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VIA ELECTRONIC MAIL AND BY HAND

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

Re: ***Advanced Micro Devices, Inc., et al. v. Intel Corporation, et al.,***
C.A. No. 05-441-JJF;
***In re Intel Corp.*, C.A. No. 05-1717-JJF; and**
***Phil Paul v. Intel Corporation (Consolidated)*, C. A. No. 05-485 (JJF)**

Dear Judge Poppiti:

Intel understood that the issue of any potential sanctions was submitted on the record at the hearing on January 23, 2009. In fact, AMD was specifically asked: "And you do not want to develop any additional factual record, nor do you want to be developing any additional legal position, if you will, in terms of briefing. Is that correct?" Its response was "[t]hat's correct, your Honor." (1/23/09 Tr. at 61:16-21.) Despite AMD's representations to the Court at the hearing, AMD in a letter brief of February 23, 2009, now argues that the Proposed Order submitted on February 22, 2009 grants the "two primary forms of relief AMD sought in its motion."

Intel has voluntarily provided AMD with an ongoing flow of information regarding its retention lapses, and the Paragraph 8 summaries were in the nature of an update to one of Intel's earlier voluntary disclosures. At the January 23, 2009 hearing, Mr. Cooper reaffirmed Intel's intention to be open and forthcoming in providing information, and the proposed order reflects that continuing commitment on Intel's part. AMD is attempting to turn Intel's willingness to update the Paragraph 8 information into some type of an admission that Intel failed to comply with the March 16, 2007 Order, and claiming that the "only relevant inquiry now is whether Intel's conduct was substantially justified."

AMD relies on the Court's opening remarks about the comparison of the Weil interview notes to the Paragraph 8 summaries, suggesting that the Court's initial observations were sufficient to justify an award of sanctions. The Court, however, explicitly indicated that its initial remarks were not tied to the discussion of any potential sanctions. As the Court explained,

> And Mr. Cooper, that's why I hope – the record can't reflect a pause, but you all in the courtroom certainly understood the pause between the comments I had to make, that I made with respect to what I did in examination of the summaries measured against the notes . . . as opposed to the issue of whether this record is ripe for any consideration of sanctions. The purpose of the audible pause was intentional. (1/23/09 Tr. at 43:9-19)

Moreover, the Court's initial remarks preceded the discussion at the hearing about the history behind the order giving rise to the Paragraph 8 summaries, which is critical to understand how Intel understood the scope and purpose of the summaries. As the Court itself recognized, Intel's "comments are certainly helpful to understand [Intel's] view and reasons for [its] reading of preservation issues." (1/23/09 Tr. at 47:14-17).[1]

To summarize some of the key points made at the hearing regarding the history of the March 16, 2007 Order:

- Intel's obligation per the March 16, 2007 Order was to "submit in writing **an updated and final report** regarding the 239 Intel Custodians **for which Intel provided preliminary information to AMD on February 22, 2007**, which will reflect Intel's best information gathered after reasonable investigation, and which shall contain the following information for each such Intel Custodian: ... A detailed written description of the preservation issues affecting that Intel Custodian, including the nature, scope and duration of any preservation issue(s)..."

  What was to be "updated" was a chart Intel had voluntarily provided to AMD on February 22, 2007 as part of its effort to inform AMD about the retention lapses it had discovered. (1/23/09 Hearing Exh. 1.) That chart, which identified preservation issues for most of the 239 custodians that had been selected as production custodians by Intel and AMD, used a legend to note the various types of any lapses for each custodian. It was this chart that AMD wanted updated and finalized and that Intel understood should be the template for the Paragraph 8 summaries. The legend covered by the preliminary chart clearly addressed compliance issues, not everyday deletion habits of custodians. (1/23/09 Tr. at 24:10-25:10.)

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[1] As the Supreme Court has noted: "a position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988). As set forth in its papers, at the hearing, and herein, Intel had such a reasonable basis here.

- AMD's expressed concern – which gave rise to the Paragraph 8 summaries – was whether the custodians were compliant or not. At the March 7, 2007 hearing, which led to the March 16 order, AMD expressed a desire to have information about individual compliance so they would not select a custodian for production with a "null set" Mr. Diamond explained that AMD wanted "information about compliance issues." (3/7/07 Tr. at 26:20 – 27:24.) He explained that "...we're going to need to know who else on our work chart is red – i.e, was noncompliant." (3/7/07 Tr. at 19:18 – 20:2.)

