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By Electronic Filing & Hand
The Honorable Vincent J. Poppiti
Fox Rothschild LLP
Citizens Bank Center, Suite 1300
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PUBLIC VERSION

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
Reply In Support of Motion to Compel Further Deposition Responses

Dear Judge Poppiti:

In advance of the hearing scheduled for May 29, 2009 at 10:00 a.m. EDT, and in response to AMD's voluminous opposition papers, Intel submits this letter in support of its motion to compel additional Rule 30(b)(6) deposition testimony.[1]

This motion continues, and we hope will help conclude, Intel's year-long effort to obtain basic deposition testimony about AMD's document preservation practices. In the wake of AMD's second motion to block any deposition on preservation, Your Honor granted Intel 16 hours of deposition time to explore the topics in Intel's deposition notice, modified only in three relatively minor respects. AMD claims Intel "squandered" that time, but the fact is that AMD wasted large parts of it making baseless speaking objections, and proffering witnesses unprepared to, or instructed not to, answer over 300 questions. AMD has since tacitly conceded the impropriety of much of its deposition obstruction. Of the approximately 160 unanswered questions Intel initially raised with AMD during the meet and confer process, AMD agreed to provide answers – scripted by counsel – to 36. *See* Intel Motion to Compel, Ex. K (Herron 4/16/09 Ltr. and Fowler 4/23/09 Ltr.). After Intel moved to compel answers to 130 questions, AMD abandoned its inapt *Noerr-Pennington* objection to 11 of them.[2] As to 12 other questions, AMD simultaneously maintains its privilege claim while pointing to other instances in which the question was supposedly answered, a further concession that the privilege objection is either

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[1] Intel understands that Your Honor has inquired about rescheduling the hearing date. We are checking schedules, and will respond promptly.

[2] AMD's post hoc attempt to replace that invalid objection with others fails. Fed. R. Civ. P. 32(d)(3)(B); *Kansas Wastewater, Inc. v. Alliant Techsystems, Inc.*, 217 F.R.D. 525, 528 (D. Kan. 2003).

invalid or waived. The time has come for AMD to comply with the Court's prior order so that Intel may complete its discovery of AMD's practices and file its motion to compel further remediation.[3]

AMD's two main points in opposition to this motion are unavailing. First, it claims that the questions fall outside the 15 topics this Court approved. That is not true as to any of the questions at issue, let alone all of them. Second, AMD argues that many of its instructions based on privilege and work product are valid. The questions do not seek protected information. Rather, they go only to the facts underlying AMD's document preservation issues – facts that are not privileged and are not work product.

The key subjects at issue include:

- AMD's reasonable anticipation of this litigation. Intel intends to move to compel remediation related to AMD's failure to implement a timely preservation plan when it first reasonably anticipated litigation against Intel. Based on AMD's own documents and admissions to date, it reasonably anticipated this litigation at least by January or February 2005 (perhaps earlier) and should have been retaining documents months before its claimed anticipation date of April 20, 2005. Yet AMD has provided almost no deposition testimony on this topic and its use of its opposition brief to tell its side of the story only emphasizes Intel's need to test AMD's assertions in deposition.

- AMD's stealth restoration activities and remediation. Intel continues to believe that AMD has conducted undisclosed interim preservation tape restoration and/or other remedial activities.[4] AMD's deposition responses and objections, and its supplemental deposition corrections, essentially dodge this issue. Intel is entitled to know the whole story.

- AMD's data losses and preservation issues. AMD maintains it has disclosed all "*known*" instances of data loss, without defining what that term means, while refusing to provide information about *suspected* or *potential* data losses. *See* Topic 12 ("Any known or *suspected* non-preservation of AMD Custodian data.") (emphasis added) It is apparent that AMD is using semantics to conceal some of its preservation issues. Even if AMD contends these (undisclosed) issues have been remediated or otherwise resolved, Intel is entitled to make an independent assessment of them, including whether AMD's remediation, if any, was adequate and whether there are other issues that require similar remediation steps.

