Frederick L. Cottrell, III
Director
302-651-7509
Cottrell@rlf.com

RICHARDS LAYTON & FINGER

July 10, 2009

VIA ELECTRONIC FILING AND HAND DELIVERY

The Honorable Vincent J. Poppiti
Special Master
Fox Rothschild LLP
Citizens Bank Center
919 North Market Street, Suite 1300
Wilmington, DE 19899-2323

REDACTED PUBLIC VERSION

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; Discovery Matter No.

Dear Judge Poppiti:

Intel asks this Court to shut down entirely any AMD Rule 30(b)(6) discovery on the very preservation issues Intel itself has interjected into this litigation and pursued with abandon. Intel claims absolute immunity to scrutiny of its own preservation practices on these points, arguing that AMD's discovery is time-barred, not ripe or duplicative or, if not duplicative, then it is "unfettered *new* discovery." (Intel Opp. at 2.) Intel's tune has thus changed considerably from when it sought this discovery from AMD, and characterized it as "well-tailored" and "routinely expected from litigants in cases involving electronic discovery issues." (*See* Intel's January 5, 2009 Letter Brief Re Scope of Intel's 30(b)(6) at p. 2, Fowler Decl. ¶ 10, Exh. I.)

The issue for decision here is direct and simple: Is AMD entitled to conduct discrete, non-duplicative and timely discovery into topics that are indisputably relevant to Intel's preservation problems and its culpability for them? Surely AMD is entitled to discovery on topics like "anticipation of litigation" that have not been addressed before -- and on which Intel is conducting discovery right now and has told the Court it will base a major, future motion. And surely AMD should be permitted to test Intel's complaints about AMD's preservation system -- detailed in repeated expert declarations, letters and motions to the Court -- to learn whether Intel itself has suffered what it now complains about.

AMD has zero interest in replowing already-plowed discovery ground and will not do so. And Intel has already conceded that a 7 hour deposition on two of AMD's deposition topics is perfectly appropriate. (*See* Intel's Response to Deposition Topic 7, Fowler Decl. ¶ 4, Exh. B.) AMD merely requests that Your Honor order Intel to submit to deposition for a total of 15 hours

-- less than half the time Intel consumed informally and formally exploring similar topics.

Intel makes five arguments in order to avoid AMD's discovery. Each is meritless.

1. Intel Misrepresents Prior Court Orders. Intel argues that AMD should have completed discovery into ***all*** preservation and harvesting-related topics -- including "the nature and extent of Intel's loss of data and the potential consequences of those losses" [1] -- by the close of Remediation Discovery in August 2007, and that AMD's discovery isn't related to Intel's losses or culpability. (Intel Opp. at 2.) That is wrong. Remediation Discovery was intended to front-load a limited round of discovery so that AMD could respond to Intel's remediation proposals (set forth at pages 30-39 of its Remediation Plan brief), the Court could order Intel to remediate, and Intel could go about doing so promptly. (*See* June 20, 2007 Bifurcation Order ¶ 1, at p. 3, Fowler Decl. ¶ 9, Exh. H.) Intel vigorously advanced bifurcation, and proposed and agreed to defer discovery into all "other matters related to Intel's evidence preservation issues" relevant to AMD's response to pages 1-30 of Intel's Remediation Plan brief -- including Intel's preservation efforts, how its losses occurred, and Intel's culpability for them. (*Id.* at ¶¶ 1, 5; *see also* May 3, 2007 Hrg. Tr. at 26:11-27:16, attached as Exhibit A to the Declaration of David Herron ("Herron Decl.") ¶ 3, filed herewith.)

This is "Causation/Culpability Discovery," which is not closed. (*See* Bifurcation Order at p. 2, Exh. H to Fowler Decl., allowing discovery into "how [Intel's] various preservation lapses occurred," and ¶¶ 1, 2 and 5 (similar).) Of course, Remediation Discovery is. But AMD's Rule 30(b)(6) discovery does not relate to Intel's Remediation Plan. It is instead directed expressly at Intel's efforts and duty to preserve documents and its culpability for failing to do so. Indeed, that is how Intel characterized its own discovery which AMD's mimics. Intel cites no Court order or case law to support its dubious assertion that AMD is foreclosed from conducting discovery on preservation issues that Intel itself put in issue.

