. Indeed, although Intel initially agreed to provide these citations, it ultimately revised its offer to only provide instances where AMD had the "opportunity" to seek this discovery. (See June 9, 2009 Letter from D. Pickett at p. 2, Fowler Decl. ¶ 7, Exh. F.) Intel knows full well that AMD has not obtained the deposition testimony it now seeks, and that AMD has no intent of trodding already-trodden deposition ground. And the assertion that this discovery *could* have been previously conducted says nothing about whether it *actually was conducted* such that the new discovery is duplicative. That is the burden *Intel* must carry but cannot. (See *Anderson v. Dillard's, Inc.*, 251 F.R.D. 307, 310 (W.D. Tenn. 2008) (party opposing the requested discovery has the burden of establishing undue burden under Fed. R. Civ. P. 26(b)(2)(C)).)

As for documents, AMD offered to withdraw every document request if Intel would represent that its prior productions included all responsive documents, and asked that, if that were Intel's contention, Intel identify such documents. (See Meet and Confer letter of June 5, 2009, Fowler Decl. ¶ 7, Exh. E.) Intel declined to do so. Instead, it evasively represented that documents responsive to AMD's requests "*would have been included*" in prior productions without identifying a single document to support this assertion. (See June 9, 2009 Letter from D. Pickett at 2, Fowler Decl. ¶ 7, Exh. F.) That is not a representation that Intel produced *any* such documents, or that prior productions constitute a complete response to AMD's document requests.

Intel is simply trying to evade proper discovery and deny AMD the deserved opportunity to defend against Intel's forthcoming motions. There is no legal basis for that. Intel's reliance on AMD's prior "opportunities," and its general representations about Intel's prior document productions, simply do not vitiate AMD's proper discovery. AMD is not foreclosed from pursuing

³ In any event, the Bifurcation Order cannot and should not generally be read to prohibit a preservation deposition that the Court's Case Management Order No. 1 explicitly provides for.

this discovery merely because the general topics may be read to overlap with prior discovery. (*See Martinez v. Menchacha*, C.A. No. 08-197, 2008 WL 5060322 (S.D. Tex. Nov. 24, 2008).) This is especially true given that the discovery addresses new issues. (*See Garrett v. San Francisco*, 818 F.2d 1515, 1518-1519 (9th Cir. 1987).) The discovery AMD seeks is new, pure and simple. Intel can't show otherwise. The Court should order Intel's compliance.

3. Intel's Smattering of Boilerplate Objections Are Also Meritless.

Finally, Intel interposes objections in an attempt to entirely preclude AMD's discovery that Intel itself contended from the start are "contrary to law and logic." (*See Intel's January 5, 2009 Letter Brief at p. 3, Fowler Decl. ¶ 10, Exh. I.*) These range from attorney-client privilege and/or work product objections to each and every deposition topic and document request, to assertions that the very discovery Intel itself conducted is a "fishing expedition" that is "unduly burdensome" or "overbroad." (*See Intel's Objections at 5, 19-24, 26, Fowler Decl. ¶ 4, Exh. B.*) AMD acknowledges that privilege and work product issues exist, but they can be handled as with prior discovery. But no objection Intel interposes precludes discovery or can limit it to something less than Intel obtained from AMD.

4. AMD Needs This Discovery To Defend Itself.

In imposing its own preservation discovery upon AMD, Intel argued that AMD had placed *its own* preservation at issue by attacking Intel's alleged preservation lapses. (*See Intel's July 2, 2008 Mot. at 7, Fowler Decl. ¶ 12, Exh. K* (arguing that "the genie is out of the bottle" and that AMD "must allow Intel to discover whether its contentions withstand scrutiny").) As noted above, having withstood roughly two years of Intel's informal and formal discovery that Intel commenced in April 2007, AMD now strongly suspects that Intel intends to characterize as "defects" in AMD's preservation program preservation measures *that Intel itself never employed*.⁴ Intel has made clear that it plans to use these "defects" to seek an AMD "remediation." (*See March 2, 2009 Letter from Donn Pickett, Fowler Decl. ¶ 13, Exh. L.*) Discovery into Intel's own record with respect to these measures is thus necessary for AMD to defend itself.

5. Conclusion

AMD is prepared to conduct this remaining Rule 30(b)(6) discovery efficiently and expeditiously. For all the foregoing reasons, we respectfully submit that Your Honor should compel the Rule 30(b)(6) deposition requested and Intel's responses to AMD's document requests forthwith.

REDACTED

Respectfully,

/s/ Frederick L. Cottrell, III

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