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VIA ELECTRONIC FILING, BY HAND & E-MAIL

The Honorable Vincent J. Poppiti
Blank Rome LLP
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PUBLIC VERSION

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

Dear Judge Poppiti:

On March 16, 2007, this Court entered an order requiring Intel to provide a “detailed written description of the preservation *issues* affecting [each] Intel Custodian, including the *nature, scope and duration* of any preservation issues.” (emphasis added) Intel did just that. Its counsel, Weil, Gotshal & Manges (“Weil”), distilled the thousands of pages of notes created during its interviews of more than 900 document preservation Custodians into 400 pages of *summaries* that were delivered to AMD and the Court. These summaries, for that is all they were, fairly and accurately described the “nature, scope and duration” of preservation issues for each Custodian. And, most importantly, the underlying Weil interview notes fully support Intel’s representation that AMD sought to challenge by requesting the notes, specifically that there was no instance of “...deliberate deletion to deny AMD access to any information responsive to the allegations in the complaint.” (Mot. at 1-2 (citing Intel’s April 23, 2007 Report and Proposed Remediation Plan)).

AMD, acknowledging that all it had - in fact, all it was entitled to have - were summaries *prepared by counsel*, sought the production of the actual Weil interview notes in their entirety. Intel objected based on privilege, and after extensive proceedings, the Special Master ordered the production of a redacted set of those notes, more than 4,600 pages in all. Since the time the notes were produced in mid-June, AMD has apparently combed those notes in an effort to try to find details in them not included in the summaries. After finding what it considered such details, and then engaging in only the most perfunctory and partial meet and confer with Intel, it filed this Motion, claiming, without basis, that it had uncovered “systematic concealment of critical facts” and “dramatic discrepancies.” As will be shown here, AMD is just plain wrong. The details that AMD finds missing do not constitute *issues* concerning the “nature, scope and

duration” of preservation issues. And even if they did, in the end they might apply to fewer than 1% of the Intel Custodians. Such an “issue” is not systematic or dramatic. Indeed, it is no issue at all.

It should be observed that the Motion has nothing to do with the bona fides of Intel’s Custodians, who simply participated in the telephonic interviews conducted by Weil. Nor is the Motion directed at any harm AMD claims to have suffered due to Intel’s voluntary disclosure of preservation issues. Rather, having now nit-picked its way through the interview notes, AMD is accusing Intel’s lawyers of intentional omissions in preparing the summaries. This tactic turns what was a good faith effort to provide information to AMD into an after-the-fact attack presumably intended more for press purposes than the merits of this litigation.

Background

In early 2007, Intel voluntarily disclosed to AMD, the Court and the Special Master that it had discovered lapses in its retention program. Intel then engaged in a vast undertaking to provide voluminous information to AMD regarding Intel’s preservation efforts and lapses. Among many other things, this information has included the production of approximately three quarters of a million pages of documents related to retention issues and nine days of depositions related solely to retention or remediation issues.¹

From the very outset of the voluntary disclosure, Intel shared with AMD information concerning the Custodians. Intel initially provided to AMD a chart dated February 22, 2007 that contained information concerning the 239 Custodians who, as of that time, had been designated as Production Custodians by either AMD or Intel.

Paragraph 6 of the March 16, 2007 Order (the “Order”), which was the product of negotiations between the parties, specifically referenced the chart and then required Intel to provide a “detailed written description of the preservation issues affecting the Intel Custodian, including the nature, scope and duration of any preservation issue(s).” In other words, Intel was to expand upon the information provided in the February 22 chart. Paragraph 8 of the Order extended this obligation to all of the preservation Custodians who had not been designated as Production Custodians. The end product of this effort is what are now known as the Paragraph 8 Custodian Summaries (the “Summaries”). The source material for the Summaries were notes

¹ Intel also provided detailed information regarding thousands of Weekly Backup Tapes, Complaint Freeze Tapes and hard drive harvests, informal technical exchanges with Intel’s remediation vendors (Intel voluntarily proposed what may well be the most extensive remediation program in the history of litigation, at a cost of well over \$20 million), detailed information regarding Intel’s IT system, information on when Custodians first received the litigation hold notices, as well as extensive explanations of preservation-related issues.

prepared by Weil when it conducted more than 900 interviews of current and former Intel employees concerning their document preservation practices.²

