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VIA ELECTRONIC FILING AND HAND DELIVERY

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

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:

Per Your Honor's direction, this letter sets forth AMD's positions regarding the dates, location, length and scope of the further depositions of AMD's preservation witnesses.

The parties have met and conferred through letter exchanges about these issues. Some agreement has been reached but, as identified below, disputes remain about the length of deposition and scope of "reasonable follow-up" questions. AMD also believes that the Special Master's attendance at the depositions -- by telephone or in person -- would materially aid Your Honor's ability to resolve on an informed basis any disputes that might arise, and that this would assist the timely completion of these depositions once and for all.

AMD will be producing four witnesses to respond to the 54 questions that Your Honor ordered be answered by further deposition: (1) Tom McCoy (21 questions regarding "anticipation of litigation"); (2) Walter Smith (16 questions regarding custodian monitoring, general IT, and backup tape issues); (3) Dene Halle (13 questions regarding backup tape restorations and "data loss" issues); and (4) Jerry Meeker (2 questions regarding changes to Dumpster settings). Per the June 22, 2009 Order (05-441, D. I. 1581; 05-1717, D.I. 1933), AMD will provide a response to Question 93 (regarding AMD's complaint's allegations concerning Sony) via interrogatory response.

Dates and Locations: Subject to the availability of Your Honor and Mr. Friedberg and his colleagues, the parties have agreed that the depositions of Messrs. Smith and Halle will be held in Los Angeles on Thursday, August 13 at 10:30 am PDT, in the downtown offices of Bingham McCutchen. Mr. McCoy's deposition will proceed the next day, Friday, August 14, at

a time yet to be determined, in Bingham McCutchen's San Francisco office. The parties have agreed that Mr. Meeker's two-question deposition should be conducted telephonically pursuant to Fed. R. Civ. P. 30(b)(4). The date and time are yet to be determined.

Deposition Length: Unfortunately, the parties have not been able to reach agreement on appropriate time limits for completion of these depositions. Intel contends that it needs 6 additional hours to pose the 54 questions in issue and "reasonably follow-up." In other words, Intel believes it deserves a 40% increase over the 16 hours of deposition time that Your Honor previously allotted and Intel fully used. Intel argues that this almost full-day of additional deposition is necessary because: (1) Intel intends to ask the deponents "what they did to prepare for further deposition" and this will take "additional time"; and (2) Intel was "foreclosed from entire lines of questioning" and needs to conduct follow-up. (*See* Mr. Pickett's letter of July 2, 2009, at p. 1, attached hereto as Exhibit A.)

AMD believes that, if Intel is willing to be efficient, Intel can comfortably take and easily complete deposition in an additional 2 hours. This is so for at least four reasons.

First, questions eliciting what the deponents did to prepare for deposition can be asked and answered in no more than a few minutes with each of the three deponents, which is how long it took Intel the last go round with AMD's deponents.

Second, the two hours remaining are adequate to deal with 54 questions. None of these questions is long; both sides know what they are; and the witnesses will come prepared to answer them. Many of the questions can be asked and answered in a matter of seconds and certainl less than a minute. In fact, 26 of the 54 questions seek a "yes" or "no" answer, REDACTED With more than two hours available to it, Intel will have 2.5 minutes per question to procure whatever information it needs. The time Intel has not utilized on "yes/no" or other short questions can be preserved for those actually deserving some follow-up. [1] In short, Intel can do an efficient, complete deposition within this time. And it has had more than adequate time to prepare appropriate follow-up questions and to cull them down to an efficient, limited number.

Third, a two-hour time limit is appropriate to prevent Intel from circumventing the reasonable constraints that the Special Master has already placed on Intel's extensive and seemingly ever-expanding deposition effort. Indeed, as Your Honor appeared to conclude at hearing on June 15, 2009, Intel did not use its deposition time on "confirmatory" discovery but, rather, launched extensively on collateral matters. (*See* June 15, 2009 Hearing Tr. at 8:21 - 9:12 ("[T]he depositions were permitted, in large measure, to confirm, under oath, what Intel learned during the course of ***numerous hours*** of informal discovery, discussion, and other vehicles that were used to learn information . . . . From my perspective, it is my overarching preliminary opinion that ***Intel used this time for purposes of searching for other collateral information***.").) The Court's June 22, 2009 Order also confirmed that Intel pursued entire subject matters -- including 11 questions on which Intel chose unsuccessfully to move to compel -- that were "not

[1] Your Honor has pointed out that not all questions require follow-up. *See e.g*, Question 158, June 22, 2009 Order at 7-8.

contemplated within the sixteen (16) hours of deposition time allotted to Intel." (*See* June 22, 2009 Order at p. 7.) Intel is in the habit of exploring new topics at every turn. A two-hour time limit would discourage Intel from using these depositions as yet another opportunity to go fishing.

