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Via Electronic Mail and Hand Delivery
The Honorable Vincent J. Poppiti
Fox Rothschild LLP
Citizens Bank Center
919 North Market Street, Suite 1300
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CONFIDENTIAL
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Public Version
September 24, 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;
Phil Paul v. Intel; C. A. No. 05-485 JJF (DM   )

Dear Judge Poppiti:

        Intel Corporation and Intel Kabushiki Kaisha ("Intel") hereby move the Court to compel
production of Advanced Micro Devices, Inc.'s and AMD International Sales & Service, Ltd.'s
("AMD") "back-end" manufacturing data.[1] Despite repeated requests from Intel for a complete
production of data regarding AMD's back-end manufacturing, and repeated promises by AMD
that it would complete its production, AMD has failed to comply with its discovery obligations.
Intel has been exceedingly patient in working with AMD but Intel's impending expert report
deadline now leaves it no choice but to file this motion and seek the Court's assistance.

        AMD's manufacturing capabilities, including its back-end manufacturing, are a central
issue in this lawsuit.
                        REDACTED
                                        Further, AMD's recently-served expert
report of Daryl Ostrander relies on assumptions about AMD's historical back-end manufacturing
data, but AMD has failed to provide the supporting data. Given the fast-approaching deadline
for Intel's expert reports, Intel needs a complete production of this data immediately.

        Background

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                        Intel has sought AMD's back-end manufacturing data since

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[1] Microprocessor manufacturing is divided into two general parts, the "front end" and the "back
end." "Front end" refers to the production of a microprocessor "die," whereas "back end" refers
to the testing of the die and its assembly into a package suitable for assembly into a computer.

early in the discovery period. In February 2008, Intel requested data from AMD about the microprocessors processed at its back-end facilities as well as AMD's "yields on a facility-by-facility, product-by-product and quarter-by-quarter basis." (Ex. 1 at 3 [02/01/08 Intel email].)[2]

In February 2009, AMD finally produced data about its front-end manufacturing processes but did not make a similar production of its back-end manufacturing data. On April 2, 2009, Intel renewed its request for "data on AMD's back-end manufacturing" by asking for "information, similar to what was provided for the front-end, that details the various back-end processes until a product ships to a customer (including inventory-related data)." (See Ex. 2 at 1 [04/02/09 Intel email].) AMD responded that it was gathering "the additional manufacturing data that you requested [i.e., the back-end data], and will produce it as soon as its collection is complete." (Ex. 3 at 1 [05/05/09 AMD email].) AMD did not follow through on its promise.

A month after AMD's promise, on June 4, 2009, Intel again requested AMD's back-end data. (Ex. 4 at 2 [06/04/09 Intel letter].) AMD promised that it would it "get back to [Intel] on this issue by the end of next week." (Ex. 5 at 1 [06/16/09 AMD letter].) AMD then made another promise that the data would be forthcoming. Nearly a month later, on July 7, 2009, AMD told Intel that it would review the back-end data the following day, and produce it "to Intel shortly thereafter." (Ex. 6 at 1 [07/07/09 Intel letter].) No such production occurred, though AMD acknowledged that Intel had "made the urgency of this issue clear several times." (Ex. 7 at 1 [07/14/09 AMD email].)

On July 17, AMD's counsel offered a counsel-generated spreadsheet in lieu of the data. After Intel insisted on the production of the underlying data in addition to the spreadsheet, AMD withdrew its offer, but finally made a back-end data production in the last week of July (Ex. 8 at 1 [07/31/09 Intel letter]). This production, however, was substantially incomplete, missing much of the data sought by Intel and identified in its June 4, 2009 letter. (*Id.* at 1-2.) Intel then reiterated its request for a full production of AMD's back-end data. (*Id.* at 2-3.)

After further and repeated prodding (Exs. 9-11 [08/06/09 AMD email; 08/20/09 Intel letter; 08/21/09 AMD email), AMD made a series of productions culminating on August 25 (Exs. 12-13 [08/25/09 AMD letter; 8/25/09 AMD email]). But rather than make a full production, AMD produced a series of weekly reports that included only some of the data owed to Intel. For example, the reports entirely omit certain categories of back-end manufacturing data and do not cover the entire relevant period. A number of the reports are missing, and for some time periods, AMD has omitted key data. In addition, many of these reports are difficult to read, and the reports themselves rely upon – and present only a partial picture of – the underlying back-end manufacturing dataset that Intel is seeking. In short, these reports are no substitute for AMD's actual back-end data, the production of which AMD continues to evade without explanation.

