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

RICHARDS LAYTON & FINGER

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VIA ELECTRONIC FILING AND 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.*, C.A. 05-441-JJF; C.A. 05-485-JJF; MDL No. 05-1717-JJF, Discovery Matter No.____

Dear Judge Poppiti:

In its opening brief, AMD supplied at least ***50*** examples of Intel's intentional failure to disclose key facts regarding its custodians' preservation failures. Both the Court's Order requiring disclosure of those facts and Intel's obligations were clear: Intel was to submit a report for each of its Custodians "reflect[ing] Intel's **best information** gathered after a reasonable investigation" and containing "**[a] detailed written description of the preservation issues affecting the Intel Custodian, including the nature, scope and duration of any preservation issue(s).**" The Order's intent and purpose, which Intel does not deny, was to mandate disclosures of evidence preservation failures sufficient to permit the Court and AMD to assess whether Intel's remediation efforts could fill those evidence gaps. There is no other reasonable reading of the Order. And it is perfectly clear that Intel violated it.

Before filing this motion, AMD gave Intel a chance to correct, without Court intervention, the misleading record its omissions created. Intel refused, calling AMD's request a "total waste of time." (Kochenderfer Letter to Pearl (August 1, 2008) at 4 (attached hereto as Exhibit A)). Intel then tried to explain away its conduct by arguing that the Order required Intel to disclose only "the preservation efforts" of each custodian – *i.e.*, what each custodian did to *preserve* evidence – rather than any of their preservation *failures or losses*. (*Id.* at 1.) But this was only Intel's first position.

Faced with a long list of preservation failures omitted from the Paragraph 8 Summaries, Intel now changes course, abandoning its prior argument wholesale. Intel's principal new contention is that this dispute amounts to nothing more than a "good faith disagreement about the level of detail" required by the Order. Intel parses the Order's language to insist that the preservation "issues" the Order required to be disclosed do not include "details" about specific, wide-ranging evidence preservation failures by dozens of Intel custodians. (Intel Opp. at 1-2.) But, the "level of detail" required by the Order leaves little room for interpretation. Nothing either in the plain language of the Order or in the history of the parties' negotiations – and certainly nothing the Court said or ordered – suggests in the slightest that Intel was free to omit material facts about a custodian's permanent deletion of documents. Intel offers absolutely no evidence to support this new reading of the Order because it cannot do so. Intel next maintains that it innocently misread the Order to only require a *summary*, now ignoring the Order's directives that Intel produce its "best information" and a "detailed written description" of preservation problems. Again, Intel offers no support for its tortured interpretation.

Without any evidence or justification to support its proposed readings of the Order, Intel's statement after the fact that it misunderstood the Order does not excuse Intel's conduct. The law is clear that a party's unreasonable interpretation of a court order does not excuse its noncompliance. *See, e.g., Trustees of Laborers, Local 310 Pension Fund v. Able Contracting Group, Inc.*, No. 1:04CV2294, 2007 WL 184748, at *6 n. 8 (N.D. Ohio Jan. 19, 2007) (finding that "[defendant's] subsequent, carefully crafted, misinterpretations of the Court's oral orders do not excuse its non-performance" and further noting that "[t]o allow this practice would permit parties to make unreasonable interpretations of the Court's orders simply to create a 'new' dispute and avoid sanctions"); *Rose Mg. Co. v. U.S. Forgecraft Corp.*, No. 91-1269, 1992 WL 180119, at *2-3 (10th Cir. July 27, 1992) (agreeing with magistrate judge's reasoning that a party's interpretation - that "all" did not mean "every" in the court's discovery order - was "offensive and self-serving" and deserving of case-dismissing sanctions with prejudice). Moreover, even partial compliance with a court order does not relieve a party from its duty of full compliance. *See Xaphes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 102 F.R.D. 545, 549 (D. Me. 1984) (noting that a party is not "free to interpret an order of this Court and to decide *sua sponte* what parts of the order are most important").

