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September 9, 2008

BY ELECTRONIC MAIL & HAND DELIVERY

The Honorable Vincent J. Poppiti
Special Master
Blank Rome LLP
Chase Manhattan Centre, Suite 800
1201 North Market Street
Wilmington, DE 19801-4226

Redacted - Public Version

Re: Advanced Micro Devices, Inc., et al. v. Intel Corporation, et al.,
Discovery Matter No.

Dear Judge Poppiti:

Advanced Micro Devices, Inc. and AMD International Sales & Service, Ltd., (collectively "AMD") hereby move for an Order compelling Intel Corporation and Intel Kabushiki Kaisha's (collectively "Intel") compliance with the Court's March 16, 2007 Order Regarding Intel's Evidence Preservation Issues (D.I. 301) ("Order"), and for sanctions against Intel pursuant to Fed. R. Civ. P. 37(a)(5)(A) and (b)(2), Del. L.R. 1.3(a) and the inherent authority of the Court to compel compliance with its orders.

I. Introduction

More than a year after discovering serious evidence preservation breakdowns, Intel finally revealed those problems to the Court and AMD in February 2007. Intel's systemic and custodian-based evidence preservation failures were the natural outgrowth of a preservation scheme that was designed to retain as little evidence as possible and was as poorly monitored as it was incompetently executed. Initially, Intel promised transparency, full disclosure, and a remediation plan that it contended would fill the evidence gaps that its self-described "lapses" had created.

Intel's transparency and full disclosure are, of course, not only Intel's legal duty but indispensable to an accurate assessment of the extent of evidence loss. And since by Intel's admission its preservation problems infected as many as 1,000 custodians, Intel's full and complete disclosure of facts about loss was the only means of finding the truth short of conducting hundreds of depositions. That is why this Court ordered Intel to submit reports for each of its 1,023 Custodians "reflect[ing] Intel's **best information gathered after reasonable investigation**" and "contain[ing] . . . : a. The Intel Custodian's name; [and] b. A **detailed written description of the preservation issues affecting the Intel Custodian, including the**

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nature, scope and duration of any preservation issue(s)." These reports have become known as "the Paragraph 8 Summaries." See March 16, 2007 Order Regarding Intel's Evidence Preservation Issues, ¶¶ 6-8 (the "Order"). Regrettably, Intel has breached its promise of transparent full disclosure and, worse yet, has violated this Court's Order requiring it.

While AMD expected that, as an aggressive advocate, Intel would spin the facts in the most favorable light, a side-by-side comparison of the Weil, Gotshal & Manges LLP notes of custodian interviews ("Weil Gotshal") and Intel's Paragraph 8 Summaries reveals Intel's systematic concealment of critical facts. The missing facts do not appear to have been carelessly omitted but instead go to the heart of any spoliation inquiry, such as Intel's knowledge that several custodians engaged in the routine [REDACTED] Intel's prevalent omissions of known facts vital to assessment of the cause, extent and remediability of loss were not merely careless omissions; they appear to have been intentional and are, in all events, indefensible.

What is now clear is that without AMD's motion to compel production of the Weil Gotshal interview notes, these critical facts would have never seen the light of day. And there is no reason to believe that Intel has disclosed all the data losses it knows about. AMD therefore moves this Court for an order requiring Intel: (1) to comply with this Court's prior Order by correcting its misleading and inaccurate Paragraph 8 Summaries; (2) to reimburse AMD for its fees and costs incurred in filing this motion and the original motion to compel production of the Weil Gotshal interview notes; and (3) to immediately and comprehensively disclose to this Court all instances of known or suspected losses of evidence that Intel's investigation revealed.

II. Background

Intel says that it became aware of "lapses" in its document preservation scheme sometime in early Fall 2006. These were not just a couple rogue custodians. [REDACTED]

[REDACTED] In November 2006, before it had informed the Court or AMD of its evidence preservation problems, Intel hired Weil Gotshal to conduct an internal investigation. As part of this investigation, Weil began interviewing Intel custodians about their document preservation practices.

