

1 Lester O. Brown (SBN 160828)  
brownl@howrey.com  
2 Fiona A. Chaney (SBN 227725)  
chaneyf@howrey.com  
3 HOWREY LLP  
4 550 South Hope Street, Suite 1100  
Los Angeles, California 90071  
5 Telephone: (213) 892-1800  
Facsimile: (213) 892-2300

6 Attorneys for Plaintiff Intel Corporation

E-filing

Filed

JAN 23 2009

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE

Paid

SI

1

CRJ

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

ADR

10 SAN JOSE DIVISION

11 Intel Corporation, a Delaware corporation,

Case No. **C09 00299 PVT**

12 Plaintiff,

**COMPLAINT FOR DECLARATORY  
RELIEF AND BREACH OF  
CONTRACT**

13 vs.

**DEMAND FOR JURY TRIAL**

14 American Guarantee and Liability  
15 Insurance Company, a New York  
16 corporation,

17 Defendant.

1 Plaintiff Intel Corporation (“Intel”) complains of Defendant American Guarantee  
2 and Liability Insurance Company (“AGLI”) and Does 1 through 10 (collectively  
3 “Defendants”), and each of them, and alleges:

4 **JURISDICTION AND VENUE**

5 1. Intel is a Delaware corporation with its principal place of business in Santa  
6 Clara, California. Intel is licensed to transact business, and is transacting business in the  
7 State of California. AGLI is a New York corporation with its principal place of  
8 business in Schaumburg, Illinois. This Court has jurisdiction over all claims for relief  
9 pursuant to 28 U.S.C. § 1332(a) in that it is a civil action between citizens of different  
10 states in which the matter in controversy exceeds, exclusive of costs and interest,  
11 seventy-five thousand dollars (\$75,000.00).

12 2. In addition, this Court has jurisdiction, pursuant to 28 U.S.C. § 2201, over  
13 the first and third claims for relief in which Intel seeks a declaration of the parties’  
14 rights and obligations under a contract of insurance.

15 3. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a)(1),  
16 28 U.S.C. § 1391 (a)(2), and 28 U.S.C. § 1391(c) because the Defendant is a  
17 corporation subject to personal jurisdiction in this district and a substantial part of the  
18 events or omissions giving rise to the claim originated in this judicial district. The  
19 subject insurance policy and the XL policy to which it follows form was negotiated and  
20 obtained through a San Francisco based insurance broker, Marsh; Intel participated in  
21 policy negotiations from its Santa Clara, California headquarters; Intel paid the  
22 premiums for the policy from its Santa Clara, California headquarters; Intel pursued its  
23 claim against AGLI from its Santa Clara, California headquarters; and Intel paid defense  
24 costs for the underlying litigation from its Santa Clara, California headquarters.).

## INTRODUCTION AND NATURE OF DISPUTE

1  
2 4. Starting in June 2005, Intel has been a defendant in lawsuits brought by  
3 Advanced Micro Devices (“AMD”), a competitor of Intel, and consumers alleging, *inter*  
4 *alia*, that Intel has engaged in unfair business practices and anticompetitive conduct in  
5 its sale, promotion and marketing of its microprocessors. Similarly, a group of  
6 consumers filed lawsuits against Intel alleging that Intel’s actions have hurt consumers.  
7 *Paul v. Intel*. These consumer actions have been consolidated as Multi District  
8 Litigation with the *AMD v. Intel* lawsuit and are known as *In Re Intel Corporation*  
9 *Microprocessor Antitrust Litigation*, MDL No. 1717-JJF. Additionally, there is another  
10 set of lawsuits which allege claims similar to the *Paul v. Intel* lawsuit which are pending  
11 in the Superior Court of California for the County of Santa Clara and have been  
12 consolidated and entitled the *Intel X86 Microprocessor Cases* (JCCP 4443) (the  
13 “California AMD Action” and collectively, all three actions as “the AMD Litigation”).  
14 The claims alleged in the AMD Litigation are at least potentially covered by the  
15 “Advertising Liability” coverage grant of the Following Form Excess Liability Policy  
16 issued by AGLI.

