



1313 North Market Street
PO. Box 951
Wilmington, DE 19899-0951
302 984 6000

www.potteranderson.com

W. Harding Drane, Jr
Partner
Attorney at Law
wdrane@potteranderson.com
302 984-6019 Direct Phone
302 778-6019 Fax

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By Hand & Electronic Filing

The Honorable Vincent J. Poppiti
Blank Rome LLP
Chase Manhattan Centre
1201 Market Street, Suite 800
Wilmington, DE 19801

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
Opposition to AMD's Motion to Compel re 30(b)(6) Notice

Dear Judge Poppiti:

Intel submits this letter in opposition to AMD's Motion to Compel filed on June 12, 2009 (Docket No. 1554), and requests an Order denying that motion.

On April 29, 2009, AMD served the 30(b)(6) notice and request for production of documents that is the subject of its motion. The notice and document requests are impermissible for three reasons. *First*, AMD's new requests are unreasonably tardy, in violation of the June 20, 2007 Stipulation and Order Bifurcating Discovery into Intel's Evidence Preservation Issues ("Bifurcation Order"). *Second*, AMD seeks burdensome, additional discovery on issues which already were or could have been explored through a wide variety of prior discovery and disclosures. *Finally*, AMD improperly and prematurely seeks discovery to defend itself against arguments that Intel has not made – discovery not ripe for the Court's consideration.

AMD's most recent 30(b)(6) notice and document requests come approximately nineteen months after causation/culpability discovery began and fourteen months after Intel put forth two 30(b)(6) witnesses for four days of depositions on remediation and causation/culpability topics. So far AMD has taken 45 hours of deposition testimony on remediation and causation/culpability issues from seven different witnesses, including both 30(b)(6) and individual witnesses, and Intel has produced over 750,000 pages of documents related to remediation and causation/culpability pursuant to an agreed-upon custodian-based approach.

Intel has also provided AMD with additional discovery related to remediation and causation/culpability issues including, but not limited to, Intel's Report and Proposed Remediation Plan, Intel's "Paragraph 8 Summaries," the "Weil Interview Notes," Intel's Remediation Report, Intel's Response to Order of March 10, 2009 regarding individual preservation issues, and a broad range of other informal disclosures.

As explained more fully below, AMD's requested discovery is precluded by both this Court's Bifurcation Order and the Federal Rules of Civil Procedure.

1. AMD's New 30(b)(6) Notice is Untimely in Violation of the Court's Bifurcation Order.

AMD's requests contravene both the letter and spirit of the Bifurcation Order. As the Court is aware, remediation discovery closed on August 31, 2007. *See* Declaration of Donn P. Pickett ("Pickett Decl."), ¶ 2, Ex. 1 at ¶¶ 1, 9. Remediation discovery included "inquiry into the nature and extent of Intel's loss of data and the potential consequences of those losses with respect to Intel's ability to remediate same." *Id.* at ¶ 1. AMD does not dispute that Remediation Discovery is closed. AMD's Topics 3, 4, 5, 6, 8, and part of 10 (relating to preservation and harvesting) fall within the category of remediation discovery and, therefore, are time-barred. The Court also ordered that "Causation/Culpability Discovery, including depositions and any additional document production, *shall proceed expeditiously thereafter.*" *Id.* at ¶ 5 (emphasis added). AMD cannot circumvent the Bifurcation Order by arguing that the language of the Order is meaningless or that discovery on those issues is open-ended without any limitations.

Under any definition of "expeditiously," AMD's service of a new 30(b)(6) notice and document requests approximately nineteen months after Causation/Culpability Discovery was ordered to proceed expeditiously violates the plain language of the Bifurcation Order.¹ AMD tries to avoid this plain language by claiming it is limited to *starting* Causation/Culpability Discovery expeditiously, without regard to how the discovery proceeds. But that is not what the Order plainly states. AMD's burdensome discovery demands are simply too late.

