

# Exhibit 11



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November 8, 2007

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VIA E-MAIL

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Re: AMD v. Intel

Dear Rich:

This letter addresses the adequacy of Intel's Supplemental Responses and Objections to Plaintiffs' Notice of Taking Deposition and Request for Production of Documents ("Supplemental Response"), served on October 4, 2007.

During our in-person meeting on September 25, 2007, we discussed the fact that Intel's original response, dated May 1, 2007, and subsequent proceedings and discussions, left unclear how and to what extent Intel intended to comply with the "Culpability/Causation" Deposition Topics and Document Requests that AMD propounded on April 24, 2007. We therefore requested, among other things, that Intel supply a Supplemental Response that would: (1) delineate those Deposition Topics and Document Requests with which Intel agrees to comply; (2) delineate the Deposition Topics and Document Requests with which Intel refuses to comply, in whole or part, and the grounds for those refusals; (3) for each Document Request with which Intel intends to comply by a custodian-based production, provide a representation by Intel that such production will be complete; (4) identify the date by which Intel will complete its production of responsive documents; and (5) state whether Intel will provide a privilege log, as requested.

We appreciate your time and effort expended in preparing the Supplemental Response, and believe that the information supplied has provided some of the clarity about Intel's positions in responding to AMD's discovery that we requested. In particular, your identification in response to particular Document Requests of the individuals who possess responsive materials is helpful. This is a positive step forward.

At the same time, Intel's Supplemental Response does not provide all the information requested or, in all instances, the clarity to which AMD is entitled under the Federal Rules.

Some of that lack of clarity is due to what we find to be a rather indecipherable web of cross-references to other documents, undefined qualifiers, and inconsistent representations. In other instances, the responses are drafted in a manner that makes it difficult or impossible to discern whether Intel has promised a complete production in response to our requests -- or precisely what its response is. And there are areas of disagreement on which the parties appear to now be at impasse.

I set forth below AMD's position on all outstanding issues with respect to Intel's Supplemental Response. I begin with general issues of concern, and then turn to specific Deposition Topics, Document Requests and Intel's responses. We ask that Intel respond in writing to each issue identified so that neither party will have to guess at the other's position, we can resolve disputes if possible, and submit the remainder to the Special Master for decision.

### General Issues and Defects in Intel's Supplemental Response

#### 1. Intel's "Retention Custodians" and Representation of Complete Responses

AMD has requested Intel to represent that it will provide a complete and comprehensive production in response to AMD's Document Requests as drafted. Intel's representations are too caveated, modified and unclear to provide the assurance required. We raise two issues on this topic.

The first is Intel's restriction of document production to certain "Retention Custodians." As we have said, a custodian-based document production is acceptable, so long as Intel represents in writing that such a production will be comprehensive. We are in no position to make an independent assessment as to the nature of custodians' preserved materials, the completeness of their files, or their document retention practices. In its General Response to our Document Requests, however, Intel unilaterally has selected -- and states that it will produce documents from -- 17 "Retention Custodians" listed on the Supplemental Response's Exhibit A. Intel says it "believes" that 7 of those Retention Custodians had "the most significant roles with respect to the creation and/or implementation of Intel's *retention plan* . . ." (Supplemental Response at 5.) Intel indicates that the other 10 Retention Custodians are "the individuals in the legal and IT departments of Intel whom Intel has identified to *include the key players* in the creation and implementation of the *retention plan* . . ." (*Id.* at n.1.)

Intel appears to be using these modifiers to limit its production obligations. AMD's document requests -- and Pages 1 through 30 of Intel's Report and Proposed Remediation Plan to which AMD must respond -- cover topics far beyond Intel's original "retention plan." *See, e.g.*, Intel's Report and Proposed Remediation Plan, at 19 ("In the Fall of 2006, Intel discovered some lapses in the implementation of the *document retention program* it developed after this action was filed. *These errors were independent of the plan itself* . . ."). Likewise, Intel's statement that the 10 employees "include the key players" in creation and implementation of the "retention plan" is not a representation that all relevant custodians with responsive documents are included; instead, Intel expressly states that they are not. (*See* Supplemental Response, n.1 at 5.)

In addition to "retention plan" issues, the discovery that AMD seeks, and to which it is entitled, includes, among other things, information as to who discovered Intel's preservation lapses, when that discovery was made, what data was lost, and what Intel did after discovering its preservation lapses. Intel's designated "Retention Custodians" must, therefore, include the individuals who discovered and investigated the lapses in Intel's preservation scheme. And the production of documents from the custodians must constitute a comprehensive response to all of the requests as drafted, not as modified by these undefined terms Intel has used.

The second issue on this topic is Intel's self-adopted time limitations. In Exhibit A, Intel states that it will restrict its search and production of documents to specific time periods, but fails to provide any representation that all documents responsive to AMD's Document Requests were sent, received or created within the specified time periods. Notably, Intel did *not* provide such date restrictions for Eva Almirantearena, Winston Kiang, Roy Batista, Daiji Toya, or Kelly Wright, other than to specify that Ms. Almirantearena's and Mr. Batista's productions will include documents created only through March 2007. The remainder of the custodians *are* date-restricted, most of them to two time periods of collectively 9 months over three years.<sup>1</sup> These unexplained temporal limitations unaccompanied by a representation that all responsive documents were sent, received or created within Intel's self-selected time windows are not acceptable.

If Intel's intent is, in fact, to provide a comprehensive production in response to AMD's Document Requests, we assume it is prepared to make a clear representation to that effect. Failing appropriate representations as to the custodians whom Intel has unilaterally selected, we cannot be expected to accept Intel's custodian-based production as sufficient. Please consider making the following representation: "Intel believes in good faith after reasonable and diligent investigation that the 'Retention Custodians' identified on Exhibit A: (1) are the most important custodians with knowledge of, and documents responsive to, the information sought by AMD's 'Causation/Culpability' Document Requests; (2) are believed to have the most documents responsive to AMD's 'Causation/Culpability' Document Requests; (3) are in possession of all of the documents which, taken together, constitute a comprehensive response to AMD's 'Causation/Culpability' Document Requests; and (4) sent, received or created all documents responsive to AMD's 'Causation/Culpability' Document Requests within the time frames specified by Intel in Exhibit A."

## 2. Limited Document Production From Certain Retention Custodians

Intel states that, as to 10 of the Retention Custodians, it will produce only "those documents that are most likely to contain material, non-duplicative information regarding the 'Causation/Culpability' requests." (Supplemental Response, at 5.) There is either a typographical error in this sentence, or it seems obfuscatory. What does this mean? If it is

<sup>1</sup> Intel also states that it will produce documents outside the specified time periods that contain the phrase "SO3." (Supplemental Response, at 59.) It thus appears that Intel is using search terms on the corpus of custodian documents, rather than reviewing them all, and plans to withhold otherwise responsive documents merely because they do not contain that phrase. This is unacceptable, at least without explanation as to why we should accept this.

intended to signal that Intel is not conducting a comprehensive review of these ten custodians' files and then producing all responsive materials found in them, we cannot accept this.<sup>2</sup> Please explain. In all events, AMD neither agrees with Intel's proposed limitation on the production from these 10 Retention Custodians, nor understands how Intel could possibly know without reviewing all the documents which are "most likely" to contain responsive information.

### 3. Intel's "Contemporaneously-Created" Production Limitation

In the majority of its responses to specific requests, Intel identifies those Retention Custodians it believes to have an appreciable quantity of "*contemporaneously-created* relevant documents," and states that it "has produced and/or will produce additional *contemporaneously-created*, non-privileged responsive documents" obtained from those Custodians. We do not understand what Intel means by this, nor why any such limitation is appropriate. From all appearances, we have to assume that this limitation has been inserted in order to justify withholding responsive documents solely on the basis that they were *not* "contemporaneously created," or to avoid producing responsive documents from Intel personnel who are in possession of them but did not generate or receive them "contemporaneously." In either case, this limitation is unacceptable without sufficient explanation and justification.

### 4. Intel's Use of the Term "Collection" to Limit its Response Obligation

We are unable to ascertain from Intel's Supplemental Response whether and to what extent Intel is producing only those responsive documents located in the "Collection" (also known as the "Investigation Documents"), or whether Intel has conducted a diligent search for *all* documents responsive to each request, whether or not they comprise part of the "Collection" compiled by Intel during the investigation into its retention issues. The Supplemental Response repeatedly interjects this ambiguity in its Exhibit A and in response to particular requests, leading us to believe that Intel is intentionally limiting its production to only these "Collection" documents that were gathered before AMD's Document Requests were even served and which were not collected with AMD's requests in mind.

Two examples will illustrate the problem this poses. First, AMD's Document Request No. 8 requests production of "Documents sufficient to show the 'basic form of notice that had been used in previous Intel litigation,' as referenced on page 2 of Intel's March 5, 2007 letter to the Court." Intel originally responded that it would produce responsive documents from the "Collection." Its Supplemental Response incorporates the original response by reference but goes on to identify certain custodians who possess responsive documents. The problem with all of this is that, based on what you have told us and what we have seen, there do not appear to be *any* responsive documents produced to us from the "Collection" and, indeed, you stated at our September 25 meet and confer session that Intel will *not* produce those documents. And Intel has responded to AMD's Deposition Topic No. 10 -- which seeks information about Intel's

<sup>2</sup> Specifically, if it is intended to signal that Intel is relying entirely on the use of search terms to identify responsive materials in the Custodians' files and disclaiming its production responsibilities otherwise, we do not accept this without further explanation and details.

litigation hold practices in other cases -- by refusing to produce a witness to testify. We are left, therefore, with a response that might or might not be read as promising compliance, while everything else you have written or said refuses it. Please clarify.<sup>3</sup> If Intel does not intend to comply with this request, as we take to be the case and as it has thus far failed to do, we are entitled to a clear statement to that effect, rather than promises of compliance from a particular source that contains nothing responsive.

Second, Intel's Supplemental Response to Document Request No. 4 -- which seeks documents sufficient to describe Intel's "tiered" retention process -- expressly states that Intel will produce documents only from the "Collection." We see no basis for such a limitation, and are left wondering whether that limitation is intended to avoid providing us a full and complete response, especially since no Retention Custodians are identified.

This problem is pervasive. Intel's original responses promising a "Collection" production are incorporated by reference in Intel's Supplemental Responses to AMD's Document Request Nos. 4, 5, 7, 8, 9, 10, 19, 20, 21, 22, 24, 26, 30, 31, 32, 34, 35, 36, 37, 38, 39 and 42. We have been provided with no representations that would justify limiting Intel's production to materials contained in the "Collection," especially now that we have seen that it is far less than advertised. Perhaps this is a non-issue. To assure that is so, we request that Intel clarify, on a request by request basis if necessary, that it has searched all potentially responsive files of the Retention Custodians, has produced all responsive documents located in those files, and has not limited its production to responsive documents found in the "Collection."

#### 5. Intel's Failure to Identify Custodians and Interjection of New Custodians

Two issues: First, in contrast to most of its Supplemental Responses, Intel did not identify the individuals who possess the documents responsive to Document Request No. 4 (concerning Intel's "tiered process to identify and preserve potentially relevant paper and electronic records"), Document Request No. 33 (concerning steps taken by Intel after discovering its failure to timely provide Litigation Hold Notices), and Document Request No. 38 (concerning when and how Intel learned of each of the "inadvertent mistakes in implementation" of its "tiered preservation process"). We request that Intel do so.

Second, we appreciate that, in response to particular requests, Intel has identified document custodians in addition to those "Retention Custodians" it lists in Exhibit A. Those responses and new custodians are: (1) Document Request No. 26, Steve Owen (Intel states that it will produce one responsive document); (2) Document Request No. 30, Georg Fisch and Bernd Sprank; (3) Document Request Nos. 35, 26 and 37, Mark Friedman, Benoit Philippe, Francis Dulce, Jim Jeffs and May Wong; and (4) Document Request Nos. 25, 27 and 45, as to which Intel promises production from "other IT sources" not yet identified to us.

<sup>3</sup> Intel's response to Document Request No. 7 is similar. Intel originally promised production from the "Collection" and to produce a "list of each Custodian who received each [Litigation Hold] notice." The Supplemental Response incorporates that response and then promises a custodian-based production. We cannot discern, and therefore request that Intel clarify, what documents will be produced in response to Document Request No. 7.

We cannot tell what Intel will produce from these custodians and sources or who they are. Accordingly, please state whether Intel intends to produce all responsive documents from the files of these eight, specifically-named custodians. Please also identify the "other IT sources" Intel refers to and what the production will consist of from those sources.<sup>4</sup> We also would appreciate Intel providing a description of these individuals' jobs and role in Intel's evidence preservation problems as it has done for the Retention Custodians in Exhibit A.

**6. Document Production Deadline**

We have asked when Intel intends to complete its production of documents responsive to AMD's "Causation/Culpability" Document Requests. At our meet and confer on September 25, we agreed not to hold you to the court-ordered September 28 production deadline based on your assurance that all responsive documents would be shortly forthcoming. You later said Intel's production would be completed by October 12. Subsequently, you again pushed back your expected completion date, this time to October 31. See Email from Richard Levy to James Pearl and David Herron (Oct. 19, 2007 2:20 PM). Most recently, you indicated that your production will not be complete until sometime in December. See Letter from Richard Levy to Mark Samuels (Nov. 7, 2007). While we appreciate Intel's re-review of its productions in light of the improper redactions it made, we do not think another month of delay is warranted or appropriate under the circumstances. We ask that the production be completed no later than November 15, 2007. That represents a six week extension of a negotiated court-ordered completion date.

**7. Intel's Privilege Logs**

Just to confirm, Intel has now agreed to provide a privilege log of all the Investigation and Causation/Culpability documents it fully withheld from its productions. See Letter from Richard Levy to James Pearl (Nov. 5, 2007); Letter from Richard Levy to Mark Samuels (Nov. 7, 2007). For documents that it produced in redacted form, Intel promised to provide the "header" information so that the senders, recipients, dates, and subject matters would be available. These limitations are acceptable to us, and we appreciate your efforts in this regard. Please let us know when we can expect to receive the privilege logs.

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<sup>4</sup> Please also identify the AMD Document Requests to which the documents of Tom Cunin, Marc Foster and Alan Stainer are responsive, since none of those "Retention Custodians" are mentioned in Intel's specific responses.

Issues Concerning Intel's Specific Responses to Document Requests and Deposition Topics

1. Intel's Responses to Document Requests

The following are Document Requests over which the parties have been negotiating in good faith for the past several months, but as to which we appear to be at an impasse. We believe it appropriate to bring these issues to the attention of the Special Master at the earliest available opportunity.

• Document Request Nos. 1, 2, 3, 40 and 41. Intel has refused to comply with Document Request No. 1 (concerning Intel's standard corporate evidence preservation policies and practices); Document Request No. 2 (concerning Intel's automatic deletion policies and practices); Document Request No. 3 (concerning how Intel's automatic deletion policies and practices have operated with respect to the email of each Intel Custodian); Document Request No. 40 (concerning the nature, timing and details of Intel's "preliminary review"); and Document Request No. 41 (concerning the nature, purpose and timing of the investigation reflected in Intel's February 22, 2007 draft spreadsheet).

AMD believes that Intel should comply fully with these document requests, all of which are directly relevant to Intel's document preservation lapses. Intel itself has put these matters directly at issue. *See, e.g., Intel's Report and Proposed Remediation Plan*, at 4 ("Intel's intentions and plans were ambitious and laudable. Its missteps were the result of human error in attempting a challenging task . . ."); Letter from Richard Horwitz to the Hon. Joseph Farnan, at 2 (Mar. 5, 2007) ("Intel also sent litigation hold notices to hundreds of employees . . . instructing them to retain all relevant documents, broadly defined, including email. . . . *The basic form of notice had been used in previous Intel litigation.*"). Thus, contrary to Intel's assertions, this information is well within the scope of both the Order Regarding Intel's Evidence Preservation Issues, entered on March 16, 2007, and the Stipulation and Order Bifurcating Discovery into Intel's Evidence Preservation Issues, entered on June 20, 2007 (which states that AMD is entitled to "discovery as to other matters related to Intel's evidence preservation issues, including that which will enable plaintiffs to respond to the assertions made by Intel at pages 1-30 of its Remediation Plan.").

We also consider the date restrictions that Intel proposes on its production of documents concerning Intel's auto-delete policies (Document Request Nos. 2 and 3) improper. Intel's prior practices, not just those in this litigation, are relevant to determining whether Intel's preservation plan was as responsible and "laudable" as Intel proclaimed in pages 1-30 of its Report and Proposed Remediation Plan. Moreover, in response to Document Request No. 3, Intel states that it will provide in summary form the known mailbox retention policies *as of May 2005* for each Intel custodian. Documents Intel has produced show that Intel's IT Department altered mailbox retention policies for Custodians *after* the filing of the Complaint, a fact that is relevant (and potentially a contributor) to Intel's preservation issues. Thus, AMD does not agree to Intel's proposed date restrictions.



With respect to Document Requests Nos. 40 (concerning the nature, timing and details of Intel's "preliminary review") and 41 (concerning the nature, purpose and timing of the investigation reflected in Intel's Feb. 22, 2007 draft spreadsheet), Intel has refused to produce any responsive documents on grounds of privilege. In my September 13, 2007 letter to you, however, we offered to accept summaries in the form of interrogatory responses for these requests. This would allow Intel to provide only the facts concerning Intel's discovery and investigation of its document preservation issues, which are not privileged, while withholding protected attorney-client communications and core work product. See *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir. 1994) ("Facts are discoverable, the legal conclusions regarding those facts are not. A litigant cannot shield from discovery the knowledge it possessed by claiming it has been communicated to a lawyer; nor can a litigant refuse to disclose facts simply because that information came from a lawyer."). Disclosure of this information is expressly required by the Court's March 16, 2007 Order, which states, "AMD and the Class Plaintiffs have requested Intel to voluntarily disclose the date(s) on which Intel or its counsel learned of the preservation lapses, failures or deficiencies identified in response to Paragraphs 6, 7 and 8 with respect to each Intel custodian. The parties shall meet & confer to establish a timetable for Intel disclosure, and whether Intel will do so voluntarily or through discovery." We therefore renew our request that Intel provide factual summaries in response to these requests.

We seek clarification on Intel's responses to the following Document Requests.

\* **Document Request No. 7:** As noted above, Intel's original response stated that Intel will produce a list of each Custodian who received each Litigation Hold notice. Please tell us whether or not Intel intends to do so now.

\* **Document Request No. 16:** Intel's original response, incorporated by its Supplemental Response, promises both a written summary or document production and states that "Intel continues to search for non-duplicative relevant documents." We take this to mean that both a summary (which would be helpful) and documents will be produced. Please confirm, and identify from or in what source additional relevant documents have been located, if any.

\* **Document Request No. 27:** This request seeks documents concerning Intel's disaster recovery backup systems protocols and procedures, "including backup tape structure and design, backup tape rotation schedules and protocols, backup tape retention policies and practices, and backup tape restoration protocols." Intel's proposed time limitation to 2005 and 2006 is acceptable. But Intel recharacterizes this request in a way that appears to be intended to narrow its scope and thus avoid production of the materials sought. Please state whether and to what extent Intel is refusing to produce the documents requested and, if so, on what ground.

\* **Document Request No. 45:** Intel has responded to this request in the same manner as it did in response to Document Request No. 27: By restating the request in an apparent effort to narrow its scope and, thus, its response burden. Please state whether Intel is refusing to produce all responsive documents and, if so, on what ground.

• **Document Requests to which Intel will respond with a written summary:**

Intel originally agreed to provide written summaries in response to Document Request Nos. 2, 13, 23, 25, 27, 28, 33 and 45. (See Intel's Response; Email from Richard Levy to David Herron and James Pearl (Sept. 26, 2007 5:48 PM).) In its Supplemental Response, we understand Intel to have now withdrawn its commitment to provide written summaries for most of these requests and, instead, to now be willing to provide written summaries only in response to Document Request Nos. 3, 13, 16 and 33. Please confirm that our understanding is correct. Because Intel has backtracked on its prior promises to provide narratives, we ask that you identify the specific documents Intel has produced in response to Document Request Nos. 2, 23, 25, 27, 28, and 45. Furthermore, please let us know when we can expect to receive written summaries in response to Document Request Nos. 3 and 16.

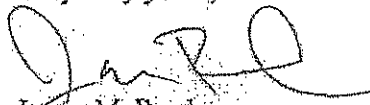
2. **Intel's Responses to Deposition Topics**

• **Deposition Topic Nos. 1, 2, 10 and 11:** We have negotiated on these Deposition Topics for several months, and consider the parties at an impasse. We intend to bring them to the attention of the Special Master at the earliest available opportunity. Intel has responded by refusing to produce witnesses to testify on portions of Deposition Topic No. 1 (concerning Intel's standard corporate evidence preservation policies and practices) and Deposition Topic No. 2 (concerning Intel's corporate "auto-deletion" policies and practices), or on the entirety of Deposition Topic No. 10 (concerning differences, deviations or discrepancies between Intel's Litigation Hold Notice activities and monitoring efforts in this litigation and its standard or customary practices) and Deposition Topic No. 11 (concerning Intel's "\$10 million discovery management program). We believe AMD is entitled to this discovery for the reasons outlined above with respect to these topics' corresponding Document Requests. If Intel has reconsidered its position, please advise.

• **All Other Deposition Topics:** We understand Intel to have agreed to produce witnesses to testify on the remaining topics as drafted. We have been asking for proposed deposition dates and renew that request now.

It appears, however, that the parties are at impasse on Document Requests 1, 2, 3, 40 and 41 and Deposition Topics 1, 2, 10, and 11. We are hopeful that most of the remaining issues in this letter can be resolved between the parties and we look forward to hearing back to you on those.

Very truly yours,



James M. Pearl  
for O'MELVENY & MYERS LLP

# Exhibit 12

# GIBSON, DUNN & CRUTCHER LLP

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## VIA E-MAIL

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Dear Bo:

Thank you for your November 8, 2007, letter concerning Intel's Supplemental Responses and Objections to Plaintiffs' Notice of Taking Deposition and Request for Production of Documents (the "Supplemental Response"), which Intel served on October 4, 2007. We address each of the general and specific issues you raise herein.

In the meantime, and as you know, Intel (which, for purposes of this letter, means the company and/or its outside counsel) produced on October 31, 2007 a re-reviewed, electronic set of the Investigation Documents, which were previously produced to AMD in paper form on August 30, 2007. Intel took the opportunity to re-review these documents to ensure that redactions of these documents were as narrow as could be made consistent with the protections of the attorney-client privilege and core work-product doctrine. Additionally, as requested in your letter of November 1, Intel is conducting a similar re-review of the nearly 9,000 additional documents constituting the balance of the material produced to AMD pursuant to the "Causation/Culpability" document requests. Intel is devoting substantial resources toward this effort and expects that the re-review will be completed, and the relevant documents produced to AMD, by the beginning of December.

## **BACKGROUND.**

In preparing its April 23, 2007 Report to the Special Master, Intel identified 17 people in its legal and IT departments from whom to collect documents. Although some of these individuals had more significant roles than others, this group – called the Retention Custodians

GIBSON, DUNN & CRUTCHER LLP

James M. Pearl, Esq.  
November 21, 2007  
Page 2

on Exhibit A to the Supplemental Response – includes the Intel personnel who had the most significant roles in the creation and implementation of Intel's retention plan (a phrase we elaborate on below).

To identify which documents from the Retention Custodians' files were likely to be responsive to AMD's requests, Intel focused on the time frames that the individuals were actively involved in the retention process. As set forth in Exhibit A to the Supplemental Response, that time period varied from custodian to custodian. For example, for the legal custodians that had the most prominent roles in the day-to-day management of the litigation and retention process – Ms. Almirantearena and Mr. Batista – Intel reviewed all of the documents in their files relevant to the retention issues through January 2007 (and later additionally reviewed their documents through March 2007).

For the IT Retention Custodians, Intel focused its document review on the time periods during which its IT department was actively involved in assisting Intel Legal with the document retention process. Those activities were centered around three main tasks: (i) the Complaint Freeze Tape process in June and July 2005; (ii) the Weekly Backup Tape process, which began in the Fall of 2005; and (iii) various efforts to assist Intel Legal with retention issues starting around October / November 2006. As such, Intel collected and reviewed the email and loose e-files from the IT Retention Custodians that fell within two broad timeframes: 6/27/05 to 1/31/06, and 10/1/06 to late January 2007. Additionally, to ensure that any Weekly Backup Tape-related documents circulated by or among the IT Retention Custodians during the interim period – namely 2/1/06 through 9/30/06 – were captured and reviewed, Intel performed a keyword search for the abbreviation "SG3," which stood for "Storage Group 3," one of the primary ways the IT Retention Custodians referred to the Weekly Backup Tape process.<sup>1</sup>

The total volume of Retention Custodian documents Intel initially reviewed exceeded 200,000. Because that volume was so large, and in order to focus on the more important documents for purposes of preparing its Report to the Special Master, Intel separated the documents on first review that appeared relatively important to the retention issues in this case from those that appeared duplicative or unimportant. In making this cut, Intel did not differentiate between those documents reflecting positively on Intel's retention efforts and those that may not. Those documents that were important – whether "good" or "bad" for Intel – became known as the Investigation Documents. It is those documents that were the basis of Intel's Report to the Special Master, and which Intel first produced to AMD in paper form on

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<sup>1</sup> For the relevant time periods, Intel read each document in the files of the Retention Custodians. It did not (as questioned in note 1 of your letter) limit its review to search term "hits." Intel searched for the term "SG3" only as a supplement to its document review.

