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VIA E-MAIL AND HAND DELIVERY

The Honorable Vincent J. Poppiti
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REDACTED PUBLIC VERSION

Re: Advanced Micro Devices, Inc., et al. v. Intel Corporation, et al., C.A. No. 05-441-JJF; 05-MD-1717-JJF -- DM No.

Dear Judge Poppiti:

AMD submits this letter brief in opposition to Intel's June 11, 2009 motion for *in camera* review and to compel production of a highly confidential and privileged PowerPoint presentation REDACTED . which AMD inadvertently produced in discovery. Intel argues: (1) that AMD waived the attorney-client privilege REDACTED and (2) while AMD has *not* waived work product protection that applies to prevent discovery of this document, the presentation purportedly contains non-core work product for which Intel claims to have a "substantial need." Intel is wrong on both counts. The redacted portion of this document is unquestionably protected from disclosure by both the work product doctrine and the attorney-client privilege. No portion of it is discoverable. Intel's motion should be denied.

I. Work Product Doctrine

Intel seeks Court-ordered disclosure

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[1] AMD will be submitting the presentation in question to Your Honor under separate cover, for *in camera* review. AMD would be pleased to discuss, on the record but outside the presence of Intel counsel, any details about the document that may be of interest to Your Honor. In an abundance of caution, AMD has been judicious in this brief when discussing the contents of the redacted material, lest its assertion of privilege and work product protection become a vehicle for their waiver.

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REDACTED and its contents fall squarely within the federal work product protection codified in Federal Rule of Civil Procedure 23(b)(3). Fed. R. Civ. P. 26(b)(3)(A). In determining whether a particular document was prepared in anticipation of litigation, the test is whether the document can fairly be said to have been prepared or obtained because of the prospect of litigation. *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1264 (3d Cir. 1993). That indisputably is the case here.

A. The Presentation Constitutes Core Work Product And Is Entitled To Absolute Protection.

An attorney's "mental impressions, conclusions, opinions, or legal theories" are "core" or opinion work product. Fed. R. Civ. P. 26(b)(3)(B). The Third Circuit has long held that core work product "receives an almost absolute protection from discovery, because any slight factual content that such items may have is outweighed by the adversary system's interest in maintaining the privacy of an attorney's thought processes and in ensuring that each side relies on its own wit in preparing their respective cases." *Haines v. Ligget Group*, 975 F.2d 81, 94 (3d Cir. 1992); *see also In re Cendant Corp. Securities Litigation*, 343 F.3d 658, 663 (3d Cir. 2003) (core work product "is discoverable only upon a showing of *rare and exceptional circumstances*"); *Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997) ("opinion work product . . . is *virtually undiscoverable*") (emphasis added).

The greatest protection -- indeed, absolute protection -- is afforded to REDACTED *In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979) (attorney's assessment of litigation "is the most sacrosanct of all forms of work product").

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: and constitutes core work product not subject to discovery. *Willingham v. Ashcroft*, 228 F.R.D. 1, 5 (D.D.C. 2005) (documents reflected attorneys' mental processes because they contained analysis of the merits of the case and were entitled to almost absolute protection); *FEC v. Christian Coalition*, 178 F.R.D. 456, 470 (E.D. Va. 1998) (memorandum regarding the strengths and weaknesses of a case reflected attorney's trial preparation strategy and was protected from discovery as opinion work product).

Intel has no persuasive response. Instead, it argues generally that portions of the presentation REDACTED are not work product at all or, if they are, they are non-core work product.[2] Intel misstates the law. REDACTED

[2] Intel's counsel admitted to reviewing the privileged presentation by expressly raising its contents during meet-and-confer discussions and repeatedly in its moving papers. (*See* Samuels Decl. ¶ 4, Exh. A; Declaration of Donn P. Pickett ¶ 13.) This is despite the fact that Intel knew REDACTED

REDACTED is core work product not subject to discovery, and Intel cites no case law -- none -- which would support compelling its disclosure. Indeed, the case principally relied upon by Intel REDACTED actually holds that this information is not only work product, but *core* work product.

Intel first argues that REDACTED are objective facts, not protected work product," citing *Simon v. G.D. Searle & Co.*, 816 F. 2d 397 (8th Cir. 1987). (*See* Intel Brief at 3.) *Simon* is nothing like this case. In *Simon*, the defendant was essentially self-insured and case reserve figures were relevant insurance information. *Simon*, 816 F. 2d at 399-404. Moreover, while the Eighth Circuit in *Simon* concluded that documents prepared by *non-attorney* corporate officials containing the company's *aggregate* case reserve information were not protected, it concluded that *individual* case reserves -- which were determined by legal department *attorneys* assessing litigation expenses -- were core work product and not discoverable.[3] *Id.* at 398-401. The Court explained:

> The individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney evaluating a legal claim. By their very nature they are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product.

Id. at 401.

REDACTED (as was the situation in *Simon*), it necessarily reveals the mental impressions, thoughts, and conclusions of attorneys and is, thus, protected core work product. *Id.* at 402, n.3 ("individual case reserve figures are nondiscoverable opinion work product").

