IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

INTEL'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR AN ORDER IMPOSING SANCTIONS AGAINST AMD AND COMPELLING REMEDIATION

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I. INTRODUCTION

Intel's and AMD's responses to their respective evidentiary retention issues stand in stark contrast. Both faced massive document retention burdens, and the ultimate document productions in this case are unprecedented in volume, scope and cost. Given the extraordinary complexity and human involvement, it is not surprising that both parties had retention lapses. But while Intel voluntarily revealed its issues and remediated them, AMD has steadfastly refused to do either. This motion for sanctions focuses on AMD's utter failure to disclose its varied and substantial document retention lapses, and seeks relief from the Court to force AMD to do what it should have done long ago: come clean about its problems and remediate them immediately.

In early 2007, Intel disclosed to AMD and the Court its discovery of lapses and errors in its document retention program. Intel committed to continue its investigation until the nature and scope of these problems were determined, develop a remediation plan to address them, submit its plan to AMD and the Court, and then execute it. Intel did what it said it would. And, in the end, due to the expansive scope of this case and the number of custodians involved, Intel implemented what is likely the most extensive and expensive document remediation effort ever undertaken. Through that enormous effort, all done voluntarily under a plan specifically approved by Order of the Court, Intel believes that it has successfully remediated retention problems and, at the appropriate time, will make a showing to the Court in support of its efforts.

AMD, on the other hand, has maintained from the beginning and represented repeatedly, to Intel and the Court, that its own document retention program was "exemplary." After Intel first questioned the sufficiency of that program, AMD claimed that a four-month "review of AMD's document preservation program" revealed "no lapses." Declaration of Brian C. Rocca in Support of Intel's Motion for an Order Imposing Sanctions Against AMD and Compelling Remediation ("Rocca Decl."), Ex. 1 (8/23/07 AMD Ltr. to Intel 1). Indeed, as late as June 2008,

in support of its (unsuccessful) motion to quash Intel's basic retention discovery requests, AMD stated:

> As AMD has continually assured Intel, AMD executed an exemplary preservation program, and it suffered none of the systematic breakdowns plaguing Intel. Indeed, we have advised Intel of the very few innocent and innocuous AMD custodian errors in preservation, and their data losses, if any, are inconsequential.

Ex. 2 (6/11/08 AMD Ltr. to Court 1 (D.I. 964)).

Intel understood first-hand the difficulties of doing an "exemplary" job in a case of this magnitude, and was skeptical of AMD's representations. Thus, Intel sought discovery on AMD's retention program, which AMD resisted at every turn. Along the way, AMD self-reported virtually nothing, continuing to misrepresent to Intel and the Court that its practices were beyond reproach. It is now clear that AMD's exemplary preservation program suffered from myriad problems. These problems had to be dragged out of AMD, usually only after a Court order. At the end of this long and expensive process, it turns out that AMD's efforts were far from exemplary – rather, they were flawed and incomplete and resulted in massive data loss.

While Intel would rather focus on the merits of the case, it cannot ignore AMD's serious retention failures and efforts to conceal them from Intel and the Court. The sanctions Intel seeks are based on the simple premise that AMD should do what Intel did openly, forthrightly, and long ago – access readily available, relevant, previously unproduced documents and produce them, remediate where appropriate, and fully disclose its retention lapses. Thus, the field will be leveled, and the parties can move on to the merits. We summarize each request below.

AMD Failed To Preserve Evidence When It Was Actively Planning This Lawsuit. AMD failed to implement any document preservation measures, as it was required to do, when it first reasonably anticipated litigation against Intel – a date we now know to be January 2005, at the latest. As a result, AMD custodians continued to delete data in the ordinary course for

several months after AMD's duty to preserve first arose. And while AMD preserved a "snapshot" of data in mid-March 2005, it choose not to produce any of that data, instead relying on preservation by individual custodians who received no retention instructions until much later.

AMD, unlike Intel, had months to plan and implement a retention program, yet did not do so when required by law. AMD's internal documents reveal that [redacted] By then, AMD had definitively concluded that, at least by its interpretation of the law, [redacted] and used [redacted] Ex. 3 (Depo. Ex. 5558 at 11). While Intel strongly disputes these claims on the merits, the point is that AMD formulated them much earlier than it admits.

In January 2005, AMD began actively preparing to file this lawsuit. It retained counsel, interviewed scores of witnesses, conducted legal research, hired economists and a jury consultant, debated litigation strategy and prepared public messaging about the case. AMD was doing everything a prospective plaintiff does *except preserve evidence*. AMD failed to implement any document preservation steps until months later, on March 19, 2005, when it created what it terms the "Snapshot" for this litigation – a [redacted] of certain email Exchange servers – and even so it has never used the Snapshot, a readily available source of unique, relevant documents, as a source for its document productions.

In a strained effort to prevent Intel's access to the Snapshot data, AMD claims that it first reasonably anticipated this litigation on [redacted] AMD's version of events is contradictory and fundamentally flawed. It makes no sense that

AMD created the preservation Snapshot on March 19, 2005 *for this litigation*, issued a first round of litigation hold notices to individual custodians on April 1, 2005 *for this litigation*, and yet claims it did not reasonably anticipate this litigation until weeks later. Indeed, AMD asserted work product protection for various activities well before April [redacted] 2005, which requires that they were done *in anticipation of litigation*. The law is clear: If a party has knowledge of a potential claim, and reasonably believes it may be asserted, the duty to preserve is triggered.

AMD's failure to implement a timely preservation program impacts each and every AMD production custodian. Moreover, much of the relevant data existing as of January 2005, when AMD's had a duty to preserve it, is now lost. All that remains is the Snapshot, an accessible and electronically catalogued source of relevant information created specially for this dispute, but never used for production. As a sanction against AMD for violating its most fundamental preservation obligation and to help mitigate the loss of evidence, Intel seeks remediation from the Snapshot and the production of responsive, unique, non-privileged documents.

AMD Conducted Stealth Restorations And Misrepresented The Facts To Intel And The Court. As noted above, while AMD repeatedly said that its retention was "exemplary," Intel suspected otherwise. AMD resisted Intel's efforts to investigate, and dismissed Intel's evidence suggesting that serious preservation lapses had occurred. However, AMD secretly undertook restoration of backup tapes, in an attempt to assess and/or fix the problems it simultaneously denied existed. For months, AMD dodged Intel's questions about undisclosed data restoration, blocked its deposition witness' testimony about it, and ultimately denied it in open court.

Finally, the truth caught up with AMD. Facing a Court-ordered deposition, AMD had to admit its stealth restorations for 57 custodians – comprising well over *one-fourth* of its production custodian population. AMD grudgingly agreed to produce restored data for 37 of

them. But even after producing literally *hundreds of thousands of new documents* for those custodians, AMD continues to stonewall Intel's request to produce what would obviously be tens, if not hundreds, of thousands more new documents for the other 20 custodians.

AMD's tactics, combined with its custodians' preservation failures, have denied Intel substantial evidence relevant to this case. Its restoration of the backup tapes made the data on them readily accessible and requires their production. The appropriate sanction for AMD's conduct is production of the previously restored data for the 20 additional custodians, many of whom are senior officers of AMD, including [redacted]

AMD Should Be Ordered to Make Full Disclosure of its Document Retention Issues. Intel, both voluntarily and under Court Order, fully and extensively disclosed its preservation issues and remediated them. By contrast, AMD has done its best to cover up its problems, delay or avoid disclosing them, and remedy them only as and when it sees fit. It is time to put an end to AMD's unilaterally imposed double standard, the effect of which is highly prejudicial to Intel. Intel therefore requests an order requiring AMD, within 15 days of the Order on this Motion, to fully disclose to the Court and Intel all of its evidence preservation lapses, and any other sanction or remedy that the Court deems just and appropriate under the circumstances.