## GIBSON, DUNN & CRUTCHER LLP

James M. Pearl, Esq.  
November 21, 2007  
Page 3

August 30th, and which Intel re-produced (with substantially fewer redactions) in electronic form on October 31st.

After its initial production of the Investigation Documents, Intel determined to make a more exhaustive production from the subset of Retention Custodians who were primarily involved in Intel's document retention efforts – Almirantearena, Batista, Olson, Smith, Clark, and Stokes. (After receiving your September 13th letter, Intel expanded the group to include a seventh Retention Custodian mentioned in that letter, Kelly Wright, although Intel does not believe Ms. Wright was central to the retention process). Intel re-reviewed the harvested files of these custodians (for the relevant date ranges) and produced from those files all of the documents that it believed to be relevant to the retention issues, even if unimportant or duplicative. That set consisted of approximately 9,000 documents.

Hopefully, this background explains some of the terminology used on pages 5-6 of Intel's Supplemental Response. From the files of the seven key custodians identified in the paragraph above, Intel believes that it has "made reasonable efforts to produce (subject to the date ranges on Exhibit A and to claims of attorney-client privilege and work product protection, and without collecting documents in the custody of Intel's outside counsel) all documents responsive to AMD's "Causation/Culpability" document requests." [See Supplemental Response at 5 (emphasis added)]

For the other ten Retention Custodians, Intel has not conducted a similar re-review of their files. It has not done so because those custodians are of substantially lesser importance to the retention issues. The relatively important documents from those custodians were, however, produced as part of the Investigation Documents. More technically, as set forth in the Supplemental Response at 5, Intel has produced from the files of those ten custodians (subject to the privilege and date range restrictions) "those documents that are most likely to contain material non-duplicative information regarding the 'Causation/Culpability' requests."

### **GENERAL ISSUES**

We now turn to the "General Issues" and purported "Defects" raised in your letter.

#### **Representation of Complete Response**

Your letter questions whether the "modifiers" used in Intel's Supplemental Response – and in particular its reference to "key players" and the "retention plan" – somehow suggest that Intel has attempted to "limit its production obligations." They do not. Rather, Intel believes that its productions "constitute a comprehensive response reflecting the information Intel reasonably believes to be most material to [AMD's 'Causation/Culpability'] requests, subject to the privileges involved." [Supplemental Response at 6]

GIBSON, DUNN & CRUTCHER LLP

James M. Pearl, Esq.  
November 21, 2007  
Page 4

Nor do the date range-restrictions used by Intel undermine the comprehensiveness of its response. As discussed, those ranges were chosen because they reflect the periods during which the relevant custodians were actively involved in the retention process.

As to the representation you request on page 3 of your November 8 letter, Intel is prepared to represent as follows:

Intel believes after reasonable and diligent investigation that the "Retention Custodians" identified on Exhibit A: (1) include the Intel personnel with the most substantial contemporaneous knowledge of, and who possess the most material, non-privileged<sup>2</sup> documents that were contemporaneously sent or received that are responsive to, the information sought by AMD's "Causation/Culpability" Document Requests; (2) include the Intel personnel in possession of the most material, non-privileged documents which, taken together, constitute a comprehensive response to AMD's "Causation/Culpability" Document Requests; and (3) sent, received or created the most material, non-privileged documents responsive to AMD's "Causation/Culpability" Document Requests within the time frames specified by Intel in Exhibit A.

**Limited Document Production from Certain Retention Custodians**

Your letter questions the scope of Intel's production from the ten Retention Custodians for whom Intel did not conduct the same re-review as it did for the other seven. The Background section above should answer that question. But to be clear, Intel did not (as questioned in note 2 of your letter) rely on search terms to identify responsive materials from those custodians. [See note 1, above] Intel read each document from the relevant date ranges and produced those that were material and non-duplicative. Given the less important role of those custodians, and the amount of time and expense involved in the review effort, Intel concluded that the documents from these ten custodians included in the Investigation Documents were sufficient – when combined with the productions from the other seven Retention Custodians – to give a comprehensive response to AMD's "Causation/Culpability" requests.

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<sup>2</sup> "Non-privileged," as used herein, means not protected by the attorney-client privilege or core-work-product doctrine.

James M. Pearl, Esq.  
November 21, 2007  
Page 5

### **The “Contemporaneously-Created” Production Limitation**

Your letter asks about the use of the phrase “contemporaneously created” in describing the retention documents Intel has produced. By that phrase, Intel means to make clear that it is not producing privileged or core-work product documents created as part of counsel’s “after-the-fact” analysis of the retention lapses. On the other hand, Intel is not using this phrase as a basis for withholding any relevant, non-privileged documents that were created as part of its retention efforts (including its potential retention lapses). Thus, for example, Intel is not producing any privileged documents from the files of inside counsel Jo Levy – who was assigned to this matter after Intel discovered the retention issues and who had not had any previous involvement in this litigation – that concern her work with outside counsel in reviewing the underlying issues. On the other hand, Intel is not withholding relevant, non-privileged documents simply because they were later forwarded to Ms. Levy as part of her assignment.

### **Intel’s Use of the Term “Collection”**

You have also expressed confusion about use of the term “Collection.” As used in Intel’s original response to AMD’s “Causation/Culpability” document requests, its original Exhibit A, and its new Exhibit A attached to the Supplemental Response, the term “Collection” is synonymous with the Investigation Documents. However, Intel’s “Causation/Culpability” document production is *not* limited to the original Investigation Documents, but now includes (a) the re-reviewed and (on October 31, 2007) re-produced Investigation Documents, and (b) the nearly 9,000 additional “Causation/Culpability” documents that Intel has already produced (and that, by the beginning of December, Intel will re-produce after a further privilege review). Accordingly, Intel’s “Causation/Culpability” document production is not limited solely to the “Collection” or the Investigation Documents, but rather includes all of these additional documents.

Your letter raises questions about some specific documents:

- Request No. 8 & Topic No. 10: As noted in the Supplemental Response, Intel has already produced the basic form of notice used in previous Intel litigation that served as the model for the original document hold notice in this case. [See Document No. 69412DOC0002551] Intel stands by its refusal to produce privileged communications and work product from other cases.
- Request No. 7: Intel has already produced the hold notices for the Custodians that were distributed through approximately the end of July 2007. Because each hold notice, on its face, shows the recipients of the notice, it should be unnecessary to prepare separately a list of each Custodian who received each



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James M. Pearl, Esq.  
November 21, 2007  
Page 6

notice (even though a partial list containing such data was included with Intel's Report to the Special Master).

- Request No. 4: Intel's "tiered" retention process is described in the Investigation Documents and in the other approximately 9,000 "Causation/Culpability" documents that have been produced.

### **Identification of Custodians and Interjection of New Custodians**

We respond to the two issues raised in this section of your November 8 letter in reverse order.

In connection with a limited number of "Causation/Culpability" document requests, Intel does not believe that the 17 Retention Custodians possessed sufficient responsive documents to provide a comprehensive response. In those cases, Intel's Supplemental Response indicates the additional custodians to whom Intel looked for responsive documents. Those custodians include:

- Steve Owen. Mr. Owen is a Server Analyst based in Swindon, England. As noted in Intel's Supplemental Response to Request No. 26, Mr. Owen provided one relevant document in connection with the recycling of Weekly Backup Tapes by Europe Intel's IT department.
- Georg Fisch and Bernd Sprank. Mr. Fisch is Managing Attorney for the EMEA (Europe, Middle East, and Africa) Business and Technology Legal Team at Intel. Mr. Sprank is a Senior Network Specialist in Intel's Greater European LAN Operations Group. As noted in Intel's Supplemental Response to Request No. 30, Messrs. Fisch and Sprank provided additional relevant documents concerning the recycling of Complaint Freeze Tapes at Intel's Munich, Germany facility.
- Mark Friedman, Benoit Philippe, Francis Dulce, Jim Jeffs, and May Wong. Messrs. Friedman (Associate General Counsel and Director, Worldwide Sales Legal), Philippe (Managing Attorney, Sales & Marketing Group (Europe, Middle East & Africa), and Jeffs (Managing Attorney, Sales & Marketing Group (Asia-Pacific) are in-house attorneys at Intel; Ms. Dulce is a Litigation Paralegal at Intel; and Ms. Wong is an Administrative Assistant in Intel's Asia-Pacific legal department. As noted in Intel's Supplemental Response to Request Nos. 35, 36, and 37, these custodians provided additional relevant documents concerning Intel's efforts to retain the data and documents belonging to departing Intel employees.

GIBSON, DUNN & CRUTCHER LLP

James M. Pearl, Esq.  
November 21, 2007  
Page 7

- Other IT Sources. Intel included the phrase "other IT sources" in its Supplemental Response to Request Nos. 25, 27, and 45 to indicate that the specifically named custodians in those responses – including Perry Olson, Dorr Clark, Curtis Smith, and William Stokes – may need to gather responsive documents from corporate sources beyond their personal files.
- Tom Cunin, Marc Foster, and Alan Stainer. These IT personnel are among the 17 Retention Custodians, and documents found within their collections are included in, and generally support, the Investigation Documents. If you have questions regarding one of their specific documents, please let us know, and we will be happy to meet and confer regarding same.

As to the other issue you raise, Intel did not identify any individuals in possession of documents responsive to Request No. 4 because the Investigation Documents, as supplemented by the additional nearly 9,000 "Causation/Culpability" documents, represent Intel's response to that request. As to Request No. 33, Intel has already responded with a summary of information in the form of an interrogatory response. And, as to Request No. 38, Intel stands on its response.

**Production Deadline for Re-Review of the Nearly 9,000 Documents**

Intel is working diligently on the re-review of the nearly 9,000 "Causation/Culpability" documents (as requested in your November 1st letter), but given the volume of documents, we do not expect the re-review and production to be complete earlier than as discussed above.

**Privilege Logs**

We are in agreement. Intel has now provided AMD with a log of those documents fully withheld from the Investigation Documents. The log for the fully withheld documents from the re-reviewed set of nearly 9,000 documents will be produced by December 14, 2007.

**SPECIFIC ISSUES**

**Responses to Specific Document Requests**

We comment on the following, specific document requests in the order presented.

- Request Nos. 1, 2, 3, 40, and 41. Intel stands on its Supplemental Responses to these topics. We do note, however, that Intel has produced documents responsive to Request Nos. 2 and 3. Moreover, as to Request No. 3, Intel has produced a document in the form of an Excel spreadsheet that provides, in summary form, the known mailbox retention policies as of May 2005 for each Intel Custodian. Such information is not readily available in summary form,

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James M. Pearl, Esq.  
November 21, 2007  
Page 8

and that is the best such summary Intel has been able to locate to date. Request Nos. 40 and 41 seek privileged attorney-client communications and core work product, which (as noted in the Supplemental Response) Intel is not willing to waive. However, as evidenced by (i) the spreadsheet provided to AMD on February 22, 2007 (which is the subject of Request No. 41), (ii) the exhibits to Intel's Report to the Special Master, and (iii) the other documents produced by Intel in response to AMD's "Causation/Culpability" document requests, Intel is not withholding from AMD the underlying facts discovered by the investigations and reviews referred to in Request Nos. 40 and 41, only the privileged attorney-client communications and core work product regarding same.

- Request Nos. 7, 16, 27, and 45. As noted above, Intel has produced the hold notices for the Custodians that were distributed through approximately the end of July 2007. The face of each notice shows the recipients of the notice, making a list of the Custodians who received each notice in response to Request No. 7 unnecessary. Regarding Request No. 16, Intel stated that it will either "provide a summary of information in the form of an interrogatory response . . . or provide documents sufficient to evidence the results of the beta test of the EMC system," and Intel has elected to produce documents in lieu of a summary. Finally, Intel has produced documents that it believes address Requests 27 and 45. If you have specific questions regarding the responsiveness of any given document, please let us know.
- Requests Responded to by Written Summary. Intel has already provided AMD with written summaries in response to Request Nos. 13 and 33, and a document in the form of an Excel spreadsheet in response to Request No. 3 (which provides, in summary form, the known mailbox retention policies as of May 2005 for each Intel Custodian). As noted above in connection with Request No. 16, Intel stated that it will either "provide a summary of information in the form of an interrogatory response . . . or provide documents sufficient to evidence the results of the beta test of the EMC system," and Intel has elected to produce documents in lieu of a summary. As to the balance of the requests noted in this section of your letter, Intel already has

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James M. Pearl, Esq.  
November 21, 2007  
Page 9

produced documents that are responsive.<sup>3</sup> Again, if you have specific questions regarding specific documents, please let us know.

**Responses to Specific Deposition Topics**

Likewise, we comment on the following, specific deposition topics in the order presented.

- Topic Nos. 1, 2, 10, and 11. Intel stands on its Supplemental Responses to these topics. We do note, however, that as to Topic No. 1, Intel has agreed to provide a Rule 30(b)(6) witness to testify about non-privileged information concerning its evidence preservation policies and practices as applied in this case, and as to Topic No. 2, Intel will allow a 30(b)(6) witness to testify concerning non-privileged information about its auto-delete policies, as applied to email and other electronic data, and any suspension or deviation from these policies in connection with this litigation.
- Other Deposition Topics. Mark Samuels and I have been corresponding separately about the depositions. We have exchanged potential deposition dates for Eva Almirantearena and Perry Olson, and we are awaiting confirmation from Mark as to AMD's availability.

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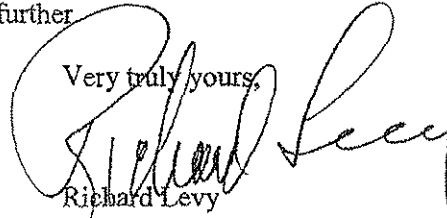
<sup>3</sup> For some examples of documents responsive to Request Nos. 2, 25, 27, and 45, see the documents produced in native form bearing native production numbers 68902-000005 through 68902-000010. Documents responsive to Request Nos. 23 and 28 are voluminous and are present throughout both the Investigation Documents collection and the additional 9,000 "Causation/Culpability" documents.

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James M. Pearl, Esq.  
November 21, 2007  
Page 10

We trust this letter addresses the issues you raised. Again, we are available to sit down with you to discuss any of these issues further.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Richard Levy". The signature is written in black ink and is positioned above the printed name "Richard Levy".

Richard Levy

RPL/rag

cc: Robert E. Cooper  
Kay E. Kochenderfer

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James M. Pearl, Esq.  
November 21, 2007  
Page 11

bcc: Jo Levy  
Jim Hunt  
Joel Nomkin  
Chris Schultz  
Tom Dillickrath  
Dan Floyd

100342610\_1.DOC

# Exhibit 13

**EXHIBIT 13**  
**REDACTED IN ITS ENTIRETY**



# **Exhibit 14**

# BINGHAM

Donn F. Pickett  
Direct Phone: 415.393.2082  
donn.pickett@bingham.com

June 9, 2009

## Via Email and U.S. Mail

David L. Herron, Esq.  
O'Melveny & Myers LLP  
400 South Hope Street  
Los Angeles, CA 90071

Re: *AMD v. Intel* – Meet and Confer (6-2-09)

Dear David:

This letter responds to your letter of June 5, 2009, in which you attempted to summarize the parties' telephonic meet and confer on June 2, 2009. We disagree with several statements in your letter and will restate our positions here to avoid further lack of clarity between the parties.

**AMD's 30(b)(6) Notice.** AMD recently served a Rule 30(b)(6) deposition notice including ten topics and ten document requests, which you acknowledge was a direct response to Intel's recent discovery into AMD's document preservation. With the exception of the parties' agreement to mutually withdraw requests for discovery on late document productions (as confirmed by email on June 4, 2009), the meet and confer did not resolve our disagreement over the propriety of AMD's requests.<sup>1</sup> Intel stands on its stated responses and objections, and we will not repeat them here – except to note as we did during the meet and confer that AMD's discovery requests violate the June 20, 2007 Stipulation and Order Bifurcating Discovery into Intel's Evidence Preservation Issues ("Bifurcation Order"), and that AMD either has already conducted discovery on these topics or had an opportunity to do so.

During the meet and confer you asked us to represent that Intel's prior document productions fully responded to AMD's current document requests. The parties previously agreed that Intel's document production obligation on retention issues would be satisfied by a custodian-based production. Pursuant to that agreement, Intel did in fact produce a voluminous set of retention-related documents from the files of the most significant custodians involved in Intel's retention plan and practices. The proper scope of that production was negotiated between the parties and, well over one year later, AMD has not raised any concerns about the sufficiency of Intel's production. Nonetheless, we can

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<sup>1</sup> That is, the parties have agreed to withdraw their discovery related to late productions (Topic 1(a) in Intel's Notice and Topics 7(a) and 7(b) and document request 10 in AMD's Notice).

Boston  
Hartford  
Hong Kong  
London  
Los Angeles  
New York  
Orange County  
San Francisco  
Santa Monica  
Silicon Valley  
Tokyo  
Walnut Creek  
Washington

Bingham McCutchen LLP  
Three Embarcadero Center  
San Francisco, CA  
94111-4067

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F 415.393.2285  
bingham.com

David L. Herron, Esq.  
June 9, 2009  
Page 2

confirm that if responsive information exists as to document requests 2, 3, 4, 6, 8 or 9, it would have been included in the production.<sup>2</sup> As such, we expect that you will withdraw these requests.<sup>3</sup>

As for the deposition topics, you asked us to provide a list of specific transcript citations in support of our position that the deposition topics are largely duplicative of prior discovery topics. As we pointed out during the meet and confer, AMD's topics (with limited exceptions) are foreclosed entirely by the Bifurcation Order. Intel does not need to conduct a detailed review of the over 45 hours of deposition testimony to reach that conclusion. Setting that issue aside, Intel believes AMD had every opportunity to ask Intel's 30(b)(6) witnesses questions about all of the deposition topics included in AMD's recent notice. AMD's desire to ask different or better questions is not grounds for another bite at the apple. Having said that, we will provide you (by the end of this week) with a list of citations showing AMD's prior opportunity to ask questions on overlapping or duplicative deposition subjects. If you intend to file a motion to compel prior to receipt of this information, please advise immediately so we will not expend any additional time on this exercise.

**Timing of Intel's Motions to Compel.** We received your redline of the draft stipulation late Friday afternoon. We responded earlier today under separate cover and hopefully we can finalize and file the stipulation tomorrow.

**Intel's Histograms.** To confirm, we are making our consultant, Neal Lawson, available for an informal interview on Wednesday, June 10 at 1:00 p.m. PDT. The subject of the interview is limited to the technical methodology used to create the histograms produced by Intel on April 29, 2009. As with prior informal sessions between the parties, we are voluntarily producing Mr. Lawson with the understanding that, by doing so, AMD will not argue that Intel has waived any applicable attorney-client privilege or work product protection. If you do not have that same understanding, please advise promptly in writing; otherwise we will proceed as planned and will assume you are in agreement.

You have recently requested additional DCNs for the documents reflected in the red and pink sections of the histograms. We believe that the informal teleconference on Wednesday may obviate a portion, if not all, of this request. After the teleconference, if

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<sup>2</sup> Intel is confirming whether its prior productions included information responsive to request 5 and will update AMD shortly.

<sup>3</sup> You also asked us to identify – from among the 750,000+ pages of documents produced – where AMD may find the responsive information. We find this request unreasonable and we are aware of no authority requiring Intel to provide it.

David L. Herron, Esq.  
June 9, 2009  
Page 3

you still need the information, please advise and we will respond as quickly as possible. In the meantime, we are discussing your request with our consultants.

As for your substantive statements about the histograms, we do not agree and we will reserve further debate for another day.

Finally, we will not agree to an informal interview of our statistician. You already have: (1) *all* of the raw data used to analyze the histograms; (2) detailed information about the process used to narrow the histograms to the current set; and (3) detailed results of our analysis. We have previously offered to consider any specific questions you have on these issues in writing, and we renew that offer here. However, we see no purpose in such informal discovery, we do not think it is required by any rule of prior practice of the parties in this case, and we decline to spend any time or resources on this exercise. AMD is free to work with its own consultants to undertake any analysis it wishes.

**Metadata of Near-Deduplicated Documents.** During the meet and confer, you indicated that AMD would not rely on the suppressed near-deduplicated metadata to explain its production deficiencies. In exchange, you asked us to withdraw our acceptance of AMD's offer of this metadata made (and accepted) during one of our hearings before Judge Poppiti, but we decline to do so. As we noted on multiple occasions before, Intel is entitled to this information under the Court's production stipulations. Your unilateral decision to violate the stipulations has placed Intel at a disadvantage in many respects. Certainly, the metadata is relevant to our analysis of AMD's data productions. Based on the data we currently have access to, the histogram methodology is final. But if, as you previously represented to the Court, AMD produces the full set of metadata to which Intel is entitled, we will use that information to validate our histogram methodology. We find it notable that AMD continues to argue that "replacement" documents are buried in the top level email chains produced to Intel, but it has not used the suppressed emails themselves -- which are stored in a searchable database -- to confirm that argument.

**AMD's "Clawback" of 5/4/2005 Document.** The parties are at an impasse and we intend to file a motion on this issue this week. We disagree that our handling of this document violated any Order or other obligation.

**Glover Park.** Per your request, we are attaching testimony of Messrs. Warshawsky and Melendres related to Glover Park. Please note that the Melendres transcript attached is still in rough form. It is clear the parties do not agree about the scope of services provided by Glover Park to AMD in late 2004 and early 2005. You continue to assert that *all* of Glover Park's activities were either (1) designed *solely* to influence government regulators or (2) are protected from disclosure by the attorney-client privilege or work product doctrine. We believe Glover Park also participated in activities designed to influence the press, the general public, customers, the media, other participants in the market (including Intel), and other groups. If you have nothing further to offer on Glover Park, we intend to file a motion to compel to enforce the Glover Park subpoenas later this week.

David L. Herron, Esq.  
June 9, 2009  
Page 4

We hope this will help clarify any misunderstanding about Intel's positions. Let me reiterate that Intel believes it is time to move on to the merits of the case at hand, and remains open to discussing resolution of these retention issues at a global level. We look forward to your considered and timely response. In the meantime, we intend to pursue our discovery of AMD's retention practices, and to seek relief from the Court as needed.

Sincerely yours,



Donn P. Pickett

cc: Mr. Eric M. Friedberg, Esq. (by email)  
Ms. Jennifer Martin, Esq. (by email)  
Mr. Mark A. Samuels, Esq. (by email)

**EXHIBIT 14 A**  
**REDACTED IN ITS ENTIRETY**

# Exhibit 15

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

ADVANCED MICRO DEVICES,	)	
	)	
Plaintiffs,	)	Civil Action No.
	)	05-441-JJF
v.	)	
	)	
INTEL CORPORATION,	)	
	)	
Defendant.	)	

June 15, 2009

Teleconference in above matter taken pursuant to notice before Renee A. Ewing, Certified Realtime Reporter and Notary Public, in the offices of Fox Rothschild, 919 Market Street, Wilmington, Delaware, commencing at approximately 3:30 p.m., there being present:

BEFORE:

THE HONORABLE VINCENT J. POPPITI, SPECIAL MASTER

Corbett Reporting - A Veritext Company  
230 North Market Street  
Wilmington, DE 19801  
(302) 571-0510



1 MR. PICKETT: Thank you, Your Honor.

2 First, just a point of maybe clarification. There are a  
3 number of questions that anticipate an argument that AMD,  
4 we thought, was likely to make, but maybe not, in  
5 response to our motion for further remediation, which is,  
6 you know, coming up, and, specifically, those questions  
7 are 27 through 30, 154 through 156.

8 They essentially go to the issue of what  
9 the burden would be, or cost, if you will, would be on  
10 AMD if Your Honor ordered remediation from the backup  
11 tapes. And we think that in restoring Ruiz and Oji  
12 already, that a significant portion of that expense has  
13 already been covered and wouldn't be all that significant  
14 to go back and do that.

15 If the argument is not going to be made,  
16 obviously, fine, we don't need to know how much of a  
17 burden it would be. If the argument is going to be made,  
18 at some point, we will need answers to those questions.  
19 But I just wanted to make that point to you.

20 MR. SAMUELS: Your Honor, all I can say  
21 is, at this point, we haven't made such an argument and  
22 there is no occasion for us to do that. It's not ripe  
23 now.

24 SPECIAL MASTER POPPITI: That's my sense

1 as well. That may be something that would have to be  
2 left for another day. If it is, I think it would be  
3 incumbent upon me to make sure that there is a full and  
4 fair opportunity to develop whether or not there is an  
5 undue burden. Once the application is made, once AMD  
6 knows what they are looking at, and once, then, I am  
7 going to have -- you are going to be able to flesh that  
8 out through the adversarial process with me if, in fact,  
9 that argument is made.

10 MR. PICKETT: Thank you, Your Honor.

11 The remaining questions to which I have  
12 a brief argument, first, 152, and while you are looking  
13 for that, I will just state, for the record, that  
14 question is: Were there other restoration activities for  
15 this litigation performed besides Mr. Oji and Mr. Ruiz?

16 And the brief argument on that consists  
17 of this: In topic ten, which, of course, was objected to  
18 but overruled by Your Honor, we specifically stated, with  
19 respect to backup tape policies and protocols, that we  
20 would be inquiring with respect to restoration activities  
21 for this litigation, both with respect to pre-litigation  
22 disaster recovery and preservation of back up tapes for  
23 this litigation.

