

December 22, 2008

BY ELECTRONIC MAIL AND HAND DELIVERY

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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

Dear Judge Poppiti:

Advanced Micro Devices, Inc. (“AMD”) and Hewlett-Packard (“HP”) have exhausted efforts to resolve a discovery dispute involving the production of documents that AMD contends are discoverable pursuant to subpoena under the process agreed to by the parties.

I. Introduction

Hewlett-Packard’s (“HP”) document production is inadequate and suspect. To reduce HP’s production burden, the parties agreed that HP would be required to produce documents from only 32 custodians in the first instance. By virtue of the positions held by the targeted custodians, their involvement in events at issue in this litigation, and the agreed-upon methods to collect their documents, AMD reasonably expected that a very high ratio of the approximately 300,000 documents HP collected would be relevant to one or more matters at issue in this litigation. Incredibly, HP’s final production totaled a mere 20,856 documents, including two supplemental productions in December 2008 – less than seven percent (7%) of those reviewed.

HP’s production is deficient in both quantity and quality. Even Intel, despite its many preservation failures, produced thousands more e-mails from HP custodians than HP did, even though these e-mails were generated after AMD served HP with a production subpoena and HP was under a duty to preserve. The quality of the documents actually produced is equally disappointing. Entire categories of documents are missing or are barely represented in the production, including draft agreements, benchmarking analyses and technological comparisons, meeting briefings and summaries, marketing policies and procedures, and quarterly rebate data.

HP either did not follow the procedures agreed to by the parties, applied unjustifiable “responsiveness” criteria in its review, or did not preserve documents after receiving the subpoena – or, most likely, a combination of all three. The result is that key documents that should have been produced were not. Consequently, this Court should compel HP to produce all of the nearly 300,000 documents HP collected, except for only those documents protected from disclosure on the grounds of attorney-client privilege or the attorney work product doctrine.

II. Statement of Facts

On June 27, 2005 – the same day the Complaint in this action was filed – AMD sent HP a preservation letter requesting that HP preserve documents relevant to the allegations in this case. *See* Declaration of Robert Postawko, ¶ 2 & Ex. A. The letter identified, by category, the documents HP was to preserve. AMD followed up on this preservation request with a production subpoena, which it served on HP on October 4, 2005. *Id.* ¶ 3 & Ex. B.

In an effort to reduce HP’s production burden, AMD, Intel, and Class Counsel subsequently agreed that HP could satisfy its production obligations via a custodian-based production.¹ The agreement reflected that HP would collect documents from the 32 custodians identified in the first instance in two different ways: fourteen “self-selecting” custodians were to set aside documents potentially responsive to the subpoenas, while keyword searches, developed by AMD, Intel and Class Counsel, were applied to the electronic documents of 18 other “non-self-selecting” custodians. The agreement further reflected that the production cut-off date for 20 custodians was June 27, 2005, and June 27, 2006 for the remaining 12 custodians. *Id.* ¶ 4.

HP completed its rolling production for this set of 32 custodians on September 12, 2008. *Id.* After problems with the production became apparent, AMD brought its concerns to HP on numerous occasions. Ultimately, AMD requested that HP simply produce the files it collected for a sample set of ten custodians so that AMD could test HP’s “responsiveness” calls. *Id.* ¶ 5 & Ex. C. HP refused, but offered instead to do a “re-review” of the documents it had previously deemed “non-responsive.” *Id.* On December 11, 2008, HP produced 18 files, each containing an individual contract that AMD had identified and requested. *Id.* ¶ 6 & Ex. D.² On December 13, 2008, HP produced 2,066 files from seven “re-reviewed” custodians. *Id.* ¶ 7 & Ex. E.

The discovery cut-off clock is ticking loudly and there is simply no time to waste. More than three years have elapsed since AMD served HP with a subpoena. This Court should compel HP to produce the documents it collected so that AMD can make its own responsiveness determination, gather the evidence to which it is entitled, and prove its case.

III. Insufficiencies in the Production

A. The Size of HP’s Production Is Suspect

Even though HP claims it reviewed approximately 200,000 documents from non-self-selecting custodians and over 100,000 documents from self-selecting custodians, its production ultimately totaled only 20,856 documents, including the 18 contract files and the 2,066

¹ There was one exception to this custodian-based approach: AMD requested that HP produce the materials that HP had submitted to the European Commission in connection with that body’s investigation of Intel’s anti-competitive practices. HP refused to make a “wholesale” production of the materials it had provided the European Commission; while AMD reserved its rights to seek HP’s E.C. production, it agreed to the custodian-based production to move discovery forward. That dispute is the subject of a separate motion filed concurrently herewith.

² In addition, pursuant to their rights under the production agreement, AMD and Intel jointly submitted a supplemental list of key words that HP ran against the “non-self-selecting” custodians’ hard drives, which HP represented resulted in some 34,000 additional document hits. Given the responsiveness filter HP previously applied, it is doubtful that these additional document hits would generate a substantial production.

documents from HP's "re-review." It is an understatement to say that the scope of this production from the world's largest computer manufacturer is surprising and disappointing, especially in comparison to other OEMs that in some instances produced nearly 22 times more documents than HP. Both Dell and Rackable produced over 450,000 documents, and smaller OEMs such as Gateway and Egenera produced approximately 230,000 documents each. Acer's production from just four custodians totaled over 176,000 files. Postawko Decl. ¶ 8.

