

December 22, 2008

Sidney Balick

Adam Balick

Joanne Ceballos

James Drnec

**BY ELECTRONIC MAIL AND HAND DELIVERY**

The Honorable Vincent J. Poppiti  
Special Master  
Blank Rome LLP  
Chase Manhattan Centre, Suite 800  
1201 North Market Street  
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***

Dear Judge Poppiti:

Despite the parties' best efforts, Advanced Micro Devices, Inc. ("AMD") and Hewlett-Packard ("HP") have reached an impasse over HP's failure to produce documents, submissions and other evidence submitted by HP to the European Commission ("E.C."). AMD respectfully requests that the Court compel HP to produce all documents, submissions and other evidence submitted by HP to the E.C.

**I. Introduction**

Beginning as early as 2000, the Directorate-General of Competition, European Commission conducted an investigation into whether Intel violated Article 82 of the E.C. Treaty, Europe's equivalent of Section 2 of the Sherman Act, by abusing its dominant position in the x86 microprocessors market. On July 26, 2007, the E.C. issued a Statement of Objections against Intel outlining the E.C.'s preliminary conclusion that Intel had engaged in abusive conduct toward OEMs "with the aim of excluding its main rival, AMD, from the x86 Computer Processing Units (CPU) market."<sup>1</sup> On July 17, 2008, the E.C. issued a Supplementary Statement of Objections against Intel outlining the preliminary conclusion that Intel had "engaged in three additional elements of abusive conduct."<sup>2</sup> As HP has conceded during the meet and confer process, it provided the E.C. various documents and other written submissions for the E.C.'s consideration during the course of its Intel investigation.

<sup>1</sup> See E.C. memo of July 27, 2007, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/314&format=HTML&aged=0&language=EN&guiLanguage=en>. Declaration of Robert Postawko ("Postawko Decl."), ¶ 2 & Exhibit A.

<sup>2</sup> See E.C. memo of July 17, 2008, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/517&format=HTML&aged=0&language=EN&guiLanguage=en>. Postawko Decl., ¶ 3 & Exhibit B.

AMD served a comprehensive document subpoena on Intel on October 4, 2005. Declaration of Robert Postawko, ¶ 4 & Exhibit C. During its production negotiations with HP, AMD specifically sought the evidence that HP had previously produced to the E.C. in connection with its Intel investigation (the “HP evidence”). Declaration of Michael McGuinness, ¶ 2. Without challenging its relevance to this litigation, HP refused to make a “wholesale” production of the HP evidence, claiming that it was protected from disclosure by a so-called “investigative privilege.” AMD reserved its rights to these materials, and following the completion of HP’s first round of production in this litigation on September 12, 2008, asked HP to confirm that it had produced the HP evidence, given that the HP evidence was undoubtedly responsive to the document requests propounded by AMD. HP reiterated its “investigative privilege” claim, which it refused to elaborate or clarify. *See* Postawko Decl., ¶¶ 5-6 & Exhibit D.

AMD and HP eventually agreed to a compromise. HP agreed to produce during the week of December 8, 2008 a redacted version of all written submissions to the E.C., as well as all documents submitted to the E.C., if AMD agreed not to seek production of items submitted to the E.C. that HP had identified as proprietary and for the E.C.’s eyes only. HP did not honor its promise, and HP now indicates that they will be produced only subject to AMD’s willingness to compromise on unrelated transactional data requests. McGuinness Decl., ¶¶ 3-4. Since HP has repudiated our agreement, AMD now seeks all of HP’s E.C. submissions, including what was identified as proprietary and for the E.C.’s eyes only.

HP’s bald assertion that it can cloak documents and materials with privilege merely by submitting them to the E.C. finds no basis in the law and is belied by HP’s recent agreement, now apparently withdrawn, to produce the HP evidence. The investigative privilege, a qualified privilege at best, belongs only to the government and is intended to protect the confidentiality and integrity of an ongoing investigation in specific circumstances not present here. HP, a private party, does not have standing to assert an investigative privilege; even if it could, the privilege would extend at most only to the physical documents submitted to the E.C. and not to HP’s own copies of the HP evidence. Therefore, the Court should compel HP to produce all documents, submissions and other evidence submitted by HP to the E.C.

## **II. HP’s E.C. Document Production Is Not Privileged**

### **A. U.S. Federal Law Controls the Privilege Claims in this Suit**

U.S. federal discovery rules apply to HP’s assertion of a privilege in this litigation. AMD, Intel, and HP are all U.S.-based companies and the proceeding is in federal district court. AMD brought its suit under the Sherman Antitrust Act, a federal law, which confers federal question jurisdiction. Privilege disputes in cases involving federal questions are governed by U.S. federal law. *Astra Aktiebolag v. Andrz Pharms., Inc.*, 208 F.R.D. 92, 98 (S.D.N.Y. 2002).

### **B. HP May Not Assert an Investigative Privilege**

The investigative privilege is a qualified federal common law privilege held by the government. It may not be asserted by a private party. *See In re M&L Business Machine Co. v.*

*Bank of Boulder*, 161 B.R. 689, 693 (D. Colo. 1993) (investigative privilege is exclusively a governmental privilege); *Sanders v. Canal Ins. Co.*, 924 F. Supp. 107, 110 (D. Or. 1996) (private insurance company unable to assert an investigative privilege). HP is a private corporation, and cannot refuse to produce relevant, discoverable documents based on an investigative privilege.

