

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

VLSI TECHNOLOGY LLC, )  
)  
Plaintiff, ) No. 18-966-CFC-CJB  
v. )  
)  
INTEL CORPORATION, )  
)  
Defendant. )  
\_\_\_\_\_ )

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**DECLARATION OF PROFESSOR LAWRENCE A. HAMERMESH**

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**I. INTRODUCTION**

1. I have been engaged by counsel for plaintiff VLSI Technology LLC (“VLSI”) to evaluate the Court’s standing order entered on April 18, 2022 (the “April 18 Standing Order”) from the perspective of its treatment of different types of business entities and owners of interests in such types of business entities. As explained more fully, it is my opinion that the terms of the April 18 Standing Order are not reasonably calculated to achieve the apparent purposes of that order, and do not justifiably differentiate among types of business entities or types of business entity interest holders.

**II. BACKGROUND AND QUALIFICATIONS**

2. I have been a professor at Widener University Delaware Law School (“Delaware Law School”) since 1994. In that capacity I have taught classes in business organizations, securities regulation, professional responsibility, corporate finance, mergers and acquisitions and equity/equitable remedies. I have also been a visiting professor at the University of Pennsylvania Law School and the University of Michigan Law School, and have taught as an adjunct professor at New York University School of Law. I am currently Professor Emeritus at Delaware Law School

and Executive Director of the Institute for Law and Economics at the University of Pennsylvania Law School. A true and correct copy of my *curriculum vitae*, which includes a list of the publications I have authored in the previous ten years, is attached hereto as Exhibit A.

3. After graduating from Yale Law School in 1976, I was a practicing attorney at Morris, Nichols, Arsht & Tunnell in Wilmington, Delaware, where I was an associate from 1976 to 1984, and a partner from 1985 to 1994. At Morris Nichols, my practice focused on litigation involving the Delaware General Corporation Law (“DGCL”) and other business entity statutes.

4. From 2001 to 2007, I served as an appointed member of the ABA Business Law Section’s Corporate Laws Committee, which is responsible for the drafting of the Model Business Corporation Act. In 2011, I was appointed as Associate Reporter for that Committee, and I served as the Reporter from 2013 through 2020. In that capacity I supervised the preparation of the Fifth Edition of the Model Business Corporation Act Annotated, which compiles corporate statutes and case law from all 50 states and the District of Columbia, addressing the full range of topics covered by the Model Business Corporation Act. I served as an elected member of the Council of the ABA Business Law Section from 2009 to 2012. From 2002 to 2003, I served as the Reporter for the ABA’s Presidential Task Force on Corporate Responsibility. From 1995 to 2022, I was a member of the Council of the Corporation Law Section of the Delaware State Bar Association, on which I served as Chair from 2002 until 2004. That Council has primary responsibility for reviewing, drafting, and proposing amendments to the DGCL and Delaware’s other business entity laws.

5. From 2010 to mid-2011, I served as Special Counsel in the Office of Chief Counsel of the Division of Corporation Finance of the Securities and Exchange Commission in Washington, D.C. In that position my primary responsibility was to advise the Division’s staff concerning matters of Delaware corporate law affecting potential regulatory initiatives. I am also

an elected member of the American Law Institute, and am an appointed member of the advisers to its project to prepare a Restatement of the Law of Corporate Governance.

6. For the time I have devoted to consideration of this matter, I am being compensated at my customary rate of \$750 per hour. Payment of my fees is not contingent upon the content or substance of the opinions expressed in this report or any testimony.

### III. DISCUSSION

#### A. *Analysis of the April 28 Standing Order*

7. In the April 18 Standing Order, Chief Judge Colm F. Connolly directed that in all cases assigned to him, including the present case which I understand had already been pending before Chief Judge Connolly for several years, any “party [that] is a nongovernmental joint venture, limited liability corporation [sic], partnership, or limited liability partnership, ... must include in its disclosure statement filed pursuant to Federal Rule of Civil Procedure 7.1 the name of every owner, member, and partner of the party, proceeding up the chain of ownership until the name of every individual and corporation with a direct or indirect interest in the party has been identified.”