II. STATEMENT OF FACTS

A. AMD Was Planning To File This Case Months Before It Started Preserving Evidence.

AMD admits [redacted], but claims that it did not reasonably anticipate litigation against Intel until April [redacted] 2005, when [redacted] Ex. 5 [redacted]

[redacted]

That position cannot be reconciled with the facts, the law or common sense. As set forth in detail below, by November 2004, AMD knew the facts and legal theories that would form the basis of its claims against Intel and had thoroughly documented them. Around that same time, AMD developed a multi-faceted program – called "Project Slingshot" – which was premised on AMD's belief that Intel stood in a [redacted] engaged in [redacted] and violated antitrust laws in the United States and elsewhere. By January 2005, [redacted], AMD was actively preparing for this litigation. AMD's activities were comprehensive, targeted on specific facts and legal claims, and litigation-focused. At this time, AMD should have, but admittedly did not, preserve evidence.

1. 2003-2004: AMD Complains That Intel Is Violating Antitrust Laws By The Same Conduct Alleged Here.

AMD's [redacted] admitted AMD learned [redacted][1]

[1] Again, Intel strongly disputes AMD's mischaracterization of Intel's business practices and misapplication of antitrust law. But that is the issue at trial. Here, it is only necessary to document the timing of AMD's view of the facts and law, and the obligations that imposed.

AMD knew the basis for these allegations at the time they allegedly occurred and made no secret of its interpretation that Intel was violating antitrust law. For example, [redacted], an AMD business consultant, [redacted] (AMD filed this case exactly 12 months later based in part on allegations about Market Development Funds and standards setting behavior. *See* Compl. ¶¶ 41, 51, 79, 92, 97, 35, 108.

[redacted]

2. November 2004: AMD's Internal Documents Establish [redacted]

In November 2004, AMD continued to refine and thoroughly document the specific legal theories ultimately asserted in its Complaint against Intel. AMD contended, in both internal and external communications, that under its reading of the law, Intel "[redacted]" through [redacted]" business practices. For example, in a PowerPoint on "[redacted]" AMD claimed that Intel [redacted]

[redacted]" "[redacted]," and "[redacted]" Ex. 3 (Depo. Ex. 5558 at 10, 15, 17). In that same document, AMD stated that [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

See Ex. 3 (Depo. Ex. 5558 at 26, 11, 35).[2]

In other [redacted] presentations, AMD complained about '[redacted]" declared Intel's practices '[redacted]" and stated '[redacted]." Ex. 8 (Depo. Ex. 227 at 15, 41); Ex. 9 (Depo. Ex. 222 at 5, 30). AMD purported to list '[redacted]" and recommended '[redacted]," including the retention of [redacted] because of their '[redacted]." Ex. 9 (Depo. Ex. 222 at 11-12).

At the same time, AMD developed Project Slingshot, a comprehensive anti-Intel campaign to [redacted] Ex. 10 ([redacted] Tr. 186:13); *see also* Ex. 5, ([redacted] Tr. 180:22-181:4). AMD's [redacted] directed Project Slingshot, along with AMD's Director of [redacted], AMD's Director of [redacted], and AMD's outside litigation counsel, O'Melveny. Ex. 10 ([redacted] Tr. 186:13); *see also* Ex. 5, ([redacted] Tr. 180:22-181:4). [redacted]." Ex. 11 (6/26/09 [redacted] Decl. ¶ 2). Its underlying premise was that '[redacted]

[2] [redacted]

[redacted]." *Id.* ¶ 6.[3] [redacted]

Without question, AMD's statements and actions in November 2004 reflect the mindset of a company with knowledge of what it believed was a potential antitrust claim. AMD was focused on a specific adversary and specific conduct, had already identified specific legal theories, had concluded that Intel's conduct was '[redacted] and '[redacted]" and [redacted].

3. Early 2005: AMD Demonstrates Knowledge Of The JFTC's Recommendation Against Intel.

[redacted]

[3] [redacted] was dead wrong. The undisputed facts of this case show that the microprocessor industry is, and has always been, highly competitive. Prices for microprocessors have dramatically declined, output has significantly increased, and performance has exponentially improved. But that proof will await another day.

[redacted]

[redacted].

4. January 2005: AMD Hires O'Melveny & Myers And Prepares On Multiple Fronts For This Litigation.

AMD admits that, in January 2005, in advance of the expected JFTC announcement, it retained O'Melveny, its longtime antitrust counsel, for the specific purpose of investigating and ultimately preparing these claims against Intel. Ex. 4 ([redacted] Tr. 304:5-16); *see also id.* at 442:8-12; Ex. 15 (7/20/09 Hrg. Tr. 68:15-17). Starting in January 2005, and continuing for three months, O'Melveny attorneys interviewed scores of AMD executives and staffers to try to gather documentation of evidence against Intel. Ex. 4 ([redacted] Tr. 304:5-16; 306:21-25). A Fortune Magazine article from August 2006 described how Mr. [redacted] summoned a dozen AMD outside lawyers to hotels near the company's headquarters in California and Texas for this purpose. Ex. 16 (Depo. Ex. 6752 at 5). [redacted]

In addition to its intensive effort to gather evidence in support of AMD's claims, [redacted], and retained various economists to review Intel's activities. One such economist was Michael Williams, Ph.D., Director of ERS Group, Ex. 4 ([redacted] Tr. 436:4-5; 437:7-8), an economic consulting firm "that specializes in analyses for complex business litigation." Ex. 17 (8/2/07 AMD Press Release). Dr. Williams specializes in antitrust and formerly worked in the Antitrust Division of the U.S. Department of Justice. *Id.* O'Melveny retained Dr. Williams [redacted]

[redacted], and "to assist counsel in understanding certain economic matters at issue in this litigation." Ex. 18 (11/9/07 Diamond Decl. ¶ 2).[4]

5. January 2005: O'Melveny Retains Glover Park For Jury Consulting And Development Of "Themes" For "The Litigation."

In November 2004, AMD had retained Glover Park, a public relations firm that "[redacted]." Ex. 19 (Depo. Ex. 224). O'Melveny took over the Glover Park retention "as of January 1, 2005," for the following admitted purposes:

> assisting in the testing and development of litigation and jury themes; preparing both AMD's legal and company spokespeople and written materials concerning the litigation; and providing expertise to help make this dispute understandable to legal and non-legal audiences.

Ex. 20 (9/27/07 Smith Ltr. to Floyd 2) (emphasis added).

