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By Hand

The Honorable Vincent J. Poppiti
Blank Rome LLP
Chase Manhattan Centre
1201 Market Street, Suite 800
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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
Request For *In Camera* Review of Disputed Document

Dear Judge Poppiti:

Intel moves to compel production of portions of a document that AMD recently "clawed back" and redacted based on its claim that some of it is protected by the attorney-client privilege and work product doctrine, and requests Your Honor conduct an *in camera* review thereof. Intel seeks an order holding: (1) AMD's disclosure of the document to a third party waived any attorney-client privilege that may have attached; (2) AMD's redactions based on work product are overbroad and incorrect; and (3) AMD must promptly produce another version of the document consistent with Your Honor's instructions following an *in camera* review.

Background. Intel is investigating the date on which AMD first reasonably anticipated this litigation. To date its investigation has revealed that by January 2005 at the latest, AMD knew the factual and legal bases of its antitrust claims against Intel and was actively preparing for this litigation. AMD contends, however, that it first reasonably anticipated litigation against Intel on or about April 20, 2005. *See, e.g.,* Docket #1458, 5/14/09 AMD Letter at 13. The document that is the subject of this Request, once properly produced by AMD, will undermine AMD's position and will support Intel's forthcoming motion on this topic.

The Document. The document in question is comprised of a cover email and two attachments. The cover email is dated May 4, 2005 and has a subject line reading "EC Deck." *See* Pickett Decl., Ex. A (AMD-065-00046889). [redacted] *Id.* (AMD-065-00046890 through AMD-065-00047039). The second attachment, dated May 2, 2005, is a PDF of a PowerPoint presentation entitled [redacted] *Id.* (AMD-065-00047040 through AMD-065-00047179).

AMD's redaction removes entirely a 48-page section of the Executive Committee Meeting attachment entitled [redacted] *See* Pickett Decl., Ex. A (AMD-065-00046975 through AMD-065-00047023 [redacted]

[redacted] *See* Docket #1458, 5/14/09 AMD Letter at 11. [redacted] undermines AMD's claim that it first reasonably anticipated this litigation on April 20, 2005. Other unprotected information in the [redacted] section may also rebut AMD's position.

The cover email shows that [redacted] The email was not labeled with any privilege designation, nor is there any indication that it was sent to [redacted] in connection with the provision of legal services. On the contrary, the email is a standard business communication to a business consultant, and even the [redacted] *See* Pickett Decl., Ex. A (e.g., AMD-065-00046892) (emphasis added). [redacted] has consulted on business projects for AMD, but the Slingshot project, including the filing of litigation against Intel, was not one of them. McDonough Decl. ¶¶ 6-8. [redacted] specifically declined to work on Slingshot or any litigation related to Intel. *Id.*

Procedural History. The parties' correspondence on this issue is attached to the accompanying Declaration of Donn Pickett, and Intel will not repeat the parties' respective positions here. Intel will briefly address, however, AMD's prior assertion that Intel's handling of the document violated the Second Amended Stipulation Regarding Electronic Discovery and Format of Document Production (the "Native Stipulation"). AMD produced a similar version of the Executive Committee Meeting attachment that was *not* sent to a third party, and clawed back that version in January 2009. It did not, however, claw back the version sent to [redacted] Although Intel believed that any privilege attaching to the document had been waived by virtue of its transmission to [redacted] Intel nonetheless notified AMD and Your Honor about the document, deactivated it from its review database, ceased further review and requested a prompt meet and confer. Intel believes its actions consistent with the Native Stipulation.

On May 1, 2009, AMD clawed back the document, asserting the attorney-client privilege and work product doctrine. AMD identified the [redacted] consultant who received the document as "a long-standing consultant" on matters of "important corporate strategy" and claimed that because of his "unique role" with respect to AMD, transmission of the document to him did not waive privilege, and that the communication was in assistance to counsel in rendering legal advice. [redacted] however, did not work on Project Slingshot, including its litigation component. *See* above. AMD provided Intel with a redacted version on May 29, 2009.

Legal Standard.

Waiver of Attorney-Client Privilege. When an attorney-client privileged communication is voluntarily shared with a third party, the privilege is lost. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1423-24 (3rd Cir. 1991); *U.S. v. Rockwell Intern'l*, 897 F.2d 1255, 1265 (3d Cir. 1990). "[I]t is vital to a claim of privilege that the communications between client and attorney were made in confidence and *have been maintained in confidence*." *U.S. v. Fisher*, 500 F.2d 683, 692 (3rd Cir. 1974) (emphasis added). Moreover, "[t]he disclosure of any meaningful part of a purportedly privileged communication waives the privilege as to the whole." *Rockwell Intern'l*, 897 F.2d at 1265. Only in narrow circumstances can the privilege be

extended to non-lawyers who are employed to assist the lawyer in the rendition of professional legal services. *Westinghouse*, 951 F.2d at 1423-24; *accord Blumenthal v. Drudge*, 186 F.R.D. 236, 243 (D.D.C. 1999). This exception must be strictly construed and should only apply when a confidential communication was made for the purpose of obtaining legal advice from the lawyer. *Westinghouse*, 951 F.2d at 1424; *Blumenthal*, 186 F.R.D. at 243.