B. E-Mail Correspondence Is Missing from the Production

It is telling that despite the many problems that plagued Intel's preservation and production of documents, even Intel produced e-mail from HP custodians that should have been, but was not, produced by HP. Many of the discrepancies are quite telling. For example, HP produced no documents at all from the files of Todd Bradley, the current General Manager of HP's Personal Systems Group ("PSG").³ In contrast, a search for Mr. Bradley's e-mail address in Intel's production resulted in hits for 1,056 files between the dates of October 4, 2005, (the date when AMD served its production subpoena on HP) and June 27, 2006 (the negotiated cut-off date for Mr. Bradley's files). Postawko Decl. ¶¶ 9-10. It seemed inconceivable that Mr. Bradley would not have a single document that in some way touched on HP's decision to purchase AMD or Intel x86 microprocessors, and indeed, Intel's production proves that this is so.

Similar discrepancies are apparent with other custodians. HP produced no documents from the files of Richard Marcello, who is responsible for HP's Business Critical Servers, or James Mouton, Senior VP and General Manager for HP's Industry Standard Servers, even though their production cut-off date, like that for Mr. Bradley, was June 27, 2006.⁴ In contrast, Intel's production includes at least 712 files between the dates of October 4, 2005 and June 27, 2006 with Mr. Marcello's e-mail address and 274 with Mr. Mouton's. *Id.*

The list goes on and on. Even for those custodians with a 2006 production cut-off date for whom HP produced at least some e-mails, in many instances Intel's production is larger. For the period between October 4, 2005 and June 27, 2006, HP produced 136 e-mails from the files of its president and CEO, Mark Hurd, while Intel's production includes 234 files with Mr. Hurd's e-mail address from the same period. Similar results were achieved for Adrian Koch, HP's Senior Vice President for the Asia-Pacific Region (123 HP compared to 184 Intel files), and Ted Clark, General Manager of Mobile Computing (43 HP compared to 112 Intel files). *Id.*

Even when the search for e-mails in the HP production during the October 4, 2005 and June 27, 2006 period is expanded to include e-mails sent by, received by, or copied to a particular custodian, regardless of where it appears in HP's production, HP fares no better. Intel produced thousands of e-mails that HP did not. *Id.* For both self-selecting (for whom search terms were not used to collect documents) and non-self-selecting custodians (for whom search terms were used to collect documents), the vast majority of these e-mails would have been hit by

³ HP's Personal Systems Group, or PSG, is the division responsible for the development and sale of desktop and mobile computers in both consumer and commercial lines.

⁴ These divisions are part of the Technology Solutions Group, which, among other things, is responsible for servers.

the search terms the parties asked HP to apply when collecting documents. Postawko Decl. ¶ 11.

Of course, Intel's documents include only e-mail correspondence between HP employees and employees of Intel, not the significant internal e-mail and other written correspondence among and between HP employees, or the internal reports, spreadsheets, PowerPoint presentations, contract drafts, and analyses that HP did not share with Intel.

C. The Productions by Individual HP Custodians Are Inadequate

The size of the productions from certain key custodians is also unfathomable. Six of HP's 32 custodians produced no documents at all. Carly Fiorina, HP's president and CEO until 2005, produced only three documents; Ann Livermore, an Executive Vice President in charge of HP's Technology Solutions Group, produced only 23 documents. Indeed, 12 of the 32 production custodians produced fewer than 100 documents each, if they produced any documents at all. Postawko Decl. ¶ 12.

D. Basic Documents Are Not Included in the Production

In light of the above, it is perhaps not surprising that entire categories of the most basic documents that are critical to this litigation are either missing from HP's production or are barely represented. For example, HP and Intel have entered into worldwide agreements for the purchase and sale of commercial and consumer processors in all market segments (desktop, servers, mobile, and workstations), and, beginning in 2006, comprehensive agreements encompassing all of HP's commercial and consumer purchases. While HP ultimately produced final versions of certain commercial agreements in a supplemental production on December 11, 2008 after AMD specifically described them, draft copies of the agreements are largely missing, as is the final version of the 2006 comprehensive agreement that AMD specifically requested.

HP's production is similarly nearly bereft of documents reflecting the negotiation and implementation of the agreements, including notes and internal and external correspondence. AMD expected to see the briefings that prepared HP's senior executives for meetings with top AMD and Intel executives, as well as after-the-fact summaries of those meetings. AMD anticipated a fuller production of benchmarking data and comparisons of AMD's and Intel's x86 technology. A comprehensive production would have included a complete set of quarterly summaries and analyses of the rebates that HP received from Intel. These documents do not appear in the production in any meaningful sense.

IV. HP Should Produce All Non-Privileged Documents Collected for Review

The deficiencies described above, while not a comprehensive list of every problem with HP's production, are sufficient to underline their magnitude. The evidentiary gaps in HP's production establish that either HP did not follow the protocols the parties agreed to for the collection and review of documents, or applied "responsiveness" criteria that were too restrictive, or failed to preserve documents. None of these explanations is acceptable. AMD is entitled to documents relevant to its claims against Intel, and HP has not produced them.

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To address these issues, this Court should order HP to produce the approximately 300,000 documents retrieved from both the self-selecting and non-self-selecting custodians, without any review by HP for responsiveness, other than those subject to the attorney client privilege or work product doctrine. *See, e.g., Tulip Computers Int'l B.V. v. Dell Computer Corp.*, No. 00-981-RRM, 2002 U.S. Dist. LEXIS 7792 at *19 (D. Del. April 30, 2002) (characterizing a similar remedy to an insufficient electronic production as “fair, efficient, and reasonable”).

Respectfully,



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AB/kl

cc: Clerk of the Court
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