AN OPEN MEMORANDUM

TO:**Andrew Grove, CEO, Intel Corp.**
FROM:Victor John Yannacone, jr.
DATE: 10 September 1991
re:***Advance Micro Devices Inc.*** v. ***Intel Corp.***

The suit that has just been filed by Advanced Micro Devices, Inc. (AMD) challenging the market dominance of Intel and alleging a laundry list of nefarious trade practices represents a crisis for American industry. Just as the Chinese ideograph for crisis is composed from the characters for danger and opportunity, so this lawsuit represents both a danger and an opportunity.

The danger is obvious. If this lawsuit is managed as all of the other lawsuits involving American high technology has been managed in the past by their respective time billing law firms and outside litigation counsel, two significant players on the leading edge of technology will see their economic and human resources devoured. The case will be interminable since the only incentive driving the lawyers on both sides is the need to pursue the litigation until the last hour that can be billed has been billed and then consume the remaining assets of the clients as fees in the ensuing bankruptcy proceedings.

An even more terrible consequence of this litigation will be the endless unsupervised discovery that will be little more than industrial espionage. The real beneficiaries will be your predatory competitors from overseas who simply have to follow the proceedings in order to stay ahead of their American competitors.

The lawsuit also presents an opportunity for Intel to lead the way and establish once and for all time that the principle product of the American Free Enterprise System is not litigation and the principle beneficiaries of the American judicial system are not the hourly billing profit sharing equity partners in large law firms.

The window of opportunity exists, however, only at the outset of a large lawsuit. During the first few weeks, decisions will be made which will irrevocably direct the course of the American electronics industry.

The first choice that Intel or any other defendant must make is who shall try the case. That choice determines how the litigation shall be managed. The next decision is what the fee shall be for defending the Company. Will it be a blank check for an indeterminate number of hours or a fixed fee for a single well-defined service— defending the company.

The consequences of defending litigation in an economically rational way are profound. Counsel chosen to defend the Company will have to commit their full and exclusive time to the Company for the duration of the litigation. That is what they are going to be paid for. It is up to them, in their enlightened self interest, to staff the litigation properly so that their skill and talents are most effectively and efficiently deployed.

If counsel is successful they will be able to terminate the litigation in less time than originally estimated and thereby increase their return on their legal time invested. Now both the company and their attorneys have the same goal— dispose of the litigation as quickly and with as much success as possible so that Intel can get on with advancing the state-of-the-art in semiconductor design and fabrication and counsel can get on with other litigation.

Rest assured that if this procedure becomes accepted practice in major litigation, the attorneys on both sides will chose the most expeditious way of resolving the controversy so that they can maximize their earnings by proceeding to other matters.

Another myth that must be exploded early on in the *Intel/AMD* litigation is that large companies hire law **firms** not lawyers for litigation. It is not the law firm that stands up in the courtroom and it is not the law firm that will face angry stockholders and creditors as the company fortunes suffer from the attrition of major litigation. It is the CEO at the Annual Meeting and a lone barrister in the Courtroom.

That trial attorney must know from the outset that he or she will be completely accountable to the company, its stockholders, its creditors, and the public at large for the management and disposition of the litigation. If counsel is successful then they can expect that for their next effort, they can command a higher fee. If counsel is unsuccessful, there may never be another opportunity or, if they are given another chance, their fee will certainly be less.

If counsel is unwilling to commit his or her total concern to the interests of the Company for the duration of the litigation, Company management should find other counsel. The interests of attorney and client must be singular and undivided during the course of major litigation. The attorney must be truly the advocate of the company and its interests during the course of the litigation.

Attorneys often flatter themselves by assuming that during litigation they are the “captain of the ship.” They are not. The captain of the ship is the CEO who is

ultimately responsible for the fate of the company. Attorneys are the "pilot" leading the ship and its captain to a safe mooring.

Even a cursory reading of *The American Lawyer* and the *National Law Journal* reveals that large time billing law firms do not exist to conduct successful litigation. They exist to generate profits per partner. Profits per partner result from proliferating billable hours by non-partners for which unwary, unsuspecting, or naive and trusting clients can be expected to pay. While we cannot assume that the large firms exist to "rip-off" their clients or kill the goose that may be laying the golden egg, there is still ample evidence that large full service time-billing law firms are not economically efficient.