Work Product. Documents prepared in anticipation of litigation by or for a party or its representative are protected from disclosure under the work product doctrine. Fed. R. Civ. P. 26(b)(3). "Core work product," defined as an attorney's (or attorney's representative's) mental impressions, conclusions, opinions, or legal theories concerning the litigation, "is generally afforded near absolute protection from discovery." *In re Ford Motor Co.*, 110 F.3d 954, 962 n.7 (3rd Cir 1997). However, "[n]on-core work-product or fact work-product contains raw factual information," and is not entitled to the same heightened protection. *See AMD, Inc. v. Intel Corp.*, 2008 U.S. Dist. LEXIS 98898, at *44 (D. Del. May 9, 2008). Rather, it may be subject to disclosure, based on a showing of substantial need and undue hardship. Fed. R. Civ. P. 26(b)(3). In short, "[a] party claiming work-product immunity bears the burden of showing that the materials in question were prepared in the course of preparation for possible litigation. Work product prepared in the ordinary course of business is not immune from discovery." *Holmes v. Pension Plan of Bethlehem Steel*, 213 F.3d 124, 138 (3d Cir. 2000) (citations omitted).

In Camera Review. Where a document contains both core and non-core work product, "the adversary party is entitled to discovery of the facts." *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 (3d Cir. 1984). In such situations, "the court is frequently called upon to review [] documents because it is the only way, in many cases, to determine whether the documents are privileged." *Hohider v. United Parcel Serv.*, 2009 WL 1163931, at *4 (W.D. Pa. Apr. 28, 2009).

Argument.

Waiver of Attorney-Client Privilege. AMD disclosed the document to [redacted] at [redacted] a business consultant, and therefore waived privilege. There is no indication, on the face of the document or otherwise, that the transmission of the document to [redacted] was related to the provision of legal services, and the evidence is to the contrary. The redacted portion of the document was entitled [redacted] and [redacted] has represented to Intel's counsel that it never worked on the Slingshot project. AMD's claim of privilege fails.

Overbroad Assertion of Work Product. The applicability of the work product doctrine must be considered on a page-by-page basis. Even if some portions of the document do indeed contain work product, AMD must still produce factual information not similarly protected. Where "the same document contains both facts and legal theories of the attorney, the adversary party is entitled to discovery of the facts." *Bogosian*, 738 F.2d at 595-596 (holding that in such situations, *in camera* review is appropriate). Ignoring that clear precedent, AMD has simply redacted *en masse* every single word from every single page of the [redacted] presentation. The law requires it to identify and produce both non-work product and any work product consisting of non-core factual data, rather than engage in bulk redactions.

For example, AMD's aggregate, historic litigation costs are objective facts, not protected work product. *See Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401-02 (8th Cir. 1987). In *Simon*, the court held that risk management documents, containing aggregate case reserve figures, were not protected work product doctrine, even where the case reserve figures contained an attorney's

"estimate of anticipated legal expenses, settlement value, length of time to resolve the litigation, geographic considerations, and other factors." *Id.* at 400-02. The court held that the documents were created in the regular course of business, and the defendant's "business involves litigation, just as it involves accounting, marketing, advertising, sales, and many other things. A [] corporation may engage in business planning on many fronts, among them litigation." *Id.* at 401. Like the documents in *Simon*, [redacted] *Simon*, 816 F.2d at 401. [redacted] *See* above.

AMD redacted a litigation expense figure not entitled to work product protection. *See Estate of J. Edgar Monroe v. Bottle Rock Power Corp.* 2004 WL 737463 *11 (E.D. La 2004) (information regarding attorneys' fees or hours spent by attorneys working on litigation are not protected by the attorney-client privilege or work product doctrine); *see also S. Scrap Material v. Fleming,* 2003 WL 21474516 *13 (E.D. La 2003) ("information relating to billing,... hourly rates, hours spent by attorneys working on litigation, and payment of attorney's fees. . .do[es] not concern the client's litigation, but rather concern[s] a business agreement"). Moreover, since the document was created in May 2005, [redacted] does not reflect work product to begin with, as it is not a [redacted]

Finally, even assuming *arguendo* that the legal expenses, or other portions of the document, somehow reflected fact-based work product, Intel should still be entitled to the information under Fed. R. Civ. P. 26(b)(3). A party is entitled to discover factual work product if it has substantial need for the material and cannot, without undue hardship, obtain their substantial equivalent by other means. *Id.* Here, a key element of Intel's claim that AMD did not properly retain its documents is Intel's belief that AMD reasonably anticipated litigation well before it began to preserve documents. [redacted] prior to retention is both directly relevant to that issue – so that Intel has substantial need for the information – and unavailable from other sources. Consequently, even if Your Honor believes that such information is factual work product, Intel should still be entitled to discover it.

Request For Relief. Intel respectfully requests that the Court conduct an *in camera* review of the document and issue an order holding as follows: (1) that by disclosing the document to a third party, AMD waived any applicable privilege; (2) that AMD's redactions include materials not covered by any applicable privilege; and (3) AMD must promptly provide a properly redacted version of the document to Intel consistent with the Court's instructions.

Respectfully,

/s/ Richard L. Horwitz

Richard L. Horwitz

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