IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE INTEL CORPORATION MICROPROCESSOR ANTITRUST LITIGATION	MDL No. 05-1717-JJF
ADVANCED MICRO DEVICES, INC. and AMD INTERNATIONAL SALES & SERVICE, LTD., Plaintiffs, v. INTEL CORPORATION and INTEL KABUSHIKI KAISHA,, Defendants.	C.A. No. 05-441-JJF
PHIL PAUL, on behalf of himself and all others similarly situated, Plaintiffs, vs. INTEL CORPORATION, Defendant.	C.A. No. 05-485-JJF **PUBLIC VERSION-** **REDACTED**

EXHIBITS
TO THE DECLARATION OF BRIAN C. ROCCA
VOLUME 4 OF 4
(Nos. 47-73)

cc: James L. Holzman, Esquire
(By electronic mail)

Frederick L. Cottrell, II, Esquire
(By electronic mail)

J. Clayton Athey, Esquire
(By electronic mail)

Dated: October 14, 2009

Richard L. Horwitz (#2246)
W. Harding Drane, Jr. (#1023)
POTTER ANDERSON & CORROON LLP
Hercules Plaza, 6th Floor
1313 N. Market Street
Wilmington, Delaware 19899-0951
(302) 984-6000
rhorwitz@potteranderson.com
wdrane@potteranderson.com

Attorneys for Defendant
Intel Corporation and Intel Kabushiki Kaisha

Exhibits 47-48 have been redacted in their entirety

Exhibit 49

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ADVANCED MICRO DEVICES, INC. and AMD INTERNATIONAL SALES & SERVICE, LTD., Plaintiffs, v. INTEL CORPORATION and INTEL KABUSHIKI KAISHA, Defendants.	C. A. No. 05-441 (JJF) PUBLIC VERSION
IN RE: INTEL CORP. MICROPROCESSOR ANTITRUST LITIGATION	MDL Docket No. 05-1717 (JJF)
PHIL PAUL, on behalf of himself and all others similarly situated, Plaintiffs, v. INTEL CORPORATION, Defendant.	C.A. No. 05-485-JJF (DM4A) CONSOLIDATED ACTION

DECLARATION OF JOHN ASHLEY

OF COUNSEL:

Robert E. Cooper
Daniel S. Floyd
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 900071
(213) 229-7000

Joseph Kattan, PC
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. N.W.
Washington, D.C. 20036-5306

Darren B. Bernhard
HOWREY LLP
1299 Pennsylvania Avenue
N.W. Washington, DC 20004
(202) 783-0800

James L. Hunt
Donn P. Pickett
BINGHAM McCUTCHEN LLP
Three Embarcadero Center
San Francisco, CA 94111
(415) 393-2000

Joel W. Nomkin
Anthony L. Marks
PERKINS COIE BROWN & BAIN P.A.
2901 North Central Avenue, Suite 2000
Phoenix, AZ 85012-2788
(602) 351-8000

POTTER ANDERSON & CORROON LLP
Richard L. Horwitz (#2246)
W. Harding Drane, Jr. (#1023)
Hercules Plaza, 6th Floor
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899-0951
(302) 984-6000
rhorwitz@potteranderson.com
wdrane@potteranderson.com

Attorneys for Defendants
Intel Corporation and Intel Kabushiki Kaisha

Dated: July 2, 2008

Public Version Dated: July 2, 2008

DECLARATION OF JOHN F. ASHLEY

I, John F. Ashley, declare and state as follows:

1. I am currently employed as the Executive Vice President of Electronic Evidence at First Advantage Litigation Consulting ("FADV"), 45240 Business Court, Suite 300, Sterling, Virginia 20166.

2. FADV is an electronic discovery and computer forensics consulting firm that assists clients with fact finding in litigation, regulatory reviews, and business decisions.

3. Before working with FADV, I was the head of the Greater Manchester Police Department's Computer Examination Unit, which at that time was the largest criminal computer forensics and electronic disclosure unit in Europe. In that position, I was responsible for all computer examinations and electronic disclosure matters in Manchester, England, North Wales, and the Isle of Man. On several occasions, I was called on to assist Scotland Yard with computer forensic investigations. I have been dedicated to the field of computer forensics, electronic disclosure and electronic discovery since 1989.

4. I have been qualified and testified at trial or in deposition as a computer forensic or electronic discovery expert on more than 70 occasions.

5. I have been asked by Intel Corporation ("Intel") to review and analyze Advanced Micro Devices, Inc.'s ("AMD's") electronic document retention program and its production in the instant matter. Specifically, I have been asked to investigate retention lapses previously disclosed by AMD as well as apparent anomalies in AMD's document production and opine about the sufficiency of (1) the design and implementation of AMD's document retention program; (2) AMD's harvesting and production practices; and (3) whether any lapses or inadequacies in that program may have resulted in the loss or non-production of data. I have also

been asked to opine about whether the information AMD has provided to date is sufficient to fairly assess these issues, and whether additional information is required to reach final conclusions. My work for Intel in this litigation is strictly limited to those issues disclosed above.

6. I have personal knowledge of the facts stated in this Declaration and am able to testify to everything contained within it under oath. I have read and signed the Protective Order entered in this matter and have complied with the terms of that Order.

7. In connection with my engagement, I was provided access to the production database containing all documents produced to Intel by AMD during the discovery period. This data was housed in Electronic Evidence Discovery, Inc.'s ("EED") review tool, Discovery Partner ("DP"). The DP tool allowed me to see documents produced by AMD and metadata fields associated with those documents.

8. In my opinion, and based on the information currently available, there appear to have been lapses in AMD's document preservation program. As a result of those lapses, my preliminary investigation indicates that some relevant data that should have been preserved and produced may have been permanently lost, or, at a minimum, not preserved, collected, or produced by AMD to date.

9. I have identified deficiencies and lapses in AMD's preservation program affecting numerous custodians and an unknown amount of data. There are deficiencies and lapses at nearly every stage of AMD's document retention, collection and production process. I will attempt to identify and describe representative problems in terms of testing and verification, as well as offer my preliminary conclusions. Where possible, I will also attempt to identify the

custodians affected and/or the amount of data that may have been lost, although in many instances, the data and information currently available is insufficient to allow full investigation.

10. My opinions are preliminary in nature, and I intend to continue to investigate and test the conclusions described herein as additional information becomes available, and reserve the right to revise my opinions in light of such information. Nevertheless, based on my work to date, these lapses fully merit further investigation and analysis as they may be indicative of data loss and/or non-production on AMD's part. In my opinion, however, a fair and complete investigation cannot be conducted without receipt of primary documents and sworn testimony from witnesses competent to address the inquiries in Intel's formal discovery requests.

A. Deleted-Items Production From Top AMD Executives

11. AMD pulled from circulation the oldest full backups of every Exchange or file server utilized by employees who might have relevant information on March 11, 2005. [Ex. 1 at 1] Thus, AMD was aware of its retention obligations in connection with its anticipated lawsuit against Intel no later than that date.

12. It is my understanding that AMD did not, however, institute any technology-based, automated means for preserving custodian data until November 2, 2005 when it initialized its journaling tool.[1] Based on the information provided by AMD, for nearly eight months all of AMD's custodians were able to permanently delete their email, either purposely or inadvertently. [redacted] Because the custodians themselves

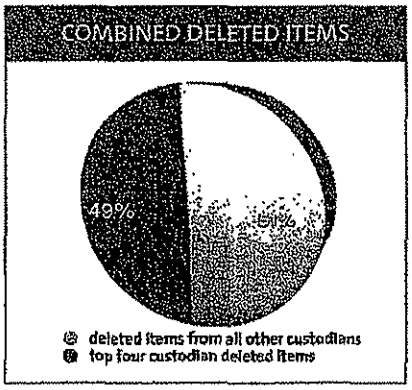
[1] [redacted]

selected which email to preserve and which email to delete during this time, I will refer to the period from March 11, 2005 to November 2, 2005 as the "Self-Select Period."

13. I analyzed the Filename/Origin in DP of AMD custodians' email sets and focused on emails that had been produced from custodians' "deleted items" folders. The fact that emails sent during the Self-Select Period existed in custodians' "deleted items" folders confirmed that those custodians were not complying with AMD's hold notice protocol during the Self-Select Period, but were instead deleting items that should have been retained in a specified folder. My analysis to date shows that AMD has produced more than 53,000 such items from "deleted items" folders during the Self-Select Period. This represents more than seven percent of all "sent" emails produced by AMD within the Self-Select Period.

14. Focusing on these "deleted" items, I performed additional testing and learned that 96% were produced from only 20 of AMD's 147 custodians. More surprisingly, I also determined that 49% of these deleted items are attributable to just four senior AMD executives:

[redacted]

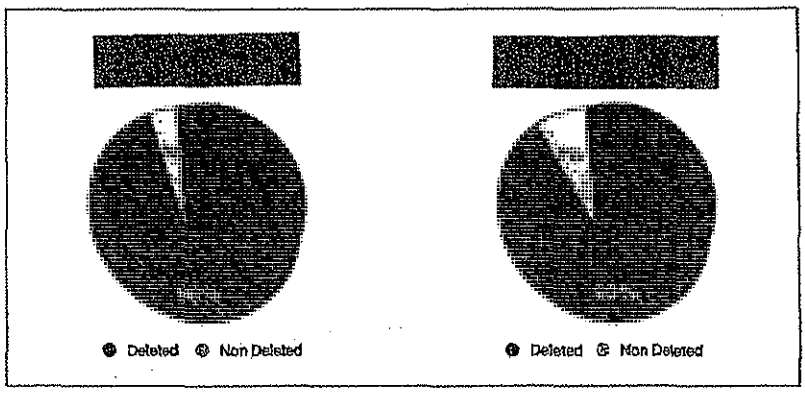


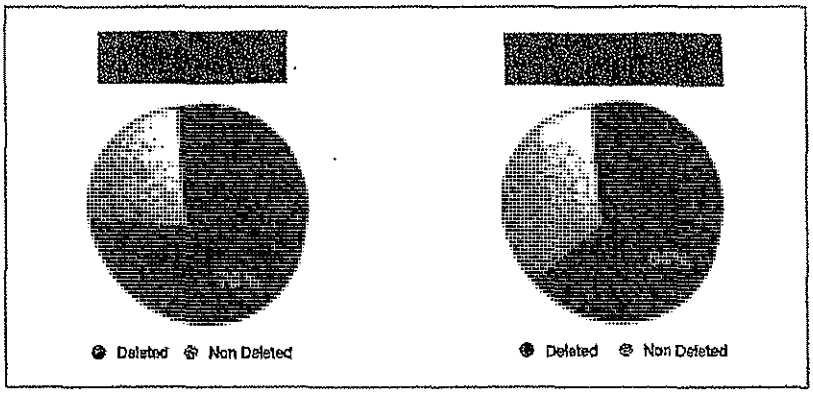
15. The evidence indicates that substantial amounts of relevant emails sent or received by these high-level executives were deleted during a time period when AMD was aware of its retention obligations and when these high-level executives had been instructed to preserve all relevant emails in a designated folder. According to a chart provided by AMD, [redacted] [Ex. 2]

16. In my opinion there are serious questions about whether AMD globally harvested deleted items for all custodians from all data sources, and whether AMD produced or even preserved such data. These questions arise in part from the fact that just 20 out of 147 custodians account for 96% of all deleted email during the Self-Select Period.

17. Based on my experience and the available information, it appears AMD engaged in undisclosed and selective remediation activity for certain custodians, resulting in the production of previously deleted items. However, it also appears that AMD did not engage in the same remediation project for the great majority of its custodians. In my opinion, if AMD did not undertake the production of deleted items across all custodians from all data sources, further discovery is necessary to reach a conclusion as to the potential scope of the problems associated with AMD's partial and undisclosed remediation, and the possible concomitant loss or non-production of relevant data.

18. I also discovered that the overwhelming majority of all emails produced for Messrs. [redacted] from the Self-Select Period were initially deleted before they were produced. These percentages were, respectively, 96%, 93%, 76%, and 64%. The following charts reflect a statistical analysis of the deleted items issues with regard to these four key AMD employees during this March 11, 2005 – November 2, 2005 Self-Select Period.





19. Thus, in the case of Mr. [redacted], 96% of all documents produced from his email during the Self-Select Period were produced from his "deleted items" folder.

20. It thus appears that some of AMD's most senior executives failed to comply with the retention instructions they had received. Although some of these emails were subsequently located and produced, each of those custodians, and, moreover, all of AMD's custodians, had the ability to permanently delete their email during the Self-Select Period. If individuals did permanently delete email, it may be beyond the reach of any subsequent remediation. There are

Mr. [redacted] to a third party during the Self-Select Period were found within a third party production and within the files of another AMD custodian, but not within the custodial files of Mr. [redacted] himself. Moreover, as described in the next section, it appears that certain files from Mr. [redacted] production, including Microsoft email personal storage files ("PSTs"), in fact had been "permanently" deleted and had to be recovered using specialized forensic software utilities.

21. Testimony and/or source documents from AMD are essential to establish whether additional deleted emails from other AMD custodians were not produced.

B. Forensic Recovery

22. By analyzing the file-path origin of the documents produced by AMD, I am able to see file folders from certain custodian hard drives entitled "Lost Files." Based on my experience, I have come to the preliminary conclusion that these folders were created using a specialized forensic software utility, EnCase, to recover files the user attempted to permanently delete. The "Lost Files" folder appears in the productions of only four custodians – none of whom was identified by AMD as having suffered data loss: [redacted][2]

23. Locally-stored PST files of two of these custodians, [redacted] (AMD's [redacted] Manager), were deleted from their hard drives. A significant number of the forensically-recovered emails from Mr. [redacted] hard drive are not found anywhere else in AMD's production. At this point I do not have sufficient information to determine when these deletions occurred but I do know that, in the case of Mr. [redacted], it was on or after December 15, 2005 (the date of the most recent email restored from his PST). I am able to conclude that in the

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[2] In the case of Messrs. [redacted], the issue appears confined to stand-alone user files as opposed to emails.

case of Mr. [redacted], the email produced from his forensically recovered hard drive PST file contains:

A. Emails that are not found anywhere else in AMD's production;

B. Emails that are found elsewhere in his production (leading me to conclude that de-duplication or near de-duplication/thread suppression were either not applied or were improperly applied);

C. Emails that post-date what has been represented as the effective date of Mr. [redacted] migration to the journaling system; and

D. Emails that post-date what has been represented as Mr. [redacted] custodial harvest date.

24. This pattern of production is unusual. AMD did reveal in its August 10, 2007 letter (in response to Intel's identification to AMD of certain apparent anomalies in its production)[3] that it had located PST files for Mr. [redacted] which we now know the user attempted to permanently delete. Those PST files included relevant messages sent as late as December 15, 2005, more than nine months after AMD was aware of its retention obligations.

25. In my opinion, AMD has, to date, provided insufficient information to understand the scope and extent of this issue. I cannot offer a final conclusion absent additional sworn testimony and documentation from AMD.

C. Failed Preservation of Sent Items

26. AMD has disclosed that at least one of its custodians, [redacted], its Vice President, [redacted], failed to disable auto-delete on his "sent

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[3] Ex. 3 at 1; Ex. 4 at 3.

items" folder during the Self-Select Period, in direct violation of the hold-notice instructions provided to him. [Ex. 5 at 7] It is my understanding (an understanding based on the incomplete information provided by AMD) that because journaling had not been implemented at this time, those emails were permanently deleted from Mr. [redacted] custodial files. However, AMD contends that Mr. [redacted] "copied himself on relevant 'sent' items and preserved those emails." [*Id.*]

27. In my opinion AMD's incomplete disclosure raises two issues. First, it indicates that there is a significant, unexplained deficiency in AMD's litigation hold procedures and its auditing of those procedures. AMD failed to disclose the problems with Mr. [redacted] preservation until years after the problem occurred, and only after repeated inquires from Intel. In my opinion, AMD's disclosure regarding Mr. [redacted] may be suggestive of a broader systemic retention failure. I believe the issue merits further investigation requiring additional information from AMD. Second, AMD's representation that no data was lost because Mr. [redacted] copied himself on all relevant sent items cannot be confirmed until receipt of Mr. [redacted] production. Determining whether Mr. [redacted] lapse is an isolated incident will require further information through formal discovery on the issue.

28. Throughout my investigation I have noted instances of sent emails being absent from the sender's production and only appearing in one or more recipients' productions. I have seen such an anomaly in the case of AMD's [redacted]. AMD has produced as relevant only 145 unique emails sent by Mr. [redacted] during the Self-Select Period. This amounts to an average of less than one per business day. Moreover, there are some unusual patterns in the chronological distribution of these sent emails. There were three two-week gaps (one each in

July, August, and September 2005) during which no relevant sent emails exist in Mr. [redacted] production.

29. Notably, there is only one sent email from Mr. [redacted] production for the entire month of October 2005 (the month preceding AMD's implementation of its journaling solution). However, when I look for sent email across the entire produced custodian population for the month of October 2005, I find 61 unique relevant emails sent by Mr. [redacted] and produced from the files of other AMD custodians. I am aware that AMD has referred to its near de-duplication protocol to explain this type of discrepancy in the past. My analysis indicates this explanation is inadequate.

30. For example, after October 2005, when journaling had been implemented for Mr. [redacted], the number of sent emails in his production jumps dramatically from just one email in October to 69 in November 2005. Indeed, there were seven sent emails produced from Mr. [redacted] custodial files during his very first day on journaling. Thereafter, there is an average of approximately 85 sent emails per month produced from the custodial files of Mr. [redacted]. Attached is a histogram showing the inconsistency between Mr. [redacted] pre- and post-hold notice and journaling behavior with regard to preservation of his sent items. [Ex. 6]

31. I have also seen AMD emails stating that any emails permanently deleted during the Self-Select Period were only available for restoration by the custodian for a period of seven days, after which they were emptied from AMD's Exchange Server "dumpster." Therefore, any such emails would not have been captured on the monthly backup tapes, except those permanently deleted within seven days of the monthly backup. [Ex. 7]

32. In my opinion it is highly unlikely that the radical inconsistency between the number of sent emails produced for Mr. [redacted] before and after he received his hold notice, and

before and after his email was journaled, can be explained by random fluctuations in email usage, near de-duplication, or subjective reviewer decisions. Rather, the anomalies are consistent with serious retention failures for Mr. [redacted] during the Self-Select Period. I am also concerned that this may be indicative of larger systemic issues. I cannot form a conclusion on this issue without further information from AMD.

D. Contradictory Instructions Within AMD's Legal Hold Notice

[redacted] [Ex. 8] [redacted]

[redacted]

36. [redacted]

E. Issues Related to Symantec Enterprise Vault

37. Beginning around November 2, 2005, AMD undertook the manual process of migrating custodian email into a tool called Symantec Enterprise Vault ("Vault"). If configured and used appropriately, the Vault should prevent the loss of emails. The correspondence I have reviewed indicates what I view as another significant and systemic failure in AMD's retention program. [redacted] [Ex. 9] [redacted] [Ex. 10] [redacted] [Ex. 11] This means that custodians could, and in all likelihood did, delete email messages that would then not have been migrated to the Vault.

38. Based on the protocol as I currently understand it, it is highly unlikely that AMD achieved a sound result in its attempt to deploy an automated preservation program that required

manual and unmonitored processes. Without additional technical information from AMD (such as migration logs), I cannot reach a definite conclusion as to the scope of data potentially lost due to this apparent failure. However, as described above, there is reason to believe that significant and systemic lapses in process, chain of custody and verification of the Vault system occurred due to the lack of clarity and insufficiency of AMD's protocol, and its validation process.

39. I have also seen correspondence [redacted] [Ex. 12] This may have increased the likelihood of data being permanently lost. I would need additional information to determine whether [redacted]

40. Based on the information currently available, it appears that there were errors in the migration of at least 15 custodians' PSTs into the Vault, including high-ranking officials like AMD's [redacted]. Metadata from the following custodians documents indicates migration failures:

[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	

41. The metadata for these custodians' PST files indicates migration error. Their custodial files contained a PST folder indicating migration failure (specifically, the phrases "Migration Failure" or "Migration Fail"). It is possible that some amount of data was lost as a result of these migration errors and that the custodial production for these custodians is not

complete. For example, if the custodian had followed the AMD IT directive and permanently deleted an unsuccessfully migrated PST file, data might be irretrievably lost.

42. Beyond preserving the pre-existing PST files selected by custodians for migration, the Vault also functions as long-term storage for email. Based upon the information I have reviewed, it appears that AMD's email system was configured to automatically migrate user emails to the Vault once they became older than 30 days. During this 30 day period, users continued to have the ability to place items in the "deleted items" folder. [redacted] [Ex. 13] This would mean that these items may be recoverable by restoring monthly backup tapes, or perhaps from AMD's journaling servers. I am unable to determine whether and to what extent AMD has undertaken these processes, absent further documents or testimony.

43. It is my understanding that the parties are required to maintain pathing information for produced items. The folder naming conventions employed by AMD are unclear and indecipherable, thereby rendering it impossible to determine, in many cases, the actual sources of a given email.

44. In order to completely understand the data sources relied upon for the collection and production of information, I need to understand these artifacts. Without understanding the file path naming conventions, I cannot assess the completeness of AMD's production.

45. In my opinion, based on the limited information available and as described above, there is reason to believe that the PST migration process designed and implemented by AMD

may constitute a systemic failure. Further testimony and documents are necessary for my review before I can reach any final conclusion.

F. Corrupt PST Recovery

46. In the course of my review I learned that AMD claims to have experienced no "systemic" failures in their preservation and production efforts. [Ex. 14 at 2-3] However, AMD has acknowledged certain retention lapses in letters to Intel. In August 2007, for example, AMD acknowledged that its production of custodial files for "a small number of custodians" was found to be incomplete. They blamed this data loss on either corrupt PST files requiring subsequent repairs or certain PST files that were "apparently not located during the initial harvest of the custodian's data." [Ex. 3 at 1]

47. In reviewing the AMD production database, I identified evidence of corrupt PSTs for 36 custodians. In order for data to be produced from a corrupt PST folder, it is necessary to utilize a tool in order to repair the corruption error. Use of such a tool entails a high likelihood of data loss during the repair process.

48. I identified these corrupted folders by searching for a folder structure containing the words "lost" and "found," indicating the likelihood that data was produced from a corrupt PST container. While AMD admits to restoring and producing data from recovered PSTs [*Id.*], I am unaware of any correspondence identifying the custodians involved or the tool used for data recovery purposes. Furthermore, a question looms as to when the corruption occurred. If corruption occurred during the harvest process, best practices would require AMD to re-harvest the corrupt PST file in the first instance. Only if these re-collections were also corrupt should a recovery tool be run, since the likelihood of data loss is increased. Analyzing the scope of this problem would require additional information from AMD as to the identities of the custodians,

whether non-corrupt versions of these PSTs still exist, and the recovery method employed in collection and repair.

49. The custodians affected include some of AMD's most senior executives, among them AMD's [redacted] The full list is as follows:

[redacted]			

G. Additional Systemic Issues

50. In light of the numerous issues described above, it would be standard practice for AMD to turn to backup tapes to restore data that may have been lost. I would expect that significant data is stored on AMD backup tapes, and this data should be included in order to provide a complete production. Due to the indecipherable file pathing information, I am unable to determine the extent to which AMD has even utilized backup tapes in its production, and therefore unable to opine on the scope of relevant data that would be produced from them. In

order to determine whether AMD has provided all available relevant information, I will require further documents and testimony from AMD.

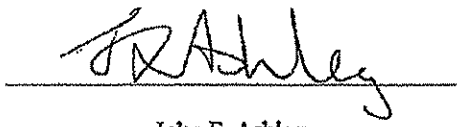
51. Furthermore, AMD in the past has referred to its de-duplication regime to explain apparent anomalies in its productions, such as emails in which a custodian was a sender or recipient, yet the email in question did not appear in such custodian's production. In my opinion, AMD's representations regarding their de-duplication methodology are confusing and inaccurate. AMD claims that their near de-duplication technology, augmented by manual review, results in production of only the final thread of an email. [Ex. 15] But in my preliminary review I have also found numerous instances of exact duplicates within single-custodian productions. These inconsistencies lead me to question whether either the standard de-duplication protocol or the near-deduplication protocol were performed correctly or in compliance with the e-discovery protocol. [Ex. 16 ¶ 4] I would require additional detail in order to opine on this issue, which may have implications in my ability to render an opinion on many of the other issues described above.

H. Conclusion and Recommendations

52. I have identified a series of preservation, harvesting, processing, and production lapses in the preceding paragraphs. I understand that AMD claims it has provided all of the information regarding its preservation regime to which Intel is entitled, pointing specifically to correspondence and attorney-drafted summaries provided to Intel ("AMD's Backup Tapes Retention Protocols" and "Summary of AMD's Document Collection Protocols"). But those materials do not address—let alone explain or resolve—any of the lapses described above. It is my strong opinion that additional documents and testimony by informed witnesses are critical not only to explain how the anomalies occurred, but to determine whether additional relevant documents remain available, but unproduced by AMD.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July __, 2008

Date: July 1, 2008



John F. Ashley

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

I, W. Harding Drane, Jr., hereby certify that on July 2, 2008 the attached document was hand delivered to the following persons and was electronically filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following and the document is available for viewing and downloading from CM/ECF:

Jesse A. Finkelstein
Frederick L. Cottrell, III
Chad M. Shandler
Steven J. Fineman
Richards, Layton & Finger
One Rodney Square
920 North King Street
Wilmington, DE 19801

James L. Holzman
J. Clayton Athey
Prickett, Jones & Elliott, P.A.
1310 King Street
P.O. Box 1328
Wilmington, DE 19899

I hereby certify that on July 2, 2008, I have Electronically Mailed the documents to the following non-registered participants:

Charles P. Diamond
Linda J. Smith
O'Melveny & Myers LLP
1999 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067
cdiamond@omm.com
lsmith@omm.com

Mark A. Samuels
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071
msamuels@omm.com

Salem M. Katsh
Laurin B. Grollman
Kasowitz, Benson, Torres & Friedman LLP
1633 Broadway, 22nd Floor
New York, New York 10019
skatsh@kasowitz.com
lgrollman@kasowitz.com

Michael D. Hausfeld
Daniel A. Small
Brent W. Landau
Cohen, Milstein, Hausfeld & Toll , P.L.L.C.
1100 New York Avenue, N.W.
Suite 500, West Tower
Washington, D.C. 20005
mhausfeld@cmht.com
dsmall@cmht.com
blandau@cmht.com

Thomas P. Dove
Alex C. Turan
The Furth Firm LLP
225 Bush Street, 15th Floor
San Francisco, CA 94104
tdove@furth.com
aturan@furth.com

Steve W. Berman
Anthony D. Shapiro
Hagens Berman Sobol Shapiro, LLP
1301 Fifth Avenue, Suite 2900
Seattle, WA 98101
steve@hbsslaw.com
tony@hbsslaw.com

Guido Saveri
R. Alexander Saveri
Saveri & Saveri, Inc.
111 Pine Street, Suite 1700
San Francisco, CA 94111
guido@saveri.com
rick@saveri.com

Michael P. Lehman
Cohen, Milstein, Hausfeld & Toll , P.L.L.C.
One Embarcadero Center, Suite 526
San Francisco, CA 94111
mlehmann@cmht.com

By: */s/ W. Harding Drane, Jr*

Richard L. Horwitz (#2246)
W. Harding Drane, Jr. (#1023)
POTTER ANDERSON & CORROON LLP
Hercules Plaza, 6th Floor
1313 N. Market Street
P.O. Box 951
Wilmington, DE 19899-0951
(302) 984-6000
rhorwitz@potteranderson.com
wdrane@potteranderson.com
Attorneys for Defendants
Intel Corporation and Intel Kabushiki Kasiha

Dated: July 2, 2008

738395 / 29282

Exhibit 50

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

RICHARDS LAYTON & FINGER

January 5, 2009

VIA ELECTRONIC FILING
AND HAND DELIVERY
The Honorable Vincent J. Poppiti
Blank Rome LLP
Chase Manhattan Centre
1201 Market Street, Suite 800
Wilmington, DE 19801

Redacted Public Version

Re: ***Advanced Micro Devices, Inc., et al. v. Intel Corporation, et al.*, C.A. 05-441-JJF; MDL No. 05-1717-JJF**

Dear Special Master Poppiti:

Pursuant to the Stipulation and Order Regarding Intel Discovery Into AMD Evidence Preservation entered by Your Honor on November 25, 2008, AMD respectfully submits this statement regarding the length and scope of the Rule 30(b)(6) depositions proposed by Intel.

Intel unquestionably took the initial position that suspected "systemic" preservation failures justified broad, intrusive discovery into AMD's evidence preservation activities. Taking Intel at its word, Your Honor prepared a Chart identifying each of the purported problems Intel asserted, obtained Intel's agreement that the Chart fully catalogued all areas of Intel's requested inquiry, and then directed the parties to pursue those areas through an informal discovery process intended to provide an efficient and cost-effective means for Intel to obtain the information it claimed to need and thereby to narrow or eliminate issues for formal Rule 30(b)(6) discovery. AMD fully cooperated in that process, producing an agreed-upon set of documents related to its preservation activities, providing disclosures by letter, making key witnesses available for lengthy interviews, and spending hundreds of hours responding to Intel's histograms.

This informal discovery has now been completed, with the result that Intel is unable to identify a single systemic AMD preservation failure -- that is, a material, system-wide flaw in the design and execution of AMD's preservation program that resulted in significant data loss. To the contrary, Intel now runs headlong away from the representations it made to Your Honor to secure the right to engage AMD in laborious, expensive and distracting preservation discovery -- going so far as to deny that it ever accused AMD of having any systemic preservation issues in the first place.

Despite its acknowledgment to Your Honor on November 7 that the informal discovery process had been successful, Intel now proceeds as if it never occurred. Intel has served a "new" Rule 30(b)(6) deposition notice that differs in no material way from the notice it served in May 2008; it demands *five days* of deposition, and contains 15 deposition topics with 49 subtopics and 8 new document requests. (*See* Intel's Rule 30(b)(6) Notice, Exh. A.) It covers almost every topic explored in informal discovery, and includes many topics well outside the bounds of the Court's Chart -- and beyond reason. The parties have met and conferred, but Intel pretends that neither informal discovery nor the Court's Chart in any way limit the formal discovery it may pursue. It has refused to narrow its deposition notice at all.

Enough is enough. It is time for Your Honor to decide the question posed by AMD's Motion to Quash: In the absence of evidence of a systemic preservation breakdown, what is the proper scope of preservation discovery? The record shows that AMD has already been subjected to more preservation discovery than has been required of *any* party in *any* reported case. The burden now rests with Intel to establish a *prima facie* case of systemic preservation failure to justify the expansive Rule 30(b)(6) discovery it yet again seeks. Because Intel cannot carry that burden, AMD will suggest below that a Rule 30(b)(6) deposition is not necessary or justified on most of Intel's proposed topics, and the remainder can be the subject of a one-day deposition which is more than ample.

I. Intel's False Claims of "Systemic" AMD Preservation Breakdown.

On the heels of its own disclosure of systemic evidence preservation breakdowns, Intel commenced discovery into AMD preservation in April 2007. (*See* AMD's Motion to Quash, Exh. A.) On May 30, 2008 -- ostensibly dissatisfied with the numerous agreed-upon disclosures made by AMD about its preservation activities[1] -- Intel served a Rule 30(b)(6) deposition notice containing 16 deposition topics (*id.*, Exh. T), and demanded production responsive to 9 broad document requests. (*Id.*, Exhs. T and B.) AMD moved to quash and Intel moved to compel.

Intel expressly based its motion on supposed "serious lapses" at "systemic levels," listing a series of "problems" it contended were "systemic in nature" and which purportedly justified broad discovery. (*See* Intel's Motion at p. 3-5.) In response, Your Honor issued a Chart which accurately catalogued every purported problem Intel had raised. The September 11, 2008 hearing on the parties' cross-motions focused on the Court's Chart, which Intel explicitly agreed to have accurately defined the issues.[2]

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[1] The preservation data AMD produced to Intel before informal discovery is described in, and attached as exhibits to, AMD's June 11, 2008 Motion to Quash (AMD's opening brief at p. 2-3, Exhs. B, C, M, N, O, S and V) and AMD's July 24, 2008 Reply on the Motion to Quash (AMD's reply brief at p. 2-3, Exhs. A, B, C, D, E, G, I and J.)