AMD received the initial set of Summaries on April 23, 2007, and the remainder on a rolling basis in the weeks and months that followed thereafter. (*See, e.g.* D.I. 321, 336, 339, 346, 352, 355-56, 375-77, 379-80, 384-85, 388-89, 391-93, 395-98, 401-02, 404-05, 409-10, 416-17, 422-23, 473-74) In November 2007, AMD moved to compel the underlying Weil attorney interview notes (“Weil Motion”). In the Weil Motion, AMD recognized that the Summaries were “cursory descriptions” and argued that they therefore did not contain “all the information they need” because they were just “high-level, attorney-crafted summaries of what the custodians ostensibly reported.” (Mot. at 4). AMD further asserted that it “merely” sought “an efficient mechanism to get the whole story out without embarking on a world tour of costly...preservation depositions.” (DM4A at 29). Simply stated, everyone involved has long understood that the Summaries were distilled versions of more detailed interview notes, and when AMD requested that greater detail, the Special Master navigated through the complex privilege and work product issues and then ordered production of redacted versions of the notes.

It now appears that AMD had an additional agenda. Upon receipt of the interview notes, AMD evidently scoured those notes looking for information therein that was not included in the Summaries. On July 27, 2008, AMD sent Intel a letter in which it purported to have identified “significant omissions” in “dozens” of summaries, although AMD only provided six actual examples—presumably its “best evidence”—out of the more than 900 sets of interview notes reviewed. (Exh. A to AMD’s Motion)

Intel’s August 5, 2008 response to AMD’s letter explained how AMD’s chosen examples indeed illustrated the fact that, as required by the Order, the Summaries did detail the “nature, scope and duration” of the selected Custodians’ preservation issues. Intel’s response also pointed out that for two of the examples, AMD had cited to earlier and superceded versions of the Summaries. With respect to one of the examples cited by AMD, Intel recognized that a computer crash had been inadvertently omitted from a Summary and updated that Summary. (D.I. 853-54) Intel further invited AMD to discuss any specific questions or issues it had. (Exh. B to AMD’s Motion)

Without any further dialogue, AMD then proceeded to file the current Motion, dropping two of the six Custodians referenced in the July 28, 2008 letter, but adding 46 more never mentioned in that letter or otherwise discussed with Intel as part of the mandated meet and confer process. (*See* Local Rule 7.1.1) The Motion fails to deliver what it advertises. Far from identifying “dramatic discrepancies” between the Weil interview notes and the Summaries, let alone evidence of Custodians intentionally deleting information for the purpose of avoiding production to AMD, the Motion is actually premised on the rather unsurprising fact that some of the interview notes contain additional information beyond what is set forth in the Summaries. This is hardly evidence that Intel acted improperly, and certainly not a violation of the Court’s

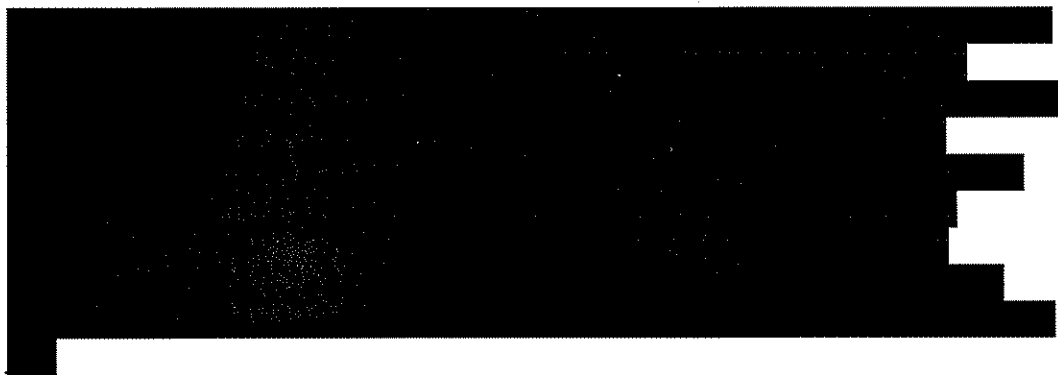
² Weil interviewed all of the 1,023 Custodians still employed by Intel at the time of the interviews between late 2006 and mid-2007, plus a number of departed employees who agreed to be interviewed.

Order, let alone a legitimate basis to impose sanctions.

Argument

1. Intel Complied with the Order

Consistent with the Order, the Summaries provided detail concerning the “nature, scope and duration” of the preservation issues affecting the Custodians. To cite excerpts from just a few of the 50 Summaries attached to the AMD Motion:



The other 45 Summaries seized upon by AMD are similar, each providing detailed descriptions of the preservation issues for the Custodian. While the notes from the interviews contained additional information, the Summaries were just that—*summaries* of the information learned in the interviews about the “nature, scope and duration” of the Custodians’ preservation issues.

