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VIA ELECTRONIC FILING AND HAND DELIVERY

The Honorable Vincent J. Poppiti
Special Master
Fox Rothschild LLP
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REDACTED PUBLIC VERSION

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; Discovery Matter No.

Dear Judge Poppiti:

Some things never seem to stay resolved in this case. Discovery from The Glover Park Group ("Glover Park"), and other public affairs consultants to AMD and its outside counsel, is one of them.

The issue of whether the parties would seek to raid one another's public affairs consultants first surfaced over two years ago when Intel served its initial subpoena on Glover Park in May 2007. AMD objected on multiple grounds, including privilege and work product, because Glover Park had been retained to assist AMD's lawyers in creating and delivering public advocacy messaging (first to the antitrust regulatory community and later in connection with the litigation). Based on these representations — which Intel cannot seriously contest — in its words, Intel "just dropped it." (Declaration of Charles P. Diamond ("Diamond Decl.") ¶ 4, Exh. A.)

Yet, only four months later, Intel was back at the well. In September 2007, Intel subpoenaed three additional public affairs firms that, like Glover Park, AMD had retained to assist with its open-competition initiatives. (Diamond Decl. ¶ 5.) After AMD objected and threatened to reciprocate, Intel withdrew its subpoenas and stipulated that it would not again serve or enforce discovery on "any consulting firm . . . calling for the production of documents or testimony related to activities designed to influence government or agency action" (hereinafter, the "2007 Stipulation"). (*See* Pickett Decl., Exh. L.) As a result of the 2007 Stipulation, which limited *both* sides, AMD has refrained from seeking documents or testimony

from Intel's public affairs consultants or others assisting Intel or its counsel in messaging related to the parties' dispute. (Diamond Decl. ¶ 5.)

Less than a year later, Intel was at it again. In August 2008, it subpoenaed another AMD public affairs consultant, Waggener Edstrom Worldwide, Inc. ("Waggener"). After objection by AMD, and a representation that Waggener stood in the same shoes as Glover Park, Intel abandoned the subpoena. (*Id.* ¶ 4.)

We are now before the Court because Intel has served yet another subpoena on Glover Park (hereinafter, the "2009 Subpoena") not only in derogation of the parties' earlier agreement and the 2007 Stipulation, but filled with requests targeting information and documents plainly protected by the attorney-client privilege and/or the attorney work product doctrine.[1] Intel claims that this new subpoena is necessary because it has supposedly "learned facts, through discovery, which contradicted AMD's representations about the nature and timing of Glover Park's work." Reality, however, could not be more different.

The facts here are simple, undisputed and not contradicted by any of Intel's "evidence":

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[1] For example, Supplemental Document Request Number 6: "All documents concerning or relating to any Services provided by Glover Park for or on behalf of *O'Melveny and Myers LLP* [sic], including without limitation Services related to AMD or Intel." (emphasis added).

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Whether the parties reached an enforceable understanding not to go after one another's public affairs consultants when Intel first subpoenaed Glover Park — and AMD had every reason to believe they did — is no longer an issue. That is because, as noted at the outset of this memorandum, the parties made an express, written agreement, memorialized by the 2007 Stipulation, which prohibits either side from serving or enforcing subpoenas against the other's consultants calling for "documents or testimony related to activities designed to influence government or agency action."

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1. The 2007 Stipulation Prohibits the Very Discovery that Intel Now Seeks.

The 2007 Stipulation forbids subpoenas to "consulting firm[s] . . . calling for the production of documents or testimony related to activities designed to influence government or agency action."[3] Although Intel attempts to characterize the 2007 Stipulation narrowly as merely a "lobbying stipulation," in fact the 2007 Stipulation is nowhere limited to "lobbying" (and never even uses the term), and it instead covers a far broader universe of activities. Lobbying is only one of many "activities designed to influence government or agency action." Instead, "activities designed to influence government or agency action" include all manner of public affairs work

[2] Emails presented by Intel in its Exhibit N support AMD.