[2] Indeed, when Your Honor asked Intel's counsel directly whether the Court's Chart "capture[d] your universe of identified problems," Mr. Pickett confirmed that it accurately set forth "our list

Since that time, Intel has repeatedly renewed its assertion of "systemic" preservation failure. Intel's first set of "histograms" was accompanied by a letter dated October 9, 2008 in which it claimed "systemic anomalies" in AMD's preservation. Then, at a hearing on November 7, Intel's counsel again suggested "systemic failures." (*See* Nov. 7, 2008 Hrg. Tr. at p. 10.) And a week later, Intel asserted "widespread non-retention" of data, "widespread . . . anomalies," and "significant problems" that purportedly require an audit of "the retention practices of *all* of [AMD's] production custodians . . . ." (*See* Intel's letter dated November 14, 2008, at p. 1, 3.)

Against Intel's repeated charges of "systemic failure," AMD methodically produced the information Intel requested as defined by the Court's Chart. As more fully detailed below, AMD produced for interview both its own personnel as well as its vendor's for 15 hours of interrogation by a battery of Intel lawyers and consultants. AMD produced documents from even more AMD personnel than Intel originally requested, and provided other responsive information by letter and email. And, in an effort to bring discovery to closure, AMD permitted Intel interrogation beyond the Court's Chart into such issues as backup tapes and "mailbox quotas." Intel had all of its questions answered, and mined the issues in the Court's Chart to their fullest extent.

Intel then made a very abrupt and telling about-face. Having uncovered no problem that could be remotely characterized as "systemic" during an exhaustive, three-month investigation, Intel's counsel back-tracked:

> "[T]his idea that there needs to be a systemic problem to proceed with discovery is, I think, a complete red herring and false issue. I don't understand why our burden would be to show a systemic problem -- whatever systemic [means]. *I'm not quite sure what systemic means, frankly.*" (*See* Dec. 12, 2008 Hrg. Tr. at p. 11.)

This on-the-record back-pedaling is a stunning *admission* by Intel that it has developed no evidence whatsoever of any systemic AMD preservation failure. Without such evidence, Intel cannot carry its burden to justify, as it must, the extensive Rule 30(b)(6) deposition discovery it now seeks.

II. The Law Does Not Permit Intel's Proposed Rule 30(b)(6) Discovery.

Intel contends that it is entitled *by right* to conduct broad discovery into AMD preservation. The Rule 30(b)(6) deposition notice at issue exceeds the scope of the issues defined by the Court's Chart, and contemplates a complete do-over of extensive informal interviews previously provided to Intel. And all of this is sought without a shred of evidence put forward by Intel of any systemic AMD preservation failure.

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of known and strongly suspected items," stating "it's fine." (*See* September 11, 2008 Hrg. Tr. at p. 63.)

No law supports this and neither do the facts. Intel's overreaching requires that Your Honor decide two questions: First, what constitutes "routine" preservation discovery that is permitted in the ordinary course; and, second, on this record, has Intel produced competent, *prima facie* evidence of systemic preservation breakdown and resulting loss sufficient to justify the scope, burden and nature of the onerous preservation discovery it proposes.

Any argument that Intel's proposed Rule 30(b)(6) discovery is "ordinary course" -- or that AMD has not already more than satisfied "routine" preservation inquiries -- cannot be taken seriously. Nothing in the Federal Rules of Civil Procedure expressly addresses preservation discovery. Instead, the scope of litigants' ordinary-course preservation disclosures is principally defined by local rule, such as this Court's Ad Hoc eDiscovery rules, which require only initial preservation-related exchanges.[3] *Delaware Ad Hoc Comm. for Electronic Discovery*, § 2 at p. 2-6; *see also* Fed R. Civ. P. 26(b)(1). *See also Managing Discovery of Electronic Information – A Pocket Guide for Judges*, at 4-6 (disclosure of systems, storage and retention protocols); *Manual for Complex Litigation, Fourth Edition*, § 11.13 (similar). Accordingly, in the ordinary course and absent systemic preservation breakdown, the rule is that a party must apprise its opponent -- through discovery or voluntarily -- of the key elements of its preservation program to allow assessment of it. AMD satisfied this discovery obligation long ago.

Beyond ordinary-course discovery, Intel has spent the last three months prying into every potential preservation problem a large team of Intel lawyers and consultants apparently dedicated entirely to that effort has been able to conjure up. AMD has cooperated every step of the way, at great cost and diversion of its limited resources during the closing months of merits discovery. Surely, Intel should not be permitted to go any further without producing real evidence making out a *prima facie* case of systemic AMD preservation breakdown.

Unsurprisingly, no one case sets forth an all-encompassing legal rule to guide decision; the preservation issues presented, purported loss, and discovery requested are simply too divergent and fact-specific in the case law. But applicable decisions teach two related propositions: First, the party requesting preservation discovery must justify it by producing evidence beyond mere suspicion that a material preservation breakdown occurred; and, second, the discovery proposed must be tailored to the issue on which such evidence has been offered. *See, e.g., Alexander v. F.B.I.*, 188 F.R.D. 111, 117-19 (D.D.C. 1998) (discovery limited to ordinary-course preservation issues); *Doe v. Dist. of Columbia*, 230 F.R.D. 47, 55-56 (D.D.C. 2005) (similar); *Tulip Computers Int'l B.V. v. Dell Computer Corp.*, 2002 WL 818061, at *6-8

[3] Though Intel argues otherwise, Judge Farnan's order permitting a deposition of the "document custodian or custodians responsible for the productions to them to inquire into the completeness of production (including electronic discovery)" certainly cannot be read to pre-authorize the completely unbridled discovery Intel now seeks, especially in light of the extensive disclosures already made by AMD both before and during the Court-supervised informal discovery process. (*See* Case Management Order No. 1 at ¶ 5(e).)

(D. Del. Apr. 30, 2002) (narrowing discovery as "far too broad," and allowing "short deposition" of party that failed "basic discovery obligations").

Scotts Co. LLC v. Liberty Mut. Ins. Co., 2007 WL 1723509 (S.D. Ohio June 12, 2007), is instructive on this point. There, plaintiff sought an order allowing its forensic expert to search the defendant's computer systems, including servers and databases, without any showing of discovery failure. The Court concluded that, absent a "strong showing" that the responding party had defaulted on its production obligations, the propounding party should not be allowed resort to the "extreme, expensive, or extraordinary means" of discovery proposed. *Id.* at *2. As the Court put it, "mere suspicion" or the "bare possibility" of discovery inadequacy was simply insufficient to permit the searching inquiry plaintiff proposed. *Id.* Other courts have reached like conclusions. *See, e.g., India Brewing Inc. v. Miller Brewing Co.*, 237 F.R.D. 190, 194-95 (E.D. Wisc. 2006) ("nothing but speculation" insufficient to justify production of preservation data); *Diepenhorst v. City of Battle Creek*, 2006 U.S. Dist. LEXIS 48551 at *9-11 (W.D. Mich. June 30, 2006) ("mere suspicion" insufficient to justify examination of hard drive). *See also In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003) (absence of any factual finding "at-the-outset . . . of some non-compliance with discovery rules" precluded requested database search).

These cases compel the conclusion that in order to justify the burdensome and intrusive preservation discovery Intel now proposes, Intel must produce competent evidence of the "systemic" AMD preservation failure Intel has loudly proclaimed for so long. Intel cannot carry this burden, despite the fact that AMD has endured multiple expansive rounds of preservation discovery, beginning with AMD's agreed-upon disclosures prior to June 2008 (*see, supra*, n.1), followed by document production and more written disclosures and, ultimately, extensive witness interviews. Intel has been given well more than a fair opportunity to investigate every purported problem it wanted and to delineate the "systemic" AMD failures it proclaimed. None has been shown. Intel's self-proclaimed "suspicions" are not enough.

Equally important, Intel's proposed deposition notice and additional document requests are not tailored to any purported loss issue, systemic or otherwise. In this sense, preservation discovery is no different than merits discovery: It must be reasonably targeted, not unduly burdensome, and not a mere "fishing expedition" that casts about unnecessarily. *See id.* (all cites); Fed. R. Civ. P. 26(b)(2)(C); *Bowers v. NCAA*, 2008 WL 1757929, at *4-6 (D.N.J. Feb. 27, 2008) (court has "broad discretion to tailor discovery narrowly" to meet case needs). As examples, Intel's Deposition Topic No. 10 concerning backup tapes (about which AMD has already made disclosures) does not seek any information bearing on some supposed systemic preservation failure. (*See* Exh. A.) Likewise, Intel's Document Request No. 1 seeks documents showing the dates, sources and data harvested from each and every electronic source -- hard drive, vault, journal, personal network space or exchange server -- for each of the 440 custodians on AMD's Custodian List. (*Id.*) The undue burden and irrelevance of this shotgun request is manifest. This is mere fishing, no more and no less.

And preservation discovery *is* materially different from merits discovery in one important respect: It is typically directed, as here, to activities conducted by a party's attorneys and,

therefore, necessarily places the attorney-client privilege and attorney work product at risk. A party defending its evidence preservation program is not required to waive privilege or work product protection in order to prove that program's adequacy. Instead, both the *subject matter of discovery* and the proposed *discovery methods* must be circumscribed in recognition of, and deference to, these protections. At the time of briefing on AMD's Motion to Quash, for example, AMD provided preservation information by way of the Declaration of Jeffrey J. Fowler, AMD's outside counsel who has knowledge of preservation, collection and production issues. That declaration's disclosure of factual preservation information did not waive the attorney-client privilege or work product protections. Similarly, in the course of preservation discovery, both Intel and AMD have provided narrative statements in lieu of deposition, which is an appropriate discovery method that can mitigate concerns about privilege or work product waiver.

Intel, however, seeks to intrude squarely on privilege. For instance, Intel's Deposition Topic No. 4 seeks testimony about when "AMD first reasonably anticipated this Litigation." (*See* Exh. A.) During the parties' meet and confer, Intel's counsel could not identify a single question that would not seek privileged information, and AMD can imagine none. Similarly, Intel's Deposition Topic No. 15 proposes inquiry on "audits and investigations" conducted by AMD's attorneys about preservation and productions -- questions Intel itself refused to answer on privilege grounds at its own witnesses' depositions. (*Id.*) That is why, as in the past, AMD again offered to provide written narrative summaries in response to some topics conditioned on a no-waiver agreement. Intel rejected this proposal out of hand.

Within this legal framework, the Court must decide discovery limits. Your Honor correctly anticipated that informal discovery would generate significant information that would resolve some issues, narrow others and, thus, materially reduce the deposition time needed to verify the pertinent facts derived. The success of informal discovery is thus pertinent to assessment of the proper scope and length of Rule 30(b)(6) deposition, which we discuss next.

III. ***"The Informal Disclosure Process Has Been Productive And Useful".***

The foregoing is a direct quote of Intel's counsel, Mr. Pickett. (*See* Nov. 7 Hrg. Tr. at p. 7.) AMD agrees with Mr. Pickett's assessment. Informal discovery afforded Intel fulsome opportunity to delve into every nook and cranny of the issues in the Court's Chart, and more. Indeed, Your Honor will recall that, in early November, AMD was reluctant to proceed with further informal discovery because experience had shown that Intel was misusing the interview process by subjecting witnesses to inquisition-style questioning by a battery of experts and consultants. At Your Honor's urging, AMD relented and produced Redacted for 7 hours, at the conclusion of which Intel indicated that it had no further questions. Mr. Pickett acknowledged that Redacted had been "a very useful interview." (*See* Dec. 12 Hrg. Tr. at p. 7.)

In view of the extensive informal discovery Intel has received and acknowledged to have been productive and useful, we are at a loss to understand the need for the complete do-over

Intel's Rule 30(b)(6) deposition notice portends. Here, in summary, are the results of informal discovery:

A. Document Production.

AMD produced documents Intel requested from the files of five AMD IT employees, including Redacted before and on November 26. AMD itself suggested producing documents from one of these five AMD employees so that the record would be even more complete. AMD did not produce harvest or non-custodian data that was outside the scope of the Court's Chart. Intel has now served new, and even broader, requests seeking a raft of harvesting and non-custodian data as part of its Rule 30(b)(6) deposition notice. (*See* Intel's Document Request Nos. 1, 2 and 8, Exh. A; *see also, infra,* at p. 15, 18.)

Intel has not uttered a word of complaint about AMD's agreed-upon November document production, much less has it requested any meet and confer to discuss it. In addition, the parties agreed that document production was to be completed during the informal discovery period. (*See* email dated October 3, 2008, at p. 2, Exh. B.) Before Intel's service last week of the new Rule 30(b)(6) notice, the parties did not discuss, nor did the Court approve, another round of document discovery. And, indeed, at the December 12, 2008 hearing, Intel itself indicated that it would not be filing a motion to compel within the time required by the Court's order. AMD believes that its preservation document production has been completed.

B. Issues Identified In The Court's Chart.

1. Court Chart Issue No. 1: Automated Journaling and Archiving. AMD first produced information on this topic during the first informal interview of Redacted in September 2007, and produced additional information when briefing its Motion to Quash. (*See* AMD' Motion to Quash at p. 3 and Exh. K; Declaration of Jeffrey J. Fowler ¶¶ 9-14.) AMD also produced documents about journaling and archiving, and Intel again interviewed Redacted Redacted extensively on this topic. Intel's Mr. Pickett agreed that AMD provided "detailed information regarding journaling and archiving," that the parties made "good progress," and has identified no "follow-up questions [Intel's consultants] may or may not have." (*See* Dec. 12 Hrg. Tr. at p. 24.)

2. Court Chart Issue No. 2: Evidence of Specific Deletion Activity. AMD produced information on this topic during initial briefing (*see* Fowler Decl. ¶¶ 19-21), and Intel thoroughly interviewed both Redacted and AMD's consultant, Tony Cardine, on this topic. Intel never raised additional questions, and Mr. Pickett conceded that "[w]ithout getting hung up over the word completed, I think [this topic] is substantially completed." (*See* Dec. 12 Hrg. Tr. at p. 25.)

3. Court Chart Issue No. 3: Redacted **issues.** AMD produced information during briefing (*see* Fowler Decl. ¶¶ 22-27), and Intel extensively questioned Redacted regarding Redacted dumpster settings and all related topics.

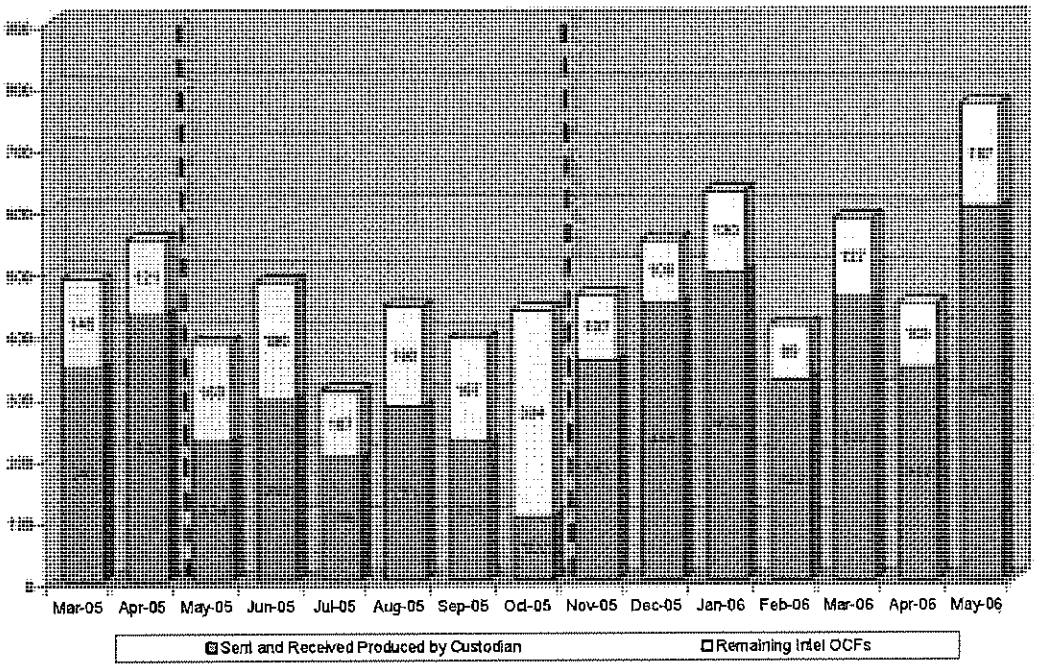
a. **Supplemental File Production For** Redacted In the course of informal discovery, AMD agreed to attempt to obtain and produce supplemental files for Redacted Redacted for the time period from March through November 2005. AMD obtained supplemental files for Redacted from backup tapes over that time period.[4] AMD also obtained supplemental files for Redacted assistant, Redacted from backup tapes over that same time period. AMD had in fact made and retained monthly backup tapes which covered the entire time period from March through November 2005 for both Redacted and Redacted The backup tape restoration effort included restoring all dumpster data for Redacted or Redacted that was captured by the backup tapes. In addition to data obtained from backup tapes for Redacted , AMD re-reviewed data from an image of her computer laptop and personal network space from which AMD had previously produced data, and obtained and produced email from her Enterprise Vault that was dated prior to December 2005. The data obtained from these sources for Redacted Redacted was reviewed to identify unique files attributable to Redacted .[5] AMD produced the supplemental Redected data from Redacted and Redacted files on November 14, 2008.

Attached hereto as Exhibit C are three sets of bar charts that depict the production for Redacted Redacted both before and after production of these supplemental files. The two charts in the first set are titled Redacted Total Sent and Received Items," with one chart depicting production "Before Backup Tape Restoration" and the other "After Backup Tape Restoration." Red shading in the "Before" chart -- inserted immediately below -- depicts sent and received items produced from Redacted materials, while yellow shading depicts the "OCFs" Intel previously claimed.

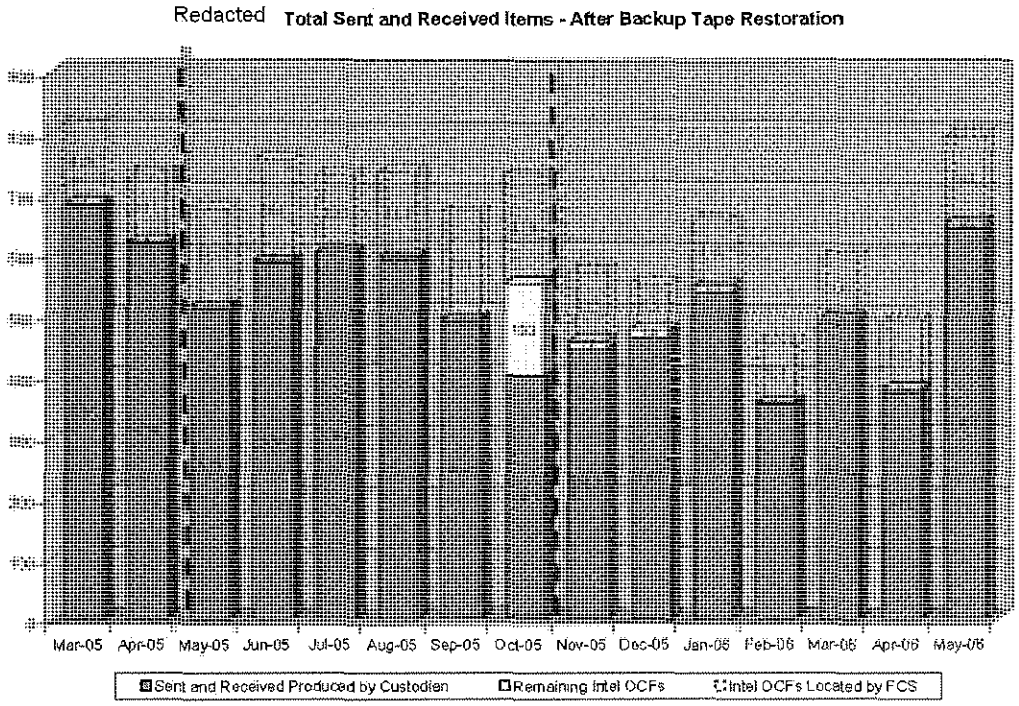
[4] As AMD previously described to Intel, AMD also produced on November 14, 2008, certain deposition reharvest data for Redacted that had not previously been produced as a result of vendor error. The deposition reharvest email produced from Redacted journal extract related to June 2006 and thereafter. This same vendor error affected other AMD custodians, and AMD completed production for all custodians affected by this issue in mid-December 2008. Both parties have encountered these types of production issues, and Intel has not registered any complaint about it.

[5] It appears that unique email files of this kind may exist for the period after November 2005 through March 31, 2008 (. Redacted production period). AMD has therefore obtained exports of Redacted journal and vault data for that post-November 2005 time period, and is currently reviewing that data for production to Intel. AMD anticipates producing these files and, thus, completing Redacted production by or before January 9.

Redacted **Total Sent and Received Items - Before Backup Tape Restoration**



Inserted next below is Redacted "After Backup Tape Restoration" chart. Shading in the "After" chart denotes the same information described above. The dotted lines depict the reduction in Intel's claimed OCFs after production of the supplemental files and under accurate OCF calculation.



This chart demonstrates that AMD has provided a robust production for Redacted Virtually no actual OCFs exist during the time frame of March through September 2005, or after Redacted mailbox was migrated to AMD's archiving systems on November 2, 2005. The only notable number of actual OCFs exists in October 2005, in which 153 OCFs remain. The presence of these OCFs is consistent with the facts that AMD disclosed earlier and that Redacted Redacted described during his informal interview. Specifically, Redacted restored the deleted items from Redacted dumpster on October 9, 2005, but did not repeat the dumpster restore exercise prior to migration of Redacted mailbox to the dedicated journal server on November 2, 2005. (*See* Fowler Decl. ¶ 25.) As such, the dumpster items for that three-week time period were not captured. Nevertheless, AMD produced 400 files for Redacted in October 2005 exclusive of the 153 actual OCFs. Total files produced before archiving are robust and often exceed total monthly counts of files produced post-archiving. The remaining two sets of charts in Exhibit C separately depict "sent" and "received" item totals both before and after production of Redacted supplemental files. These charts show robust productions of this email in all months preceding journaling, and actual OCFs are virtually nil.

At hearing on December 12, Intel's Mr. Pickett claimed to have additional questions about Redacted supplemental production, and AMD indicated that it awaited Intel's inquiry. On December 30, 2008, Intel sent AMD a list of 7 questions. (*See* Intel's December 30, 2008 letter, Exh. D.) The foregoing information responds to Intel's questions.

4. **Court Chart Issue No. 4: Deleted Item Harvesting.** AMD provided information about deleted item harvesting with its briefing (*see* Fowler Decl. ¶¶ 19-21), and Intel thoroughly questioned both Messrs. Cardine and Redacted on this topic. At the December 12 hearing, Mr. Pickett claimed that there were "problems, the .ost files" -- which has nothing whatsoever to do with deleted item harvesting -- and suggested Intel might need to follow-up "once we digest [Redacted] information." (*See* Dec. 12 Hrg. Tr. at p. 28.) Intel has not followed up.

5. **Court Chart Issue No. 5:** Redacted AMD supplemented its prior disclosure about Redacted at the time of briefing. (*See* Fowler Decl. ¶ 28.) As AMD stated at the December 12 hearing, Intel thereafter never pursued this issue in any manner at any time during informal discovery. Intel's December 30 letter, however, asked that AMD confirm certain email counts Intel has tabulated from the production AMD made for Redacted (*See* Exh. D.) AMD will work with Intel to provide the confirmatory information it has requested.

6. **Court Chart Issue No. 6: "Lost Files."** AMD provided data regarding "lost files" with its briefing (*see* Fowler Decl. ¶¶ 30-33), and Intel extensively questioned Mr. Cardine about this issue. Intel ultimately withdrew it. (*See* Intel's November 18, 2008 letter, Exh. E.)

AMD must emphasize that Intel's false "lost files" issues forced AMD to spend well over 100 hours of its attorneys' and consultants' time researching and responding to Intel's oft-shifting "lost files" theories, obtaining and reviewing documents about it, preparing for and attending Mr. Cardine's interview, and engaging in post-interview follow-up. "Lost files" was a non-issue from the start, a point Intel refused to concede until the Special Master's experts pressed Intel with their own analysis. This was a very expensive and ultimately fruitless discovery foray not dissimilar to other issues Intel continues needlessly to pursue.

7. **Court Chart Issue No. 7: Migration of Historic .Psts to The Enterprise Vault.** AMD provided information about .pst migration with its briefing (*see* Fowler Decl. ¶¶ 35-42), and Intel extensively questioned Redacted about this issue. At hearing on December 12, AMD's counsel stated that AMD considers this issue resolved, and Mr. Pickett responded, "I agree." (*See* Dec. 12 Hrg. Tr. at p. 30-31.)

8. **Court Chart Issue No. 8: Archiving of Deleted Items in the Enterprise Vault.** AMD provided information concerning deleted item archiving with its briefing (*see* Fowler Decl. ¶¶ 10-12, 40), and Intel thoroughly questioned Redacted about this issue. At hearing on December 12, AMD stated that it considered this issue resolved. Mr. Pickett responded that "subject to digesting" the information, Intel might have further issues and would notify AMD. (*See* Dec. 12 Hrg. Tr. at p. 31.) Intel has provided no notice of any "loose ends."

9. **Court Chart Issue No. 9: "Lost and Found" Notations.** AMD provided information about "lost and found" notations with its briefing (*see* Fowler Decl. ¶¶ 43-

46), and Intel questioned Mr. Cardine about this issue on October 8 and 15. Since that time, Intel has raised no further questions on this topic. Although Intel was non-committal at the December 12 hearing (*see* Dec. 12 Hrg. Tr. at p. 31-32), this issue has obviously been resolved.

10. Court Chart Issue No. 10: Hold Notice Instructions. AMD produced its hold notices well over a year ago, subject to an explicit agreement that by doing so no privilege or work product waiver would be claimed. This topic was not addressed in informal discovery. Intel proposes it as a deposition topic, and we discuss that topic below. (*See* Exh. A).

11. Court Chart Issue No. 11: "File Path" and Deduplication Processes. Intel extensively questioned Mr. Cardine about these subjects on October 15, and AMD produced additional information by letter. (*See* AMD's November 17, 2008 letter at p. 3, Exh. F.) This followed information disclosed by AMD to Intel more than a year ago on October 15, 2007. (*See* AMD's October 15, 2007 email, Exh. G.) Intel has conducted thorough discovery on this topic repeatedly.

12. Other Lapses Previously Disclosed by AMD: Redacted **and** Redacted In addition to the foregoing issues, the Court's Chart contains a section titled "Other Lapses Previously Disclosed by AMD." Of the topics listed there, hold notices is the subject of Intel's current Rule 30(b)(6) discovery, and Redacted is discussed above. The remaining issues Intel raised relate to Redacted and Redacted .

a. Redacted : AMD considers all issues relating to Redacted to be resolved. AMD provided a complete, thorough and detailed explanation of Redacted inadvertent loss of approximately 3 gigabytes of data in March 2007, and thoroughly described its efforts to obtain replacement files. (*See* AMD's letter dated March 19, 2008, Exh. H.) The disclosure contained detail well beyond anything reasonably required under the circumstances, and certainly far exceeded anything Intel has provided for any of its custodians. AMD has also produced documents concerning Redacted inadvertent loss and repeatedly offered him for deposition, even offering to fly him to the United States for that purpose. There is no question that AMD's efforts to obtain and produce replacement files were successful. Attached hereto as Exhibit I are three charts depicting the production AMD made on behalf of Redacted during the "loss" period, broken down by sent, received and total email files. The chart titled Redacted Total Sent and Received Items" -- which covers the "loss" period from October 2005 through March 2007 -- is most pertinent. As depicted in that chart, the production AMD has made for Redacted is robust, and there are no apparent gaps. If Intel has further questions, or questions AMD's detailed account of what happened, it is free to depose Redacted as AMD has repeatedly offered.[6]

[6] At one time, AMD considered providing Intel with certain information about Redacted file counts, prior to attorney review for responsiveness and privilege. However, AMD was unable to obtain comfort that by doing so it would not open up the possibility that Intel would seek to depose its outside counsel, or expose itself to a claim of privilege and work product waiver.

b. Redacted : AMD disclosed information to Intel about Redacted Redacted on May 14, 2008. (*See* AMD's Opening Brief on Motion to Compel, Exh. S.) In summary, AMD provided a litigation hold notice to Redacted on February 21, 2006. On March 30, 2006, AMD migrated Redacted email account to AMD's vault and journal archiving systems. During the archiving period, Redacted either lost or suffered the theft of one of his laptop computers. In May 2007, AMD imaged Redacted other computer but the hard drive used to make that acquisition failed. AMD sent that hard drive to an outside vendor, but the vendor was unable to recover data from that image. Thus, as described to Intel, AMD was unable to obtain data from two laptop hard drives utilized by Redacted . However, during the time period in question, Redacted email account was on AMD's archiving systems, from which a robust email production was made. Intel did not request any additional information regarding Redacted at any time during informal discovery. AMD believes that its prior disclosures regarding Redacted satisfied any legal duty it owed Intel. If Intel has further questions, it can get the answers from Redacted at deposition.

C. Intel's "Histogram" Exercise and Individual Custodian Issues.

While AMD will not chronicle all the details here, Intel's entire "histogram" gambit merely served as Intel's last-gasp effort to concoct a "systemic" problem. Not only did its histograms show no such thing, they were so manifestly erroneous -- in ways that Intel could easily have addressed before inflicting enormous expense on AMD to debunk them -- as to call into serious question Intel's good faith in pursuing this course. This time-consuming exercise principally served to demonstrate the expected: Custodians attempting to comply with their preservation duties go about that task in various ways. In the final analysis, however, Intel is -- as it was when it filed its motion to compel -- still fixating on individual custodian preservation issues that are mostly unremarkable and have been fully and adequately explained.

IV. Intel's Over-Reaching Rule 30(b)(6) Discovery Must Be Circumscribed.

Your Honor has repeatedly stated the expectation that informal discovery would eliminate and narrow issues in order to minimize deposition time, and that the Court would, in fact, set appropriate limits on the length and scope of any ultimate deposition. Until now, Intel appeared to understand Your Honor's directive. Indeed, Intel's Mr. Pickett himself acknowledged that the Court's Chart "guided the parties with respect to what issues ought to be addressed," and that informal discovery would "*tailor the formal discovery*" so that the parties could "*then proceed to what I think of as confirmatory discovery.*" (*See* Nov. 7 Hrg. Tr. at p. 30-35.)

Intel's proposed Rule 30(b)(6) deposition is disobedient to the Court's directives. Intel has rejected all reasonable efforts to limit itself to "confirmatory discovery," as it represented to Your Honor. Instead, after subjecting AMD to months of burdensome informal discovery, Intel now seeks *five days* of deposition on 15 topics, which further embrace 49 subtopics. (*See* Exh. A.) Making matters worse, Intel has even added to its notice 8 new document requests never previously discussed, much less authorized by Your Honor.

Promptly upon receipt of Intel's notice, AMD sent Intel a detailed meet and confer letter. (*See* AMD's December 19, 2008 letter, Exh. J.) In that letter, AMD proposed that, as to those topics clearly seeking confirmation of facts adduced in informal discovery, Intel could prepare lists of the specific facts it wanted to confirm and AMD would then affirm under oath. As to other topics that are outside the scope of the Court's Chart, AMD even offered in some cases to provide narrative summaries. Intel did not even do AMD the courtesy of a written response, and on December 22 simply rejected all of AMD's proposals and refused to modify its deposition notice in any way. Although agreeing that many of the deposition topics seek only confirmatory information, Intel's final positions, as described to AMD, are that: (1) the Court's Chart in no way limits the discovery Intel may pursue now; (2) Intel itself is entitled to dictate the discovery method by which facts are affirmed under oath, and only deposition is sufficient; and (3) there are no limits on the scope and length of deposition except as Intel may itself decide.

AMD is prepared on the "Confirmatory Discovery" items below to confirm in writing and under oath the facts adduced during informal discovery. As to those topics implicating the attorney-client privilege and work product protections, AMD is willing to provide narrative summaries under oath, subject to an agreement that by doing so no privilege is waived. Any deposition on issues not addressed by these discovery methods should be limited to a single day which should be more than adequate. As to all remaining topics, AMD reserves all objections and declines to submit to deposition, and also reserves all objections to Intel's new and unwarranted document requests.

A. Confirmatory Discovery.

- Deposition Topic Nos. 1 and 2: Topic No. 1 concerns implementation of the Enterprise Vault, while Topic No. 2 concerns journaling. Intel agrees that its proposed discovery is confirmatory only. AMD is willing to affirm in writing under oath all facts elicited during informal discovery as to which Intel requests confirmation. Alternatively, if Intel wants to use its limited deposition time on these subjects, AMD has no objection.

