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April 2, 2009
BY ELECTRONIC FILING
AND HAND DELIVERY

The Honorable Vincent J. Poppiti
Special Master
Bank Rome LLP
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REDACTED
PUBLIC VERSION

Re: Advanced Micro Devices, Inc. et al v. Intel Corp. and Intel Kabushiki Kaisha, Civil Action No. 05-441
AMD's Request for Issuance of the Letters Rogatory (D.M. 26)

Dear Judge Poppiti:

AMD respectfully requests that the Special Master recommend that Judge Farnan issue the letters rogatory AMD has requested in DM 26. We are mindful that [REDACTED] However, given the lengthy processing time we anticipate in the countries that ultimately receive the letters, the Court will have the opportunity to [REDACTED] and the Court is persuaded by its objections.

The alternative is to [REDACTED] Waiting will jeopardize AMD's use of the discovery. Our deadline for examining witnesses is [REDACTED] Issuance of the letters rogatory is the beginning of the discovery process, not the end. If the process is suspended [REDACTED] the [REDACTED] materials are not likely to come into AMD's possession until long after they can serve any useful purpose.

In this letter, we address the only objection that Intel could arguably raise with allowing the process to begin immediately: that AMD came into possession of [REDACTED] inappropriately and that this somehow bars its use of any information contained in [REDACTED] including making a request for documents AMD would not have known existed had it not received [REDACTED] The premise here is that a civil equivalent to the "fruit of the poisonous tree" doctrine found in criminal procedure bars a litigant

from formulating discovery requests based on information it obtains inappropriately. As explained more fully below, under the circumstances of this case, no such doctrine exists.

There is no Fruit of the Poisonous Tree-like Doctrine that Would Cause the Pending Determination of DM 27 To Impact the Court's Ability to Issue the Letters Rogatory

In order to protect a criminal defendant's Constitutional rights, courts have created a judicial rule which bars the use of evidence not only directly resulting from an illegal search or seizure, but also the indirect fruits of such a search. The primary purpose of this rule "is to deter future unlawful police conduct" by eliminating incentives for the police to do so. *United States v. Calandra*, 414 U.S. 338, 347 (1974). Accordingly, not even in criminal cases will the "fruits" doctrine prevent the use of information derived from a breach of privilege as opposed to an unconstitutional search. *See Nickel v. Hannigan*, 97 F.3d 403, 409 (10th Cir. 1996) (declining to apply the fruit of the poisonous tree doctrine to the possible breach of attorney-client privilege); *United States v. Marashi*, 913 F.2d 724, 731 n.11 (9th Cir. 1990) stating in dictum "that no court has ever applied [the 'fruits of the poisonous tree'] theory to any evidentiary privilege and that we have indicated we would not be the first to do so").

Notably, courts have also not extended this exclusionary rule doctrines to civil cases, even in the context of police searches in violation of the Fourth Amendment. *See Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364 n.4 ("[W]e have generally held the exclusionary rule to apply only in criminal trials"); *Townes v. City of New York*, 176 F.3d 138, 145 (2d. Cir. 1999) ("The fruit of the poisonous tree doctrine is an evidentiary rule that operates in the context of criminal procedure . . . . and . . . has generally been held to apply only in criminal trials." (internal citations and quotation marks omitted)).

Given this, the "fruits" doctrine should be least applicable in a civil case to the use of information derived from a privileged disclosure as opposed to an illegal search, and courts have so held. In a case indistinguishable from ours, the court in *SEC v. OKC Corp.*, 474 F. Supp. 1031 (N.D. Tex. 1979), refused "to prevent the SEC from using the privileged information [contained in a report prepared by OKC's law firm] to frame demands for information that are not privileged." Rejecting the argument that "a prophylactic exclusionary rule is a necessary buttress to the attorney-client privilege" such that the unprivileged evidence "should be quashed as a fruit of the poisonous tree," *id.* at 1039, the court instead held that where a party "innocently learns of privileged information from a person who rightfully possesses that information, there is no conduct to deter unless it is the delivery of that information by a person who, although rightfully in possession of it, was not authorized to disclose it." *Id.* Preventing the SEC from using the privileged information to formulate discovery requests, the court reasoned, would not deter disclosure by the party with the obligation to keep privileged information confidential, OKC's law firm.

We are in the same situation.

Preventing AMD from making legitimate use of the information derived as a result would only prevent AMD from getting at the truth.

Moreover, AMD stands in the same "innocent" shoes as the SEC did in *OKC Corp.* it should not now be prevented on deterrence grounds from using information it legitimately learned.

Respectfully,

/s/ Chad M. Shandler

Chad M. Shandler

CS:lmg

cc: Richard L. Horwitz, Esquire
James L. Holzman, Esquire

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2009, I electronically filed the foregoing document with the Clerk of Court using CM/ECF and have sent by Electronic Mail to the following:

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