24 So, we are interested in whether there

# Exhibit 16

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

IN RE	)	
INTEL CORPORATION	)	MDL No. 05-1717-JJF
MICROPROCESSOR ANTITRUST	)	
LITIGATION	)	
<hr/>		
ADVANCED MICRO DEVICES, INC., a	)	
Delaware corporation, and AMD	)	
INTERNATIONAL SALES & SERVICES, LTD.,	)	
a Delaware corporation,	)	
	)	
Plaintiffs,	)	C.A. No. 05-441-JJF
	)	
v.	)	
	)	
INTEL CORPORATION, a Delaware corporation,	)	
and INTEL KABUSHIKI KAISHA, a Japanese	)	DM-4 di.3
corporation,	)	
	)	
Defendants.	)	
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ORDER

WHEREAS, on April 24, 2009, defendants Intel Corporation and Intel Kabushiki Kaisha (hereafter jointly, "Intel"), filed an opening letter brief moving to compel further testimony in response to 130 questions it posed to plaintiffs' Advanced Micro Devices, Inc. and AMD International Sales & Service, Ltd. (hereafter jointly, "AMD") Fed. R. Civ. P. 30(b)(6) witness regarding evidence preservation issues ("Motion to Compel");

WHEREAS, the parties completed briefing on Intel's Motion to Compel on May 26, 2009;

WHEREAS, a telephonic hearing (the "Hearing") on Intel's Motion to Compel was held before Special Master Vincent J. Poppiti (the "Special Master") on June 15, 2009;

WHEREAS, two discrete issues were raised by counsel at the Hearing with respect to the attorney-client privilege and the restoration of tapes of certain AMD custodians;

NOW, THEREFORE, IT IS HEREBY ORDERED, AS FOLLOWS:

A. Attorney-Client Privilege

Intel moved the Court to compel AMD's Rule 30(b)(6) deponent to answer questions 93, 96, 97, and 99.<sup>1</sup> AMD objected to each of these questions based upon the attorney-client privilege and attorney work product. After reviewing the questions and conducting the Hearing, the Special Master concludes that questions 96, 97, and 99 implicate the attorney-client privilege, and Intel's Motion to Compel is therefore denied with respect to these questions. However, the Special Master also concludes that question 93 does not implicate the attorney-client privilege. AMD is therefore ordered to respond to question 93 via interrogatory. None of these questions implicates the attorney work-product doctrine. The attorney-client privilege protects communications between an attorney and his client related to a fact of which the attorney was informed by his client without the presence of a third party for the purpose of securing primarily either a legal opinion or legal services, where the privilege has not been waived. See Pfizer Inc. v. Ranbaxy Laboratories, Ltd., 2004 U.S. Dist. LEXIS 20948, at \*\*2-3 (Oct. 7, 2004). "Only communications made for the purpose of obtaining or giving legal advice are protected." Id. at \*4.

Questions 96, 97, and 99 implicate the attorney-client privilege because each of these questions ask AMD to disclose its reasons for commencing litigation, which in the Special Master's view necessarily implicates AMD's communications with its attorneys for the purpose of securing legal advice. For example, question 96 states:

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<sup>1</sup> Numbers herein correspond to the parties' chart titled "Intel's and AMD's Positions On The Remaining Questions."

Was one of the circumstances leading to AMD's decisions to commence this litigation Intel's steamroller business practices?

See Ozmun Tr. at 188:11-20.

Questions 97 and 99 similarly deal with AMD's communications with counsel regarding its decision to commence this litigation.<sup>2</sup> See 3V, Inc. v. CIBA Specialty Chems. Corp., 587 F. Supp. 2d 641, 647 (D.Del. Nov. 20, 2008) ("In general, the attorney-client privilege protects attorney-client communications made for the purpose of obtaining or giving legal advice").

On the other hand, Question 93 is not protected by the attorney-client privilege, because in the Special Master's view it is simply a factual question. Question 93 states:

Q: When did AMD learn that Intel paid Sony in 2003 multimillion dollar sums disguised as discounts and promotional support in exchange for absolute microprocessor exclusivity as alleged in paragraph 30 – as paragraph 40 [of AMD's civil complaint in this action]?

See Ozmun Tr. 177:20-178:4.

Question 93 seeks factual information regarding when AMD learned that a certain event occurred, and does not reveal confidential attorney-client communications. See Cobell v. Norton, 2003 U.S. Dist. LEXIS 1487, at \*16 (D.D.C. 2003) (holding that answer to simple factual question that does not reveal any confidential communications with attorney for the purpose of securing legal advice or services is not protected by the attorney-client privilege).

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<sup>2</sup> Question 97 states:

Was one of the circumstances leading to AMD's decision to commence this litigation Intel's alleged use of its ability to offset margins across multiple business units?

See Ozmun Tr. at 188:21-189:2.

Question 99 states:

What conduct led to AMD's decision to commence this litigation?

See Ozmun Tr. at 190:5-8.

Alternately, even if AMD objects because the Fed. R. Civ. P. 30(b)(6) deponent, Beth Ozmun, is an attorney, AMD's objection is without merit in this instance. See Honeywell Int'l v. Nikon Corp., C.A. No. 04-1337-JJF, DM-13, D.I. 1481 (D.Del. Nov. 25, 2008) (holding that party may not avoid its obligation under Fed. R. Civ. P. 30(b)(6) by putting forward an attorney as its witness).

**B. Restoration of Tapes**

Intel poses a number of questions regarding tape restoration performed by AMD.<sup>3</sup> The Notice of Deposition of AMD's witness pursuant to Fed. R. Civ. P. 30(b)(6) (the "Notice of Deposition") states, in pertinent part:

14. AMD's attempts (successful or unsuccessful) to recover, restore or produce documents related to any Custodian (including but not limited to the Custodians identified in Topic 14 above), from backup tapes, other employees' electronic files, and/or from data previously harvested but suppressed by AMD's near-deduplication protocols.

See Notice of Deposition of AMD at ¶ 14.

Intel moves the Court to Compel Intel to answer questions 26, 27, 28, 29, 30, 31, 32, 144, 145, 148, 149, 151, 152, and 153-158. After consideration of the parties' arguments on this issue, the Special Master concludes that questions 26, 32, 144, 145, 148, 149, 152, and 153 are not protected by the attorney-client privilege and fall within the scope of topic 14 of the Notice of Deposition. See 3V, Inc. v. CIBA Specialty Chems. Corp., 587 F. Supp. 2d at 647 ("In general, the attorney-client privilege protects attorney-client communications made for the purpose of obtaining or giving legal advice"). Significantly, AMD did not object to the scope of deposition topic 14 during the hearing before the Special Master on January 9, 2009. See Tr. of Hr'g Before Special Master dated Jan. 9, 2009 at 67:5-7. Intel is entitled to know whether

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<sup>3</sup> See Questions 26, 27, 28, 29, 30, 31, 32, 144, 145, 148, 149, 151, 152, and 153-158.

restoration efforts occurred beyond Messrs. Ruiz and Oji based on the broad scope of deposition topic 14.

For example, question 26 asks what else was restored, other than “Mr. Ruiz and Ms. Ng-Lim’s mailbox?”. See Halle Tr. at 121:9-21. AMD interposed an attorney-client privilege and attorney-work product objection. If mailboxes for other custodians were restored, AMD is required to disclose such information because it falls within the broad scope of topic 14, which refers to restoration efforts for any Custodian, to which AMD agreed, and does not reveal confidential attorney-client communications.

Questions 144, 152 and 153<sup>4</sup> similarly ask what restoration efforts were performed with respect to Messrs. Ruiz and Oji, and if restoration efforts beyond those two custodians occurred. The Special Master concludes that these restoration efforts are not protected by the attorney-client privilege or attorney work product. Thus, whether AMD is able to search Mr. Seyer’s data (question 144) and whether NDCI restored all of the tapes it received from AMD to find Mr. Ruiz’s tapes (question 153) fall within deposition topic 14, and are proper.

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<sup>4</sup> Question 144 states:

Q: Does AMD have the ability, itself, then to search Mr. Seyer’s data on those for that set that you just discussed? . . .

Q: Was that done in connection with any restoration activities for this particular lawsuit?

A: Objection, work product, attorney client privilege.

See Smith Tr. at 175:9-176:13.

Question 152 states: “Were there other restoration activities for this litigation performed besides Mr. Oji and Mr. Ruiz?” and question 153 states “Did NDCI have to restore all the tapes it received from AMD to find the tapes for Mr. Ruiz?”. See Smith Tr. at 194:6-11 and 194:12-19.



In questions 32, 145, 148 and 149, Intel asked about the specific technology that was used to restore Messrs. Ruiz and Oji's tapes.<sup>5</sup> Although Walter Smith ("Smith") was designated by AMD to testify upon topic 10, which concerns "backup tape policies and procedures", including "restoration activities for this litigation," he was unable to answer these questions. See Notice of Deposition at ¶ 10. Questions 32, 145, 148, and 149 fall within the scope of deposition

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<sup>5</sup> Question 32 states:

You mentioned before the break that you were aware of technology that was available to pull individual custodians' data from the backup tapes. Do you whether that technology was used for the Ruiz remediation?

See Halle Tr. at 127:1-17.

Question 145 states:

Q: Regarding Mr. Ruiz and Mr. Oji, same question?

A: You know I am aware – I know that we did restore data for Mr. Oji and Mr. Ruiz, restored data for those two individuals as part of this litigation. I am not aware of the specific mechanisms for those two individuals. I don't know.

See Smith Tr. at 176:12-18.

Question 148 states:

Q: Do you know anything about the restoration activities related to Mr. Oji and Mr. Ruiz?

A: Yeah. As we previously discussed, right, I know that tapes were – were pulled back from storage vaults, as we would call them, right for the restoration. I know that the data was restored from those tapes and produced for this litigation. The specific data center operations, individual technique used for restoring the data, I am not – I am not familiar with the specific details of how the restoration of that restoration was done.

See Smith Tr. at 177:25-178:13.

Question 149 states:

Q: Do you know any of the details about how the restoration was done? . . .

A: As for the specifics of the individual, the set of tapes for the two instances we are talking about, no, I actually have no knowledge of the specific IT technique used and whether that was done by IT or an outside party.

See Smith Tr. at 178:14-179:1.

topic 10, and AMD should adequately prepare Smith or another witness regarding these three questions.

Questions 27, 28, 29, 30, 31, 151, 154, 155, and 156 relate directly to the cost and/or burden to AMD of restoring data on backup tapes. During the Hearing, counsel for Intel represented that these questions deal specifically with Intel's future motion for further remediation. See Tr. of Hr'g at 44:1-19. The Special Master concludes that Intel's possible motion for future remediation is not ripe for decision at this time. These questions were not contemplated within the allowed sixteen (16) hours of deposition time allotted to Intel. However, the Court will consider further argument on the issue if Intel files a motion for further remediation in the future.

Lastly, the Special Master denies follow-up with respect to questions 157 and 158 at this time. Question 157 states:

Did AMD receive back from NDCI all of the mailboxes on the tapes that it sent?

See Smith Tr. at 195:16-20.

AMD amended the transcript to answer "No" to this question. Intel's request to follow-up regarding the location of the tapes and burden to access the tapes for additional remediation relates solely to a future motion for further remediation. This issue is not ripe for decision. As a result, the Special Master finds that question 157 has been answered and additional follow-up will not be allowed at this time.

Question 158 asks:

Did NDCI restore the exchange dumpster when it restored the tapes?

See Smith Tr. at 195:21-23.

AMD amended the transcript to add "Yes" in response to this question. Intel's request to follow-up regarding the status of the dumpster is moot. The dumpster has been restored. With respect to Intel's request to follow-up regarding the burden to access the dumpster for additional remediation, this issue relates to a future motion for further remediation, and is not ripe for decision at this time. Thus, the Special Master concludes that question 158 has been answered and additional follow-up will not be allowed at this time.

However, AMD may renew its application with respect to questions 27, 28, 29, 30, 31, 151, 154, 155, 156, 157 and 158 when filing its motion for further remediation.

C. Meet and Confer

With respect to all other rulings made by the Special Master at the Hearing, the parties shall meet and confer as to whether either party intends to take a Fed. R. Civ. P. 53(f)(2) objection. If either party intends to object, Intel shall prepare a form of Order, which shall be stipulated to by AMD for form only, and submitted to the Special Master no later than close of business on Monday, June 29, 2009. If neither party intends to object, the transcript of the Hearing shall be the the record of the rulings made.

Additionally, the parties shall advise of their meet and confer discussion regarding additional Fed. R. Civ. P. 30(b)(6) time that will be necessary as a result of the Special Master's Rulings.

THE SPECIAL MASTER'S OPINION AND ORDER WILL BECOME A FINAL ORDER OF THE COURT UNLESS OBJECTION IS TAKEN IN ACCORDANCE WITH THE ANTICIPATED ORDER OF THE COURT WHICH SHORTENS THE TIME WITHIN WHICH AN APPLICATION MAY BE FILED PURSUANT TO FED. R. CIV. P. 53(f)(2).

Entered this  
22nd day of June, 2009

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal stroke and a vertical stroke, positioned above a horizontal line.

Vincent J. Poppiti (DSBA No. 100614)  
Special Master

**EXHIBITS 17-33**  
**REDACTED IN THEIR ENTIRETY**

# Exhibit 34

▷

United States District Court,  
District of Columbia.

Roy BANKS, Plaintiff,

v.

OFFICE OF THE SENATE SERGEANT-  
AT-ARMS and Doorkeeper, Defendant.

CIV.A. Nos. 03-56HHKJMF, 03-868HHKJMF,  
03-2080HHKJMF.

May 3, 2004.

**Background:** Parties filed various discovery motions in Title VII case.

**Holdings:** The District Court, Facciola, United States Magistrate Judge, held that:

- (1) motion to correct deposition, which was filed after summary judgment motion, would be denied since it was academic and raised a question that was beyond the court's jurisdiction;
- (2) number of interrogatories exceeded numerical restriction on interrogatories;
- (3) plaintiff was not entitled to discover information about "other terminated employees, including their race";
- (4) names and qualifications of the 265 applicants who were not chosen to be finalists were irrelevant to whether the employer discriminated against plaintiff when he chose successful candidate; and
- (5) defendant would be required to respond to untimely requests for admissions.

Ordered accordingly.

West Headnotes

[1] Federal Civil Procedure ⚡2541

170Ak2541 Most Cited Cases

If a motion for summary judgment has been filed, witness's modifying what she said in deposition can so disrupt the movant's legal arguments that courts may hesitate to permit the change despite the literal command of Federal Rules of Civil Procedure that it be permitted. Fed.Rules Civ.Proc.Rule 30(e). 28

U.S.C.A.

[2] Federal Civil Procedure ⚡2541

170Ak2541 Most Cited Cases

Motion to correct deposition, which was filed after summary judgment motion, would be denied since it was academic and raised a question that was beyond the court's jurisdiction since movant was not relying on either deponent's testimony as given or as to be corrected to establish that there was no genuine issue of material fact and that movant was entitled to judgment. Fed.Rules Civ.Proc.Rule 30(e). 28 U.S.C.A.

[3] Federal Civil Procedure ⚡1488.1

170Ak1488.1 Most Cited Cases

Compound question demanding documents, and raising topics: of employee's evaluations, employee's loss of certain duties because of them, and what information was provided to the evaluators and from whom did it come would be counted as four interrogatories for purposes of numerical restriction on interrogatories. Fed.Rules Civ.Proc.Rule 33(a). 28 U.S.C.A.

[4] Federal Civil Procedure ⚡1488.1

170Ak1488.1 Most Cited Cases

Interrogatory speaking first to employer's general hiring practices and then to the hiring of the person for the position of manager for the capitol facilities would be counted as two interrogatories for purposes of numerical restriction on interrogatories as those were separate topics. Fed.Rules Civ.Proc.Rule 33(a). 28 U.S.C.A.

[5] Federal Civil Procedure ⚡1488.1

170Ak1488.1 Most Cited Cases

Interrogatory speaking to two distinct topics and demanding documents would be counted as three interrogatories for purposes of numerical restriction on interrogatories. Fed.Rules Civ.Proc.Rule 33(a). 28 U.S.C.A.

[6] Federal Civil Procedure ⚡1506

170Ak1506 Most Cited Cases

**[6] Federal Civil Procedure** ↪1513

170Ak1513 Most Cited Cases

A party's opinions and contentions are discoverable by interrogatory; asking a party how one count of his complaint differs in its legal theory from a second count is perfectly legitimate. Fed.Rules Civ.Proc.Rule 33(c), 28 U.S.C.A.

**[7] Privileged Communications and Confidentiality** ↪146

311Hk146 Most Cited Cases

(Formerly 410k201(1))

Agreements as to attorney fees are not privileged.

**[8] Federal Civil Procedure** ↪1512

170Ak1512 Most Cited Cases

Title VII plaintiff was not entitled to discover information about "other terminated employees, including their race" because that information was not requested in his interrogatory; plaintiff was only entitled to discover potential witnesses with knowledge of facts underlying the lawsuit.

**[9] Federal Civil Procedure** ↪1275

170Ak1275 Most Cited Cases

If a potential witness in Title VII case was an employee of the defendant and defendant agreed to produce for deposition or trial its employees upon reasonable notice, defendant would be required to provide plaintiff with the witness' work address and phone number; however, since no trial date had yet been set, defendant had no obligation to reveal the witnesses it could call. Fed.Rules Civ.Proc.Rule 26(a)(1)(A), 28 U.S.C.A.

**[10] Federal Civil Procedure** ↪1275

170Ak1275 Most Cited Cases

For discovery purposes, names and qualifications of the 265 applicants who were not chosen to be finalists were irrelevant to whether the employer discriminated against plaintiff when he chose successful candidate. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

**[11] Federal Civil Procedure** ↪1676.1

170Ak1676.1 Most Cited Cases

**[11] Federal Civil Procedure** ↪1678

170Ak1678 Most Cited Cases

Title VII defendant would be required to respond to untimely requests for admissions where plaintiff served the requests 28 days before the close of discovery, and defendant's duty to answer the requests fell only two days outside the prescribed discovery period, and where defendant had moved to enlarge the discovery period without bringing deadline dispute to light. Fed.Rules Civ.Proc.Rule 36, 28 U.S.C.A.

**[12] Federal Civil Procedure** ↪1361

170Ak1361 Most Cited Cases

(Formerly 170Ak1271)

**[12] Federal Civil Procedure** ↪1364

170Ak1364 Most Cited Cases

(Formerly 170Ak1271)

It is not an appropriate exercise of the judicial supervision of discovery to issue a protective order to prevent counsel from asking a question that is irrelevant or so ineptly phrased that it can be condemned as vague or ambiguous.

**[13] Federal Civil Procedure** ↪1278

170Ak1278 Most Cited Cases

Preclusion from offering testimony at trial requires a showing that the violation of the rule or of the court's orders pertaining to discovery is so gross that no lesser sanction is appropriate.

**[14] Federal Civil Procedure** ↪1278

170Ak1278 Most Cited Cases

**[14] Privileged Communications and Confidentiality** ↪22

311Hk22 Most Cited Cases


Withholding of privilege log may subject a party to discovery sanctions and may be viewed by the court as a waiver of any privilege or protection. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

**[15] Federal Civil Procedure** ↪1483

170Ak1483 Most Cited Cases



Failure to object in a timely fashion to interrogatories constitutes a waiver of any objections unless good cause is shown. Fed. Rules Civ. Proc. Rule 33, 28 U.S.C.A.

**[16] Privileged Communications and Confidentiality** 

311Hk22 Most Cited Cases

(Formerly 410k222)

Federal Rules of Civil Procedure do not require the filing of a privilege log when a party claims a privilege as to a deposition question or an interrogatory; a party can comply with the requirement of applicable rule by otherwise communicating sufficient information to enable other parties to assess the applicability of the privilege or protection. Fed. Rules Civ. Proc. Rule 26(b)(5), 28 U.S.C.A.

\*8 William P. Farley, John F. Karl, Jr., McDonald & Karl, Washington, DC, for Plaintiff.

Katherine Anne Goetzl, Ronald I. Tisch, Littler Mendelson, Washington, DC, for Defendant.

**MEMORANDUM OPINION**

FACCIOLA, United States Magistrate Judge.

This Title VII case has now generated eighteen motions that must be resolved. The motions fall into two categories. First, there are procedural motions, some of which ask the presiding judge, Judge Kennedy, to modify deadlines he has set for the end of discovery and the filing of dispositive motions. These motions are not before me, but I have resolved others that seek the modification of deadlines pertaining to discovery motions. Second, there are discovery motions filed by the parties seeking various forms of relief and they are before me.

**\*9 INTRODUCTION**

Roy Banks ("plaintiff"), an employee of the Senate Sergeant-at-Arms ("SAA" or "defendant") claims that 1) he was denied a promotion to branch manager because of his race or sex; 2) he was retaliated against for seeking counseling with the Office of Compliance; 3) he was subjected to a hostile work environment based on his race, age, alleged disability,

or sex; 4) he was discriminated against because of his sex; 5) he was denied leave under the Family and Medical Leave Act because of his sex, race, or the fact that he filed complaints of discrimination; 6) he was denied an accommodation for his disability; 7) he was denied disability leave; 8) he was terminated because of his race, age, alleged disability, sex, or in retaliation; and 9) SAA improperly handled his compensation claims. *Defendant's Motion for Summary Judgment*, page 1.

**DISCUSSION**

*I. Procedural Posture*

Some of the motions filed by the defendant, SAA, seek to compel plaintiff to provide discovery. Both plaintiff and defendant have filed numerous discovery motions. However, defendant has also moved Judge Kennedy to extend the time within which to complete discovery and file motions for summary judgment. Judge Kennedy, however, did not rule on defendant's motion for an extension of the previously established deadlines for the completion of discovery and the filing of motions for summary judgment. Confronted with these deadlines, SAA filed its motion for summary judgment. Despite that filing, I will now resolve the outstanding discovery motions in the order they were filed.

*II. Analysis*

*A. Plaintiff's Motion to Strike Portions of Alvin Macon's Errata Sheet [# 20]*

Rule [FN1] 30(e) of the Federal Rules of Civil Procedure grants a witness the right to make changes in form or substance in her deposition provided the witness signs a statement indicating the changes and the reasons for them.

FN1. Unless otherwise indicated, references to a "Rule" are to the Federal Rules of Civil Procedure.

[1] If a motion for summary judgment has been filed, the witness's modifying what she said can so disrupt the movant's legal arguments that courts

may hesitate to permit the change despite the literal command of Rule 30(e) that it be permitted. [FN2]

[FN2] In the reported cases, the courts have not been consistent. Courts have refused to make a change at all, re-opened discovery to permit the movant to interrogate the witness as to the change she wishes to make, permitted the change (leaving to the court the task of assessing the significance of the change for the motion before it), or permitted the change only upon a particular showing. See Burn v. Board of County Commissioners, 330 F.3d 1275, 1282-83 (10th Cir.2003); Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 103 (2d Cir.1997); Garcia v. Pueblo Country Club, 299 F.3d 1233, 1242 (10th Cir.2002); Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir.2000); Summerhouse v. HCA Health Services of Kansas, 216 F.R.D. 502 (D.Kan.2003); Pepsi-Cola Bottling Co. v. Pepsico, Inc., 2002 WL 511506 (D.Kan.2002); Walker v. Yellow Freight Systems, Inc., 1999 WL 955364 (E.D.La. Oct. 19, 1999); Rios v. Welch, 856 F.Supp. 1499 (D.Kan.1994); Rios v. Bigler, 847 F.Supp. 1538 (D.Kan.1994).

[2] It is clear, however, that SAA is not relying on either Macon's testimony as given or as to be corrected to establish that there is no genuine issue of material fact and SAA is entitled to judgment. I have reviewed that motion and its attachments and cannot find a single reference to Macon, let alone his deposition. The motion to correct the deposition is, therefore, academic and raises a question that is beyond the court's jurisdiction and must be denied. Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983).

If the motion for summary judgment is denied and Macon is called as a witness and impeached with the portion of the deposition he is trying to correct, there will still be time enough to consider Macon's application. Until that occurs, however, the ques-

tion presented by this motion is premature, hypothetical and non-justiciable. *Id.*

\*10 B. *Defendant's Motion for a Protective Order from Supernumerary Interrogatories* [# 29]

### 1. *The Problem*

By his Order of January 5, 2004, Judge Kennedy restricted the parties in these three consolidated cases to 30 interrogatories. Before that Order had issued, plaintiff served two sets of interrogatories. According to plaintiff, the first set of interrogatories was comprised of nineteen questions and the second eight, for a total of twenty-seven. SAA sees it differently, insisting that one question in the first set (number 8) and seven in the second set (numbers 1-6 & 8) contained subparts and, when those subparts are counted as separate interrogatories, plaintiff has propounded many more interrogatories than Judge Kennedy permitted by the January 5, 2004 Order.

### 2. *Analysis*

When Rule 33(a) was amended to limit the number of interrogatories that can be propounded, the draftsmen appreciated that the numerical restriction could be evaded by "joining as 'subparts' questions that seek information about discrete separate subjects." Fed.R.Civ.P. 33 advisory committee's note. Therefore, the numerical limitation in the rule is stated as "not exceeding 25 in number including all discrete subparts." Fed.R.Civ.P. 33(a).