- Deposition Topic No. 3(b): This topic concerns Redacted dumpster settings and, more generally, custodians' ability to delete email. AMD is prepared to produce Redacted for deposition to confirm the facts he provided during his interview concerning the settings on Redacted dumpster. As to the remainder of this deposition topic, AMD will either confirm facts of interest to Intel in writing under oath, or produce an appropriate representative for deposition. AMD declines to produce information regarding "shift delete" absent further discussion and agreement with Intel.

- Deposition Topic No. 5(a) and (c) through (e): Topic No. 5(a) concerns the timing of AMD's issuance of hold notices, which is information AMD has already provided to Intel in writing. AMD will agree to confirm these dates under oath. Topic Nos. 5(c) and (d) concern AMD's knowledge of custodian adherence to hold notices and "monitoring and auditing." These issues directly implicate the attorney-client privilege and work product since AMD's in-house and outside counsel directed all such activities. AMD declines to waive those

privileges. AMD is, however, prepared to provide a responsive narrative summary under oath pursuant to a no-waiver agreement. Topic No. 5(e) is wholly redundant of Topic No. 7, addressed below.

- Deposition Topic No. 6: This deposition topic and its 6 subtopics concern harvesting of electronic data. This topic -- "AMD's harvesting of electronic data for this Litigation from all geographic locations and sources (hard drives, live exchange server mailboxes, Enterprise Vault, email journaling)" -- is not justified; it is well outside the scope of the Court's Chart, overbroad, and vague. There is no evidence of any systemic harvesting issue that might justify such a broad topic, and AMD therefore objects to producing a witness to testify regarding it, as phrased. In addition, by agreement with Intel, AMD already provided a written summary in response to the first version of this deposition topic (prior Deposition Topic No. 8) that covered the same issues. (*See* email dated November 16, 2007, attached hereto as Exh. K.) Harvesting was later thoroughly covered in informal discovery. To resolve this issue, as to Topic No. 6(a) concerning personnel conducting the harvests, 6(b) regarding harvesting protocols, 6(c) regarding data included and excluded from harvests, and 6(d) regarding timing of harvesting, AMD is willing either to confirm facts in writing under oath, or to provide a further narrative summary under oath. Deposition on these topics is unnecessary, and AMD objects to deposition on subtopics 6(e) and (f) for the reasons discussed below.

- Deposition Topic No 7: This topic concerns AMD IT support of preservation activities, was fully covered in informal discovery, and Intel seeks confirmatory information only. AMD will either confirm facts in writing under oath, or submit to confirmatory deposition.

- Deposition Topic Nos. 8 and 9: These deposition topics seek testimony about "procedures utilized by AMD's electronic discovery vendors" (Topic No. 8), and "de-duplication and near de-duplication methods" using Attenex software. (Topic No. 9.) No AMD employee can speak to these issues -- which have been the subject of repeated discovery and disclosures since October 2007 -- and AMD declines to produce its vendors to testify as company representatives. (*See, supra,* at p. 12.) AMD is prepared, however, to confirm under oath the facts previously adduced as to which Intel desires confirmation.

- Deposition Topic No. 11: This deposition topic seeks information about a written statement made by AMD's outside counsel in October 2005 concerning document retention policies, and is outside the Court's Chart. If inquiry is to be permitted at all, the information sought is more efficiently obtained by interrogatory than by subjecting trial counsel to deposition, and AMD has therefore proposed to provide the information sought in the form of an interrogatory response.

- Deposition Topic Nos. 12, 13 and 14: Deposition Topic No. 12 seeks information regarding "known or suspected non-preservation of data." AMD has already made the disclosures required of it by law. AMD will, if Intel desires, affirm them in writing under oath.

Deposition Topic No. 13 seeks information about individual custodians. Specifically, Intel seeks deposition regarding the "timing, scope and nature of the problems and/or issues for the following Custodians' data preservation, harvesting, processing and/or productions," and lists Redacted . AMD has already made disclosures that satisfy any legal duty AMD owes with regard to Redacted and Redacted and will provide additional information regarding Redacted as discussed above. If Intel has further questions, it will have the opportunity to ask them during the depositions of the custodians themselves.

With regard to Redacted and Redacted AMD is prepared to provide narrative summaries to supplement the disclosures AMD previously made. As referenced in the materials submitted with AMD's December 9, 2008 letter brief, for example, AMD has located additional data for Redacted During the course of document production, both Intel and AMD have occasionally identified additional data for certain custodians after initial production, and have produced it in the ordinary course. AMD will make such a supplemental production for Redacted within the next several weeks. AMD also previously identified a collection issue for Redacted and Redacted issues are described in AMD's December 9, 2008 letter brief and exhibits as well. AMD believes that these supplemental disclosures will satisfy any duty owed by AMD. If Intel has further questions, it should depose the custodians themselves.

Deposition Topic No. 14 seeks information regarding restoration and production of data from backup tapes. This topic is outside the scope of the Court's Chart. AMD is nevertheless willing to confirm in writing its prior representations that it has obtained and produced backup tape material for Redacted In all other respects, this topic is unjustified.

B. Intel Proposed Topics That Are Either Outside the Scope of the Court's Chart And/Or Seek Privileged Information.

The remainder of the discovery proposed by Intel in its Rule 30(b)(6) notice is not particularized to the issues of any specific AMD custodians. This discovery can be justified, therefore, only if it were directed at some established AMD preservation breakdown. These topics are not directed at any such issue and, in addition, are not within the scope of the issues defined in the Court's Chart. The Court should quash this discovery.

- Deposition Topic No. 3(a) and (c): This topic is aimed at "mailbox quotas" and otherwise appears to seek a primer on standard operating features of Microsoft's Outlook® product. This topic is outside the Court's Chart. AMD, however, permitted Intel to fully pursue this issue at Mr. Meeker's informal interview. As Intel knows, AMD's litigation hold notices directed any employee who needed to expand her mailbox size limits to Redacted Redacted Contrary to Intel's speculation that mailbox size limits caused data loss, Redacted explained that he granted every one of the requests he received for mailbox quota increases. Intel has identified no loss resulting from the existence of such routine mailbox-size quotas, and its questions on this topic have all been answered. AMD objects to producing a witness for deposition on this non-issue.

- Deposition Topic No. 4: Again well outside the Court's Chart, this proposed topic seeks testimony about when AMD contemplated litigation. AMD can imagine no question Intel might ask which would not intrude on the attorney-client privilege, and Intel has identified none. Accordingly, AMD objects to producing a witness to testify on this topic.

- Deposition Topic No. 5(b) and (d): These topics seek testimony from AMD's lawyers about the "meaning and intent of the language" in AMD's attorney-drafted hold notices, and about AMD's lawyers' "monitoring and auditing" of hold notices. Under a privilege non-waiver agreement, AMD has already produced all of the litigation hold notices it issued, provided the dates on which the notices were issued to each production custodian, and provided information about its monitoring activities. (*See* AMD' Motion to Quash reply brief at p. 2, Exhs. D and E; AMD's December 9, 2008 letter brief and attached exhibits.) This is more than sufficient, and AMD declines to waive the attorney-client privilege or work product protection by subjecting its lawyers to deposition about their thought processes or litigation activities.

- Deposition Topic No. 6(e) and (f): These subtopics seek information about the identity of custodians subject to harvesting and "documentation, auditing and validation." They are outside the Court's Chart, and especially the latter subtopic seeks to invade the attorney-client and work product privileges. Importantly, AMD has already produced detailed information about harvesting: A lengthy written summary of AMD's data collection protocols; the dates of harvest of electronic information for designated custodians; and extensive interviews of Messrs. Redacted and Cardine on every harvesting question Intel wanted to raise. Intel has submitted no evidence of some systemic harvesting failure that could justify this intrusive discovery.

- Deposition Topic No. 10: This topic seeks testimony about backup tapes, including "the type of media used, rotation schedules, and restoration activities." In addition, by letter dated November 19, 2008, Intel posed 17 questions with multiple subparts about backup tapes, including such inquires as the "tape format (DAT, DLG, QIC), tape capacities, whether the data was compressed, and backup software (brand and version)." (*See* Intel's November 19, 2009 letter, Exh. L.) All of these topics are outside the scope of the Court's Chart, and none of them bears on any purported systemic AMD preservation breakdown. In addition, AMD has already provided a narrative of its backup tape protocols, and AMD permitted questions about this topic at Redacted interview in the vain hope that Intel's curiosity would be satisfied and the inquiry would end there. Beyond this, AMD has confirmed that it had complete backup tape coverage for Redacted and Redacted Intel has demonstrated no need for further discovery on this topic.

- Deposition Topic No. 15: Intel seeks through this topic testimony from AMD lawyers about the "audits and investigations" into AMD's preservation activities. This information is privileged.

C. Intel's New Document Requests Are Unwarranted.

The Court directed Intel to seek documents in informal discovery and, as noted, the parties agreed that document production was to be completed during that time frame. (*See* Exh. B.) Neither the Court nor the parties discussed another round of document production. Intel has nevertheless propounded 8 new, onerous document requests. On the condition that this will end preservation document production entirely, AMD is prepared to produce documents responsive to Document Request No. 6 concerning notices to AMD employees regarding archiving. Intel's other requests, however, go too far.

By way of summary, Document Request No. 1 seeks documents showing the dates and sources of *all* electronic documents harvested from *all* sources for *all* 440 custodians on AMD's Custodian List. This does not arise from an issue in the Court's Chart, and Intel cannot justify such a make-work request and the massive burden it would impose. Document Request No. 2 is equally unduly burdensome and outside the scope of the Court's Chart, seeking as it does documents showing "the nature and scope of each harvest of electronic data from AMD's Enterprise Vault and email journaling systems." Document Request No. 3, also outside the scope of the Court's Chart, seeks deduplication logs for every one of the 1.5 terabytes of documents AMD has produced in this case, while Document Request No. 4 seeks logs of .pst migration to the Enterprise vault for almost 200 employees, even though Intel agreed on the record that this issue has been entirely resolved. (*See, supra,* at p. 11.) Document Request No. 5 seeks production of documents related to the Intel-contrived mailbox quota issue, which is both outside the Court's Chart and, in any event, unjustified by any *prima facie* showing of loss as to *any* custodian -- much less *all* of them. And Document Request No. 7, also outside the scope of the Court's Chart, asks for email addresses that Intel already has in the document productions of AMD's designated custodians.

Intel's Document Request No. 8 is perhaps Intel's most outrageous. This request seeks "for each individual AMD Custodian *for whom data has **not** been produced*" -- that is, the more than 250 AMD employees whose documents will *never* be produced in this case by stipulation and Court orders -- documents showing the timing of steps taken to preserve data, suspected non-preservation of data, dates of harvest, dates of archiving, and the dates on which AMD provided litigation hold notices. Intel cannot make any showing to justify this burdensome request.

V. Conclusion

Surely it should be obvious by now that Intel's preservation discovery gambit is not motivated by a true desire for production of additional data, nor by a good faith belief that AMD has suffered some systemic preservation failure. Instead, Intel seems determined to inflict the maximum possible cost, distraction and burden on AMD and the Court at a time when the fact discovery cut-off is looming. Permitting Intel license to conduct yet more unfettered, fishing-expedition-style discovery is unjustified by any showing it has made. Intel has been given more than a full and fair opportunity to conduct preservation discovery, and AMD is willing to confirm any of the information previously provided under oath, if Intel desires. That Intel has

not cut back one iota the scope of the formal discovery it now seeks after subjecting AMD to massive, costly informal discovery over the past several months speaks volumes about its motives here. AMD's preservation program was reasonable, adequate and fully satisfied any and all obligations imposed by law, and if Intel had evidence showing otherwise, it would come forward with it. The Court should put an end to Intel's preservation discovery shenanigans once and for all.

AMD looks forward to discussing these issues with Your Honor at the January 9 hearing.

Respectfully,

/s/ Frederick L. Cottrell, III

Frederick L. Cottrell, III (#2555)

FLC/lll
Enclosures

cc: Clerk of the Court
Eric Friedberg, Esquire (w/e) (By Electronic Mail)
Jennifer Martin, Esquire (w/e) (By Electronic Mail)
Donn Pickett, Esquire (w/e) (By Electronic Mail)
Richard L. Horwitz, Esquire (w/e) (By Hand and Electronic Mail)
James L. Holzman, Esquire (w/e) (By Hand and Electronic Mail)

Exhibit 51

RICHARDS LAYTON & FINGER

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

December 9, 2008

REDACTED PUBLIC VERSION

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

Re: *Advanced Micro Devices, Inc., et al. v. Intel Corporation, et al.*, C.A. 05-441-JJF; C.A. 05-485-JJF; MDL No. 05-1717-JJF

Dear Judge Poppiti:

Pursuant to the Stipulation and Order Regarding Intel Discovery Into AMD Evidence Preservation, entered by Your Honor on November 25, 2008, AMD submits this Statement Re Status of Intel's "Histograms."

I. Introduction

On October 9, 2008, Intel sent a letter asserting that AMD has "systemic" evidence preservation problems. Intel has yet to identify what these purported "systemic" issues are. Instead, Intel has embarked on repeated fishing expeditions, casting about for any possible anomaly, real or imagined, on which to base an assertion of "systemic" error.

Intel's latest gambit is the generation of dozens of "histograms," which are bar charts that Intel contends demonstrate email preservation problems by AMD custodians. On November 14, 2008, Intel provided AMD and Mr. Friedberg with histograms for 79 AMD custodians.[1] Intel has also announced that it is preparing and intends to submit histograms over the next few weeks for every other AMD custodian, 179 in all. Intel maintains that AMD should assume the burden of analyzing all of these histograms and rebutting whatever it is Intel purports them to show.

[1] These 79 histograms included replacements of 35 histograms Intel had previously submitted on October 9, 2008, all of which Intel later admitted to be erroneous.

As Your Honor suggested during a hearing on November 20th, and with the subsequent assistance of the Special Master's advisors, Mr. Friedberg and Ms. Martin, the parties have settled upon a sample set of 21 histograms (slightly more than 25% of the total provided thus far), which AMD agreed to analyze and report on in the first instance. Intel and AMD each picked 10 sample AMD custodians, and Ms. Martin added one additional custodian of interest who was not already on the parties' lists. Following the joint selection of these sample histograms, AMD provided Mr. Friedberg and Intel with its preliminary analysis in writing, following which Mr. Friedberg conducted a December 5, 2008 telephone conference to discuss AMD's preliminary findings and thereby to enable him to assist Your Honor.

This Statement sets forth AMD's analysis concerning 20 of the 21 sample custodians selected,[2] and our suggestions about how the process for assessing Intel's histograms should proceed going forward.

AMD's Statement consists of this letter brief and attachments, and an Appendix that consists of custodian-specific analysis for each of the sample custodians. The Appendix also contains "counter-histograms" that AMD has itself generated to accurately depict the relevant data.

II. Background Regarding Intel's Histograms

Intel's histograms are bar charts that purport to show a custodian's monthly volume of email produced by AMD from that custodian's own files, as well as what are known as "OCFs"-- that is, unique emails that the custodian purportedly sent or received that were produced from other custodians' files, but not from the custodian's own. Intel's histograms contain "yellow shading" which, according to Intel, is meant to depict and quantify "the precise number of emails that should have been, but were not, produced in the custodian's data." (*See* Intel's letter dated October 9, 2008, at p. 1.) Intel's histograms were accompanied by lists of DCNs (document control numbers) corresponding to each of the email files Intel claims to constitute a unique OCF for each custodian.

Since the time these histograms were submitted by Intel just under four weeks ago, a large team of AMD counsel and vendor personnel have spent literally hundreds of hours -- including over the Thanksgiving holiday weekend -- analyzing these histograms and the accompanying lists of roughly 120,000 DCNs. That effort has already cost AMD a tremendous amount of money, and has also diverted resources from many other important case tasks.

As we will show, Intel's histograms grossly exaggerate the presence of OCFs, and do not demonstrate any "systemic" issues. Based on AMD's analysis thus far, which encompasses 20 of the 21 sample custodians, Intel has overstated OCFs by at least 50%, and by almost 100% for certain individual custodians. The number of incorrectly-attributed OCFs in Intel's histograms

[2] As explained below, AMD has not been able in the time allotted to comprehensively assess Intel's histogram with regard to one AMD custodian, [redacted]

will likely grow as further work is performed. To this point, AMD's analysis has been accomplished with the aid of some automation; what lies ahead is a laborious, manual effort that will require weeks to complete. Because Intel is equally capable of running the manual search strings on the remaining OCFs, we will conclude this Statement with the suggestion that if Intel cares to pursue its claim of systemic issues with regard to these histograms, it should be required to conduct the manual search itself, certify to AMD and Your Honor that it has properly completed it, and then generate new, corrected histograms that ***accurately*** portray true OCFs and eliminate all of the "false positives."

III. Observations About OCFs

The presence of OCFs in a large document production is unsurprising and to be expected. To be sure, Intel's own production includes massive quantities of OCFs. Indeed, the centerpiece of Intel's remediation plan is its reliance on OCFs to supplement its own custodians' productions that were decimated by the auto-delete function it neglected to switch off.

Nor is the presence of OCFs within AMD's production a new issue. In September 2007, Intel raised this very issue with AMD. At that time, Intel identified a number of custodians with OCFs -- that is, custodians whose productions did not include items apparently authored or received by them, but which were found in the production of other custodians' files. At some considerable expense, AMD thoroughly investigated those allegations with respect to the very first AMD custodian on Intel's list, [redacted] Through its analysis, AMD determined that [redacted] had in fact preserved each and every one of the 593 supposedly missing emails, or OCFs, that Intel had attributed to him. AMD communicated this to Intel. (A copy of AMD's September 14, 2007 letter setting forth this analysis is attached hereto as **Exhibit A.**)

As Intel knows through this September 2007 exchange, through discussions between the parties, and through discovery -- including the informal discovery in which the parties are now engaged -- there are many reasons that OCFs may exist.

First and foremost, OCFs will inevitably occur whenever human beings are required to make individual judgments. Every custodian must necessarily make personal, on-the-fly decisions -- in some cases, perhaps a thousand or more of them each month -- about whether a given email is or is not within the scope of the preservation instructions given to him/her. In a production of this magnitude, it is to be expected that one custodian may judge the responsiveness of a given email differently than another custodian looking at the same item.

Second, OCFs will often result from the exercise of different relevance judgments by reviewing attorneys looking at the same document. In short, different reviewers looking at the same items in different custodians' data sometimes come to different judgments about relevance and responsiveness. Therefore, the fact that an email was produced from the files of one custodian does not necessarily mean that a second custodian who was also party to that email communication did not also preserve it.

Third, OCFs will occur as a by-product of the fact that AMD's processing vendor (like many e-discovery vendors using state-of-the-art processing) applies deduplicating and near-deduplicating protocols to email collections as part of routine data processing. The culling of "near-duplicates" is fully explained in the document attached hereto as **Exhibit B**, which was provided to Intel counsel on October 15, 2007. The effect of this is that only the longest, unique string of an email is produced; the identical email "fragments" of that longer email chain that may exist separately within the custodial collection are culled, and not produced as separate email items. Thus, as fully disclosed and explained to Intel more than a year ago, Intel may identify what it contends is a unique OCF when it is, in fact, wholly contained within a longer email string that was both preserved and produced by the subject custodian.

Fourth, OCFs will occur in those presumably unusual cases in which different attorney reviewer decisions may be made about whether a document is privileged, such that a document deemed privileged when reviewed in one custodian's files may not be so viewed by another reviewer looking at another custodian's files, with the result that it is produced as part of one custodian's data but not the other's.

The presence of an OCF does not necessarily mean, therefore, that the subject custodian did not retain that very same document. To understand the reason for an OCF, each must be examined individually. While some OCF analysis can be performed electronically with the aid of programming (which itself imposes substantial programming and processing time and expense), finding all of the duplicate email "fragments" within a longer, deduplicated email chain cannot be. Instead, this requires manual review that, depending on volume, can entail very significant and costly work.

III. AMD's OCF Assessment Method and the Burden Intel Improperly Inflicted

In this part, we describe the method AMD and its processing vendor, Forensics Consulting Solutions ("FCS") used to assess Intel's purported OCFs and to identify falsely-attributed OCFs. We also summarize the burden this exercise has already imposed on AMD -- a burden that AMD believes Intel could easily have reduced substantially by undertaking a proper analysis, using data available to it, before firing off dozens of erroneous histograms.

Intel claims that, over the time period from March 2005 through November 2006, there are 120,300 OCFs attributable to the sample AMD custodians (other than [redacted] Intel provided DCNs for these files. To assess this, FCS developed electronic programming that allowed it to compare Intel's purported OCFs to the sample custodians' email collections. Generally described, FCS first aggregated associated metadata for Intel's purported OCFs, and assembled the set of emails from the custodian's population where the custodian was either a sender or a recipient of the email. Through processes of "exact matching" and "ThreadHash" matching, FCS was able to identify falsely-attributed emails and track the results. It is the figures so derived that are reflected in this letter brief, and in the written summaries and AMD's "counter-histograms" that are attached in the Appendix.

As set forth in more detail below, FCS has thus far determined through this process that Intel falsely attributed more than 50% of the 120,300 OCFs. For some custodians, the error rate approaches 100%.

The electronic methodology outlined above has required substantial effort. AMD's vendor, FCS, was required to spend significant time developing, programming and executing this process. This method does, however, utilize attributes of the electronic email files that facilitate assessment in a semi-automated sense. AMD believes that the remaining OCFs will be further reduced by the manual, document-by document review and comparison process described above, which might perhaps be accompanied by some text-searching methodology. Specifically, AMD believes based on its experience last year chasing down [redacted] OCFs that many of the remaining Intel-characterized OCFs are part of larger email strings maintained or produced by the subject custodian that the electronic process can not identify. Top level metadata from these files simply does not permit ruling out all false OCFs electronically. To execute this part of the OCF review exercise, Intel's false OCFs would have to be identified through creation and assignment of comparative email collections to document review attorneys, who necessarily would have to review and compare each document and track results by hand. Additionally, AMD believes that some of the remaining OCFs may be falsely-attributed but are part of the data repository maintained by AMD's alternate processing vendor, Stratify, Inc. FCS has collected that data but is encountering some difficulty in manipulating it in the electronic process described above. This work remains in progress. It is this issue that precluded AMD's ability to provide a full analysis and assessment in relation to AMD's [redacted]

Thus far, AMD has incurred hundreds of thousands of dollars of expense, and has spent hundreds of hours of its lawyers' and consultants' valuable time, to conduct these analyses and respond in an expedited fashion to Intel's OCF assertions. We have already determined that Intel's attribution of OCFs is wildly inaccurate and exaggerated. And while we have now begun the laborious manual review needed to attack the remaining OCFs, AMD does not believe it should be its sole burden to complete it.

Intel has had in hand the data needed to eliminate many, if not most, false OCFs. For at least two of these 21 sample custodians [redacted] we have discovered that Intel simply neglected to take into account all of the custodians' production data.[3] In addition, Intel appears to have made no effort whatsoever to account for purported OCFs that can be attributed to the near-deduping protocols, although Intel has known for well over a year the specifics of FCS' de-duping protocols. In September 2007, AMD informed Intel -- and Intel thus knew -- that near-deduping explained most of the falsely-attributed OCFs. At the time Intel prepared its current histograms, it must have known that many of its purported OCFs would be false positives for the same reason and could be located by searching the text of the custodians' productions. Rather than attempting in any way to eliminate such false OCFs, however, Intel

[3] Intel's errors do not appear to be limited to [redacted] Although analysis continues, AMD believes that there are at least 7 other custodians within the sample set of custodians whose productions contain exact matches of at least some of Intel's purported OCFs.

simply made its overblown OCF assertions and attempted to put AMD to the task and expense of debunking them.

IV. AMD's Assessment of Intel's Histograms

A. Overall Statistics Applicable to the Sample AMD Custodians

Statistical observations relevant to the overall population of sample AMD custodians are worth making. As noted already -- and as Intel should have predicted -- Intel's histograms vastly overstate the number of actual OCFs. For the 20 sample AMD custodians analyzed, Intel asserted that a total of 120,300 unique OCFs exist for the time period from March 2005 through November 2006. AMD's analysis thus far shows that 62,910 of Intel's purported OCFs were, in fact, retained by the subject custodians and/or produced from their files.[4] Actual OCFs are thus at least 52% lower than Intel has claimed. Put another way, Intel has overstated actual OCF figures by at least 110%.

Intel has also calculated that AMD produced 308,320 emails from the actual files of these 20 sample AMD custodians. As such, Intel is contending that OCFs represent over 28% of the global production for these custodians. The data actually reveal that OCFs comprise less than 16% of the total production. Intel, of course, has yet to take a position as to what this type of data shows or means about AMD's production -- or, indeed, about Intel's own production.

Interestingly, during the parties' conference with Mr. Friedberg and Ms. Martin on December 5, 2008, Intel stated for the first time that its concerns are limited to alleged OCFs through May 2006. This was a curious comment, since Intel's lists of DCNs included more than 22,000 alleged OCFs during the period from June 2006 through November 2006.[5] At any rate, even excluding the period following May 2006, the results are not materially different. Over that somewhat shorter time frame, Intel identified 97,916 purported OCFs. Of that total, we have thus far determined that 48,602 are falsely attributed to the sample AMD custodians. This represents an error rate -- thus far -- of 50%, substantially the same as the 52% error rate in the period including June-November 2006.

B. Custodian-Specific Analyses

Assessment of OCFs, data retention and productions patterns, and generating the statistics applicable to both is mostly a custodian-specific inquiry and exercise. Indeed, each of the sample AMD custodians had varying levels of OCFs attributed by Intel, and differing

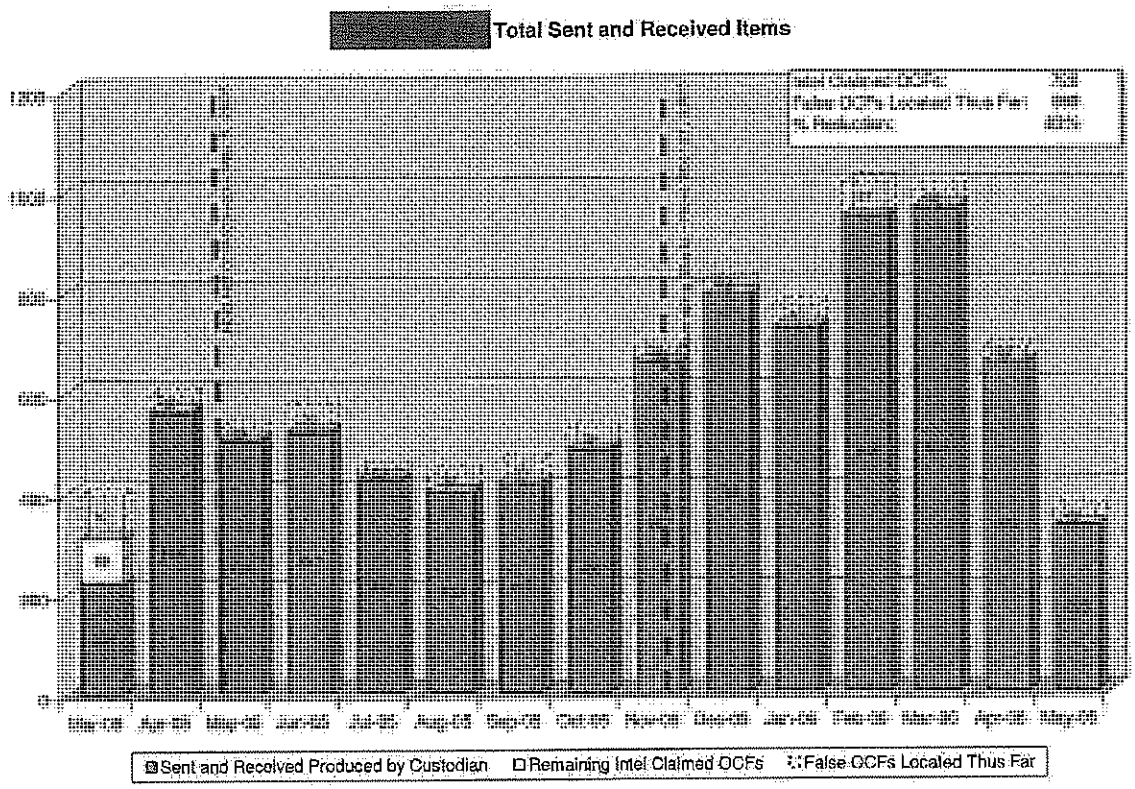
[4] The total number of false OCFs that FCS has identified has increased from 62,871 to 62,910 since AMD's December 5, 2008 report to Mr. Friedberg.

[5] Because Intel included those post-May 2006 DCNs with its histograms, AMD went to the trouble and expense of analyzing them. Regrettably, this appears to be a part of Intel's overbroad and inappropriate effort to saddle AMD with burdensome tasks, to which Intel now responds, "Never mind."

production patterns and file counts. The results of AMD's analyses thus naturally vary depending on these and other custodian-specific traits, such as idiosyncratic emailing and preservation habits.

AMD has set forth the bulk of these custodian-specific analyses in its written summaries and "counter-histograms" attached in the Appendix. As noted, the written summaries provide data, statistics and AMD's observations of certain relevant patterns. These summaries are most easily understood when viewed along with AMD's counter-histograms.

AMD's counter-histograms supplement the written summaries by depicting numerically and pictorially several things in three different charts. The first chart is titled "Total Sent and Received Items." An example chart appears below.



This chart provides a single, multi-colored bar representing the entire production for each custodian, including OCFs, for each month of the time period identified. The "red" shading depicts production from the custodian's own files and provides a file count number (which AMD took from Intel's histograms except for [redacted] where Intel's custodian file counts were inaccurate). The "yellow" shading and associated number show the actual OCFs that remain after execution of FCS' electronic OCF-identification process outlined above. The "dotted line" box on the top of each bar and its associated number identify the total number of

OCFs that we have thus far determined Intel to have erroneously attributed to that custodian for that month. The charts also show, with vertical dotted lines, the date on which AMD delivered a litigation hold notice to the custodian, and the date (if applicable) that the custodian's email account was migrated to AMD's automated archiving systems. In addition, in the upper right hand corner is a box in which we have set forth the total number of OCFs Intel alleged for the custodian; the OCFs from that population that FCS has thus far located within the custodian's collection; and the resulting percentage reduction made thus far in the OCF total Intel has alleged.

The second and third charts are the "Total Sent Items" and "Total Received Items," respectively. The same bars, shading and dotted lines appear as described above.

C. Analysis of Custodian Categories and Apparent Data Trends

Comments can also be made about data trends we thus far seem to be finding with different groups of custodians.

1. Analysis of Custodian Categories

The sample AMD custodian histograms appear to fall into three general categories. The first is those custodians for whom OCFs are low by any reasonable standard and, therefore, appear to us to raise no issue and to warrant no further analysis. One example is [redacted] the subject of the September 2007 exchange with Intel on the topic of OCFs. Intel has attributed a total of 474 sent and received item OCFs to [redacted] over the time period from May 2005 through April 2006 -- which covers both the pre-archiving and post-archiving time periods. AMD's analysis shows that, at most, only 24 OCFs actually exist over this entire timeframe. In other words, [redacted] himself retained over 99.6% of the subject email files that were ultimately produced by AMD on [redacted] behalf. Other custodians -- like [redacted] and [redacted] -- also appear to be part of this group.

The second category of custodians is those whose OCFs or email file counts exhibit anomalous patterns, for example, relatively high numbers of OCFs in a certain window of time with lower numbers at other times, or a high number of sent items relative to received items during some time frames. Whether such an unexpected pattern is the result of a custodian's idiosyncratic preservation habits, a corrupted .pst file or other similar issue, a failure by Intel to fully take into account the custodian's production, or something else, requires a custodian-by-custodian assessment.

AMD's [redacted] a sample custodian selected by Intel, is one example. [redacted] testified at deposition about his idiosyncratic method of preserving data, which included using his sent items folder as his primary preservation repository.

AMD's [redacted] is another example. Intel apparently contends that [redacted] failed to retain sent items prior to the automated archiving of his email account in November 2005, and points to the existence of sent item OCFs. Our analysis thus far demonstrates that Intel has

overstated total sent item OCFs in this time period by almost 50%. Indeed, the data show that [redacted] himself preserved, and AMD produced, 6,795 emails from April through October 2005, an average of over 970 emails per month. However, when all is said and done, for a single month (April 2005), [redacted] production does appear to contain a high number of OCFs relative to files produced from his own collection. AMD has not yet completed its ongoing investigation on this point.

The third category is those custodians whose actual OCFs are consistently high relative to the number of files produced from their own collection. Perhaps the best example is AMD's [redacted] In the time period from March 2005 through May 2006, [redacted] total monthly OCFs appear to average about 400. The total number of files produced, both from [redacted] collection and actual OCFs, is very close to this average every month. In addition, there are no "gap" months of obviously low total file counts, and there are no sharp discontinuities in total produced email volumes month-to-month.

