Potter
Anderson
Corroon LLP

1313 North Market Street
P.O. 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

July 10, 2009

By Hand
The Honorable Vincent J. Poppiti
Fox Rothschild LLP
919 N. Market Street, Suite 1300
Wilmington, DE 19801

PUBLIC VERSION
July 16, 2009

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
Reply – Motion to Compel Discovery from Glover Park (DM 36)

Dear Judge Poppiti:

Intel submits this letter in reply to AMD's opposition materials and in support of its Motion to Compel Discovery from Glover Park Group (scheduled for hearing on July 20, 2009).

The parties' dispute over Glover Park boils down to two issues. First, Intel is entitled to discovery of Glover Park's *non-lobbying* activities on behalf of AMD. This includes, *inter alia,* any information related to: (1) Glover Park's development of a public relations campaign aimed at Intel, (2) AMD's own competitive marketing strategy and (3) the anticipated or actual effect of the litigation on AMD's customers, the media, or on the public generally. The parties' Lobbying Stipulation does not foreclose discovery into any of these subjects. Nor is this information protected by any legitimate claim of attorney-client privilege or attorney work product. This discovery will undoubted shed light on the issue of AMD's anticipation of litigation, a key component of the upcoming motion for remediation.

Second, AMD contends that its outside counsel, O'Melveny & Myers, took over the retention of Glover Park effective January 1, 2005 to assist it with developing messaging related to regulatory investigations of Intel's practices. AMD then vaguely claims that at some unidentified time "[t]hereafter," Glover Park began "collaborating with O'Melveny to develop and to test jury themes, assisting counsel and AMD employees in talking about the litigation and helping O'Melveny distill the dispute into language that was understandable to both legal and non-legal audiences." AMD Opp. at 2-3. Intel believes Glover Park's work on this litigation likely commenced during the first quarter of 2005 (*i.e.*, between January and March 2005). If so, that admission would conclusively establish that AMD reasonably anticipated litigation long before it says it did. Intel is entitled to explore this issue.

AMD's broad and self-serving representations do not adequately address these two issues, and Intel needs discovery of Glover Park so that the Court can rely on facts, not ambiguities, in resolving the remediation motion.

A. Information About Glover Park's Non-Lobbying Activities Is Neither Privileged Nor Foreclosed By Stipulation. It is no secret that Intel believes AMD reasonably anticipated litigation against Intel several months earlier than AMD acknowledges. Intel further believes that information (documents and testimony) relating to Glover Park's non-lobbying activities will help establish that fact. As AMD acknowledges, a main thrust of Glover Park's role was to convince the marketplace, including opinion leaders, technology leaders, customers, and the general public, that Intel did not engage in fair and open competition. As such, communications between the two companies will likely reveal the *timing* of AMD's knowledge of the facts and antitrust theories that underlie its legal claims against Intel.

1. Information About Non-Lobbying Activities Is Not Privileged. AMD's own case law establishes that its communications with Glover Park when Glover Park worked directly for AMD (Nov - Dec 2004) were not privileged. *See, e.g., In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321, 331 (S.D.N.Y. 2003) (the party "would not have enjoyed any privilege for her own communications with [the PR firm] if she had hired [it] directly, even if her object in doing so had been purely to affect her legal situation.") And, of course, AMD's "transfer" of Glover Park's services to O'Melveny does not transform non-privileged communications into privileged communications. *U.S. v. Kovel*, 296 F.2d 918, 921 (2nd Cir. 1961) ("Nothing in the policy of the privilege suggests that attorneys, simply by placing...a [PR] firm on their payrolls...should be able to invest all communications by clients to such persons with a privilege the law has not seen fit to extend when the latter are operating under their own steam."); *NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 140-141 (N.D.N.Y. 2007) (counsel's hiring of the PR firm was a "facade" to "give cover" to communications).

Commentators have concluded that "expanding the attorney-client privilege to communications with public relations consultants is inadvisable and against the interests of justice." *See, e.g.,* Ann M. Murphy, *Spin Control and the High-Profile Client--Should the Attorney-Client Privilege Extend to Communications With Public Relations Consultants?,* 55 Syracuse L. Rev. 545, 589 (2005). The limited situations where courts have extended the privilege to public relations firms are inapplicable here. The communications with Glover Park were not for the purpose of and necessary to AMD obtaining legal advice. *Kovel*, 296 F.2d at 921; *Louisiana Mun. Police Employees Ret. Sys. v. Seal Air Corp.*, 253 F.R.D. 300, 314 ("involvement of the third party must be nearly indispensable or serve some specialized purpose in *facilitating attorney-client communications.*"); *Haugh v. Schroder Inv. Mgmt. N. America*, 2003 WL 21998674, *3 (S.D.N.Y. Aug. 25, 2003) (communications shared with PR consultant non-privileged because communications were not necessary to attorney providing legal advice).

That Glover Park's work for AMD might have ultimately proven useful to O'Melveny in providing AMD legal services, is insufficient. *In re Calvin Klein Trademark Trust,* 198 F.R.D. 53, 55 (S.D.N.Y. 2000) ("The possibility that [the PR firm's] activity may have been helpful to [counsel] in formulating legal strategy is neither here nor there if [the PR Firm's] work and advice simply serves to assist counsel in assessing the probable public reaction to various strategic alternatives, as opposed to enabling counsel to understand aspects of the client's own communications that could not otherwise be appreciated in the rendering of legal advice.").