Identifying a "discrete subpart" has proven difficult. While a draconian approach would be to view each participial phrase as a subpart, [FN3] the courts have instead attempted to formulate more conceptual approaches, asking whether one question is subsumed and related to another or whether each question can stand alone and be answered irrespective of the answer to the others. Kendall v. GES Exposition Services, 174 F.R.D. 684 (D.Nev.1997). But, as another court has stated, this is anything but a bright-line test. Safeco of America v. Rawstron, 181 F.R.D. 441, 445 (C.D.Cal.1998). It may also beg the question presented.

FN3. See *Valdez v. Ford Motor Co.*, 134 F.R.D. 296 (D.Nev.1991).

Perhaps a more pragmatic approach, reminiscent of Justice Stewart's memorable "definition" of pornography, [FN4] would be to look at the way lawyers draft interrogatories and see if their typical approaches threaten the purpose of the rule by putting together in a single question distinct areas of inquiry that should be kept separate.

FN4. *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (Stewart J., concurring) (stating, as to pornography, "I know it when I see it").

The first and most obvious example is the combining in a single interrogatory of a demand for information and a demand for the documents that pertain to that event. Clearly, these are two distinct demands because knowing that an event occurred is entirely different from learning about the documents that evidence it occurred. Thus, a demand for information about a certain event and for the documents about it should be counted as two separate interrogatories.

Lawyers, sensitive to the numerical restriction, also subdivide interrogatories so that after they introduce a topic, they demand to know in detail all the particulars about it, frequently introducing their specific demands with the phrase "including but not limited to." Thus, they may ask their opponent to state whether a particular product was tested and then demand to know when the tests occurred, who performed them, how and where they were conducted and the result. In such a situation, all the questions relate to a single topic, testing, and it would be unfair and draconian to view each of the demands as a separate interrogatory. This approach ends, however, the moment the interrogatory introduces a new topic that is in a distinct field of inquiry. Thus, in the "testing" example, asking how the results of the tests were used in any advertising about the product's fitness for a particular purpose would have to be viewed as a separate interrogatory.

After reviewing the interrogatories at issue, I find myself agreeing with SAA as to interrogatory 8 of the first set and interrogatories 2, 5, 6, and 8 of the second set, insofar as these interrogatories first demand information \*11 and then demand the documents pertaining to it.

I also find, however, that SAA is arguing in favor of using the draconian approach of counting every subdivision of an interrogatory as a separate question. I rejected that method as unfair. For example, in objecting to interrogatory 4 of the second set, SAA insists that asking about what duties plaintiff was given or had taken away is distinct from asking who added them or took them away. Those two topics are too intimately and logically connected to have to be divided into two separate questions.

However, since several of the remaining interrogatories do speak to more than one topic, they must be counted as more than one. I will now explain what I mean more specifically as to each of these interrogatories.

*a. Interrogatory 2 of the Second Set*

[3] In addition to demanding documents, this interrogatory raises three topics: 1) plaintiff's evaluations, 2) plaintiff's loss of certain duties because of them, and 3) what information was provided to the evaluators and from whom did it come. Thus, including the demand for documents, I find that this compound question should be counted as four interrogatories.

*b. Interrogatory 3 of the Second Set*

[4] This interrogatory speaks first to the SAA's general hiring practices and then to the hiring of the person for the position of Manager for the Capitol Facilities. As those are separate topics, this question should be counted as two interrogatories.

*c. Interrogatory 6 of the Second Set*

[5] This interrogatory speaks to two distinct topics: 1) the determination that plaintiff was not entitled to disability leave and 2) the number of employees in the past ten years who were denied disability

leave. Since this question also seeks documents, it should be counted as three interrogatories.

By my calculations, plaintiff propounded eight more interrogatories than permitted. [FN5] I can either grant plaintiff leave to exceed the number permitted by Judge Kennedy's Order, permit plaintiff to propound a new set of interrogatories that complies with the Order, or grant a protective order, relieving the SAA of the obligation to answer the last eight interrogatories to which SAA objected, interrogatories 4, 6, and 8.

[FN5. Plaintiff propounded twenty-seven interrogatories but in my view they should be counted as thirty-eight. Plaintiff was entitled to propound thirty, leaving a balance of eight.

I will not grant plaintiff leave to exceed the number of interrogatories permitted by Judge Kennedy; judicial orders are to be obeyed, not ignored. I appreciate that some sections of the interrogatories that demand documents may just as easily be considered Requests for Production of Documents. I do not know whether plaintiff propounded any such Requests and if it did not, it may not be necessary to issue a protective order because once the demand for documents now made in the interrogatories are formulated as Requests for Production, SAA may be willing to answer the interrogatories that remain.

To solve this problem, I am going to demand that the parties do something that, in my judgment, they have yet to do: cooperate. The pleadings in this case indicate to me that these lawyers have all but ignored the obligation imposed by Rule 7(m) of the Local Civil Rules, that they conscientiously attempt to resolve discovery matters before presenting the issue to the court. While the parties claim in their motions that they have fulfilled this responsibility, all they seem to do is to exchange nasty letters and equally nasty phone calls. I now will provide them with the opportunity to forge a compromise. I expect them to meet and attempt to agree on what documents will be exchanged and what interrogat-

ories will be answered, now that they have the benefit of my thinking. I certainly hope that they can resolve their differences and relieve themselves and the court of further time and expense. If they cannot resolve their differences, within two weeks, they shall advise me by *praecipe* that they cannot and I will return to the issues presented by this motion.

\*12 C. *Defendant's Motion to Compel Discovery From the Office of Compliance* ("D's Mot. to Compel") [# 36]

Plaintiff invoked the mandatory conciliation and mediation provisions of the Congressional Accountability Act, 2 U.S.C. § 1401-1403 ("CAA"). [FN6] In a prior opinion, I stated of these provisions:

[FN6. All references to the United States Code or the Code of Federal Regulations are to the electronic versions that appear in Westlaw or Lexis.

In subjecting agencies within the legislative branch to monetary liability for claims of race and other discrimination, Congress created a system that requires an employee of such an agency who complains of such discrimination to engage first in counseling and then mediation. 2 U.S.C.A. §§ 1401 & 1402 (1997). Once counseling and mediation have ended, the employee must make an election. \*161 He can either file an action in a district court or initiate an administrative proceeding by filing a complaint with the Office of Compliance. 2 U.S.C.A. § 1404 (1997). If the employee chooses the administrative remedy, a hearing officer resolves the case and either party may appeal that officer's decision to the Board of Directors of the Office of Compliance. 2 U.S.C.A. § 1406 (1997). Appeal of the decisions from this Board lies in the United States Court of Appeals for the Federal Circuit. 2 U.S.C.A. § 1407(a)(1).

Congress has elected to shield portions of this process from public inquiry. First, all counseling and mediation "shall be strictly confidential." 2

U.S.C.A. § 1416(a) & (b) (1997). Additionally, "all proceedings and deliberations of hearing officers and the Board, including any related records, shall be confidential." 2 U.S.C.A. § 1416(c) (1997). The only exception pertinent here would be for the final decisions specified in 2 U.S.C.A. § 1416(f) (1997), i.e., those made by a hearing officer or the Board of Directors in favor of an employee or by the Board if it has reversed the decision of a hearing officer in favor of an employee. 2 U.S.C.A. § 1416(f) (1997).

Waters v. United States Capitol Police Board, 216 F.R.D. 153, 161 (D.D.C.2003).

SAA served a subpoena upon the Office of Compliance, created by Congress to, *inter alia*, supervise the counseling and mediation processes, demanding production of the documents plaintiff submitted to the Office of Compliance, including his requests for counseling and mediation and the documents provided him. D's Mot. to Compel, Exhibit 1, Schedule A.

The Office of Compliance, citing the confidentiality provisions of the CAA, discussed in my earlier opinion, resisted surrendering the forms that plaintiff filled out to commence the conciliation process in the six instances where plaintiff invoked the process. SAA insists that the documents alone will permit it to ascertain whether plaintiff in fact exhausted the administrative remedy. See Halcomb v. Office of the Senate Sergeant-at-Arms, 209 F.Supp.2d 175 (D.D.C.2002) (administrative remedy provided by the CAA must be exhausted as pre-condition to suit in the District Court).

I believe that in its present posture this case does not present an actual question for me to decide. Whatever may be the proper resolution of the abstract question that is raised by the enforcement of a subpoena issued by the employing agency and refused by the Office of Compliance, the real question is whether the plaintiff, having elected to pursue a case in the District Court, may nevertheless insist that the confidentiality provisions of the CAA bar its opponent from seeing the documents he filed

to invoke the conciliation process when those documents are relevant to a defense that the employing agency wishes to investigate and, if appropriate, assert. Thus, in my view, I am going to insist that plaintiff show cause why I should not order the Office of Compliance to comply with the subpoena. If plaintiff has no objection, I will hear from the Office of Compliance as to why it should still not be compelled to comply with the subpoena. I will permit SAA to be heard as to all issues presented, once plaintiff responds to the order to show cause.

\*13 D. Defendant's Motion to Compel Discovery from Plaintiff [# 37]

Defendant claims insufficiencies in plaintiff's responses to interrogatories and requests to produce documents.

#### 1. Interrogatories

In interrogatories 1 and 2, SAA asked how Count III and Count IV of the complaint set forth a distinct cause of action from Count II and what legal theories animated Counts III and IV. In response, plaintiff first objected on the grounds that the question "seeks an answer to a pure question of law" but then proceeded to provide a lengthy answer.

[6] First, plaintiff's objection is inappropriate. A party's opinions and contentions *are* discoverable by interrogatory. See Fed.R.Civ.P. 33(c) & advisory committee's note ("As to requests for opinions or contentions that call for the application of law to fact, they can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery."). Asking a party how one count of his complaint differs in its legal theory from a second count is perfectly legitimate.

Second, I have read the answers plaintiff provided, and I am afraid that I do not understand how the answers to the interrogatories actually speak to the question presented. Plaintiff will, therefore, have to provide a much clearer explanation of how the counts differ in legal theory from each other. The crucial point is not what evidence plaintiff will

tender in support of each count but how the claim made in one count is different from and not duplicative of another.

I disagree, however, with SAA's contention that plaintiff's answer to SAA's interrogatory 11, that asked plaintiff to indicate how he was victimized by sexual discrimination, is inadequate and find that it answers the interrogatory sufficiently.

2. *Requests for Production of Documents*  
a. *Fee Agreements*

[7] Plaintiff refuses to produce his fee agreement with his counsel. While I agree that agreements as to fees are not privileged, [FN7] they become relevant, at best, when plaintiff prevails and seeks a fee. Whether such agreements are discoverable and whether plaintiff waived the privilege by his allegedly untimely response to the request to produce can wait until then. In the meanwhile, I reject the notion that there may be someone else paying counsel's fees other than plaintiff as too fanciful to justify compelling production of the fee agreement. Furthermore, assessing one's settlement posture by knowing what one's opponent is paying counsel is not a legitimate use of discovery; discovery seeks relevant evidence, not ammunition for settlement discussions, as welcome as they may be.

[FN7] Edna Selan Epstein, *The Attorney Client Privilege and the Work-Product Doctrine*, at 67 (4th ed.2001).

b. *Mitigation*

SAA propounded three requests for documents pertaining to plaintiff's seeking and securing work since being fired and to his application (if any) for disability retirement. Resisting SAA's motion to compel a response, plaintiff represents to the court, through his counsel, that plaintiff "does not have any documents that he did not turn over to Defendant." *Banks' Opposition to the Sergeant-at Arms' Motion to Compel Discovery from Plaintiff* at 15. I will, therefore, deem plaintiff to have represented by his counsel, an officer of this court, that there are no documents sought by any of SAA's Requests

for Production of Documents that have not been turned over to SAA. If that representation proves not to be correct, SAA may seek sanctions.

E. *Plaintiff's Motion Pursuant to Rule 37 to Compel Defendant to Answer Plaintiff's Request for Interrogatories* ("P's Mot. to Compel") [# 38]

Plaintiff moves the court to order defendant to answer fully and completely Plaintiff's First Set of Interrogatories, Request Numbers 2, 4, 5, 16, and 18. [FN8] I will consider each Interrogatory Request in turn.

[FN8] Defendant has agreed to supplement Request Numbers 6, 8, 10, 12, 13, and 14 but has not yet provided the supplemental responses. It shall do so within 30 days of the issuance of this Memorandum and Opinion.

\*14 1. *Interrogatory Number 2*

Plaintiff's Interrogatory Number 2 states:

Identify by name, current address, job title, and telephone number each and every person with knowledge of the facts which are the subject of this lawsuit, such identification shall include a summary of the facts and information for each witness defendant expects to testify in this matter on behalf of defendant.

In response, defendant provided the names and contact information of several managers at SAA, as well as the subjects about which each person had knowledge. Two witnesses were listed as having knowledge about "the selection process used in 2001-2002 regarding the Branch Manager of Capitol Facilities position." P's Mot. to Compel, Exhibit B at 5-6. Another witness was identified as the selecting official. *Id.* at 6. Defendant also stated that it had not yet identified the witnesses whom it intends to call at trial. P's Mot. to Compel at 7-8.

Plaintiff contends that defendant's response is inadequate and that he is entitled to discover: 1) additional information regarding other terminated em-

employees, including their race and 2) personnel information concerning the officials involved in selecting the finalists for the Manager of Capitol Facilities and in making the decision to terminate him. *Id.* Plaintiff also insists that defendant has refused to disclose the names of other employees that have information regarding the facts underlying the instant lawsuit. *Id.* at 8.

Defendant claims that in his motion, plaintiff seeks information that he did not seek in the initial interrogatory, namely information regarding other terminated employees. *Defendant's Opposition to Plaintiff's Motion to Compel Defendant to Answer Plaintiff's Request for Interrogatories* ("D's Opp. to Mot. to Compel") at 6. Defendant also argues that he should not be compelled to respond to Interrogatory Number 2 because it seeks information protected by the work-product privilege, *i.e.*, the identification of his trial witnesses and a summary of their expected testimony. *Id.* at 3. In addition, defendant maintains that the interrogatory is ambiguous and overbroad because it seeks all witnesses with knowledge of the "facts" that are the "subject of this lawsuit." *Id.* at 5-6. Rather, according to defendant, because plaintiff included a wide variety of allegations in his complaints and because he failed to clarify the information he sought before filing the instant motion, defendant should not be required to provide any additional information in response to this interrogatory. *Id.*

[8] Defendant is, in part, correct in its argument. Plaintiff is not entitled to discover information about "other terminated employees, including their race" because that information was not requested in the interrogatory. Plaintiff is only entitled to discover potential witnesses with knowledge of facts underlying the lawsuit. As defendant points out, however, plaintiff's complaints contain many allegations, and determining "each and every person" who may have knowledge of each fact alleged by plaintiff may be near impossible. In addition, in his motion, plaintiff names the very witnesses he wants defendant to disclose. For example, plaintiff lists

the names of SAA employees he believes have knowledge of the facts underlying the lawsuit. P's Mot. to Compel at 8. In addition, plaintiff states that, *via* the depositions of other witnesses, he has learned the identity of the official who made or confirmed the decision to terminate him. *Plaintiff's Reply in Further Support of His Motion to Compel Defendant to Answer Plaintiff's Request for Interrogatories* ("P's Reply to Mot. to Compel") at 5-6.

Therefore, I will order defendant to provide the business addresses and phone numbers of the witnesses plaintiff has named in his motion and reply: Alvin Macon, Karen Miller, Karen Ellis, Mr. Banks' warehouse co-workers, Ms. Goldring, Ms. Coates, Keith Kennedy, Mr. Pickle, Catherine Brooks, and Ann Harkins. In addition, even though it may be impossible to identify each and every person who knows something--no matter how trivial--about the instant action, the Federal Rules of Civil Procedure require parties, as part of their initial disclosures, to provide "the name and, if known, the address \*15 and telephone number of each individual *likely to have discoverable information* that the disclosing party may use to support its claims or defenses...." Fed.R.Civ.P. 26(a)(1)(A) (emphasis added). In addition, it is not only appropriate but also necessary for defendant to identify with specificity the people who were the decisionmakers in this case. Therefore, I will order defendant to identify clearly all individuals who reviewed or supervised plaintiff's work and all individuals who reviewed his application for the position he sought. Defendant must also disclose the officials that: 1) narrowed the candidate list to two finalists, 2) made the final selection for the Branch Manager position, and 3) decided to terminate Mr. Banks. [FN9]

[FN9] The identities of some of these individuals may have already been provided to Mr. Banks *via* deposition testimony or other discovery methods, but to clarify matters, especially in light of the barrage of discovery disputes currently before the court, I will order defendant to provide this

information in a single document.

[9] If a potential witness is an employee of the defendant and defendant agrees to produce for deposition or trial its employees upon reasonable notice, defendant must provide plaintiff with the witness' work address and phone number. See Waters v. United States Capitol Police Board, 216 F.R.D. 153, 164-65 (D.D.C.2003) (stating that, under similar circumstances, providing home contact information would be unnecessary). Otherwise, defendant must provide that witness' home address and phone number if they are known.

As for witnesses expected to be called at trial, I will not order defendant to disclose their names, nor will I order defendant to produce a summary of the witnesses' anticipated testimony. Such a request is premature. Under the local and federal rules, a party must provide such information, but it need not do so until it makes its pretrial disclosures, at least thirty days before trial or upon submission of its pretrial statement. Fed. R. Civ. Pro. 26(a)(3); LCvR 16.5(b). Since no trial date has yet been set in this case, defendant has no obligation to reveal the witnesses it may call. In addition, requiring defendant to disclose the names of witnesses he anticipates calling would violate the work-product privilege. As I explained in another case:

Defendant is not entitled to the exact list of witnesses planning to testify as of this date. Fed.R.Civ.P. 26(a)(3) only requires the plaintiff to give names of certain witnesses who plaintiff expects to testify at trial, at least 30 days prior to trial or upon submission of his pretrial statement. Local Rule 209(b)(1)(iv). Thus, the plaintiff has no duty to disclose the exact witnesses he intends to call until then.... The disclosure defendant requests of the names of the witnesses who provided statements to plaintiff's counsel crosses the boundary into work product because the names requested are interwoven with the preparation of plaintiff's case. Here, the plaintiff decided from all of the employees of the IRS with potentially relevant information who he wanted to in-

terview. Clearly such decisions constitute "strategy" and a lawyer's "mental process" in preparing for litigation. This information is therefore work product and not discoverable information.

Chiperas v. Rubin, No. CIV.A. 96-130, 1998 WL 531845, at \*1 (D.D.C. Aug. 24, 1998).

#### 2. Interrogatory Number 4

Plaintiff's Interrogatory Number 4 states:

Identify by name, address, and social security number and position applied for, all persons who have applied for any position at the Office of the Senate Sergeant at Arms and Doorkeeper of the Senate which Plaintiff applied to, whether the application was oral or written during the period of December 1995 through the present, including the date of the application and whether the person was ultimately hired.

Defendant objects to this interrogatory on grounds of relevance, overbreadth, undue burden, and invasion of privacy of third parties. D's Opp. to Mot. to Compel at 8-9. In response to the interrogatory, defendant stated that 267 people applied for the position of Branch Manager of Capitol Facilities and that plaintiff and Ralph Rouse, the selectee, were the only two finalists.

\*16 Plaintiff finds defendant's response to be inadequate [FN10] because it failed to identify any of the 265 other applicants. Plaintiff summarized his dissatisfaction and frustration with defendant's responses by stating that he believes he is entitled to discover "whether all of the African-Americans who applied for the position were similarly or better qualified than Rouse." P's Mot. to Compel at 9.

FN10. Plaintiff also criticizes defendant's response because defendant failed to provide contact information for Mr. Rouse. However, Mr. Rouse's contact information was provided in response to Interrogatory Number 2. Plaintiff also objects to defendant's failure to provide information regarding whether the other 265 applicants were ultimately hired in the Branch Manager po-



sition or another position. As defendant explains in its opposition, however, this criticism is frivolous. D's Opp. to Mot. to Compel at 8 n. 7. Because defendant explained that Mr. Rouse was hired for the position, it can be easily inferred that none of the other 266 applicants were selected for the job. In addition, because plaintiff applied only to be Branch Manager, that is the only position for which information was sought in this interrogatory. *Id.*

Defendant maintains that the names and qualifications of the 265 applicants, besides plaintiff, who were not selected as finalists and, therefore, not presented to SAA for consideration are irrelevant. D's Opp. to Mot. to Compel at 9. Defendant also claims that disclosing such information would constitute an unwarranted intrusion into the privacy rights of the other applicants. *Id.* at 9-10.

[10] Defendant is correct. The names and qualifications of the 265 applicants who were not chosen to be finalists are irrelevant to whether the selecting official discriminated against plaintiff when he chose Mr. Rouse. In addition, while the information may be relevant to whether the initial review of applicants was discriminatory, plaintiff cannot claim that he was discriminated against during the first round of application decisions because he survived that round and was named as a finalist. In addition, knowing the identities of the 265 applicants would only be helpful to plaintiff if he knew their races, but plaintiff did not seek that information in the interrogatory and defendant has stated that it did not collect data on the applicants' racial backgrounds. Therefore, the information requested in Interrogatory Number 4 is irrelevant to plaintiff's lawsuit, and I will not compel defendant to respond.

### 3. Interrogatory Number 5

Plaintiff's Interrogatory Number 5 states:

For each of the employees identified in Number "4" above, state with specificity each and every reason why each employee was offered a position or the reasons the person was not offered a posi-

tion.

In light of my discussion regarding Interrogatory Number 4, I will similarly not compel defendant to provide this information.

### 4. Interrogatory Number 16

Plaintiff's Interrogatory Number 16 states:

Please completely identify all witnesses you expect to call at trial, including the expected nature of their testimony.

For the reasons stated in my discussion of Interrogatory Number 2, I will similarly not order defendant to provide plaintiff with this information.

### 5. Interrogatory Number 18

Curiously, in his motion to compel, plaintiff lists Interrogatory 18 but fails to explain why he is seeking a court order compelling defendant to respond more fully to this interrogatory. Defendant also fails to address the particulars of Interrogatory 18. [FN11] Because neither party addressed the merits of this request, I will not compel defendant to file any supplemental responses to this interrogatory.

[FN11] Ostensibly because of defendant's failure to address Interrogatory Number 18, plaintiff states that defendant "concedes the motion" as to Interrogatory Number 18. P's Reply to Mot. to Compel at 10.

F. Defendant's Motion for a Protective Order from Plaintiff's Request for Admissions; Request for Expedited Ruling ("D's Mot. for P.O.") [# 47]

[11] Defendant has moved the court for a protective order from answering plaintiff's 150 requests for admission, claiming that requests \*17 for admissions were not timely served. D's Mot. for P.O. at 1.

Plaintiff's requests for admissions were hand-delivered on January 20, 2004. *Id.* at 3. Under Rule 36, defendant's response was due on February 19, 2004, thirty days after the requests were served. However, according to the court's original scheduling order, all discovery was scheduled to close by

February 17, 2004. Therefore, under the original scheduling order, the requests for admission were untimely. See Fed.R.Civ.P. 36; Gluck v. Ansett Australia Ltd., 204 F.R.D. 217, 219-20 (D.D.C.2001) (finding that the "text, structure and purpose of the federal rules ... suggest that service of plaintiff's requests for [admissions] was subject to the discovery deadline"). See also Toone v. Fed. Express Corp., No. CIV.A. 96-2450, 1997 WL 446257, at \*8 (D.D.C. July 30, 1997) (finding that plaintiff's motion to compel responses to his requests for admissions should be denied because of untimely service, failure to file a motion to extend the discovery deadline, and failure to file a motion to shorten the time for defendant's response).

On February 5, 2004, however, the court granted defendant's motion to amend the discovery schedule. [FN12] Under the amended order, discovery was set to close on February 24, 2004. The court also extended each party's deadlines for responding to outstanding discovery by one week. Thus, according to defendant, its new deadline to respond to the requests for admission was February 26, 2004. *Id.* at \*3.

[FN12]. The court ordered: "The defendant shall have an additional week to respond to discovery and to file any opposition or reply briefs; plaintiff shall have an additional week to respond and to file any opposition or reply briefs. The discovery cut-off date is extended to February 24, 2004." February 5, 2004 Minute Entry.

Under the original scheduling order and according to the revised discovery schedule, the requests for admissions were untimely. However, plaintiff barely missed the deadline. He served the requests 28 days before the close of discovery, and defendant's duty to answer the requests fell only two days outside the prescribed discovery period.

These facts are clearly distinguishable from the eleventh-hour situations in which this court has protected a party from answering untimely requests for

admissions. In Gluck v. Ansett Australia Ltd., plaintiff submitted requests for admissions within one week of the discovery deadline. Gluck, 204 F.R.D. at 218. In Toone v. Fed. Express Corp. the requests for admissions were served on the same day that discovery was set to close, and under the Rules, the defendant had until the day of the original trial date to respond. Toone, 1997 WL 446257, at \*8.