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2   The exhibits cited in this letter are appended to the Declaration of Jay Srinivasan, which has been filed with the letter.

Argument

Federal Rule of Civil Procedure ("FRCP") 26(b)(1) requires production of "any nonprivileged matter that is relevant to any party's claim or defense." *Daval Steel Products v. M/V Fakredine*, 951 F.2d 1357, 1365 (3d Cir. 1991) ("The discovery provisions of the Federal Rules of Civil Procedure are 'designed to achieve disclosure of all the evidence relevant to the merits of a controversy.'").

AMD's back-end data is unquestionably relevant here. Notably, during the entirety of Intel's efforts to obtain this data, AMD has never disputed the data's relevance. Nor could it credibly do so. AMD claims that Intel denied AMD additional microprocessor sales. A critical part of Intel's defense is that AMD's did not have sufficient manufacturing capability to meet the demand that AMD actually enjoyed, let alone any additional demand. The discovery sought by Intel goes to the heart of this issue.

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FRCP 26(a)(2)(B) requires that a party who has designated an expert witness for trial provide a report that contains, among other things, a "complete statement of all opinions the witness will express and the basis and reasons for them," and "*the data or other information considered by the witness in forming them.*" FRCP 26(a)(2)(B)(i), (ii) (emphasis added); *see also Dunkin' Donuts Inc. v. Patel*, 174 F. Supp. 2d 202, 211 (D. N.J. 2001) ("The test of a report is whether it [is] sufficiently complete, detailed and in compliance with the Rules so that surprise is eliminated, unnecessary depositions are avoided, and costs are reduced.") (citation and internal quotation marks omitted).

Dr. Ostrander's report violates FRCP 26(a)(2)(B)(ii) because AMD has not produced the back-end manufacturing data that Dr. Ostrander must have relied upon in making assertions about AMD's manufacturing capabilities (unless he considered no data or other evidence in making the assertions in his report).[3] *See Johnson v. Gonzalez*, 191 F.R.D. 638, 646 (D. Kan. 2000) ("the language of amended Rule 26(a)(2)(B) [is] clear and plain – *all* data or information considered by the expert must be disclosed") (emphasis in original). In his report, Dr. Ostrander relies upon AMD's historical manufacturing capabilities – including AMD's historical back-end manufacturing capabilities – to support his conclusions. (Ex. 14 at ¶¶ 40-50 [Expert Report of Dr. Daryl Ostrander].) But Dr. Ostrander's report does not cite any evidence in support of his claims, rendering the discovery at issue even more essential for testing the validity of his assertions.

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[3] This defect is also a proper grounds to strike Dr. Ostrander's report, which is woefully inadequate in a number of respects and consists entirely of conclusions that are unadorned by citation to a single piece of supporting data or, indeed, any other evidence. Intel will challenge this report at the appropriate time but, for the moment, Intel requires AMD's back-end data to respond to Dr. Ostrander's report and to otherwise defend itself in this case.

Intel's need to receive the back-end manufacturing data cannot be overstated.

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Without a complete set of AMD's actual back-end yields (for the entirety of the relevant time period by product, by bin, by quarter), Intel cannot verify Dr. Ostrander's assertion

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Another example of the prejudice to Intel stems from Dr. Ostrander's assumption that

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Without knowledge of the content, quality, and eventual disposition of AMD's microprocessor inventories by product, by quarter, and by bin, Intel cannot evaluate or respond to Dr. Ostrander's claim that

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A final example is Dr. Ostrander's assertion regarding

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Without AMD's inventory data, including the data regarding down coring and down caching, Intel cannot evaluate

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Wholly apart from the need to respond to Dr. Ostrander's report, Intel needs the back-end manufacturing data to establish exactly how much AMD was able to produce. Without a complete set of AMD's back-end manufacturing data, Intel cannot fully respond to Dr. Ostrander's report or fully defend itself.

Request for Relief

Intel respectfully requests the Court to compel AMD to make an immediate production of a complete set of AMD's back-end manufacturing data.

Respectfully yours,

/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)

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