So far, AMD has not discovered anything to indicate that the relatively low number of email files [redacted] himself appears to have retained is a result of a data collection anomaly. In addition, [redacted] retention of a relatively small number of files compared to OCFs is not the result of a failure by AMD to impose a proper litigation hold or to monitor it. Instead, as detailed in [redacted] written summary, AMD issued a comprehensive litigation hold to him within a week after this lawsuit began. AMD thereafter provided [redacted] with numerous written reminders about preservation. [redacted] selectivity in deciding which files were relevant and which were not does not reflect what AMD would have preferred. That is not, however, the consequence of some failure by AMD to exercise reasonable efforts to secure compliance by [redacted] with AMD's preservation instructions.

2. Trends Apparent in the Data

Several trends throughout the sample custodian data also are apparent.

As to a number of custodians, Intel asserted that a large number of OCFs existed in the post-archiving time period[6] (which varies by custodian, but is often November 2005). In fact, FCS' analysis shows across the board that actual OCFs in the post-archiving period are negligible.[7] Indeed, OCF totals in the post-archiving time period often reduce to zero or only a few emails, as they did, for example, for [redacted] The absence of material

[6] The "post-archiving time period" represents the period following the custodian's migration to an automated system for preserving email; such a system, which AMD began implementing in the fall of 2005, is a "passive" preservation system in that it does not require or depend upon the exercise of custodian judgment.

[7] AMD's current working supposition is that the OCFs present in the post-archiving time period may be the product of the Stratify data repository on which AMD has not yet been able to run analyses. Even were that not the case, the actual OCF numbers in that time period are *de minimus* by any standard.

numbers of OCFs in the post-archiving time period suggests that AMD's archiving systems are working effectively to capture custodian email, and that AMD was able to successfully extract that data from its archives.

We also observe that there is reason to question the utility of any analysis that compares volumes of sent items to volumes of received items and draws conclusions from that comparison, as Intel seems to have done. First, some custodians simply do not send much email, at least email that is deemed responsive to Intel's document requests. (*See*, for example, AMD's counter-histograms for [redacted] A disparity between sent and received items thus may mean nothing other than that.

Second, disparities between a custodian's sent and received email volumes may also be the product of idiosyncratic, but perfectly appropriate, emailing habits. Consider, for example, AMD's [redacted] testified that he used his sent items folder as his email preservation repository. AMD's analysis shows that Intel's purported sent item OCFs reduce to virtually zero in almost every month, while reductions in received items OCFs number in the hundreds almost every month. Indeed, total OCFs are 48% lower than Intel alleged, with an overall reduction of 3,318 of Intel's alleged OCFs. This type of result is found with other custodians, and particularly those who saved more sent items relative to received items, or *vice versa*. (*See, e.g.*, AMD's counter-histograms for [redacted] among others.) There is good indication that for these and other custodians the purportedly missing "sent" OCF was actually within the "received" collection for the subject custodian, or the other way around. It thus follows that disparities between the volume of sent versus received email does not by itself have any particular significance.

Assessing the differences between sent and received items is both difficult and often meaningless. Consider this example: Custodian A sends an email to Custodian B and copies Custodian C. Custodian B receives the email and replies only to Custodian A. Custodian A now has two email items: A shorter sent item, and a longer received item. Custodian B also has two email items: A shorter received item and a longer sent item. Custodian C, on the other hand, was not a party to the reply and thus has only one email item: the shorter received item. AMD will produce the shorter received item for Custodian C. As a result of near-deduplication, however, AMD will only produce the longer received item for Custodian A and the longer sent item for Custodian B. Of course, both items incorporate a complete copy of the shorter email. Yet under this scenario, Intel's OCF identification method would have improperly counted the shorter item produced by Custodian C as two OCFs: For Custodian A, the shorter item is a missing *sent* item even though it was produced within a longer *received* item; for Custodian B, the shorter item is a missing *received* item even though it was produced as part of a larger *sent* item. The distinction between sent and received items in this example thus has no probative value. In both cases, Intel would have received a complete copy of the shorter item in Custodian A and B's production and could have located it within the text of the larger items prior to carelessly asserting that Custodians A and B failed to retain it.

Many other permutations are possible, such as an instance where Custodian B is a "cc" on Custodian A's email, and Custodian B "replies to all." When he does so, Custodian B will receive his own reply as a received item, and will have the identical item in his sent items. Whether Custodian B's practice is to preserve the item in his sent mail, or in his inbox, is a matter of personal habit, although that personal habit could substantially affect the relative size of the custodian's sent item vs. received item collection.

V. Conclusions and AMD's Suggestions For Future Analysis

AMD has shown that Intel's OCF analysis, and analysis overall, is fraught with error. Intel's overstated OCF allegations are the most obvious. AMD considers it a serious problem that Intel knew the probable explanations for OCFs from the September 2007 experience involving [redacted] but, in its desire to inflict massive, unnecessary cost and burden on AMD, made material assertions that are simply untrue -- and which could have been avoided had Intel assumed the burden, as it should have, to rigorously analyze and test its assertions first.

AMD's analysis also allows us to draw this conclusion with certainty: Contrary to Intel's repeated assertions, the issues and so-called anomalies that Intel has raised with respect to the sample AMD custodians, and generally, are in no sense "systemic." Quite to the contrary, the issues here are unique and custodian-specific, and the explanation for them depends, and will continue to depend, on the characteristics of such things as each AMD custodian's emailing habits and tendencies, preservation practices, individually-retained file counts and actual OCF totals. The anomalies encountered are simply not, as in Intel's case, the consequence of a failure to disable an aggressive, systematic auto delete, a systematic failure to migrate custodians to backed-up servers; or a systematic failure to notify custodians of their preservation obligations.

For all the reasons set forth in these materials, AMD believes that the sampling and analysis it has done so far is more than sufficient to demonstrate the absence of any systemic issue or error. Intel should not be permitted to continue to force AMD to toil away on dozens more pointless OCF hunts, especially at AMD's expense.

Instead, AMD submits that Intel should be required to do two things before any further proceedings about "histograms" take place. First, Intel should be required to do the work it should have done at the outset to identify all false OCFs and reduce its allegations to those OCFs that are truly unique. It has the data it needs and the capacity to do so. Before any additional histograms are presented, or further response is required of AMD, Intel ought to be required to certify that it has carried this burden that properly is placed on it.

Second, with regard to each and every histogram Intel presents to AMD and the Court -- whether now-existing or later-generated -- Intel ought to be ordered to state and define with particularity and in writing precisely what "anomaly" or other issue it believes the histogram shows, and what Intel contends should be done about it. Indeed, so far, Intel has done nothing specific whatsoever to identify its complaint about each custodian or what justifies its complaint. It is too late for that. And without this kind of specificity and clarity -- where Intel lays all its

cards on the table in an open, direct manner -- AMD is being forced to play a very expensive and distracting game of pin the tail on the OCF. That is not a game AMD should be forced to play.

AMD looks forward to discussing these issues with Your Honor during the conference call scheduled for 2:00 p.m. EST on December 12.

Respectfully,

/s/ Frederick L. Cottrell, III

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

FLC,III/lll
Enclosures

cc: Clerk of the Court
Eric Friedberg, Esquire (w/e) (By Electronic Mail)
Jennifer Martin, Esquire (w/e) (By Electronic Mail)
Donn Pickett, Esquire (w/e) (By Electronic Mail)
Richard L. Horwitz, Esquire (w/e) (By Electronic Filing)
James L. Holzman, Esquire (w/e) (By Electronic Filing)

EXHIBIT A

O'MELVENY & MYERS LLP

BEIJING
BRUSSELS
CENTURY CITY
HONG KONG
LONDON
NEWPORT BEACH

400 South Hope Street
Los Angeles, California 90071-2899
TELEPHONE (213) 430-6000
FACSIMILE (213) 430-6407
www.omm.com

NEW YORK
SAN FRANCISCO
SHANGHAI
SILICON VALLEY
TOKYO
WASHINGTON, D.C

September 14, 2007

OUR FILE NUMBER
8,346-163

WRITER'S DIRECT DIAL
(213) 430-6340

WRITER'S E-MAIL ADDRESS
msamuels@omm.com

VIA EMAIL

Kay Kochenderfer, Esq.
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197

Re: ***AMD v. Intel Corporation***

Dear Kay:

This letter is written with reference to your letters of September 4 and 10, which allege that nine AMD Custodians failed to preserve as Sent Items a total of 5,384 emails authored by them that have been produced out of the "In Boxes" of other AMD Custodians who received them. Those Custodians are [redacted]

Based on our investigation thus far, your claim is totally unfounded, and we are offended at having been put to the time and expense to debunk it.

Your September 4 letter was written following my August 10 letter to Bob Cooper in which I informed you that in the course of our review, we discovered that a number of our 108 party-designated Custodians had corrupted .pst files that were being repaired, or other .pst files that had not yet been harvested or processed. I told Bob that those .pst's were being processed and reviewed, and that the responsive data from them would be in your hands shortly. Since that time, and as I promised, we have made supplemental productions from a number of those custodians' files, and more will be on its way soon. Your September 4 letter and its 109 page list of "missing" items did not take into account any of these materials, as you acknowledged when we met in your office on September 7.

As you also acknowledged during our September 7 meeting, your list also included thousands of items (3,434 of them by our count) where the "missing" email was not the top item in the chain you identified. Rather, it was some unidentified email message buried within the

chain. I wrote to you that day confirming this, pointing out that we had no ability to ascertain which item in the chain you were inquiring about, and asking you to identify it for us by date and time so we could search for it in the Custodian's data. Inexplicably, you refused, although the information was obviously available to you.

As a consequence of your September 4 letter (in which you knowingly failed to take into account all of the Custodian data that had been produced to you since August 10) and your September 10 letter (in which you declined to point us to the specific email in a chain about which you were inquiring), you have forced us to devote substantial and largely unnecessary efforts to investigating your questions, at considerable expense to AMD.

We have now concluded our work with respect to the first custodian on your September 4 letter, [redacted] Of the 593 supposedly missing items you attributed to him, [redacted] preserved each and every one.

The attached spreadsheet accounts for each of the DCNs in one of five ways: Produced to Intel; Being Reviewed for Production; Deemed Non-Responsive; De-Duplicated; or Calandro DCNs. I elaborate on each of these categories below.

Produced to Intel: This table lists the DCN from your letter and then the DCN for the same item produced from [redacted] data. In some instances, there are multiple DCNs listed, each of which is included in and/or inclusive of the DCN on your list.

Being Reviewed for Production: This table lists the DCN from your letter where we have confirmed that the same item exists in [redacted] data and is in the cue for review and production to Intel. I expect that these items, where responsive, will be produced to you within the next several weeks. If for some reason you require inspection of these items before then, we will oblige you.

Deemed Non-Responsive: This table lists the DCN from your letter where the reviewer of the same item from [redacted] data deemed it non-responsive. As you acknowledge in your September 10 letter, different reviewers looking at the same item in different custodians' data can sometimes come to different judgments as to responsiveness, and that was the case with these items.

De-Duplicated: This table lists the DCN from your letter where the item in question (a portion of a larger email string) exists in [redacted] data but was suppressed as being a "near duplicate." In each instance, the item in question was in fact produced from [redacted] data as part of a larger email chain, identified in the second column. A textual explanation of the way the software defines and suppresses near duplicates is set forth below.[1]

[1] To identify near duplicates, Attenex Patterns Workbench makes a copy of each email, and "normalizes" the e-mail content by removing reply identification characters such as ">" and condensing consecutive white spaces to a single space. It then groups e-mail based on the "subject thread," which is a normalized version of the subject field of the e-mail, and compares

To satisfy you that the email chain fragment was in fact preserved in [redacted] data, but was simply suppressed, at your request we will on a one-time basis retrieve the items and make them available for your inspection. If for some reason Intel has an issue with our de-duplicating protocol (which provides Intel with every bit of the content while at the same time reducing both side's processing and review burden), we are happy to discuss it with you.

[redacted] **DCNs**: This table lists DCNs identified in your letter that did, in fact, come from [redacted] data. The assertion on page 1 of your letter that these items were produced out of some ***other*** custodian's data is simply incorrect.

As I noted earlier, Intel's refusal to identify the specific email chain fragment of interest, as I reasonably requested in my September 7 letter, inflicted upon AMD considerable programming effort and expense, as well as extensive manual review, to conduct the investigation. We do not intend to conduct a similar "treasure hunt" now for the other eight custodians. Rather, when our document exchange is complete on February 15, 2008, should you so desire, we can each flyspeck one another's productions looking for items received from a designated custodian whose documents do not include the "sent" counterpart. I am confident that in virtually all instances, any AMD disconnect will be the result of entirely proper de-duping or differing reviewer judgments about responsiveness. Rest assured, however, that if you request us to engage in such a wasteful exercise, we will make the same request of you. Frankly, we do not think this is how either of us should be spending our clients' money.

If you disagree, in the meantime you can resolve some similar questions abut Intel's production. For example, we have received production of a large number of email messages sent by [redacted] that do not appear to have been retained by him. The list attached to this letter contains a sampling of such messages, and there are many similar Intel custodians. Perhaps you care to explain?

---

the normalized content of each e-mail to other emails within its subject thread group. If the exact content of a normalized e-mail is contained within another e-mail, then the contained email is identified as a near duplicate. Source e-mail files in Attenex Patterns Workbench are not altered in this process. An e-mail with attachments will only be identified as a near duplicate of another if all of its text and all of its attachments are completely contained in another e-mail that has the exact same attachments, as determined by MD5 hash value.

I will respond separately with respect to your Rule 30(b)(6) notice concerning AMD document preservation. The exercise you have put us through, coupled with your inexplicable effort to make it as onerous and expensive for AMD as possible, convinces us that your discovery is largely unjustified (and, at the very least, premature).

Very truly yours,

Mark A. Samuels
of O'MELVENY & MYERS LLP

Enclosures

[redacted]
67382-006308
67382-006277
66381-004388
67382-006228
67382-006345
67382-006344
66619-001886
67382-006254
67382-006319
67652-006611
67382-006332
67530-003633
67382-006261
66381-004393
66381-001668
67652-003699
66165-004966
66358-000304
66682-001624
67652-003721
67652-003678
67382-006267
66709-000333
67382-006346
66619-001778
67382-006229
67379-005010
66682-001771
67382-006305
67382-006320
67382-006310
66165-005599
66358-000463
66650-000808
66682-001875
66709-000348
67382-006231
66358-003313
66062-014096
66381-002191

66682-001874
66619-002137
67382-006255
67539-001278
67382-006257
67382-006222
67382-006296
67382-006299
66062-013870
67382-006342
66682-001626
67524-018550
67652-004638
67652-003482
67652-006326
66036-003948
67382-006274
67382-006275
67382-006215
67382-006286
67382-006263
67652-003716
67382-006301
66682-001993
66682-001674
67382-006237
67382-006223
67382-006236
67382-014456
66682-001920
67666-001077
66682-001988
67382-006260
67382-006219
67382-006220
66682-001625
67382-006224
67652-003740
67382-006268
67382-006239
67382-006273
67382-006238

67652-006321
66358-001683
66381-008947
67539-001280
67765-000180
67382-006269
67382-006306
66682-002024
67382-006249
67382-006300
66381-007942
67539-002025
67382-006241
67382-006281
66375-003492
67788-001564
67382-006270
67382-006243
67666-000731
67382-006347
67652-006329
66657-005726
67382-006322
66381-003052
67382-006288
66619-001585
67382-006329
67382-006282
66682-001730
67382-006304
67382-006318
67382-006284

EXHIBIT B

Attenex

Attenex® Patterns® 4.0

Tech Brief

Near Duplicate E-Mail Messages

Matters may contain many e-mail messages that are part of the same conversation (an exchange of e-mail messages about a single topic), and these messages often contain all prior conversation and history. For example, a reply may quote the entire original message. If the last (most recent) message in a conversation contains all prior conversation and history, this may be the only document that needs to be reviewed.

Workbench operators can suppress from a matter such near-duplicate e-mail messages: messages whose text body and attachments are wholly contained within a longer, later e-mail message sent and received by the same people as the earlier message.

Workbench regards one e-mail message as a near duplicate of another if:

- The thread subjects are identical
- The text body of the earlier message is wholly contained at the bottom of the later message
- All files attached to or embedded within the earlier message are also present in the later message
- The sender and all recipients of the earlier message also sent or received the later message

Each condition is described in detail in the sections below.

The longer, later message that contains the near duplicate e-mail message is known as the surviving message. A single near-duplicate e-mail message may have multiple survivors, because one message may branch into multiple conversations—for example, one conversation results from a reply to a message, whereas another conversation results from the forwarding of the original message to additional people.

Near duplicate e-mail messages are suppressed when the files containing them are loaded into a matter, and a Workbench operator can instruct Workbench to keep either one surviving message for each custodian or one surviving message for the entire matter.

Near Duplicate E-Mail Message Detection

When a Workbench operator loads a source media volume (a collection of files) into a matter database, Workbench catalogs the files in the volume. When cataloging e-mail messages in a mail container file (a .pst, .msg, or .nsf file), Workbench writes to the matter database information about each item, including:

- A hash code calculated against the message's thread subject value and the last few characters of the message body
- The text contents of the message's body
- For each file attached to or embedded object extracted from the message, a hash code calculated against the file/object's contents
- A list of the message's sender and recipients

Identical Thread Subjects

For Workbench to regard one e-mail message as a near duplicate of another, both must have the same thread subjects. Similar to, but different from, a message's subject line, the thread subject is the original subject line of the first message in a conversation.

Unlike a message's subject line, its thread subject can't be altered. Following is an example of two conversations (one an offshoot of the other) in which the subject lines differ, but all messages have the same thread subject, which means some might be regarded as near duplicates of others.

Message Action	Subject Line	Thread Subject
John sends Mary a message	Project Estimate	Project Estimate
Mary replies to John	Re: Project Estimate	Project Estimate
John forwards Mary's reply to Susan	Fwd: Re: Project Estimate	Project Estimate
Susan forwards message to Tim after changing the subject line	Concerns About Project	Project Estimate
Tim replies to Susan	Re: Concerns About Project	Project Estimate

Text Body of Earlier Message Wholly Contained at Bottom of Later Message

For Workbench to regard one e-mail message as a near duplicate of another, the text body of the earlier message (potential near duplicate) must be wholly contained at the bottom of the later message (potential survivor).

When an operator loads the messages in a mail container file, Workbench writes to the matter database the text body of each message. During near-duplicate identification, Workbench compares the text of the earlier and later messages (as written to the matter database) character by character, starting at the ends of the messages.

Working backward, Workbench determines whether the text body of the earlier message matches the text at the bottom of the later message. If they do, Workbench continues to regard the earlier message as a potential near duplicate and the later message as a potential survivor.

When comparing message bodies, Workbench will regard the earlier message as a potential near duplicate, even if the message bodies differ in the following ways:

- The messages contain different amounts of spacing between non-space characters.
- The messages contain different types of whitespace characters—for example, Workbench regards a line feed or newline character as equivalent to a space.
- The letter casing of the text is different.

Note: Because Workbench begins comparing the messages at their ends, the quoted earlier message *must* be at the bottom of the later message for it to be considered a near duplicate.

Attached Files or Embedded Objects in Earlier Message Present in Later Message

For Workbench to regard one e-mail message as a near duplicate of another, all the files attached to or embedded in the earlier message must also be present in the later message (though the later message can contain additional attachments or embedded objects that aren't present in the earlier message). When Workbench catalogs the messages in a mail container file, it calculates and md5 hash value for

each attached file or embedded object (which Workbench writes to disk as a standalone file) based on its contents.

During near-duplicate identification, Workbench compares the hash values of the attached files and embedded objects in both messages. Matching hash values indicate the files' contents are identical (even if their file names are not), which means Workbench will continue to regard the earlier message as a potential near duplicate and the later message as a potential survivor.

Sender & All Recipients of Earlier Message Also Sent or Received Later Message

Finally, for Workbench to regard one e-mail message as a near duplicate of another, the sender and recipients of the earlier message must also have sent or received the later message (though additional people may have received it as well).

When determining recipients, Workbench includes "to", "cc", and "bcc" recipients but doesn't distinguish among them. For example, if a person was a "to" recipient of the earlier message and a "bcc" recipient of the later message, Workbench would continue to regard the earlier one as a near duplicate of the later one (assuming the earlier message meets all other near-duplicate criteria).

Exhibit 52

BINGHAM

Donn P. Pickett
Direct Phone: 415.393.2082
Direct Fax: 415.262.9217
donn.pickett@bingham.com

October 9, 2008

Via Email

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

Re: Preliminary Analyses of AMD Data Productions

Dear David:

As discussed yesterday, Intel is continuing to analyze various sample AMD production custodians to understand better the completeness of AMD's data production. Based on this analysis, Intel has uncovered what appears to be significant and systemic anomalies in the productions of a high percentage of AMD custodians during the pre-journaling period. Although our analysis is preliminary and does not take into account the most recent productions provided by AMD at the end of September, we wanted to share it with AMD early in the informal discovery process. We believe that early, informal disclosure of the analyses will provide AMD with a full and fair opportunity to review it, raise any questions or disagreements with it, and/or, if necessary, propose and undertake steps to resolve apparent anomalies in its data productions.

Toward that end, we have enclosed with this letter a series of histograms related to thirty-five AMD custodians. Please note we are producing this information based on your representation and agreement that Intel is not waiving any applicable attorney-client privilege or work production protection by virtue of this informal disclosure. The following chart sets forth the name of the custodians for which we are producing a histogram, as well as the nature of the potential problem we have observed.

CHART OF POTENTIAL PRODUCTION ANOMALIES RE SAMPLE OF AMD PRODUCTION CUSTODIANS (PRE-JOURNALING)

Custodian	Sent	Received	Both
[redacted]			☒
	☒		
		☒	
		☒	

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

T 415.393.2000
F 415.393.2286
bingham.com

Custodian	Sent	Received	Both
[redacted]		☒	
		☒	
		☒	
			☒
		☒	
		☒	
	☒		
			☒
			☒
			☒
		☒	
			☒
	☒		
		☒	
			☒
		☒	
			☒
			☒
		☒	
		☒	

Custodian	Sent	Received	Both
[redacted]			☒
	☒		
	☒		
		☒	
			☒
			☒
		☒	
			☒
		☒	
	☒		

We look forward to discussing these analyses with you.

Sincerely yours,

Donn P. Pickett

Donn P. Pickett

Enclosures

cc: Mr. Eric M. Friedberg, Esq. (by email and FedEx)
Ms. Jennifer Martin (by email and FedEx)
Mr. Jeffrey Fowler, Esq. (by email only)

Exhibit 53

BINGHAM

Donn P. Pickett
Phone: 415.393.2082
donn.pickett@bingham.com

April 29, 2009

Via Email and FedEx

Mark A. Samuels, Esq.
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071-2899

Re: Analysis of AMD Data Productions

Dear Mark:

The purpose of this letter is to explain the attached revised histogram analysis relating to 37 AMD production custodians. The first section of the letter summarizes our findings. The second section provides a general overview of the underlying methodology. The methodology was modified to account for any remaining issues and to provide AMD with "the benefit of the doubt" with regard to any uncertainties in the data.[1] The final section sets forth our specific requests and suggested next steps. Please note that much of this information was transmitted in my letter of March 2, 2009, and I am repeating it here simply for ease of reference.

We start by noting that since my March 2 letter, despite AMD's complaints about Intel's analysis, AMD continues to uncover and produce thousands of emails identified only after Intel's investigation revealed production lapses. To address gaps identified in prior histograms, AMD produced almost 8,000 additional documents on April 15 from the custodial files of [redacted] and over 5,000 additional documents on March 3 from [redacted]. Of course, these new productions follow the January 9 remedial production (from backup tapes) of over 3,000 documents from [redacted]

OVERVIEW OF FINDINGS

As reflected in the attached analyses, Intel has observed two distinctive and problematic patterns in AMD's data production, referred to as the "[redacted] **Pattern**" and the "[redacted] **Pattern.**" Both demonstrate AMD custodians' significant retention failures and the concomitant need for remediation.

The [redacted] ***Pattern.*** In its December 9, 2008 filing, AMD described a "category" of custodians – headlined by [redacted] "the best example" of this category – who consistently failed to preserve relevant emails. *See* AMD Letter dated 12/9/08 at 9. AMD acknowledged that the "relatively low number of email files" compared to files produced

[1] As previously noted, we are willing to make our consultants available by teleconference to discuss this methodology at a mutually convenient time next week.

Boston
Hartford
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London
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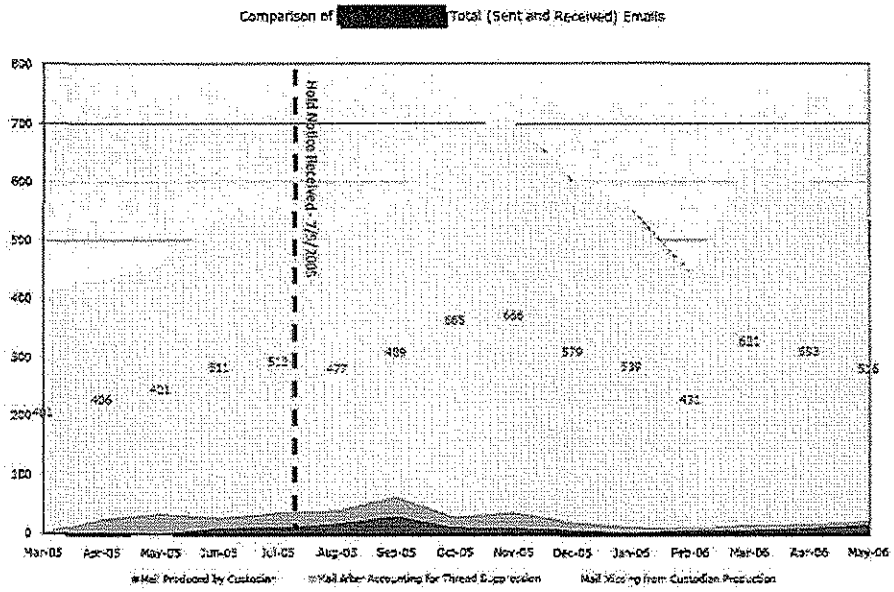
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Walnut Creek
Washington

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

T 415.393.2000
F 415.393.2286
bingham.com

from other AMD custodians was not due to any data collection anomaly. Rather, AMD conceded that the [redacted] Pattern custodians' "selectivity in deciding which files were relevant and which were not does not reflect what AMD would have preferred." *Id.* Put more directly, AMD admitted that [redacted] and a number of [redacted] colleagues massively failed to preserve relevant emails.

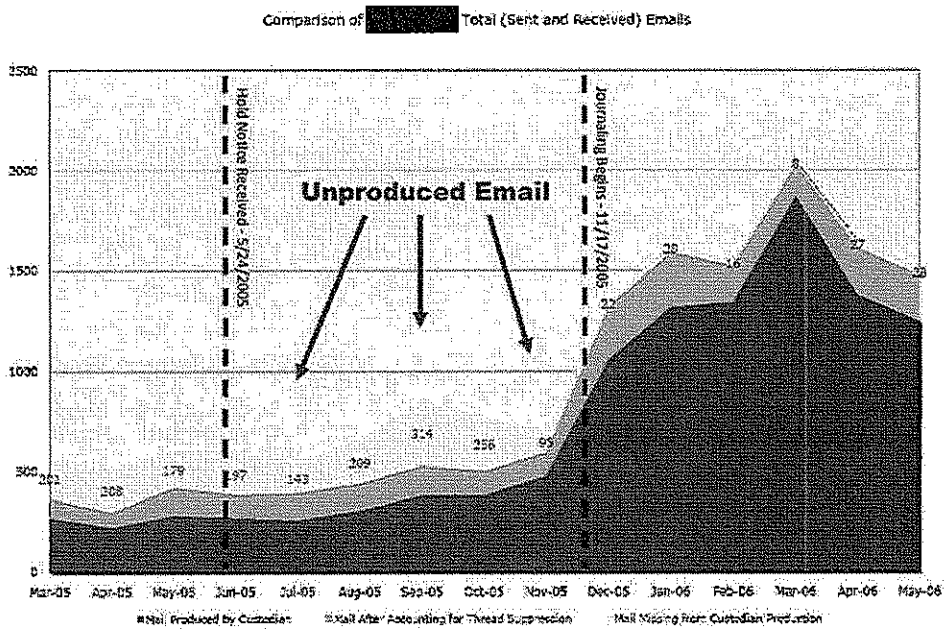
Intel has identified several AMD custodians whose productions are consistent with the [redacted] Pattern. These custodians have an exceedingly high proportion of Missing emails (the yellow area) compared to Produced emails (the red and pink[2] areas). I should note that many of the [redacted] Pattern custodians were never placed on journaling during the depicted time frame – as such, their productions are inadequate for the entire time period. Here is an example, revised to reflect our new methodology:



The [redacted] Pattern. Intel has also identified numerous custodians whose productions reflect a statistically significant *increase* in their total monthly number of emails post-journaling. Stated differently, these custodians' combined total of Produced (red and pink area) emails and Missing (yellow area) emails increases significantly after the custodian was migrated to journaling. The prevalence of this pattern reveals that AMD has failed to

[2] The pink section represents documents that would have previously been identified as missing (yellow), but are now being credited to AMD due to the possibility that the custodian produced a near-duplicate email. Although Intel at times collectively refers to the red and pink areas as "Produced" emails, Intel does not believe AMD's suppression and non-production of near-duplicate emails (and their associated original, unique metadata) complies with the Court's production orders in this case.

produce tens of thousands of emails to Intel that exist outside the production custodian population; that is, emails between (1) the subject custodians and (2) non-production custodians and/or third parties that were deleted by the subject custodian. In the below example, I have added blue arrows to depict the area in the chart that should have reflected additional produced emails, but does not, due to apparent custodian deletion and the absence of the deleted emails from other custodians' productions:



Using the same regression analysis described in my letter of March 2, 2009, we have calculated the average difference in monthly emails before and after journaling.[3] As reflected in the table on the following page, there are tens of thousands of potentially missing emails.

[3] The pre-journaling period for each custodian begins on his or her hold notice date. We will respond to any specific questions you have regarding the regression analysis upon receipt in writing.

AMD [redacted] CUSTODIANS SIGNIFICANT INCREASE IN TOTAL EMAILS BEFORE AND AFTER JOURNALING			
Custodian	Avg # of Missing Emails (Monthly)	95% Confidence Interval	
		Lower Bound	Upper Bound
[redacted]	802	493	1,110
	892	166	1,617
	471	238	705
	348	96	601
	940	630	1,249
	621	125	1,118
	611	343	880
	680	57	1,302
	296	44	549
	331	192	470
	195	51	339
	502	146	858
	665	464	866
	219	139	299
	273	63	482
	471	90	851
	466	160	772
	362	14	709
	1,599	922	2,277
	1,505	832	2,179
	418	78	766
	263	56	471
	1,238	786	1,690
	402	231	573
	1,254	400	2,108
	240	82	398
	235	139	332
	794	549	1,039
	814	433	1,195

[redacted]	549	333	765
	352	263	442

The following chart consolidates all 37 of the subject custodians (in alphabetical order) and identifies the observed pattern for each of them. The histograms for these custodians are attached (also in alphabetical order) to this letter.