In a situation more analogous to this one, the Southern District of New York required a party to respond to untimely requests for admissions because: 1) they were only untimely by a day or two, 2) counsel explained that they were served on a Monday after a messenger failed to pick them up on a Friday, and 3) the parties still had two months before the close of expert discovery. Revlon Consumer Products Corp. v. Estee Lauder Cos., No. CIV.A. 5960, 2001 WL 521832, at \*1 (S.D.N.Y. May 16, 2001). Similarly, plaintiff in this case missed the deadline by only two days, and his counsel explained that the requests were supposed to be delivered 4 days earlier. Because of an emergency closing at defendant's office and an intervening holiday weekend, however, the requests were served the following Tuesday. Plaintiff's Opposition to Sergeant-at-Arms' Motion for Protective Order at 3. In addition, it was defendant that moved to enlarge the discovery period, and it did so without bringing to light this deadline dispute. In light of all of these factors, I will order defendant to respond to plaintiff's 150 requests for admissions within 30 days of the date of this Memorandum Opinion. Given the confusion surrounding the deadlines, however, I will not grant plaintiff's cross-motion for attorney's fees and costs [FN13] related to this motion.

[FN13]. See Opposition to the Sergeant-At-Arms' Motion for a Protective Order from Plaintiff's Request for Admissions and Cross Moves for the Award of Attorney's Fees and Costs [# 55].

\*18 G. Defendant's Motion for Protective Order

*Regarding Plaintiff's Rule 30(B)(6) Notice of Video Deposition [# 57] and Plaintiff's Motion to Preclude Defendant from Offering Testimony Concerning the Subject Matter of Plaintiff's Rule 30(b)(6) Notice of Deposition and Request for Attorneys' Fees and Costs [# 59]*

On February 10, 2004, plaintiff served a notice of deposition upon SAA pursuant to Rule 30(b)(6). It listed 35 topics on which testimony was sought. On February 18, 2004, SAA advised plaintiff's counsel that SAA would be moving for a protective order within two days time. Plaintiff indicated he would nevertheless go forward with the deposition on February 23, 2004, a Monday. On February 20, 2004, SAA did file a motion for protective order objecting to several of the 35 topics as irrelevant because they dealt with a matter (workmen's compensation claim) that was the subject of a pending motion to dismiss. Thus, SAA filed its motion for a protective order on Friday afternoon and the deposition proceeded the following Monday. Since neither Judge Kennedy nor I sleep here on the weekends, it was impossible for either of us to rule on the motion for a protective order; indeed, plaintiff still had 11 days under our Local Rules to respond to it. LCvR 7(b).

1. *Supervision of Depositions Generally*

[12] The premise of defendant's motion is that it is an appropriate exercise of the judicial supervision of discovery to issue a protective order to prevent counsel from asking a question that is irrelevant or so ineptly phrased that it can be condemned as vague or ambiguous. The problem with that premise is that, as I have pointed out in this very case, the federal courts do not permit a witness to refuse to answer a question that is irrelevant. Instead, the witness must answer the question, subject to the objection. On the other hand, if SAA has it right, federal courts should go to the opposite extreme and, when a 30(b)(6) deposition is taken, not only permit the witness to refuse to answer an irrelevant question but rule in advance as to what topics are relevant.

Alternatively, a party can secure a protective order

under Rule 26 upon a showing of good cause. Although those words are designed to be malleable, all can agree that insisting that a federal court act to prevent the possibility that irrelevant questions will be asked at a deposition is completely unprecedented and would require the court to micro-manage the discovery process. That is the exact opposite of what a court is supposed to be doing in enforcing Rule 1. In any event, the worst that can happen when a party asks a 30(b)(6) witness questions about an irrelevant topic is that the process will be unnecessarily time-consuming. While there are more pleasant ways to pass the time, that kind of "burden" has to be endured in any deposition because, as I have explained, a witness must answer even irrelevant questions in a non-30(b)(6) deposition. To have one rule for the ordinary deposition and a completely different one for 30(b)(6) depositions makes no sense, particularly when some lawyers hardly need encouragement to make discovery more expensive and when, given crowded dockets, the court may not be able to act as promptly as the parties hope on a motion to preclude the party taking the 30(b)(6) deposition from asking certain questions. Moreover, there is time and power enough after the deposition has been taken to punish the party or lawyer who wasted everyone's time. Thus, without precluding the possibility of reaching a different decision in a case where there is more obvious abuse, I will exercise my discretion in this case and deny SAA's motion for a protective order.

I appreciate that there remains open the necessity of taking one or more 30(b)(6) depositions as to the remaining 27 topics. I feel an urgent necessity to supervise that process for several reasons. I have reviewed carefully the list of topics in *Plaintiff's Rule 30(b)(6) Notice of Video Deposition to Defendant's Office of the Senate Sergeant at Arms and Doorkeeper*. In most respects, it certainly does not describe with "reasonable particularity the matters on which examination is requested." Fed.R.Civ.P. 30(b)(6). Instead, each of the topics reads like an interrogatory or a section of a request for production of documents. For example, topic 20 defines a

"topic" as: "The sum and \*19 substance of all conversations between Ann Harkins and any employee of the SAO concerning Mr. Banks from January 1, 2002 and March 20, 2002, the date of those conversations, where those conversations took place, the reason for those conversations, the person who requested that a conversation (which includes any meeting) take place." It almost goes without saying that this "topic" is absurdly overbroad; conversations about Mr. Banks' hair style or his new suit cannot possibly be relevant to this lawsuit.

I am afraid that many of the other "topics" suffer from the same or similar problems. However, I have neither the time nor the inclination to "flyspeck" them. Instead, I will wipe the slate clean and require the parties to attempt in good faith to arrive at a mutually agreeable listing of topics for the 30(b)(6) depositions that are to be taken and the 30(b)(6) witnesses who will speak to them. In arriving at that list, I expect the parties to find topics that will insure that the 30(b)(6) depositions are meaningful exercises in ascertaining information that has not been previously discovered or are necessary to ascertain the position SAA took or takes as to factual and legal issues that have arisen. By taking these depositions, plaintiff is certifying to me that he will not ask questions that duplicate questions previously asked of other witness or seek information that he already has by virtue of responses to other discovery devices. The list of topics, that will have to be approved by me before the deposition is taken, will have to be consistent with that certification.

## 2. *The McComish Deposition*

I now turn to the McComish deposition.

[13] Plaintiff seeks an extraordinary remedy, the preclusion from offering testimony at trial as to the subject matter of Plaintiff's February 10, 2004 Rule 30(b)(6) Notice of Deposition. Since that Notice covers every issue in the lawsuit, plaintiff is, in effect, seeking a default judgment. Such relief requires a showing that the violation of the rule or of the court's orders pertaining to discovery is so gross

that no lesser sanction is appropriate. Zenian v. District of Columbia, 283 F.Supp.2d 36 (D.D.C.2003). I have reviewed the McComish deposition carefully, and I cannot find in it any basis for the remedy plaintiff seeks. To the contrary, I find that McComish answered conscientiously and completely the questions as to the specific things she did with reference to plaintiff's demand that he be accommodated because of his asserted disability. I appreciate that plaintiff takes her to task for not investigating certain matters, but she is under no obligation to investigate anything if she otherwise answers the questions on the basis of her knowledge. The courts understandably guard against the gamesmanship of a corporation, for example, naming as a 30(b)(6) witness a person who knows nothing about the topics and does nothing to inform himself about them so that his deposition threatens to be a series of cynical "I do not know" statements. See e.g., In re Vitamins Antitrust Litigation, 216 F.R.D. 168 (D.D.C.2003). There was nothing like that whatsoever in this case. The witness explained what she did in reference to the processing of plaintiff's request for an accommodation and identified other persons who may have other information about that topic and the somewhat related issue of plaintiff's applying for workmen's compensation. Once she spoke of what she did and of what others did or might know, she fulfilled her responsibility. She had no responsibility to investigate plaintiff's case for him.

I certainly appreciate that she refused to answer certain questions as being beyond the scope of the topics she agreed to testify to and refused to answer others on the grounds of privilege. It is my intention, however, that once the parties have agreed upon the proper topics for the remaining 30(b)(6) depositions, they will then agree upon what 30(b)(6) witnesses will speak to what topic. Once that is done, the areas that McComish refused to discuss will have been covered by other witnesses, rendering her refusal moot. As to the issue of privilege, it is my repeated experience that I cannot rule on the legitimacy of a claim of privilege in a depos-

ition without knowing the context of the situation, which can only be secured by my asking the witness the circumstances in which the privileged communication took place. Hence, unless it is unnecessary to do so, I intend to re-\*20 commence her deposition before me, and I will rule on the application of the privileges claimed as to each question in which they are asserted. I will, however, postpone resuming the deposition in my presence until all the other 30(b)(6) depositions are taken, so that I can ask McComish additional questions. It may well be that these other depositions may render the assertion of the privilege insignificant and the resources that would be consumed in resolving whether or not the privilege was properly claimed can be conserved until then.

H. *Plaintiff's Motion to Compel Defendant to Fully and Completely Respond to Plaintiff's Third Request for Production of Documents and Provide Identified Documents* ("P's 2nd Mot. to Compel") [# 61] and *Plaintiff's Motion to Compel Defendant to Provide Privilege Log and Motion for an Order that Defendant Has Waived Privilege as to Responsive Documents Not Produced* ("P's 3rd Mot. to Compel") [# 71]

#### 1. Background History

On July 30, 2003, Banks served his first document request on SAA. *See* P's 3rd Mot. to Compel, Exhibit A. On September 16, 2003, SAA responded. *See Id.*, Exhibit B. Rather than provide the responsive documents along with a privilege log, SAA withheld the documents and indicated that the documents were privileged. *Id.*

On November 18, 2003, Banks served his second document request on SAA. *See id.*, Exhibit C.

On January 12, 2004, Banks served his third document request on SAA. *See id.*, Exhibit D. Banks also requested by letter that a privilege log be provided prior to plaintiff's taking of depositions in this matter. On February 23, 2004, SAA responded to Bank's third document request, giving the same response that it had previously. *See id.*, Exhibit G.

On numerous occasions, Banks attempted to obtain a privilege log from SAA. *See id.*, Exhibits E, H, I, and J. Finally, on March 23, 2004, SAA provided Banks with a "comprehensive privilege log." *Defendant's Opposition to Plaintiff's Motion to Compel Production of a Privilege Log* ("D's 3rd Opp.") at 1.

#### 2. Analysis

Banks seeks the production of a privilege log by SAA as well as an order from this court declaring that SAA has waived its assertion of any and all privileges as to these documents because the privilege log was not produced in a timely fashion. SAA counters that the motion is now moot because a privilege log has been produced. D's 3rd Opp. at 1. SAA also contends that it has not waived any privileges and that the log itself provides Banks with the information it needs to challenge, on a substantive level, the privileges asserted. *Id.* at 1-2.

#### a. Documents

Under Rule 26(b)(5), a party is required to submit a privilege log when asserting a privilege as to any otherwise discoverable material:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

[14] In addition, the withholding of such a privilege log may subject a party to sanctions under Rule 37(b)(2) and may be viewed by the court as a waiver of any privilege or protection. Fed.R.Civ.P. 26 advisory committee's note. *See also Avery Denison Corp. v. Four Pillars*, 190 F.R.D. 1, 2 (D.D.C.1999).

In the case at bar, while SAA did ultimately provide Banks with a privilege log, it was not

provided in a timely fashion. Nevertheless, a privilege log was provided and, therefore, the issue of waiver is not raised.

By the same token, SAA's only excuse for the five-month delay in providing the privilege log is that it took time to prepare it. \*21 D's 2nd Opp. at 2. Under Rule 37(a)(4), the court may, in its discretion and after providing the non-prevailing party an opportunity to respond, award attorney's fees to the prevailing party following the court's resolution of a motion to compel. See Cobell v. Norton, 213 F.R.D. 16, 28-29 (D.D.C.2003). Although SAA did ultimately file a privilege log, I will order SAA to show cause why Banks should not be awarded attorney's fees and costs for having to file a motion to compel in the first instance.

Furthermore, the failure to file the privilege log occurs, according to plaintiff, in a disturbing context. Plaintiff complains that on March 26, 2004, he received 300 documents that were apparently responsive to requests that were served on July 30, 2003, September 16, 2003 and November 18, 2003. March 26, 2004 was six days before discovery was to close and after plaintiff had taken depositions which, he claims, might have been used to prepare for the deposition or interrogate the deponent.

The record does not reflect any reason for that delay. Nor did SAA ever ask for court permission to delay its response to the three requests for production of documents. The absence of any such court permission and plaintiff's claim of prejudice resulting from that delay compel me to require SAA to show cause why sanctions, in addition to the attorney's fees I am awarding, should not be awarded plaintiff. I expect SAA to justify the delay and the alleged failure to secure judicial permission and to rebut any claim of prejudice that plaintiff asserts. My Order will, therefore, allow ample time for plaintiff to respond and for SAA to reply.

#### b. Interrogatories

[15] Unlike requests for the production of documents, an interrogatory must simply "be answered

separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable." Fed.R.Civ.P. 33(b)(1). As with requests for the production of documents, however, under Rule 33(b)(4), the failure to object in a timely fashion to interrogatories constitutes a waiver of any objections unless good cause is shown. See Byrd v. Reno, No. CIV.A. 96-2375, 1998 WL 429676, at \*4 (D.D.C. Feb. 12, 1998). There is no claim by Banks that SAA failed to object in a timely fashion to any of the interrogatories, and therefore, waiver is not an issue.

[16] Plaintiff also claims, however, that SAA "failed to provide a witness log for the Interrogatory Communications which the Defendant claimed were privileged." Reply at 2. This claim is also made as to assertions of privilege made by a witness during a deposition. Thus, it appears that plaintiff thinks that once a party or a witness claims a privilege, that party or witness must file a privilege log. While privilege logs have become the universal means of claiming a privilege when a party claims that certain documents are privileged from discovery, there is nothing in the Federal Rules of Civil Procedure that requires the filing of a privilege log when a party claims a privilege as to a deposition question or an interrogatory. A party can comply with the requirement of Rule 26(b)(5) by otherwise communicating sufficient information to "enable other parties to assess the applicability of the privilege or protection." Thus, in a given case, a well-formed objection to a question, whether oral or written, may suffice. Since there is no obligation to file the "witness" or "interrogatory" logs plaintiff seeks, SAA cannot be sanctioned for not providing them.

#### c. In Camera Review

As just noted, there are now 400 documents claimed to be privileged. I have reviewed the privilege log and find, as I invariably do, it is useless. See Marshall v. District of Columbia Water &

Sewage Authority, 214 F.R.D. 23, 25 n. 4 and cases cited therein (D.D.C.2003). I will, therefore, order the production of all documents claimed to be privileged for my *in camera* evaluation.

*I. Defendant's Motion to Reopen Plaintiff's Deposition and Memorandum of Law in Support Thereof*  
[# 70]

Counsel now representing SAA did not represent it at the plaintiff's deposition, and \*22 he now seeks to reopen that deposition for another day. In opposition, plaintiff and his counsel filed sworn declarations attesting that plaintiff, who was in pain during his deposition due to recent surgery, agreed to continue the deposition until 8:25 p.m., an hour and one half hour longer than the seven hours permitted by Rule 30(d)(2), with the understanding that SAA would then complete the deposition and not have to resume it. SAA, by its new counsel, claims that it was the illness of the court reporter that caused the adjournment. Significantly, SAA does not tender an attestation either from the court reporter indicating that his or her illness was the reason for the adjournment or from prior counsel for SAA, denying the agreement plaintiff claims was made. Hence, plaintiff's and his counsel's attestations are unrebutted and carry the day. I will not permit the deposition to be resumed but will invoke what I consider Rule Number One of professionalism and civility among lawyers-a deal is a deal.

**CONCLUSION**

A detailed Order accompanies this Memorandum Opinion.

222 F.R.D. 7

END OF DOCUMENT

H

United States District Court,  
E.D. Pennsylvania.  
STATE FARM MUTUAL AUTOMOBILE IN-  
SURANCE CO. et al., Plaintiffs,  
v.  
NEW HORIZONT, INC. et al., Defendants.  
Civil Action No. 03-6516.

Nov. 25, 2008.

**Background:** Insurer sued health-care providers, alleging fraudulent scheme to obtain payment for injuries allegedly caused by its insureds, asserting claims for fraud, conspiracy, and unjust enrichment. After providers moved to compel deposition of insurer's corporate designee in his individual capacity, insurer moved for protective orders enjoining providers from taking designee's deposition in his individual capacity and additional deposition noticed by providers. After motions for protective orders were granted, providers moved for reconsideration and filed two new motions to compel.

**Holdings:** The District Court, Eduardo C. Robreno, J., held that:

- (1) providers did not establish good cause required to take deposition of insurer's corporate designee in his individual capacity;
- (2) providers had to obtain leave of court to conduct additional deposition of insurer;
- (3) providers could not be granted leave to conduct additional depositions of insurer; and
- (4) reconsideration of protective order precluding providers from taking additional deposition of insurer was not warranted.

Ordered accordingly.

West Headnotes

[1] **Federal Civil Procedure** ⚡1327.1

170Ak1327.1 Most Cited Cases

Deposition of insurer's corporate designee in his individual capacity could be conducted only if good

cause was shown by health-care providers in insurer's action for fraud, conspiracy, and unjust enrichment, given providers' concession that designee did not have personal knowledge of facts underlying insurer's claims or defenses, and instead verified discovery responses on insurer's behalf. Fed.Rules Civ.Proc.Rules 26(b)(1), 30(b)(6), 28 U.S.C.A.

[2] **Federal Civil Procedure** ⚡1327.1

170Ak1327.1 Most Cited Cases

Health-care providers did not establish good cause required to take deposition of insurer's corporate designee in his individual capacity in insurer's action for fraud, conspiracy, and unjust enrichment, given that district court's prior suggestion that providers could be entitled to file motion to compel specific answers to interrogatories if designee had no basis for verifying insurer's answers to interrogatories did not invite fishing expedition into designee's preparation in present and any other cases in past 10 years, that providers had opportunity to discover relevant facts to which they were entitled through

depositions of two corporate designees, and that court needed no further testimony to determine amount of sanction for insurer's failure to prepare designee. Fed.Rules Civ.Proc.Rules 26(b)(1), 30(b)(6), 28 U.S.C.A.

[3] **Federal Civil Procedure** ⚡1451

170Ak1451 Most Cited Cases

Assuming that first of plaintiff's corporate designees was provided information by counsel that was not provided to second corporate designee, such that second designee was ineffective deponent, defendants' proper remedy was motion to compel deposition testimony of corporate designee on grounds that second designee was not adequately prepared, rather than seek to depose first designee in his individual capacity. Fed.Rules Civ.Proc.Rule 30(b)(6), 28 U.S.C.A.

[4] **Federal Civil Procedure** ⚡1346.1



170Ak1346.1 Most Cited Cases

**[4] Federal Civil Procedure** ⇨1408

170Ak1408 Most Cited Cases

Notice of deposition was unreasonably overbroad, both as to testimony to be taken and documents to be produced, when it indicated that testimony had to be provided "on matters related to this litigation, including, but not limited to [certain examples]," and that documents required included "[a]ny and all discovery responses, including but not limited to actions, other than the instant action, for the period from 1998 to 2008." Fed.Rules Civ.Proc.Rule 26(b)(2)(C), 28 U.S.C.A.

**[5] Federal Civil Procedure** ⇨1408

170Ak1408 Most Cited Cases

Notice of deposition could not seek, on short notice, documents that were already the subject of pending document request; request was simply end-run around rule allowing 30 days to respond to document requests. Fed.Rules Civ.Proc.Rule 34(b)(2)(A), 28 U.S.C.A.

**[6] Federal Civil Procedure** ⇨2814

170Ak2814 Most Cited Cases

When a motion to compel is denied, court must impose sanctions in the amount of the fees and costs associated with responding to the motion unless the motion was substantially justified or it would be otherwise unjust to impose sanctions. Fed.Rules Civ.Proc.Rule 37(a)(5)(B), 28 U.S.C.A.

**[7] Federal Civil Procedure** ⇨2774(2)

170Ak2774(2) Most Cited Cases

Genuine dispute existed between the parties as to propriety of defendants' deposition of plaintiff's corporate designee in his individual capacity, and therefore defendants' motion to compel deposition was substantially justified and sanctions based on denial of motion to compel were not warranted. Fed.Rules Civ.Proc.Rule 37(a)(5)(B), 28 U.S.C.A.

**[8] Federal Civil Procedure** ⇨1327.1

170Ak1327.1 Most Cited Cases

Pursuant to rule requiring leave of court to take de-

position of deponent who had already been deposed in case, defendants had to obtain leave of court to conduct additional deposition of corporate plaintiff through its designees. Fed.Rules Civ.Proc.Rule 30(a)(2)(A)(ii), 28 U.S.C.A.

**[9] Federal Civil Procedure** ⇨1327.1

170Ak1327.1 Most Cited Cases

**[9] Federal Civil Procedure** ⇨1358

170Ak1358 Most Cited Cases

Health-care providers did not justify their failure to ask questions related to insurer's non-fraud claims against them during providers' prior depositions of insurer's corporate designees, precluding granting of leave to conduct additional depositions of insurer and warranting granting of insurer's motion for protective order, when providers indicated that they simply chose to focus first on fraud claims and then seek additional depositions for other claims.

Fed.Rules Civ.Proc.Rules 26(b)(2), 30(a)(2), 28 U.S.C.A.

**[10] Federal Civil Procedure** ⇨928

170Ak928 Most Cited Cases


Reconsideration was not warranted with respect to protective order that precluded health-care providers from taking additional deposition of insurer through its corporate designee based on providers' decision not to address insurer's non-fraud claims against them during their first two depositions of insurer and to seek additional depositions later, given that district court, in granting protective order, did not overlook cases cited by providers in support of their request for multiple depositions, and neither insurer's abuse of discovery process nor its counsel's suggestion that providers notice additional deposition justified providers' delay in attempting to obtain discovery on non-fraud claims. Fed.Rules Civ.Proc.Rule 30(b)(6), 28 U.S.C.A.

**[11] Federal Civil Procedure** ⇨2651.1

170Ak2651.1 Most Cited Cases

Judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the

controlling law, (2) the availability of new evidence that was not available when the court granted the motion for summary judgment, or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.

**[12] Federal Civil Procedure**  928

170Ak928 Most Cited Cases

A motion for reconsideration may address only factual and legal matters that the court may have overlooked; it is improper on a motion for reconsideration to ask the court to rethink what it had already thought through, rightly or wrongly.

**[13] Federal Civil Procedure**  2774(2)

170Ak2774(2) Most Cited Cases

Health-care providers had colorable argument that, at the time they filed motions to compel deposition of insurer in insurer's action for fraud, conspiracy, and unjust enrichment, propriety of additional depositions of insurer was yet to be ruled on by district court, given providers' then-pending motion for reconsideration on issue, and therefore motions to compel were substantially justified and sanctions based on denial of motions were not warranted. Fed. Rules Civ. Proc. Rules 30(b)(6), 37(a)(5)(B), 28 U.S.C.A.

\*229 Cy Goldberg, Richard Michael Castagna, Goldberg, Miller & Rubin, PC, Philadelphia, PA, for Plaintiffs.

Joel W. Todd, Dolchin Slotkin & Todd PC, Maria Temkin, Bruce S. Marks, Marks & Sokolov, LLC, Michael B. Tolcott, Gilbert B. Abramson, James A. Backstrom, Counsellor at Law, Philadelphia, PA, Frank H. Morgan, Jr., James L. McKenna, P.C., Wynnewood, PA, for Defendants.

MEMORANDUM

EDUARDO C. ROBRENO, District Judge.

I. BACKGROUND

State Farm Mutual Automobile Insurance Co. and State Farm Fire and Casualty Co. \*230 ("State Farm") brought suit against certain health-care pro-

viders ("Defendants"), alleging that Defendants carried out a fraudulent scheme to obtain payment for injuries allegedly caused by State Farm insureds. During the course of discovery, Defendants conducted a deposition of State Farm through its corporate designee, Austin Bowles, pursuant to Federal Rule of Civil Procedure 30(b)(6). Disputes arose at the deposition concerning Bowles's responses and counsel for State Farm's instructions not to answer.

Defendants subsequently moved to compel Bowles's Rule 30(b)(6) deposition testimony. State Farm argued that, at the deposition, counsel "properly instructed Bowles not to disclose any facts learned from discussions with counsel in preparation for the Rule 30(b)(6) deposition because such facts constitute attorney work product." State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc., 250 F.R.D. 203, 214 (E.D.Pa.2008). The Court disagreed, and instructed the parties that "[t]o the extent that defense counsel's questions seek relevant, non-privileged facts learned from discussions with counsel, and do not seek counsel for State Farm's mental impressions, conclusions, opinions, or legal theories, those questions must be answered," pointing the parties to the decision in Protective Nat'l Ins. Co. v. Commonwealth Ins. Co., 137 F.R.D. 267, 280 (D.Neb.1989). New Horizont, 250 F.R.D. at 215-16 & n. 9.

The Court's order required that "an additional Rule 30(b)(6) deposition of Mr. Austin Bowles, and/or another appropriately prepared designee, shall take place no later than June 9, 2008." Id. at 223. The Rule 30(b)(6) deposition was taken on June 11, 2008, through State Farm employee and corporate designee John Costanzo. On May 20, 2008, Defendants noticed yet another Rule 30(b)(6) deposition of State Farm to address additional, previously unexplored areas of inquiry.

In a separate section of the memorandum, the Court briefly discussed Federal Rule of Civil Procedure 33(b), and the possibility that Bowles's verifications of answers to interrogatories may have been im-

proper, as "[i]t is incomprehensible how Bowles could have verified under oath the truth of answers to interrogatories if he had never previously seen them." *Id.* at 222. While the Court did not hold that the answers to interrogatories were improperly verified, it did note that "Defendants may be entitled to file a motion to compel responses to specific interrogatories that State Farm failed to answer or answered in an evasive or incomplete manner ... and possibly for sanctions," if Bowles verified those responses without any basis. *Id.* at 222 n. 18.

