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October 8, 2009

By Hand and Electronic Filing

The Honorable Vincent J. Poppiti
Fox Rothschild LLP
919 North Market Street, Suite 1300
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PUBLIC VERSION
October 22, 2009

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; Phil Paul v. Intel; C. A. No. 05-485 JJF (DM)**

Dear Judge Poppiti:

On October 6, 2009, less than two weeks before Intel Corporation and Intel Kabushiki Kaisha ("Intel") must serve expert reports and more than nine weeks after the deadline for Advanced Micro Devices, Inc. and AMD International Sales & Service, Ltd. ("AMD") to serve their expert reports, AMD produced to Intel an amended expert report of Daryl Ostrander that materially changed the report's opinions, including some of its ultimate conclusions about AMD's purported manufacturing capacity, to address certain acknowledged factual errors. As a result, AMD also amended the reports of two of its other experts, Professors Watson and Lys. Under the tight time frames provided in Case Management Order Nos. 11 and 12 for the parties to complete expert reports and discovery, AMD's correction of material errors in the Ostrander and related reports just before Intel's deadline to respond to the pre-existing versions of these reports, compounded by AMD's lack of candor in describing the nature of these corrections, deprives Intel of the opportunity to adequately respond to AMD's experts by its October 19, 2009 deadline. Because Intel has been unfairly prejudiced by AMD's service of these revised reports at this late hour, the schedule should be modified to allow Intel sufficient time to file adequate rebuttals, even if it means the additional time comes at AMD's expense.

Intel hereby moves the Court to: (1) continue to November 9, 2009, the date by which Intel must serve its expert report responding to the Ostrander report; (2) allow Intel to serve on the same date supplemental reports of any other Intel expert affected by AMD's amendments, limited to the portions affected by the amendments; and (3) maintain all other expert report-related deadlines entered by the Court, as amended by agreement of the parties. Because time is of the essence, as Intel's expert reports are due in 11 days, Intel requests the Court to hear this motion on October 13, 2009 (or October 12, if Your Honor is available on the federal holiday), and to order AMD to serve any opposition to this motion by October 9.

AMD has materially revised important aspects of the Ostrander report, including its ultimate conclusions about AMD's manufacturing capabilities, which, in turn, directly affect the claimed damages by other experts. AMD admits to certain of these changes in its cover letter accompanying the new materials. (Declaration of Michael M. Lee ("Lee Decl."), ¶ 2; Ex. 1 [10/6/09 AMD Letter].) Although AMD claims that the revisions are "minor," (*id.*, ¶ 2; Ex. 1 at 2), in fact they result in a wholesale revision of the report, which, according to AMD, is significant enough to necessitate amending the reports of Professors Watson and Lys. (*Id.*, ¶ 2; Ex. 1 at 2-3.) AMD has failed even to acknowledge, let alone excuse, these significant revisions.

Because Intel is still reviewing the amended Ostrander report, which AMD served on Tuesday night (October 6), the full scope of the amendments to the Ostrander report is not yet known. AMD has exacerbated the situation by failing to make full disclosure of the amendments to the report. While AMD's cover letter mentions some of the changes in very general terms, Intel already has documented that AMD has not specified several material revisions. (Declaration of Michael Quinn ("Quinn Decl."), ¶¶ 5-7.) For example, the Ostrander report centers on eight "but for" supply/demand scenarios that purport to project AMD's ability to satisfy additional demand for microprocessors. The amended report changes the projections for five of those eight scenarios. (Quinn Decl., ¶ 6.)

The chain of events that led to the amendment of the Ostrander report is highly relevant to the remedy that Intel seeks. Soon after AMD served its eight expert reports on August 3, Intel noticed that the supporting materials for the Ostrander report and certain other reports appeared deficient. On August 10, Intel notified AMD of these deficiencies. With respect to the Ostrander report, Intel noted that the bulk of the cells within the supporting spreadsheets contained no sources, underlying formulas, or calculations, thus preventing Intel from determining the source of these figures or the manner in which they were calculated. (Lee Decl., ¶ 3; Ex. 2 at 1 [8/10/09 Intel Letter].) In response, on August 13, AMD stated, "there are no further spreadsheets supporting the ones already provided to you. If Intel has questions about the information in those spreadsheets, it can certainly explore them at Dr. Ostrander's expert deposition." (*Id.*, ¶ 4; Ex. 3 at 2 [8/13/09 AMD Letter].) When the parties attempted to schedule a call to discuss these issues, AMD again stated, "that Intel already has all the backup materials it needs and to which it is entitled." (*Id.*, ¶ 5; Ex. 4 [8/15/09 AMD E-mail].) On August 18, AMD orally represented that there were no further materials supporting the spreadsheets than those already provided for Dr. Ostrander's report. (*Id.*, ¶ 6.)

Later that day, Intel raised additional questions related to the Ostrander report. In particular, Intel requested further information related to references in the report's exhibits to data "provided by Global Foundries," and asked that AMD produce any data, programs, methodologies, or materials used in constructing or presenting the GlobalFoundries data. (*Id.*, ¶ 7; Ex. 5 at 3 [8/18/09 Intel Letter].) On August 21, despite AMD's prior representation that no further backup materials existed, AMD stated that it was "in the process of confirming all of the relevant information to respond to [Intel's] inquiry about the data from Global Foundries," and that it would "get back to [Intel] as soon as [AMD could] on this point." (*Id.*, ¶ 8; Ex. 6 at 3 [8/21/09 AMD Letter].) AMD also revealed that that it had "inadvertently omitted" from Dr. Ostrander's disclosure a spreadsheet page prepared by Dr. Ostrander and belatedly produced it

almost three weeks after the original deadline for expert disclosures. (*Id.*) This was the first admission by AMD that it had failed to comply with its disclosure obligations. Unfortunately, for two weeks thereafter, AMD simply failed to acknowledge Intel's request for all data that AMD was required to disclose when it served the report.