	AMD CUSTODIAN	PATTERN
1.	[redacted]	
2.		
3.		
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28.	[redacted]	
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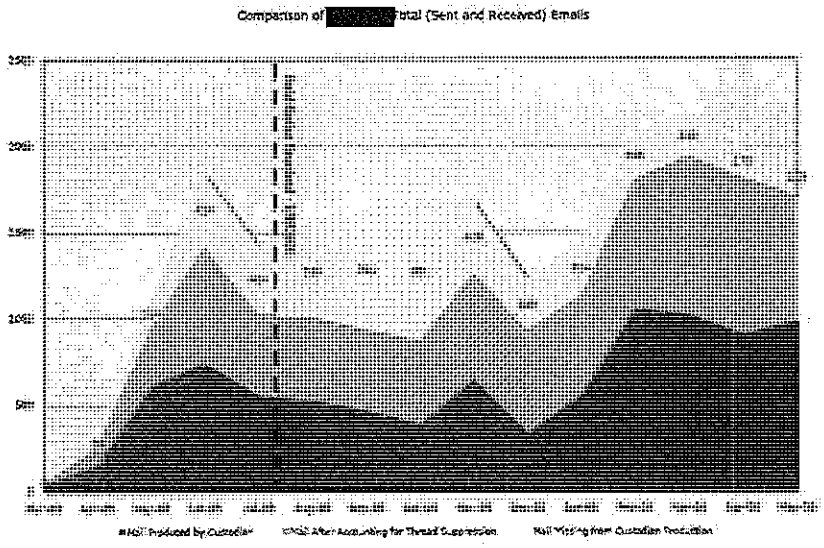
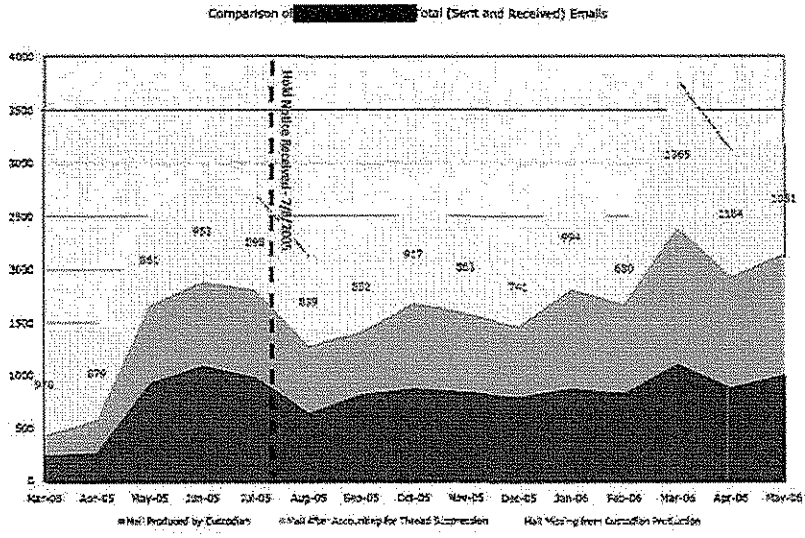
33.		
34.		
35.		
36.	[redacted]	Both
37.	[redacted]	Other

We wish to point out two additional custodians labeled as having an "Other" pattern above: [redacted] and [redacted] While [redacted] did not meet the stringent statistical test because they have more Produced emails than the typical [redacted] Pattern (and therefore a lower ratio of Missing to Produced), they nevertheless failed to preserve literally thousands of emails each during the relevant period, as the following histograms clearly indicate:

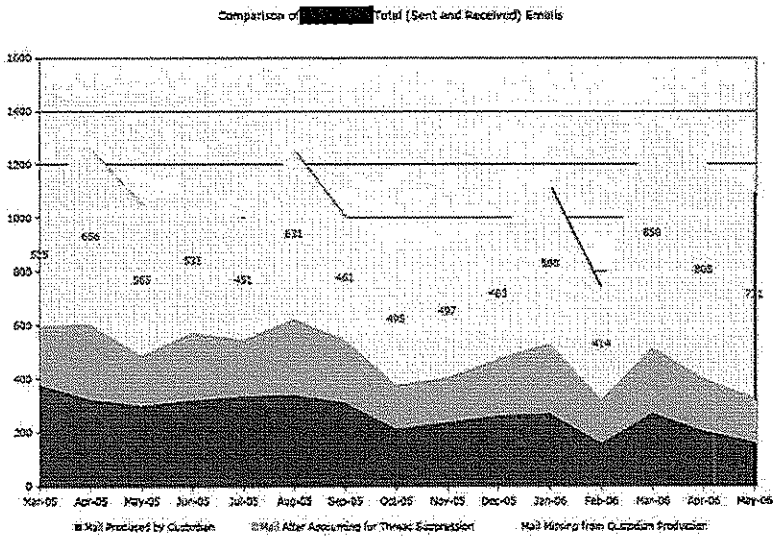




Not only do these two custodians display serious retention problems, their senior positions at AMD make their failures even more problematic. There are also more like them; for now we will limit the discussion to these examples.[4]

So there is no misunderstanding, I want to clarify that the analysis described in this letter focuses on the retention practices of custodians only *after* they first received litigation hold notices. The analysis does not evaluate whether AMD issued hold notices to the 37 subject custodians, or to other AMD custodians, in a timely manner. Intel is troubled by the timing of some of AMD's hold notices, and we will address this issue separately. Solely as an example, the below histogram for custodian Fanny Chan, who received a late hold notice (as AMD acknowledges), reflects a disturbing pattern of non-retention:

[4] For example, Intel also has concerns about the productions of AMD custodians [redacted]. We are not including their histograms with this letter, however, because we are cognizant that [redacted] and [redacted] work in AMD's Legal Affairs office and thus their productions might raise unique issues.



In sum, Intel's graphic and statistical analyses conclusively demonstrate significant retention lapses by AMD custodians that were not cured by productions from other custodians. Therefore, remediation is both appropriate and necessary.

OVERVIEW OF METHODOLOGY

Intel has utilized a straightforward methodology, incorporating the information available to it, in order to prepare its histogram analysis. Of course, Intel cannot compensate for what it does not know – that is, the metadata associated with the tens, if not hundreds, of thousands of documents suppressed by AMD as part of its unilaterally imposed suppression of near-duplicate documents from production. Despite your previous offer in open Court, AMD has not produced these documents, or even the metadata associated with them, so Intel has compensated by making every possible assumption in favor of exclusion (*i.e.*, in favor of AMD). Our methodology is described below.

The new histograms were generated after Intel discovered a single coding error in the hundreds of lines of code associated with its previous histograms. The net effect of this error in the code was a failure to identify certain custodian Conversation Index Parent ("CIP") matches that post-dated potential missing DCNs. Intel corrected this error and also validated the remainder of the coding.

When writing the new histogram code, Intel added certain additional terms to its query, in order to compensate for the absence of metadata associated with the suppressed near duplicate documents, as well as other observed anomalies in the metadata associated with the documents AMD *did* produce. A short summary of Intel's methodology is as follows:

- Custodial documents associated with the subject custodian ("the Custodian") were identified.

- Documents found in all other custodial productions where the Custodian appeared as sender or recipient were identified. When multiple instances of the same email were located, a single copy was selected for analysis.

- The subject Custodian's own produced documents were then compared to the documents found in non-custodial files, and the non-custodial documents were eliminated when a match was found. The remaining documents represent potential missing documents found within the non-custodial files associated with the subject Custodian.

- The list of potential missing documents was then subjected to two tests to determine if any near duplicate documents from the Custodian collection could serve as "replacements" (thereby eliminating the potential missing document from the non-Custodial files).

    - The first comparison used the CIP value along with sent date/time and attachment count to find potential near duplicate replacements.

    - The second comparison, designed to broaden the scope of the test (in AMD's favor), included a body hash, subject hash, body length, sent date/time and attachment count to identify replacement documents (again, eliminating potential missing DCNs) from non-Custodial files.

- Finally, in order to compensate, to the extent possible, for messages containing apparent metadata anomalies, the missing documents were compared with a list of DCNs for the subject Custodian that would have been exact duplicates but for anomalous sent date/time values. The comparison further removed potentially missing candidates based on body and subject hash values, CIP, and body length while ignoring the invalid sent date/time.

A final point: It appears that AMD assigned identical DCNs to a subset of documents in its document productions. That means two unrelated documents in some instances can have the exact same DCN. This apparent error or anomaly in AMD's DCN assignment process does not impact Intel's analysis in any manner. It is something AMD should be aware of, however, when it searches for documents that Intel has identified as missing from a custodian's production.

NEXT STEPS

The attached histograms reveal significant retention problems for the subject custodians. Intel continues to believe that AMD has not followed through on a promise it has repeatedly made in its prior correspondence – that it will disclose to Intel any custodian retention issues consistent with its discovery obligations and the professional obligations of counsel. Intel renews its request for this information.

Intel additionally requests that AMD undertake the following steps:

1. AMD should restore the mailboxes of the subject custodians from preservation tapes created/retained specifically for this matter and produce all unique, responsive, non-privileged items.

2. AMD should produce to Intel all emails it suppressed as a result of the Attenex near-deduplication protocol. In the alternative, Intel is willing to consider production of agreed-upon metadata as a first step. We will be sending a separate letter to address this issue further.

3. AMD should immediately process and review any active data related to the subject custodians that *has already been restored from backup tapes* as a result of the Ruiz remediation, and produce all unique, responsive, non-privileged items. AMD can minimize the review burden by deduplicating the restored (but now active) data against the subject custodian's production set and thus would only need to review/produce supplemental unique items.

4. To the extent AMD has harvested active data from non-designated (*i.e.*, non-production) custodians, AMD should run searches within that data set for emails to or from the subject custodians, and produce supplemental unique, responsive, non-privileged items.

The current state of AMD's data production is inadequate. Intel has undertaken massive efforts to investigate, disclose and remediate its own retention issues. AMD's efforts in this regard have fallen far short. The time has come for AMD to remedy its own data preservation failures.

Sincerely yours,

Donn P. Pickett

Donn P. Pickett

Attachments

cc: Mr. Eric M. Friedberg, Esq. (by email and FedEx)
Ms. Jennifer Martin, Esq. (by email and FedEx)
Mr. David Herron, Esq. (by email and FedEx)

Exhibit 54

O

O'MELVENY & MYERS LLP

BEIJING
BRUSSELS
CENTURY CITY
HONG KONG
LONDON
NEWPORT BEACH

400 South Hope Street
Los Angeles, California 90071-2899
TELEPHONE (213) 430-6000
FACSIMILE (213) 430-6407
www.omm.com

NEW YORK
SAN FRANCISCO
SHANGHAI
SILICON VALLEY
TOKYO
WASHINGTON, D.C.

OUR FILE NUMBER
008,346-163

June 1, 2006

WRITER'S DIRECT DIAL
(213) 430-6574

VIA E-MAIL AND U.S. MAIL

WRITER'S E-MAIL ADDRESS
mmaddigan@omm.com

Dan Floyd, Esq.
Gibson Dunn & Crutcher
333 South Grand Avenue
Los Angeles, California 90071

Re: ***AMD v. Intel***

Dear Dan:

Enclosed please find AMD's Custodian List and Party Designated Production Custodian List. Pursuant to paragraph 1 of the Stipulation and Order Regarding Document Production, I hereby certify as follows with respect to the Custodian List:

> After reasonable investigation, AMD hereby represents that the individuals listed below are believed to comprise all of its and its subsidiaries' personnel in possession of an appreciable quantity of non-privileged, material, non-duplicative documents and things responsive to Intel's Initial Document Requests (except those requests identified pursuant to the parties' stipulation as corporate requests and those requests to which AMD has objected and declined to produce documents) in the custody of individual custodians (as opposed to corporate or organization-level requests or shared files or databases). This Custodian List includes any former employee as to whom AMD or its subsidiaries have retained responsive documents and things. AMD hereby commits to promptly supplement this Custodian List upon discovery of any additional custodians who have been omitted from this Custodian List. AMD further represents that it has not knowingly excluded from its Custodian List any person known or believed to possess documents harmful to its claims or defenses in this case.

Pursuant to our informal agreement to do so, I have attempted to include titles for the individuals identified on both lists. A few titles are missing from the Custodian List, however, and I will provide those to you as soon as possible (hopefully tomorrow).

If you have any questions about these documents, please let me know.

Sincerely,

Michael M. Maddigan
of O'MELVENY & MYERS LLP

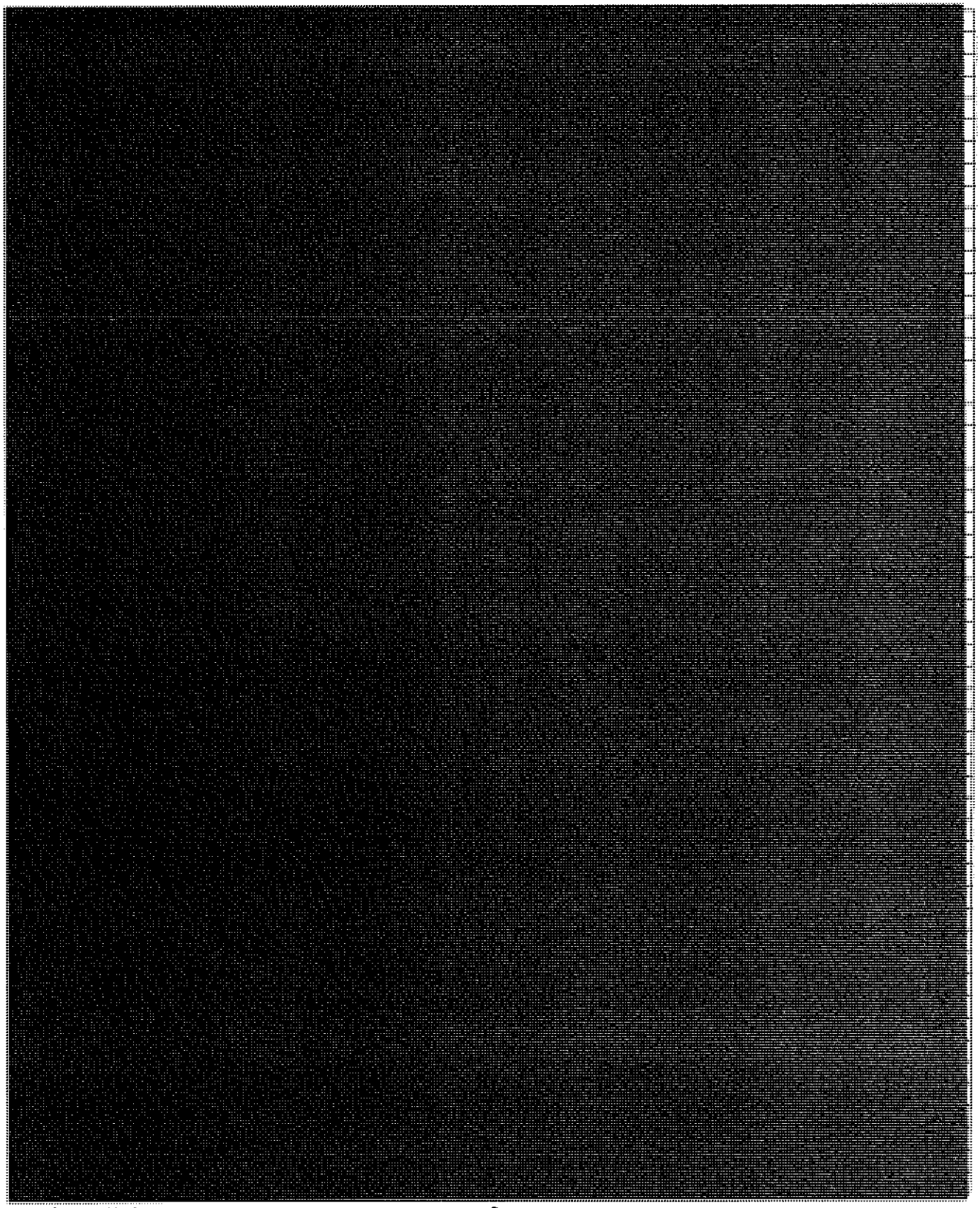
cc: Darren Bernhard, Esq.

LA2:801259.1

AMD PARTY DESIGNATED PRODUCTION CUSTODIAN LIST

Name	Title
[redacted]	

AMD PARTY DESIGNATED PRODUCTION CUSTODIAN LIST



AMD PARTY DESIGNATED PRODUCTION CUSTODIAN LIST

Exhibits 55-57 have been redacted in their entirety

Exhibit 58

BINGHAM

Donn P. Pickett
Direct Phone: 415.393.2082
Direct Fax: 415.262.9217
donn.pickett@bingham.com

November 14, 2008

Via Email and FedEx

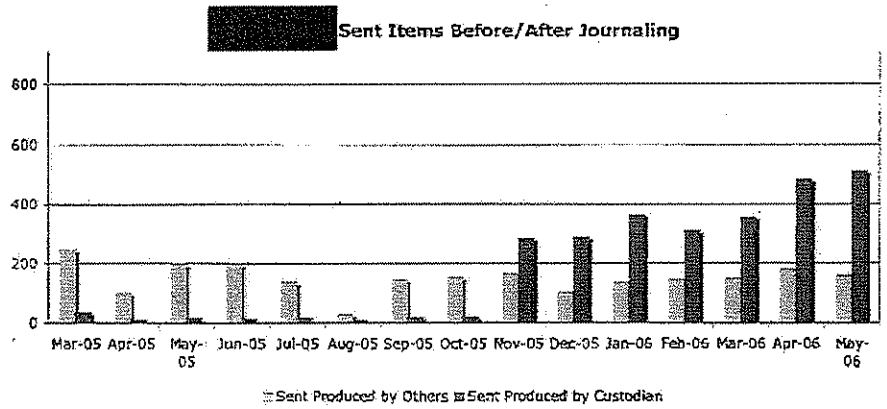
David L. Herron, Esq.
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071

Re: Analyses of AMD Data Productions

Dear David:

This letter encloses revised histograms related to 79 AMD production custodians. Please note we are providing this information based on your agreement that Intel is not waiving any applicable attorney-client privilege or work product protection by virtue of this informal disclosure.

On October 10 Intel produced to AMD and Mr. Friedberg a series of histograms (and the numbers that underlie them) related to 35 AMD production custodians. The histograms compared (1) the total number of emails produced from an individual custodian with (2) the total number of emails relating to that custodian that were produced from the broader custodian population. To help illustrate how the original analysis worked, below is an example histogram from Intel's October 10 production. As you will see, the blue bars represent the total number of relevant emails that [redacted] sent that were produced from the electronic files of *other* custodians. The red bars represent the total number of relevant emails that [redacted] sent that were produced from *his own* files. The histogram suggests that [redacted] potentially failed to retain relevant sent emails from at least March 2005 through October 2005.



From Intel's perspective, the original sample of 35 histograms revealed potentially troubling patterns in AMD's data preservation and productions – namely, the apparent widespread non-retention and/or non-production of relevant data from (at least) the pre-journaling period.

Boston
Hartford
Hong Kong
London
Los Angeles
New York
Orange County
[redacted]
Santa Monica
Silicon Valley
Tokyo
Walnut Creek
Washington

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

415.393.2000
415.393.2286
bingham.com

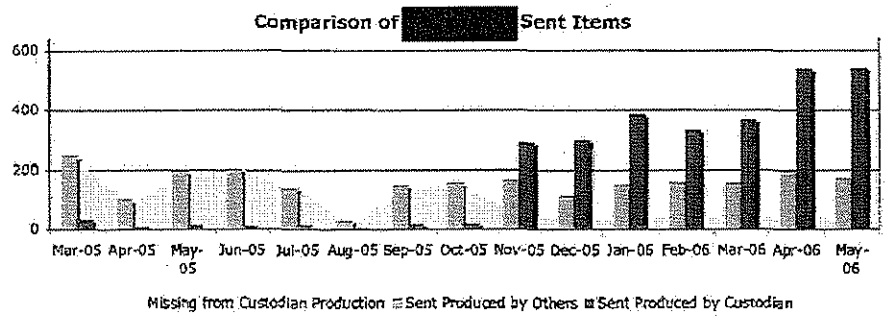
On October 23, AMD interviewed Intel's consultants regarding the methodology used to create the histograms. In light of that conversation, Intel's consultants have modified the histograms to take into account certain issues raised by AMD. Here is a brief description of the modifications:

- *First*, the analysis now incorporates AMD's September 30 data production which, with the exception of a limited number of deposition reharvests and free throw custodians, we understand represents AMD's final custodial production pursuant to the parties' production stipulation.

- *Second*, for each custodian under review, Intel has now provided document control numbers (DCNs) for all unique emails that were produced from the broader custodian population but (for some undisclosed reason) were not produced from the custodian at issue.

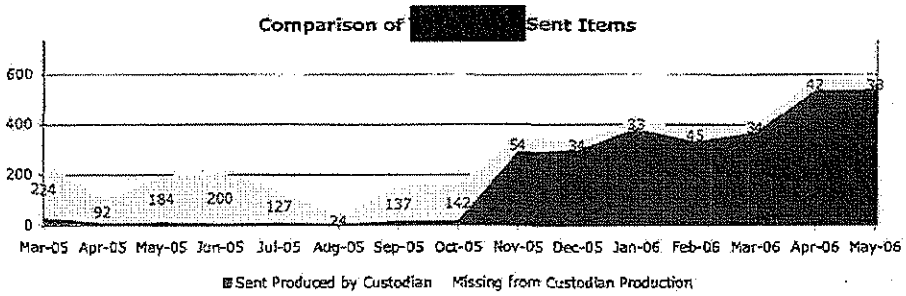
- *Third*, for each custodian, Intel has now included additional elements to the analysis which illustrate the specific number of sent and received relevant emails that the custodian at issue apparently failed to retain.

Again, to help illustrate how the revised analysis works, below is an example histogram from the revised set. The red and blue bars represent the same information originally provided by Intel in the October 10 histograms (and described on page 1, above) plus any additional documents produced through September 30. The new yellow shading, however, identifies the number of unique emails that should have been, but were not, produced in the custodian's data.



For example, if [redacted] sent an email to a production custodian and that email was produced in both [redacted] production (as a sent email) and also in the recipient's production (as a received item), then those emails are excluded from the yellow shading in the above chart. If, however, an email from [redacted] was produced only in the recipient's production (as a received item) and *not* in [redacted] production (as a sent item), then that deleted or otherwise missing email is included in the yellow shading.

Intel has also provided a supporting "stacked area" graph for each custodian which illustrates (in yellow shading) and quantifies the precise number of emails that should have been, but were not, produced in the custodian's data. A sample of the stacked area graph is provided on the top of the following page.



Attached here for your reference is an index which identifies the names of all custodians analyzed to date. To be clear, Intel has not analyzed any additional custodians since October 10. Rather, Intel applied its revised methodology to the same custodians it previously reviewed, and is now producing histograms for all of them.

As I have noted on several occasions, including during the November 7 status conference, Intel provided the original 35 histograms only as a sample of the apparent problems with AMD's productions. From Intel's perspective, the revised sample histograms reveal significant problems during both the pre- and post-journaling periods for an even greater number of custodians. In light of the consistent and widespread pattern of apparent anomalies, Intel believes, and once again requests, that AMD should undertake a full review of the retention practices of *all* of its production custodians, and fully report the results of such a review to Intel, Judge Poppiti and Mr. Friedberg. Toward that end, and as we discussed yesterday, Intel's consultants will review, at significant expense to Intel, the remaining production custodians.

Finally, Intel would welcome Mr. Friedberg's involvement early on, and throughout, the meet and confer process related to the histograms. Intel respectfully reiterates its expectation that any remediation or restoration of data that AMD intends to conduct should be performed transparently, guided by input from Mr. Friedberg, and pursuant to an order from Judge Poppiti. We look forward to discussing these analyses with you and Mr. Friedberg in the coming weeks.

Sincerely yours,

Donn P. Pickett

Attachment and Enclosures

cc: Mr. Eric M. Friedberg, Esq. (by email and FedEx)
Ms. Jennifer Martin, Esq. (by email and FedEx)
Mr. Jeffrey Fowler, Esq. (by email only)

INDEX

AMD CUSTODIAN NAME	TAB NO.
[redacted]	1
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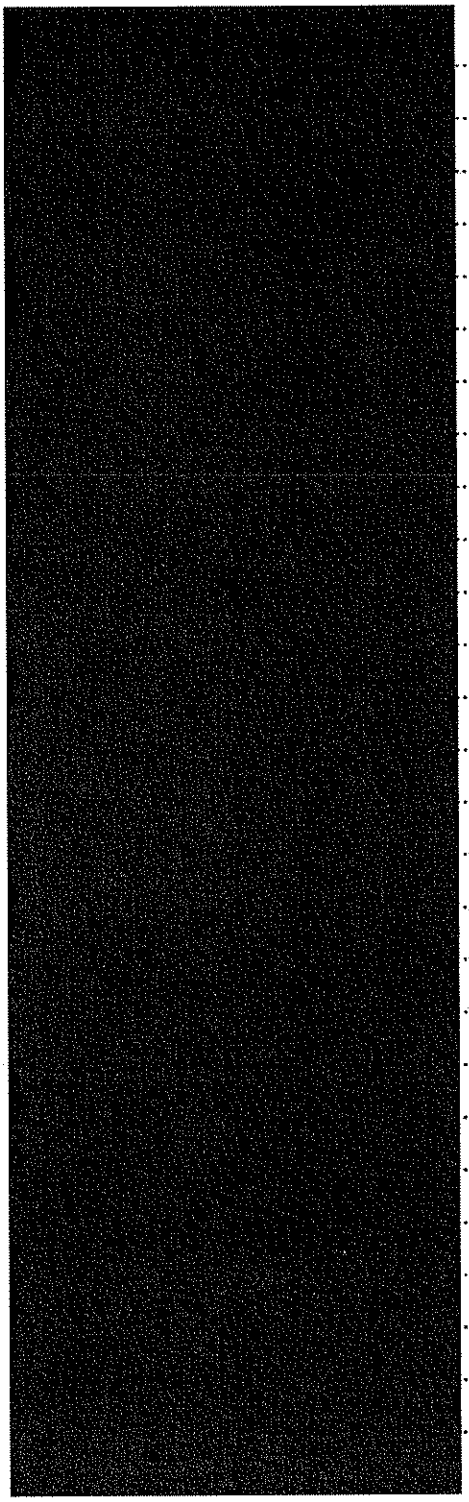

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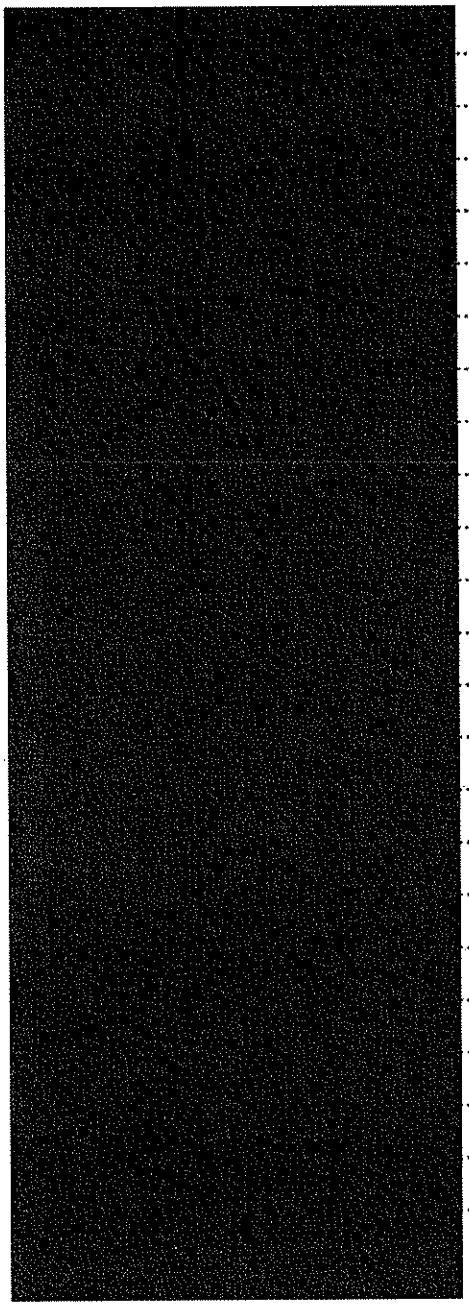

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Exhibit 59 has been redacted in its entirety

Exhibit 60

O'MELVENY & MYERS LLP

BEIJING
BRUSSELS
CENTURY CITY
HONG KONG
LONDON
NEWPORT BEACH
NEW YORK

400 South Hope Street
Los Angeles, California 90071-2899

TELEPHONE (213) 430-6000
FACSIMILE (213) 430-6407
www.omm.com

SAN FRANCISCO
SHANGHAI
SILICON VALLEY
SINGAPORE
TOKYO
WASHINGTON, D.C.

May 9, 2009

OUR FILE NUMBER
008,346-163

WRITER'S DIRECT DIAL
(213) 430-6230

WRITER'S E-MAIL ADDRESS
dherron@omm.com

VIA E-MAIL AND U.S. MAIL

Donn Pickett, Esq.
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4067

Re: *AMD v. Intel*

Dear Mr. Pickett:

On April 29, 2009, Intel produced its now fourth-amended and revised set of "histograms" for 37 AMD custodians. Before AMD commits any more time and money to assessing histograms and providing a response to this new set, we must request and insist that Intel confirm two points in writing: First, that the 37 "subject custodians" are the only AMD custodians for whom Intel requests or will request that AMD "remediate" by providing supplemental files; and, second, that the methodology underlying this fourth set of Intel histograms will not be subject to any further revision, i.e., that this is the last and final methodology Intel will utilize in histogram creation and analysis.

Intel needs to commit once and for all on these points. Over the past seven months, AMD has spent an extraordinary amount of time, effort and money assessing Intel's past histograms and, in every instance, discovered and reported material errors in them that led Intel back to the drawing board. Intel's histogram history is well-known to you:

- On October 9, 2008, Intel produced 35 histograms of AMD employees. In an informal interview held shortly thereafter, AMD pointed out obvious flaws in Intel's analysis.

- More than a month later on November 14, 2008, Intel conceded its errors and presented 79 new histograms. Of these, 35 were said to replace the October 9 histograms, and 44 were entirely new. Intel characterized these histograms as reflecting a "revised analysis" with "additional elements" and a changed methodology. (*See* your letter of November 14, 2008.)

- AMD then spent the next two weeks, including over the Thanksgiving holiday, analyzing Intel's newly-concocted histogram methodology on an expedited basis. In filings with

the Special Master and his consultants on December 5 and 9, 2008, AMD again exposed Intel's methodological flaws, and demonstrated that Intel had not undertaken reasonable measures to eliminate false OCFs, or conducted proper quality control.

- Intel then took the next *three months* to reanalyze, rework and rejigger its histograms for a third time -- and remained perfectly silent about histograms during that entire time period. On March 2, 2009, however, Intel presented its then thrice-revised set of histograms of 34 AMD custodians.[1] Many of the AMD custodians depicted were entirely new to Intel's histogram analysis, and Intel abandoned arguments about alleged non-preservation by dozens of earlier-identified AMD custodians. At that time, you stated that: (1) Intel had implemented another new and significantly-revised methodology to prepare this set of histograms; (2) that "*Intel has now done everything in its power to fairly and accurately identify missing documents*"; and (3) Intel was requesting that AMD produce supplemental files but only for the 34 "subject custodians" identified in your letter. (*See* your letter dated March 2, 2009.)

- Ten days later on March 12, 2009, we sent you a letter identifying yet again serious flaws in Intel's methodology, using one AMD custodian [redacted]) as an example. (A copy of our March 12, 2009 letter to you is attached for your reference.)

- Two days after that, on March 14, 2009, you sent us an email advising that you had identified "a minor error in the analysis underlying the histograms" related to "a single item on one line of code." You promised to provide corrected histograms "shortly" and, until then, suggested "suspension of any analysis related to the March 2 versions of the histograms." AMD followed your suggestion. Again, however, we heard nothing more from you about histograms.

- Then on April 29, 2009[2] -- i.e., *two months* after your March 2 histograms and a *month and a half* after you directed us to put "pencils down" on any analysis -- you delivered "Intel Histograms Version 4.0" for 37 AMD custodians. Notably, without explanation, 6 custodians depicted in your March 2 histograms have been removed and 9 new ones have been added. And, again, Intel's histogram methodology has materially changed, now for a fourth time: The error you referenced is now said to affect "hundreds of lines of code" -- not just one, as you stated before; Intel has "added certain additional terms to its queries"; Intel has subjected purported OCFs to "two tests" never revealed before; and Intel conducted a statistical analyses your letter doesn't describe. (*See* your letter of April 29, 2009.)

AMD is interested in testing Intel's new histograms and, more importantly, in bringing this entire histogram exercise to a close. But we are not about to embark on this exercise for a fourth time only to have Intel later change course yet again -- especially when merits discovery is at full swing and the discovery cutoff of June 12, 2009 looms. Accordingly, please confirm in

[1] This set of Intel histograms was delivered just *three days* before the commencement of Rule 30(b)(6) depositions and, as such, appeared intended to impair AMD's ability to analyze them and respond promptly.
[2] This set of Intel histograms was produced just *one day* after we agreed to your proposed briefing schedule for Intel's pending motion to compel deposition answers and, again, leads us to suspect ulterior motive.

writing that the 37 AMD "subject custodians" are the only custodians for whom Intel seeks "remediation" and that Intel's histogram methodology is at long last final.

