

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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LEE BORDELEAU; DANIEL BUCZEK; DEBBIE BUCZEK; ELEANOR M.  
CORCORAN; KENNETH SCHOLZ; MEL THOMPSON; DAPHNE  
THOMPSON; ROY SCHERRER; COHOCTON WIND WATCH LTD.; JOHN  
F. TUBRIDY; TIMOTHY JOLDOS; JACOB KERN JR.; MICHAEL KUZMA;  
DONALD A. PERRY; CHARLES SACKETT; CRYSTAL DEGENHART;  
DAVE BAILEY; GREG SWITALA; KENNETH P. WILLARD; CLIFF  
CARLSON; RICHARD NAYLON; BOB CONFER; DAVID MANTHIE;  
SONYA DUSZA; JEFFERY P. DANINGBURG; ROBERT SOMMERS;  
DONALD G. HOBEL; PAUL V. HURLEY; SANDRA L. MASTERSON;  
ANTHONY J. MANNA; GINNY ROBER; JAMES L. LESZYNSKI;  
DOUGLAS W. HALL; KATHLEEN F. TORRENCE; WAYNE D.  
CARLISLE; ROBERT OZZIMO; PAUL O'NEILL; ERIK O'NEILL; JIM  
BREM; PAULETTE PETERSON; STEVEN MATIASZ; RUS THOMPSON;  
JUL THOMPSON; BURR DEITZ; DAVE HAND; MICHAEL REBMANN;  
RAY ROBERTS; RICHARD A. COOPER; ANTHONY MATUSZAK; MIKE  
WALSH;

Plaintiffs,

- against -

The STATE OF NEW YORK; The NEW YORK STATE ASSEMBLY; The  
NEW YORK STATE SENATE; DAVID PATTERSON, individually and as  
Governor of the State of New York; DEAN SKELOS, individually and as  
Majority Leader and Temporary President of the New York State Senate;  
SHELDON SILVER, individually and as Speaker of the New York State  
Assembly; THOMAS P. DINAPOLI, individually and as Comptroller of the  
State of New York; AIDA BREWER, individually and as Treasurer of the  
State of New York; LAURA L. ANGLIN, individually and as Budget Director  
of the State of New York, ADVANCED MICRO DEVICES INC.;  
AMERICAN AXLE & MANUFACTURING, INC.; DELPHI HARRISON;  
INTERNATIONAL BUSINESS MACHINES CORPORATION; BASS PRO  
SHOPS OUTDOOR WORLD, LLC; WEST GENESEE HOTEL  
ASSOCIATES, d/b/a, Hyatt-Regency Buffalo; NEW YORK STATE URBAN  
DEVELOPMENT CORPORATION d/b/a Empire State Development  
Corporation; EMPIRE STATE DEVELOPMENT CORPORATION; ERIE  
CANAL HARBOR DEVELOPMENT CORPORATION;

Defendants.

Index No. 6582-08

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**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' ORDER TO SHOW  
CAUSE, AND IN SUPPORT OF AMD'S MOTION TO DISMISS THE VERIFIED  
COMPLAINT PURSUANT TO CPLR 3211(A)(3) AND (A)(7)**

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Advanced Micro Devices, Inc. (“AMD”), by its attorneys, Greenberg Traurig, LLP, submit this Memorandum of Law in Opposition to Plaintiffs’ Order to Show Cause, and in support of AMD’s Motion to Dismiss the Verified Complaint (“Complaint”) pursuant to CPLR 3211(a)(3) and (a)(7).<sup>1</sup>

### **PRELIMINARY STATEMENT**

The Plaintiffs are challenging, on constitutional grounds, a broad range of programs and appropriations enacted by the Legislature to promote New York State’s economy. In many instances, these programs and appropriations include additional scrutiny by executive agencies, resulting in heightened transparency and accountability. Plaintiffs name AMD as a defendant in this lawsuit presumably because the Legislature has appropriated funds related to AMD’s proposal to build a semiconductor chip manufacturing plant in Saratoga County. This project would involve a multi-billion dollar private investment and would result in the creation of 1,200 high technology jobs in upstate New York.