Chuck Diamond of O'Melveny affirmed to the Court that, during the first quarter of 2005, he and [redacted], were regularly communicating with Glover Park's "experienced competition lawyer," Mr. Sallet, about "potential claims" against Intel, "strategies [they] thought about developing," and "thinking out loud about this case." Ex. 15 (7/20/09 Hrg. Tr. 66:22-67:19 (D.I. 2013)). Mr. Diamond represented to the Court that his first quarter 2005 communications with Glover Park involved discussions "about potential claims and how they could be argued and whether they were strong, [and] whether they were weak." *Id.* at 69:13-22. Mr. Diamond claimed that all of these communications during the first quarter of

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[4] Dr. Williams eventually produced a study which concluded that "Intel has extracted monopoly profits from microprocessor sales" and that any "pro-competitive justifications for Intel's monopoly profits are implausible." *Id.*

2005 constitute "core work product," and that Intel's subpoena for production of documents from Glover Park would "open up a window" into the way he and [redacted] thought about the case – "the most intrusive kind of core work product discovery imaginable." *Id.* at 67:18. By definition, work product protection applies *only* if a party is reasonably anticipating litigation.[5]

6. [redacted]: AMD Prepares To Publicly Launch "Project Slingshot" Including A "[redacted]" Against Intel.

In [redacted], internal AMD documents suggest that [redacted]

[redacted]

[5] *See, e.g., Pettingill v. Caldwell*, No. 05-224-JJF, 2006 WL 2439842, (D. Del. Aug. 21, 2006) (Farnan, J.) ("Attorney work product includes documents prepared by counsel, or at counsel's direction, in preparation for trial or in anticipation of litigation.").

(Depo. Ex. 223). Mr. Diamond confirmed that such communications were occurring during the first quarter of 2005. Ex. 15 (7/20/09 Hrg. Tr. 66:22-67:19; 69:13-22 (D.I. 2013)). Yet the evening before Intel's Rule 30(b)(6) deposition of Mr. [redacted] AMD produced documents that were purportedly the subject of the log entries but did not match their topics or dates. Mr. [redacted] Whatever the accuracy of the log entries, there can be no doubt on this record that AMD was actively preparing for this litigation in early 2005.

7. March 2005: Anticipating This Litigation, AMD Instructs IT To Retain Intel-Related Documents.

On March 8, 2005, the JFTC issued a recommendation to Intel's Japan-based subsidiary, a defendant in this action, under Japanese law and authority, to cease and desist certain alleged conduct. Within hours, (March 9, 2005 in the United States), AMD issued a press release accusing Intel of harming consumers and violating antitrust laws around the world. Ex. 24 (Depo. Ex. 228). [redacted]

Two days later, on March 11, 2005, AMD notified its IT department that AMD '[redacted]" Ex. 26 (AMD-500-00000092 to 93). AMD instructed its IT staff to, among other steps, [redacted]" Exchange backups, conduct and retain a backup on March 19, 2005 and, going forward, continue to conduct and retain a backup every 30 days. [redacted]

(10/24/05 AMD Ltr. to Intel 2) (emphasis added). [redacted] [6]

Despite these activities and prior admissions, AMD now asserts – incredibly – that it was not even considering a lawsuit against Intel at the time. Ex. 5 [redacted]. Rather, AMD claims, in light of the JFTC's March 8, 2005 announcement, AMD "[redacted] AMD's remarkable position is that it was not itself considering filing a lawsuit, yet it issued "litigation" hold notices because it might be dragged into some other, unspecified lawsuit.[7]

9. June 2005: AMD's Complaint Alleges Antitrust Theories It Had Been Developing Since 2004.

On June 27, 2005, AMD filed its Complaint against Intel. It was based on the same legal theories AMD had developed and described in the [redacted]. *See, e.g.,*

[6] [redacted]

[7] [redacted]

Compl. ¶¶ 2-3, 35, 39-46, 59-71, 85-87, 108-121. Project Slingshot's "[redacted]" against Intel, based on the litigation preparation starting in January 2005, was publicly launched.

B. **AMD's Document Retention Efforts Were Too Late, And Too Little.**

When AMD finally did take an affirmative step to preserve documents – namely, the creation of the March Snapshot – it failed to concurrently issue litigation hold notices to relevant employees, or harvest live data, in a timely manner.[8] As a result, the Snapshot was not a redundant source of information or simply a preservation backstop, but rather a *standalone*, *unique* and *untapped* repository of relevant data during a critical time frame – a time frame when no other preservation steps were taken, and at which time AMD internally acknowledged that it "[redacted]." *See* Ex. 31 (1/9/09 Hrg. Tr. 12:1-14.3 (D.I. 1491)) (Mr. Fowler: "The answer to your question, Mr. Friedberg, is no. We did not process the March 19th, 2005, backup snapshot....").

Not only did AMD refuse to produce documents from the Snapshot – again, its lone preservation measure during the first quarter of 2005 – it did not collect a *single byte* of live data from any source (Exchange server, hard drive, or otherwise) for *five months* after it filed its Complaint, and *ten months* after it first reasonably anticipated litigation (at least by January 2005). AMD's preservation program during most of 2005 relied exclusively on custodian compliance with litigation hold notices. If litigation hold notices were issued late – and they were – AMD should have acknowledged the need for remediation and taken appropriate remedial steps . If custodians did not comply with the notice – and many did not – additional data was potentially lost during the post-notice period.

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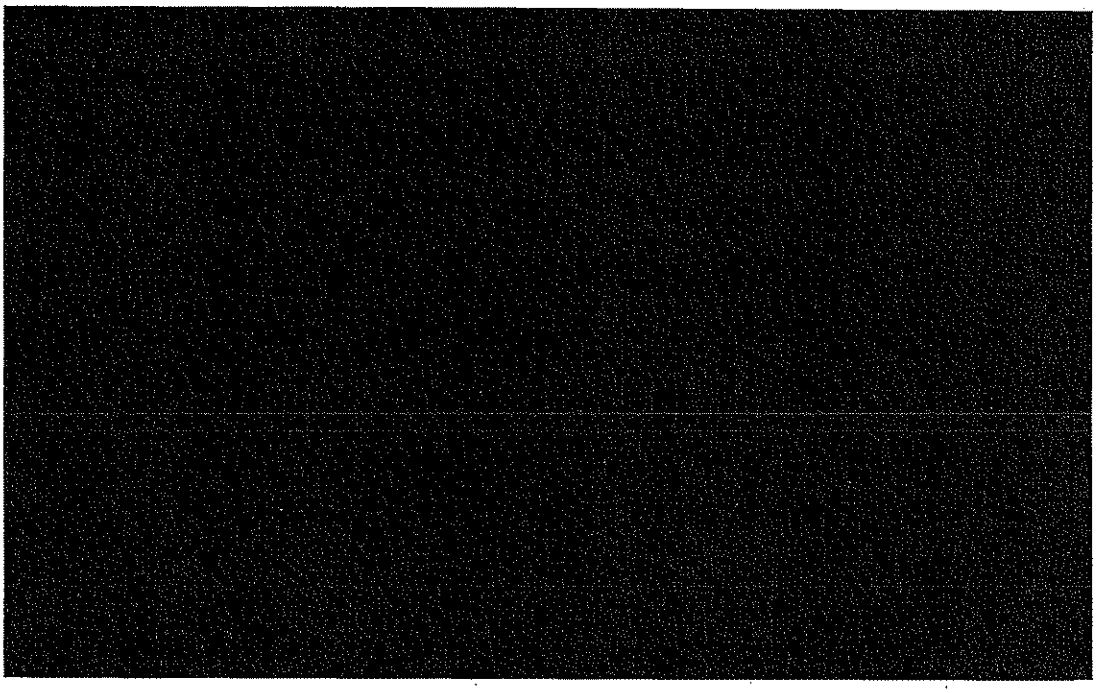
[8] Intel believes that some delay in issuing hold notices or harvesting data can be expected in a case of this complexity. But the nature and extent of AMD's delay in this case is excessive.

