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February 4, 2009

BY HAND DELIVERY AND ELECTRONIC FILING
The Honorable Vincent J. Poppiti
Blank Rome LLP
Chase Manhattan Centre, Suite 800
Wilmington, DE 19801-4226

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:

Toshiba Corporation ("Toshiba") cannot have it both ways. It cannot argue that its production obligations are confined by the terms of the Production Agreement and at the same time refuse to produce documents under the Agreement because the Court lacks jurisdiction over it. As explained below, Toshiba's irrelevant discourse on due process/minimum contacts does not change the fact that it negotiated and later executed a Production Agreement that, if not enforceable in Delaware (or elsewhere in the United States), would effectively be worthless. That surely was not the intention of the Parties when they executed the Production Agreement. Nor was it the intention of the Parties that Toshiba would partially perform its obligations under the Production Agreement and then complain that the Court lacked jurisdiction over it when AMD and the Class sought to compel Toshiba compliance with the remainder of its obligations. Toshiba's attempts to evade enforcement of the Production Agreement in this Court are inconsistent with the intent of the Parties, contrary to the terms of the Agreement and prejudicial to AMD and the Class.

I. Toshiba Is Required To Appear Before This Court To Defend Its Non-Compliance With the Production Agreement.

The Production Agreement was the product of many long hours of negotiations between the Parties.[1] And, as is true with all contracts, both AMD and Toshiba received consideration

[1] The negotiations, which took place in the form of dozens of telephone conversations and several e-mails and letters between 2006 and 2008, were conducted primarily by Toshiba's U.S. counsel in Washington, D.C. and AMD's counsel in Wilmington, Delaware. On occasion, Intel's U.S. counsel and the Class's counsel participated in the negotiations.

under the Agreement. For Toshiba, it received a commitment from the Parties that they would not seek documents from several of the Toshiba custodians identified in the subpoena issued to Toshiba and a concession from the Parties that Toshiba's production obligations for the three subordinate Paragraph 1 custodians (*see* 1/15/09 Letter (D.I. at 1493)) were limited to 2001, 2002 and 2003, subject, of course, to the Parties' right to request additional documents under the Agreement. Toshiba also received a commitment that the documents it produced under the Production Agreement would be treated as confidential pursuant to the protective order entered by the Court. The consideration received by AMD under the Agreement was no less important. Rather than litigating issues of service and jurisdiction, AMD received a firm commitment from Toshiba that it would produce documents for the three Paragraph 1 custodians from 2001-2004. Toshiba also agreed to produce documents from the files of [redacted] and documents from 2000-2001 and 2005 through October 2006 provided that AMD (or the Class) made the requisite showing under the Production Agreement. Once AMD received Toshiba's commitment that it would produce the documents called for under the Production Agreement, it dispensed with additional means of service[2] and suspended all efforts to pursue additional discovery from Toshiba.

Toshiba signed the Production Agreement in August 2008. Thereafter, Toshiba performed certain of its obligations under the Production Agreement, producing documents from the three Paragraph 1 custodians in September 2008. When asked by AMD to fulfill its remaining obligations under the Agreement in November and December, however, Toshiba asserted that it owed no further obligations to AMD or the Class because it is not subject to jurisdiction in the United States. Toshiba's argument is flawed for several reasons.

First and foremost, the language of the Production Agreement itself reveals that the Parties understood that the Special Master would resolve disputes arising from Toshiba's document production. [redacted] Yet, despite availing itself of the protections afforded by this Court, Toshiba now makes the inconsistent assertion that this Court lacks jurisdiction to enforce the Production Agreement. Toshiba cannot have it both ways. *See Masefield AG v. Colonial Oil Indus.*, 2005 WL 2105542, at *3 (S.D.N.Y. Sept. 1, 2005 ("plaintiffs cannot employ the Court's jurisdictional power as both a sword and shield.") (Exhibit A hereto).

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[2] AMD served the subpoena on Toshiba through two of Toshiba's United States subsidiaries, Toshiba America Information Systems, Inc. ("TAIS), located in Irvine, California and Toshiba America, Inc., located in New York. Had Toshiba not signed the Production Agreement, AMD would have served a Toshiba officer located in the United States.

[3] Toshiba has already appeared before this Court twice under similar circumstances. On May 19, 2006, Toshiba filed objections to the Protective Order with this Court (D.I. 89). Again, on June 26, 2008, Toshiba wrote to this Court to object to a third party's effort to modify the Protective Order. (D.I. 1028). In both instances, Toshiba sought protection from this Court.

Second, Toshiba's argument that the Production Agreement cannot be enforced in the United States would render the Agreement completely illusory. For example, under Toshiba's interpretation of the Agreement, Toshiba could have signed the Production Agreement, decided not to produce a single document and then claimed that AMD and the Class could not obtain the discovery Toshiba agreed to provide because the Production Agreement is not enforceable. Such a result would leave AMD and the Class without a remedy under the Agreement regardless of the severity of the breach.

Finally, AMD and the Class would be prejudiced if they are left with no means to enforce the Production Agreement. During the time in which the Parties negotiated the terms of the Production Agreement, AMD did not pursue discovery from Toshiba in Japan with respect to the document custodians identified in the subpoena based on its good faith belief that Toshiba would comply with its obligations under the Production Agreement, and that any non-compliance would be addressed by this Court. After obtaining valuable concessions from AMD (*i.e.*, securing AMD's agreement to remove several custodians from the witness list), Toshiba is now attempting to shut off the remainder of the discovery that it agreed to provide under the Production Agreement by arguing that the Agreement is not enforceable by this Court.