The appropriations relating to the AMD project are appropriate and constitutional. First, New York courts have long held that the State may appropriate money to a public benefit corporation, such as the Urban Development Corporation (“UDC”), for a public purpose, which specifically includes economic development. In this case, the appropriations relating to the AMD project were specific, line-item appropriations made directly to the UDC, a public benefit corporation. Moreover, the Legislature identified the purpose of these appropriations and specified that the appropriations are to be funded through notes or bonds issued by UDC. As such, these appropriations satisfy all of the applicable constitutional provisions. In addition,

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<sup>1</sup> AMD relies upon and hereby incorporates by reference the arguments presented by the Attorney General in his memorandum of law in support of the State Defendants’ motion to dismiss the Complaint and in opposition to Plaintiffs’ Order to Show Cause.

before these expenditures can occur, UDC must satisfy itself that the project will aid in the development, growth and prosperity of Saratoga County. Thus, the appropriations relating to the AMD project will undergo additional scrutiny by an executive branch agency. The process is transparent and there is accountability at every step. Plaintiffs' constitutional challenges to the appropriations relating to the AMD project are therefore without merit and should be dismissed.

### **STATEMENT OF FACTS**

On June 23, 2006, the New York State Legislature made two appropriations to the New York State Urban Development Corporation ("UDC") for high technology projects relating to the AMD chip manufacturing project:

[t]he sum of \$500,000,000 . . . for costs associated with the development of a semiconductor manufacturing facility, including but not limited to the construction purchase and installation of equipment, or other state costs required pursuant to a letter of intent executed by the chairman of the New York state urban development corporation and semiconductor manufacturer; and

[t]he sum of \$150,000,000 . . . for research and development activities of a semiconductor manufacturer pursuant to a letter of intent executed by the chairman of the New York state urban development corporation and a semiconductor manufacturer.

2006 N.Y. Sess. Law Ch. 55, § 5. The corresponding Article VIII budget legislation provides that the above appropriations are to be funded by the proceeds of notes or bonds issued by the UDC. *See* 2006 N.Y. Sess. Law Ch. 59, Part J-1, § 4. These expenditures have not yet occurred, but were re-appropriated by the Legislature in 2007 and in 2008. *See* 2007 N.Y. Sess. Law. Ch. 55, § 3 and 2008 N.Y. Sess. Law Ch. 55, § 3.

### **PROCEDURAL HISTORY**

Plaintiffs initiated this lawsuit on August 4, 2008 by filing an Order to Show Cause, supported solely by a Complaint, with the Supreme Court, Albany County. According to the Complaint, this action was brought pursuant to the New York State Constitution, common law,

CPLR 3001 and New York State Finance Law § 123-b. Plaintiffs seek an order permanently enjoining the defendants from distributing or receiving state funds in violation of the New York State Constitution, and further declaratory and other relief. (Compl. ¶ 1.) The Verified Complaint recites three “causes of action”: (1) the defendants are giving or receiving, or about to give or receive, state funds in violation of Article VII, § 8 of the New York State Constitution; (2) the current state budget contains “numerous” appropriations that violate Article VII, § 7 of the New York State Constitution and that “Defendants” have violated this provision; and (3) the Senate and Assembly have, under the current state budget, improperly delegated their legislative powers in violation of Article III of the New York State Constitution. (Compl. ¶¶ 69-76.) With respect to AMD, Plaintiffs allege that the current state budget includes an unlawful appropriation of \$300,000,000 to “an international computer chip research and development center,” which Plaintiffs allege, upon their information and belief, refers to AMD. (Compl. ¶ 37.) In fact, the corresponding legislation and legislative memorandum of support expressly states that this appropriation is related to a state project with SEMATECH, not AMD. *See* 2007 N.Y. Sess. Law Ch. 259; Mem. In Support of Legislation, Assembly Bill 8359 (Silver).

The Order to Show Cause and Complaint request that the Court grant Plaintiffs final judgment in their favor, and provide for the following relief: (1) an order and permanent injunction barring the state defendants from giving state funds to the private defendants or any other private corporation or undertaking similarly situated; (2) an order directing the return of all funds previously transferred to the private defendants in violation of the state constitution pursuant to the current state budget or pursuant to action of any public respondent within the last four months, together with interest; (3) a declaration that it is illegal for any state defendant to transfer state monies to private corporations or firms unless explicitly authorized by one of the

three exceptions specified in Article VII of the New York State Constitution; (4) an injunction against any spending resulting from the improper delegation of legislative power of appropriation to other official; (5) an injunction against any spending in violation of Article VII, § 7; (6) costs, disbursements and reasonable attorney's fees; and (7) such other and further relief as the Court deems just and proper. (Compl., Demand for Relief ¶¶ 1-7.)

On August 4, 2008, the Honorable John E. Egan signed Plaintiffs' Order to Show Cause, thereby ordering the Defendants to show cause before this Court on September 15, 2008 why an Order should not be made and entered granting the ultimate relief sought in the Complaint. The parties subsequently agreed upon a briefing schedule and a revised hearing date of October 13, 2008 and, on September 15, 2008, Plaintiffs served a Memorandum of Law in support of their Order to Show Cause ("Pls.' Br.").