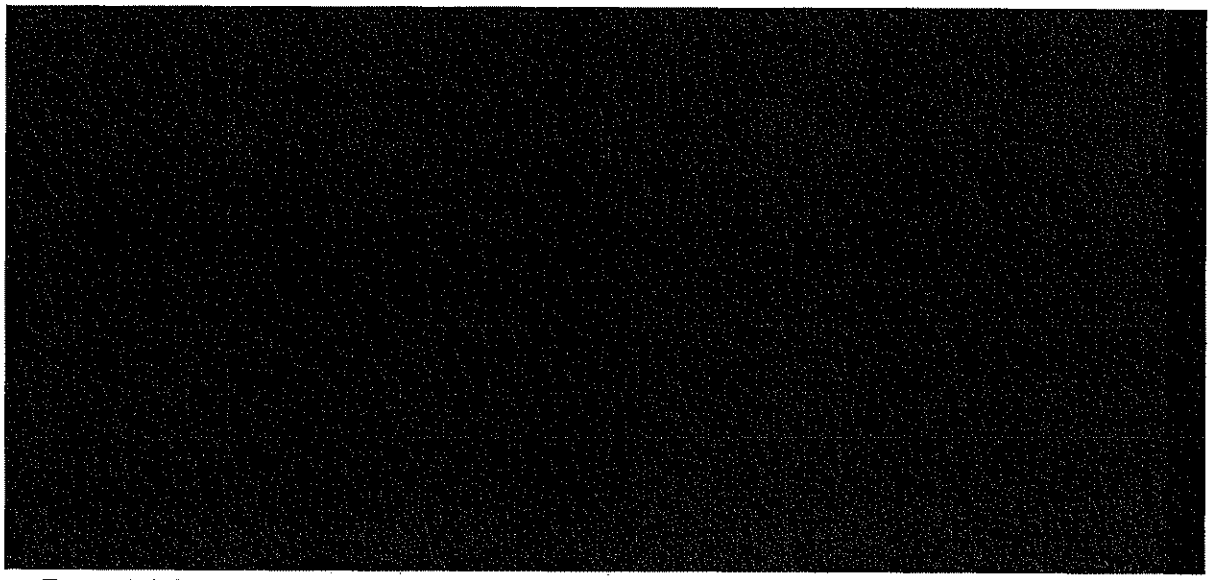
These problems were compounded by AMD's [redacted], which were enforced by [redacted] This establishes the importance of the Snapshot as a unique source of information.

1. AMD Waited Too Long To Instruct Employees To Retain Their Relevant Documents.

Upon receipt of the Complaint, Intel, among other preservation steps, promptly issued over 600 litigation hold notices. Ex. 32 ([redacted] Tr. 37:7-10). Intel placed over 70% of its production custodians on hold within 30 days of the Complaint's filing. Considering the vast scope and complexity of AMD's Complaint, and the lack of any advance warning, Intel's initial efforts as a defendant reflect an aggressive, good faith effort to timely preserve evidence. Those efforts stand in stark contrast to plaintiff AMD's slow rollout of litigation hold notices – whether analyzed from either the date of its anticipation of litigation (no later than January 1, 2005) or the date it acknowledged it "must" preserve evidence (March 11, 2005). Whereas Intel's production custodians received initial hold notices, on average, within [redacted] days of the Complaint, Ex. 33 (Intel Hold Notice Dates), AMD's production custodians received them, on average, within [redacted] days from January 1, 2005 (the date of AMD's reasonable anticipation), and within [redacted] days from March 11, 2005 (the date AMD issued its IT hold notice). Ex. 34 (AMD-500-00000094 to 97). The following chart (Ex. 72) depicts a comparison of the distribution of Intel's and AMD's hold notices over time, using both the January 1, 2005 and March 11, 2005 dates:



Some of AMD's most senior (and obviously relevant) custodians inexplicably did not receive hold notices for weeks or months after AMD's retention obligation arose. For example:

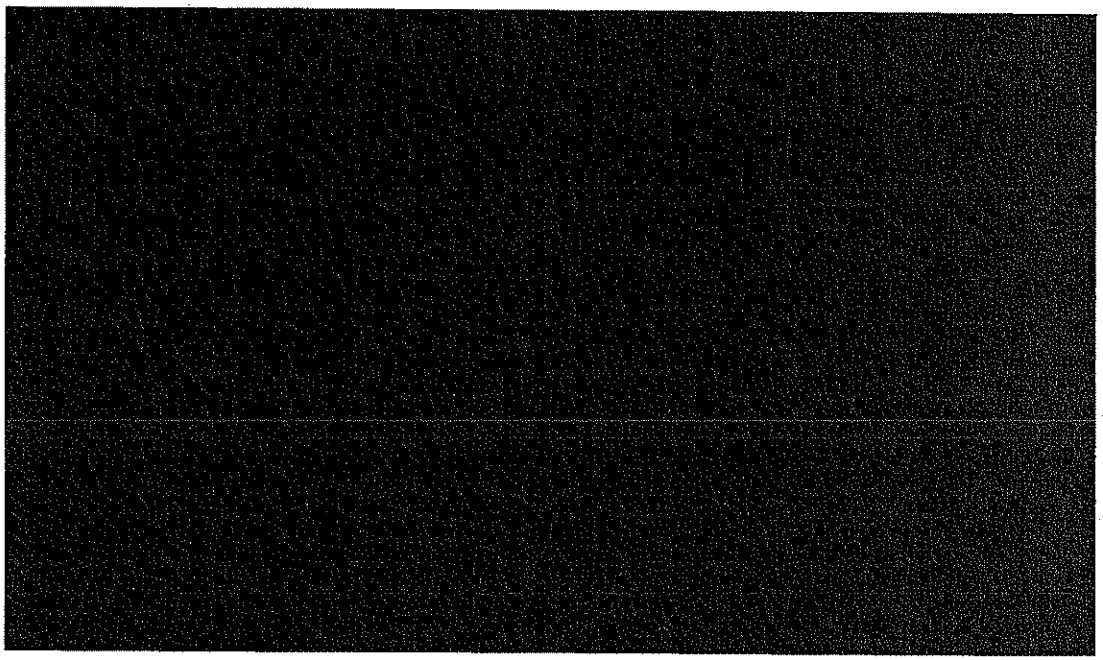


Ex. 34 (AMD-500-00000094 to 97).

AMD has never justified its inordinate delay in issuing litigation hold notices to its employees. Since AMD's entire preservation plan (outside the unproduced Snapshot) hinged on the timely delivery of notices and custodians' compliance with them, its failure to broadly distribute them to a sufficient number of likely custodians, and its delayed distribution to many key custodians, constituted a retention failure requiring resort to the Snapshot for remediation.

2. AMD Delayed Its Collection of Relevant Documents

Data collection (or "harvesting") is a common method of preserving data and a prerequisite to producing it. AMD unreasonably delayed its harvests and lost additional data as a result. Intel, in contrast, commenced harvesting immediately upon learning it had been sued. Whereas Intel's production custodians were first harvested, on average, within [redacted] days of the Complaint, AMD's were first harvested, on average, [redacted] days from January 1, 2005 (the date of AMD's reasonable anticipation), and [redacted] days from March 11, 2005 (the date AMD issued its IT hold notice). Ex. 34 (AMD-500-00000094 to 97); Ex. 35 (7/24/08 Fowler Decl., Ex. J (D.I. 1087)); Ex. 36 (Intel Harvest Dates). The chart on the following page (Ex. 73) depicts the timing of the parties' respective data harvests using, again, the date of the Complaint as the starting point for Intel, and both January 1, 2005 and March 11, 2005 as the starting points for AMD:



Ex. 35 (7/24/08 Fowler Decl., Ex. J (D.I. 1087)); Ex. 36 (Intel Harvest Dates).