AMD’s principal complaint, applicable to nearly all of the 50 Summaries attached to the Motion (which only comprise approximately 5% of the more than 900 Summaries), is that -- despite the fact that the Summaries described the nature and scope of the materials being preserved (and the length of time for which they were being preserved) -- the Summaries did not also reference statements made by certain Custodians concerning their manual email deletion practices. However, a notation in the Weil notes indicating that a Custodian has manually deleted emails, or emptied the deleted folder bin, or otherwise keeps his virtual desktop clean, does not, in itself, impact the nature, scope or duration of a preservation issue.

As a threshold matter, the deletion of emails not required to be retained does not reflect any preservation issue. In other words, a Custodian who archived all emails responsive to the hold notice production requests has no preservation issue even though she may have reported that she regularly deleted emails and emptied her deleted items folder every day.

Similarly, a Custodian who deleted an email after a weekly back up tape was made has no preservation issue arising from the subsequent manual deletion of that email. AMD has taken a similar position with respect to its own Custodians. After repeatedly telling Intel it was unaware of any preservation issues on its part, on July 24, 2008 AMD disclosed for the first time that it knew some senior executives were regularly deleting relevant emails. According to AMD,

an AMD Custodian's deletion of relevant emails after receiving a hold notice is [REDACTED] (Declaration of Jeffrey J. Fowler, ¶ 19), presumably because AMD was able to restore those emails from the Dumpster, archive or emails of other Custodians.

AMD claims that whether a Custodian was manually deleting email is relevant to determine if the Custodian's email was preserved by weekly back up tapes. Although "relevance" is not the standard set forth by the Order, this argument is misplaced. The manual deletion of email does not impact the nature, scope or duration of the preservation issues for those Custodians for whom *no* weekly back up tapes were made. For those Custodians, emails not moved to a permanent storage area, like a .pst folder, would be removed from the Custodian's mailbox by Intel's Outlook Exchange retention settings, regardless of whether the Custodian left those emails in his or her Inbox or deleted them manually. AMD has known this since the Summaries were first provided. Forty of the 50 Custodians identified by AMD fall into this category for some or all of the relevant time period.³ For those Custodians, the key to describing the nature, scope and duration of their preservation issues is to identify the types of information they *did* move to permanent storage.

For example, if a Custodian who was not on weekly back up tapes did not properly archive his relevant emails, the nature, scope and duration of the Custodian's preservation issue is not defined by whether he or she manually deleted emails or whether they were removed by the retention settings. Rather, the nature, scope and duration of the Custodian's preservation issue turns on the description of what he or she did preserve. Did the Custodian, for example, archive received emails, but not sent emails? Did the Custodian preserve only emails relevant to his or her business? That is the type of information called for by the Order and that is precisely the information contained in the Summaries.

There are ten Custodians identified by AMD (out of the more than 900 Summaries) for whom there are weekly backup tapes for all or nearly all of the relevant time period. And the interview notes for one of the ten, [REDACTED] reflect that he deleted junk or spam. Of the remaining nine, only six are among those actually being called upon to produce documents in this case. In the final analysis this Motion is really about an issue that potentially impacts fewer than 1% of the Custodian Summaries.⁴ And even as to this very limited number of Custodians

³ "Relevant time period" is used to refer to the time period from the commencement of the general program to preserve Weekly Backup Tapes in November 2005 to the implementation of the journaling/archive system.

⁴ Of the three Custodians specifically focused on in AMD's letter brief, two—[REDACTED]—are among the Custodians whose emails were not backed up for significant periods and thus AMD has long known that any emails they did not archive during those periods had been deleted. As for [REDACTED] the third Custodian mentioned in the letter brief, AMD goes over the top in suggesting that to the extent a responsive email was not archived (he had several gigs of emails archived in his PST folders) his deletion practices meant [REDACTED] AMD knows that this is not true. Because of the remediation effort by Intel, the email would have been produced to AMD if *any of the 1,023 preservation Custodians*

who were on weekly back up tapes and who reported potential gaps in their retention efforts, an email not preserved by a particular Custodian may well have been found and produced through Intel's remediation efforts of the other 1,022 Custodians.⁵

As is reflected by the AMD Motion, the manual deletion practices of the Custodians are referenced only sporadically in the Weil interview notes. Some Custodians indicated that they were manually deleting emails. As is *not* mentioned in the AMD Motion, others told the Weil interviewers that they had not manually deleted emails, which would have been relevant to show that those Custodians' emails likely *were preserved* on weekly backup tapes even if they were not archiving them as instructed.⁶

Regardless of whether the Custodian reported that he had or had not manually deleted emails, this level of detail was generally not addressed in the Summaries. Stated otherwise, the Summaries were focused on identifying whether the Custodians had preservation issues and, if so, the nature, scope and duration of those issues as opposed to trying to drill down to assess the ultimate consequence of any such issues. In the course of drafting more than 900 *summaries* of the "nature, scope and duration of any preservation issues," Intel provided in good faith the information that was called for under the Order.⁷ To the extent AMD genuinely believes otherwise, it now has the underlying interview notes.