On September 4, having still not received answers from AMD about its outstanding questions, Intel sought written confirmation from AMD that "no further data, documents, files, or spreadsheets containing formulas, methodologies, or calculations for Dr. Ostrander's expert report exist, aside from the spreadsheets already provided." (*Id.*, ¶ 9; Ex. 7 at 1 [9/4/09 Intel Letter].) After receiving no definitive response from AMD, Intel had no choice but to file a motion to compel the production of all back-up material for Dr. Ostrander's report.

Only after Intel filed its motion did AMD finally respond. On September 15, five weeks after Intel first raised these issues, and after AMD's repeated remonstrations that it had nothing more to give, AMD sent Intel 17 additional spreadsheets in support of the Ostrander report, which included revisions to the Ostrander report. (*Id.*, ¶ 10; Ex. 8 at 1-3 [9/15/09 AMD Letter].) Significantly, AMD represented:

We can now confirm, as you requested, that we have produced all data and documents considered by Dr. Ostrander in forming the opinions set forth in his report discoverable under the May 10, 2007 Amended Stipulation and Protective Order re Expert Discovery.

(*Id.*, ¶ 10; Ex. 8 at 1 [9/15/09 AMD Letter].) Operating under AMD's latest representation, Intel withdrew its motion to compel AMD to produce all the back-up materials related the report.

As a result of this belated revision – six weeks after the original deadline for AMD's expert disclosures, Intel scrambled to understand the differences in and import of these new materials. Despite AMD's representation that it had described all the changes to the Ostrander report (*see id.*, ¶¶ 10-11; Ex. 8 [9/15/09 AMD Letter], Ex. 9 [9/18/09 AMD Letter]), Intel sought to confirm that it understood all of the changes made to the revised spreadsheets. During a September 29 call to discuss AMD's latest revisions, and only after Intel raised the issue, AMD acknowledged there were additional changes to Dr. Ostrander's opinions that AMD had failed to disclose to Intel. AMD was unable to explain the nature of these previously undisclosed revisions, but promised to respond soon thereafter. (*Id.*, ¶ 12.) On September 30, Intel raised an additional question related to the new Ostrander materials and followed up again the following week. (*Id.*, ¶¶ 13-14; Ex. 10 at 1-2 [9/30/09 Intel Letter]; Ex. 11 [10/5/09 Intel E-Mail].) Instead of answering Intel's questions (which remain unanswered), on October 6, *nine weeks* after the original expert disclosures deadline, AMD sent Intel a substantially revised Ostrander report. (*Id.*, ¶ 2; Ex. 1 at 1-3 [10/6/09 AMD Letter].)

Intel's expert and support teams have spent the last two months drafting a detailed report responding to the Ostrander report. Now that AMD has amended the report less than two weeks before Intel's report must be served, the expert and support teams are unable to identify all of the amendments, analyze them, respond to them, and revise the existing rebuttal report, which is at a very late stage of drafting, by the current October 19 deadline. Moreover, because of the

repeated references in the rebuttal report to the opinions and conclusions of the Ostrander report as originally served, the expert and support teams must devote considerable time and resources to auditing every discussion of or reference to the Ostrander report to determine whether it must be revised in light of the amended report's new conclusions. This is expected to be a time consuming process, which will require three additional weeks to complete. The accompanying Declaration of Michael Quinn details some of the material changes Intel has discovered so far in its review of the amendments in the Ostrander report, which is not yet complete, and the hardship suffered by Intel as a result of just having received these critical revisions. (*See* Quinn Decl., ¶¶ 5-10.)

AMD's eleventh hour amendment of the report is particularly disturbing in light of the history recounted above. Having repeatedly represented to Intel that it had produced all of the relevant backup data for the Ostrander report, AMD not only produced new data that should have been disclosed with the report but amended the report itself. Intel sets forth this history here to show how difficult it has become for Intel to identify the opinions being proffered in the Ostrander report.

Request for Relief

For the reasons set forth above, Intel respectfully requests the Court to extend to November 9, 2009, the time for Intel to submit the expert report directly affected by the amendment to the Ostrander report. Further, while Intel intends to submit on their current due dates the reports of its other experts whose reports are affected by the last-minute amendments to the Ostrander, Watson, and Lys reports, Intel respectfully requests the Court to allow Intel to serve on November 9 supplemental reports addressing the analysis that is affected by these amendments.

Finally, the Court recently entered CMO No. 12, which sets forth the schedule for expert depositions, summary judgment briefing, and other pre-trial activities. The dates specified in CMO No. 12 do not allow room to continue the AMD's November 25, 2009 rebuttal report deadline without significantly prejudicing Intel's summary judgment briefing and otherwise upsetting the other pre-trial dates. Because Intel is blameless for creating the current dilemma, while AMD has waited more than nine weeks to amend these three critical reports, there is no reasonable basis for prejudicing Intel by forcing it to move for summary judgment before receiving AMD's rebuttal expert reports. The only way to maintain the current trial schedule without prejudicing Intel is to maintain the current due date for AMD's rebuttal reports. To the extent that AMD will have less time to respond to some of Intel's expert reports, it is because AMD alone must bear the responsibility for its untimely amendments to its expert reports.

For the foregoing reasons, Intel respectfully requests the Court to order that the due date for AMD's rebuttal reports, including any affected by Dr. Ostrander's report, remain at November 23, 2009.

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The Honorable Vincent J. Poppiti
October 8, 2009

Respectfully yours,

/s/ W. Harding Drane, Jr.

W. Harding Drane, Jr.

WHD:cet

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

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