17 5. Intel tendered the AMD Litigation to AGLI via California based insurance  
18 broker, Marsh, in accordance with the relevant policy requirements for coverage. In  
19 response, AGLI has failed and refused to provide a defense for Intel, ignored the clear  
20 potential for coverage of the AMD Litigation and repudiated its policy obligations by  
21 denying coverage.

22 6. Without AGLI’s assistance, Intel has been defending itself in the AMD  
23 Litigation despite the fact that it purchased coverage from AGLI to cover such costs.

24 7. Intel brings this complaint for declaratory relief and breach of contract  
25 requesting the Court to declare and enforce Intel’s rights to defense and indemnity  
26

1 coverage for the AMD Litigation under the "Advertising Liability" provisions of the  
2 Following Form Excess Liability Policy issued by AGLI.

3 **THE PARTIES**

4 8. Intel is and was at all relevant times, a Delaware corporation, with its  
5 principal place of business in Santa Clara, California. Intel is licensed to transact  
6 business, and is transacting business in the State of California.

7 9. Intel is informed and believes and on that basis alleges that AGLI is, and at  
8 all times material hereto was, an insurance company incorporated in the state of New  
9 York, with its principal place of business in the State of Illinois.

10 **THE INSURANCE POLICIES**

11 10. Intel, through California based insurance broker, Marsh, purchased several  
12 layers of comprehensive liability insurance from a variety of insurance companies  
13 during the April 1, 2001 through April 1, 2002 time period. Those occurrence based  
14 comprehensive liability policies sit above a \$11 million retention and a fronting policy  
15 issued by Old Republic Insurance Company ("ORIC") with limits of \$5 million in the  
16 aggregate including defense costs. Intel already has exhausted the retention and ORIC  
17 fronting policy as well as the second layer policy which sits directly below the AGLI  
18 Policy.

19 11. Sitting immediately above this \$11 million retention and \$5 million  
20 fronting policy, and directly below the AGLI Policy, is Commercial Umbrella Policy  
21 No. HFL 004-27-84-01 (the "XL 01-02 Policy") issued by XL Insurance America, Inc.  
22 ("XL") to Intel in California, which provides \$50 million in coverage for defense and/or  
23 indemnity in excess of the retention/fronting policy for each occurrence resulting in  
24 Ultimate Net Loss to Intel, as defined in the XL 01-02 Policy, during the policy period  
25 of April 1, 2001 to April 1, 2002. The XL 01-02 Policy includes defense costs within  
26 limits.

1 12. The XL 01-02 Policy required XL to:  
2 [D]efend any suit against the Insured alleging such injury or  
3 destruction and seeking damages on account thereof, even if  
4 such suit is groundless, false or fraudulent, and to pay all  
5 allocated claims expenses . . . .

6 XL 01-02 Policy, at II.

7 13. The XL 01-02 Policy covers liability on account of “Advertising Liability”  
8 which is defined to include:

9 Injury arising out of offenses *such as, but not limited to*, libel,  
10 slander, defamation, infringement of copyright, title (including  
11 trademark) or slogan, piracy, unfair competition, idea  
12 misappropriation (including trade secrets), breach of  
13 confidential information, electronic mail intercepts,  
14 misappropriation of the style of doing business (including  
15 website/homepage design), or invasion of rights of privacy  
16 *committed, or alleged to have been committed, in any*  
17 *software, advertisement, promotion, publicity article,*  
18 *broadcast or telecast.*

19 XL 01-02 Policy, at III (E) (emphasis added).

20 14. The XL 01-02 Policy defines an “occurrence,” with respect to “Advertising  
21 Liability,” as follows:

22 an offense, which results in **advertising liability** arising out of  
23 the **Named Insured’s** advertising activities. All damages  
24 involving the same injurious material or act, regardless of the  
25 frequency or repetition therefore, the number or kind of media  
26

1 used, and the number of claimants, and all such damages shall  
2 be considered as arising out of one **occurrence**.