After misreading *Simon*, Intel goes on to cite two cases for the proposition that attorney's fees, hourly rates, and other generic *billing* information are generally not protected from disclosure. (*See* Intel Brief at 4.) That is not what is at issue here. Also, Intel ignores that attorney billing information is protected from disclosure where it would "reveal litigation strategy and/or the nature

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REDACTED (*See* Intel Brief at 2.) This is a blatant violation of the Second Amended Stipulation Regarding Electronic Discovery and Format of Document Production (D.I. 288 in C.A. No. 05-441-JJF; D.I. 396 in C.A. No. 05-1717-JJF) entered by the Court, which provides: "If a Receiving Party reasonably believes that the Producing Party has allowed access to any documents, data or information that is potentially privileged, the Receiving Party shall notify the Producing Party and specifically identify the information. ***The Receiving Party shall cease any review of the potentially privileged material.***" (Emphasis added.) Intel counsel obviously received this document from contract attorney reviewers, circulated the document, reviewed it, sent two letters to Your Honor about it, and now recounts its privileged and work product-protected content in Intel's papers. This alone warrants denial of Intel's motion, at a minimum.

[3] The dissenting judge in *Simon* persuasively argued that aggregate reserve information should be protected from discovery as well, because it also reveals attorneys' mental impressions regarding the cost of litigation and its disclosure would give an adversary an unfair advantage in settlement negotiations. *Id.* at 405-09.

of services performed." *Hyman Co. Inc. v. Brozost*, 1997 WL 535180, at *3 (E.D. Pa. Aug. 8, 1997); *see also Ring v. Commercial Union Ins. Co.*, 159 F.R.D. 653, 659-60 (M.D.N.C. 1995).

It is also perfectly obvious that Intel is not simply requesting generic billing information but, instead, seeks production of

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This is protected core work product.

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It is well established that counsel's view of a case and facts relating thereto which counsel considers significant are core work product. *Coleman v. General Elec. Co.*, 1995 WL 358089, at *2 (E.D. Pa. June 8, 1995).

Disclosure of these facts thus would reveal counsel's mental impressions. The District Court for the Southern District of California's decision in *Newport Pac., Inc. v. County of San Diego*, 200 F.R.D. 628 (S.D. Cal. 2001), is illustrative. There, plaintiffs argued that an information packet presented to the San Diego County Board of Supervisors during a closed-door session was not protected to the extent that any of the documents contained therein were preexisting documents, documents obtained from third parties, or documents containing factual information. *Id.* at 633. In denying the plaintiffs' motion to compel and request for an *in camera* review, the Court held:

> Defendants maintain the closed session is where the Board makes policy and strategy choices on litigation and the packet information contains County Counsels' analysis of issues for presentation to the Board at closed session, which is the hallmark of the attorney-client privilege and work product doctrine. . . . To the extent that the information at issue here is County Counsel's analysis of issues for presentation to the Board at closed session where the Board makes policy and strategy choices on litigation, the information is attorney work product, and therefore protected from disclosure.

Id. at 634.

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Under circumstances such as these **REDACTED** Your Honor has already held in this case that the entire document should be treated as core work product and should not be produced even upon a showing of substantial need. *In re Intel Corp. Microprocessor Antitrust Litigation*, 2008 WL 2310288, at *16 (D. Del. June 4, 2008). Other courts in the Third Circuit have similarly held that "commingled fact and opinion work product" constitutes opinion or core work product that may not be discovered. *In re Linerboard Antitrust Litigation*, 237 F.R.D. 373, 386-90 (E.D. Pa. 2006). In sum, **REDACTED**

REDACTED to permit disclosure of any portion of this document.

B. Even If The Presentation Were Non-Core Work Product, Intel Has Not And Cannot Prove "Substantial Need."

Since AMD has shown that REDACTED, Intel bears the burden of establishing a "substantial need" for AMD's work product. *State Farm Mut. Auto. Ins. Co. v. Metro. Family Practice*, 2005 WL 3434000, at *3 (E.D. Pa. Dec. 12, 2005). The Supreme Court has held that discovery of non-core work product is proper only "where production of those facts is *essential* to the preparation of one's case." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (emphasis added). Other courts have held that "substantial need" for work product materials exists only where the information sought is "*essential*," "*crucial*," or "*carries great probative value*." *National Congress for Puerto Rican Rights v. City of New York*, 194 F.R.D. 105, 110 (S.D.N.Y. 2000).

Intel has made no such showing, nor can it. Utilizing the information it gained by illicit review of AMD's inadvertently-produced privileged document, Intel nonetheless asserts that it has a substantial need for

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Specifically, Intel argues "substantial need"

REDACTED (*See* Intel Brief at 4.) Intel has no such need, substantial or otherwise; indeed, these are already facts of record. As set forth in AMD's May 14, 2009 submission to Your Honor opposing Intel's motion to compel further Rule 30(b)(6) testimony (D.I. 1458 in C.A. No. 05-441-JJF; D.I. 1801 in C.A. No. 05-1717-JJF),

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REDACTED And even if it were considered non-core work product, further fall considerably short of being "essential" to the preparation of Intel's case. This material would be no more than helpful -- if even that -- to Intel's far-fetched theory. But merely being "helpful" is not enough to allow discovery of an adversary's work product. *Carey-Canada, Inc. v. California Union Ins. Co.*, 118

[4] These facts also do nothing to support Intel's theory. REDACTED

Micron Tech., Inc. v. Rambus, Inc., 255 F.R.D. 135, 139-50 (D. Del. 2009). Thus, the information Intel says it needs, but already has, does not advance its argument REDACTED

F.R.D. 242, 247 (D.D.C. 1986) (where work product is not essential, but merely helpful, discovery must be denied). Your Honor should so hold.