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[3] Intel has repeatedly asked AMD for its assent to a briefing schedule and procedure to hear Intel's motion – required due to the delays in securing AMD's deposition testimony. Intel will seek the Court's intervention to set a procedure at the May 29 hearing (subject to rescheduling on June 2 or another date).

[4] Intel made these concerns known well over a year ago in Mr. Ashley's first declaration. *See, e.g.,* Declaration of John Ashley (7/1/08 (D.I. 763)), at ¶ 17.

This letter is organized into three sections, as follows: Section I sets forth the current status of the questions that are the subject of Intel's motion. Section II addresses the parties' main disputes on matters related to the attorney-client privilege and work production protection. Section III addresses the inadequate preparation of AMD's 30(b)(6) witnesses. Intel is also submitting a revised chart, which is identical to AMD's but adds a column in which Intel responds to AMD's contentions on the questions that remain the subject of Intel's motion.[5] Because AMD opted to separately argue each and every question in the chart, Intel is forced to respond accordingly, although it will attempt to do so concisely.

I. OVERVIEW OF QUESTIONS THAT REMAIN THE SUBJECT OF THIS MOTION

Before filing this motion, Intel – both unilaterally and pursuant to a lengthy teleconference and multiple letters – narrowed the number of unanswered questions at issue from well over 300 to 130. Since the motion was filed, AMD has conceded its erroneous position on, and supplied answers to, an additional 48 questions. Some of those answers are adequate, while other answers require follow up questions. As reflected in the revised chart that accompanies this letter, Intel's motion now concerns 86 questions (and related subject matter).[6]

Intel seeks an allotment of time to (1) re-ask questions that AMD has not answered and conduct reasonable follow-up on the subject matter of those questions, and (2) proceed with reasonable follow-up questions to certain of the supplemental responses provided by AMD after the deposition.

A. Questions AMD Has Refused To Answer

The majority of questions at issue have never been answered. Although the disputes vary from question to question there are some common themes:

- Each of the unanswered questions falls squarely within topics in Intel's deposition notice approved by Your Honor and call for underlying factual information that is not subject to any privilege or work product protection.

- AMD continues to block fundamental questions about its document preservation. It uses two primary methods. First, it claims that AMD's knowledge of preservation problems are privileged. But those underlying facts have nothing to do with attorney client communications. Second, it claims that only preservations problems that ultimately

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[5] Intel's chart also corrects AMD's entry number 38.

[6] Intel disagrees with the tenor and substance of Mr. Herron's declaration purporting to relate the underlying facts. Although it is unnecessary to respond to each of his arguments, Intel openly acknowledges it sought to expedite the parties' meet and confer, because Intel was (and remains) concerned about AMD's year-long strategy of delay and obstruction. Given the substantial narrowing of issues, it is apparent that the meet and confer process was productive. Mr. Herron's disparagement of it is not.

resulted in known data losses are permissible topics. As noted above, Intel is entitled to know what happened and independently assess AMD's remediation efforts.

- AMD attempts to raise objections in its Opposition not raised during the depositions themselves. These tardy objections are waived, as outlined in Intel's Motion (at 6). AMD provides no explanation or legal authority supporting the *ex post facto* assertion of objections.

- AMD's positions on many of Intel's questions are contradictory. For example, while "standing on" its assertion of privilege in many cases, AMD simultaneously points to alleged "answers" on the record, which of course undermines its position that the information is privileged. *See, e.g.*, Chart (Questions No. 22, 44, 138). AMD cannot have it both ways.

- AMD's attempts to justify its positions by pointing to Intel's objections to different questions asked more than a year ago are mere distractions. AMD's arguments are off point, too late, and in any case not before the Court.

Intel requests that AMD be ordered to provide knowledgeable witnesses and permit them to answer Intel's questions.

B. Non-Responsive and Insufficient New "Answers"

The remaining questions require further testimony because AMD's supplemental written answers are inadequate, beg additional questions, or both.[7] AMD should not be permitted to block the give and take of live deposition testimony by asserting improper instructions or failing to prepare its witnesses. Intel is entitled to unfiltered, sworn testimony, including reasonable follow-up. *See Cavanaugh v. Wainstein*, 2007 U.S. Dist. LEXIS 40242, at *33 (D.D.C. 2007).