3 XL 01-02 Policy, at III (J)(3) (emphasis in original).

4 15. Intel has exhausted the XL 01-02 Policy through payments for defense by  
5 XL to Intel in California and Intel's own expenditures for the defense of the AMD  
6 Litigation.

7 16. Intel has exhausted the ORIC fronting policy and its retention through the  
8 payment of defense costs.

9 17. AGLI issued a Following Form Excess Liability Policy No. AEC 5228803  
10 00 (the "AGLI Policy") to Intel at its corporate headquarters in Santa Clara, California,  
11 which provides \$50 million in total defense and/or indemnity coverage in excess of \$66  
12 million. The AGLI Policy "follows form," *i.e.*, contains the same terms and conditions  
13 as the XL 01-02 Policy including, explicitly, the Advertising Liability coverage grant in  
14 the XL 01-02 Policy. True and correct copies of the XL 01-02 Policy and AGLI Policy  
15 are attached hereto as Exhibits A and B respectively, and are incorporated herein by  
16 reference.

### 17 THE AMD LITIGATION

18 18. On June 26, 2005, *AMD v. Intel*, Case No. 05-441, was filed in the U.S.  
19 District Court for Delaware. The plaintiff, AMD, asserts three claims against Intel: (1)  
20 Willful Maintenance of a Monopoly in Violation of Sherman Act, Section 2; (2) Secret  
21 Discriminatory Rebates and Discounts in Violation of California Bus. & Prof. Code §  
22 17045; and (3) Interference With Prospective Economic Advantage in Violation of  
23 California Bus. & Prof. Code § 17045. AMD seeks damages and treble damages for its  
24 alleged lost profits, injunctive relief prohibiting Intel from engaging in "further conduct  
25 unlawful under Section 2 of the Sherman Act or Section 17045 of the California Bus. &  
26 Prof. Code," as well as attorneys fees and costs for the action. A true and correct copy

1 of the complaint filed in the *AMD v. Intel* lawsuit is attached hereto as Exhibit C and  
2 incorporated herein by reference.

3 19. On July 12, 2005, the lawsuit entitled *Paul v. Intel*, Case No. 05-485, was  
4 filed in the same court. The plaintiffs in that action assert seven claims against Intel and  
5 seek damages alleging: (1) Violation of Section 2 of the Sherman Act; (2) Violation of  
6 the California Cartwright Act, California Bus. & Prof. Code § 16720; (3) Violation of  
7 California's Tort Law Against Monopolization; (4) Violation of the California Unfair  
8 Competition Law, California Bus. & Prof. Code § 17200 et seq.; (5) Violation of State  
9 Antitrust and Restraint of Trade Laws; (6) Violation of State Consumer Protection and  
10 Unfair Competition Laws; (7) Unjust Enrichment and Disgorgement of Profits. This  
11 lawsuit, including other actions with very similar allegations, has been consolidated as  
12 *In Re Intel Corporation Microprocessor Antitrust Litigation*, MDL No. 1717-JJF ("the  
13 Consolidated AMD Actions"). A true and correct copy of the complaint filed in the  
14 *Paul v. Intel* lawsuit is attached hereto as Exhibit D and incorporated herein by  
15 reference.

16 20. Additionally, another set of lawsuits which allege claims similar to the  
17 *Paul v. Intel* lawsuit pending in the Superior Court of California for the County of Santa  
18 Clara and have been consolidated and entitled the *Intel X86 Microprocessor Cases*  
19 (JCCP 4443) (the "California AMD Action"). As referenced above, the Consolidated  
20 AMD Actions and the California AMD Action will be referred to collectively as "the  
21 AMD Litigation."