Defendants did not file any such motion; instead, on May 13, 2008, Defendants noticed the deposition of Bowles in his *individual* capacity, proposing a May 22, 2008 deposition date. The notice does not cite Rule 30(b)(6), and includes extremely broad topic areas for examination:

[C]ounsel ... will take the deposition of Austin Bowles on *matters related to this litigation, including, but not limited to*, (a) his preparation for his deposition as Plaintiffs' corporate designee held on June 6, 2007, (b) verifications of Plaintiffs' discovery responses in the above action, and (c) facts and materials provided to him by Plaintiffs' counsel in preparation for his above deposition and related to his verifications as authorized by the Federal Rules of Civil Procedure. Def.'s Mot. to Compel, Ex. 2 (doc. no. 377) (emphasis added). The notice is also accompanied by extremely broad categories of documents that Bowles must bring to the deposition:

1. *Any and all discovery responses, including but not limited to*, answers to interrogatories and document production requests, admissions, verified by Mr. Austin Bowles on behalf of Plaintiffs, and/or transcripts of depositions given by Mr. Bowles on behalf of Plaintiffs, and/or transcripts of depositions given by Mr. Bowles on behalf of Plaintiffs, in *actions, other than the instant action, for the period from 1998 to 2008*.

2. Documents identified in Ruslana Voloshen and Northeast Aqua and Physical Therapy Center, Inc.'s Supplemental Request for Production of \*231 Documents--Set IX, dated May 13, 2008.

*Id.* (emphasis added).

By letter of May 19, 2008, counsel for State Farm indicated that the proposed date would not work, and stated its position that the deposition was improper, indicating that it would file a motion for protective order. *Id.*, Ex. 4. The deposition was scheduled for June 11, 2008.

On May 30, 2008, however, apparently seeking to preempt the motion for protective order, Defendants filed a motion to compel Bowles's deposition in his individual capacity under Rule 37(a) (doc. no. 377). The motion for protective order seeking to enjoin the deposition of Bowles in his individual capacity was filed on June 20, 2008 (doc. no. 387). State Farm also filed a motion for protective order seeking to enjoin Defendants from taking the additional Rule 30(b)(6) deposition that Defendants noticed on May 20, 2008 (doc. no. 381).

The Court decided the motions from the bench following a hearing on July 14, 2008, denying as moot the motion to compel, and granting the motions for protective orders. Thereafter, a written order was issued memorializing the decision (doc. no. 393). See Order, July 16, 2008 (doc. no. 393). Defendants have filed a motion for reconsideration of the order to the extent that it granted State Farm's motion for a protective order from the additional Rule 30(b)(6) deposition noticed on May 20, 2008 (doc. no. 398). Defendants have also filed two new motions to compel, seeking an additional Rule 30(b)(6) deposition of Plaintiffs to address previously unexplored issues of reliance, damages and proximate cause (doc. nos. 400 & 401). [FN1] This memorandum seeks to explain more fully the basis for the Court's July 16, 2008 order. In addition, for the reasons set forth below, Defendants' motion for reconsideration (doc. no. 398) and motions to compel an additional Rule 30(b)(6) deposition (doc. nos. 400 & 401) will be denied.

[FN1] On October 1, 2008, Defendants Ruslana Voloshen and Northeast Aqua and Physical Therapy Center, Inc. noticed an

additional Rule 30(b)(6) deposition on the topics of reliance, damages and proximate cause. (See doc. no 400.) On October 14, 2008, these Defendants filed a motion to compel the Rule 30(b)(6) deposition noticed on October 1, 2008. (*Id.*)

On October 2, 2008, Defendants Guennadi Lioubavini and Roman Lubavin issued another notice of deposition of State Farm's Rule 30(b)(6) designee, also seeking to address issues related to damages. (See doc. no. 401.) On October 16, 2008, these same Defendants filed a motion seeking to join the pending motions for reconsideration (doc. no 398) and to compel (doc. no. 400), which was styled as a motion to compel the additional Rule 30(b)(6) deposition noticed on October 2, 2008 (doc. no 401).

Although Defendants issued separate notices of deposition to Plaintiffs' Rule 30(b)(6) designee, the October notices address identical issues and, for the purposes of this analysis, the Court will construe them as seeking only one additional deposition of State Farm on the topics of reliance, damages and proximate cause. See *infra* Part IV.

## II. MOTION FOR PROTECTIVE ORDER: AUSTIN BOWLES

### A. Rule 26(c)(1)

Rule 26(c)(1) governs protective orders and provides, in pertinent part:

The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including ... forbidding the disclosure or discovery [or] ... forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; ....

Fed.R.Civ.P. 26(c)(1).

### B. *Bowles's Deposition in His Individual Capacity*

Defendants' effort to depose Bowles in his individual capacity is yet another distraction far removed from the merits of a case already mired in discovery disputes. For the reasons that follow, the Court has granted Plaintiffs' motion for protective order (doc. no. 387).

### 1. *The May 7, 2008 memorandum and order*

Defendants believe that a deposition of Bowles in his individual capacity was ordered by the Court in its May 7, 2008 memorandum and order:

\*232 The Notice of Deposition and document requests were drafted specifically to follow the Court's directive to (1) re-depose Bowles on the subject of the facts (if any) learned by Bowles from State Farm's counsel, and (2) elicit information regarding verification of discovery responses to determine whether the responses contained truthful information and whether a further motion to compel and/or sanctions is required.

Def.'s Mot. to Compel 5 (doc. no. 377).

The Court did not order that the deposition of Bowles in his individual capacity be taken. To the contrary, the memorandum clearly directed: "The Rule 30(b)(6) deposition of Bowles, or another suitable witness, shall resume in accordance with the order of this Court." *New Horizont*, 250 F.R.D. at 215. The order directed that "an additional Rule 30(b)(6) deposition of Mr. Austin Bowles, and/or another appropriately prepared designee, shall take place no later than June 9, 2008." *Id.* at 223. Nowhere did the Court order the deposition of Bowles in his individual capacity.

### 2. *Good cause*

[1] Defendants, of course, do not need an order of the Court to depose Bowles as an individual; however, any discovery sought must fit within the broad boundaries of Rule 26:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense

.... For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed.R.Civ.P. 26(b)(1); see also Robinson v. Hartford Ins. Co., No. 03-5618, 2004 WL 1090991, at \*1 n. 1 (E.D.Pa. May 11, 2004) (distinguishing between "core" and "good cause" discovery).

At the July 14, 2008 hearing, defense counsel conceded that Bowles does not have any personal knowledge of the facts underlying State Farm's claims or defenses. Rather, Bowles verified discovery responses *on behalf of* State Farm. Therefore, the deposition of Bowles in his individual capacity may only be permitted if Defendants can demonstrate "good cause."

[2] First, Defendants argue that Bowles's testimony is "obviously relevant ... in light of this Court's Order allowing Moving Defendants to bring a further motion for sanctions." Def.'s Mot. to Compel. 6 (doc. no. 377). As explained above, the Court discussed the possibility that Bowles had no basis for verifying the answers to interrogatories, and noted that "Defendants may be entitled to file a motion to compel responses to specific interrogatories that State Farm failed to answer or answered in an evasive or incomplete manner ... and possibly for sanctions," if Bowles verified those responses without any basis. New Horizont. 250 F.R.D. at 222 n. 18. In suggesting that Defendants might be entitled to file a motion to compel specific answers to interrogatories, the Court did not intend that Defendants commence a fishing expedition into Bowles's preparation not only in this case but also as to any related or unrelated case during the past ten years. Therefore, contrary to Defendants' contention, the Court's order does not provide "good cause" for the discovery sought.

[3] Second, Defendants argue that "to the extent counsel provided Bowles information related to the [Rule] 30(b)(6) deposition," Defendants are entitled

to know it. Def.'s Mot. to Compel 7 (doc. no. 377). The notice at issue, however, seeks to depose Bowles in his *individual* capacity. Defendants have already conducted two Rule 30(b)(6) depositions of State Farm, one through Austin Bowles and another through John Costanzo, and thus any pertinent information could have been obtained from State Farm's designee in those depositions. [FN2]

FN2. Defendants suggest that Bowles was provided information by counsel that was not provided to Costanzo, and thus that Costanzo was an ineffective Rule 30(b)(6) deponent. Even if Defendants' assertion is true, the proper avenue for this grievance is a motion to compel Rule 30(b)(6) deposition testimony on the basis that Costanzo was not adequately prepared, not a deposition of Bowles in his individual capacity.

\*233 Third, Defendants argue that Bowles's testimony is "relevant to the Court's determination of the gravity of State Farm's conduct to ascertain the amount of sanctions granted by [the] May 8, 2008[sic] Order." *Id.* The lengthy and contentious discovery in this litigation has armed the Court with sufficient information to determine the sanction amount. Additional discovery for this purpose would be wasteful.

Finally, Defendants argue that they are entitled, by the Court's May 7, 2008 order, to know "the facts and materials provided to Bowles by State Farm's counsel in preparation for his deposition in regard to the questions which he was instructed not to answer." *Id.* Defendants are referred to the Court's May 7, 2008 memorandum and order:

"It is important to distinguish between facts learned by a lawyer, a memorandum or document containing those facts prepared by the lawyer, and the lawyer's mental impressions of the facts. The facts are discoverable if relevant. The document prepared by the lawyer stating the facts is not discoverable absent a showing required by Federal Rule of Civil Procedure 26(b)(3)."

New Horizont. 250 F.R.D. at 215 (quoting *Protect-*

ive. 137 F.R.D. at 278 n. 1, 281). As explained above, Defendants have had the opportunity through two Rule 30(b)(6) depositions to discover relevant facts to which they are entitled. Defendants have not shown that they are entitled to discovery of the work-product-protected materials provided to Bowles by counsel.

[4][5][6][7] In sum, Defendants have failed to demonstrate any "good cause" for the deposition of Bowles as an individual. [FN3] Accordingly, Plaintiffs' motion for protective order (doc. no. 387) has been granted. [FN4]

[FN3]. Even if Defendants' notice of deposition satisfied Rule 26(b)(1), "[a]ll discovery is subject to the limitations imposed by Rule 26(b)(2)(C)." Fed.R.Civ.P. 26(b)(1). Under that rule, "the Court must limit discovery" if it determines that, inter alia, "the discovery sought is unreasonably cumulative or duplicative" or "the burden or expense of the proposed discovery outweighs its likely benefit." Fed.R.Civ.P. 26(b)(2)(C). Here, Defendants' notice of deposition is overbroad as to both the testimony to be taken and documents to be produced. It states that testimony must be provided "on matters related to this litigation, including, but not limited to [certain examples]." Def.'s Mot. to Compel, Ex. 2. The documents required include "[a]ny and all discovery responses, including but not limited to ... actions, other than the instant action, for the period from 1998 to 2008." *Id.* These categories are unreasonably overbroad, and even if "good cause" existed for the deposition, the scope of the deposition would have to be narrowed. The notice of deposition also improperly seeks, by May 22, 2008, the documents identified in an already-served May 13, 2008 document request. *See id.* Requesting on short notice documents that are already the subject of a pending document request is noth-

ing more than an end-run around Rule 34(b)(2)(A), which allows 30 days to respond to document requests.

[FN4]. Defendants' motion to compel is the mirror-image of State Farm's motion for a protective order. Because the motion for a protective order has been granted, Defendants' motion to compel has been denied as moot. When a motion to compel is denied, the Court must impose sanctions in the amount of the fees and costs associated with responding to the motion unless the motion was "substantially justified" or it would be otherwise "unjust" to impose sanctions. *See Fed.R.Civ.P. 37(a)(5)(B)*. Here, because there is a genuine dispute between the parties as to the propriety of Bowles's deposition, the motion to compel was substantially justified, and sanctions are not warranted.

### III. MOTION FOR PROTECTIVE ORDER: RULE 30(B)(6) [FN5]

[FN5]. Plaintiffs have sought a protective order only with respect to Defendants' May 20, 2008 notice of deposition (*see* doc. no. 381), but have opposed Defendants' Mot. to Compel the October 1, 2008 and October 2, 2008 notices (*see* doc. nos. 407 & 409). In this section, the Court will address only the May 20, 2008 notice of deposition, which is the subject of Plaintiffs' motion for a protective order (doc. no. 381). For a discussion of the October 1, 2008 and October 2, 2008 notices of deposition, and the related motions to compel (doc. no. 400 & 401), *see infra* Part IV.

As explained above, Defendants have taken two Rule 30(b)(6) depositions of State Farm in this case: one through Austin Bowles on June 6, 2007, and another through John Costanzo on June 11, 2008. Defendants, by their May 20, 2008 notice of deposition, \*234 now seek an additional Rule

30(b)(6) deposition, arguing that the questioning at the previous two depositions focused only on State Farm's fraud claims, and that additional questioning is required relating to State Farm's claims for conspiracy and unjust enrichment. Because the deposition sought by Defendants would be the third deposition of State Farm, the Court must first determine whether repeated depositions of party should be permitted, in accordance with Federal Rule of Civil Procedure 30(a)(2)(A)(ii).

A. Rule 30(a)(2)(A)(ii)

[8] A party need not normally obtain leave of court to take a deposition. Fed.R.Civ.P. 30(a)(1). The exceptions to this rule include the following:

A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):

(A) if the parties have not stipulated to the deposition and:

(i) the deposition would result in more than 10 depositions being taken under this rule ... by the plaintiffs, or by the defendants, or by the third-party defendants; [or]

(ii) the deponent has already been deposed in the case; ...

Fed.R.Civ.P. 30(a)(2).

There is some disagreement as to whether the leave requirement in Rule 30(a)(2)(A)(ii) applies if a party seeks a second Rule 30(b)(6) deposition of a corporate party that has already been deposed. The text of the rule and the advisory committee notes are silent on the relationship between Rule 30(a)(2)(A)(ii) and 30(b)(6). In contrast, regarding the immediately previous subsection allowing for a limit of 10 depositions without leave, the notes state: "A deposition under Rule 30(b)(6) should, for purposes of this limit, be treated as a single deposition even though more than one person may be designated to testify." Fed.R.Civ.P. 30(a)(2)(A) advisory committee's note (1993). [FN6]

FN6. The most recent revision of the Federal Rules resulted in the renumbering of

these sections. The 10-deposition limit, currently Rule 30(a)(2)(A)(i), was formerly 30(a)(2)(A). The second-deposition restriction, currently 30(a)(2)(A)(ii), was formerly 30(a)(2)(B).

Reasoning from this note that "Rule 30(b)(6) depositions are different," at least one court has held that leave of court is not required when seeking a second Rule 30(b)(6) deposition of a corporate party who has already been deposed. See Quality Aero Tech, Inc. v. Telemetrie Elektronik GmbH, 212 F.R.D. 313, 319 (E.D.N.C.2002); see also Kimberly-Clark Corp. v. Teco Healthcare Retail Group, No. 05-985, 2007 WL 601837, at \*3 n. 1 (granting leave but noting that "there is some question about whether leave of court is even required").

Other courts, however, have held to the contrary. See Ameristar Jet Charter, Inc. v. Signal Composites, Inc., 244 F.3d 189, 192 (1st Cir.2001) (holding that it was not plainly wrong for the district court to quash a Rule 30(b)(6) subpoena when leave was not obtained); In re Sulfuric Acid Antitrust Litig., No. 03-4576, 2005 WL 1994105, at \*3-6 (N.D.Ill. Aug.19, 2005) (following Ameristar Jet, rejecting Quality Aero, and citing 7 Moore's Federal Practice § 30.05(1)(c)). Among these courts is the only court in this circuit to address the issue. In Sunny Isle Shopping Ctr., Inc. v. Xtra Super Food Cents, Inc., the Court noted in a footnote order that Rule 30(a)(2)(A)(ii) "has been held applicable to corporate depositions noticed pursuant to Rule 30(b)(6)." No. 98-154, 2002 WL 32349792, at \*1 (D.Vi. July 24, 2002) (following Ameristar Jet).

The latter view appears to be the better one. Neither the text of the rule nor the committee's note exempts Rule 30(b)(6) depositions from the leave requirement in the event of a second deposition of a party already deposed. Rather, the notes state only that a Rule 30(b)(6) deposition should be treated as one deposition, no matter how many designees testify, for purposes of the 10-deposition limit. This limitation has a readily discernable logic, as large corporations with voluminous and complex docu-

ments may require testimony from multiple officers and custodians to provide comprehensive testimony regarding all matters "known or reasonably available to the organization." \*235 Fed.R.Civ.P. 30(b)(6). Thus, a contrary rule would place an unfair constraint on the number of depositions allowed to parties needing to conduct Rule 30(b)(6) depositions.

The same cannot be said for Rule 30(a)(2)(A)(ii). The policy against permitting a second deposition of an already-deposed deponent is equally applicable to depositions of individuals and organizations. Taking serial depositions of a single corporation may be as costly and burdensome, if not more so, as serial depositions of an individual. In both cases, each new deposition requires the deponent to spend time preparing for the deposition, traveling to the deposition, and providing testimony. In addition, allowing for serial depositions, whether of an individual or organization, provides the deposing party with an unfair strategic advantage, offering it multiple bites at the apple, each time with better information than the last. In short, the unfairness that manifests under Rule 30(a)(2)(A)(i), justifying an exception to the 10-deposition limit, does not manifest under Rule 30(a)(2)(A)(ii).

Here, Defendants have not sought leave of court to conduct an additional deposition of State Farm; [FN7] thus the May 20, 2008 notice of deposition was improper. Plaintiffs' motion for protective order with respect to the May 20, 2008 notice could be granted on that basis. In the interest of efficiency, however, and in order to turn the litigation back to the merits, the Court will address the appropriateness of the discovery requested as if Defendants had sought leave of court.

FN7. Leave was not required to conduct the second Rule 30(b)(6) deposition because it was ordered by the Court. See New Horizont, 250 F.R.D. at 216.

B. Rule 26(b)(2)(C)

[9] The Court may only grant leave to conduct multiple depositions of a single organization "to the extent consistent with Rule 26(b)(2)." See Fed.R.Civ.P. 30(a)(2).

Rule 26(b)(2) provides:

On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed.R.Civ.P. 26(b)(2)(C); see also Melhorn v. N.J. Transit Rail Operations, Inc., 203 F.R.D. 176, 180 (E.D.Pa.2001) ("Absent some showing of need or good reason for doing so, a deponent should not be required to appear for a second deposition.").

At the July 14, 2008 hearing, when asked why State Farm was not asked questions in connection with its non-fraud claims at the two prior Rule 30(b)(6) depositions, defense counsel responded as follows:

[T]his is a very complex matter. The way we decided to proceed is, we decided to take the fraudulent issues which were related to the four counts of the complaint first, then see what happens and then, you know, seek depositions on the other three counts of the complaints which are RICO conspiracy, unjust enrichment, and restitution which are side issues really. We just simply decided to proceed in that manner.

Hr'g Tr. 19:2-10, July 14, 2008.

The justification provided is insufficient. Defense counsel provides no reason, let alone a good reason,



why the questions relating to State Farm's non-fraud claims were not noticed at the previous two Rule 30(b)(6) depositions; Defendants simply chose to proceed in such a manner. However, the Federal Rules do not contemplate the "wait-and-see" approach to discovery taken by Defendants. Such an idiosyncratic approach would permit Defendants, without having demonstrated \*236 any good cause for doing so, to avoid drafting a comprehensive notice of deposition and instead conduct depositions seriatim, thereby shifting costs to the opposing side, which would be forced to expend resources preparing for several Rule 30(b)(6) depositions, instead of one.

Therefore, the Court cannot grant Defendants leave to conduct additional Rule 30(b)(6) depositions of State Farm, as "the party seeking discovery has had ample opportunity to obtain the information by discovery in the action," and has not provided a good reason for failing to do so. Fed.R.Civ.P. 26(b)(2)(C). Accordingly, Plaintiffs' motion for protective order (doc. no. 381) has been granted.

### C. Motion for Reconsideration

[10][11][12] Defendants now seek reconsideration of the Court's July 16, 2008 order to the extent that it granted State Farm's motion for a protective order precluding an additional Rule 30(b)(6) deposition of State Farm. A motion for reconsideration, however, may be granted only under certain circumstances:

The purpose of a motion for reconsideration, we have held, is to correct manifest errors of law or fact or to present newly discovered evidence. Accordingly, a judgment may be altered or amended if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice.

Max's Seafood Cafe ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir.1999) (internal

citations and quotations omitted). "[A] motion for reconsideration addresses only factual and legal matters that the Court may have overlooked. It is improper on a motion for reconsideration to ask the Court to rethink what it had already thought through—rightly or wrongly." Glendon Energy Co. v. Borough of Glendon, 836 F.Supp. 1109, 1122 (E.D.Pa.1993) (quotation omitted).

Defendants argue that the Court has overlooked the cases permitting multiple Rule 30(b)(6) depositions of a party. The Court did not overlook these cases; in fact, they are the very same cases upon which Defendants based their arguments at the hearing on the motion for protective order. Accordingly, because they have already been considered by the Court, these cases are not a proper basis for reconsideration.

Defendants additionally argue that State Farm's abuse of the discovery process has necessitated their strategy of taking depositions seriatim. Defendants further argue that State Farm acquiesced to additional Rule 30(b)(6) depositions, pointing to a July 19, 2007 letter from counsel for State Farm stating that "Defendants are free to draft a new corporate designee notice on [the issues of reliance and damages] pursuant to Rule 30(b)(6)." Def.'s Mot. for Recons., Ex. 1. Defendants finally point to the delay caused in this case by State Farm's abuse of the discovery process, including its failure to prepare Bowles for deposition.

The conduct of the parties in this case has not been a shining example of the discovery process. However, State Farm's delay in providing discovery relating to its fraud claims does not explain why Defendants did not even attempt to obtain discovery on State Farm's non-fraud claims until such a late date. In other words, even accepting that State Farm's conduct during the discovery period violated the Federal Rules of Civil Procedure, for which they were sanctioned previously (*see, e.g.*, 5/7/08 Order at 37 (doc. no. 374)), this does not explain why Defendants, having served their first Rule 30(b)(6) deposition notice on November 1, 2006,

then waited until May 20, 2008, to serve a Rule 30(b)(6) deposition notice addressing non-fraud issues. The fact that counsel for State Farm suggested in a July 19, 2007 letter that Defendants notice an additional Rule 30(b)(6) deposition did not entitle Defendants to wait nearly a year before noticing that deposition or give Defendants carte blanche to indiscriminately notice multiple Rule 30(b)(6) depositions. [FN8]

[FN8. In Plaintiffs' response to Defendants' motion for reconsideration, Plaintiffs dispute Defendants' characterization of their July 19, 2007 letter, noting that "[b]y suggesting a new notice Plaintiffs were not waiving their objections to said notice, but rather advising opposing counsel of their position." Pl.'s Resp. Defs.' Mot. to Recons. 9 (doc. no. 399).

Rather, the only explanation for Defendants' delay in seeking these Rule 30(b)(6) \*237 depositions appears to be the one offered by defense counsel at the July 14, 2008 hearing on the motion for protective order: "We just simply decided to proceed in that manner." Hr'g Tr. 19:2-10, July 14, 2008. Accordingly, Defendants' motion for reconsideration (doc. no. 398) will be denied.

#### IV. MOTIONS TO COMPEL: OCTOBER 1, 2008 AND OCTOBER 2, 2008 NOTICES

[13] On October 1, 2008 and October 2, 2008, Defendants noticed yet another 30(b)(6) deposition, this time on the previously unexamined areas of reliance, damages and proximate cause. On October 14, 2008 and October 16, 2008, Defendants filed motions to compel this last minute deposition (doc. nos. 400 & 401). On October 27, 2008 and October 30, 2008, Plaintiffs filed their responses to Defendants' motions to compel (doc. nos. 407 & 409), which seek an award of the costs they have incurred in responding to Defendants' October notices and motions, pursuant to Fed.R.Civ.P. 37(a)(5)(B). See, e.g., Pls.' Resp. to Defs.' Mot. to Compel 3 (doc. no. 407).

Defendants, by their October notices of deposition, seek an opportunity to depose State Farm's Rule 30(b)(6) designee for the fourth time. This will not be permitted. Again, Defendants issued the October notices of deposition without either seeking leave of the Court or demonstrating good cause. Specifically, Defendants have failed to explain to the Court why they waited until October 1, 2008--just thirteen days before the lengthy discovery phase was scheduled to conclude--to begin to explore with a State Farm Rule 30(b)(6) designee the issues of reliance, damages, and proximate cause. Rather, in their motion to compel, Defendants repeat their earlier argument that they are entitled to notice "several depositions of corporate designees on different subjects" and further state that they "should not be penalized for choosing such a strategy by no fault of their own." Defs.' Mot. to Compel 2 (doc. no. 400). Defendants' proffered justification is inadequate and their newest motions to compel (doc. nos. 400 & 401), will be denied. [FN9] An appropriate order follows. [FN10]

[FN9. As discussed above, the "wait-and-see" approach to noticing Rule 30(b)(6) depositions that Defendants' urge this Court to adopt is not contemplated by the Federal Rules and would have significant negative implications on the costs of discovery. (See *supra* Part III.B.)