For example, during Mr. Halle's deposition, Intel asked the following question about chart of harvest dates provided by AMD to Intel:

[redacted]

See Chart, No. 34; Intel Motion, Ex. J. [redacted] and AMD provided a supplemental response along with its opposition brief, as follows:

[redacted]

[7] This includes Question Nos. 17, 18, 19, 26, 34, 37, 68, 102, 110, 111, 151, 157, 158.

[redacted]

AMD's "answer" is non-responsive, or partly responsive at best. [redacted]

II. INTEL DOES NOT SEEK INFORMATION PROTECTED FROM DISCLOSURE BY ANY PRIVILEGES OR OTHER DOCTRINES

A. AMD Cites Case Law That Supports Intel's Position

AMD does nothing to refute Intel's assertion that underlying facts are not protected by privilege or work product protection. *Upjohn Co. v. United States,* 449 U.S. 383, 395-96 (1981); *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 208 F.R.D. 109, 121-22 (D.N.J. 2002). In fact, two of AMD's own cases confirm that such *factual* discovery is not barred. *See T&H Landscaping, LLC v. Colorado Structures Inc.,* 2007 U.S. Dist. LEXIS 63495, at *3-4 (D. Colo. 2007) (defendant's response to "factual statements within the [plaintiff's expert] report" is an appropriate area of questioning for a 30(b)(6) deponent); *In re Cendant Corp. Securities Litigation*, 343 F.3d 658, 662 (3d Cir. 2003) (Federal Rule of Civil Procedure 26(b)(3) "does not bar discovery of *facts* a party may have learned from documents that are *not themselves discoverable.*") (citing *Federal Practice and Procedure* § 2024, at 337) (emphasis added). AMD's attempt to characterize Intel's fact-based inquires as seeking "conclusions of AMD's counsel" is unavailing. *See, e.g.,* AMD Opp. at 19; citing No. 14 [redacted]

Similarly, the case AMD cites (and mischaracterizes) in its attempt to seek blanket protection for anything having to do with its "investigations, validation and auditing activities concerning data preservation, collection and production" actually *supports* Intel's position. AMD Opp. at 7 & 16, citing *In re Linerboard Antitrust Litigation*, 237 F.R.D. 373 (E.D. Pa. 2006). *Linerboard* concluded that the 30(b)(6) witness was not required to talk to in-house counsel to prepare for his deposition for several reasons. First, the Court concluded that the witness had been adequately prepared to answer the questions asked based on more than two weeks of preparation which included reviewing deposition testimony and talking to more than ten individuals. Second, the deponent had produced extensive non-privileged sources of information responsive to the topic of inquiry. Finally, the court found that the in-house counsel's mental *recollections* of facts learned from an investigation that had been conducted twelve years earlier would necessarily be "so intertwined with mental impressions" as to

constitute opinion work product. *Id.* at 379. Intel is not asking for AMD counsel's recollections of facts, or opinion work product, but seeks to discover only the facts themselves, which in *Linerboard* had already been disclosed to plaintiffs through production of "almost 30,000 pages of documents" *and 30(b)(6) depositions*. *Id.* at 378 (emphasis added). Indeed, *Linerboard's* holding was expressly "limited to the circumstances of this case in which there has been extensive discovery of the underlying facts." *Id.* at 379. Here, by contrast, AMD has steadfastly refused to disclose the facts.

Moreover, contrary to *Linerboard* in which the discovering party "had available to them extensive non-privileged sources of the same information," *id.* at 383, AMD engaged in a shell game by designating an in-house counsel, Ms. Ozmun, as a witness, failing to prepare her as a 30(b)(6) witness and then claiming her knowledge was privileged. Repeatedly, AMD feigned compliance by instructing her [redacted] *See, e.g.,* (Question No. 45). Of course, Ms. Ozmun then had no testimony to offer. AMD should have either designated a non-attorney to testify or permitted Ms. Ozmun to testify *as AMD*, rather than in her capacity as an attorney. Instead, [redacted] If Ms. Ozmun were testifying *as AMD,* as she should have in response to a 30(b)(6) notice, she would have been able to distinguish her "recollections" of facts as an attorney and to testify about the underlying, unprivileged facts themselves.[8] *See Linerboard*, 237 F.R.D. at 386.