We also are compelled to correct two misstatements in your April 29 letter. First, you take us to task on late productions of 13,000 files for three custodians -- all of which were produced prior to their depositions. With all due respect, Intel's complaint is petty in light of its own late productions which dwarf AMD's in size, scope and their disruptive effect on depositions. You well know that: (1) Intel produced hundreds of thousands of files equating to over 500,000 pages of documents for almost 190 Intel custodians -- 22 of whom had already been deposed -- in May and December 2008; (2) in April 2009, Intel produced 30,000 files for Intel custodians [redacted] just prior to two of these custodians' depositions because of Intel "journal extraction" errors; and (3) on April 30 -- i.e., *the day after your most recent accusation about AMD's productions* -- you informed us that Intel will be producing over 5,000 documents for 10 more Intel custodians (five of whom already have been deposed) and cancelled the imminent deposition of one of those people. Overall, Intel has produced documents after conclusion of the depositions of approximately 30 Intel custodians, including some of its highest-ranking executives. Again, we do not suggest that AMD's productions have been flawless, and we will provide a last clean-up production shortly. But Intel's unabated, material production failures make us question your motivation to lodge charges of far lesser offenses against AMD.

Second, you assert that AMD failed properly to disclose preservation problems and that AMD's counsel have violated their "professional obligations." That is reckless poppycock; we reject it entirely. Given the fulsome record of Intel's lack of transparency -- and new discoveries we are making right now of Intel non-disclosures for literally dozens of its custodians -- it appears that you alone labor under the misimpression that Intel has been fully forthcoming while AMD has not. In any event, we advise circumspection to you, and that you avoid further cavalier attempts to impugn us with false charges.

We look forward to your prompt response.

Sincerely,

David L. Herron
of O'MELVENY & MYERS LLP

cc: Eric Friedberg, Esq. (by email only)
Jennifer Martin, Esq. (by email only)
Jason Novak, Esq. (by email only)

LA3:1157562.1

Exhibit 61

BINGHAM

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

May 29, 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* – AMD's Document Preservation Issues

Dear David:

This responds to your letters of May 22 and 26 which raise several overlapping issues. In addition to advising you of our positions on these issues, we are compelled to correct a number of your misstatements, as well as tee up some of the issues for a meet and confer next week (on Monday, Tuesday or Wednesday).

Intel's Forthcoming Motion(s) To Compel. As you know, we believe AMD reasonably anticipated litigation against Intel months before it started to retain documents. AMD presented its side of the story to Judge Poppiti by letter of May 14. We consider your arguments on this issue to be premature and, candidly, some of the claims in your letter only raise more questions and concerns. In addition, as we have previously advised, we believe AMD's preservation program suffers from numerous defects requiring remedial document productions. We are particularly concerned about AMD's delays in issuing litigation hold notices and harvesting custodial data. As such, we intend to explore these topics through discovery and we will file a motion, following a meet and confer, at the appropriate time.

Our pending motion to compel further deposition testimony concerns all of these issues. Because the hearing on our motion has been continued until June 15 (per the Court's request), Intel may not have a complete record in hand before the June 12 fact discovery cutoff, and thus would not be able to submit all the relevant evidence were we to file before June 12. Anticipating this scheduling issue, we asked for your agreement on May 14, and again on May 21, that (1) AMD will not argue that Intel is foreclosed from its requested relief if it files its motion after the discovery cutoff, *or* (2) Intel will have the right to submit supplemental evidence along with its reply brief (of course providing AMD with an opportunity to respond to any such evidence).

Your letter of May 26 seeks to barter on this straightforward request. You say that AMD will agree that Intel is not foreclosed from its requested relief if it files its motion after the discovery cutoff, but only if Intel "withdraw[s] all timeliness objections" to AMD's voluminous new discovery requests. We cannot agree to this proposal. Contrary to your suggestion, Intel's "timeliness objections" are not related to the discovery cutoff. Rather, as set forth in our Responses, our "timeliness objections" are based on Judge Poppiti's prior Orders in the case setting deadlines for the very discovery requests you served (with

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

T 415.393.2000
F 415.393.2286
bingham.com

a few exceptions).[1] Your complaints about Intel's position on these tardy requests are not well taken, particularly since AMD has already taken over *45 hours* of deposition testimony on Intel's retention issues, and has received over *750,000 pages of documents*, not to mention detailed reports on each and every Intel preservation custodian.

We suggest that a telephonic meet and confer on the schedule for Intel's forthcoming motion(s) is appropriate under the circumstances. If the parties cannot reach agreement, or if AMD is unwilling or unable to meet and confer early next week, then in light of the imminent discovery cutoff we will be forced to take this issue directly to Judge Poppiti.

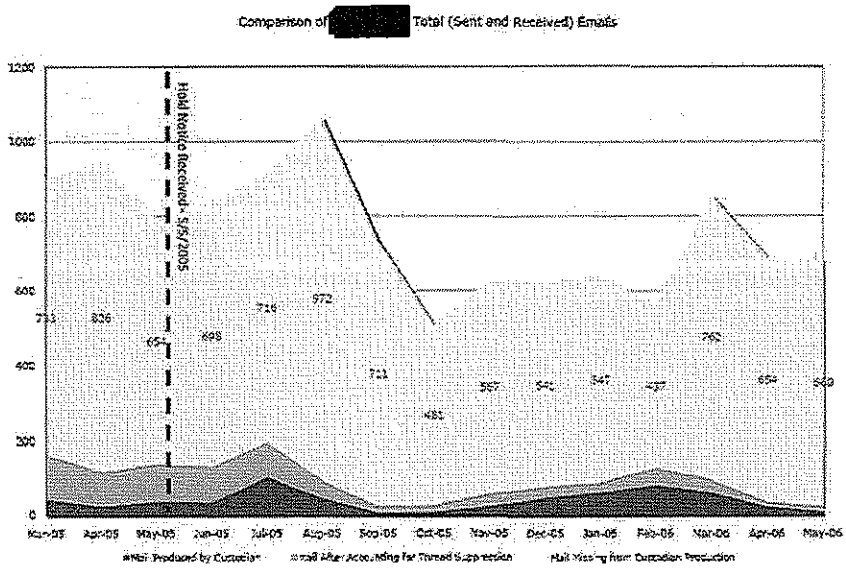
Histograms. It is no secret that we, like AMD, believe that certain AMD custodians' "selectivity in deciding which files were relevant and which were not does not reflect what [the parties] would have preferred." *See* AMD's 12/9/08 Letter to Judge Poppiti at 9. These custodian preservation habits, in combination with flaws in AMD's preservation plan, have resulted in significant gaps in AMD's document productions, as reflected in the histograms produced to you on April 29. I will again confirm that (a) the histogram methodology is in final form; (b) Intel has requested that AMD remediate the document productions of the 37 subject custodians; and (c) if AMD does not satisfactorily remediate those custodians' productions, Intel reserves the right to file a motion to compel such remediation. All that said – now for the third time – here are three points that need to be mentioned before responding to your request for yet more document control numbers (DCNs).

First, a clarification. Intel has filed a motion to compel further deposition testimony. We believe the requested testimony will reveal additional preservation issues including, for example, AMD's departed employee problems. As such, we are simply not in a position to confirm that the 37 subject custodians are the only custodians for whom we will seek individual remediation.

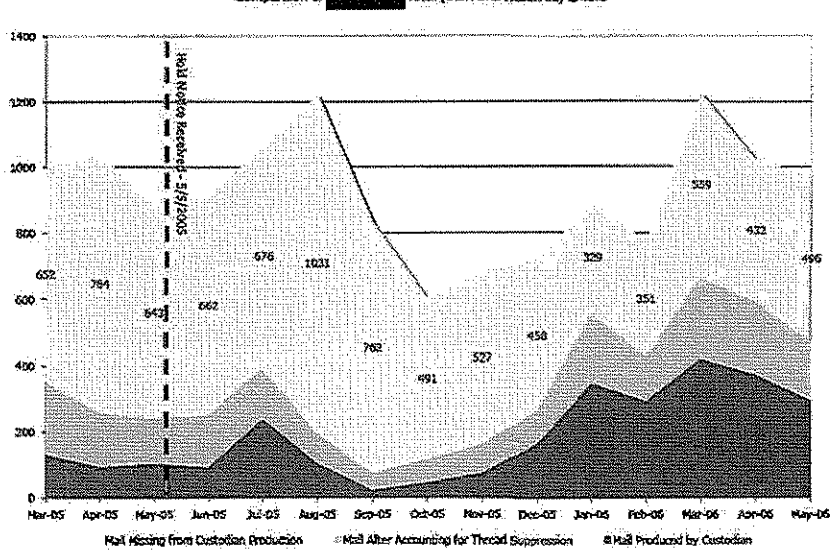
Second, a correction. As we would have been happy to explain to you in an informal interview (which we have offered on several occasions), there have been changes in the histograms for a few reasons. The shifts AMD has observed within the yellow, pink and red sections are largely due to the refining of Intel's analysis over time to account for inaccuracies in the metadata produced by AMD, as well as AMD's failure to produce metadata associated with near-duplicate suppressed documents. In addition, AMD has produced tens of thousands of additional documents since Intel started the histogram exercise. That obviously has an impact on the analysis. For example, this past week AMD produced additional data for custodian [redacted] Although the production did not cure the data deficiency (*i.e.*, [redacted] still has significant problems), it did change the numbers:

[1] As you have acknowledged, Intel has offered to produce a witness to testify about certain topics. *See* Intel's 5/23/09 Response to AMD's new discovery requests.

4/29/09 [redacted] Histogram

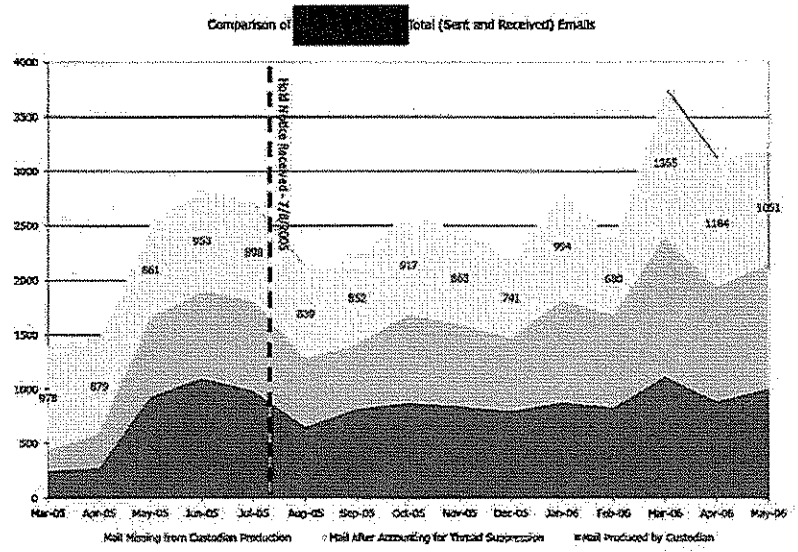


[redacted] Histogram After AMD' 5/16/09 Production

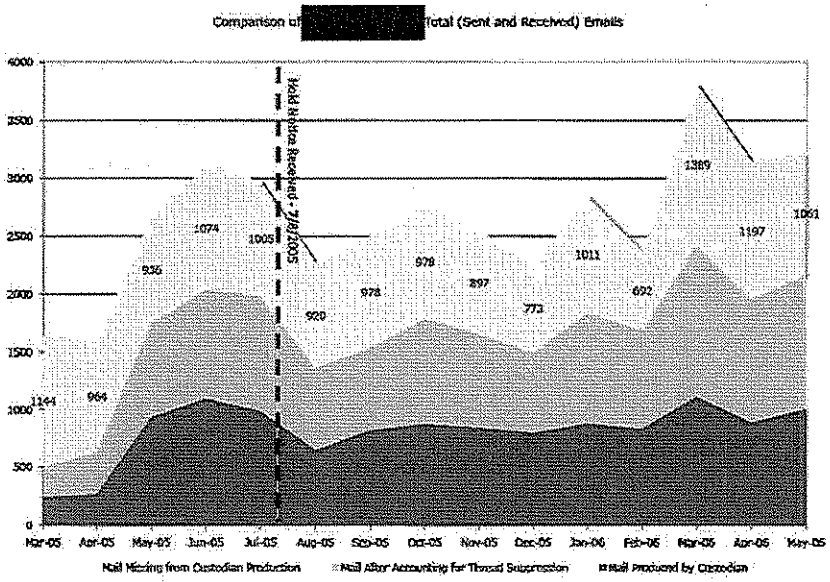


As another example, your productions of tens of thousands of documents on May 16 and 17 impacted the histogram analysis for many custodians who were not part of those productions. As you can see below, the newly produced documents from other custodians revealed even more "missing" documents from [redacted] production set. *Compare* Aug-05 (839 to 920); Sept-05 (852 to 978); etc.

4/29/09 [redacted] Histogram



[redacted] Histogram After AMD's 5/16/09 & 5/17/09 Productions



The point is that your own continued production of data have impacted the email counts in the histograms.

Third, a reminder. We have now requested on multiple occasions the metadata for all responsive, non-privileged documents that were suppressed and not produced on account of your near-deduplication protocol. After agreeing to provide this information during the hearing on January 9, 2009, you advised Intel by letter of February 6, 2009 that AMD would not even address this issue until the close of fact discovery (which is nearing), and that you would not produce the metadata unless Intel paid for all associated costs. We reject your suggestion that Intel should bear these costs. AMD chose to implement a near-deduplication plan that does not comply with the Court's Orders; now, AMD should bear the cost of producing the data Intel should have received in the first place.[2]

Despite our requests, you have not provided us with any explanation for why this process would be so costly or time consuming, nor have you made any specific showing of burden. Because Intel has agreed to accept the metadata, (and not the text) of the documents, there should be no privilege concerns. If AMD deemed the top level of an email chain to be non-privileged, and produced the entire chain to Intel, then the lower levels of the chain would similarly be non-privileged.[3] Moreover, in response to Ms. Martin's questioning at deposition, [redacted] acknowledged that the suppressed emails are always "associated" with the top level of the email chain within the Attenex database. We expect that you will soon be ready to discuss the production of this long-overdue data to Intel.

With those three points in mind, allow me to address your new request for yet more DCNs. As you know, when you asked previously for DCNs for the "missing" documents or "OCFs" – namely, the documents reflected in the yellow shaded area – we accommodated you. If AMD has found some or all of these "missing" DCNs within the analyzed individual custodian productions, we ask that AMD simply reveal its findings so that both parties can move forward.

We will agree to provide you with these additional DCNs on the condition that you will agree to first identify any "missing" documents you have identified based on our prior submission of DCNs, and that you provide, at AMD's expense, the metadata for all suppressed near-duplicate emails. We can discuss this issue during our meet and confer next week.

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[2] If AMD wished to deploy a near-deduplication thread suppression process on the review side to make its own review more efficient – so be it. But that is not to say AMD should have kept those documents suppressed at the time of production. Such a significant production decision should have been made pursuant to a Court order and with Intel's consent from the beginning.

[3] Intel agrees that AMD need only produce suppressed documents associated with documents produced in *native* form, thus further eliminating any privilege concerns.

Glover Park. As you know, we believe Glover Park has documents relating to AMD's reasonable anticipation of litigation against Intel. We have been trying to engage you on this issue since March 31. On May 20, when you provided us with a written statement about the scope of Glover Park's services for AMD, we noted its apparent inconsistency with certain deposition testimony and documents and immediately asked for clarification. We await your response.

Redacted Version of Document AMDN-065-00028313. It has now been well over a month since we brought this document to your attention on April 21, 2009, and we still do not have a redacted version. We accept your offer to meet and confer about the document, but obviously we cannot do that until you produce a redacted version. We again ask you to do so promptly, and trust that you will be willing to discuss the document in detail during the meet and confer process. If not, we will need to involve Judge Poppiti.[4]

* * *

Please let me know as soon as possible if you are available to meet and confer on Monday, Tuesday or Wednesday next week (June 1-3). Based on the recent correspondence with Judge Poppiti regarding scheduling, we understand that you are available on some or all of those days. Again, if we cannot meet and confer during that time frame, we will have to take the scheduling issues directly to Judge Poppiti, as time is of the essence.

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)

[4] Please note we reject your contention that Intel's handling of this document violated any stipulation or court order.

Exhibit 62

Potter
Anderson
Corroon LLP

1313 North Market Street
P.O. Box 951
Wilmington, DE 19899-0951
302 984 6000

www.potteranderson.com

Richard L. Horwitz
Partner
Attorney at Law
rhorwitz@potteranderson.com
302 984-6026 Direct Phone
302 658-1192 Fax

May 26, 2009
Public Version Dated: June 5, 2009

By Electronic Filing & Hand
The Honorable Vincent J. Poppiti
Fox Rothschild LLP
Citizens Bank Center, Suite 1300
919 North Market Street
Wilmington, Delaware 19899

PUBLIC VERSION

Re: Advanced Micro Devices, Inc., et al. v. Intel Corporation, et al., C.A. No. 05-441-JJF; In re Intel Corporation, C.A. No. 05-MD-1717-JJF
Reply In Support of Motion to Compel Further Deposition Responses

Dear Judge Poppiti:

In advance of the hearing scheduled for May 29, 2009 at 10:00 a.m. EDT, and in response to AMD's voluminous opposition papers, Intel submits this letter in support of its motion to compel additional Rule 30(b)(6) deposition testimony.[1]

This motion continues, and we hope will help conclude, Intel's year-long effort to obtain basic deposition testimony about AMD's document preservation practices. In the wake of AMD's second motion to block any deposition on preservation, Your Honor granted Intel 16 hours of deposition time to explore the topics in Intel's deposition notice, modified only in three relatively minor respects. AMD claims Intel "squandered" that time, but the fact is that AMD wasted large parts of it making baseless speaking objections, and proffering witnesses unprepared to, or instructed not to, answer over 300 questions. AMD has since tacitly conceded the impropriety of much of its deposition obstruction. Of the approximately 160 unanswered questions Intel initially raised with AMD during the meet and confer process, AMD agreed to provide answers – scripted by counsel – to 36. *See* Intel Motion to Compel, Ex. K (Herron 4/16/09 Ltr. and Fowler 4/23/09 Ltr.). After Intel moved to compel answers to 130 questions, AMD abandoned its inapt *Noerr-Pennington* objection to 11 of them.[2] As to 12 other questions, AMD simultaneously maintains its privilege claim while pointing to other instances in which the question was supposedly answered, a further concession that the privilege objection is either

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[1] Intel understands that Your Honor has inquired about rescheduling the hearing date. We are checking schedules, and will respond promptly.

[2] AMD's post hoc attempt to replace that invalid objection with others fails. Fed. R. Civ. P. 32(d)(3)(B); *Kansas Wastewater, Inc. v. Alliant Techsystems, Inc.*, 217 F.R.D. 525, 528 (D. Kan. 2003).

invalid or waived. The time has come for AMD to comply with the Court's prior order so that Intel may complete its discovery of AMD's practices and file its motion to compel further remediation.[3]

AMD's two main points in opposition to this motion are unavailing. First, it claims that the questions fall outside the 15 topics this Court approved. That is not true as to any of the questions at issue, let alone all of them. Second, AMD argues that many of its instructions based on privilege and work product are valid. The questions do not seek proteeted information. Rather, they go only to the facts underlying AMD's document preservation issues – facts that are not privileged and are not work product.

The key subjects at issue include:

- AMD's reasonable anticipation of this litigation. Intel intends to move to compel remediation related to AMD's failure to implement a timely preservation plan when it first reasonably anticipated litigation against Intel. Based on AMD's own documents and admissions to date, it reasonably anticipated this litigation at least by January or February 2005 (perhaps earlier) and should have been retaining documents months before its claimed anticipation date of April 20, 2005. Yet AMD has provided almost no deposition testimony on this topic and its use of its opposition brief to tell its side of the story only emphasizes Intel's need to test AMD's assertions in deposition.

- AMD's stealth restoration activities and remediation. Intel continues to believe that AMD has conducted undisclosed interim preservation tape restoration and/or other remedial activities.[4] AMD's deposition responses and objections, and its supplemental deposition corrections, essentially dodge this issue. Intel is entitled to know the whole story.

- AMD's data losses and preservation issues. AMD maintains it has disclosed all "*known*" instances of data loss, without defining what that term means, while refusing to provide information about *suspected* or *potential* data losses. *See* Topic 12 ("Any known or *suspected* non-preservation of AMD Custodian data.") (emphasis added) It is apparent that AMD is using semantics to conceal some of its preservation issues. Even if AMD contends these (undisclosed) issues have been remediated or otherwise resolved, Intel is entitled to make an independent assessment of them, including whether AMD's remediation, if any, was adequate and whether there are other issues that require similar remediation steps.

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[3] Intel has repeatedly asked AMD for its assent to a briefing schedule and procedure to hear Intel's motion – required due to the delays in securing AMD's deposition testimony. Intel will seek the Court's intervention to set a procedure at the May 29 hearing (subject to rescheduling on June 2 or another date).

[4] Intel made these concerns known well over a year ago in Mr. Ashley's first declaration. *See, e.g.*, Declaration of John Ashley (7/1/08 (D.I. 763)), at ¶ 17.

This letter is organized into three sections, as follows: Section I sets forth the current status of the questions that are the subject of Intel's motion. Section II addresses the parties' main disputes on matters related to the attorney-client privilege and work production protection. Section III addresses the inadequate preparation of AMD's 30(b)(6) witnesses. Intel is also submitting a revised chart, which is identical to AMD's but adds a column in which Intel responds to AMD's contentions on the questions that remain the subject of Intel's motion.[5] Because AMD opted to separately argue each and every question in the chart, Intel is forced to respond accordingly, although it will attempt to do so concisely.

I. OVERVIEW OF QUESTIONS THAT REMAIN THE SUBJECT OF THIS MOTION

Before filing this motion, Intel – both unilaterally and pursuant to a lengthy teleconference and multiple letters – narrowed the number of unanswered questions at issue from well over 300 to 130. Since the motion was filed, AMD has conceded its erroneous position on, and supplied answers to, an additional 48 questions. Some of those answers are adequate, while other answers require follow up questions. As reflected in the revised chart that accompanies this letter, Intel's motion now concerns 86 questions (and related subject matter).[6]

Intel seeks an allotment of time to (1) re-ask questions that AMD has not answered and conduct reasonable follow-up on the subject matter of those questions, and (2) proceed with reasonable follow-up questions to certain of the supplemental responses provided by AMD after the deposition.

A. Questions AMD Has Refused To Answer

The majority of questions at issue have never been answered. Although the disputes vary from question to question there are some common themes:

- Each of the unanswered questions falls squarely within topics in Intel's deposition notice approved by Your Honor and call for underlying factual information that is not subject to any privilege or work product protection.

- AMD continues to block fundamental questions about its document preservation. It uses two primary methods. First, it claims that AMD's knowledge of preservation problems are privileged. But those underlying facts have nothing to do with attorney client communications. Second, it claims that only preservations problems that ultimately

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5 Intel's chart also corrects AMD's entry number 38.

6 Intel disagrees with the tenor and substance of Mr. Herron's declaration purporting to relate the underlying facts. Although it is unnecessary to respond to each of his arguments, Intel openly acknowledges it sought to expedite the parties' meet and confer, because Intel was (and remains) concerned about AMD's year-long strategy of delay and obstruction. Given the substantial narrowing of issues, it is apparent that the meet and confer process was productive. Mr. Herron's disparagement of it is not.

resulted in known data losses are permissible topics. As noted above, Intel is entitled to know what happened and independently assess AMD's remediation efforts.

- AMD attempts to raise objections in its Opposition not raised during the depositions themselves. These tardy objections are waived, as outlined in Intel's Motion (at 6). AMD provides no explanation or legal authority supporting the *ex post facto* assertion of objections.

- AMD's positions on many of Intel's questions are contradictory. For example, while "standing on" its assertion of privilege in many cases, AMD simultaneously points to alleged "answers" on the record, which of course undermines its position that the information is privileged. *See, e.g.*, Chart (Questions No. 22, 44, 138). AMD cannot have it both ways.

- AMD's attempts to justify its positions by pointing to Intel's objections to different questions asked more than a year ago are mere distractions. AMD's arguments are off point, too late, and in any case not before the Court.

Intel requests that AMD be ordered to provide knowledgeable witnesses and permit them to answer Intel's questions.

B. Non-Responsive and Insufficient New "Answers"

The remaining questions require further testimony because AMD's supplemental written answers are inadequate, beg additional questions, or both.[7] AMD should not be permitted to block the give and take of live deposition testimony by asserting improper instructions or failing to prepare its witnesses. Intel is entitled to unfiltered, sworn testimony, including reasonable follow-up. *See Cavanaugh v. Wainstein*, 2007 U.S. Dist. LEXIS 40242, at *33 (D.D.C. 2007).

For example, during Mr. Halle's deposition, Intel asked the following question about chart of harvest dates provided by AMD to Intel:

[redacted]

See Chart, No. 34; Intel Motion, Ex. J. [redacted] and AMD provided a supplemental response along with its opposition brief, as follows:

[7] This includes Question Nos. 17, 18, 19, 26, 34, 37, 68, 102, 110, 111, 151, 157, 158.

[redacted]

AMD's "answer" is non-responsive, or partly responsive at best. [redacted]

II. INTEL DOES NOT SEEK INFORMATION PROTECTED FROM DISCLOSURE BY ANY PRIVILEGES OR OTHER DOCTRINES

A. AMD Cites Case Law That Supports Intel's Position

AMD does nothing to refute Intel's assertion that underlying facts are not protected by privilege or work product protection. *Upjohn Co. v. United States,* 449 U.S. 383, 395-96 (1981); *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 208 F.R.D. 109, 121-22 (D.N.J. 2002). In fact, two of AMD's own cases confirm that such *factual* discovery is not barred. *See T&H Landscaping, LLC v. Colorado Structures Inc.*, 2007 U.S. Dist. LEXIS 63495, at *3-4 (D. Colo. 2007) (defendant's response to "factual statements within the [plaintiff's expert] report" is an appropriate area of questioning for a 30(b)(6) deponent); *In re Cendant Corp. Securities Litigation*, 343 F.3d 658, 662 (3d Cir. 2003) (Federal Rule of Civil Procedure 26(b)(3) "does not bar discovery of *facts* a party may have learned from documents that are *not themselves discoverable.*") (citing *Federal Practice and Procedure* § 2024, at 337) (emphasis added). AMD's attempt to characterize Intel's fact-based inquires as seeking "conclusions of AMD's counsel" is unavailing. *See, e.g.*, AMD Opp. at 19; citing No. 14 [redacted]

Similarly, the case AMD cites (and mischaracterizes) in its attempt to seek blanket protection for anything having to do with its "investigations, validation and auditing activities concerning data preservation, collection and production" actually *supports* Intel's position. AMD Opp. at 7 & 16, citing *In re Linerboard Antitrust Litigation*, 237 F.R.D. 373 (E.D. Pa. 2006). *Linerboard* concluded that the 30(b)(6) witness was not required to talk to in-house counsel to prepare for his deposition for several reasons. First, the Court concluded that the witness had been adequately prepared to answer the questions asked based on more than two weeks of preparation which included reviewing deposition testimony and talking to more than ten individuals. Second, the deponent had produced extensive non-privileged sources of information responsive to the topic of inquiry. Finally, the court found that the in-house counsel's mental *recollections* of facts learned from an investigation that had been conducted twelve years earlier would necessarily be "so intertwined with mental impressions" as to

constitute opinion work product. *Id.* at 379. Intel is not asking for AMD counsel's recollections of facts, or opinion work product, but seeks to discover only the facts themselves, which in *Linerboard* had already been disclosed to plaintiffs through production of "almost 30,000 pages of documents" *and 30(b)(6) depositions. Id.* at 378 (emphasis added). Indeed, *Linerboard's* holding was expressly "limited to the circumstances of this case in which there has been extensive discovery of the underlying facts." *Id.* at 379. Here, by contrast, AMD has steadfastly refused to disclose the facts.

Moreover, contrary to *Linerboard* in which the discovering party "had available to them extensive non-privileged sources of the same information," *id.* at 383, AMD engaged in a shell game by designating an in-house counsel, Ms. Ozmun, as a witness, failing to prepare her as a 30(b)(6) witness and then claiming her knowledge was privileged. Repeatedly, AMD feigned compliance by instructing her [redacted] *See, e.g.,* (Question No. 45). Of course, Ms. Ozmun then had no testimony to offer. AMD should have either designated a non-attorney to testify or permitted Ms. Ozmun to testify *as AMD,* rather than in her capacity as an attorney. Instead, [redacted] If Ms. Ozmun were testifying *as AMD,* as she should have in response to a 30(b)(6) notice, she would have been able to distinguish her "recollections" of facts as an attorney and to testify about the underlying, unprivileged facts themselves.[8] *See Linerboard,* 237 F.R.D. at 386.

B. AMD Has Abandoned Its Erroneous *Noerr-Pennington* Assertion

AMD's legally unsupported assertion of the *Noerr-Pennington* doctrine as a bar to discovery was simple obstruction. AMD does not address, and therefore concedes, this point.

C. AMD Improperly References and Misconstrues Prior Objections By Intel That Are Not Before the Court

1. Intel's Prior Objections Are Not In Issue

As a starting point, Intel's prior objections are not before the Court. *See, e.g., In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 1994 U.S. Dist. LEXIS 1344, at *4 n.2 (E.D. Pa. 1994) (rejecting the "what's good for the goose, is good for the gander" defense to a discovery motion; "defendants' point fails to address the fundamental difference between the two privilege logs, that being that only the defendants' log is at issue"). AMD offers no legal authority for why Your Honor should base its decision on isolated, often out of context, prior objections that are not the subject of the pending motion.

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[8] AMD attempts to shift the burden to Intel in seeking this discovery. However, Intel does not have to show a "substantial need" to obtain the non-privileged facts over which AMD has improperly asserted work-product protection. *See Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000) (requiring objecting party to demonstrate that work product privilege applies before shifting burden to party seeking production).

2. Even If Intel's Prior Objections Were In Issue, AMD Has Not Raised Them Within A Reasonable Amount Of Time

AMD notes that it "has not yet put the privilege and work product lines Intel drew to the test by way of a motion." AMD Opp. at 7, fn. 8. However, the time for such a motion has passed. AMD's Rule 30(b)(6) depositions on Intel's document retention practices took place over 15 months ago. A motion to compel must be "sought within a reasonable time to prevent delay." *Carnathan v. Ohio Nat'l Life Ins. Co.*, 2008 U.S. Dist. LEXIS 65546, at *5 n.2 (M.D. Pa. 2008); *see also Lapenna v. Upjohn Co.*, 110 F.R.D. 15, 18 (E.D. Pa. 1986) (only considering claims brought pertaining to "recent depositions," and declining to consider complaints about assertions of privilege made 16 months earlier). AMD should not be permitted to hijack Intel's motion with untimely complaints about depositions that occurred well over one year ago.

3. Intel's Prior Objections Are Distinguishable In Any Event

Apart from their other problems, AMD's cherry-picked examples are distinguishable from the questions that *are* before the Court. As discussed below, AMD's assertion that it "simply drew the same privilege and work product lines as Intel," AMD Opp. at 7, is not accurate. Moreover, AMD obtained an unprecedented amount of discovery on Intel's document retention and preservation practices, yet it distorts the massive record by only citing a tiny portion of Intel's testimony and objections. Critically, AMD cites to isolated Intel objections while ignoring the fact that AMD obtained, in many instances, the very discovery Intel seeks now and to which AMD inappropriately objects.[9]

Factual IT Questions vs. Attorney Mental Processes. AMD objected to the question, [redacted] Ozmun Tr. 56:1-6. AMD curiously claims that this question "delves into counsel's decision-making process," AMD Opp. Ex. A. No. 42, and therefore instructed its witness not to answer. The question, however, seeks an underlying fact – [redacted] To buttress its improper objection, AMD points to Intel's objection to an AMD question about [redacted] AMD Opp. at 8. The difference is obvious. [redacted] The latter is protected, the former is not.

Discovery and Knowledge of Preservation Issues. [redacted] For example, AMD objected to the

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[9] For example, AMD objects to Intel's question No. 22 [redacted] yet obtained answers from Intel on an identical issue: [redacted] Almirantearena Tr. 194:7-10; *see also id.* 191:12-15 [redacted]

question, [redacted] Halle Tr. 108:2-10. Intel is entitled to know what AMD's preservation issues were. In answering, AMD would not have had to disclose any privileged information, nor explain how its counsel came to any realizations. AMD claims that "Intel refused to answer questions about whether and when it became aware of custodian preservation problems."[10] AMD Opp. at 8. But Intel has provided AMD with detailed documents and deposition testimony about when it became aware of its custodian preservation issues.

