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**VIA ELECTRONIC FILING, BY HAND & E-MAIL**

The Honorable Vincent J. Poppiti
Blank Rome LLP
Chase Manhattan Centre, Suite 800
Wilmington, DE 19801-4226

**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; and Phil Paul, et al. v. Intel Corporation, C.A. 05-485-JJF**

Dear Judge Poppiti:

Intel submits this letter to address two issues: (1) Intel's request, pursuant to Local Rule 1.1(d), to modify Local Rule 30.6 to permit counsel to consult with a witness concerning his/her testimony after a continuance lasting more than five days; and (2) to ask the Special Master to establish a protocol for determining which party proceeds first when both parties seek to depose the same third-party witness.

**Local Rule 30.6.** As has already been recognized in these proceedings, L.R. 30.6, governing the conduct of counsel for a deponent, was adopted and modeled after the Delaware state court rules. Those rules uniformly permit counsel to confer with a deponent after a five-day recess or continuance. L.R. 30.6 does not include the five-day provision. L.R. 1.1(d), however, expressly authorizes the Court to modify the application of any of the Rules in the interests of justice, and such modifications have been made in this case. For example, the parties stipulated less than 2 weeks ago to amend L.R. 30.3 to allow the FTC to attend certain depositions, and used the state court rules as a guide to interpreting the application of L.R. 30.6 to third parties. Modification of L.R. 30.6 is warranted, as unique circumstances in the management of this case render application of the Rule as written unfair and contrary to the interests of justice, as explained below.

First, it is reasonable to interpret L.R. 30.6 as written with Rule 30(d) of the Federal Rules of Civil Procedure in mind, which, unlike the Delaware state rules, presumptively limits depositions to seven hours. The short presumptive time limits mean that continuances are both less likely and less significant than in a case involving multi-day depositions with no time limits. And contrary to AMD's statements in its pretrial statements concerning the vast numbers of

depositions it required, it is clear that AMD will take far fewer but much longer depositions. To date, of the 19 depositions taken or noticed by AMD of Intel, 15 have been more than one day, with three being three days or more. AMD has indicated that it currently intends to take at least two five-day depositions in the coming months. AMD has continued three depositions because it could not complete its examination within the requested two or three days. By contrast, Intel has completed its questioning of all AMD witnesses on consecutive days, with any continuances being expressly for the purpose of allowing AMD to conduct a continued direct examination. Thus, while AMD has had in some instances many days to prepare its direct examination, Intel is left with witnesses who are deposed for many days, on events over many years, with long breaks without any intervening ability to prepare for the additional testimony. And then, when Intel needs to conduct its direct examination, it must prepare immediately after AMD's examination. This has been unfair to Intel, but even more importantly creates obvious incentives for gamesmanship.

Second, the unfairness is exacerbated by the parties' agreements to address the massive production of native files. Specifically, paragraph 5(d) of Case Management Order No. 4 provides that only native documents converted to TIFF format may be used in the litigation, but any such document may used on 14 days notice. Therefore, the universe of documents that may be used in deposition is continually growing, so between continued sessions of a deposition, large numbers of new documents often become available for use. In fact, over the past three months, AMD has designated more than 185,000 pages of such documents.

Both parties seem to agree that it is unfair to allow the other party to examine a witness on a document not identified pursuant to paragraph 5(d) in time for witness preparation, but disagree on the remedy. AMD appears to believe that it is workable to limit the preparation only to newly TIFF'd documents. Intel believes this is unworkable and unfair for at least two reasons: (1) the email documents which dominate the TIFFs in this case are typically not isolated, but are relevant to larger issues or other documents, so such a standard would be difficult to implement; and (2) any attempt to monitor whether additional witness preparation conducted by the attorney was limited to newly TIFF'd documents would necessarily require invading the attorney-client privilege. Creating yet another potential area for uncertain interpretation and conflict is not in the interests of either party. The uniform approach of the Delaware state court rule would address the problems identified above in a manner consistent with the interests of justice. It would also maintain appropriate incentives to schedule and conduct depositions without continuances.