Weil Gotshal has now completed interviews of nearly all 1,023 Intel custodians and has determined whether and to what extent each custodian complied with his or her document preservation obligations. On April 23, 2007, Intel filed with the Court a Report and Proposed [REDACTED]

Remediation Plan (D.I. 321) ("Proposed Remediation Plan") in a self-characterized effort at transparency. This effort intentionally down-played any culpability, stating: "Intel has discovered a number of human errors in the post-complaint period in the execution of its [preservation] plan. . . . [T]hese human errors were misunderstandings or errors by individual employees, with ongoing day to day business responsibilities, working diligently to carry out the complex and unprecedented scope of preservation obligations in this case." Proposed Remediation Plan at 3. Intel also assured AMD, Class Plaintiffs and the Court that "Intel's investigation has revealed **no instance of deliberate deletion** to deny AMD access to any information responsive to the allegations in the complaint."² *Id.* (emphasis added)

This Court ordered Intel to produce its "best information" about data loss and preservation failure in the form of a "detailed written description of the preservation issues . . . including the nature, scope and duration of any preservation issue(s)." (Order ¶¶ 6-8.) The purposes of that Order were to facilitate Intel disclosures that the law requires, obviate the need for vast and expensive discovery, and supply this Court and the parties with data sufficient to assess whether loss occurred and whether Intel's efforts would remediate it. The Order, in short, required Intel's transparent, full disclosure.

Skeptical that Intel's Paragraph 8 Summaries actually contained the unvarnished truth, AMD and Class Plaintiffs requested the notes taken by Weil Gotshal during Intel custodian interviews ("Weil Interview Notes"). Plaintiffs' Request for Production No. 34 (Apr. 10, 2007) (D.I. 312). Intel refused, but the Court agreed with Plaintiffs and ordered their production because "Intel placed the accuracy and validity of the information contained in [the Paragraph 8 Summaries] at issue. . . ." Special Master's Report and Recommendation (DM 4A) (May 9, 2008) at 20.

AMD has now analyzed the Weil Interview Notes and discovered that there are dramatic discrepancies between what Intel disclosed to the Court and what it knew about data losses and evidence destruction from the Weil Gotshal investigation. AMD has attached a table showing 50 examples of misleading summaries that omit unquestionably material facts that Intel was required to disclose (the omitted facts are bolded in the related Weil Interview Notes).³ As the attached comparison reveals, Intel obscured crucial data loss information such as:

² Intel also claimed it had "a sound basis to believe that ultimately **nothing of any genuine significance will prove to have been lost**," (*id.* at 7 (emphasis added)), an assertion that no Intel deponent has yet been able to support through study, data or even anecdote.

³ To be sure, the comparison is only a sampling. Many more of the Intel Paragraph 8 Summaries are drafted in a way designed to obscure the true facts about Intel's evidence loss. These are just the most egregious examples.

[REDACTED]

When confronted with the misstatements in the Paragraph 8 Summaries, Intel brazenly defended itself by claiming that its obligation under the Order was limited to summarizing what "each Custodian actually preserved -- or set out to preserve" and that any omitted information regarding its custodian's actual preservation problems could simply be "inferred." (See Pollner Decl., Exhibit C.) Intel never informed AMD of its peculiar interpretation of the Order nor did Intel provide any support for why the Order required anything less than what its plain language provides: complete disclosure of all preservation issues. Intel instead asserted that the concealed facts were just "obvious corollaries" of what Intel decided to disclose. It is neither AMD's nor the Court's obligation to guess or speculate at what the truth is and the Court can judge for itself whether the concealed information was in any way obvious from Intel's Paragraph 8 Summaries. What happened here is simple: Intel knew of these issues, told the Court it was fully disclosing them and then decided not to reveal the whole truth.

AMD then gave Intel a chance to correct the misleading record it created without Court intervention. Intel refused.