Intel's final argument is that the material omissions and misstatements in **50** of Intel's reports (pointed out by AMD in its motion) represent a small fraction of the total reports it submitted to the Court and to AMD. This argument fails on several fronts. First, and most importantly, selective candor in some reports is not enough to avoid sanctions for intentional omissions in a substantial number of other reports. Such omissions by Intel on this broad scale and as to these critical issues of loss in the face of an Order requiring production of that very information is sanctionable. Second, during the meet and confer process, AMD pointed out several instances in which Intel had deliberately omitted key facts. Rather than correct the record, Intel responded that AMD was cherry-picking its "best evidence." AMD therefore pointed out 50 instances of concealment in its motion. To be sure, there are many more instances where a Paragraph 8 Summary is materially misleading, but the 50 examples provided

by AMD indisputably establish intentional omissions. The burden is now on Intel to correct the record.

Absent Intel's compliance with the Order, AMD and the Court are unable to assess how Intel's widespread systemic and individual preservation failures occurred and whether those evidence losses can be remediated. It strains common sense to argue, as Intel does, that rampant double-deletion practices need not be disclosed because, if the custodian was not on backup tapes, the evidence would have been destroyed anyway by Intel's auto-delete purge. (Intel Opp. at 4-5.) That is not a defense or excuse. Instead, it is a somewhat stunning admission that Intel knew about losses that it now contends it was free to omit.[1] And, taking a step back, it simply defies any reasonable reading of this Court's Order to suggest that the permanent deletion of relevant evidence is not material in a spoliation inquiry.

Sanctions are Warranted. Intel's noncompliance with the Order was far from a simple ministerial violation. Apparently believing the facts contained in the Weil Interview Notes would remain protected under the attorney-client privilege, Intel prepared and produced misleading reports that obstructed AMD's ability to show or assess loss. This clear violation of the Order warrants sanctions under Fed. R. Civ. P. 37 and Del. L.R. 1.3(a).[2] Because sanctions can be imposed when a party violates an order in good faith[3] they are particularly deserved when, as here, the party's defense of its breach reduces to an indefensible interpretation of the order it violated.

Intel's argument that AMD has suffered no harm because it gave "AMD the actual Weil Interview Notes from which the Summaries were prepared long before AMD filed its Motion" also fails. Sanctions flow, not because AMD remains in the dark, but because Intel intentionally omitted evidence the Court had ordered it to disclose. Granted, AMD ultimately discovered and exposed the omissions, albeit at considerable expense that it should not have had to bear. But concealment works irrevocable harm to our system of fact-finding, which depends on the parties' candor in responding to court orders requiring disclosure. Intel's conduct blemished the system,

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[1] Indeed, even a custodian who was not on backup tapes would still have presumably 29 days of emails – in the absence of double deletion – when his or her computer was "harvested." If the custodian double-deleted all of his or her incoming emails, however, there would be nothing there to harvest so the double deletion practices are relevant irrespective of whether the custodian is on backup tapes.

[2] AMD only moved for sanctions under Rule 37 and L.R. 1.3. It did not move for sanctions under the inherent power of the Court as Intel suggests.

[3] *See Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 207-08 (1958) ("For purposes of subdivision (b)(2) of Rule 37, we think that a party 'refuses to obey' simply by failing to comply with an order . . . [T]he willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply.")

and that stain remains whether the information has now been disclosed. Were the law otherwise, no revealed perpetrator could ever be sanctioned.

Finally, and tellingly, Intel is entirely silent on the issue of whether it has knowledge of preservation issues and evidence losses outside of the Weil Interview Notes. Instead, Intel just ignores AMD's requested relief. Intel's silence on this point suggests that AMD does not, in fact, have all of the information it needs to properly analyze Intel's remediation plan, as AMD was entitled to receive under the Order. Intel should now be required to unambiguously disclose all preservation "issues" (whether contained in the Weil Interview Notes) and all known or suspected evidence losses.

Conclusion: This Court should: (1) compel compliance with the Order, including by ordering Intel to update its Paragraph 8 Summaries with all currently known preservation issues and losses and to submit that update under oath; and (2) award sanctions against Intel in the amount of AMD's attorneys' fees and costs for both the Weil Interview Notes Motion and the instant motion.

Respectfully,

/s/ Frederick L. Cottrell, III

Frederick L. Cottrell, III (#2555)
Cottrell@rlf.com

FLC,III/afg

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