As the chart shows, Intel began custodial harvesting immediately and continued its (data preservation) activities without delay. Ex. 36 (Intel Harvest Dates). AMD, on the other hand, did not harvest until many months later. For example, AMD could have, but did not, collect live email data from custodians or servers until November 2005. Ex. 30 (Tr. 203:6-7) (" "). Instead, it waited for months on end, relying exclusively on its slow rollout of litigation hold notices, *and risking massive email deletion, either through intentional or innocent custodian conduct.*

3. AMD Maintained

While AMD stresses Intel's automatic email management system as part of its retention failures – a point Intel disputes – AMD ignores its own use of a similar system. Ex. 28 (.

[redacted] Tr. 19:1-20:10; 55:19-57:15; 61:13-67:30). AMD maintained [redacted]

AMD admitted that [redacted]

Significantly, just before starting to preserve evidence, AMD recommended to [redacted]

[redacted] Ex. 42 (AMD-F157-5100503). [redacted] The timing of these instructions, March 2005, is particularly problematic, because AMD had already reasonably anticipated litigation at least two months earlier and, on its own analysis, should have been retaining documents by March 11, 2005.

C. AMD's Retention Plan Failed And AMD Tried To Cover It Up.

Throughout this case, AMD repeatedly acknowledged its "ongoing duty to apprise Intel of [data] losses," Ex. 2 (6/11/08 AMD Ltr. to Court 3 (D.I. 964)); that the "the 'spirit' of the Amended Federal Rules supports transparency and disclosure," Ex. 44 (4/23/07 AMD Ltr. to Intel 1); and that it had a duty "to monitor compliance with litigation hold notices" and to "report instances where [it] identified losses of relevant data." Ex. 45 (11/27/07 AMD Ltr. to Intel 3). AMD said one thing, and did another.

1. AMD Repeatedly Boasted Of "Exemplary" Preservation And Blocked Intel's Efforts To Investigate.

For over a year, AMD persistently responded to every inquiry into its document preservation practices by assuring Intel that its preservation program was "working as intended," Ex. 44 (4/23/07 AMD Ltr. to Intel 2), and "operating as designed and intended." Ex. 46 (8/10/07 AMD Ltr. to Intel 1). During a hearing on May 24, 2007, AMD's counsel proclaimed: "[t]here is absolutely no basis for concern on Intel's part about AMD's document preservation activities." Ex. 47 (5/24/07 Hrg. Tr. 11:24-12.2 (D.I. 502)).

When Intel began to press for formal discovery to test these claims under oath, AMD's mantra of perfection continued:

> As AMD has continually assured Intel, AMD executed an exemplary preservation program, and it suffered none of the systematic breakdowns plaguing Intel. Indeed, we have advised Intel of the very few innocent and innocuous AMD custodian errors in preservation, and their data losses, if any, are inconsequential.

Ex. 2 (6/11/08 AMD Ltr. to Court 1 (D.I. 964)). AMD then demanded that Intel present evidence in advance to justify even the start of any inquiries into AMD's practices:

> Moreover, despite AMD's repeated requests, Intel has never identified any authority or any AMD data loss or preservation issue that could begin to justify the electronic colonoscopy it now wants to conduct.

Id. at 4. The truth was much more mundane – Intel was simply asking for a Rule 30(b)(6) deposition to test AMD's repeated boasts about the success of its preservation. Over AMD's strenuous objection, the Court allowed Intel to continue to investigate AMD's preservation practices through formal discovery. Ex. 48 (9/11/08 Hearing Tr. 10:2-11 (D.I. 1188)); 1/22/09 Report and Rec. (D.I. 1507), adopted as an Order on 2/3/09 (D.I. 1532).

2. AMD Reluctantly Revealed Material Preservation Problems Only After Intel Uncovered Them.

For over a year, AMD feigned outrage at Intel's requests for basic retention information and continued to assert that its practices were the gold standard. Despite AMD's resistance, Intel continued to "peel the onion" and, with every layer, uncovered more issues. When pressed for information, and usually over its objection and pursuant to Court order, AMD was forced to acknowledge a multitude of previously undisclosed issues. Among them were the following:

a. AMD Hid [redacted] Systematically Deleted Emails In Violation Of Hold Notices.

On July 2, 2008, in opposition to AMD's motion to quash Intel's request for preservation discovery, Intel produced a pictorial analysis (referred to as a "histogram") of the data production of [redacted]. Ex. 49 (7/2/08 Decl. of John Ashley at Ex. 6 (D.I. 1049)). At the hearing, AMD could not explain [redacted] production anomalies and ultimately agreed to remediate from backup tapes. Ex. 48 (9/11/08 Hrg. Tr. 35:21-36:2; 37:17-22 (D.I. 1187)).

At deposition, AMD reluctantly acknowledged [redacted] *See, e.g.*, Ex. 37 (Meeker Tr. 23:14-19). AMD claimed keeping email "[redacted]" "[redacted]." *Id.* 27:1-28:5. That is untrue on its face. AMD produced the "overwhelming majority" of [redacted] emails from the Deleted Items folder, proving his systematic deletion. Ex. 49 (7/2/08 Ashley Decl. ¶¶ 18, 19 (D.I. 1049)). Indeed, [redacted]

[redacted] As a result of this conduct, AMD was forced to resort to backup tapes to remediate the loss of emails. *See* Ex. 30 ([redacted] Tr. 111:21-113:7; 131:2-6).

[redacted], knew of [redacted] habit of deleting emails routinely, and then deleting his Deleted Items folder. Ex. 37 ([redacted] Tr. 18:8-19:23); Ex. 30 ([redacted] Tr. 111:21-112:22); Ex. 29 (7/24/08 Fowler Decl. ¶ 24 (D.I. 1087)). Rather than seek [redacted] compliance with the hold notice, [redacted] modified the setting of the dumpster folder into which [redacted] deleted emails were discarded, to try to prevent his emails from being lost forever. Ex. 37 ([redacted] Tr. 18:6-20:13); Ex. 30 ([redacted] Tr. 111:21-112:22). He made the same undisclosed modification to the dumpster of [redacted], [redacted] (at the time), to preserve his evidence. Ex. 29 (7/24/08 Fowler Decl. at ¶ 24 (D.I. 1087)); Ex. 37 (Meeker Tr. 18:6-13).