Efforts To Learn About Custodian Preservation Issues. AMD refused to answer questions as to [redacted] AMD objected to the question, [redacted] No. 37. By contrast, Intel allowed this testimony and only objected to questions [redacted] where such testimony would reveal the specific actions of its attorneys, the substance of an attorney-client communication or its attorneys' work product. For example, Intel objected to inquiries concerning [redacted] in the interviews conducted by Intel's counsel, AMD Opp. at 8, and [redacted] AMD. Opp. Ex. A. No. 37 (emphasis added). In short, Intel objected to questions that sought [redacted]

Facts Of Preservation Issues Learned From Or By Outside Counsel. AMD refused to answer the question [redacted] Ozmun Tr. 95:7-17. AMD cites Intel objections to inquires about [redacted] For example, AMD points to Intel's objection to the question, [redacted] No. 53. In [redacted] This is quite distinct from AMD's objection to a question that sought [redacted]

D. Selective Assertion of Privilege Should Not be Permitted

AMD cannot decide to answer some topics and selectively assert a privilege as to other questions on that topic. *Westinghouse Elec. Corp. v. Republic of Phil.*, 951 F.2d 1414, 1426 n.13 (3d Cir. 1991). For example, AMD permitted its witness to testify when witnesses *were* aware

[10] AMD also claims that Intel refused to answer "in some cases" whether Intel discovered any problems at all, or the extent of those problems. This is untrue, and AMD provides no such citations. The questions AMD cites in its brief each ask whether Intel came to a certain realization at a specific time.

of their preservation obligations: [redacted] But not when its witnesses may have had *mistaken beliefs* about their preservation obligations: [redacted] Halle Tr. 108:2-10.

III. INTEL ASKED APPROPRIATE QUESTIONS THAT FALL WITHIN THE DESIGNATED TOPICS AND YET AMD WAS UNPREPARED OR UNWILLING TO ANSWER

A. Intel Complied with the Court's Order

AMD skirts responsibility for its failure to prepare witnesses by misconstruing the Court's January 22, 2009 Order (the "Order"). First, contrary to AMD's unfounded suggestion, Intel was expressly "not limited" to "confirmatory questions," Order ¶1, and instead was granted the right to test by examination, at formal deposition, AMD's document retention and preservation practices. Second, the Order only modified Intel's deposition notice in three specific ways, and Intel in no way violated these modifications. The Court ordered that:

- Intel's questions should focus on designated custodians only. AMD does not claim that Intel sought testimony on non-designated (*i.e.*, non-production) custodians.

- On deposition Topic 6 (Harvesting), the Court noted it would be "impractical for AMD to prepare and present a witness who could testify regarding the proposed data-harvesting details with respect to every AMD custodian." Intel did not ask questions that called for harvesting details with respect to any, let alone "every," AMD custodian.

- Intel's back-up tape questions (Topic 10) were confined to the "subtopics explicitly delineated in the Notice for this topic."[11] Those subtopics included: type of backups, software and media used, content and frequency of the backups, tape rotation/recycling schedule, and restoration activities for this Litigation. D.I.. 1291 (1/22/09). Each of Intel's questions about AMD's preservation tape protocols and restoration activities fall squarely within these subtopics.

AMD fails to cite an actual instance where Intel's questions fall outside the express ambit of Your Honor's Order.

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[11] The parties were also ordered to make a "good-faith" attempt to address deposition Topic 13 in the form of an interrogatory response. After considering the issue carefully, including AMD's conduct during the informal discovery process, Intel decided to pursue live testimony instead of attorney-crafted narratives.

B. Intel's Topics Were Described With Sufficient Particularity And Its Questions Were Plainly Within the Scope

Despite a prior unsuccessful motion opposing each of the 30(b)(6) topics in which it did not raise the issue, AMD now attempts to ratchet up the level of specificity required of Intel's 30(b)(6) deposition notice. The notice need not be, as AMD argues, so detailed as to "permit the responding party to . . . reasonably anticipate the questions that will be asked." AMD Opp. at 5. AMD is not entitled to a virtual preview of deposition questions, only notification as to the specific areas of exploration. Indeed, AMD complained before the deposition about the number of subtopics delineated in the notice, but now complains there were not enough. AMD cannot have it both ways. A notice need only be reasonable; perfection is not the standard.

Thus, AMD's witness should have been prepared to answer Intel's questions, which were squarely within its noticed topics. For example, AMD's designee on the "events and circumstances leading to AMD's decision to commence this Litigation" (Topic 4), should have been able to testify, for example, when AMD learned of the Intel contracts it disputes as anticompetitive – a *key* allegation in AMD's Complaint. No. 41. Yet, AMD asserts this is "beyond the scope."[12]

AMD's assertion that such questions call for "legal contentions" is unavailing. AMD Opp. at 6. In contrast to the 30(b)(6) topics rejected in *In re Independent Service Organizations Antitrust Litigation,* which required a corporate witness to "testify about facts supporting numerous paragraphs" of the defendant's Answer and Counterclaims, Intel seeks such basic, factual, discovery as when AMD learned of the basic allegations in AMD's Complaint. 168 F.R.D. 651, 654 (D. Kan. 1996); *see, e.g.*, No. 93.

It is also unclear how the information Intel seeks could not be "reasonably available to AMD." AMD Opp. at 18-19. [redacted] No. 13. These activities were fundamental to AMD's document preservation strategy – it's unclear how the order in which they occurred could be "unduly burdensome to collect and validate."

C. Intel's Questions Relating To AMD's Reasonable Anticipation Date Call For Relevant Information

Deposition topic number 4 concerns the "[d]ate on which AMD first reasonably anticipated this Litigation, *and the events and circumstances leading to AMD's decision to commence this Litigation.*" (emphasis added). This topic was not limited by Your Honor in any way, and Intel's counsel gave specific examples in open court of the types of questions Intel

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[12] AMD devotes a section of its opposition to a witness-by-witness summary of testimony. AMD Opp. at 9-20. Intel rejects AMD's characterization of the testimony, but does not believe a point by point response, or counter-summaries, are warranted. Intel will instead address the issues on a question by question basis in the attached chart.

would be pursuing. Jan. 9, 2009 Hearing Tr. 39:10-40:24. Ignoring these points, AMD, during the deposition and in its opposition, has taken an artificially restrictive view of this topic's scope and the relevant law.

The information Intel seeks regarding *the events and circumstances leading to AMD's decision to commence this litigation* is relevant and discoverable, and will be a basis for Intel's forthcoming motion to compel documents from AMD's preservation tapes. Intel should be entitled to explore the timing of AMD's knowledge of potential causes of action against Intel, supporting legal theories, and the facts that underlie the allegations in its complaint. *See, e.g., Micron Technology, Inc. v. Rambus Inc.*, 255 F.R.D. 135, 150 (D. Del. 2009) (concluding that litigation was reasonably foreseeable by the time plaintiff had "identified potential litigation targets, causes of action, and fora," and was drafting claim charts). This evidence may be found in internal documents, public statements and communications with third parties (including government agencies). It may also be gleaned from AMD's conduct in the months leading up to its commencement of this litigation, such as the date it retained an economist to evaluate Intel's conduct, or the date it commenced an evaluation of potential legal claims.

All of these facts, once disclosed, may shed additional light on when AMD should have known that its internal documents could be relevant to litigation against Intel, and thus should have been preserved in a timely fashion. Intel simply cannot accept AMD's "take our word for it" approach.

* * *

Intel respectfully requests an order: (1) overruling AMD's objections; (2) providing Intel with time to obtain answers to unanswered questions and reasonable follow-up questions; (3) instructing AMD to provide witnesses properly prepared to answer all outstanding questions; and (4) instructing AMD to produce its witnesses for deposition in San Francisco. We look forward to discussing these issues with Your Honor at the hearing (to be rescheduled).

Respectfully,

/s/ Richard L. Horwitz
Richard L. Horwitz

RLH:cet
917980 / 29282
Enclosure
cc: Clerk of Court (via Hand Delivery)
Counsel of Record (via CM/ECF & Electronic Mail)

Exhibit 63 has been redacted in its entirety

Exhibit 64

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O'MELVENY & MYERS LLP

BEIJING
BRUSSELS
CENTURY CITY
HONG KONG
LONDON
NEWPORT BEACH
NEW YORK

400 South Hope Street
Los Angeles, California 90071-2899

TELEPHONE (213) 430-6000
FACSIMILE (213) 430-6407
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SAN FRANCISCO
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SINGAPORE
TOKYO
WASHINGTON, D.C.

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WRITER'S DIRECT DIAL
(213) 430-6230

WRITER'S E-MAIL ADDRESS
dherron@omm.com

VIA EMAIL AND U.S. MAIL

Donn Pickett, Esq.
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4067

Re: ***AMD v. Intel***

Dear Mr. Pickett:

We write to bring Intel's "histogram" exercise to closure.

Since Intel's first delivery of histograms on October 10, 2008, you have subjected us to a constantly-changing barrage of charges. For ten months, we have been attempting to obtain: (1) your identification of a specific and final set of AMD custodians about whom you are complaining; (2) your firm commitment that Intel's histogram methodology is final; and (3) a full explanation of both Intel's histogram methodology, as well as your explanation of the precise quantitative standards that Intel contends justify its demand that AMD "remediate" from backup tapes. AMD has finally prevailed on Intel on the first two issues -- but never the last.

The first challenge was getting Intel to commit to a list of custodians for whom it contends AMD ought to remediate. As is well-documented, Intel's October 2008 delivery of 35 histograms was followed by three modified sets, each based on a different methodology and each targeting different custodians: 79 histograms on November 14, 2008; 34 more histograms on March 2, 2009; and the final set of 37 histograms on April 29, 2009. (*See* my May 9, 2009 letter to you, attached as Exhibit A.) To date, Intel has sent AMD a total of 185 histograms regarding 99 separate AMD custodians. We have spent many hundreds of hours of our own and our consultants' valuable time, and well over $1 million of our client's money, only to have Intel withdraw 148 of its 185 histograms after we exposed their analytic flaws. As matters now stand, only 13 of Intel's earliest histograms -- none of them today bearing more than scant resemblance to your originals -- have survived to the final set of 37. On June 17, 2009, however, you represented that Intel's custodian selections are final and that "Intel will not produce additional or revised histograms . . . ." (*See* your letter of June 17, 2009, attached as Exhibit B.)

In order to select this final group of 37 AMD custodians, Intel has stated that it thoroughly examined virtually every AMD custodian's production. Intel also conducted all the discovery it wanted over the past year and, after that fulsome discovery opportunity, now commits and limits its complaints to approximately 20% of AMD's production custodians.

Second, this entire exercise has been characterized by Intel consuming excessive time modifying, testing and finalizing its histogram methodology. Indeed, it took Intel *almost six months* -- from delivery of its second set of histograms on November 14, 2008, to the final set's delivery on April 29, 2009 -- for Intel to re-jigger its histograms into their current form. It took another three weeks after that until May 21 (and repeated demands by AMD) for Intel to confirm that its histograms "and their underlying methodology, are in final form." (*See* your letter dated May 21, 2009, attached as Exhibit C, and my letters to you dated May 9, 20 and 22, 2009.)[1]

Intel, however, still has not explained its histogram methodology in detail remotely sufficient for AMD to attempt to replicate and rebut it. Indeed, in AMD's brief June 10, 2009 interview with Intel's consultant, Mr. Lawson confirmed that he and three of his colleagues -- along with attorneys from Bingham McCutchen and Howrey -- spent many "hundreds of hours" during the six months after November 2008 creating Intel's latest histogram methodology. But Mr. Lawson provided, at most, an incomplete sketch of it, and the artificial two-hour limit you imposed on the interview precluded any real opportunity to get under the covers of your latest methodology. Mr. Lawson also admitted that Intel did not track or document its results at each step of its histogram-generation process, and that many of the file counts and values recorded in Excel files Intel delivered to AMD do not accurately reflect Intel's current results -- and, indeed, have nothing whatsoever to do with them. In short, the self-described "general overview" of Intel's methodology in your April 29, 2009 letter and Mr. Lawson's brief interview give only a bare outline of *what* Intel did, but not *how* Intel did it in detail sufficient for AMD to attempt to replicate Intel's methodology and fully test it.

Likewise, Intel has utterly refused to identify -- let alone justify -- the quantitative factors and criteria it has employed in selecting the supposedly non-compliant AMD custodians for its "remediation" demand. Despite our inquiries, Intel has shrouded its criteria in secrecy and leaves us with no way to assess the criteria and factors on which Intel bases its demand for "remediation" with respect to the latest group of 37 AMD custodians -- as opposed to the approximately 140 AMD custodians whose productions Intel does not contest. Your March 2 and April 29, 2009 histogram letters also simply claim "loss" without defining any measures that drove Intel's custodian selections, and the so-called [redacted]" and "[redacted]" data don't disclose Intel's criteria. Likewise, the statistical analysis behind Intel's histograms is left a mystery, and you have refused our repeated requests to produce your heretofore unnamed statistical expert for informal interview or deposition to shed light on the criteria Intel actually employed. Thus, as set forth below, we are unable to discern any consistent selection criteria Intel may have used and, whatever those criteria are, they are indefensible.

[1] It also took until July 1, 2009, for Intel to produce the DCNs for the full data set underlying its histograms that AMD had first requested six weeks before in May 2009.

Overall, Intel has done everything in its power to make this histogram exercise as burdensome, expensive and distracting to AMD as possible.[2] Intel has led us down four separate histogram dead ends; compelled AMD to dedicate massive attorney and consultant hours in the midst of merits discovery and expert report preparation to debunk your patently false assertions and flagrantly flawed methodologies; and played "bait and switch" with 100 different custodians, only to withdraw your accusations as to two-thirds of that group without so much as the slightest acknowledgement of error.

It is now obvious to AMD that attempting to fully replicate and thoroughly rebut the most recent set of histograms concocted by Intel's legion of consultants and attorneys over six months would require AMD to expend substantial additional resources that, at this late point in the litigation, is neither warranted nor necessary. Fact discovery has been closed for two months now, and AMD prefers to focus its time and resources on experts and preparing for trial. And now that Intel has finally limited its demands to 37 AMD custodians, it appears it may prove less costly and certainly more expedient for AMD simply to restore applicable backup tapes and produce data. Accordingly, rather than spend the next five months taking expert depositions, obtaining and analyzing Intel's histogram-related documents, and attempting to reverse-engineer Intel's latest histograms further, AMD will instead collect and produce files from backup tapes for the identified 37 AMD custodians.

AMD's willingness to provide these files in the interest of expedition is not a concession of a duty to do so. AMD does not concede for a moment that Intel's histograms prove anything about remediable loss; far from it. As we shall show, Intel's histograms are still error-fraught, and we are convinced that, time and resources permitting, full analysis would reveal even more material defects. At most, Intel's histograms demonstrate nothing more than the fact that, despite AMD's numerous hold notices, reminders and monitoring, a limited handful of the 37 AMD custodians was less successful in preservation than others. But there is no evidence -- none -- of any preservation failure on AMD's behalf, much less a systemic one. Instead, AMD is confident that the supplemental files produced will serve principally to demonstrate two things: (1) that while some new "unique" files will certainly be produced, AMD's supplemental production will serve to duplicate OCFs that Intel already possesses; and (2) AMD's productions, along with any unique OCFs, will fill any arguable "gaps," thus demonstrating that AMD designed and implemented an effective preservation system that actually works.

The balance of this letter is dedicated to reviewing the results of the analysis of Intel's histograms that we have conducted to date. We caution that this is only a partial analysis conducted in the short time we have had the data -- repeatedly requested but only belatedly

[2] It is also perfectly evident that Intel has no real interest in production of the documents it claims are "missing." Had Intel's interest in AMD's production issues been sincere, it surely would have raised them earlier, focused on the AMD custodians it had true concerns about, and sought to obtain the documents for use in deposition. Indeed, Intel's true motives have been apparent since February 7, 2006, when Intel first informed AMD of its preservation issues and made its initial offer of a global stand-down. Since that time, Intel has stopped at nothing to force AMD to negotiate a truce. The most transparent indicator of Intel's true motives was your proposal on June 2, 2009, that AMD agree to forgo filing a sanctions motion based on Intel's evidence preservation debacle in exchange for Intel abandoning its histograms. We can think of no better indicator of Intel's true motivation for this histogram gambit.

produced -- that underlie Intel's histograms. These currently-detectable flaws in Intel's methodology and analysis, however, show that Intel has manipulated the data in order to falsely assert, depict, and vastly overstate purported "loss." It is also clear that Intel takes issue with many custodians whose data reveal no material loss or deficiency whatsoever, let alone loss that the law would require AMD to remediate at its expense.

Intel's Flawed Histogram Methodology: The long march that led us to Intel's fourth set of histograms is set forth in prior correspondence. (*See* Exh. A.) Given Intel's three prior foul-ups and the six months since November 2008 Intel took to try to get its histograms right, one would assume that Intel would have made every effort to constrain its analysis to reality and, at the very least, to conduct a quality control review before it tossed another set of histograms over our wall. No such luck.

Let's be perfectly clear what it is Intel's histograms purport to show: They are meant to provide both a pictorial and statistical depiction of *individual custodians'* efforts to preserve data. But Intel's histograms -- especially its use of "pink" files and post-journaling OCFs, as described below -- rely on inherently flawed analytic methods to paint a fictional preservation portrait that unfairly inflates and misrepresents a custodian's *actual* effort to retain documents. We describe these specific defects below.

First, Intel still has not solved its false OCF problem. And despite our admonitions to you, Intel still asserts as "loss" email files produced by the subject custodian or withheld in the ordinary course of review or by stipulation. As such, just like the October 2008 histograms and all later iterations, Intel's current histograms falsely accuse custodians of failing to save emails that they actually preserved.

AMD has conducted a manual review of just some of Intel's purported OCFs and, again, has detected significant errors.[3] We began by identifying, in the first instance, potential matches for roughly 48,500 of the 101,949 purported "yellow" OCFs Intel identified.[4] Next, we engaged attorney reviewers to review this set and, for the time being, ignored the remainder of Intel's purported OCFs. The reviewers then compared the full text of each potential match side-by-side with each purported OCF. So far, our reviewers have located over 18,300 matches from among the 48,500 purported OCFs analyzed -- i.e., roughly 38% of Intel's OCFs examined to date -- within the applicable custodians' collections. Of this total, AMD found that exact copies of 15,700 Intel OCFs are contained within the custodians' collection (either as exact matches or contained within longer strings retained by custodians). In addition, AMD found over 2,600

[3] We were surprised at Mr. Lawson's admission that Intel failed to conduct a full manual review of the alleged "missing files," choosing only to conduct a limited quality-control sampling. As AMD has said from the beginning, to be truly accurate, the detection of false OCFs requires manual review.

[4] Again, AMD did not use and has never used the near-duplicate files suppressed by operation of the Attenex software in this or any other histogram-related analysis. That is both because it is wholly unnecessary and because that information is not easily manipulated within the Attenex system. We regard Intel's continued effort to hide behind its lack of access to those unnecessary suppressed files as nothing more than an excuse for failures to conduct quality control with means readily available to you.

"partial matches" that represent instances in which the custodian retained a substantial portion (and in many cases, all but a clearly irrelevant fragment) of the purportedly missing emails.

This overall 38% error rate in the subset of OCFs that AMD has thus far examined -- and Intel's failure to detect these OCFs and make allowances for reviewer differences and other valid reasons for OCFs -- have led it repeatedly to misrepresent to the Court and Mr. Friedberg the true state of custodians' preservation compliance. For instance, even without having completed our work, we have already found that 86% of the OCFs Intel identified for [redacted] were retained by him; 87% of those identified for [redacted] were retained by him; 73% of the OCFs Intel identified for [redacted] were retained by her; 77% of the OCFs that Intel identified for [redacted] were retained by him; and AMD's preliminary efforts show that between 22% and 58% of Intel's purported OCFs for 15 additional histogram custodians are false: [redacted]. Intel has thus materially overstated purported OCFs for more than half of AMD's custodians, and perhaps more.

Finding purported OCFs among AMD custodians' legitimately-withheld documents is unsurprising. As Intel is aware, OCFs will often and innocently occur as a result of differences in responsiveness judgment exercised by different reviewers looking at the same document. The parties also have agreed to the use of a "presumptively privileged" key word search protocol that, pursuant to stipulation and Court order, authorized AMD to withhold roughly 490,000 documents captured within the searches without further review. It thus appears that Intel may have counted as "missing" emails legitimately withheld under this protocol for one custodian, but previously produced for another custodian, and vice-versa. Similarly, Intel did not make any effort to account for any of the 87,796 TIFFs that AMD produced. Thus, emails retained and then produced for a custodian in partially-redacted, TIFF format, but produced in native and unredacted form for another custodian, have been incorrectly identified by Intel's methodology as OCFs for the first custodian.[5]

The results of AMD's partial manual review underscore the limitations and unreliability of Intel's histogram attack. No matter how elaborate Intel's algorithms for eliminating false OCFs, it is simply not true that an email "missing" from a custodian's production necessarily means that custodian failed to preserve it. AMD suspects that it would find even more OCF errors were it to proceed with a manual review of the remaining 53,000 purported OCFs that Intel identified as "missing." We decline to be put to any more expense. Our analysis to date is sufficient to satisfy us that, for the fourth time, Intel has tossed in our lap a pile of false OCF accusations directed at AMD custodians without effective quality control efforts.

[5] While accounting for TIFFs and presumptively privileged documents may be complex or not fully possible (in the case of presumptively privileged documents), AMD finds it notable that Intel never acknowledged these failures and limitations in its methodology in any of its communications to the Court or AMD and, further, that Intel's consultant Mr. Lawson was not even aware of the privilege protocol and its potential effect on OCF identification.

Second, Intel improperly (and dishonestly) characterizes as "missing" thousands of emails generated or received after the applicable custodians were placed on journaling (i.e., "post-journaling OCFs"). By including such post-journaling OCFs in both its pictorial histogram depictions and statistical calculations, Intel again materially overstates custodians' purported losses, and unfairly accuses custodians of failing to preserve emails that AMD's journaling system undoubtedly did preserve.

Everyone understands that all emails sent and received by a custodian are automatically retained by journaling; after journaling, preservation is no longer within the *custodian's* control. Thus, as an analytic matter, post-journaling OCFs could not possibly represent emails that are "missing" from a custodian's production based on her or his preservation failure. Intel has not found any error in the function or operation of AMD's journaling system even after having had the opportunity to examine its workings, and AMD is aware of none. It follows that true OCFs exist in post-journaling collections *only* as a result of differences in reviewer decisions as to relevance or privilege. But those files most certainly are not "missing" from any custodian's production. Intel's inclusion of them to suggest custodian loss is thus an analytic flaw.

And it is a serious flaw. Including these post-journaling OCFs in custodians' histograms not only creates a false pictorial representation of actual custodian preservation, but also yields a statistically improper and unfair inflation of post-journaling email averages -- which Intel then compares to pre-journaling email averages to assert grossly exaggerated disparities in pre- versus post-journaling file counts. In my fourth point below, I describe how Intel's improper inclusion of post-journaling OCFs, along with Intel's "pink" emails, seriously skew the statistics that Intel uses to accuse AMD custodians of preservation failures.

Third, both Intel's histogram depictions and statistical use of the "pink" emails -- i.e., the so-called "mail after accounting for thread suppression" -- are inappropriate. At his interview, Mr. Lawson admitted that these "pink" documents are presumed not to have any unique content because they are wholly contained in the custodians' own productions. They are, therefore, by definition the same "false OCFs" that AMD eliminated from Intel's analysis when AMD presented counter-histograms in December 2008 and thereafter.

We understand that Intel purports to give AMD "credit" for the "pink" files. With respect, that is pretend credit that actually disserves reality; the "pinks" falsely depict the true volume of each AMD custodian's production. Despite Intel's purported good will, the inclusion of "pinks" thus results in an analytically-dishonest pictorial display of the actual production record. And precisely because the "pink" files are, by Intel's admission, nothing more than false OCFs, Intel should *not* have included them in pictorial depictions (since they distort the true number of unique documents actually produced, and thus present a false picture of actual custodian production), or utilized them -- as Intel did -- in its statistical calculations.

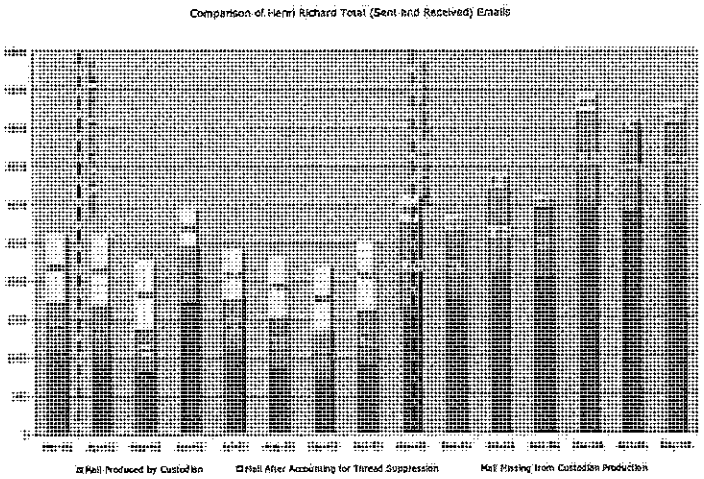
Intel's error of including "pinks" in the histograms might be forgivable -- or at least understandable -- but Intel's illicit use of these false OCF "pink" files in its purported "statistical loss" calculations is not. By using "pinks" in its calculations, Intel has done exactly what it said

it would not do: Penalize AMD for the "pinks" by improperly inflating the alleged "missing" emails with them. Intel's misleading statistics are discussed next.

Fourth, Intel's statistical use of both the false OCFs represented by the "pink" files and the post-journaling OCFs described above presents a demonstrably false picture of AMD custodian preservation within each of the 37 histograms.

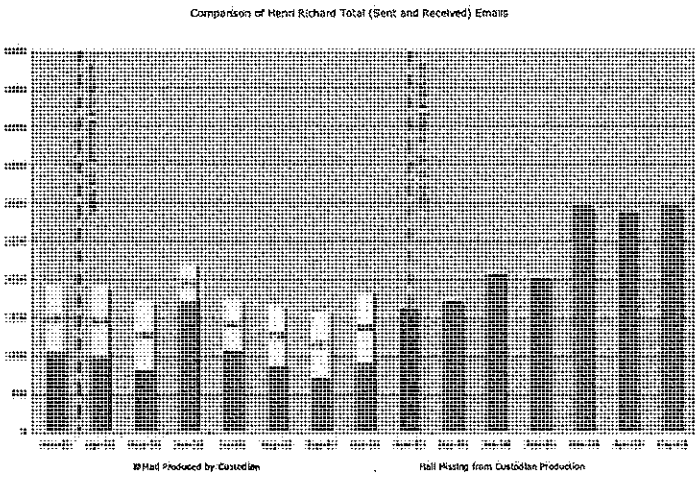
Take the histogram of [redacted], for example. Intel claims that [redacted] is "missing" an average of 1,254 emails per month. When "pink" emails are excluded from the calculation, however, that figure is reduced by 511 emails per month.[6] By including the false OCF "pink" files, Intel thus overstates [redacted] purported "missing" files by 3,580 emails over the seven-month period it analyzed. And when post-journaling OCFs -- again, all of which were preserved by AMD's journaling system and, thus, cannot represent "missing" email that the custodian himself neglected to preserve -- are also excluded, Intel's "missing" emails figure falls by another 230 emails per month. Thus, Intel overstates [redacted] "loss" by roughly 741 emails per pre-journaling month, which comes out to a whopping 5,186 purportedly lost emails over the entire pre-journaling period. Intel's improper methodology thus inflates the number of emails it claims are missing from [redacted] production by *over 144%*.

Below we depict the dramatic result of Intel's inflation for [redacted]. The first histogram is Intel's (with its "waves" converted to more accurate monthly bars) which includes the "pinks" and post-journaling OCFs Intel used to calculate 1,254 "missing" emails per month:



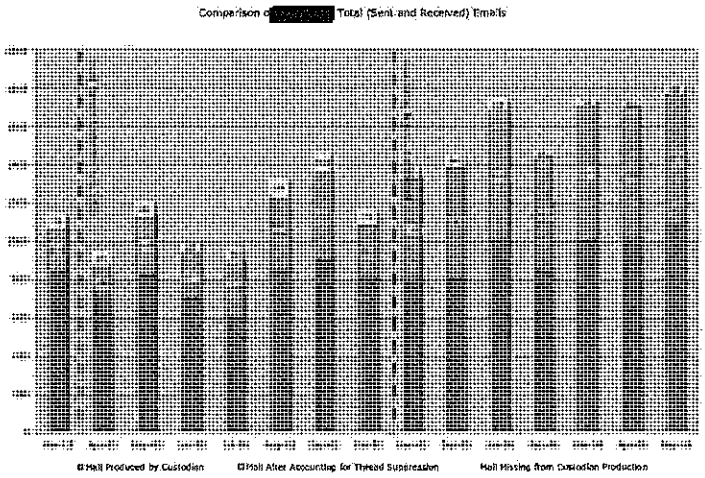
The next histogram shows that, when the improper "pink" emails and post-journaling OCFs are removed, the picture is much different:

[6] In recalculating the number of "missing" emails, AMD uses the data Intel provided. Because Intel has not provided its histogram data in any unit smaller than an entire month, however, AMD includes the month in which journaling commences (typically November 2005) with the other post-journaling months.

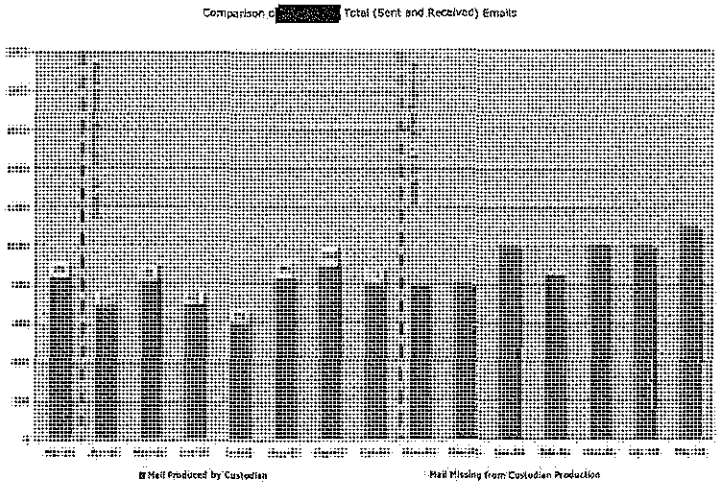


As depicted in this corrected chart, AMD produced for [redacted] roughly 1,803 unique emails per month before journaling, and 2,545 emails per month after journaling. Thus, there is an average disparity between pre-and post-journal months of roughly 743 emails per month -- driven mainly, it appears, by [redacted] higher emailing activity in the three month period from March through May, 2006. This production picture shows thousands of emails produced in each pre-journaling month, and pre-journaling monthly email totals that exceed some post-journaling monthly email totals. Intel's calculations thus seriously overstate reality and do not try to and can't account for fluctuations in [redacted] emailing activity.

Intel has also exaggerated OCF figures for [redacted] (for whom Intel overstates "lost" emails 647 per month, or 4,529 emails total -- an inflation of 2,000%); [redacted] (overstating at least 386 "lost" emails per month, or 2,702 in total -- an inflation of over 450%); and [redacted] (overstatement of at least 444 "lost" emails per month, or 1,774 in total, thus inflating Intel's figure by 42%), to name a few. Of particular note is Intel's chart for [redacted]:



The picture Intel created is deceiving. While Intel claims [redacted] is "missing" 471 emails per month, when the illicit "pinks" and post-journaling OCFs are removed, [redacted] pre-journaling monthly average is -- at *most* -- about 85 emails less than his post-journaling monthly average, a differential of less than 10%. This is a paradigm example of Intel's use of quantitative measures to identify remediation candidates that is indefensible. Indeed, an accurate histogram shows tha[redacted] pre-journaling and post-journaling monthly email file counts are virtual "mirror images":



These defects are pervasive throughout Intel's analysis. Attached below is our analysis for 27 of the 30 histogram custodians that Intel accuses of the '[redacted] Pattern," i.e., differences in email volumes before and after journaling.[7] It illustrates the significant inflation of Intel's statistics that occurs virtually across the board for these custodians, and the claimed "loss" of 39,000 emails that aren't missing at all:

[7] For three of the thirty [redacted]" custodians included in Intel's April histogram letter -- [redacted] -- AMD was unable to replicate Intel's monthly averages, and is therefore unable to calculate exactly how their histograms are affected by Intel's errors.