Moreover, even if HP had standing to assert an investigative privilege, which it does not, the privilege would protect only the physical documents that HP submitted to the E.C., not copies of the documents that HP itself possesses. *Sanders*, 924 F. Supp. at 109 (confidentiality provision protecting government investigative documents from disclosure applies only to documents in the government's possession, not to copies held by private parties). AMD is seeking documents from HP, not the E.C. Accordingly, the privilege does not apply.

**C. The Purpose of the Investigative Privilege Is Not Furthered by HP's Claim**

The purpose of the investigative privilege is to prevent harm to law enforcement efforts by (1) preventing disclosure of law enforcement techniques and procedures, (2) preserving the confidentiality of sources, (3) protecting witnesses and law enforcement personnel, (4) safeguarding the privacy of individuals involved in an investigation, and (5) otherwise preventing interference with an investigation. *United States v. Myerson (In re Dep't of Investigation)*, 856 F.2d 481, 484 (2d Cir. 1988). None of those interests would be furthered by allowing HP to withhold vital documents here simply because HP also produced them to the E.C.

The investigative privilege is a qualified, not absolute, privilege. *Tuite v. Henry*, 98 F.3d 1411, 1417 (D.C. Cir. 1996). The party claiming the privilege bears the burden of showing that the documents would reveal law enforcement techniques or sources. Courts engage in a balancing test considering factors such as:

- (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information,
- (2) the impact upon persons who have given information of having their identities disclosed,
- (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure,
- (4) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question,
- (5) whether the investigation has been completed,
- (6) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation,
- (7) whether the plaintiff's suit is nonfrivolous and brought in good faith,
- (8) the importance of the information sought to the plaintiff's case.

*Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973).

None of these factors supports a decision to withhold highly relevant documents. AMD's suit against Intel is undisputedly not frivolous and was brought in good faith. The information contained in the HP evidence – which concerns Intel's anticompetitive behavior with HP – is obviously highly relevant to AMD's case. HP is not a confidential informant whose identity must be kept secret to protect the integrity of an ongoing investigation or for HP's own safety. HP is not the target of the Commission's investigation and the HP evidence does not cover, for example, an immunity application made to the E.C. under its Leniency Program. HP is not a likely defendant in a criminal proceeding to follow from the E.C.'s investigation. The investigation is at an advanced stage. No credible purpose would be served by allowing HP to withhold the production of the HP evidence here.

The balance also tips heavily toward production because Intel already has access to the disputed documents, or at least the vast majority of them. As a subject of the E.C. investigation, Intel is privy to filings with the E.C. Although Intel is not permitted to use those filings in defending against this litigation, it has possession of the documents which no doubt provide useful information that AMD is entitled to review. Since Intel has already seen the documents, and no investigative process will be harmed by their production, they must be produced.

#### **D. HP's Production to the E.C. Waives Any Claim of Privilege**

HP appears to believe that the very fact of producing documents to a governmental agency cloaks them in privilege. But well-settled law holds that the production of documents to a governmental entity, rather than cloaking the production with a new privilege, *waives* any privilege previously attaching to the documents. *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F. 2d 1414 (3d Cir. 1991).<sup>3</sup> Even if the E.C. recognized some kind of privilege that would forever shield HP's production of the HP evidence from disclosure in Europe, which it does not, U.S. courts hesitate to enforce privileges recognized in foreign jurisdictions but not in the United States. *See Bristol-Myers Squibb Co. v. Rhone-Poulenc Rorer, Inc.*, 1998 WL 51534 at \*3 (S.D.N.Y. April 2, 1998) (foreign secrecy statutes do not create privileges in U.S. courts).

### **III. Conclusion**

While AMD has been entitled to HP's E.C. submissions all along, HP's recent document production – coming after nearly two years of negotiations, foot-dragging and delay – is plainly inadequate. As noted in a separate motion filed concurrently herewith, Todd Bradley, since 2005 HP's General Manager of the Personal Systems Group (desktop and mobile products), produced no documents at all. Carly Fiorina, until 2005 HP's President and CEO, produced only three documents. In total, HP produced only 20,856 documents; approximately 22 times fewer documents than Dell and a fraction of what much smaller OEMs, such as Rackable, turned over. Postawko Decl. ¶ 7. HP is clearly attempting to conceal the true nature of its Intel dealings. The

<sup>3</sup> See also Eric Kraeutler and Paul Weller, "Losing Privileges by Cooperating With the Government: The Westinghouse Electric Decision," [http://www.morganlewis.com/pubs/41FDE12F-F372-4516-808A7A6B3C1C3517\\_Publication.pdf](http://www.morganlewis.com/pubs/41FDE12F-F372-4516-808A7A6B3C1C3517_Publication.pdf) (accessed December 19, 2008) (U.S. courts generally refuse to allow claims of selective privilege waiver in document productions to government agencies). Postawko Decl. ¶8 & Ex. E.

The Honorable Vincent J. Poppiti  
December 22, 2008  
Page 5-

disclosure of HP's presumptively truthful statements made to an investigative competition body would be a productive and welcome first step in revealing the true nature of those dealings.

Respectfully,

A handwritten signature in black ink, appearing to read "Adam Balick". The signature is fluid and cursive, with a long horizontal stroke at the end.

Adam Balick  
(Bar ID#2718)

AB/kl

cc: Clerk of the Court  
Richard L. Horwitz, Esquire  
James L. Holzman, Esquire  
David P. Primack, Esquire  
Steve W. Fimmel, Esquire  
Robert E. Postawko, Esquire