22 21. The complaints in the AMD Litigation, allege, among other things, that  
23 during the AGLI Policy period of 2001 to 2002, Intel engaged in unfair business  
24 practices and anticompetitive conduct in its sale, promotion and marketing of its  
25 microprocessors. Accordingly, these allegations trigger the potential for coverage under  
26 the "Advertising Liability" provision of the AGLI Policy. For example, the Master  
27

1 Class Action Complaint in the *In Re Intel Corporation Microprocessor Antitrust*  
2 *Litigation* case alleges that Intel's market development funds ("MDF"), promotional and  
3 advertising campaigns constituted unfair competition. This Complaint contains the  
4 following alleged description of the MDF program:

5 The major retailers demand market development funds (MDF)  
6 in exchange for shelf space. MDF can consist of *cooperative*  
7 *advertising support*, but more frequently it comprises a  
8 marketing related opportunity that a chipmaker must buy for  
9 tens of thousands of dollars; for example, *for space in a*  
10 *Sunday circular, an in-store display* or an Internet training  
11 opportunity with the chain's sales staff. The MDF required to  
12 *secure shelf space* can run as high as \$25 per box depending  
13 on the computer price point and how urgently the competing  
14 chip makers want the shelf space.

15 *In Re Intel Corporation Microprocessor Antitrust Litigation*, Master Complaint, ¶ 99  
16 (emphasis added). A true and correct copy of the *In Re Intel Corporation*  
17 *Microprocessor Antitrust Litigation*, Master Complaint is attached hereto as Exhibit E  
18 and is incorporated by reference.

19 22. As a further example of the advertising allegations, many of the complaints  
20 in the AMD Litigation allege:

21 Through its economic muscle and relentless marketing –  
22 principally its "Intel Inside" and "Centrino®" programs,  
23 which financially reward OEMs for branding their PCs as Intel  
24 machines – Intel has transformed the OEM world.

1 *See, e.g., Naigow v. Intel*, United States District Court, San Francisco Division, Case  
2 No. C-05-2898, Complaint, ¶ 37. A true and correct copy of the *Naigow v. Intel*  
3 complaint is attached hereto as Exhibit F and is incorporated herein by reference.

#### 4 **AGLI REPUDIATED ITS POLICY OBLIGATIONS**

5 23. Intel advised AGLI of the AMD Litigation. Moreover, once the retention  
6 and fronting policy as well as the XL 01-02 Policy was exhausted through the payment  
7 of defense costs for the AMD Litigation, Intel advised AGLI that it was obligated to  
8 provide an immediate defense and to promptly pay all reasonable defense costs and  
9 expenses incurred by Intel.

10 24. Despite the clear potential of covered liability presented by the AMD  
11 Litigation, AGLI summarily denied coverage leaving Intel to defend itself in the AMD  
12 Litigation without the benefits owed under the AGLI Policy.

#### 13 **FIRST CAUSE OF ACTION**

##### 14 **[Declaratory Relief With Regard to AGLI's Duty to Defend]**

15 25. Intel re-alleges and incorporates by reference paragraphs 1 through 24  
16 above as though set forth fully herein and alleges against AGLI as follows.

17 26. The insuring provisions of the of the AGLI Policy obligate AGLI to pay  
18 the defense costs and expenses incurred by Intel, in excess of its retention, fronting  
19 policy and the XL 01-02 Policy, in defending against the AMD Litigation. No  
20 exclusions or any other terms or conditions in the AGLI Policy bar or preclude AGLI's  
21 duty to pay Intel's defense costs and expenses incurred defending against the AMD  
22 Litigation.

23 27. Intel has at all times relevant to the AGLI Policy performed all of the  
24 obligations required of it under the AGLI Policy, except as excused. All conditions  
25 precedent to performance by AGLI pursuant to the terms of the AGLI Policy, including  
26

1 exhaustion of underlying limits and amounts, have been met, are excused or otherwise  
2 have been prevented by AGLI from occurring.

3 28. Intel is entitled to have the AGLI Policy interpreted in a reasonable manner  
4 that maximizes its insurance coverage.

5 29. Intel is informed and believes and thereon alleges that AGLI disputes the  
6 contentions as set forth above. Therefore, an actual and justiciable controversy exists  
7 between AGLI and Intel concerning the matters alleged.

8 30. Intel therefore seeks a judicial declaration that it has a right to  
9 reimbursement and payment of defense costs under the AGLI Policy for the AMD  
10 Litigation, confirming Intel's contentions as stated above. A declaration is necessary at  
11 this time in order that the parties' dispute may be resolved and that the parties may be  
12 aware of their respective rights and duties.