In October 2005, when it came time to harvest [redacted], AMD restored data from the dumpster to [redacted] Deleted Items folder, which not only modified the metadata in

violation of the parties' production stipulation, but also concealed the fact that [redacted] had been [redacted], in violation of his litigation hold notice.[2] Ex. 37 ([redacted] Tr. 26:5-8). [redacted] dumpster modifications establish that AMD knew, by at least October 2005, that [redacted] and that at least five other [redacted] had sufficient preservation issues to justify restoring their Deleted Items folders from their dumpsters. Ex. 37 ([redacted] Tr. 28:18-20; 30:24-31:4); Ex. 29 (7/24/08 Fowler Decl. at ¶¶ 25-26 (D.I. 1087)). Yet AMD concealed these important facts when the parties exchanged information describing their evidence preservation measures that same month. *See, e.g.*, Ex. 27 (10/24/05 AMD Ltr. to Intel). AMD also concealed that it chose to restore the deleted items from the dumpsters of other five custodians. Ex. 37 ([redacted] Tr. 28:18-20; 30:24-31:4); Ex. 29 (7/24/08 Fowler Decl. at ¶¶ 25-26 (D.I. 1087)). AMD thus denied Intel the ability to request that the dumpsters for other executives also be restored and produced in a timely fashion. Indeed, AMD never disclosed these facts to Intel or the Court until it was forced to respond to Intel's investigation of its practices. *See, e.g.*, Ex. 46 (8/10/07 AMD Ltr. to Intel 1); Ex. 1 (8/23/07 AMD Ltr. to Intel 1); *see also* Ex. 29 (7/24/08 Fowler Decl. at ¶¶ 24-26 (D.I. 1087)).

b. AMD Admits That Many Other Custodians' Retention Practices Were "Not What AMD Would Have Preferred."

In an effort to avoid discovery of its evidence preservation lapses, AMD asserted, in a June 11, 2008 letter to the Court, that it had already "advised Intel of the very few innocent and

[2] [redacted]

innocuous AMD custodian errors in preservation, and [that] their data losses, if any, [we]re inconsequential." Ex. 2 (6/11/08 AMD Ltr. to Court 1 (D.I. 964)). However, after Intel had identified scores of individual custodian "errors in preservation" and resulting "data losses," AMD ultimately was forced to change its tune.

On December 9, 2008, after months of denying any problems, in the face of evidence reflecting widespread non-retention of emails by its custodians, AMD finally acknowledged many of its custodians' preservation practices were not, to use its word, "exemplary." Indeed, according to AMD, some custodians' "selectivity in deciding which files were relevant and which were not does not reflect what AMD would have preferred." Ex. 51 (12/9/08 AMD Ltr. to Court 9 (D.I. 1365)). And AMD's backpedaling continued: "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." *Id.* at 3.

One custodian, Mr. [redacted] was first flagged by Intel on October 9, 2008 as having obvious and massive preservation problems. Ex. 52 (10/9/08 Intel Ltr. to AMD). During the Rule 30(b)(6) deposition, Intel asked whether AMD was aware Mr. [redacted] was not keeping emails. Ex. 30 (Halle Tr. 107:7-8). AMD's counsel objected on privilege grounds and instructed AMD's corporate witness not to answer. *Id.* at 107:9-11. Intel moved for, and received, an order requiring a response, and at the further deposition, the truth finally came to light: "AMD learned of Mr. [redacted] low file counts in mid 2007." *Id.* 203:13-14.

It is bad enough that AMD never voluntarily disclosed this obvious preservation issue, and instead waited for over two years to do so, only after Intel received a Court order requiring it. But worse than non-disclosure, AMD misrepresented the facts to Intel. On August 10, 2007, AMD advised Intel in writing that:

> [w]e have now completed a review of AMD's preservation program with respect to each of the 108 AMD party-designated production custodians. We are pleased to report that our preservation program appears to be operating as designed and intended; no lapses in that program have been identified.

Ex. 46 (8/10/07 AMD Ltr. to Intel 1). AMD repeated this (false) assurance on August 23. Ex. 1 (8/23/07 AMD Ltr. to Intel 1). Mr. [redacted] was among the 108 AMD production custodians that were the subject of AMD's purported custodian-by-custodian review. AMD admitted at deposition that it learned about Mr. [redacted] issues in mid-2007, likely as part of the review, yet failed to disclose those issues to Intel, and, in fact, after four months (from April to August 2007) misrepresented that its review revealed "no lapses."

Mr. [redacted] is but one example – most of the other AMD custodians classified as having [redacted] retention issues were also among the 108 AMD party-designated production custodians purportedly subject to the custodian-by-custodian review in mid-2007, including [redacted]. Ex. 53 (4/29/09 Intel Ltr. to AMD); Ex. 54 (AMD Designated Custodian List). Either AMD misinformed Intel about these custodians as well, or its "review" was woefully inadequate.

c. AMD Employees Deleted Emails, According To AMD, To "Preserve" Them.

Despite their obligation to retain, not delete, relevant emails, several of AMD's top executives appeared to have substantial emails produced from their "Deleted Items" folders. *See* Ex. 49 (7/2/08 Ashley Decl. ¶ 18 (D.I. 1049)) ("I discovered that an overwhelming majority of all emails produced for Messrs. [redacted] ...were initially deleted before they were produced.") In response, AMD contended that "an AMD custodian's preservation of email in a Deleted Items folder is not evidence of a failure to comply with preservation protocols," and claimed that some custodians "routinely used their Deleted Items folders as a

location to preserve emails they wanted to retain." Ex. 29 (7/24/08 Fowler Decl. ¶ 19 (D.I. 1087)). That explanation, if credible at all, admitted a direct violation of AMD's hold notice.

d. AMD Instructed Its Employees To Delete PSTs Which Included Relevant Emails.

The conduct described above – deleting emails to preserve them – created yet another potential cause for lost data, because when AMD migrated its employees' PST files into its Enterprise Vault archive, it did not routinely transfer the Deleted Items folder. Ex. 28 (Tr. 205:4-206:9); Ex. 55 (Depo. Ex. 229 at AMD-F051-5103248). According to AMD,

[redacted]

e. Over Time AMD Admitted A Lengthy Series Of Previously Undisclosed Issues.

Intel's investigation triggered a steady stream of other undisclosed preservation and production issues that would have never been revealed, but for Intel's efforts. For example:

- Intel learned that AMD unilaterally deployed, without Intel's agreement or Court authorization, a near-deduplication protocol that suppressed lower level messages in email chains for both review *and production* purposes. Ex. 56 (12/09/08 AMD Ltr. to Court, Ex. B (D.I. 1365)). This practice blatantly violated Court-ordered stipulations on electronic discovery and production of native files entered into by the parties, permitting only custodial exact deduplication, and providing that "each electronic file will be produced with all of its original metadata intact...." *See* 5/15/06 Stip. and Order 2-3 (D.I. 76) and 02/20/07 Stip. and Order 3-4 (D.I. 396).
- AMD admitted, almost four years into the lawsuit and more than two years after it represented that its investigation of its document retention program revealed no lapses, that [redacted]
- Years after representing to Intel on October 24, 2005 that AMD had "suspended" its "document retention and destruction policies" to "prevent the inadvertent destruction of documents that may be relevant to this lawsuit," Ex. 27 (10/24/05 AMD Ltr. to Intel 1), AMD acknowledged that its [redacted]

[redacted]

- Years after representing to Intel on October 24, 2005 that AMD had not and would not recycle or overwrite any backup tapes since March 11, 2005, [redacted]

- AMD issued late litigation hold notices to two AMD custodians in September 2006, [redacted], but failed to disclose that fact until almost one year later, on August 10, 2007, and even then did not identify the custodians by name. *See* Ex. 46 (8/10/07 AMD Ltr. to Intel 2); *see also* Ex. 5 ([redacted] Tr. 106:3-15) (disclosing the names of the two custodians for the first time on March 6, 2009).

