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**BY HAND DELIVERY AND  
ELECTRONIC FILING**

The Honorable Vincent J. Poppiti  
Blank Rome LLP  
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REDACTED  
PUBLIC VERSION

Re: *In re Intel Microprocessor Antitrust Litigation,*  
C.A. Nos. 05-md-1717, 05-441, 05-485 (DM 24)

Dear Judge Poppiti:

Our opening submission demonstrated that Toshiba Corporation (“Toshiba”) failed to comply with its obligations under the Production Agreement (“Agreement”). Rather than address these deficiencies directly, Toshiba focuses on irrelevant jurisdictional and service issues that were resolved by the Agreement. The Parties clearly understood when they executed the Agreement that applications to enforce Toshiba’s obligations under the Agreement would be decided by the Special Master. It comes with ill-grace for Toshiba to now argue otherwise.

**Scope of Production Agreement.** The Agreement represents a compromise among the Parties regarding Toshiba’s obligations to produce documents under the subpoena. The Agreement does not restrict the Parties from pursuing documents from Toshiba’s U.S. subsidiaries (including TAIS), it does not limit or restrict the Parties’ right to subpoena individuals associated with Toshiba, and it certainly does not prevent the Parties from deposing Toshiba employees, including <sup>1</sup> The Agreement only addresses *Toshiba Corporation’s* document production obligations -- nothing more.<sup>2</sup>

**Jurisdictional and Service Arguments Are Irrelevant And Unavailing.** By entering into the Agreement, the Parties obviated the need to engage in further discussions regarding service and jurisdiction. This compromise was a major reason why AMD decided to forgo its

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<sup>1</sup> AMD already informed Toshiba of its intent to depose \_\_\_\_\_ and other Toshiba witnesses. Toshiba, however, denied AMD’s request to have the witnesses appear voluntarily.

<sup>2</sup> The parties never discussed the depositions of Toshiba witnesses in negotiating the Agreement. The italicized language quoted in Toshiba’s letter (p. 4) merely reiterates that the Parties may not seek additional documents from Toshiba once Toshiba fully complies with the Agreement.

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right to seek documents from many of the Toshiba custodians identified in AMD's subpoena. Toshiba understood full well when it executed the Agreement that the Special Master would resolve any disputes arising under the Agreement. Although Toshiba reserved its service and jurisdictional objections, Toshiba agreed to comply with the terms of the Agreement and further agreed to have this Court resolve certain disputes arising under the Agreement. This intention is clear from the express language of the Agreement wherein the Parties agreed that, with respect to the limitations set forth in paragraph 2, "the parties may apply to the Special Master or the Court to lift those limitations." Exhibit A to 1/15/09 Letter at ¶2.<sup>3</sup> Toshiba's argument that "[t]he agreement thus preserves Toshiba's grounds of opposition in the event that a party (such as AMD here) seeks to compel documents from Toshiba" is misplaced. (Letter at 3). Such "grounds" could be asserted in response to a request for documents outside of the Agreement, but cannot be used by Toshiba to excuse compliance with its contractual undertaking.

Toshiba has also failed to support its jurisdictional argument. Toshiba's reliance on the *Allen* and *O.S.C. Corp.* cases is unavailing. Those courts held that Toshiba was not subject to personal jurisdiction under the facts presented. Conversely, in *Copiers Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F. Supp. 312 (D. Md. 1983), the court concluded that Toshiba was subject to personal jurisdiction. *Id.* at 320. Despite Toshiba's implications to the contrary, it is no stranger to U.S. litigation or this Court. Indeed, while Toshiba was reserving its right in this case to object on jurisdictional grounds, it concurrently was prosecuting a complaint for patent infringement in this very Court, and has been litigating in other U.S. district courts as well. See Exhibit A. This is in addition to the business Toshiba transacts across the United States and in Delaware. In light of these factors, Toshiba can hardly complain if an MDL court sitting with nationwide jurisdiction over third parties enforces an agreement to produce relevant documents.