[FN10. Sanctions will not be awarded in this instance. See *supra* n. 4 (noting that "when a motion to compel is denied, the Court must impose sanctions in the amount of the fees and costs associated with responding to the motion unless the motion was 'substantially justified' or it would be otherwise 'unjust' to impose sanctions" (quoting Fed.R.Civ.P. 37(a)(5)(B))). Here, Defendants' motions to compel were substantially justified because they were brought while their motion for reconsideration was pending before the Court. Thus, Defendants have a colorable argument that,

at the time they filed the instant motions, the propriety of additional Rule 30(b) (6) depositions of State Farm was yet to be ruled on by the Court.

V. CONCLUSION

The Court has granted Plaintiffs' motions for protective order (doc. nos. 381, 387), and has denied as moot Defendants' motion to compel (doc. no. 377). Defendants' motion for reconsideration (doc. no. 398) and Defendants' motions to compel an additional Rule 30(b) (6) deposition (doc. nos. 400 & 401) will be denied.

**ORDER**

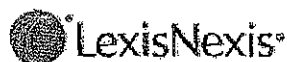
**AND NOW**, this 25th day of November, 2008, for the reasons stated in the accompanying Memorandum, it is hereby **ORDERED** that Defendants' motion for reconsideration (doc. no. 398) is **DENIED with prejudice**.

**IT IS FURTHER ORDERED** that Defendants' motion to compel additional 30(b)(6) depositions (doc. nos. 400 & 401) are **DENIED with prejudice**.

**AND IT IS SO ORDERED.**

254 F.R.D. 227

END OF DOCUMENT



LEXSEE 2006 U.S. DIST. LEXIS 85139



Analysis  
As of: Jun 24, 2009

**STATIC CONTROL COMPONENTS, INC., PLAINTIFF/COUNTERCLAIM DEFENDANT v. LEXMARK INTERNATIONAL, INC., DEFENDANT/COUNTERCLAIM PLAINTIFF v. WAZANA BROTHERS INTERNATIONAL, INC., d/b/a MICRO SOLUTIONS ENTERPRISES, PENDL COMPANIES, INC., and NER DATA PRODUCTS, INC., COUNTERCLAIM DEFENDANTS**

**CIVIL ACTION NO. 04-84-GFVT**

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY**

*2006 U.S. Dist. LEXIS 85139*

**November 9, 2006, Decided**  
**November 9, 2006, Filed**

**SUBSEQUENT HISTORY:** Motion denied by *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 2006 U.S. Dist. LEXIS 90207 (E.D. Ky., Dec. 13, 2006)

**PRIOR HISTORY:** *Static Control Components v. Lexmark Int'l*, 2006 U.S. Dist. LEXIS 73845 (E.D. Ky., Sept. 28, 2006)

**CORE TERMS:** deposition, customer, noticed, designee, notice, entity, evidence supporting, counterclaim, cartridges, toner, discoverable, expectancy, duplicative, questioning, interfere, breached, tortious interference, forthcoming, tortiously, interfered, deponent, deposed, business relationship, individual capacity, tort claims, cross-examined, scheduled, marketing, tangible, analyses

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JUDGES: JAMES B. TODD, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: JAMES B. TODD

## OPINION

### MEMORANDUM OPINION AND ORDER

In compliance with the Order of November 6, 2006, Lexmark provided the Magistrate Judge with (1) a copy of the *Rule 30(b)(6)* deposition, noticed by Static Control on October 26, 2005, and taken of Lexmark *Rule 30(b)(6)* designee Janet M. Smith on December 2, 2005, (2) a copy of the continued *Rule 30(b)(6)* deposition, noticed by Static Control on July 6, 2006, taken of Lexmark *Rule 30(b)(6)* designee Janet M. Smith on July 26, 2006, (3) the topics noticed for the two prior *Rule 30(b)(6)* depositions of designee Janet M. Smith, and (4) the topics noticed by Pendl in the [\*8] *Rule 30(b)(6)* deposition of designee Janet M. Smith at issue, scheduled to be taken on November 15, 2006. Additionally, pursuant to the Order of November 6, 2006, Lexmark and Pendl filed briefs setting forth their respective positions regarding the scope of the third *Rule 30(b)(6)* deposition of Lexmark *Rule 30(b)(6)* designee Janet M. Smith.

In considering this matter, the Magistrate Judge has read the transcripts of the two prior depositions of Lexmark *Rule 30(b)(6)* designee Janet M. Smith that were conducted on December 2, 2005, and July 26, 2006, and the Magistrate Judge has reviewed and compared the topics noticed by Static Control in the two prior depositions of Lexmark *Rule 30(b)(6)* designee Janet M. Smith (hereafter referred to as the "Prior Notice") with the topics noticed by Pendl in the forthcoming deposition of Lexmark *Rule 30(b)(6)* designee Janet M. Smith (hereafter referred to as the "Current Notice") scheduled for November 15, 2006, all of which are briefly summarized below:

#### A. Deposition taken on December 2, 2005

This deposition was noticed by Static Control; however, Pendl was also present at this deposition, and Pendl asked questions of the *Rule 30(b)(6)* [\*9] deponent, Janet M. Smith. The following topics were noticed for this deposition:

*Topic No. 1:* The identity of each and every person or entity that has breached a "Prebate/Return Program license/agreement," as that phrase is used in paragraph 106 of Lexmark International's Second Amended Answer and Counterclaims in Case No. 04-CV-84-KSF; and for each such breach by any person or entity so identified, whether Lexmark believes Static Control caused that breach in whole or in part.

*Topic No. 2:* The identity of each and every "Lexmark customer[]" that has breached its "obligations under the Prebate/Return Program contract employed with the Prebate/Return Program Printers," as alleged in paragraph 108 of Lexmark International's Second Amended Answer and Counterclaims in Case No. 04-CV-84-KSF; and for each such breach by any customer so identified, whether Lexmark believes Static Control caused that breach in whole or in part.

*Topic No. 3:* Any and all evidentiary support for the allegations in paragraph 108 of Lexmark International's Second Amended Answer and Counterclaims in Case No. 04-CV-84-KSF, that "various customers" have "breach[ed] their obligations [\*10] under the Prebate/Return Program contract employed with the Prebate/Return Program Printers."

*Topic No. 4:* The identity of each and every customer referenced in paragraph 115 of Lexmark International's Second Amended Answer and Counterclaims in Case No. 04-CV-84-KSF, in which Lexmark alleges that Static Control "engaged in conduct intended to interfere, and which did interfere, with the valid business expectancy and relationship between Lexmark and its customers."

*Topic No. 5:* The identity of all persons likely to have discoverable information concerning (a) topics 1 through 4 above, or (b) Lexmark's testimony concerning Topics 1 through 4 above.

*Topic No. 6:* The description by category and location of all discoverable documents, data compilations or tangible things that relate to (a) topics 1 through 4 above, or (b) Lexmark's testimony concerning Topics 1 through 4 above.

A review of the transcript of the December 2, 2005 deposition reflects that all topics that were noticed to be covered in this deposition were in fact covered.

#### **B. Deposition taken on July 26, 2006**

This deposition was noticed by Static Control; however, Pendl was also present [\*11] at this deposition, and Pendl asked questions of the *Rule 30(b)(6)* deponent, Janet M. Smith. The following topics were noticed for this deposition:

1. Forecasts and analyses of as well as strategies and plans for marketing Lexmark Laser Toner Cartridges.

2. Lexmark Laser Toner Cartridge marketing, including but not limited to advertising, promotion, offers for sale, packaging, and labeling.

5. Forecasts and analyses of as well as strategies and plans for selling Lexmark Laser Toner Cartridges.

14. The identity of persons likely to have discoverable information concerning (a) Topics 1 through 13 above; or (b) Lexmark's testimony concerning Topics 1 through 13 above.

15. The description by category and location of all discoverable documents,

data compilations or tangible things that relate to: (a) Topics 1 through 13 above; or (b) Lexmark's testimony concerning Topics 1 through 13 above.

A review of the transcript of the July 26, 2006, deposition reflects that all topics that were noticed to be covered in this deposition were in fact covered.

#### **C. Deposition noticed for November 15, 2006**

This forthcoming *Rule 30(b)(6)* deposition of Lexmark was [\*12] noticed by Pendl. The following topics were noticed for this deposition:

*Topic No. 1:* Any contract between Lexmark and any entity identified in Lexmark's Disclosure to the Court's Opinion and Order of March 7, 2006 [Docket Entry No. 269 "Lexmark's Disclosure"] that Lexmark alleges was tortiously interfered with by any party to this litigation ("Lexmark Contract").

*Topic No. 2:* Any business relationship or expected contract between Lexmark and any other entity that Lexmark alleges was tortiously interfered with by any party to this litigation ("Lexmark Expectancy").

*Topic No. 3:* The formation of any Lexmark Contract or Lexmark Expectancy.

*Topic No. 4:* Any and all evidence supporting Topic 3.

*Topic No. 5:* Any and all breaches of any Lexmark Contract.

*Topic No. 6:* Any and all evidence supporting Topic 5.

*Topic No. 7:* Any and all acts by any party to this litigation that Lexmark alleges were intended to interfere, and which did interfere, with any Lexmark Contract or Lexmark Expectancy.

*Topic No. 8:* Any and all evidence supporting Topic 7.

*Topic No. 9:* The allegation that any entity identified in Lexmark's [\*13] Disclosure provided empty toner cartridges directly to any party to this litigation other than Lexmark.

*Topic No. 10:* Any and all evidence supporting Topic 9.

*Topic No. 11:* The entities or persons who sold or otherwise supplied filled toner cartridges to any entity Lexmark alleges breached a Lexmark Contract or Lexmark Expectancy by providing empty toner cartridges to companies other than Lexmark.

*Topic No. 12:* Any and all evidence supporting Topic 11.

*Topic No. 13:* Any and all communications between Lexmark and any entity identified in Lexmark's Disclosure.

*Topic No. 14:* Any and all communications between Lexmark and any entity which Lexmark alleges it has a business relationship or expected contract that was tortiously interfered with by any party to this litigation.

*Topic No. 15:* Any and all evidence supporting Topics 13 or 14.

*Topic No. 16:* All documents identified by Lexmark in response to Pendl's Second Set of Interrogatories and Third Request for Production to Lexmark.

*Topic No. 17:* Janet Smith's verification of Lexmark's supplemental response to Pendl's Second Set of Interrogatories and Third Request for [\*14] Production to Lexmark.

*Topic No. 18:* The identity of persons likely to have discoverable information about (a) Topics 1 through 17 above; or (b) Lexmark's testimony concerning Topics 1 through 17 above.

#### Discussion/Analysis

Pendl asserts that it is entitled to a *Rule 30(b)(6)* deposition of Lexmark concerning Lexmark's claims against Pendl for tortious interference with contractual relations and tortious interference with prospective advantage (hereafter collectively "the interference claims"). Lexmark has agreed to make Janet Smith available to be deposed in her individual capacity and on Topic No. 17 of the topics listed in the Current Notice. However, Lexmark objects to Janet Smith being deposed on any other of the eighteen (18) topics listed in the Current

Notice, arguing that its *Rule 30(b)(6)* designee, Janet Smith, in her two prior depositions in this case, has already given testimony in respect to these other seventeen (17) topics listed in the Current Notice; therefore, such testimony would be duplicative and should not be permitted.

Based on a review of the transcripts of the prior depositions of Lexmark's *Rule 30(b)(6)* designee Janet M. Smith, and Judge [\*15] Forester's Order of March 7, 2006, the Magistrate Judge concludes that, in addition to questioning Janet Smith about Topic No. 17, Pendl should also be permitted to ask other limited questions of Janet Smith concerning a portion of the 159 customer names Lexmark provided to Pendl. This conclusion is based on the following rationale:

1. The six topics noticed in the Prior Notice by Static Control in October of 2005 were very broad topics that encompassed the interference claims, and as previously stated, all six topics were covered during the course of the deposition of Lexmark *Rule 30(b)(6)* designee Janet Smith on December 2, 2005. Although this deposition was noticed by Static Control, Pendl was present at this deposition and participated in this deposition, Lexmark's objections notwithstanding, by questioning Janet Smith in respect to the interference claims.<sup>1</sup>

2. During the course of the December 2, 2005 deposition, the following forty-nine (49) customers of Lexmark were identified by Janet Smith as having been in violation of the Prebate Agreement:

1. Countrywide Mortgage
2. Best Buy
3. Target
4. K-Mart
5. Citibank
6. Fleet Bank
7. Bank One
8. Bank of America
9. [\*16] State of Louisiana
10. Shopko
11. Jackson Memorial Hospital
12. Value City
13. Toys-R-Us
14. PEP Boys
15. J.C. Penny-Eckerd
16. Missouri Vocational Enterprises



17. Smurfit Stone
18. University Hospital of Cleveland
19. CVS
20. Service Merchandise
21. Big Brothers & Big Sisters of Kentuckiana
22. Nissan North America, Inc.
23. Professional Women's Forum
24. UK Children's Hospital
25. Picadome Elementary School
26. National Kidney Foundation
27. Harbor House of Louisville
28. Aurora Health Care in Milwaukee
29. Cravath, Swaine & Moore
30. Residence Inn
31. Guy's Waste Service
32. Paine Webber
33. Hannaford Brothers
34. Daewood Motors America
35. Chase Investment Services
36. Central DuPage Hospital
37. Shelter Insurance
38. Abington Memorial Hospital
39. Arizona Supreme Court
40. U.S. Forest Service
41. U.S. Post Office
42. TVA
43. Mayo Clinic
44. World Savings
45. Morgan, Stanley, Dean, Witter
46. Carolina First Bank
47. Bank of the West
48. Royal Bank of Canada
49. Citigroup

At the December 2, 2005, Static Control asked Janet Smith what proof Lexmark had to support its claims that

the foregoing 49 customers had violated the Prebate Agreement. [\*17] Pendl also had the opportunity during its cross-examination of Janet Smith to inquire of her as to Lexmark's proof that these 49 customers had violated the Prebate Agreement.

3. Subsequent to the December 2, 2005 deposition, in an *Opinion & Order* entered by Judge Forester on March 7, 2006, Judge Forester ordered Lexmark "to produce a list of customers, within thirty (30) days from the date of this opinion and order, that it alleges has committed a breach of its Prebate agreement which form the basis of Lexmark's claims against the counterclaim defendants for tortious interference with contracts." *Opinion & Order*, p. 4 [DE # 234]. In compliance with that Order, Lexmark provided the counterclaim defendants with a list of 159 customers who Lexmark believes have breached the Prebate Agreement.

4. On July 26, 2006, Janet Smith was deposed again as Lexmark's *Rule 30(b)(6)* designee. While the topics noticed for this continued *Rule 30(b)(6)* deposition did not specifically cover the interference claims, Janet Smith was questioned concerning the interference claims. Pendl was present at this deposition and asked questions of Janet Smith.

5. Since Pendl has already heard testimony [\*18] from Lexmark concerning the 49 Lexmark customers identified at the *Rule 30(b)(6)* deposition in December 2, 2005, cross-examined the deponent Janet Smith at that time, and could have asked her questions concerning these 49 Lexmark customers, the Magistrate Judge concludes that Pendl has essentially waived its right to ask any further questions of Lexmark as to these 49 customers. However, since Lexmark's list of 159 customers had not been provided to Pendl at the time of the December 2, 2005, deposition, Pendl should be given the opportunity to ask Janet Smith questions concerning the 110 other Lexmark customers, since such inquiry would not be duplicative of testimony obtained from Janet Smith in prior *Rule 30(b)(6)* depositions.

1 Lexmark's counsel objected to Pendl's questioning Janet Smith on December 2, 2005, because such questioning was outside the notice. Nevertheless, Lexmark's counsel did not instruct Janet Smith not to answer any questions asked of her by Pendl. See 12/2/05 Deposition, pp. 38-39. Pendl's counsel cross-examined Janet Smith at pages 133-156 of the 12/2/05 Deposition.

19] Consequently, for all of the foregoing reasons, at the forthcoming *Rule 30(b)(6)* deposition noticed by Pendl for November 15, 2006, concerning Lexmark's interference claims, Pendl may ask Lexmark what proof it has that these other 110 customers identified by Lex-

mark as having violated the Prebate Agreement have actually violated the Prebate Agreement.

Accordingly, **IT IS HEREBY ORDERED** that:

1. Pendl's motion to take Lexmark's *Rule 30(b)(6)* deposition on tort claims [DE # 450] is **GRANTED IN PART and DENIED IN PART**, as follows:

a. The motion is granted in that, in addition to Lexmark making its *Rule 30(b)(6)* designee Janet Smith available for deposition in her individual capacity and to answer questions concerning Topic No. 17 on the Current Notice, Pendl may question Janet Smith concerning (1) Lexmark's interference claims as they relate to Pendl, and (2) the remaining 110 customers of the 159 customers identified by Lexmark as having violated the Prebate Agreement.

b. The remainder of Pendl's motion to take Lexmark *Rule 30(b)(6)* deposition on tort claims is denied as to the remaining 17 topics listed on Pendl's Current Notice, as such testimony would be duplicative [\*20] of prior testimony from *Rule 30(b)(6)* designee Janet Smith.

2. No other party attending the *Rule 30(b)(6)* deposition of Lexmark's designee Janet Smith on November 15, 2006, may ask questions of Janet Smith that are duplicative of prior testimony given by her in her two previous depositions as Lexmark's *Rule 30(b)(6)* designee.

This 9th day of November, 2006.

JAMES B. TODD,

UNITED STATES MAGISTRATE JUDGE

**EXHIBITS 35-36  
REDACTED IN ITS ENTIRETY**

# Exhibit 37

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

IN RE	)	
INTEL CORPORATION	)	
MICROPROCESSOR ANTITRUST	)	MDL No 05-1717-JJF
LITIGATION	)	
<hr/>		
ADVANCED MICRO DEVICES, INC., a	)	
Delaware corporation, and AMD	)	
INTERNATIONAL SALES & SERVICES, LTD.,	)	
a Delaware corporation,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 05-441-JJF
	)	
INTEL CORPORATION, a Delaware corporation,	)	
and INTEL KABUSHIKI KAISHA, a Japanese	)	
corporation,	)	
	)	
Defendants.	)	
<hr/>		
PHIL PAUL, on behalf of himself	)	
and all others similarly situated,	)	C.A. No. 05-485-JJF
	)	
Plaintiffs,	)	CONSOLIDATED ACTION
	)	
v.	)	
	)	
INTEL CORPORATION,	)	
	)	
Defendants.	)	

STIPULATION AND PROPOSED CASE MANAGEMENT ORDER NO. 4

WHEREAS, on May 16, 2006 the Court entered Case Management Order No. I (D.I. 123 in Docket 05-441 JJF), establishing a December 31, 2006 cut-off date for the exchange of party documents, subject to one reasonable agreed-upon extension; and

WHEREAS, in light of the parties' representations, hereby made, that they have complied with the February 15, 2008 deadline established in Stipulated Case Management Order No. 3 for the completion of custodian document production, and in light of the Deposition Reharvest and Free Throw production provisions previously agreed upon and so ordered by the Court in Stipulated Case Management Order No. 3;

NOW, THEREFORE, the parties through their respective counsel of record, hereby stipulate, subject to the approval of the Court, that the following modifications be made to the parties' ongoing document retention obligations.

1. **Document Retention Obligations for Existing Custodians.**

a. Intel and AMD have each implemented automated email retention systems as the primary means of preserving relevant emails sent to or from all custodians currently employed by that party, and the operation of those systems has been the subject of interviews and other formal and/or informal exchange. Each party believes and represents that its respective systems are successfully capturing emails as intended and described. In addition, Paragraph 4 of Stipulated Case Management Order No. 3 provides that any Deposition Reharvest productions will be limited to email files. Accordingly, the parties now agree that as to custodian materials generated or received from and after January 1, 2008, AMD and Intel are relieved of any further retention obligations beyond the continued good faith operation and maintenance of their respective automated email retention systems.

b. The parties agree that Paragraph 1 of this Stipulation is limited to the retention of custodian data generated from and after January 1, 2008 only, and does not otherwise modify the obligations of the parties in connection with any other orders entered in this matter, including specifically and without limitation their respective preservation and production obligations under the Custodian Stipulation.

# Exhibit 38

# GIBSON, DUNN & CRUTCHER LLP

## LAWYERS

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March 20, 2007

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Client No.  
C 42376-00830

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Daniel A. Small, Esq.  
Cohen, Milstein, Hausfeld & Toli, P.L.L.C.  
1100 New York Avenue, N.W.  
Suite 500, West Tower  
Washington, D.C. 20005

Re: *Advanced Micro Devices, Inc., et al., vs. Intel Corporation, et al., Civil Action No. 05-441-JJF; In Re Intel Corporation Microprocessor Antitrust Litigation, MDL No. 05-1717-JJF; and Phil Paul vs. Intel Corporation, Civil Action No. 05-485-JJF*

Dear Messrs. Diamond and Small:

Pursuant to Paragraph 3 of the Order Regarding Intel's Evidence Preservation Issues, set forth in this letter is a description of Intel's email archiving solution.

Intel has implemented an industry leading email archive system by EMC. The system is composed of several inter-related components of EMC's email archiving solution including EmailXtender, DiskXtender and Centera (collectively the "Archive"). The hardware and software related to the Archive was installed by EMC and set up pursuant to standard set up procedures. Vendor testing at the time of installation validated that the Archive was properly capturing email from the Exchange journal system according to the parameters and design of the EMC software/hardware. Intel is continuing to work with EMC to enhance the storage and replication abilities of the system.



GIBSON, DUNN & CRUTCHER LLP

Charles P. Diamond  
Daniel A. Small  
March 20, 2007  
Page 2

The Archive has not been populated with legacy email that exists within the electronic mailbox of custodians.<sup>1</sup> The Archive was designed to capture all of the custodians' Exchange email transmissions to and from the custodian as of the date the custodian was put on the Exchange journaling system.

Intel recently moved the Archive system from one network to another network. In connection with that move, some email messages in the queue moving from the Exchange journaling system to the Archive system have been delayed. As a matter of caution, at least until the emails in the queue have moved into the Archive system, Intel is implementing a temporary suspension of the auto-delete feature on the email accounts of the custodians on the Exchange journaling system.

Custodians' Exchange emails that enter the Archive will be preserved for the duration of the litigation.<sup>2</sup> No rules or settings have been or will be enabled in the Archive that will allow for the alteration or deletion of stored email. The operation of the Archive prevents individual custodians from deleting or altering emails located within the Archive. Intel will audit and monitor the performance of the Archive.

Sincerely,



Robert E. Cooper

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- <sup>1</sup> The term "custodian" as used in this letter refers to custodians who are listed on the June 1, 2006 Custodian Designations of Intel Corporation and Intel Kabushiki Kaisha Pursuant to the Stipulation and Order Regarding Document Production.
  - <sup>2</sup> As designed by BMC, the Archive system deletes stored data once the data reaches fifteen years of age.

# Exhibit 39

# GIBSON, DUNN & CRUTCHER LLP

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March 28, 2007

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Client No.  
C 42376-00830

Mark Samuels, Esq.  
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Re: *Advanced Micro Devices, Inc., et al., vs. Intel Corporation, et al., Civil Action No. 05-441-JJF; In Re Intel Corporation Microprocessor Antitrust Litigation, MDL No. 05-1717-JJF; and Phil Paul vs. Intel Corporation, Civil Action No. 05-485-JJF*

Dear Mr. Mark:

This letter will follow-up on the two telephone conversations you held last week with Kay Kochenderfer and your e-mail to her earlier today. Your email to Kay this morning indicated that you were "disappointed" that you had not yet received a response to your request for additional information regarding Intel's email archiving system. However, it was my understanding that you and Kay specifically agreed that Intel would provide a response today, which we are doing by this letter.

Next, in your e-mail to Kay, you asserted that you "do not believe that Intel has complied" with Paragraph 3 of the Order. To the contrary, Intel represented precisely where it stood with respect to implementing its archive system and advised you that, pending resolution of a delay in the queue to write emails to the Archive, Intel was suspending auto-delete.

Paragraph 3 of the Order states that "[b]y March 20, 2007, Intel shall represent in writing: (1) *whether* it has successfully implemented an e-mail archiving solution that captures all emails sent or received by any Intel Custodian still employed at Intel, including all then-existing Intel Custodian e-mail. . . ."

GIBSON, DUNN & CRUTCHER LLP

Mark Samuels, Esq.  
March 28, 2007  
Page 2

In compliance with Paragraph 3, on March 20, 2007, I sent a letter to Chuck Diamond and Daniel Small which provided more than what was required by the Order, specifically the following information:

Intel has implemented an industry leading email archive system by EMC. The system is composed of several inter-related components of EMC's email archiving solution including EmailXtender, DiskXtender and Centera (collectively the "Archive"). The hardware and software related to the Archive was installed by EMC and set up pursuant to standard set up procedures. Vendor testing at the time of installation validated that the Archive was properly capturing email from the Exchange journal system according to the parameters and design of the EMC software/hardware. Intel is continuing to work with EMC to enhance the storage and replication abilities of the system.

The Archive has not been populated with legacy email that exists within the electronic mailbox of custodians.<sup>1</sup> The Archive was designed to capture all of the custodians' Exchange email transmissions to and from the custodian as of the date the custodian was put on the Exchange journaling system.