- AMD's litigation hold notices instructed employees that they [redacted] Not until August 13, 2009 did AMD disclose that, despite this clear instruction, [redacted]

[redacted]

3. AMD Has Been Forced To Produce Hundreds Of Thousands Of New Documents After Wrongly Denying Their Existence.

a. Intel Pointed Out AMD's Clear Retention Failures.

Following AMD's concessions regarding [redacted] production during the September 11, 2008 hearing, *see* Ex. 48 (9/11/08 Hrg. Tr. 37:17-38:16 (D.I. 1187)), Intel began producing additional histograms that reflected potential preservation and/or production issues for many other AMD custodians. Intel made no secret of the fact that it was concerned about undisclosed data restoration, as clearly stated in its November 14, 2008 letter to AMD and Mr. Friedberg: "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." Ex. 58 (11/14/08 Intel Ltr. to AMD 3). On November 14, 2008, AMD produced, for the first time, over 3,200 new documents it had recovered from backup tapes for [redacted]. Ex. 59 (11/14/08 AMD Ltr. to Intel); Ex. 50 (1/5/09 AMD Ltr. to Intel 8-9); Ex. 28 ([redacted] Tr. 190:14-23) ([redacted]").

Over the next several months, as its investigation into AMD's practices continued, Intel identified a number of other custodians whose productions, similar to [redacted], exhibited data anomalies and possible preservation issues. Ex. 53 (4/29/09 Intel Ltr. to AMD 1-8). As a result,

AMD produced thousands of additional documents and conceded, for the first time, that many of its custodians did not properly retain documents. Ex. 51 (12/9/08 AMD Ltr. to Court 9) (acknowledging there is a "category" of custodians whose "selectivity in deciding which files were relevant and which were not does not reflect what AMD would have preferred").

In response to Intel's inquiries, AMD said it had not restored data (other than for two custodians, [redacted]), yet consistently refused to say so under oath, instructing its Rule 30(b)(6) witness to refuse to answer Intel's questions to that effect. *See, e.g.*, Ex. 28 ([redacted] Tr. 194:5-11) ("Q. So our record is clear, I am going to ask this again. Were there other restoration activities for this litigation performed besides [redacted]? A: [redacted]"). Intel was forced to move to compel an answer to that straightforward question.

On April 29, 2009, Intel, still unaware of AMD's undisclosed restoration activities, identified a list of 37 AMD custodians exhibiting serious retention/preservation issues. Ex. 53 (4/29/09 Intel Ltr. to AMD). In response, AMD insisted that Intel commit itself to the list of 37 custodians and agree not to request remediation for any others. Ex. 60 (5/9/09 AMD Ltr. to Intel 1). Intel agreed, but made it clear that further deposition testimony, if ordered by the Court, could result in additional requests for remediation. Ex. 61 (5/29/09 Intel Ltr. to AMD 2).[10] Further developments demonstrated that Intel's reservation of rights was more than prudent.

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[10] The parties thereafter stipulated, and the Court ordered, that Intel could move to compel production of data from backup tapes "based upon new testimony that Intel obtains through further deposition, if any, that may be ordered by the Court" in response to Intel's motion to compel further deposition testimony. 8/27/09 Stip. and Order 2-3 (D.I. 2077).

b. AMD Wrongly Denied Its Secret Restoration Activities In Open Court.

During the course of its investigation into AMD preservation issues, Intel repeatedly expressed concern that AMD was engaged in undisclosed data restoration activities. Intel also clearly stated its expectation that any restoration of preservation tape data should be performed transparently. Ex. 58 (11/14/08 Intel Ltr. to AMD 3). More recently, in a May 26, 2009 letter to the Court seeking further deposition testimony and an order overruling certain improper objections, Intel stated:

> **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. AMD's deposition responses and objections, and its supplemental deposition corrections, essentially dodge this issue. Intel is entitled to know the whole story.

Ex. 62 (5/26/09 Intel Ltr. to Court 3 (D.I. 1333)). During the June 15, 2009 hearing, Intel raised the undisclosed restoration issue again and, in an effort to avoid having to provide facts under oath at deposition on this topic, AMD again denied that such activities had occurred:

Ex. 63 (6/15/09 Hrg. Tr. 47:6-19) (emphasis added).

AMD thus made it clear on the record that the only restoration activities that it did not want to [redacted]" were the [redacted] that occurred during the remediation for

Messrs. [redacted] Of course, we now know AMD's counsel had another restoration "issue" in mind at this point in the hearing – namely, AMD's undisclosed data restoration for dozens of *other* custodians (performed by a separate e-discovery vendor).

The Court then addressed the specific deposition question at issue in the context of [redacted]

Ex. 63 (6/15/09 Hrg. Tr. 48:12-18) (emphasis added). Mr. Samuels allowed this statement of his position to stand uncorrected. On June 22, 2009, following AMD's statements at the hearing, the Court ordered it to respond to the restoration question at issue. 6/22/09, Report and Rec. 4-8 (D.I. 1933), adopted as an Order on 7/7/09 (D.I. 1979).

c. Facing A Sworn Deposition About Its Restoration Activities, AMD Agreed To Remediate For 37 Of Its Custodians.

Following that Order, the 30(b)(6) deposition was scheduled to continue on August 13, 2009. In a surprising turn of events, on August 11, two days before it knew it would have to answer Intel's question about undisclosed restoration, AMD changed its position and stated it would produce backup tape data for the 37 production custodians Intel identified as having apparent preservation and/or production issues. Ex. 64 (8/11/09 AMD Ltr. to Intel 3).

d. AMD Finally Came Clean Under Oath, Admitting That Its Secret Data Restorations Started in November 2008.

On August 13, 2009, AMD produced [redacted], its e-discovery consultant, to respond to the questions on restoration activities – including the question the Court quoted during the June 15, 2009 hearing. Ex. 63 (6/15/09 Hrg. Tr. 48:12-18). In another surprising twist, AMD admitted for the first time that it had been conducting undisclosed backup tape restoration since *November 2008*, after Intel produced its first set of histograms, and stated that data from *57 AMD production custodians* had been restored since that time. Ex. 30 ([redacted] Tr. 189:13-191:1; 187:7-188:3); *see also* Ex. 65 (AMD-412-00000002). These 57 custodians included not only the 37 for whom AMD – just two days earlier – had committed to produce documents from preservation tapes, but 20 others for whom AMD made no such commitment. Indeed, AMD had apparently attempted to induce Intel's agreement to limit remediation to the 37 custodians at the same time it was denying that undisclosed restorations had occurred. *See* Parts a & b, *supra*.

AMD's tardy remediation for the 37 custodians, already voluminous, continues. Thus far, just six months before trial, and more than 18 months after the deadline for production of custodian documents, AMD has produced more than 200,000 new documents from 24 of the 37 custodians. Ex. 66 (9/12/09 AMD Ltr. to Intel); Ex. 67 (9/17/09 AMD Ltr. to Intel); Ex. 68 (10/1/09 AMD Ltr to Intel.); Ex. 69 (AMD Remediation File Counts). AMD expects its remediation from these custodians to be complete by November. Following AMD's surprise disclosure, Intel advised AMD by letter of August 28, 2009, that AMD was obligated to produce of the restored backup tape data for the 20 remaining custodians. Ex. 70 (8/28/09 Intel Ltr. to AMD). AMD refused to produce any such data for the 20 additional custodians *and, in fact, disclosed to Intel that all such restored data has since been deactivated and now again resides only on the backup tapes*. Rocca Decl. ¶ 2.