Unfortunately, major American companies continue to bleat over the high cost of litigation while perpetuating the system that can only lead to ultimate elimination of American business corporations from the world market.

Strategy And Tactics

Only the company and its management can decide what constitutes "success" in major litigation. What results are acceptable to Company management and stockholders? What is the ultimate goal of the litigation? At what point does continuing the litigation cease to be cost effective? These are determinations that must be made by Company management at the outset of the litigation.

The answers to these questions establish the *strategy* for the litigation.

Tactics, on the other hand, are the responsibility of counsel. Counsel has a duty to outline the tactical considerations underlying the plan for conducting the litigation to achieve the goals and objectives of the company, but ultimate responsibility for the success or failure of the tactical aspects of the litigation rests upon counsel. Since counsel is working under a fixed fee contract, there is no incentive to proliferate tasks and prolong Discovery.

Summary Judgment

Any Company sued by a competitor must insist that their corporate position and protestations of innocence become the basis of an affirmative motion for summary judgment or partial summary judgment as soon as issue is joined by an answer to the complaint. This should occur within 30 days or less of the day the complaint was filed.

Under the *Federal Rules of Civil Procedure*, a properly crafted motion for summary judgment supported by substantial credible documentary and testimonial

evidence stating facts and expert opinion calls for an affirmative response supported by substantial credible evidence not merely the conclusory statements of lawyers. If such a response is not forthcoming, then the very merits of the claims made against the company can be questioned by the court and in some cases dismissed out of hand. This would terminate the litigation in weeks rather than years and produce a windfall profit for the successful attorney and an extraordinarily successful result for the company which can then get on with its business— advancing the state-of-the-art. Even if the motion is denied and the case continues, the issues will have been significantly narrowed, the scope of discovery limited, a firm trial date established, and the delay usually associated with major litigation among corporations when represented by large time billing law firms eliminated.

Discovery

One of the first tasks of management under the direction of house counsel is to assemble any and all documents that may be truly considered relevant to the litigation. Those documents must be reviewed by company management to determine whether they contain confidential or proprietary information. Counsel must then establish with trial counsel the means whereby such information will remain company confidential and not become subject to scrutiny by competitors or the general public. Any attempt to discover proprietary information should be treated as what it really is— industrial espionage. Such improper discovery efforts must be thwarted.

After relevant documents have been assembled, Company management must determine which of its executives and employees have actual knowledge of the facts relevant to the issues of the litigation and insist that only those individuals be deposed. Of necessity these individuals will become the Company management liaison team with Counsel responsible for managing the litigation.

Trial counsel must be prepared to address the question of materiality at every stage of the discovery process. It is the information sought to be discovered not just relevant, but material towards the resolution of the issues or is it merely serving as a means to proliferate hourly billing and increase staffing.

Document Production and Management

Any business management team worthy of the trust of its stockholders would be foolish to allow strangers access to their most intimate corporate records and data. It should be inconceivable that such folly would be tolerated in the Board Rooms

of any public corporation, especially a high technology company. There is a well known maxim in the world of competitive bridge that “one look is worth a thousand finesses.” While we can assume that attorneys, like competitive bridge players, never cheat, nevertheless, prudence dictates that in litigation involving high technology, corporate counsel must take charge of and at all times be personally responsible for the corporation’s documents.

Corporate counsel and senior management must personally review all company documents for trade secrets and competitive materials before they release any of them, even to trial counsel for the corporation. The basic principles of modern espionage and intelligence gathering are most appropriate to high technology litigation. “Need to know” should be the rule with respect to examination of sensitive materials. What has not been seen cannot be disclosed— inadvertently or otherwise.

The economic benefits which can be realized by corporate litigants which manage their own documents are significant. The thousands of hours that are customarily billed to the Company when document management services are performed by outside counsel become direct costs of litigation easily monitored by company management when the work is done by salaried employees of the corporation. Not only is security maintained but costs are controlled, since it is Company employees that are doing the work.

It is no wonder that American business is being ridiculed by Japanese managers when such elementary economic considerations seem to have eluded the consideration and concern of our high technology corporation managers who are so ready to believe the self-serving myths perpetuated by their outside counsel.