- On April 23, 2007, Intel filed its Report and Proposed Remediation Plan, which contained Intel's first submission pursuant to the provision of the Court's order for the first 239 custodians. The summaries were attached to the Report as Exhibit C, and Intel described what it was providing in those summaries.[2] Additional summaries were provided on April 27, and the remaining hundreds of summaries were provided generally on a weekly basis. Moreover, the format of the Paragraph 8 submissions is such that it is obvious they were summaries. Indeed, the summaries filed May 11 and thereafter were titled "Custodian Summaries."

- The language found in the Paragraph 8 summaries reflects the template of the preliminary chart. Was the custodian compliant? That is, did the custodian receive and follow the retention hold notice instructions? If not, what was the nature of the failure? What was the scope of the failure – did the custodian fail to preserve sent emails only, or both received and sent emails? Did the custodian nevertheless retain emails deemed important for business purposes? What was the duration of the failure – the period of time when the custodian failed to preserve materials? When did the custodian first begin following the hold notice instructions? (1/23/09 Tr. at 30:25-32:16.)

- Pursuant to the March 16, 2007 Order, AMD was obligated to provide its responses to the various disclosures required of Intel, including the summaries, on May 8, 2007. The Order further reserved AMD's right to require additional information about the custodian's preservation issues. (1/23/09 Tr. at 35:6-38:3.)

> "12. On May 8, 2007, and after appropriate FRCP 30(b)(6) and/or written discovery, AMD and the Class Plaintiffs shall submit to Intel and the Special Master their respective responses to **Intel's disclosures** pursuant to this order **and** to Intel's proposed

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[2] *See* 1/23/09 Hearing Exh. 3 at n. 12: "For each of the 239 custodians initially designated by the parties, this Exhibit [C] includes the following information: (1) the custodian's name; (2) whether the custodian was designated by Intel or AMD; (3) a description of the retention issues for each custodian; (4) whether Intel has located Complaint Freeze Tapes for the custodian; (5) whether Intel has created and preserved Weekly Backup Tapes for the custodian, and if so, the first date of such tapes, and (6) the date the custodian's materials were harvested."

plan of remediation." (Emphasis supplied.)

"16. This order is without prejudice to the rights of AMD or the Class Plaintiffs to request the disclosure of additional information from Intel with respect to its evidence of preservation issues...."

- Intel's submissions of its Paragraph 8 summaries were intended to be an iterative process, but AMD never filed a response. AMD never challenged the level of detail in any of the Custodian Summaries. Nor did AMD ever ask Intel to include any specific information it thought should be provided. If AMD thought the summaries were insufficient, it should have made its concerns clear – particularly since they knew that the project was ongoing.

- Intel undoubtedly has provided the most extensive and detailed information about preservation issues ever attempted – much less on such a fast time table. The Custodian Summaries were not the only information Intel undertook to provide to AMD – all in the same time frame. Considerable additional information was provided concerning the preservation issues of each Custodian, including but not limited, to: (1) the identity of Intel Custodians to whom Intel did not deliver litigation hold instructions until 2007 as set out in Intel's March 5, 2007 letter to the Court; and, for each individual, the date on which Intel delivered the litigation hold notice; (2) the identity of those Intel Custodians who had been identified in the Summer and Fall of 2005 to be put on document retention, but whose e-mail data Intel did not migrate by November 2005 to the dedicated servers that were backed up weekly, and for each such custodian, Intel's best approximation of the date on which Intel subsequently migrated the Custodian's data to such dedicated servers; (3) the date on which the journaling/archiving system was successfully implemented as to each Intel Custodian; (4) the date on which the journaling/archiving system was successfully implemented as to each Intel Custodian, and (5) a fully and complete accounting of the weekly backup tapes, on a week by week basis for a 72 week period, for each Intel Custodian.

Intel came forward unprompted and voluntarily informed AMD and the Court of its preservation issues. Intel undertook extraordinary self-initiated steps to do the right thing, and provided volumes of information about its retention missteps - the antithesis of hiding the ball. The notion that Intel would voluntarily disclose preservation issues and turn over massive amounts of information regarding those preservation issues - and then try to hide occasional detail about the retention practices of some 900 custodians - rings hollow.

Intel respectfully asks the Court to keep in mind that Intel not only voluntarily provided AMD with an endless stream of information about its retention lapses, but also voluntarily undertook a massive and hugely expensive program to remediate any retention losses, at its own cost. Intel's conduct in shouldering this burden has been extraordinary and exemplary. In these

circumstances, to impose sanctions on Intel for the decisions of its counsel in summarizing a small number of more than 900 interviews, would be unjust under the circumstances, particularly when AMD never sought the detail they now complain should have been included.

Respectfully,

Richard L. Horwitz

RH/cet
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cc: Clerk of Court (via Hand Delivery)
Counsel of Record (via CM/ECF & Electronic Mail)