Intel's flip-flop interpretation of Case Management Order No. 1 -- allowing a deposition into "the completeness of document production (including electronic discovery)" -- is likewise unavailing. (*See* CMO No. 1 ¶ 5(e), Fowler Decl. ¶ 11, Exh. J.) Intel has repeatedly cited CMO No. 1 to justify the 32 hours of so-called "routine" discovery it has already conducted into AMD's preservation practices (with more to come). Yet it now contends that 45 hours of deposition by AMD into what appears to be the largest preservation failure by any litigant in U.S. litigation history is too much. Preservation discovery is no picnic. But AMD's discovery -- and the deposition permitted by CMO No. 1, which AMD has not taken -- is perfectly appropriate. And it is not too much for AMD to seek what Intel has already obtained.

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[1] Intel mis-cites the Court's Bifurcation Order, which provides that Remediation Discovery "may include" inquiry into the nature and extent of Intel's losses. (*See* Bifurcation Order ¶ 1, at p. 3-4, Fowler Decl. ¶ 9, Exh. H.) In quoting the Order, Intel fails to mention the "may include" language in order to suggest that loss-related discovery was *required* to be conducted in the Remediation Discovery phase and is now too late.

2. Intel Has Failed To Prove That AMD's Discovery Is Duplicative. Intel fails to meet its burden under Rule 26(b) to show that AMD's deposition topics are duplicative, cumulative or unduly burdensome. Instead, Intel has buried the Court in off-point deposition testimony that purports to show only that AMD had the "opportunity" to seek this new discovery -- which is not the standard, even under the cases Intel cites. (*See* Pickett Decl. ¶ 7, Exh. 6.)

For the Court's convenience, AMD sets forth its positions on Intel's topic-by-topic arguments in a new version of the chart that Intel submitted. (*See* Herron Decl. ¶ 5, Exh. C.) AMD also invites the Court's review of the deposition testimony Intel cites, which doesn't remotely establish that all the targeted discovery now sought was already obtained -- or that AMD ever "got into the details, into the weeds" that Intel has on similar topics. We highlight, however, Intel's pretense that inquiry into Intel's "anticipation of litigation" (Deposition Topics 1 and 2) -- the latest hot topic in Intel's own Court-permitted discovery -- is off limits. This is nonsense: AMD has not conducted discovery on this topic, a point Intel admits by its cursory and baseless treatment of this issue in its brief and chart. (*See* Pickett Decl. ¶ 7, Exh. 6 at 1-2.)

3. Intel's "You Had Your Chance" Argument Is Unsupported By Case Law. The three cases Intel cites to argue that "prior opportunities" preclude AMD's discovery don't help it. (Intel Opp. at 3.) The first is *Static Control Components Inc. v. Lexmark Int'l, Inc.*, C.A. No. 04-84-GFVT, 2006 U.S. Dist. LEXIS 85139 (E.D. Ky. Nov. 9, 2006). *Static Control* denied further discovery into a specific customer list that had been the subject of two prior Rule 30(b)(6) depositions. *Id.* at *18. But that court permitted 30(b)(6) discovery on a new customer list that had not come to light until after the prior depositions. *Id.* Nowhere in the paper mountain that Intel filed has it shown that AMD seeks to revisit topics addressed in prior depositions. Instead, AMD's deposition topics target issues that *Intel* raised *after* AMD's prior discovery through its numerous "expert" declarations, briefs, arguments and other submissions, including: Topics 1 and 2 (reasonable anticipation); Topics 3(a)-3(d) (Intel's efforts to change or monitor custodian Outlook and dumpster settings, mailbox quotas, and resultant loss); Topic 4(d) (errors or loss associated with Intel's EMC Archive, including extraction of data from it); Topic 5(c) (harvest from live mail servers); and Topic 5(d) (harvests of Deleted Items, including from Exchange Dumpsters). Given that AMD's deposition topics seek new information not duplicating prior discovery, the second case Intel cites also supports AMD. (*See* Intel Opp. at 3 (citing *Banks v. Office of the Senate Sergeant-at-Arms & Doorkeeper*, 222 F.R.D. 7, 19 (D.D.C. 2004) (ordering the parties to ensure that 30(b)(6) depositions are "meaningful exercises in ascertaining information that has not been previously discovered")).) A similar order by this Court would be unnecessary, but easy to follow.