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[3] The carve-out in the 2007 Stipulation concerning discovery of documents related to anticipation of litigation was specifically limited to DC Navigators and the plain language of the stipulation makes clear that this carve-out does not purport to apply to all consultants.

and include such things as grassroots advocacy and issues framing and management as well as general public relations work. Further, the language in the 2007 Stipulation is broad in the sense that it prohibits discovery of anything "*related* to activities designed to influence government or agency action."

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But whether characterized as public affairs or public relations, materials related to efforts to influence government or agency action are insulated from discovery under the plain terms of the 2007 Stipulation; and Intel has proffered nothing remotely to suggest that the parties intended that agreement to be limited to lobbying activities.

Intel's chosen sound bytes characterizing Glover Park's work as merely public relations or,

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2. The Attorney-Client Privilege and/or the Attorney Work Product Doctrine Also Apply to Glover Park's Activities For and at the Request of AMD Counsel.

Even in the absence of the 2007 Stipulation, materials exchanged by AMD counsel with Glover Park are protected from discovery by the attorney-client privilege and/or the attorney work product doctrine. This would be so even were there a factual basis for Intel's attempt to mischaracterize Glover Park's role as some lowly "public relations" advisor. Intel is just wrong when it says in categorical fashion that "disclosures made by a client or its attorney to a public relations consultant are *not* protected" by the attorney-client privilege. Contrary to Intel's assertion, attorney disclosures to communications consultants do not need to concern "*litigation* strategy" to be privileged, *see In re New York Renu with Moistureloc Prod. Liab. Litig.*, 2008

WL 2338552 (D. S.C. May 8, 2008); they merely must involve legal advice. *Id.* Nor is it necessary that communications between the communications firm and the law firm help the latter to formulate legal advice to the client. *See In re Calvin Klein Trademark Trust*, 198 F.R.D. 53, 54 (S.D.N.Y. 2000).

For example, in *In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321 (S.D.N.Y. 2003), the court found to be privileged precisely the kinds of communications that Intel seeks here. In that case, lawyers representing the target of various regulatory and criminal investigations hired a public relations firm to assist a key and integral part of their legal strategy. *Id.* at 324. The lawyers in *Grand Jury* were worried that "unbalanced and often inaccurate press reports" about their client would create public pressure that would unfairly influence government officials' decisions on whether or not to move forward. *Id.* at 324. The lawyers thus sought to "alter[] the mix of public information" regarding their client's situation to lessen that risk. *Id.* at 326, 324.[4] The court held that attorney-client privilege applied in this instance, where attorneys did not themselves possess the requisite expertise to carry out their legal strategy. *Id.* at 330 (noting that the privilege should act to "encourag[e] frank communication among client, lawyers, and public relation consultants"); *id.* at 325 (citing *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961)).

AMD's situation is nothing if not perfectly analogous.

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[4] As the court explained: "Questions such as whether the client should speak to the media at all, whether to do so directly or through representatives, whether and to what extent to comment on specific allegations, and a host of others *can only be decided without careful legal input only at the client's extreme peril*." *Id.* at 330 (emphasis added).

[5] REDACTED McCoy Decl. ¶ 6; Diamond Decl. ¶ 2.

[6] Intel's citation of an AMD witness's deposition testimony that REDACTED

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3. Conclusion.

AMD and Glover Park respectfully request that Your Honor put the discoverability of public affairs consultants back in the box the parties created for it when they entered into, and sought and obtained Court approval of, the 2007 Stipulation. The 2007 Stipulation precludes discovery directed to consultants calling for materials or testimony "related to activities designed to influence government or agency action." Intel's 2009 Subpoena to Glover Park, and its belated effort to enforce its May 2007 Subpoena, flatly violate the 2007 Stipulation. It would be patently unfair, and wholly inappropriate, to allow Intel to seek discovery from AMD's consultants after it induced AMD to refrain from conducting that same discovery of Intel's. Your Honor should so order.

To end the matter once and for all, however, Glover Park is willing to review its files and produce any non-privileged, responsive materials dated prior to March 31, 2005 and that do not relate "to activities designed to influence government or agency action." This will assure that Intel will receive discoverable "anticipation of litigation" materials — if any exist — which is the goal that silently drove this motion in the first place.

Respectfully,

/s/ Frederick L. Cottrell, III

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