II. Attorney-Client Privilege

As demonstrated above, there is no question that the presentation constitutes core work product. Nor can there be any question REDACTED did not waive that protection, and Intel does not contend otherwise.[5] That alone is enough to preclude disclosure and, as such, the Court need go no further. That said, the presentation is most certainly also protected from disclosure by the attorney-client privilege.

An oft cited formulation of the attorney-client privilege is this:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative . . . ."

Rules of Evidence for United States Court and Magistrates, 56 F.R.D. 183, 236 (1972).

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[5] REDACTED did not constitute a waiver of work product protection as a matter of law. *See, e.g., In re Sunrise Sec. Litigation*, 130 F.R.D. 560, 583 (E.D. Pa. 1989) (notwithstanding potential waiver of the attorney-client privilege, no waiver of work product protection where there was a reasonable basis to believe that a non-adversary third party would keep the materials confidential). The Third Circuit has made it clear that disclosure to a third party waives work product protection *only if:* (1) the third party is an adversary; or (2) the disclosure enables an adversary to get access to the information. *Westinghouse Elec. Corp. v. The Republic of the Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991).

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REDACTED . (*See* Declaration of Hector de J. Ruiz ("Ruiz Decl.") ¶ 7; Brand Decl. ¶ 10.) The presentation clearly satisfies all of the elements of the attorney-client privilege. Thus, the only issue before Your Honor regarding privilege is REDACTED waived privilege.

A. REDACTED **Did Not Waive Privilege.**

While disclosure of privileged material to a third party can operate as waiver of the attorney-client privilege, there is a well-recognized exception where the third party is an "insider" of the client. *In re Bieter Co.*, 16 F.3d 929, 937-40 (8th Cir. 1994). In *In re Bieter*, the Eighth Circuit held that a third party consultant with whom privileged documents were shared was the "functional equivalent" of an employee and, therefore, that the disclosure to the consultant did not vitiate the privilege. *Id.* at 938-40. The Court reasoned that, when applying the attorney-client privilege, it was inappropriate to distinguish between full-time employees and consultants who, although performing important company functions, were not on the company's employee payroll. *Id.* at 437.

Where a consultant's role is functionally indistinct from that of an employee, other courts have followed *In re Bieter* to extend the attorney-client privilege to communications with insider consultants. *See, e.g., In re Adelphia Communications Corp.*, 2007 WL 601452, at *7-9 (S.D.N.Y. Feb. 20, 2007); *Every Penny Counts, Inc. v. American Express Co.*, 2008 WL 2074407, at *2-3 (M.D. Fla. May 15, 2008). There is no single determinative test for assessing "functional equivalence," and courts consider an array of factors in determining whether a consultant appropriately fits within the privilege. *In re Bristol-Myers Squibb Secs. Litig.*, 2003 U.S. Dist. LEXIS 26985, at *12 (D.N.J. June 25, 2003).

For instance, in concluding that communications which a company shared with its consultants maintained the privilege, the D.C. Circuit cited the fact that the consultants acted as an integral part of a team with employees and were assigned to deal with company strategy. *FTC v. GlaxoSmithKline*, 294 F.3d 141, 148 (D.C. Cir. 2002). Similarly, in extending the attorney-client privilege to a third party consultant, the District Court for the Southern District of New York noted that the consultant was incorporated into the corporation's staff to perform an important function and possessed authority to make decisions on behalf of the company. *In re Copper Market Antitrust Litig.*, 200 F.R.D. 213, 219-20 (S.D.N.Y. 2001). The inquiry is thus necessarily fact specific and turns on the circumstances of each case, but common themes throughout the case law are whether the consultant had responsibility for a key corporate activity, whether the consultant was authorized to speak and act on behalf of the company, and the frequency and extent of the consultant's contact with corporate employees.

The facts here demonstrate that whose presence did not vitiate the attorney-client privilege.

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Where, as here, a consultant acts as a *de facto* employee of a company and has a management role REDACTED , reason and case law mandate that the consultant be free to confer with corporate counsel without fear that confidential communications will be compromised and discovered. To waive the attorney-client privilege REDACTED , but preserve the privilege for communications with lesser employees, would elevate form over substance, and run counter to the principles set forth in *In re Bieter* and its progeny. AMD did not waive the attorney-client privilege.

For the foregoing reasons, AMD respectfully requests that Your Honor deny Intel's request for production of the privileged presentation.

Respectfully,

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cc: Clerk of the Court (By Electronic Filing)
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