### ARGUMENT

A complaint should be dismissed under CPLR 3211(a)(7) where the court determines that the plaintiff cannot succeed upon any reasonable view of the facts stated in the complaint. *Farmer v. Green Bus Lines, Inc.*, 254 A.D.2d 389, 390 (2d Dep't 1998). In making this determination, "a court need not accept as true legal conclusions or factual allegations that are either inherently incredible or flatly contradicted by documentary evidence." *McNeary v. Niagara Mohawk Power Corp.*, 286 A.D.2d 522, 524 (3d Dep't 2001) (citations omitted). As set forth below, the Plaintiffs cannot succeed upon any reasonable view of the facts alleged in their Complaint and the Complaint should therefore be dismissed.

#### **I. The Funds at Issue are Lawful Appropriations by the State to a Public Benefit Corporation for a Public Purpose**

Legislative enactments "enjoy a strong presumption of constitutionality" and Plaintiffs bear the burden of proving unconstitutionality "beyond a reasonable doubt." *Schulz v. State of*

*New York*, 84 N.Y.2d 231, 241 (1994) (upholding the state’s plan to fund \$20 billion in transportation improvements through bonds issued by public authorities). Courts must also give particular deference to public funding programs that are “essential to addressing the problems of modern life, unless such programs are ‘patently illegal.’” *Id.* Courts recognize that to do otherwise would be to question the judgment of the Legislature and thus would constitute an unconstitutional usurpation by the courts of the executive power. *See, e.g., Schulz v. State of New York*, 160 Misc. 2d 741, 746 (N.Y. Sup. Ct. 1994) (declining to entertain challenge to the budget director’s judgment in accepting the Legislature’s recommendations in allocating \$48 million lump sum appropriation).

**A. The Urban Development Corporation is a Public Benefit Corporation Created to Promote the New York State Economy and has the Authority to Provide Funding for that Purpose**

The appropriations relating to the AMD project in the current state budget constitute a direct appropriation by the State to UDC. UDC is a public benefit corporation created by the Legislature in 1986 for the purposes of promoting a vigorous economy, preventing economic stagnation, and encouraging the creation of new job opportunities. *See* N.Y. Unconsol. Law § 6254(1) (McKinney 2008); *see also* N.Y. Unconsol. Laws § 6252 (McKinney 2008) (pronouncing “it is the policy of the state to retain existing industries and to attract new industries through the acquisition, construction, reconstruction and rehabilitation of industrial and manufacturing plants and commercial facilities, and to develop sites for new industrial and commercial building”). UDC’s powers are derived from Article XVIII of the New York State Constitution and there is no constitutional infirmity in its creation. *Floyd v. N.Y.S. Urban Dev. Corp.*, 33 N.Y.2d 1, 7 (1973).

In establishing UDC, the Legislature expressly provided that the “acquisition, construction, reconstruction, rehabilitation or improvement of such industrial, manufacturing and commercial facilities . . . are public uses and public purposes for which public money may be loaned and private property may be acquired and tax exemption granted, and that the powers and the duties of the New York State urban development corporation as hereinafter prescribed are necessary and proper for the purpose of achieving the ends here recited.” N.Y. Unconsol. Law § 6252. The Legislature further declared that the Act establishing the UDC “shall be liberally construed so as to effectuate its purposes.” *Id.* at § 6284.

UDC is granted broad powers to carry out these functions, including the power to acquire, construct or provide for the construction of any project and to issue its negotiable bonds and notes for that purpose. *See* N.Y. Unconsol. Laws § 6255(9), (20) (McKinney 2008). Before undertaking the acquisition and construction of an industrial project, however, UDC must first make the following findings: (1) that unemployment or underemployment exists in the area in which the project is to be located; (2) that the acquisition or construction and operation of such project will prevent, eliminate or reduce such unemployment or underemployment; (3) that adequate provision has been or will be made to pay the cost of such project; and (4) that the project will aid in the development, growth and prosperity of the state and the area in which the project is located. N.Y. Unconsol. Law § 6260(b) (McKinney 2008).

**B. The Appropriation of Funds to a Public Benefit Corporation for a Public Purpose is Constitutional under Article VII, § 8**

Plaintiffs’ legal conclusion that appropriations relating to the AMD project violate Article VII, § 8 of the New York State Constitution is incorrect as a matter of law. Article VII, § 8 prohibits two actions by the State: (1) the gift or loan of money to or in aid of a private corporation, association, or undertaking; and (2) the gift or loan of the State’s credit to public or