B. AMD Has Abandoned Its Erroneous *Noerr-Pennington* Assertion

AMD's legally unsupported assertion of the *Noerr-Pennington* doctrine as a bar to discovery was simple obstruction. AMD does not address, and therefore concedes, this point.

C. AMD Improperly References and Misconstrues Prior Objections By Intel That Are Not Before the Court

1. Intel's Prior Objections Are Not In Issue

As a starting point, Intel's prior objections are not before the Court. *See, e.g., In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 1994 U.S. Dist. LEXIS 1344, at *4 n.2 (E.D. Pa. 1994) (rejecting the "what's good for the goose, is good for the gander" defense to a discovery motion; "defendants' point fails to address the fundamental difference between the two privilege logs, that being that only the defendants' log is at issue"). AMD offers no legal authority for why Your Honor should base its decision on isolated, often out of context, prior objections that are not the subject of the pending motion.

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[8] AMD attempts to shift the burden to Intel in seeking this discovery. However, Intel does not have to show a "substantial need" to obtain the non-privileged facts over which AMD has improperly asserted work-product protection. *See Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000) (requiring objecting party to demonstrate that work product privilege applies before shifting burden to party seeking production).

2. Even If Intel's Prior Objections Were In Issue, AMD Has Not Raised Them Within A Reasonable Amount Of Time

AMD notes that it "has not yet put the privilege and work product lines Intel drew to the test by way of a motion." AMD Opp. at 7, fn. 8. However, the time for such a motion has passed. AMD's Rule 30(b)(6) depositions on Intel's document retention practices took place over 15 months ago. A motion to compel must be "sought within a reasonable time to prevent delay." *Carnathan v. Ohio Nat'l Life Ins. Co.*, 2008 U.S. Dist. LEXIS 65546, at *5 n.2 (M.D. Pa. 2008); *see also Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 18 (E.D. Pa. 1986) (only considering claims brought pertaining to "recent depositions," and declining to consider complaints about assertions of privilege made 16 months earlier). AMD should not be permitted to hijack Intel's motion with untimely complaints about depositions that occurred well over one year ago.

3. Intel's Prior Objections Are Distinguishable In Any Event

Apart from their other problems, AMD's cherry-picked examples are distinguishable from the questions that *are* before the Court. As discussed below, AMD's assertion that it "simply drew the same privilege and work product lines as Intel," AMD Opp. at 7, is not accurate. Moreover, AMD obtained an unprecedented amount of discovery on Intel's document retention and preservation practices, yet it distorts the massive record by only citing a tiny portion of Intel's testimony and objections. Critically, AMD cites to isolated Intel objections while ignoring the fact that AMD obtained, in many instances, the very discovery Intel seeks now and to which AMD inappropriately objects.[9]

Factual IT Questions vs. Attorney Mental Processes. AMD objected to the question, [redacted] Ozmun Tr. 56:1-6. AMD curiously claims that this question "delves into counsel's decision-making process," AMD Opp. Ex. A. No. 42, and therefore instructed its witness not to answer. The question, however, seeks an underlying fact – [redacted] To buttress its improper objection, AMD points to Intel's objection to an AMD question about [redacted] AMD Opp. at 8. The difference is obvious. [redacted] The latter is protected, the former is not.

Discovery and Knowledge of Preservation Issues. [redacted] For example, AMD objected to the

[9] For example, AMD objects to Intel's question No. 22 [redacted] yet obtained answers from Intel on an identical issue: [redacted] Almirantearena Tr. 194:7-10; *see also id.* 191:12-15 [redacted]

question, [redacted] Halle Tr. 108:2-10. Intel is entitled to know what AMD's preservation issues were. In answering, AMD would not have had to disclose any privileged information, nor explain how its counsel came to any realizations. AMD claims that "Intel refused to answer questions about whether and when it became aware of custodian preservation problems."[10] AMD Opp. at 8. But Intel has provided AMD with detailed documents and deposition testimony about when it became aware of its custodian preservation issues.