2. Sanctions are Not Warranted

The fact that AMD could with the benefit of perfect hindsight find something in approximately 5% of more than 900 sets of interview notes that was not included in the Summaries and that might possibly be of some relevance to fewer than 1% of the Custodians is

sent or received a copy of the email and retained it as instructed. AMD is well aware that it has received a significant volume of █████-related emails not found in his email collection but found in the collections of others through remediation.

⁵ Emails not captured on the Weekly Backup Tapes for each individual Custodian may have been preserved by one of the other 1,022 Custodians – in pst folders on their hard drives, on Complaint Freeze Tapes, on Weekly Backup Tapes or other by other means – and, if so, would have been produced as part of Intel's Remediation Plan to the extent the email was responsive and non-privileged.

⁶ To cite just one of many examples, the summary for █████ reflected that although he was trying to archive his sent email, he █████
█████ Nowhere in the Summary █████ did
Weil reflect the comment in the interview notes that █████
█████ which means that even responsive sent emails he failed to archive should have been captured by his weekly backup tapes.

⁷ Because this information was not called for in the Order, Intel sees no reason to engage in a Custodian by Custodian response to the voluminous attachment to the AMD Motion. If, however, Your Honor wishes to delve into that detail, Intel would be pleased to expeditiously provide a similar chart, together with detail on the Summaries and Weil interview notes for Custodians with preservation issues who reported that they were not manually deleting.

hardly probative of a “systematic concealment of critical facts,” let alone a violation of the Order. And even if one were to construe the Order as requiring such detail, the omission would hardly justify the imposition of sanctions.

The controlling legal standard for imposing discovery sanctions in the Third Circuit—especially under the court’s inherent power—is quite stringent. Not surprisingly then, AMD completely ignores controlling precedent, preferring instead to cherry-pick inapplicable out-of-circuit cases to fabricate a lax standard for sanctions.⁸ In the Third Circuit, “a court’s inherent power should be reserved for those cases in which the conduct of a party or an attorney is *egregious*.” *Martin v. Brown*, 63 F.3d 1252, 1265 (3d Cir. 1995) (emphasis added). This is in harmony with the Supreme Court’s instruction that federal courts should exercise “restraint and discretion” in imposing sanctions under their inherent power. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). *See also Martin*, 63 F.3d at 1265 (“We have previously suggested care in the use of inherent powers to impose sanctions.”). Accordingly, courts in the Third Circuit do not readily impose sanctions, even when limited to fee-shifting sanctions.

⁸ AMD’s cited cases are inapposite to the facts here. For example, in *Brick v. HSBC Bank, USA*, No. 04-CV-0129E(F), 2004 WL 1811430 (W.D.N.Y. Aug. 11, 2004), the court did not impose sanctions merely for maintaining silence after certain records had been destroyed—though even if it had, the holding would be irrelevant since, far from maintaining silence, Intel has provided significant information to AMD. In *Brick*, the court only imposed sanctions after counsel ignored “repeated warnings and admonitions” from the court. 2004 WL 1811430 at *5 (quotations omitted). Furthermore, the court caught counsel misrepresenting the completeness of production, attempting to conceal destroyed evidence, taking erroneous legal positions, and ignoring its duties to creditors, none of which occurred here. *Id. Rice v. Hamilton Oil Corp.*, 658 F. Supp. 446 (D. Colo. 1987), is similarly distinguishable. In *Rice*, an attorney omitted portions of a quote and mischaracterized the holding of a cited case, purposely leading the court to believe that the evidence supported the exact *opposite* position than it really did. 658 F. Supp. at 449-50. Here, AMD merely claims that Intel’s disclosures are insufficiently detailed; it cannot dispute that the identified Summaries accurately disclosed significant detail concerning the Custodians’ preservation issues. And in *Rice*, the court imposed sanctions under Rule 11—a theory under which AMD does not seek relief in the current Motion. *Id.* at 450. Finally, AMD cites *Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1 (1st Cir. 2005), describing the holding as “affirming sanctions for discovery misconduct where attorney omitted relevant facts from letter to opposing counsel.” AMD mischaracterizes the holding. The First Circuit did not affirm sanctions based on the attorney’s omission of relevant facts from the letter. While the court upheld a factual finding related to omissions in the letter, ultimately, the court affirmed the monetary sanctions because the party was “so unjustified” in seeking a protective order to preclude the production of the letter that “he must personally bear the costs of opposing it.” *Sheppard*, 428 F.3d at 11. It was the groundless basis for seeking a protective order—which is wholly inapplicable to AMD’s Motion—not the contents of the letter, which supported the imposition of sanctions.