How this Court's proper boundaries on Intel's preservation depositions were decided in the first place is important. When the length and scope of Intel's depositions first came up, Intel argued strongly against this Court narrowing in any manner its right to conduct discovery into each and every one of the 15 topics in its Rule 30(b)(6) deposition notice. (*See* Intel's January 5, 2009 brief regarding length and scope of Rule 30(b)(6) deposition at p. 2 and 3.) (05-441, D.I. 1117; 05-1717, D.I. 1443). Intel acknowledged then that, as a consequence of that broad inquiry, it would be up to Intel to "allocate its time appropriately" so that it would not be "wasting" it. (*Id*.) At hearing the on January 9, 2009, Your Honor advised that it would be important "certainly for Intel to use the time efficiently." (*See* January 9, 2009 Hrg. Tr. at 41:17-19.) (05-441, D.I. 1164; 05-1717, D.I. 1491). That said, the Court did not constrain Intel's decisions about how to use its time, instead stating that "whatever time is ultimately allotted to Intel, it's their time to use as they choose." (*Id.* at 37:7-11, and 37:12-16 (Mr. Pickett acknowledging that it would be incumbent on Intel to "set priorities").) In response to Intel's requests, the Court then increased Intel's allotted time from the preliminary 14 hours discussed to 16 hours. (*Id.* at 123:17-23.)

Intel made its choices, and should not now be permitted a virtual do-over. Indeed, in addition to pursuing topics not contemplated within its time allotment (*see* June 22, 2009 Order at p. 7), Intel squandered its time in many ways that AMD has chronicled for the Court already -- from refusing written summaries in lieu of deposition, posing the same questions to multiple witnesses, rejecting a non-waiver proposal that would have made deposition more efficient, to asking questions about "journal searches" which the Court ordered be resolved informally. (*See* AMD's May 14, 2009 Opposition to Intel's motion to compel deposition testimony at p. 3-5.) (05-441, D.I. 1458; 05-1717, D.I. 1801). The fact is that Intel used every last second of its time as it saw fit, and eschewed means of deposition efficiency readily available to it. No topics were "foreclosed" to it, as Intel now complains, and Intel cites none. Intel's decisions should not be consequence-free. In issue now and appropriate for deposition are 54 questions -- not a complete re-do, an undue expansion, or a new launch into new topics. After about 16 hours of "informal" discovery and another 16 hours of deposition, Intel indisputably has already had a liberal opportunity to develop its record. Granting Intel another 6 hours would be inappropriate and an invitation to mischief.

Finally, Intel's demand for another 6 hours of deposition is founded on a fundamentally-flawed premise of what constitutes "reasonable follow-up." We address that issue next.

Deposition Scope and "Reasonable Follow-Up": Unless reasonable limits are imposed, AMD fears that Intel will push inquiry on the mostly narrow, discrete questions in issue beyond all reasonable limits, and beyond anything these Rule 30(b)(6) witnesses can possibly anticipate and prepare for, leading in the end to more "I don't know" answers, which will in turn lead to another cycle of motion practice. Intel self-restraint can best be induced by setting a reasonable

time limit that requires Intel to focus on the questions actually in issue and avoid collateral or new matters.

What truly constitutes "reasonable follow-up," and how far a deposing party is permitted to go in the re-deposition of an already-deposed witness, is the issue. A common-sense view is that -- in keeping with proper strictures on time and subject matter -- "reasonable follow-up" should be defined by what naturally and reasonably flows from the questions as posed and phrased at the first deposition -- as opposed to allowing departure into new areas or beyond the reasonable scope of the matters already in issue.

Indeed, courts do not hesitate to impose limits -- and pre-deposition constraints -- in order to assure that "reasonable follow-up" does not become a back-door vehicle to "re-deposition." Thus, for example, in *Alexander v. F.B.I.*, 186 F.R.D. 170 (D. D.C. 1999), the court permitted follow-up on the precise questions previously posed, but stated that the deposing party:

> will not be afforded a 'second bite at the apple' as if this further examination was an entirely new deposition. Plaintiffs shall limit their questions to the questions compelled by the court today and questions reasonably related to the subject matter these questions involve. The court is not simply granting plaintiffs an open re-deposition, and the plaintiffs have not even attempted to discuss the proper factors governing leave for such a re-deposition under the [Federal Rules of Civil Procedure] 30(a)(2)(B) and 26(b)(2).