AMD also claims that discovery can be left open until whatever time AMD chooses to respond to Intel's purported spoliation, "which AMD has not yet done." *See* AMD's June 12, 2009 Letter Brief, Docket No. 1554 ("Motion") at 2. It is unreasonable, however, to presume that AMD may continue taking discovery (duplicative or otherwise) up to whatever date it may decide to file a motion for sanctions.

Intel's position that the time for causation/culpability discovery has concluded is not new. Indeed, Intel notified AMD well over a year ago of its position that AMD's discovery into Intel's preservation issues had already exceeded the bounds of what was appropriate, and that continued discovery on it was unreasonable. *See* Pickett Decl. ¶ 3, Ex. 2. On May 2, 2008, after agreeing to yet another deposition demanded by AMD (former employee Michael O'Donnell), Intel reiterated its position that Causation/Culpability discovery should be closed, and informed AMD that it would need to raise the issue before Your Honor if AMD served further non-expert deposition requests. *See* Pickett Decl. ¶ 4, Ex. 3. AMD did not respond, other than to request deposition dates for Mr. O'Donnell, then waited over a year to serve its new 30(b)(6) notice and document requests.

Finally, AMD's argument that CMO1 allows unfettered new discovery fails. That Order permits the parties to take a deposition on the completeness of document production (including electronic discovery), *see* Pickett Decl., ¶ 5, Ex. 4 at 3-4, and Intel has already provided substantial testimony and documentary evidence on preservation and production issues. Moreover, Intel has agreed to a deposition on the completeness of Intel's production of organic and remedial electronic data from the Global Database. *See* Pickett Decl. ¶ 6, Ex. 5 at 13.

¹ The word "expeditiously" is defined as "marked by or acting with prompt efficiency." Merriam-Webster On-Line Dictionary, *available at* <http://www.merriam-webster.com/dictionary/expeditiously>. AMD's belated service of its requests is neither prompt nor efficient.

Intel's prior reliance on CMO1 to support its initial request for preservation discovery does not undermine its current objection to AMD's voluminous, second round of requests. At the time Intel relied on CMO1 to support its request for a deposition on preservation, Intel had not obtained any discovery on AMD's preservation and productions issues, yet AMD had already taken seven depositions and received 750,000 pages of documents on Intel's preservation and production issues.

2. AMD's New 30(b)(6) Notice and Document Requests are Impermissibly Duplicative of Prior Discovery AMD Has Actually Obtained or Had Ample Opportunity to Obtain.

AMD's latest 30(b)(6) notice and document requests are foreclosed under F.R.C.P. 26(b)(2)(C), which provides that the court must limit the extent of discovery if the discovery sought is unreasonably cumulative or duplicative, the burden or expense of the proposed discovery outweighs its likely benefit, *or* the party seeking discovery has had ample opportunity to obtain the information through previous discovery. *See, e.g., Static Control Components, Inc., v. Lexmark Int'l, Inc.*, No. 04-84-GFVT, 2006 U.S. Dist. LEXIS 85139, at *15-18 (E.D. Ky. Nov. 9, 2006) (finding that the "broad" topics noticed in previous 30(b)(6) deposition provided the opportunity to ask questions concerning that topic and further questions were "essentially waived."); *see also Banks v. Office of the Senate Sergeant-at-Arms & Doorkeeper*, 222 F.R.D. 7, 19 (D.D.C. 2004) (ordering the parties to find topics that will "insure that the 30(b)(6) depositions are meaningful exercises in ascertaining information that has not been previously discovered" and ordering the party seeking discovery "not [to] ask questions that duplicate questions previously asked of other witness [sic] or seek information that [it] already has by virtue of responses to other discovery devices").

AMD's new 30(b)(6) notice seeks deposition testimony on topics duplicative of those covered in prior 30(b)(6) and individual depositions, and into which AMD already had ample and repeated opportunities to inquire. Although Intel believes AMD's tardy discovery is foreclosed entirely and that a topic by topic analysis is unnecessary, Exhibit 6 to the Pickett Decl. provides examples of the substantial overlap between AMD's prior and new discovery requests.² *See Pickett Decl.* ¶ 7, Ex. 6. AMD's apparent desire to ask slightly different or perhaps better questions on these various topics is not grounds for another bite at the apple. *See State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.*, 254 F.R.D. 227, 235 (E.D. Pa. 2008) (noting that "[t]aking serial depositions of a single corporation may be as costly and burdensome, if not more so, as serial depositions of an individual. . . . [A]llowing for serial depositions, whether of an individual or organization, provides the deposing party with an unfair strategic advantage, offering it multiple bites at the apple, each time with better information than the last").