Further, public relations advice, "even if it bears on anticipated litigation, falls outside the ambit of protection" of the work-product doctrine because "the purpose of the rule is to provide a zone of privacy for strategizing about the conduct of litigation itself, not for strategizing about the effects of the litigation on the client's customers, the media, or on the public generally." *Id.*

2. The Lobbying Stipulation Does Not Apply Here. In addition to its overbroad assertion of privilege, AMD asks the Court to interpret (really, misinterpret) the parties' Lobbying Stipulation to encompass all of Glover Park's activities, including corporate marketing, public relations or litigation support. That overly broad interpretation cannot be reconciled with the language of the Lobbying Stipulation itself, which only forecloses discovery into "documents or testimony related to activities *designed to influence government or agency action*" (which is the definition of the word "lobbying"). *See* Intel Ex. L, Lobbying Stipulation at 2 (emphasis added).[1] The plain meaning of the words used in the stipulation should govern. *Steigerwalt v. Terminix Int'l. Co., LP*, 246 Fed. Appx. 798, 801 (3d Cir. 2007) ("the words used, even in their literal sense, are the primary, and ordinarily most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else") (citation omitted).

AMD's contention that the stipulation includes any and all Glover Park activities is contrary to both the letter and spirit of the agreement. The stipulation expressly carved out certain "reasonable anticipation" discovery that Intel now seeks, thus demonstrating the parties never intended to foreclose such discovery. *See* Intel Ex. L, Lobbying Stipulation at 2-3 (subpoenas withdrawn "save and except that portion of the subpoena served on DC Navigators, LLC...requiring production of documents tending to show that AMD reasonably anticipated filings its lawsuit against Intel prior to March 31, 2005").

Since lobbying is limited to attempts to influence "public officials," rather than commercial audiences, AMD's own witnesses and documents conclusively prove that Glover Park performed functions well outside this narrow ambit. [redacted] McCoy Decl. ¶¶ 4-5. Indeed, Glover Park worked to [redacted] *See* Intel 6/12/09 Letter at 4 and Exs. O, P & Q; AMD Opp. at 5 [redacted] McCoy Decl. [redacted] These are not public officials, they are not the targets of lobbying efforts, and Glover Park's work involving these audiences is, *a fortiori*, not subject to the strictures of the Lobbying Stipulation between the parties.

In sum, the information is not privileged or precluded from disclosure by the Lobbying Stipulation. Intel requests an Order requiring Glover Park to produce all documents, and a witness to testify about, all non-lobbying activities performed for AMD.

---

[1] "Lobbying" means: "to conduct activities aimed at influencing public officials and especially members of a legislative body on legislation" and "to attempt to influence or sway (as a public official) toward a desired action." *See* http://www.merriam-webster.com/dictionary/lobbying. The Supreme Court has defined "lobbying activities" to exclude "attempts to saturate the thinking of the community." *United States v. Rumely*, 345 U.S. 41, 47-48 (1953).

B. O'Melveny's January 2005 Retention of Glover Park Must Be Explored. AMD vaguely asserts that all information related to Glover Park's work for O'Melveny starting January 1, 2005 is protected by the "attorney-client privilege and/or the attorney work product doctrine." AMD Opp. at 6. By letter of September 27, 2007, AMD's counsel advised Intel that Glover Park was retained "as of January 1, 2005" for the following purposes:

> to provide such services as O'Melveny & Myers LLP may require, including assisting in the *testing and development of litigation and jury themes*, preparing both AMD's legal and company spokespeople and written materials *concerning the litigation*; and providing expertise to help make this dispute understandable to *legal* and non-legal *audiences*.

Intel Ex. F., at 2 (emphasis added). AMD's counsel made that disclosure before Intel started to investigate the date on which AMD first reasonably anticipated this litigation, and apparently without recognizing the import of AMD's admission that Glover Park was retained to conduct litigation activities during the first quarter of 2005.

Now AMD's story has changed. AMD claims that O'Melveny first retained Glover Park as of January 1, 2005 to assist with its messaging vis-à-vis government regulators, and only later – at some unspecified time – turned its attention to this litigation. AMD's carefully crafted statements in its brief and declarations only highlight the timing issue. *See* Opp. at 2 ("*Thereafter*...its duties expanded to include collaborating with O'Melveny to develop and test jury themes"); Opp. at 6 ("*Later*, Glover Park began performing all manner of services to assist counsel...with this litigation"); Sallet Decl. ¶ 6 [redacted] (emphasis added to all).

Particularly on this ambiguous record, only full discovery of Glover Park's activities will establish what it did, when it did it and what import that has on AMD's anticipation of litigation.

C. Conclusion. Intel accepts Glover Park's offer to "review its files and produce any non-privileged, responsive materials," but asks the Court to issue an Order to clarify what constitutes "non-privileged, responsive materials." Moreover, in light of AMD's assertion of the attorney-client privilege "and/or" the work product doctrine (which, by definition, requires reasonable anticipation of litigation), Intel requests that the Court order AMD to (1) verify under oath its counsel's statement in the September 27, 2007 letter that Glover Park was retained for litigation activities as of January 1, 2005; and/or (2) produce within 15 days a privilege log identifying the materials it seeks to protect, the date of those materials, their subject matter, and the precise nature of the privilege or protection asserted.

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)