The Third Circuit has held that “a court may assess attorney’s fees when a party has ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’” *Gillette Foods, Inc. v. Bayernwald-Fruchteverwertung, GmbH*, 977 F.2d 809, 813 (3d. Cir. 1992) (quoting *Chambers*, 501 U.S. at 45-46). See also *Weisberg v. Riverside Township Bd. of Educ.*, 272 F. Appx. 170, 173 (3d. Cir. 2008) (also quoting *Chambers*). And “a finding of bad faith is generally required” to impose any sanctions under the court’s inherent authority. *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 242 (3d. Cir. 2007). Indeed the Third Circuit has often *required* a showing of bad faith before exercising its inherent power to impose sanctions. See *Fellheimer, Eichen & Braverman, P.C. v. Charter Techs. Inc*, 57 F.3d 1215, 1227 (3d. Cir. 1995) (“a finding of bad faith is required to support a court’s employment of its inherent sanction power”); *Landon v. Hunt*, 938 F.2d 450, 454 (3d. Cir. 1991) (“a prerequisite for the exercise of the district court’s inherent power to sanction is a finding of bad faith conduct”). AMD’s complaints concerning the level of detail in a small percentage of Intel’s Paragraph 8 Summaries cannot possibly demonstrate that counsel’s conduct rises anywhere close to what is required in this Circuit to justify the imposition of sanctions.

The standard for imposing sanctions under Rule 37(a)(5)(A) is similarly stringent. Fee-shifting sanctions under that Rule are appropriate only in limited circumstances inapplicable here. Contrived motions to compel—such as AMD’s current Motion—certainly cannot support sanctions. The Rule notes that sanctions are unwarranted when “the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action.” Fed. R. Civ. P. 37(a)(5)(A)(i). Here, AMD sought court action after having *already received* the very information it seeks in its Motion, namely, the Weil Interview Notes.⁹

Moreover, sanctions cannot be imposed because Intel’s “nondisclosure, response, or objection was substantially justified.” Fed. R. Civ. P. 37(a)(5)(A)(ii). At most, there is a good faith disagreement here about the Order’s required level of detail for the Summaries. Under Third Circuit precedent, “in the context of Rule 37 sanctions, substantial justification occurs when there is a genuine dispute concerning compliance.” *Tracinda*, 502 F.3d at 241 (quotations omitted). The existence of such a dispute “make an award of expenses unjust” under Rule 37(a)(5)(A). Fed. R. Civ. P. 37(a)(5)(A)(iii).¹⁰ The Court should likewise reject AMD’s attempted bootstrap to retroactively impose sanctions for the cost of the Weil Motion. As Your Honor is well aware, Intel had substantial justification to oppose that Motion and in no way acted in bad faith in asserting its privilege objections. Finally, AMD’s make-work request to

⁹ AMD also failed to meet and confer on 46 of the “examples” which now form the basis of the current Motion. Local Rule 7.1.1.

¹⁰ Sanctions are unwarranted under Rule 37(b)(2) for the same reasons. Intel has not purposely “fail[ed] to obey an order to provide or permit discovery.” Fed. R. Civ. P. 37(b)(2)(A). And even if the Court were to side with AMD’s interpretation of the Order and find that Intel had purposely failed to obey the Order, Intel had already given AMD the actual Weil Interview Notes from which the Summaries were prepared long before AMD filed its Motion. See Fed. R. Civ. P. 37(b)(2)(C) (sanctions are unwarranted when the non-movant “was substantially justified or other circumstances make an award of expenses unjust”).

have Intel rewrite the Summaries to reflect additional detail is unnecessary where AMD has already received the notes from which the Summaries were prepared.

3. Conclusion

Intel provided AMD with more than 900 Summaries which accurately identified the nature, scope and duration of preservation issues for the Custodians. When AMD asked the Court to order the production of the underlying Weil interview notes because the Summaries were " cursory" and drafted at a "high level," the Court granted the request. Enough is enough. AMD has not and cannot show that Intel acted inappropriately, let alone in bad faith. AMD's Motion should be denied.

Respectfully submitted,

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