Efforts To Learn About Custodian Preservation Issues. AMD refused to answer questions as to [redacted] AMD objected to the question, [redacted] No. 37. By contrast, Intel allowed this testimony and only objected to questions [redacted] where such testimony would reveal the specific actions of its attorneys, the substance of an attorney-client communication or its attorneys' work product. For example, Intel objected to inquiries concerning [redacted] in the interviews conducted by Intel's counsel, AMD Opp. at 8, and [redacted] AMD. Opp. Ex. A. No. 37 (emphasis added). In short, Intel objected to questions that sought [redacted]

Facts Of Preservation Issues Learned From Or By Outside Counsel. AMD refused to answer the question [redacted] Ozmun Tr. 95:7-17. AMD cites Intel objections to inquires about [redacted] For example, AMD points to Intel's objection to the question, [redacted] No. 53. In [redacted] This is quite distinct from AMD's objection to a question that sought [redacted]

D. Selective Assertion of Privilege Should Not be Permitted

AMD cannot decide to answer some topics and selectively assert a privilege as to other questions on that topic. *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1426 n.13 (3d Cir. 1991). For example, AMD permitted its witness to testify when witnesses *were* aware

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[10] AMD also claims that Intel refused to answer "in some cases" whether Intel discovered any problems at all, or the extent of those problems. This is untrue, and AMD provides no such citations. The questions AMD cites in its brief each ask whether Intel came to a certain realization at a specific time.

of their preservation obligations: [redacted] But not when its witnesses may have had *mistaken beliefs* about their preservation obligations: [redacted] Halle Tr. 108:2-10.

III. INTEL ASKED APPROPRIATE QUESTIONS THAT FALL WITHIN THE DESIGNATED TOPICS AND YET AMD WAS UNPREPARED OR UNWILLING TO ANSWER

A. Intel Complied with the Court's Order

AMD skirts responsibility for its failure to prepare witnesses by misconstruing the Court's January 22, 2009 Order (the "Order"). First, contrary to AMD's unfounded suggestion, Intel was expressly "not limited" to "confirmatory questions," Order ¶1, and instead was granted the right to test by examination, at formal deposition, AMD's document retention and preservation practices. Second, the Order only modified Intel's deposition notice in three specific ways, and Intel in no way violated these modifications. The Court ordered that:

- Intel's questions should focus on designated custodians only. AMD does not claim that Intel sought testimony on non-designated (*i.e.*, non-production) custodians.

- On deposition Topic 6 (Harvesting), the Court noted it would be "impractical for AMD to prepare and present a witness who could testify regarding the proposed data-harvesting details with respect to every AMD custodian." Intel did not ask questions that called for harvesting details with respect to any, let alone "every," AMD custodian.

- Intel's back-up tape questions (Topic 10) were confined to the "subtopics explicitly delineated in the Notice for this topic."[11] Those subtopics included: type of backups, software and media used, content and frequency of the backups, tape rotation/recycling schedule, and restoration activities for this Litigation. D.I.. 1291 (1/22/09). Each of Intel's questions about AMD's preservation tape protocols and restoration activities fall squarely within these subtopics.

AMD fails to cite an actual instance where Intel's questions fall outside the express ambit of Your Honor's Order.

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[11] The parties were also ordered to make a "good-faith" attempt to address deposition Topic 13 in the form of an interrogatory response. After considering the issue carefully, including AMD's conduct during the informal discovery process, Intel decided to pursue live testimony instead of attorney-crafted narratives.

B. Intel's Topics Were Described With Sufficient Particularity And Its Questions Were Plainly Within the Scope

Despite a prior unsuccessful motion opposing each of the 30(b)(6) topics in which it did not raise the issue, AMD now attempts to ratchet up the level of specificity required of Intel's 30(b)(6) deposition notice. The notice need not be, as AMD argues, so detailed as to "permit the responding party to . . . reasonably anticipate the questions that will be asked." AMD Opp. at 5. AMD is not entitled to a virtual preview of deposition questions, only notification as to the specific areas of exploration. Indeed, AMD complained before the deposition about the number of subtopics delineated in the notice, but now complains there were not enough. AMD cannot have it both ways. A notice need only be reasonable; perfection is not the standard.