**Order of Questioning of Third Party Depositions.** Case Management Order No. 6 sets forth a protocol for scheduling third-party depositions. CMO No. 6 at ¶ 5. CMO No. 6 provides that between the first and fifth of each month, counsel shall serve a notice by letter or email to the opposing party of any third-party depositions to be taken the following month. *Id.* at ¶ 1. As to third-party witnesses, notice shall also be served on the witness or the witness's counsel. *Id.* at ¶ 5. Within 14 days of receipt of such notice, the third-party witness must respond with proposed dates that accommodate the parties' time estimates for the deposition. *Id.*

An issue concerning the scheduling of third-party depositions has arisen as to which CMO No. 6 is silent. For third-party witnesses whose depositions have been requested by both AMD and Intel, CMO No. 6 does not set forth any protocol for determining which party will be deemed to be the "requesting party" under CMO No. 6 and thereby take the lead in the deposition and question the witness first.

AMD asserts that all third-party depositions are AMD depositions and it will question the witnesses first. The process of noticing third-party depositions of customers is just beginning and Intel believes it is important to put in place an orderly procedure for noticing the third-party depositions that fairly allocates the lead role in the depositions among the parties. This is necessary only for third-party witnesses whose depositions have been requested by both AMD and Intel; as to witnesses whose depositions are requested by only one side, there is no issue as to who is the requesting party under CMO No. 6.

The process of scheduling the depositions of third-party witnesses affiliated with Dell illustrates the issue. As Dell is scheduled to complete the second installment of its document production in the next several weeks, the parties have begun the process of noticing and scheduling depositions of Dell witnesses. In its Preliminary Pretrial Statement filed in May 2008, Intel indicated that it believed the depositions of three current or former Dell executives (Michael Dell, Chairman and Chief Executive Officer; Kevin Rollins, former Chief Executive Officer; and Jeff Clarke, Senior Vice President) were necessary as part of its affirmative trial presentation. AMD in its Preliminary Pretrial Statement listed 42 potential Dell deponents, including the three witnesses who were identified by Intel. AMD's list obviously was substantially overbroad, and obviously went well beyond witnesses AMD would seek to introduce in its case-in-chief.

After negotiations, Dell has agreed to make six of its current or former employees available for depositions: Michael Dell, Kevin Rollins and Jeff Clarke (the three witnesses sought by both sides), as well as Dan Allen, Alan Luecke and Jerele Neeld. As the only Dell depositions requested by Intel were those of Messrs. Dell, Rollins and Clarke, and there was no dispute by Dell's counsel as to the appropriateness of these depositions, Intel took no position in the negotiations between AMD and Dell regarding whether any additional Dell witnesses would be made available for deposition. AMD apparently negotiated three additional depositions, without waiving its right to seek further additional witnesses later on.

On October 2, Intel responded to AMD's request for estimates of the amount of time Intel would require to examine the six Dell deponents. Intel also requested that the parties discuss the issue of which party would take the lead in each deposition. The next day, counsel for AMD faxed a letter noticing its intention to take the six Dell depositions in late November or December. On October 6, pursuant to the agreed-upon schedule for noticing depositions under CMO No. 6, AMD and Intel both served their letters noticing November depositions. Intel noticed the three Dell witnesses it had requested and AMD noticed all six depositions.

Intel believes that simply allowing AMD to take the lead on any deposition it chooses is not appropriate. The vast majority of the third-party depositions will be trial depositions as the witnesses will be outside the subpoena range for trial. The requesting party will be able to set the framework for the deposition and cover much of the relevant subject matter for the deposition from its point of view and according to its plan for trial. Third parties will be understandably reluctant to be questioned by subsequent examiners about the same ground already covered by the requesting party in its examination. As a result, the requesting party will be able to largely frame the issues and questions for what will in most cases be the witness's trial testimony. AMD's status as the plaintiff does not give it the automatic right to proceed first in all third-party depositions. Intel would expect that some of third parties would testify first in its case, and allowing AMD to go first with all third party witnesses will adversely affect Intel's trial preparation. Rule 611 of the Federal Rules of Evidence allows the Court to control the order of interrogating witnesses, and some reasonable balance needs to be struck here, given the amount of testimony that will be admitted through deposition.

Intel believes that where the deposition of a third-party witness is requested by both AMD and Intel the parties should be required to meet and confer to determine which party should be deemed the requesting party under CMO No. 6. If the parties are unable to reach a resolution, then the issue shall be promptly brought to the attention of the Special Master. Paragraph 5(c) of CMO No. 6 already requires this procedure for other disputes relating to the scheduling of third-party depositions. A simple solution could be to alternate the option of proceeding first when a dispute arises. If such a protocol is not put in place, and simply listing a third party's name in a letter gives a party priority in the deposition, there will be an incentive to prematurely notice witnesses simply as a placeholder, which is not what was envisioned by CMO No. 6.

Respectfully submitted,

***/s/ Richard L. Horwitz***

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