13 **SECOND CAUSE OF ACTION**

14 **[Breach of Contract – Duty to Defend the AMD Litigation]**

15 31. Intel re-alleges and incorporates by reference paragraphs 1 through 30  
16 above as though fully set forth herein and alleges against AGLI as follows.

17 32. AGLI has breached its duties under the AGLI Policy by repudiating and  
18 otherwise denying its obligation to provide defense coverage for the AMD Litigation.

19 33. As a direct and proximate result of AGLI's material breach of contract,  
20 Intel has been deprived of the benefits of the AGLI Policy and has suffered general and  
21 consequential damages including, but not limited to, the following:

- 22 (a) Intel has incurred and continues to incur attorneys' fees, expenses and  
23 costs in defending itself against the AMD Litigation;  
24 (b) Intel has incurred and continues to incur attorneys' fees, expenses and  
25 costs in seeking the benefits of its insurance contracts.  
26

1 34. The full scope of the damages cannot be determined at this time, but is  
2 clearly in excess of the \$75,000 jurisdictional threshold of this court.

3 **THIRD CAUSE OF ACTION**

4 **[Declaratory Relief With Regard To AGLI's Duty to Indemnify]**

5 35. Intel re-alleges and incorporates by reference paragraphs 1 through 34  
6 above as though fully set forth herein and alleges against AGLI as follows.

7 36. The insuring provisions of the of the AGLI Policy obligate AGLI to  
8 indemnify Intel with respect to the loss incurred by Intel, in excess of its retention,  
9 fronting policy and the XL 01-02 Policy, with respect to the AMD Litigation. No  
10 exclusions or any other terms or conditions in the AGLI Policy bar or preclude AGLI's  
11 duty to indemnify Intel for the AMD Litigation.

12 37. Intel has at all times relevant to the AGLI Policy performed all of the  
13 obligations required of it under the AGLI Policy, except as excused. All conditions  
14 precedent to performance by AGLI pursuant to the terms of the AGLI Policy, including  
15 exhaustion of underlying limits and amounts, have been met, are excused or otherwise  
16 have been prevented by AGLI from occurring.

17 38. Intel is entitled to have the AGLI Policy interpreted in a reasonable manner  
18 that maximizes its insurance coverage.

19 39. Intel is informed and believes and thereon alleges that AGLI disputes the  
20 contentions as set forth above. Therefore, an actual and justiciable controversy exists  
21 between AGLI and Intel concerning the matters alleged.

22 40. Intel therefore seeks a judicial declaration that it has a right to indemnity  
23 under the AGLI Policy for the AMD Litigation, confirming Intel's contentions as stated  
24 above. A declaration is necessary at this time in order that the parties' dispute may be  
25 resolved and that the parties may be aware of their respective rights and duties.

**PRAYER**

WHEREFORE, Intel prays for judgment as follows:

On The First Cause of Action:

1. For a declaration that Intel's contentions as set forth above are correct, including without limitation that AGLI has a duty to defend Intel in the AMD Litigation;

On The Second Cause of Action:

2. For damages according to proof at the time of trial, but no less than \$50 million, plus interest;

On The Third Cause of Action:

3. For a declaration that Intel's contentions as set forth above are correct including without limitation that AGLI has a duty to indemnify Intel in the AMD Litigation;

On All Causes of Action:

4. For its costs of suit incurred herein;

5. For reasonable attorneys fees incurred in its efforts to obtain the benefits due under the AGLI Policy; and

6. For such other and further relief as may be deemed just and proper.

Dated: January 23, 2009

HOWREY LLP

By: \_\_\_\_\_  
Lester O. Brown  
Attorneys for Plaintiff  
Intel Corporation

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**DEMAND FOR JURY TRIAL**

Intel hereby demands a jury trial in this action.

Dated: January 23, 2009

HOWREY LLP

by JH

By: Lester O. Brown  
Lester O. Brown  
Attorneys for Plaintiff  
Intel Corporation