Thus, AMD's witness should have been prepared to answer Intel's questions, which were squarely within its noticed topics. For example, AMD's designee on the "events and circumstances leading to AMD's decision to commence this Litigation" (Topic 4), should have been able to testify, for example, when AMD learned of the Intel contracts it disputes as anticompetitive – a *key* allegation in AMD's Complaint. No. 41. Yet, AMD asserts this is "beyond the scope."[12]

AMD's assertion that such questions call for "legal contentions" is unavailing. AMD Opp. at 6. In contrast to the 30(b)(6) topics rejected in *In re Independent Service Organizations Antitrust Litigation,* which required a corporate witness to "testify about facts supporting numerous paragraphs" of the defendant's Answer and Counterclaims, Intel seeks such basic, factual, discovery as when AMD learned of the basic allegations in AMD's Complaint. 168 F.R.D. 651, 654 (D. Kan. 1996); *see, e.g.*, No. 93.

It is also unclear how the information Intel seeks could not be "reasonably available to AMD." AMD Opp. at 18-19. [redacted] No. 13. These activities were fundamental to AMD's document preservation strategy – it's unclear how the order in which they occurred could be "unduly burdensome to collect and validate."

C. Intel's Questions Relating To AMD's Reasonable Anticipation Date Call For Relevant Information

Deposition topic number 4 concerns the "[d]ate on which AMD first reasonably anticipated this Litigation, *and the events and circumstances leading to AMD's decision to commence this Litigation.*" (emphasis added). This topic was not limited by Your Honor in any way, and Intel's counsel gave specific examples in open court of the types of questions Intel

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12 AMD devotes a section of its opposition to a witness-by-witness summary of testimony. AMD Opp. at 9-20. Intel rejects AMD's characterization of the testimony, but does not believe a point by point response, or counter-summaries, are warranted. Intel will instead address the issues on a question by question basis in the attached chart.

would be pursuing. Jan. 9, 2009 Hearing Tr. 39:10-40:24. Ignoring these points, AMD, during the deposition and in its opposition, has taken an artificially restrictive view of this topic's scope and the relevant law.

The information Intel seeks regarding *the events and circumstances leading to AMD's decision to commence this litigation* is relevant and discoverable, and will be a basis for Intel's forthcoming motion to compel documents from AMD's preservation tapes. Intel should be entitled to explore the timing of AMD's knowledge of potential causes of action against Intel, supporting legal theories, and the facts that underlie the allegations in its complaint. *See, e.g., Micron Technology, Inc. v. Rambus Inc.*, 255 F.R.D. 135, 150 (D. Del. 2009) (concluding that litigation was reasonably foreseeable by the time plaintiff had "identified potential litigation targets, causes of action, and fora," and was drafting claim charts). This evidence may be found in internal documents, public statements and communications with third parties (including government agencies). It may also be gleaned from AMD's conduct in the months leading up to its commencement of this litigation, such as the date it retained an economist to evaluate Intel's conduct, or the date it commenced an evaluation of potential legal claims.

All of these facts, once disclosed, may shed additional light on when AMD should have known that its internal documents could be relevant to litigation against Intel, and thus should have been preserved in a timely fashion. Intel simply cannot accept AMD's "take our word for it" approach.

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Intel respectfully requests an order: (1) overruling AMD's objections; (2) providing Intel with time to obtain answers to unanswered questions and reasonable follow-up questions; (3) instructing AMD to provide witnesses properly prepared to answer all outstanding questions; and (4) instructing AMD to produce its witnesses for deposition in San Francisco. We look forward to discussing these issues with Your Honor at the hearing (to be rescheduled).

Respectfully,

/s/ Richard L. Horwitz
Richard L. Horwitz

RLH:cet
917980 / 29282
Enclosure
cc: Clerk of Court (via Hand Delivery)
Counsel of Record (via CM/ECF & Electronic Mail)