(Id. at 179.) Other courts similarly construe "reasonable follow-up" narrowly. (*See, e.g., Cimaglia v. Union Pacific R.R. Co.*, No. 06-CV-3084, 2008 WL 5388330, at *2 (C.D. Ill. Dec. 18, 2008) (ordering narrow and tailored supplemental deposition, and holding that it was proper for the defendant to instruct its witness not to answer questions that fell outside this narrow topic); *Cellpro v. Baxter Int'l, Inc.*, No. C92-715D, 1992 WL 454839, at *5 (W.D. Wash. Dec. 28, 1992) (limiting follow-up to specific bounds of questions previously posed).) Nor can "reasonable follow-up" questions be permitted to invade privilege or work product protections that may not have been imperiled by the underlying original question. (*See, e.g., Genentech, Inc. v. Insmed Corp.*, No. C-04-5429, 2006 WL 988877, at *3 (N.D. Cal. Apr. 13, 2006) (permitting "reasonable follow up questions (such as the factual basis for his understanding) so long as no questions are asked which would elicit answers that would clearly reveal the protected content of any attorney-client communication"); *Smalls v. Fallon*, No. 92CIV.8191, 1995 WL 5847, at *16 (S.D.N.Y. Jan. 5, 1995) (expressly ordering that follow-up questions may not seek privileged information); *Alexander v. F.B.I.*, 192 F.R.D. 12, 19 (D. D.C. 2000) (similar).)

Intel's request for 6 hours of additional deposition time to ask 54 questions -- half of which call for simple "yes" or "no" answers -- is, by itself, a good indication of Intel's intent to conduct unreasonable follow-up. Intel's request amounts to almost seven minutes for each question! Intel's recent communications are further indication that Intel's intended "follow up" will be expansive, and tethered only loosely, if at all, to the actual questions Your Honor has directed AMD to answer. For example, in a letter dated June 18, 2009, before Your Honor ordered Question 93 (concerning when AMD knew about certain allegations concerning Sony as alleged in AMD's complaint) to be answered by interrogatory, rather than deposition, Intel provided a list of questions about entirely unrelated allegations in the complaint it claimed it

would ask as purported follow-up questions. (*See* Mr. Pickett's letter of July 18, 2009, at p. 2, attached hereto as Exhibit B.)

AMD understands that the Court cannot rule in the abstract whether questions it hasn't yet heard do or do not constitute "reasonable follow up" to the discrete questions which AMD has been ordered to answer. At the same time, AMD has reason to believe Intel will attempt to turn a Rule 30(b)(6) deposition that is supposed to involve the discrete questions Your Honor has ruled upon into a much broader foray -- for example, a dissection of its lengthy Complaint seeking to elicit AMD's litigation contentions. Such a deposition would be inappropriate (and impossible to prepare a witness for) in any setting, but is especially inappropriate and onerous here.[2] AMD will prepare its witnesses so that they can provide the factual information known to the company responsive to the questions Your Honor has ruled upon, and follow-up questions on those subjects that it can reasonably foresee. Beyond that, Intel should not be permitted to use these questions, AMD's complaint, or any of the millions of documents produced in this case to launch into new topics -- which, in any event, could not have been covered in the time originally allotted.

Again, AMD recognizes the difficulty and impracticality of Your Honor attempting to impose exacting limits on follow-up questions Intel has not yet posed. We suggest again, therefore, that the best means to assure that Intel uses self-restraint and limits its inquiry to truly reasonable follow-up questions is for Your Honor to impose a time limit of two hours on further deposition. Two hours will permit Intel ample time to obtain the responsive information that Your Honor ordered AMD to provide; it also will serve to constrain Intel from galloping beyond the bounds of the 54 questions in issue into a re-deposition concerning topics that are not properly tethered to them.

AMD is prepared to discuss this further with Your Honor, and suggests that this should be addressed at the hearing currently scheduled for July 20, 2009.

Respectfully,

/s/ Frederick L. Cottrell, III

Frederick L. Cottrell, III (#2555)

FLC,III/afg
Attachments

cc: Clerk of the Court (via electronic filing)
Richard L. Horwitz, Esquire (via electronic mail)
James L. Holzman, Esquire (via electronic mail)

[2] Your Honor's June 22, 2009 ruling seems to recognize this. Question No. 93 sought information about when AMD learned the facts underlying the allegations in its Complaint concerning Sony, and Your Honor appropriately ordered that question to be answered by interrogatory. If there were other questions of that nature and within the scope of the Rule 30(b)(6) notice that Intel wanted to pose, they should have been asked at the original deposition and subject to the time limits Your Honor imposed.