**Toshiba Should Produce The Documents.** Toshiba's discussion about the documents is more notable for what it does not address than anything else. For instance, Toshiba does not dispute that (i) it remained Intel exclusive for several years; (ii) [redacted] are two of Toshiba's most important witnesses who led the Toshiba/Intel negotiations and made all of the material decisions; and (iii) [redacted] frequently participated in meetings with Intel's senior executives and engaged in private discussions with such executives. Toshiba provides nothing that would dispute the importance of the documents sought by AMD and the Class. Instead, Toshiba makes the unsupported, conclusory statement that "it believes that all or almost all responsive documents of [redacted] were produced as part of the paragraph 1 production or as JFTC documents." (Letter at 5). Yet, Toshiba fails to explain how it searched for responsive documents, why the three subordinate custodians would possess all of [redacted] documents and whether an attorney searched [redacted] documents before making the representation that "all or almost all" of their documents were produced. Since Toshiba has already represented that it preserved all of [redacted]

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<sup>3</sup> Although this provision speaks to the limitations set forth in Paragraph 2 of the Agreement, it would strain credulity to believe that the Parties intended different provisions of the same Agreement to be enforceable in separate fora. Similarly, it would be illogical to suggest that the Parties would enter into an agreement without having a means to enforce it.

documents requested in the subpoena<sup>4</sup> and conducted a “preliminary investigation,” any “additional burden” should not be onerous, particularly when measured against the potential importance of the documents.

Toshiba’s statements regarding the volume of documents it produced are misleading. Of the “six thousand pages” of documents and “several hundred pages” of documents allegedly produced by Toshiba, a review of these documents shows that a majority of these pages are voluminous spreadsheets or outlines.<sup>5</sup> Moreover, within the English language page totals referenced by Toshiba, we could find no e-mails from 2001 and 2002 that even referenced [redacted]. For 2003 and 2004, we could locate only six e-mails or letters authored by [redacted] and eight authored by [redacted]. This is insufficient given their pervasive involvement in the negotiations with Intel. Our opening brief demonstrated convincingly that [redacted] participated regularly in meetings with Intel. *See, e.g.* Exhibit F to 1/15/09 Letter. Toshiba’s production from the three custodians, however, contains no documents substantively referring or relating to many of these meetings with Intel, including meetings held on 7/14/02, 8/28/02, 10/3/02, 7/24/03, 8/22/03, 3/17/04, 10/1/04 and 11/9/04.<sup>6</sup> An exhaustive review of [redacted] documents is warranted under such circumstances.<sup>7</sup>

**Toshiba Is Obligated To Produce Documents Related To Event No. 2.** Toshiba refuses to produce documents related to Event No. 2 on grounds that:

[redacted] is not an “event.” Even under the plain language interpretation that Toshiba posits, it is undeniable that the decision to [redacted] is an “occurrence.” Toshiba also argues that AMD’s request is duplicative because it already produced documents from 2003 and 2004. Not so. Although [redacted] AMD is still entitled to documents from 2005 and 2006 that pertain to [redacted].

Finally, Intel argues that AMD is not entitled to documents pertaining to Event No. 2 because it has failed to prove that Intel has not already produced the documents. Put simply, Intel likely would not have internal Toshiba documents. With respect to communications between Intel and Toshiba, it would be difficult for AMD to prove which, if any, of these documents were produced by Intel without knowing the documents that Toshiba has in its possession. To resolve this issue, AMD offered in its November 14 letter to review an index of responsive Toshiba documents and identify the documents that have not been produced. Toshiba refused this request. AMD and the Class remain willing to discuss with Toshiba any reasonable alternative it wishes to propose.

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<sup>4</sup> See Letters dated 7/08/05, 7/13/05 and 7/15/05, Exhibit B hereto.

<sup>5</sup> Representative samples of these types of documents are attached at Exhibit C.

<sup>6</sup> That Toshiba’s subordinate custodians produced three documents by Intel is of no moment. The three documents referenced by Toshiba (Letter at 5, n. 10) are all draft letters that one would expect to find in a centralized file.

<sup>7</sup> Toshiba’s argument that AMD failed to demonstrate that the [redacted] documents were not previously produced by Intel is without merit. The Agreement contains no such requirement.

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Respectfully,

*/s/ Chad M. Shandler*

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CMS/ps

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