With respect to documents, AMD has already served two prior document requests regarding remediation and causation/culpability issues. *See Pickett Decl.* ¶¶ 10-11, Exs. 9 & 10. The parties agreed, and the Court ruled, that Intel's production obligation would be satisfied by a custodian-based collection and production. *See Pickett Decl.* ¶ 12, Ex. 11 at 2; *see also id.* ¶42, Ex. 41. As AMD is aware, Intel identified the 17 most significant custodians involved in Intel's

² AMD mischaracterizes the meet and confer history with respect to the overlapping deposition topics. Intel offered to provide further information with respect to "AMD's prior opportunity to ask questions on overlapping or duplicative deposition subjects," *See Pickett Decl.* ¶ 15, Ex. 14 at 2, but AMD informed Intel that it saw "no utility in that information." *See Pickett Decl.* ¶¶ 8-9, Exs. 7-8.

retention plan as well as a subset of those custodians who played the most significant roles in designing and implementing Intel's retention procedure. *See* Pickett Decl. ¶ 13, Ex. 12 at 1-3. Intel then produced documents from these custodians. At the time, AMD agreed that this "custodian-based document production approach was acceptable." *See* Pickett Decl. ¶ 12, Ex. 11 at 2. Intel completed these productions in late 2007, and provided supplemental documents in response to AMD's follow-up inquiries. AMD cannot now revisit the production agreement over a year later by serving duplicative or overlapping requests, *see* F.R.C.P. 26(b)(2)(C), and essentially demanding that Intel re-review 750,000 pages of previously-produced documents to identify to which new requests the documents are responsive.³

During the meet and confer process, Intel advised AMD that if responsive non-privileged information exists as to document requests 2, 3, 4, 6, 8, or 9, it would have been included in the production. *See* Pickett Decl. ¶ 15, Ex. 14 at 1-2. Intel also informed AMD that it is in the process of confirming that its prior productions also included information responsive to request 5. *See id.* at 2 n.2.

3. AMD's Motion is Not Ripe for Consideration

AMD acknowledges that its discovery mimics Intel's discovery, *see* Motion at 1 n.1, and argues that it "strongly suspects" that it may eventually "need[] this discovery to defend itself" against a motion that Intel has not yet filed. *Id.* at 4. Assuming *arguendo* that AMD cannot mount a defense based on its already voluminous deposition and document discovery, Your Honor recently concluded, and AMD agreed, that preemptive discovery into unripe issues is disfavored. *See* Pickett Decl. ¶ 16, Ex. 15 at 44-45 (AMD has not "made such an argument" related to the restoration of preservation tapes, so "[i]t's not ripe now"); Pickett Decl. ¶ 17, Ex. 16 at 7. AMD should not be permitted to launch still more preservation discovery in anticipation of a potential defense to a hypothetical motion that is not before the Court.

4. Conclusion

Intel respectfully requests that AMD's motion to compel further 30(b)(6) deposition testimony and production of documents be denied.

Respectfully,

/s/ W. Harding Drane, Jr.

W. Harding Drane, Jr.

WHD:cet

Enclosure

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

³ The parties also agreed to a custodian-based approach for AMD's document production on retention issues. *See* Pickett Decl. ¶ 14, Ex. 13 at 7. Following AMD's production from five custodians, Intel issued additional document requests, but AMD objected on the grounds that Intel "ha[d] not uttered a word of complaint about AMD's agreed-upon . . . document production," and insisted that its "preservation document production ha[d] been completed." *Id.* In light of its position on its own document production, it is unreasonable for AMD to claim well over a year after Intel made its agreed-upon custodian-based document production – to which AMD has likewise "not uttered a word of complaint" – that it is now somehow inadequate.