8. The April 18 Standing Order does not expressly disclose its purpose, although Chief Judge Connolly’s Memorandum Order in this action entered on October 17, 2022 (the “October 17 Memorandum Order”) suggests that information specified in the April 18 Standing Order is intended to enable the Court to determine whether it has “a conflict of interest that precludes it from presiding over the case” and that “presiding over the case will not create an appearance of impropriety.”<sup>1</sup> The October 17 Memorandum Order further suggests that, although VLSI has

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<sup>1</sup> A recent amendment to F.R.C.P. Rule 7.1, which takes effect on December 1, 2022, only applies in diversity cases and is aimed at determining a party’s citizenship for purposes of diversity jurisdiction. Memorandum From the Comm. on Rules of Practice and Procedure to

certified to the Court that it has already provided all information responsive to the April 18 Standing Order in VLSI's possession, the Court may dismiss the case due to "failure to provide the information required by the Court's April 18 [ ] Standing Order ... ."

9. For purposes of the analysis set forth below, it is assumed that indirect ownership by a judge or the judge's family of a party through a common investment fund is not a conflict requiring disqualification unless the judge participates in the management of the fund. *E.g.*, Code of Conduct for United States Judges Canon 3(C)(1)(c)(i). Recognizing that the right of a Delaware limited liability company (such as VLSI) to pursue litigation to enforce its legal rights is enshrined in the Delaware statute governing LLCs,<sup>2</sup> the April 18 Standing Order is unsustainable because: (1) its discrimination among types of business entities lacks a rational basis; and (2) even apart from such discrimination, it requires disclosure of information that cannot serve the assumed purpose of the order, yet it also fails to require disclosure of information necessary to serve that purpose.

***B. Unsupportable Discrimination Among Forms of Business Entity***

10. It is not entirely clear which forms of business entities the April 18 Standing Order covers. Although it refers to "limited liability corporation[s]," there is actually no entity under

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Scott S. Harris, Clerk, Sup. Ct. of the U.S. (Oct. 18, 2021). That does not appear to be the purpose of the April 18 Standing Order as it applies here; I understand this is not a diversity jurisdiction case.

<sup>2</sup> Section 18-106(a) of the Delaware Limited Liability Company Act ("DLLCA") confers upon all Delaware LLCs, such as VLSI, the power to "carry on any lawful business, purpose or activity, whether or not for profit, with the exception of the business of banking as defined in §126 of Title 8." Any doubt that this language empowers LLCs to sue to enforce their legal rights is dispelled by DLLCA Section 18-1001, which specifies who has standing to bring a derivative action on behalf of an LLC, and refers to "the right of a limited liability company to recover a judgment in its favor" – thereby confirming that an LLC can sue to enforce its legal rights.

Delaware law with that designation.<sup>3</sup> Similarly, it refers to a “nongovernmental joint venture,” which is not a statutorily recognized form of business entity under Delaware law. Moreover, while it refers to “partnership,” its additional reference to a “limited liability partnership,” and the principle of *inclusio unius est exclusio alterius*, suggests that it does not apply to other specific types of partnership, like limited partnerships or limited liability limited partnerships. In any event, the April 18 Standing Order does not on its face apply to corporations of any sort, or to other business entities, like statutory trusts or business trusts.

11. To the extent the April 18 Standing Order imposes its disclosure requirements on limited liability companies but not corporations, it is not reasonably calculated to serve its purpose, because direct or indirect ownership interests in a corporation can be substantively identical, in their control significance and economic significance, to ownership interests in an LLC. Indeed, it is not an exaggeration to say that in terms of control and economic significance, the substance of any direct or indirect interest in an LLC can be replicated in a corporation.<sup>4</sup>

12. By way of specific example, I understand that the voting power in the election of plaintiff VLSI’s Board and the equity interest in VLSI is held by CF VLSI Holdings LLC (“Holdings”), also a Delaware limited liability company. Because VLSI and Holdings are limited liability companies, the April 18 Standing Order apparently requires VLSI to disclose the members of Holdings, which I understand VLSI has already done. If plaintiff VLSI were instead a

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<sup>3</sup> The April 18 Standing Order thus literally does not apply to plaintiff VLSI, a Delaware limited liability company. I understand that subsequent orders entered by the Court in this case have clarified that this Order was intended to apply to VLSI.

<sup>4</sup> For that reason, and without in any way altering the substance of its ownership and control, any Delaware limited liability company that would be subject to the April 18 Standing Order could seemingly avoid the requirements of that order by the simple expedient of converting to a corporation, as authorized by DLLCA Section 18-216 (“a domestic limited liability company may convert to a corporation”).

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