Custodians' Exchange emails that enter the Archive will be preserved for the duration of the litigation.<sup>2</sup> No rules or settings have been or will be enabled in the Archive that will allow for the alteration or deletion of stored email. The operation of the Archive prevents individual custodians from deleting or altering emails located within the Archive. Intel will audit and monitor the performance of the Archive.

As you know from your two telephone conversations last week with Kay, on the day that Intel was obligated to provide AMD and class counsel with information about the e-mail archiving solution, Intel was aware of a delay that was occurring in writing emails to the Archive and I therefore explained that issue in my March 20, 2007 letter. I further explained that "as a matter of caution, at least until the emails in the queue have moved into the Archive system, Intel is implementing a temporary suspension of the auto-delete feature on the email accounts of the custodians on the Exchange journaling system." I am at a loss to understand how you can

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<sup>1</sup> The term "custodian" as used in this letter refers to custodians who are listed on the June 1, 2006 Custodian Designations of Intel Corporation and Intel Kabushiki Kaisha Pursuant to the Stipulation and Order Regarding Document Production.

<sup>2</sup> As designed by EMC, the Archive system deletes stored data once the data reaches fifteen years of age.

GIBSON, DUNN & CRUTCHER LLP

Mark Samuels, Esq.  
March 28, 2007  
Page 3

complain about Intel's full disclosure regarding delay in the queue, much less Intel's suspension of auto-delete for the email accounts of the custodians on the Exchange journaling system.

To bring you up to date, Intel is still in the process of clearing the queue, and has, as we told you we were doing, suspended the auto-delete feature on the email accounts of the custodians on the Exchange journaling system. The suspension will remain in effect at least until resolution of the queue issue and Intel will provide notice to AMD and class counsel before resumption of auto-delete.

Sincerely,



Robert E. Cooper

cc: Daniel A. Small  
Charles Diamond

100187133\_3 (2).DOC

# Exhibit 40

# BINGHAM

Donn P. Pickett  
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May 30, 2008

David L. Herron, Esq.  
O'Melveny & Myers LLP  
400 South Hope Street  
Los Angeles, CA 90071-2899

Re: AMD v. Intel: AMD Document Production

Dear David:

First, allow me to introduce myself. I (assisted by Tony Marks of Perkins Coie and others) will be continuing Rich Levy's efforts to learn about AMD's document retention while Rich moves on to other projects. We look forward to dealing with you going forward.

This responds to your May 14, 2008 letter. In that letter, AMD unambiguously refused to provide the formal discovery Intel seeks. We will file the appropriate motion with the Special Master with regard to Intel's pending document request, and are serving an updated 30(b)(6) notice which AMD should either comply with or move to quash. We have enclosed a copy of the new notice and would appreciate knowing your decision about compliance within a week or so.

Despite AMD's refusal to provide formal discovery, there are a few areas where a degree of informal cooperation is continuing and could be helpful to both sides. In particular, AMD has asked for an exchange of information about hold notice distribution. Intel hopes such cooperation will continue and expand, and includes with this letter certain information requested by AMD. At the same time, there remain important issues where only depositions and documents can suffice, and informal exchanges of information, while they may reduce the scope of formal discovery, did not (and, from our viewpoint, will not) replace it. Moreover, there are some points in your letter Intel feels compelled to address. We will discuss those general points first, then respond to the numbered paragraphs in your letter.

A. Intel's Formal Discovery Requests are Still Effective. Without trudging through the details, Intel rejects AMD's characterization (at 1-2) of the parties' discussions and correspondence. Intel never abandoned its formal discovery requests, and never agreed that informal exchanges of information would serve as a complete substitute for depositions under oath and document discovery. Throughout the months following Intel's formal discovery requests AMD has limited the information it would provide to Intel. In some cases Intel accepted AMD's limitations or accepted informal responses, but never at the expense of surrendering its right to take discovery as provided for by the Federal Rules. In any case, the facts on the ground have changed significantly in recent weeks and months, and Intel knows things about AMD's document retention now that it did not know last November and that reinforce the need for formal discovery. Intel is willing to remain

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David L. Herron, Esq.  
May 30, 2008  
Page 2

flexible with regard to certain information (as demonstrated below) but is committed to obtaining the testimony and documents to which it is entitled.

B. Intel Has Cited Authority Supporting Its Discovery Requests. You continue to assert that Intel has not cited any authority supporting its right to take formal discovery. We assume you mean authority that AMD finds persuasive, because we have already cited such authority in two letters.<sup>1</sup> In response, AMD has not even acknowledged that authority, much less provided any authority supporting its own refusal to provide formal discovery and Intel has not discovered any in its own research. It appears the matter will have to be resolved by the Special Master and there is no further point in using letters as preview briefs.

C. Intel Will Not Agree to Unilateral Limitations on the Custodians Relevant to Discovery. AMD has made it clear that it does not intend to produce information relating to document retention for non-production custodians, claiming (at 3) that information about "non-production custodians is irrelevant to any issue in the case . . . ." Although retention lapses for non-production custodians do not result in any prejudice to the opposing party, they are nevertheless relevant to understanding the reasonableness of AMD's retention policies and practices. As you know, Intel has disclosed information regarding both its non-production custodians and its production custodians. AMD's unusual resistance to disclosing information about non-production custodians naturally raises suspicion. We will insist that the playing field be level in that regard.

D. AMD Must Disclose the Steps It Has Taken to Discover Retention Lapses. AMD's disclosures regarding its document retention are evolving. AMD has, piecemeal over the past few months, revealed a series of new retention lapses. And each new disclosure contradicts prior representations from AMD. Thus, AMD insisted for months that it was aware of no data loss,<sup>2</sup> although its IT department had known about Mr. Oji's loss for months and had known about Mr. Soares's data loss for years. Similarly, AMD

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<sup>1</sup> 4/14/2008 Levy letter to Herron, and 9/19/2007 Levy letter to Pearl.

<sup>2</sup> 4/23/2007 Herron letter ("We can represent that AMD's overall preservation program appears to be working as intended and that, at this time, we are aware of no systemic failure in the execution of that preservation plan . . . ."); 8/10/2007 Samuels letter ("We are pleased to report that our preservation program appears to be operating as designed and intended; no lapses in that program have been identified."); 8/23/2007 Diamond letter (same); 9/14/2007 Samuels letter at 4 (AMD "convince[d]" that Intel's discovery requests are "largely unjustified"); 11/27/2007 Herron letter at 3 (denying knowledge of any undisclosed document retention lapses).



David L. Herron, Esq.  
May 30, 2008  
Page 3

assured Intel repeatedly that no relevant data could be lost to auto-delete<sup>3</sup> but now reveals that, in fact, one custodian allowed auto-delete to run on his sent mail. The fact that these lapses occurred long ago indicates that AMD's attorneys either (1) knew about the lapses and said nothing, or (far more likely) (2) are just now learning facts that others at AMD have known for months or years. Under the circumstances, Intel is entitled to know what, if anything, AMD has done or is doing to investigate whether other lapses exist.

AMD represented more than a year ago (last April) that it would undertake some type of investigation of the AMD-designated production custodians last summer, describing the investigation as a "thorough follow-up review of AMD's preservation program to date, on a custodian by custodian basis . . ."<sup>4</sup> AMD reported last August that, as a result of that review "[w]e are pleased to report that our preservation program appears to be operating as designed and intended; no lapses in that program have been identified."<sup>5</sup> AMD also assured Intel that it would continue with its investigation of other production custodians. These representations, in light of the recent disclosures, raise serious questions about the thoroughness of AMD's investigation. Moreover, AMD has not responded to our question about whether AMD was investigating non-production custodians, and insists on withholding information about lapses among such custodians. Intel cannot have any confidence that AMD has identified all of its retention lapses in these circumstances. In fact, as in the case of Mr. Oji, it appears that the lapses are coming to the attention of AMD's lawyers by chance rather than as the result of any organized investigation. We intend therefore to inquire about AMD's investigation (limiting ourselves to purely factual matters, not inquiring about any attorney-client communications, opinions, thought processes, etc.) during the 30(b)(6) deposition. The core question is whether AMD has adequately investigated all of its custodians retention practices or not, and what actions comprised that investigation.

Let me now respond to the specific points in your letter.

1. Harvest Dates. Enclosed at your request is a list of Intel's deposition reharvest dates. (Attachment 1) In the interest of cooperation, we are willing to withdraw our request that AMD provide the dates of other reharvests of its custodians. However, we are not willing to withdraw our request that AMD provide the dates of the *initial* harvests for *all* custodians (including non-production custodians). These dates are relevant to the

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<sup>3</sup> 4/23/2007 Herron letter at 2 (stating that AMD's "email communications were being systematically preserved [from auto-delete] at the same time Intel's were being systematically destroyed.");

<sup>4</sup> 4/23/2007 Herron letter at 1.

<sup>5</sup> August 10, 2007 Herron letter at 1.

David L. Herron, Esq.  
May 30, 2008  
Page 4

reasonableness of AMD's retention practices and shed light, for particular custodians, on AMD's diligence in meeting other retention obligations, such as issuing hold notices and placing custodians on journaling. Moreover, Intel has provided this information to AMD. Accordingly, we will address the issue with the Special Master unless assured that the information is forthcoming promptly.

2. Journaling Dates. Enclosed is a list of the dates Intel custodians were placed on journaling (Attachment 2). The list is based on our best available information and we are continuing to audit it. If we learn of any revisions that need to be made we will inform you. There are a small number of custodians for whom we currently only have fairly imprecise data about their journaling dates.<sup>6</sup> They were journaled between December 18, 2006 and March 18, 2007. We are working to obtain more precise dates and will provide them if and when we are able.

3. Mr. Oji's Data Loss Issues. As explained in our April 24 letter, Intel's discovery requests were not triggered by, nor are they dependent upon, Mr. Oji's data loss. Even without knowledge of specific retention lapses, Intel would be entitled to the discovery it seeks.

We look forward to receiving the promised correspondence obtained from the backup of Mr. Oji's "frequent correspondents." We also appreciate the disclosure of Mr. Oji's correspondence with AMD IT personnel. We assume there is also correspondence between AMD's lawyers and AMD IT about this issue. We request that (pursuant to Intel's RFP #5) AMD produce such correspondence, redacting out privileged or core-work product information, but providing non-core work product and factual information. As you know, Intel has produced such correspondence to AMD. That said, Intel still needs to proceed with the 30(b)(6) deposition on topics related to these data loss issues.

4. Intel Inquiries Regarding Back-Up Tapes and AMD's IT Infrastructure. We appreciate AMD's agreement to provide a narrative regarding its relevant IT infrastructure. We also presented a number of questions about AMD's tape backups, and you responded by asking why we need this information. The reason is that the information will make it possible to determine whether AMD has met its obligations to retain custodian data. AMD requested the same information from Intel, and we provided it.

AMD declines to confirm (by physical inspection) that it has monthly Exchange tapes for each AMD custodian from March 2005 to the present (with the exception of people who started at AMD after March 2005 or have left since). Although Intel has provided that information to AMD, you state that the request is illegitimate and that you

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<sup>6</sup> Amar Babu, David (Hui) She, Ramunas Domarkas, Alexey Karnaev, Dimitri Klepatski, Adrian Criddle, Paul Prior, Alexey Karpukhin, Wendy Howes Pompe, Erwin Van Meer, Ramzi Abdul Baki, and Scott Trumbull.

can think of no good reason for the request. One reason for the request is that AMD continues to disclose retention lapses. Those lapses are supposed to be backstopped by the monthly backup program AMD implemented. It is therefore legitimate to ask AMD to confirm that it has created and maintained the backups, and, at a minimum, to audit some random selection of the tapes to verify that the backup process is working.

5. Intel's and AMD's Litigation Hold Notices. The discussion under point five of AMD's letter demonstrates continuing confusion on AMD's part about what hold notices Intel has produced, and when. AMD seems to believe that Intel failed to produce custodian hold notices until March 28, 2008. This is incorrect. We have been very clear, and would refer AMD to points 5 and 6 of Mr. Levy's March 28, 2008 letter. The short answer is that Intel produced to AMD all of its custodian hold notices issued through July 2007, in unredacted form, during the approximately three-month period between July 20, 2007 and October 13, 2007. Those productions included more than 130 unique custodian hold notices, and we believed the production was complete. We audited the production recently and identified a single custodian hold notice did not disclose recipients (because it was produced in "bcc" format) so we provided a complete list of those recipients on March 28, 2008. In light of the simple fact that AMD has had essentially all of Intel's unredacted custodian hold notices for at least seven months, AMD's heated rhetoric is perplexing—especially given its contemporaneous refusal, despite repeated requests, to produce information about its own hold notices.

AMD also remains confused about Intel's production of its IT custodians' hold notices. By August 10, 2007, Intel had produced to AMD the hold notices delivered to Intel IT through July 2007. We stated, in our March 28, 2008 letter (responding to the demand in your March 11, 2008 letter that Intel produce its IT hold notices), "[w]e have already provided you with all of Intel's IT litigation hold notices with the exception of a single one, which is enclosed." Despite this unambiguous statement, you state (at 6), "Intel has still refused to . . . produce[] the litigation hold notices delivered by Intel to its IT personnel." AMD then goes on at length lecturing Intel as if it has not produced its IT hold notices. Again, we frankly don't know what can be added to our prior representations. To assist AMD, however, Attachment 3 to this letter contains the production numbers and dates for Intel's IT hold notices (excepting the notice delivered with our March 28 letter).

In contrast to Intel's early production of unredacted hold notices, AMD first responded to Intel's request for AMD's hold notices by producing nothing, then by producing redacted exemplars (including redactions of the dates), then by producing redacted exemplars (with the dates unredacted), then most recently by producing redacted copies of all its hold notices. But AMD has yet to produce the fundamental information that Intel produced many months ago: the date[s] on which each custodian received hold notices, and the specific hold notice each received. AMD has now agreed to provide that information in chart form for production custodians, but Intel must insist that AMD

David L. Herron, Esq.

May 30, 2008

Page 6

produce that information for *all* custodians, as Intel has.<sup>7</sup> Intel will seek the Special Master's intervention to acquire this data.

6. Litigation Hold Notice Dates. As we have repeatedly stated, Intel produced its hold notices in unredacted form. Thus, AMD has for many months known the dates on which Intel sent each custodian his or her hold notices. Nevertheless, based on your offer to exchange charts summarizing that very information, enclosed is a chart that does so (Attachment 4). As you will note, the chart includes all 1,023 Intel custodians (not just production custodians) and all dates through July 2, 2007 on which the hold notice or reminder was sent. Please reciprocate by providing a chart with the same information for AMD—not excluding non-production custodians—by June 5.

7. Litigation Hold Dates for Particular AMD Custodians. AMD's disclosure of the names of custodians who did not timely receive hold notices (information AMD has long known, but withheld) underscores the importance of AMD coming clean about the dates all of its custodians received hold notices. For example, we note that AMD apparently issued hold notices to at least some of its custodians (indicating knowledge that the employee might have responsive information), but failed to place them on journaling contemporaneously. We will seek this information in our formal discovery. Should AMD refuse to disclose hold-notice-receipt dates for all of its custodians, Intel will address that issue with the Special Master.

We also note that AMD first raised this issue (i.e., the fact that some custodians had not received hold notices timely) in its August 10, 2007 letter. In that same letter AMD disclosed that it had identified "a small number of custodians (including Messrs. Ruiz and Colandro) whose initial productions did not include all available .pst files." AMD has still not disclosed the number or identities of those custodians whose PST files were not initially harvested, or how the failure to harvest occurred. We intend to inquire about that issue during our 30(b)(6) deposition[s].

8. Auto-Delete. Mr. Kepler's data retention lapse occurred more than three years ago (AMD admits it was aware of its data-retention obligations no later than March 2005 although Intel believes the date may have been much earlier). The fact that this lapse is just coming to light now—despite Intel's repeated inquiries about AMD's use of auto-delete and AMD's representations that there was nothing to report—highlights the need for Intel to understand what investigation, if any, AMD has previously undertaken with regard to all of its custodians.

9. Possible Custodian Data Loss. AMD knew about the loss of Mr. Soares's laptop sometime after March 30, 2006 (by which time AMD had determined that Soares's

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<sup>7</sup> AMD's suggestion (at 6) that "Intel's conduct has unnecessarily delayed" AMD from producing this information is unsupported.

David L. Herron, Esq.  
May 30, 2008  
Page 7

data might be relevant to the lawsuit), but did not inform Intel. Perhaps AMD believed it was unnecessary to notify Intel about the data loss because neither party had designated him as a production custodian at that time. Indeed, it seems certain—based on AMD's current position of withholding retention information about non-production custodians—that AMD would have continued to conceal Mr. Soares's data loss but for the fact that Intel designated Soares as a production custodian.

Perhaps more troubling is the fact that even *after* Intel designated Mr. Soares as a production custodian AMD did not disclose the loss of his laptop, and failed to disclose an additional, subsequent data loss that occurred in May 2007—months *after* Intel had designated Mr. Soares. This subsequent data loss also occurred *after* Intel's April 11, 2007 letter requesting that AMD disclose all known data retention lapses.<sup>8</sup> It is difficult to understand why this information is only coming to light now, and unavoidably raises the question, what other retention lapses remain undisclosed?

Intel is not required to rely on AMD's informal representations that its document retention program has operated "as intended" with "no lapses" identified. Given all of the open issues and AMD's refusal to provide a variety of information, Intel must insist on compliance with its formal discovery. We will therefore proceed with the 30(b)(6) deposition as described in the enclosed notice and move to compel compliance with our outstanding document requests.

Sincerely yours,



Donn P. Pickett

Enclosures

cc: Robert E. Cooper, Esq.  
Peter E. Moll, Esq.  
Richard L. Horowitz, Esq.  
Anthony Marks, Esq.

bcc: Jo Levy, Esq.  
Tanya Hunter, Esq.  
James Hunt, Esq.

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<sup>8</sup> Intel asked, "Is AMD aware of the loss of any documents potentially relevant to this litigation . . . either as a result of human conduct, the operation of a computing system, or otherwise?" 4/11/2007 Cooper letter at 1.

**ATTACHMENT 1  
TO EXHIBIT 40  
REDACTED IN ITS ENTIRETY**

**ATTACHMENT 2**  
**Production Numbers**  
**for IT Hold Notices**

Production Number	Produced
68649-000026	7/27/2007
68651-000048	8/4/2007
68591-000003	8/10/2007
68591-000014	8/10/2007
68591-000015	8/10/2007
68591-000026	8/10/2007
68591-000034	8/10/2007
68591-000037	8/10/2007
68591-000039	8/10/2007
68591-000041	8/10/2007
68591-000043	8/10/2007
68591-000044	8/10/2007
68591-000045	8/10/2007
68591-000046	8/10/2007
68591-000047	8/10/2007
68643-000182	8/10/2007
68643-000183	8/10/2007

# **Exhibit 41**



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

IN RE	)	
INTEL CORPORATION	)	
MICROPROCESSOR ANTITRUST	)	MDL No. 1717-JJF
LITIGATION	)	
<hr/>		
ADVANCED MICRO DEVICES, INC., a	)	
Delaware corporation, and AMD	)	
INTERNATIONAL SALES & SERVICES, LTD.,	)	
a Delaware corporation,	)	
	)	
Plaintiffs,	)	
	)	C.A. No. 05-441-JJF
v.	)	
	)	
INTEL CORPORATION, a Delaware corporation,	)	
and INTEL KABUSHIKI KAISHA, a Japanese	)	
corporation,	)	
	)	
Defendants.	)	
<hr/>		
PHIL PAUL, on behalf of himself	)	
and all others similarly situated,	)	C.A. No. 05-485-JJF
	)	
Plaintiffs,	)	CONSOLIDATED ACTION
	)	
v.	)	
	)	
INTEL CORPORATION,	)	
	)	
Defendants.	)	

**ORDER RE AMD'S AND CLASS PLAINTIFF'S INITIAL  
REMEDATION DISCOVERY**

WHEREAS, on March 16, 2007, Special Master Poppiti entered an Order Regarding Intel's Evidence Preservation Issues (the "Special Master's Order");

WHEREAS, on June 20, 2007, Special Master Poppiti entered an Order Bifurcating Discovery into Intel's Evidence Preservation Issues (the "Bifurcation Order"), pursuant to which discovery concerning Intel's evidence preservation issues has been bifurcated such that discovery is first to be conducted to enable Plaintiffs to respond to Intel's remediation plan ("Remediation Discovery"), while discovery as to other matters related to Intel's evidence preservation issues ("Causation/Culpability Discovery") will proceed after the Remediation Discovery has concluded;

WHEREAS, on May 15, 2007 and May 16, 2007, respectively, AMD and Class Plaintiffs served their initial Remediation Discovery, consisting of parallel Notices of Taking Deposition Under FRCP 30(b)(6) and Request for Production of Documents re Remediation ("Initial Remediation Discovery"); and

WHEREAS, Intel has served its responses and objections to the Initial Remediation Discovery, and the parties have met and conferred in an effort to resolve as many issues as possible;

NOW, THEREFORE, IT IS HEREBY STIPULATED BY AND BETWEEN THE PARTIES HERETO SUBJECT TO THE APPROVAL OF THE COURT, AS FOLLOWS:

1. The parties have agreed upon a "custodian" based approach toward production of documents in response to the Initial Remediation Discovery. Intel hereby represents, based on reasonable investigation, that it believes in good faith that the individuals listed below have been retaining the materials responsive to the Initial Remediation Discovery either in response to specific litigation hold notices and/or as a matter of general practice. Intel shall promptly produce documents from the following custodians.

1. Malcolm Harkins
2. Todd Buelt
3. Dave Pistone
4. Russell Price
5. Adam Pollitt
6. Dorr Clark

These are the individuals whose electronic and paper files will initially be produced in response to the Initial Remediation Discovery ("Initial Remediation Discovery Custodians"). Notwithstanding its objections to the Initial Remediation Discovery (other than on privilege or work product grounds), Intel will promptly produce, subject to the clarification set forth in a May 24, 2007 email from Mark Samuels to Daniel Floyd, all non-privileged documents responsive thereto from the files of the Initial Remediation Discovery Custodians. If this or other Remediation Discovery leads AMD and Class Plaintiffs to believe that other custodians possess significant non-duplicative documents that are likely to be relevant to the issues as set forth in Paragraph 1 of the Bifurcation Order, Intel agrees to promptly accommodate reasonable requests for production from additional custodians, and any disputes that may arise in this regard shall be submitted to Special Master Poppiti for resolution. AMD and Class Plaintiffs reserve their right, set forth in Paragraph 3 below, to move to compel production of responsive materials from the files of Intel attorneys or legal staff, and Intel reserves its right to oppose any such motion.

2. In order to reduce its burden of document review in connection with the Initial Remediation Discovery, AMD and Class Plaintiffs have agreed that Intel may limit its search for responsive documents to specially created .pst archives that contain the documents responsive to the Initial Remediation Discovery if Intel can represent that all of the custodian's documents responsive to the Initial Remediation Discovery have been preserved and segregated in the specially created archive. If the custodian does not keep such segregated files, Intel shall use its best efforts to locate all documents responsive to the Initial Remediation Discovery.

3. Intel has excluded from its list of Initial Remediation Discovery Custodians in Paragraph 1 its attorneys and legal staff, inside and outside, on the basis that the non-duplicative documents held by those individuals are almost entirely protected from discovery by the attorney client privilege or work product doctrine. This has been done over AMD's and Class Plaintiffs' objection, and AMD and Class Plaintiffs reserve their rights to seek an order compelling the production of responsive materials from attorneys and legal staff, as well as an order requiring the submission of privilege logs identifying all responsive documents being withheld on privilege and/or attorney work product grounds. Intel reserves its rights to oppose entry of such orders.

4. Intel shall provide complete written summaries containing the information called for by Request Nos. 5, 8, and 13 of the Initial Remediation Discovery.

5. Intel represents that the written Litigation Hold Notices called for by Request No. 2 of the Initial Remediation Discovery are maintained in a central corporate file outside the custody of any particular custodian, and Intel will therefore produce the written notices from its central corporate files as its complete response to Request No. 2.

6. Without limiting Intel's obligations under Paragraph 1 hereof, Intel shall produce promptly, and on a rolling basis, the categories of materials listed on pages 6-7 of its response and objections to the Initial Remediation Discovery.

7. The parties agree that to avoid potentially lengthy disputes over whether documents constitute work product, or whether Plaintiffs can meet the standards in Rule 26(b)(3) of the Federal Rules of Civil Procedure for the production of certain work product, it is agreed that in producing documents pursuant to this Order, Intel shall not withhold any attorney work

product unless it contains the mental impressions, conclusions, opinions, or legal theories of an attorney or party representative within the meaning of F.R.C.P. 26(b)(3), and Intel's production of such materials will not be deemed a waiver of any protection applicable to such "opinion work product" under F.R.C.P. 26(b)(3). However, AMD and Class Plaintiffs fully reserve any and all other rights or grounds to challenge any assertions of privilege or work product protection. The parties agree that paragraph 35 of the Second Amended Stipulation Regarding Electronic Discovery and Format of Document Production will apply to this production.

8. To the extent not superseded by this Order, the Special Master's Order and Bifurcation Order remain in full force and effect.

**RICHARDS, LAYTON & FINGER, P.A.**

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*Attorneys for Intel Corporation and Intel  
Kabushiki Kaisha*

ENTERED this  
10 day of July, 2007

  
\_\_\_\_\_  
Vincent J. Poppiti (#100614)  
Special Master