II. Toshiba's Jurisdictional Arguments Are Irrelevant.

Toshiba devotes nearly its entire brief to jurisdictional arguments that are irrelevant to the motion before the Court. Toshiba gives cursory attention to the import of the Production Agreement, arguing only that the permissive language of Paragraph 2 does not waive Toshiba's right to contest jurisdiction. Toshiba does not address the fact that the Parties affirmatively decided under the Production Agreement that this Court would resolve disputes over Toshiba's confidentiality designations for the documents produced by Toshiba during the course of the litigation. Toshiba also does not explain the logic behind its argument that it may invoke the protections afforded by this Court when it suits its needs but can evade the reach of this Court when its performance under the Production Agreement is challenged.

III. Toshiba Had Direct Contacts With And Transacted Business In The United States.

Toshiba would have this Court believe that it transacts no business in the United States. This is not true. In fact, Toshiba's officers [redacted] traveled to the United States on many occasions to meet with Intel during which the parties discussed, among other things, pricing of CPUs and the monetary and non-monetary incentives that Toshiba would receive if it purchased Intel CPUs.[4] As Your Honor is aware, the deals negotiated by Intel during meetings such as these are directly at issue in this litigation. [redacted]

[4] Certain of these meetings are identified in the chart attached at Exhibit F to AMD's January 15, 2009 letter. (*See* D.I. 1493 at Ex. F) A cursory review of the documents produced thus far shows that [redacted] attended several other meetings in the United States during the relevant time period. (*See* Exhibit B hereto). For the Court's reference, [redacted] refer to [redacted] If the Court finds that it would be helpful to have a comprehensive list of all meetings attended by [redacted] in the United States, AMD will promptly submit such a list to the Court.

[redacted] frequent visits to the United States refute Toshiba's argument under the Due Process Clause and Delaware's long-arm statute (if applicable) that it did not purposefully direct any activities at this forum.[5]

Toshiba also makes the argument that TAIS "markets and sells substantially all Toshiba PCs" in the United States. Without the benefit of jurisdictional discovery, AMD cannot test the veracity of this statement. Moreover, while it may be the case that TAIS is responsible for the actual sale of PCs in the United States, it does not diminish the fact that the CPUs contained in the Toshiba PCs sold here were procured by Toshiba. Obviously, the price at which Toshiba PCs are sold in the United States is related directly to the deal struck by Toshiba with Intel. It would be premature to conclude that such actions have not subjected Toshiba to the jurisdiction of this Court. *See Commissariat A L'Energie Atomique v. Chi Mei Optoelectronics Corp*, 395 F.3d 1315, 1320-21 (Fed. Cir. 2005); *Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 283-84 (3d Cir. 1994).

While Toshiba argues that there is no overlap and almost total separation between it and TAIS, the documents produced by Intel suggest otherwise -- particularly with respect to activities relevant to the allegations in this action. Specifically, [redacted] Toshiba's control over the decisions made by TAIS gives rise to personal jurisdiction. *In re Isotatic Graphite Antitrust Litig*, 2002 WL 31421920, at *2-3 (E.D. Pa. Sept. 19, 2002) (finding jurisdiction over Japanese parent company where parent controlled pricing decisions of U.S. subsidiary) (Exhibit E hereto). At a minimum, however, the documents suggest that AMD should be entitled to take jurisdictional discovery (including depositions of the affiants) to determine the full extent of the overlap between TAIS and Toshiba, Toshiba's control over TAIS's purchasing decisions and the extent to which an agency relationship existed between the entities. This costly detour, however, is unnecessary given that the Court has jurisdiction to enforce the Parties' obligations under the Production Agreement.[9]

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[5] This action is an MDL proceeding under 28 U.S.C. § 1407 meaning that this Court has jurisdiction over parties and non-parties who reside outside of this district. *See United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.* 444 F.3d 462, 468-69 (6th Cir. 2006). For present purposes, this means that the Special Master would have jurisdiction over Toshiba to the extent it that directed its activities anywhere in the United States.

[6] A sampling of representative documents showing the overlap between Toshiba and TAIS and the extent to which Toshiba participated in and controlled TAIS's affairs is attached at Exhibit C.

[7] *See* Exhibit D hereto.

[8] *See, e.g.*, Nos. 2, 3, 6, 7 and 8 to Exhibit B and Nos. 3, 4, 5, 6, 7, 8, 9, 10 and 11 to Exhibit C.

[9] If desired by AMD, jurisdictional discovery is warranted in this case to explore not only the extent of overlap between TAIS and Toshiba with respect to the procurement of CPUs and financial incentives received from Intel, but also to establish the facts necessary for this Court to decide whether the exercise of jurisdiction over Toshiba would comport with due process. Given the looming fact

Respectfully submitted,

/s/ Chad M. Shandler

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CMS/ps
Enclosures
cc: Clerk of the Court (Via Electronic Filing)
Vernon R. Proctor, Esq. (Via Electronic Mail)
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discovery cut-off date, however, the practicality of conducting such discovery remains in doubt. This is yet another reason why it would be prejudicial to AMD if Toshiba were allowed to evade its obligations under the Production Agreement.