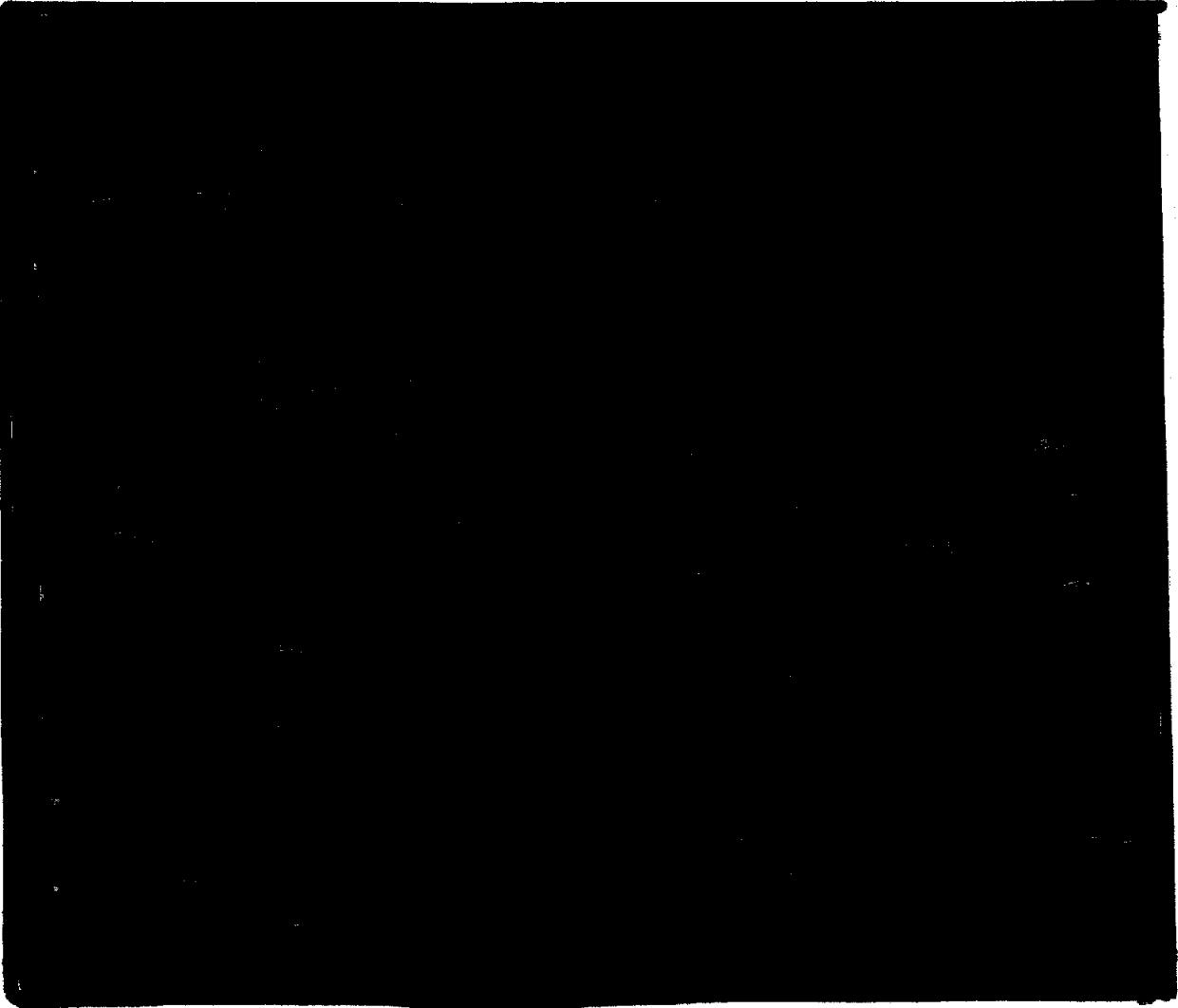
III. Discussion

A. Intel Violated the Court's Order by Omitting Material Preservation Issues From the Paragraph 8 Summaries.

Intel's obligations to the Court and to AMD under the Order could not have been clearer. For each custodian, the Order required "[a] detailed written description of the preservation issues" affecting the custodian, including the "nature, scope and duration of any preservation issue(s)" based on Intel's "best information gathered." This means the good, the bad and the ugly of Intel's preservation failures. Despite this clear mandate, Intel's Paragraph 8 Summaries are replete with critical omissions, half-truths and mischaracterizations. These misstatements appear to have been calculated to obscure the truth and to hinder any loss analysis by AMD or the Court. Here are but a few examples of these misstatements:

[REDACTED]

[REDACTED]



Intel, like any other litigant, is under a duty to submit truthful information to a court. *See, e.g., Madrid v. Woodford*, 2004 WL 2623924, at *7 (N.D. Cal. Nov. 17, 2004) (ordering party to show cause why sanctions should not be imposed after party filed a letter containing falsehoods along with deliberately misleading investigative memorandum with Special Master). This means that Intel was under an obligation to tell the whole story and not pick and choose information, as “a half-truth . . . can be just as misleading, sometimes more misleading, than an absolutely false representation.” *In re Kouterick*, 167 B.R. 353, 364 (Bkrtcy. D.N.J. 1994). Intel’s misstatements

about the destruction of evidence warrant the imposition of sanctions. Fed. R. Civ. P. 37(a)(5)(A) and (b)(2); Del. L.R. 1.3(a).

Courts often sanction the type of behavior Intel has displayed as it threatens the integrity of the discovery process. In *Brick v. HSBC Bank USA*, No. 04-CV-0129, 2004 WL 1811430, at *5 (W.D.N.Y. Aug. 11, 2004), the Court sanctioned a party after finding that the party's counsel, among other things, "got caught maintaining silence when he knew that records had been destroyed." *Rice v. Hamilton Oil Corp.*, 658 F. Supp. 446 (D. Colo. 1987) is also instructive. In *Rice*, the court imposed sanctions against the plaintiffs' counsel for using partial quotes when they "knew or should have known that his partial quotes, taken out of context would mislead the Court if left uncorrected." *Id.* at 450; see also *Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1, 9-10 (1st Cir. 2005) (affirming sanctions for discovery misconduct where attorney omitted relevant facts from letter to opposing counsel). Here, Intel and its counsel were fully aware of the information contained in the Weil Interview Notes, yet chose to select only partial information for inclusion in the Paragraph 8 Summaries – information or pieces of information that advanced Intel's side of its preservation story.

Faced with an individual custodian preservation problem of its own, AMD did the right thing: It described precisely how the loss occurred; how much data was lost; the circumstances around the loss; how AMD would "remediate" the loss; and why that remediation would be successful. See Pollner Decl., Exhibit F. Intel's Paragraph 8 Summaries are not remotely of the same character, despite this Court's Order. The truth about Intel's losses needs to come out. Only Intel knows the true extent of its losses, and it should be forced to tell it.

IV. Conclusion

For the reasons stated herein, the Court should order Intel to: (1) to comply with this Court's prior Order by correcting its misleading and inaccurate Paragraph 8 Summaries; (2) reimburse AMD for its fees and costs incurred in filing this motion and the original motion to compel the Weil Gotshal interview notes; and (3) to immediately and comprehensively disclose to this Court all instances of known or suspected losses of evidence Intel's investigation revealed.

Respectfully,

/s/ Frederick L. Cottrell, III

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cc: Clerk of the Court (By Electronic Filing)
Richard L. Horwitz, Esq. (Via Electronic Mail)
James L. Holzman, Esq. (Via Electronic Mail)

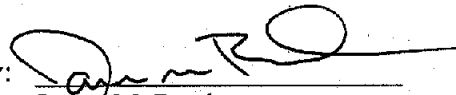
1. On July 25, 2008, I sent a letter to Intel counsel requesting that Intel correct its misleading Paragraph 8 Summaries and reimburse AMD for its costs and fees incurred in seeking the Weil Gotshal interview notes. Attached hereto as Exhibit A is a true and correct copy of the July 25, 2008 letter.

2. On August 1, 2008, Intel responded to my request and refused to correct the Paragraph 8 Summaries. Attached hereto as Exhibit B is a true and correct copy of the August 1, 2008 letter.

Dated: September 9, 2008

Respectfully submitted,

By:



James M. Pearl
O'MELVENY & MYERS LLP

*Attorney for Plaintiffs Advanced Micro
Devices, Inc. and AMD International Sales
& Service, Ltd.*

CCI:791853.1

EXHIBIT A

**SEALED
DOCUMENT**

EXHIBIT B

**SEALED
DOCUMENT**