Lastly, *State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.*, 254 F.R.D. 227 (E.D. Pa. 2008), cited by Intel, addresses the risk of "serial depositions." This has nothing to do with AMD's discovery on questions and new topics distinct from prior discovery. AMD neither seeks nor can it obtain any unfair advantage. AMD merely seeks information for its own evidence spoliation motion against Intel and to defend itself against Intel's preservation attacks.

4. AMD's 30(b)(6) Discovery is Necessary and "Ripe". If AMD's discovery is not too late, Intel argues, then it purportedly is not "ripe" because Intel has not yet filed its

motions relating to AMD's preservation. (Intel Opp. at 4.) Intel thus complains about and invites delay in the same breath. AMD fully intends to utilize the fruits of this discovery in its forthcoming motion about Intel's spoliation of evidence, including Intel's apparent failures to initiate preservation before the case was filed (Topics 1 and 2), to restore Exchange dumpsters when moving custodians to dedicated servers (Topic 5), and to monitor preservation throughout the case (Topic 3). And there would be no efficiency -- instead, only Intel-procured delay -- in foreclosing proper discovery until Intel gets around to filing motions which it has never denied will involve the issues AMD's discovery embraces. *Compare, e.g.,* Topics 1 and 2 *with* Intel's June 11, 2009 Request For *In Camera* Review of Disputed Document, at 1 (alleging AMD reasonably anticipated litigation months before its preservation efforts began); Topic 5(c) *with* Third Decl. of John Ashley, January 5, 2009, ¶ 31 (alleging various "harvest failures" including attacks on AMD's harvests of "live mail"). Intel cites no authority whatsoever -- nor could it -- for the proposition that discrete discovery on the issues Intel itself interjected in this litigation should be deferred until after Intel seeks relief founded upon them.

5. Intel's Refusal to Produce Responsive Documents is Unjustified. Intel misstates the parties' agreements and Court's orders on document production. The parties agreed to a custodian-based approach to document production *only* with respect to "*Initial Remediation Discovery*." (*See* July 10, 2007 Order Regarding AMD's and Class Plaintiff's Initial Remediation Discovery at ¶ 1, Pickett Decl., Exh. 41.) No such limit was placed on Causation/Culpability document discovery. And AMD has stated that it is willing to accept Intel's identification of -- and written representation that it has already produced -- all documents responsive to AMD's document requests. Intel has declined to do so, refuses to state whether any documents exist, and refuses to even look. (*See* Intel's Opp. at 4, stating only "*if* responsive non-privileged information exists [as to a subset of AMD's requests], it would have been included" in Intel's remediation production.) AMD's offer remains open. Short of Intel's compliance with it, however, AMD's document requests obviously seek relevant documents -- a fact Intel does not dispute -- and Your Honor should order Intel to produce them.

AMD's Rule 30(b)(6) discovery is fully justified and necessary. Intel has failed to meet its burden to demonstrate otherwise. Your Honor should order Intel to comply with AMD's discovery.

Respectfully,

/s/ Frederick L. Cottrell, III

Frederick L. Cottrell, III (#2555)

FLC,III/afg

cc: Clerk of the Court (via electronic filing)
Richard L. Horwitz, Esquire (via electronic mail)
James L. Holzman, Esquire (via electronic mail)