Custodian	A. Intel's Average Number of "Missing" Emails per Month[8]	B. Intel's Average, Without the "Pinks" and Post-Journaling OCFs	C. Intel's Overstatement of Lost Emails (Subtracting Columns A from B)	D. Intel's Total Inflation of "Missing" Email (Sum of Column C for Pre-Journaling Months)	E. Percentage Increase in Alleged "Lost" Emails Per Month Due to Intel's Flawed Methodology
[redacted]	802	466	336	2353	72%
[redacted]	348	322	26	130	8%
[redacted]	940	701	239	1196	34%
[redacted]	621	398	223	893	56%
[redacted]	611	498	113	788	23%
[redacted]	680	33	647	4529	1961%
[redacted]	296	146	150	450	103%
[redacted]	331	173	158	1103	91%
[redacted]	195	-146	341	2386	[n/a][9]
[redacted]	665	420	245	1712	58%
[redacted]	219	172	47	330	27%
[redacted]	471	85	386	2702	454%
[redacted]	466	385	81	324	21%
[redacted]	362	308	54	216	18%
[redacted]	1599	1240	359	1796	29%
[redacted]	1505	1061	444	1774	42%
[redacted]	418	267	151	602	56%
[redacted]	263	174	89	624	51%

[8] For column two, AMD uses the figures that Intel provides in its histogram letter of April 29, 2009, at p. 4. AMD attempted to reproduce Intel's average number of "missing" e-mails per month by taking the difference between the monthly average of all pink, red, and yellow e-mails before journaling and the monthly average after journaling -- the same calculation Intel describes in the April 29, 2009 letter. AMD found that Intel has inflated these basic monthly average calculations, but we are unable to tell how or why. This is another example of how Intel's statistics remain a black box.

[9] It is not possible to calculate a percentage *increase* in "lost" e-mails in [redacted] case because the corrected number of lost or missing e-mail is less than zero, i.e., [redacted] has more e-mail volume in the months prior to journaling than after journaling is implemented.

Custodian	A. Intel's Average Number of "Missing" Emails per Month[8]	B. Intel's Average, Without the "Pinks" and Post-Journaling OCFs	C. Intel's Overstatement of Lost Emails (Subtracting Columns A from B)	D. Intel's Total Inflation of "Missing" Email (Sum of Column C for Pre-Journaling Months)	E. Percentage Increase in Alleged "Lost" Emails Per Month Due to Intel's Flawed Methodology
[redacted]	1238	1009	112	782	11%
[redacted]	402	255	147	589	58%
[redacted]	1254	513	741	5186	144%
[redacted]	240	136	104	623	76%
[redacted]	235	163	72	501	44%
[redacted]	794	680	114	457	17%
[redacted]	814	393	421	3366	107%
[redacted]	549	399	150	899	38%
[redacted]	352	268	84	585	31%

AMD is not suggesting that these calculations, which begin to fix only two of Intel's inaccuracies, actually reflect how many emails a custodian saved or purportedly "failed to save." Rather, our point is that Intel's analytically-bankrupt introduction, pictorial depiction and statistical use of "pinks" and post-journaling OCFs produce materially misleading results. These results leave AMD to guess at what confused standard -- i.e., what quantitative measures and criteria -- Intel has selected and applied to conclude that these particular custodian's document productions require remediation. This is especially true as to custodians whose preservation "issue" appears to be based *solely* on Intel's improper inclusion of "pinks" and post-journaling OCFs, which include [redacted], and [redacted], to name a few. Indeed, per the corrected analysis described above, [redacted] is "missing" no more than 33 emails per month -- while her total production consists of over 1,500 e-mails per month. This is hardly a picture of loss and does not remotely justify Intel's remediation demand as to her.

We are confident that the foregoing are not Intel's only analytic flaws. For instance, were AMD able to fully investigate precisely how Intel conducted its de-duplication analysis, it may uncover the true cause of the massive increase of 60,000 pink emails for 28 custodians between Intel's March and April 2009 histograms. Intel's consultant Mr. Lawson stated that the biggest contributing factor to this increase was an "updated de-duplication technology," apparently referring to de-duplication of the pool of potential OCFs, a preliminary step in Intel's histogram analysis. How changes to preliminary de-duplication could yield such a massive shift

in Intel's latest histograms remains a mystery. Whatever the underlying cause for it, however, the effect on Intel's statistics was drastic: In March 2009, Intel contended that AMD custodian [redacted] was "missing" 467 emails per month; in April 2009, this somehow grew to 802 purportedly "missing" emails per month -- a 72% increase despite the fact that AMD made very few, if any, additional email productions during that time (and certainly, none for [redacted]). Likewise, absent any additional production, Intel bumped [redacted]' monthly average for "missing" emails from 832 to 1,505 per month - an increase of 673 monthly emails, or 81%. A significant number of Intel's other '[redacted] pattern" custodians were similarly affected. The underlying causes for this remain an impenetrable black box.

In sum, the flaws that AMD has already discovered are sufficient to demonstrate that Intel has -- intentionally or through want of proper care -- produced analytically-dubious histograms and statistics that indisputably present a false picture of custodian productions and preservation efforts. And that is *all* Intel produces: A set of file counts with no explanation whatsoever as to why the tallies of allegedly "lost" files or purported number of "missing" emails mark the trigger point for when a litigant is required to voluntarily turn to inaccessible backup tape data to supplement its production.

As discussed next, this falls well below the standard of proof any responsible litigant should have demanded of itself.

Intel's Histograms Are Not Dispositive Proof of Anything: Beyond presenting four vastly varied versions of histograms, Intel has never made *any attempt* at a true evidentiary showing of AMD custodian preservation failure. Instead, Intel apparently expects the Court to accept its histograms in a vacuum, un-supplemented by other evidence.

And that is because Intel has no other "proof." Of the 37 subject histogram custodians, Intel did not depose 26 of them. Of the 11 it did depose, Intel asked no preservation questions whatsoever of 6 custodians. This includes [redacted] -- after whom Intel named a purported preservation pattern.[10] And as to those it did question about preservation, Intel offers no testimony now -- and has offered none before -- which suggests that the custodian did not know about, or attempt in good faith to adhere to, his or her preservation duties. Indeed, the handful of histogram custodians who *were* asked preservation questions all testified that they diligently followed preservation instructions. *See* [redacted]

[10] Quite incredibly, this also includes AMD custodian [redacted]. Intel, of course, highlighted [redacted] loss as a means to justify the preservation discovery it has been conducting for over a year, and then conducted both extensive formal and informal discovery about that loss. But when it came to [redacted] deposition, *Intel had no questions whatsoever about preservation.*

[redacted]

Intel's histograms also are not evidence that *AMD itself* did not satisfy its duty to preserve evidence. AMD diligently met its preservation obligations for each of the custodians in Intel's set of histograms by, among other things, providing prompt initial hold notices for *all* 37 AMD histogram custodians between April and July 2005, and also providing at least two and as many as 5 reminders prior to their being placed on journaling. That a small handful of AMD custodians could have done a better job preserving emails does not imply any failure on AMD's part to implement and monitor a legally-compliant preservation plan. Intel presents not a shred of evidence to show otherwise.

In addition, Intel's continued argument that OCFs are "proof" only of AMD loss is duplicitous. The principal foundation of Intel's own remediation plan is that the same "missing" emails it uses to attack AMD's custodians are, for Intel, "repopulation sources" sufficient to fully supplement the productions of non-compliant Intel custodians. ("To the extent there is a retention issue with a specific custodian, another source of emails and related attachments that can be used to augment that Custodian's production are the records of other custodians that either sent or received such emails and their attachments." *See* Intel's April 23, 2007, Remediation Plan at p. 34.) Intel fails to give AMD the same credit. If, as Intel contends, *post-remediation* OCFs are sufficient to augment a production to cleanse an Intel custodian of any preservation wrongdoing, then surely *pre-remediation* OCFs that fill perceptible gaps should obviate the need for AMD to remediate at all. AMD has made this point repeatedly and, yet, Intel still contends that OCFs show only "loss" for AMD, but complete and defensible productions for Intel.

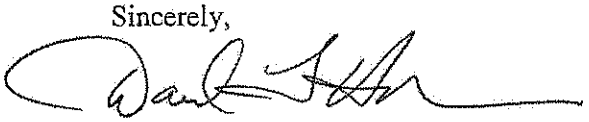
That double standard is analytically dishonest. Where there is a collection of OCFs that AMD has already produced to Intel that appears to fill any "gaps" in production, there is an absence of the "good cause" necessary to require AMD to resort to backup tapes. (*See* Fed. R. Civ. P. 26(b)(2)(B) (necessity of showing "good cause" in order to force a producing party to resort to inaccessible data).) If Intel were to apply the same "OCFs-fill-gaps" standard to AMD's custodians that it readily uses for its own, Intel would find that the volume of email for many AMD custodians is identical (or even greater) *before* journaling than *after* journaling or, in any event, fill perceptible gaps in a custodian's own retention. (*See* Exhibit D, attached hereto.)

We have not attempted here to exhaustively chronicle all of Intel's problems as to the 37 AMD custodians it targets. But our examination of Intel's histograms shows that Intel improperly asserts a remediation duty as to all sorts of other custodians without justification. This includes three custodians who were on *sabbatical leaves* during the pre-journaling period, fully explaining relatively low file counts in their email productions for that time period; custodians, like [redacted], where modest variations in file counts month-to-month do nothing to undercut a successful preservation picture; and other custodians where Intel's suggestion of loss is highly dubious, if not frivolous. (*See* Exhibit D, attached hereto.) We will save for another day -- after AMD has produced supplemental files -- a detailed analysis of each

and every custodian's production. Intel is on notice, however, that it will be put to the test of explaining why it demanded "remediation" for these custodians, and what factors justified this exercise -- beyond Intel's desire to impose as much burden and expense on AMD as possible in order to extract a stand-down on Intel's evidence destruction issues. AMD reserves all rights.

For now, however, AMD is done with Intel's distracting histogram exercise that does not show what Intel contends. Rather than continue to divert resources to further debunking yet another set of dubious histograms that took Intel six long months to concoct, AMD will produce data from backup tapes. In order to expedite production, AMD will apply the "presumptively privileged" protocol to these documents, and produce them on a rolling basis. We anticipate that this effort will be completed within the next two to three months. It will prove not to be easy, quick or cost-free. In the circumstances, however, it is time to turn our attention to trial preparation and, of course, Intel's destruction of vast quantities of relevant evidence as to which Intel's entire histogram exercise appears to have been designed as a defense.

Sincerely,



David L. Herron
of O'MELVENY & MYERS LLP

cc: Eric Friedberg, Esq. (by email only)
Jennifer Martin, Esq. (by email only)
Jason Novak, Esq. (by email only)

LA3:1160407.3

EXHIBIT A

O'MELVENY & MYERS LLP

BEIJING
BRUSSELS
CENTURY CITY
HONG KONG
LONDON
NEWPORT BEACH
NEW YORK

400 South Hope Street
Los Angeles, California 90071-2899
TELEPHONE (213) 430-6000
FACSIMILE (213) 430-6407
www.omm.com

SAN FRANCISCO
SHANGHAI
SILICON VALLEY
SINGAPORE
TOKYO
WASHINGTON, D.C.

May 9, 2009

OUR FILE NUMBER
008,346-163

WRITER'S DIRECT DIAL
(213) 430-6230

WRITER'S E-MAIL ADDRESS
dherron@omm.com

VIA E-MAIL AND U.S. MAIL

Donn Pickett, Esq.
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4067

Re: ***AMD v. Intel***

Dear Mr. Pickett:

On April 29, 2009, Intel produced its now fourth-amended and revised set of "histograms" for 37 AMD custodians. Before AMD commits any more time and money to assessing histograms and providing a response to this new set, we must request and insist that Intel confirm two points in writing: First, that the 37 "subject custodians" are the only AMD custodians for whom Intel requests or will request that AMD "remediate" by providing supplemental files; and, second, that the methodology underlying this fourth set of Intel histograms will not be subject to any further revision, i.e., that this is the last and final methodology Intel will utilize in histogram creation and analysis.

Intel needs to commit once and for all on these points. Over the past seven months, AMD has spent an extraordinary amount of time, effort and money assessing Intel's past histograms and, in every instance, discovered and reported material errors in them that led Intel back to the drawing board. Intel's histogram history is well-known to you:

- On October 9, 2008, Intel produced 35 histograms of AMD employees. In an informal interview held shortly thereafter, AMD pointed out obvious flaws in Intel's analysis.

- More than a month later on November 14, 2008, Intel conceded its errors and presented 79 new histograms. Of these, 35 were said to replace the October 9 histograms, and 44 were entirely new. Intel characterized these histograms as reflecting a "revised analysis" with "additional elements" and a changed methodology. (*See* your letter of November 14, 2008.)

- AMD then spent the next two weeks, including over the Thanksgiving holiday, analyzing Intel's newly-concocted histogram methodology on an expedited basis. In filings with

the Special Master and his consultants on December 5 and 9, 2008, AMD again exposed Intel's methodological flaws, and demonstrated that Intel had not undertaken reasonable measures to eliminate false OCFs, or conducted proper quality control.

- Intel then took the next *three months* to reanalyze, rework and rejigger its histograms for a third time -- and remained perfectly silent about histograms during that entire time period. On March 2, 2009, however, Intel presented its then thrice-revised set of histograms of 34 AMD custodians.[1] Many of the AMD custodians depicted were entirely new to Intel's histogram analysis, and Intel abandoned arguments about alleged non-preservation by dozens of earlier-identified AMD custodians. At that time, you stated that: (1) Intel had implemented another new and significantly-revised methodology to prepare this set of histograms; (2) that "*Intel has now done everything in its power to fairly and accurately identify missing documents*"; and (3) Intel was requesting that AMD produce supplemental files but only for the 34 "subject custodians" identified in your letter. (*See* your letter dated March 2, 2009.)

- Ten days later on March 12, 2009, we sent you a letter identifying yet again serious flaws in Intel's methodology, using one AMD custodian [redacted]) as an example. (A copy of our March 12, 2009 letter to you is attached for your reference.)

- Two days after that, on March 14, 2009, you sent us an email advising that you had identified "a minor error in the analysis underlying the histograms" related to "a single item on one line of code." You promised to provide corrected histograms "shortly" and, until then, suggested "suspension of any analysis related to the March 2 versions of the histograms." AMD followed your suggestion. Again, however, we heard nothing more from you about histograms.

- Then on April 29, 2009[2] -- i.e., *two months* after your March 2 histograms and a *month and a half* after you directed us to put "pencils down" on any analysis -- you delivered "Intel Histograms Version 4.0" for 37 AMD custodians. Notably, without explanation, 6 custodians depicted in your March 2 histograms have been removed and 9 new ones have been added. And, again, Intel's histogram methodology has materially changed, now for a fourth time: The error you referenced is now said to affect "hundreds of lines of code" -- not just one, as you stated before; Intel has "added certain additional terms to its queries"; Intel has subjected purported OCFs to "two tests" never revealed before; and Intel conducted a statistical analyses your letter doesn't describe. (*See* your letter of April 29, 2009.)

AMD is interested in testing Intel's new histograms and, more importantly, in bringing this entire histogram exercise to a close. But we are not about to embark on this exercise for a fourth time only to have Intel later change course yet again -- especially when merits discovery is at full swing and the discovery cutoff of June 12, 2009 looms. Accordingly, please confirm in

[1] This set of Intel histograms was delivered just *three days* before the commencement of Rule 30(b)(6) depositions and, as such, appeared intended to impair AMD's ability to analyze them and respond promptly.
[2] This set of Intel histograms was produced just *one day* after we agreed to your proposed briefing schedule for Intel's pending motion to compel deposition answers and, again, leads us to suspect ulterior motive.

writing that the 37 AMD "subject custodians" are the only custodians for whom Intel seeks "remediation" and that Intel's histogram methodology is at long last final.

We also are compelled to correct two misstatements in your April 29 letter. First, you take us to task on late productions of 13,000 files for three custodians -- all of which were produced prior to their depositions. With all due respect, Intel's complaint is petty in light of its own late productions which dwarf AMD's in size, scope and their disruptive effect on depositions. You well know that: (1) Intel produced hundreds of thousands of files equating to over 500,000 pages of documents for almost 190 Intel custodians -- 22 of whom had already been deposed -- in May and December 2008; (2) in April 2009, Intel produced 30,000 files for Intel custodians [redacted] just prior to two of these custodians' depositions because of Intel "journal extraction" errors; and (3) on April 30 -- i.e., *the day after your most recent accusation about AMD's productions* -- you informed us that Intel will be producing over 5,000 documents for 10 more Intel custodians (five of whom already have been deposed) and cancelled the imminent deposition of one of those people. Overall, Intel has produced documents after conclusion of the depositions of approximately 30 Intel custodians, including some of its highest-ranking executives. Again, we do not suggest that AMD's productions have been flawless, and we will provide a last clean-up production shortly. But Intel's unabated, material production failures make us question your motivation to lodge charges of far lesser offenses against AMD.

Second, you assert that AMD failed properly to disclose preservation problems and that AMD's counsel have violated their "professional obligations." That is reckless poppycock; we reject it entirely. Given the fulsome record of Intel's lack of transparency -- and new discoveries we are making right now of Intel non-disclosures for literally dozens of its custodians -- it appears that you alone labor under the misimpression that Intel has been fully forthcoming while AMD has not. In any event, we advise circumspection to you, and that you avoid further cavalier attempts to impugn us with false charges.

We look forward to your prompt response.

Sincerely,

David L. Herron
of O'MELVENY & MYERS LLP

cc: Eric Friedberg, Esq. (by email only)
Jennifer Martin, Esq. (by email only)
Jason Novak, Esq. (by email only)

LA3:1157562.1

EXHIBIT B

BINGHAM

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

June 17, 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* – Follow-up to Informal Interview

Dear David:

This letter follows your interview of Intel's consultant, Neal Lawson, on June 10, 2009.

First, Intel will not produce additional or revised histograms based on AMD's production of new data after April 29, 2009. We believe it is most efficient to focus on the static set of data as of April 29, 2009 (the date Intel produced its latest histograms), and that running updated versions to account for the new data is not a productive use of time or resources. Moreover, we do not believe that AMD's production of new data has adequately remediated any of the subject custodians' productions. We expect, however, that AMD will not use the existence of newly-produced items in subject custodians' productions to claim that Intel's methodology, as opposed to AMD's recent productions, resulted in so-called "false OCFs."

Second, although we have already provided you with detailed information about Intel's selection of the "subject custodians" – including the raw data used for the analysis, a description of the analysis, and the results thereof – Intel renews its offer to answer questions about that process (subject to non-waiver agreement) if AMD provides its questions in writing.

Third, we again renew our request for the metadata (not including message content) of the emails AMD suppressed as a result of its near-deduplication protocol. Now that fact discovery has ended -- which you previously explained was a prerequisite for production of such metadata – we again request that AMD produce the metadata or, as a preliminary step, provide an explanation of the claimed burden from a technical and cost perspective.

Sincerely yours,

Donn P. Pickett

cc: Mr. Eric Friedberg, Esq. (by email)
Ms. Jennifer Martin, Esq. (by email)
Mr. Jeffrey Fowler, Esq. (by email)

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

415.393.2000
415.393.2286
bingham.com

EXHIBIT C

BINGHAM

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

May 21, 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* – AMD's Document Preservation Issues

Dear David:

This responds to your letter of May 20, 2009.

I find your first, second and third paragraphs to be somewhat unclear, so let me try to restate the issues so there is no misunderstanding.

- The histograms we produced on April 29, 2009, and their underlying methodology, are in final form. We have requested that AMD remediate the document productions of the 37 subject custodians. If AMD does not satisfactorily remediate those custodians' productions, Intel reserves the right to file a motion to compel on these issues.

- Whether or not it is called remediation, Intel intends to file a motion to compel the production of unique, responsive, non-privileged documents related to all AMD production custodians from AMD's March 2005 snapshot.

- In my letter of May 14, 2009, I requested that AMD, in advance of the forthcoming motion practice on all these issues, either (a) stipulate to a reasonable briefing schedule that provides Intel with an opportunity to supplement the evidentiary record to the extent Intel receives additional evidence (including an opportunity for AMD to respond to any additional evidence), or (b) agree that Intel is not foreclosed from its requested relief if it files its motion(s) to compel after the close of fact discovery. We await your immediate response on this important scheduling issue, which you promised "shortly" in your May 20, 2009 letter.

On the other topics raised in our respective letters, allow me to make a few points.

- We will be serving a response to AMD's recent discovery requests tomorrow or over the weekend.

- On Glover Park, we will respond to Mark's recent email in short order.

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

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

T 415.393.2000
F 415.393.2286
bingham.com

- On the document that is the subject of the parties' letters to Judge Poppiti dated April 21, May 1, May 4 and May 7, I wish to note that it has now been 30 days since we brought this matter to your attention. We expect that AMD will produce a redacted version of the document promptly. If you do not provide a redacted version in sufficient time for us to meet and confer in advance of the May 29 hearing before Judge Poppiti, we intend to raise the issue at the hearing solely to ascertain the procedural means by which any dispute about the document may be resolved.

- We look forward to your response to our request that additional depositions be conducted within ten days of the May 29 hearing (in the event the Court grants Intel's motion to compel).

Sincerely yours,

Donn P. Pickett

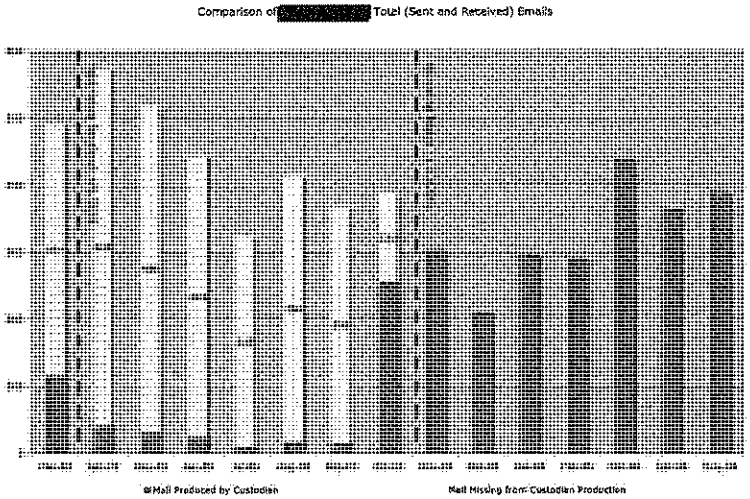
cc: Mr. Eric M. Friedberg, Esq. (by email)
Ms. Jennifer Martin, Esq. (by email)
Mr. Mark A. Samuels, Esq. (by email)

EXHIBIT D

EXHIBIT D

PRELIMINARY ANALYSIS OF SELECT INTEL HISTOGRAMS

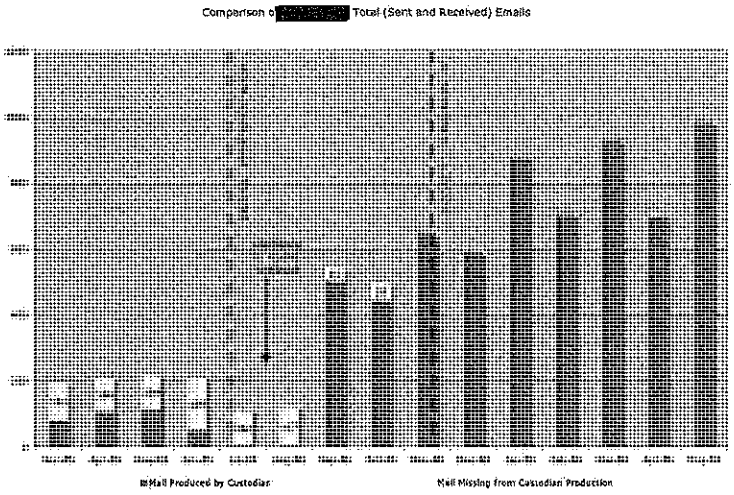
OCFs Fill Gaps. One example is AMD's custodian, [redacted]. The following chart utilizes Intel's data set, but replaces the less precise "waves" with bars and removes Intel's "pink" emails and post-journaling OCFs from consideration:



[redacted] pre-journaling file counts reflect a relatively high proportion of OCFs. Were [redacted] an Intel custodian, however, Intel would argue that his pre-journaling OCFs and post-journaling file counts provide a complete production. Other AMD custodians for whom actual OCFs supplement the custodian's own production include, among many others, such custodians as [redacted]

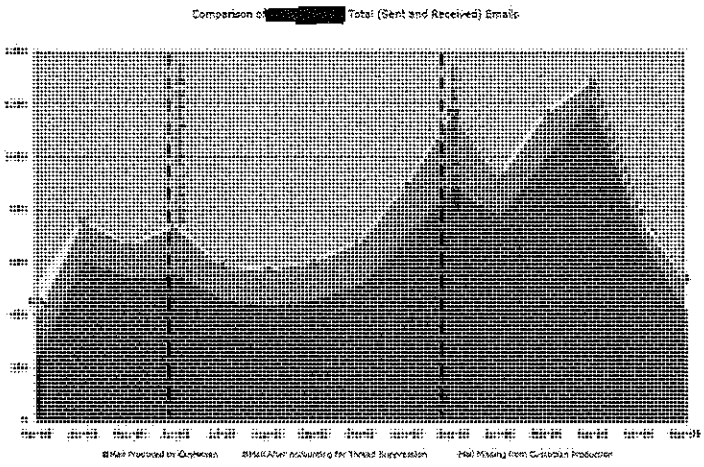
Sabbaticals. AMD's records show that at least three of the 37 histogram custodians – [redacted] -- were on sabbatical leaves during the pre-journaling period, thus explaining relatively low file counts for that time period.

For instance, Intel alleges that [redacted] is "missing" 402 emails per month prior to journaling. But he was on sabbatical from July 11, 2005 through September 6, 2005. When his email totals from July and August 2005 are factored out, it becomes clear that Intel's figure is exaggerated by at least 150 emails per month, or nearly 60%. And comparing the last two full post-journaling months for [redacted] (September and October 2005) with the first two journaling months (November and December 2005), this corrected chart yields a preservation picture at odds with the one that Intel portrays:

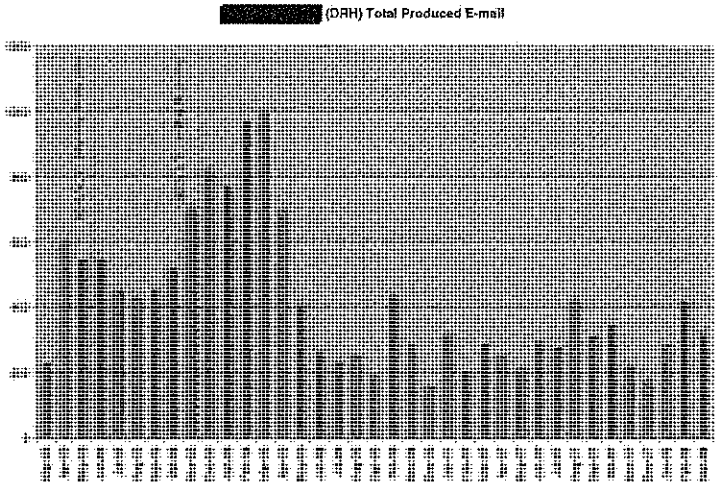


Likewise, Intel alleges that [redacted] is "missing" 331 emails per month prior to journaling. But without accounting for his sabbatical from May 31 through August 1, 2005, Intel's "loss" figure is overstated by at least 158 emails per month - an exaggeration of 91%. And [redacted] email counts in the months after he returned from sabbatical are on par with the volumes in several post-journaling months. Intel also alleges that [redacted] is missing emails prior to journaling. When his sabbatical from August 26, 2005 through October 23, 2005 is accounted for, AMD's analysis shows that Intel materially overstates purported loss.

File Count Variations. Ever since Intel accused AMD custodian [redacted] in September 2007 of not saving 593 emails -- *all of which* AMD was able to locate in interim strings in his production -- Intel has been unable to show that [redacted] failed to preserve:

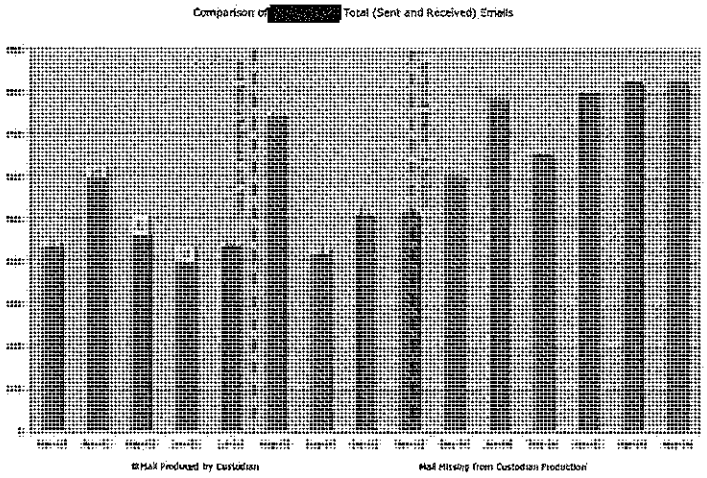


Intel's own analysis also shows that, almost without exception, every email [redacted] sent or received, he kept himself. Intel's argument about purported loss appears, therefore, to be based solely on the "spike" of email activity between January and April 2006 and the pre- and post-journaling file count disparity that creates. Intel has cherry-picked data. Indeed, here is [redacted] *entire* post-journaling production through March 2008:



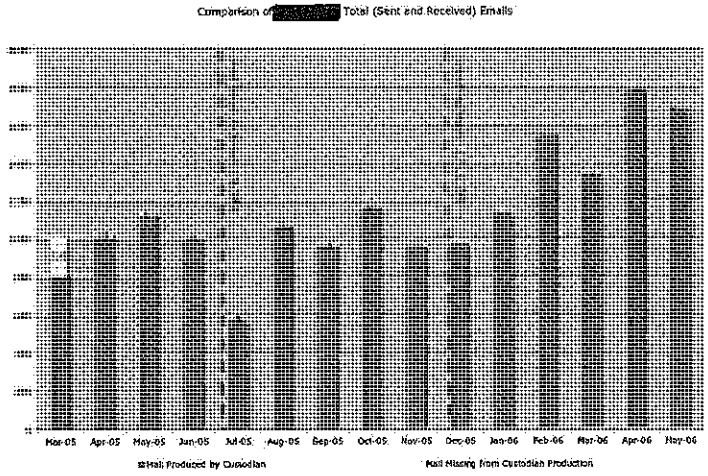
Intel's own data demonstrates that AMD produced relatively high volumes of email for [redacted] during the one year period from April 2005 through April 2006 and, thereafter, his volumes of relevant and responsive e-mail decreased substantially month by month *when he was on journaling*. There are many other AMD custodians among the 37 Intel has identified whose production record is similar to [redacted].

Other Custodians. Intel has included a number of other custodians for whom accurate data tends to suggest good faith efforts at compliance. Take, for example, [redacted]:



Excluding "pink" emails and post-journaling OCFs, [redacted] produced nearly 600 emails per month prior to journaling, and a little over 700 emails after journaling. This shows few, if any, OCFs even by Intel's count; robust monthly retention by the custodian himself; and pre-journaling file retention that exceeds or equates to post-journaling totals. Intel's illicit use of data *more than doubled* the number of monthly "missing" emails for [redacted] -- from 146 to 296 per month -- to justify a demand for remediation.

[redacted] corrected histogram is similar:



Intel overstates its "loss" figures for [redacted] by 56%, or an additional 900 "missing" emails per month. Again, the actual file counts show almost no OCFs and relatively consistent monthly productions.

LA3:1160443.1

Exhibits 65-69 have been redacted in their entirety

Exhibit 70

BINGHAM

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

August 28, 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* – Restored Data

Dear David:

During Intel's continued Rule 30(b)(6) deposition, [redacted] *See, e.g.*, [redacted] In light of AMD's prior representations and objections to Intel's specific inquiries, we were surprised to learn about the timing and scope of these previously undisclosed restoration activities. AMD has committed to production of unique, responsive, non-privileged data for 37 of these 57 custodians. *See* 8/24/09 Tr. 13:9-19. The remaining custodians for whom AMD has not made a similar commitment include the following: [redacted] If so, we believe AMD's restoration and subsequent non-production is inconsistent with AMD's discovery obligations.

We wish to schedule a meet and confer with you next week to discuss this issue, as well as the schedule for the forthcoming motion practice. We suggest Tuesday (9/1/09) at 10, 11 or 3 p.m. (PDT) or Wednesday (9/2/09) at 10, 11 or 2 p.m. (PDT).

Please note this letter constitutes notice pursuant to subparagraph (d) on page 2 of the parties' June 12, 2009 Stipulation and Proposed Order Regarding Filing Deadline For Intel's Motion(s) to Compel. Intel reserves all rights under that stipulation, the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

Sincerely yours,

Donn P. Pickett

Donn P. Pickett

cc: Mr. Eric Friedberg, Esq. (by email)
Ms. Jennifer Martin, Esq. (by email)
Mr. Jeffrey Fowler, Esq. (by email)

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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

T 415.393.2000
F 415.393.2286
bingham.com

Exhibits 71-73 have been redacted in their entirety