III. ARGUMENT

A. Summary of Argument: AMD Should Be Ordered To Do What Intel Long Ago Did Voluntarily.

Intel moves for a sanctions order requiring AMD to complete a full and transparent remediation based on AMD's failure to take appropriate or timely steps to preserve substantial quantities of relevant data as well as its failure to produce relevant data it did retain. At least by January 2005 AMD reasonably anticipated its lawsuit against Intel and did everything a future plaintiff would do to prepare for that case – including hiring trial counsel, conducting extensive witness interviews to support its allegations and retaining a jury consultant – but did not start retaining relevant documents, the one thing the law obligated it to do.

Moreover, at every turn, AMD has represented that its document preservation was "exemplary," with "no lapses," but resisted Intel's investigation of those representations. Throughout Intel's investigation, AMD has not been forthcoming about its document preservation issues, its knowledge of those problems or its restoration activities designed to address them. Despite these roadblocks, Intel's investigation uncovered a laundry list of undisclosed preservation problems and led to a series of substantial remedial document productions – hundreds of thousands of documents – which are still underway.

Some of AMD's preservation mishaps are understandable in a case of this magnitude. Other problems, however, undermine the integrity of AMD's entire preservation program and the sufficiency of its document productions, and cannot be ignored. Nor should the Court ignore the manner in which AMD's preservation issues have come to light. In stark contrast to Intel's voluntary and timely disclosure of preservation issues, and its comprehensive efforts to remediate them, AMD spent years concealing its own issues, obstructing Intel's investigation, and engaging in stealth data restoration, all while touting its exemplary conduct.

This Court has "inherent power to impose sanctions against a party that has destroyed relevant evidence." *In re Wechsler,* 121 F. Supp. 2d 404, 427 (D. Del. 2000). In selecting the appropriate sanction for spoliation of evidence, three factors are relevant:

1. "[T]he culpability of the party who destroyed or failed to preserve the evidence;"
2. "[T]he degree of prejudice suffered by the innocent party;" and
3. "[T]he availability of less severe sanctions that would avoid unfairness to [the victim] while, at the same time, deterring similar misconduct in the future."

Mosel Vitelic v. Micron Tech. Inc., 162 F. Supp. 2d 307, 311 (D. Del. 2000).

The first two factors, the culpability of the offender and the prejudice suffered by the other party, should be given the most weight. *See, e.g., Jordan F. Miller Corp. v. Mid-Continent Aircraft Service, Inc.*, No. 97-5089, 1998 WL 68879, at *4 (10th Cir. Feb. 20, 1998); *see also GE Harris Ry. Electronics, L.L.C. v. Westinghouse Air Brake Co.*, No. 99-070, 2004 WL 5702740, at *3 (D. Del. Mar. 29, 2004) ("A party's bad faith intent speaks to that party's degree of fault and must be factored into a court's choice of sanction.").

AMD's conduct merits sanctions. Its recent and ongoing remediation of 37 additional custodians is only a beginning of the remediation required. *First,* AMD failed to preserve documents as of the date it first reasonably anticipated litigation against Intel, and it has misrepresented key facts to Intel and the Court on this issue. *Second,* AMD conducted undisclosed data restoration from backup tapes, concealed that fact from Intel and the Court, and then allowed the restored data to be destroyed before Intel learned of its existence, while in the meantime seeking Intel's agreement to forego production of the (undisclosed) restored data. *Third,* despite AMD's now proven pattern of widespread preservation lapses, it has never disclosed the extent of those problems. In fact, it has repeatedly misrepresented the scope and

nature of them. Intel, in contrast, voluntarily disclosed its preservation issues and, pursuant to Court Order, has remediated them. AMD's efforts to cover up its retention failures weigh heavily in determining appropriate sanctions. *Finally*, AMD's decision to withhold documents from the Snapshot and its undisclosed restorations are plainly prejudicial.

Specifically, Intel seeks sanctions against AMD requiring it to complete its remediation by producing responsive documents from (1) a March 2005 "Snapshot" created for the purposes of this litigation, and (2) previously restored backup tapes for 20 custodians which predate the journaling of those custodians. In addition, Intel seeks sanctions requiring AMD to fully disclose the nature, scope and duration of all of its document preservation issues, as Intel has done, within 15 days of the Order on this Motion.[11] These sanctions constitute a measured and straightforward remedy for AMD's misconduct, and indeed simply mirror Intel's own completed remediation of its fully disclosed preservation lapses.

B. AMD Should Be Sanctioned Because It Failed To Preserve Evidence When It Was Planning This Lawsuit.

It is well established, in the Third Circuit and elsewhere, that knowledge of a "potential" claim triggers the duty to preserve evidence. The controlling standard is whether a party has a "reasonable belief that litigation is foreseeable," *Micron Tech., Inc. v. Rambus, Inc.*, 255 F.R.D. 135, 148 (D. Del. 2009); or "reasonably should know [that] litigation is foreseeable." *Mosaid Techs. Inc. v. Samsung Elec. Co., Ltd.*, 348 F. Supp. 2d 332, 336 (D.N.J. 2004). Litigation need not be certain, imminent or even probable. As this Court put it, the obligation to preserve arises

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[11] This Court previously defined "preservation issues" as "any Custodian's failure to preserve responsive documents, whether that failure was caused by the manual or automatic deletion of responsive documents and/or by the passive failure to save or archive responsive documents." March 10, 2009 Order (D.I. 1628) at 3.

"when a party has reason to believe that a lawsuit *may* be filed." *In re Wechsler*, 121 F. Supp. 2d 404, 417 (D. Del. 2000) (emphasis added). A party who breaches this duty "by allowing relevant evidence to be destroyed may be sanctioned by the court." *Id.* at 415.

Similarly, this Court has ruled that "A duty to preserve evidence arises when there is knowledge of a *potential* claim." *Micron Tech., Inc. v. Rambus Inc.*, 255 F.R.D. 135, 148 (D. Del. 2009) (emphasis added). Once a potential – not "potentially viable" – claim is identified, "a party is under a duty to preserve evidence which it knows, or reasonably should know," is relevant to reasonably foreseeable litigation. *Id.* at 148. Litigation need not be imminent; indeed, "a duty to preserve evidence can arise many years before litigation commences." *Id.*

AMD violated this fundamental obligation. By January 2005, at the latest, AMD had plenty of reason to believe this very lawsuit may be filed. It knew the facts that formed the basis for its allegations. It had developed the legal theories that it pursued in the Complaint. It had hired litigation counsel, jury consultants and experts. It had prepared its legal strategy, including an elaborate public relations effort. Its team of lawyers interviewed the key AMD witnesses seeking support for its allegations. Preservation of witnesses' oral statements should have triggered preservation of their documents.

The law requires a plaintiff who knows that it may have a legal claim against a party to begin retaining evidence related to that claim, but AMD did not. It continued its normal document policy, including the routine destruction of electronic and other evidence. It did not issue any litigation hold notices to custodians until April 2005 and for many key witnesses not until well after that date. Obviously, AMD cannot undo the harm of failing to preserve for those months because some documents are gone forever. But it has a set of data, the March 2005 Snapshot, that was specifically created to preserve documents related to this litigation and which

has vast amounts of data that have not been produced. AMD should be ordered forthwith to produce all responsive, previously-unproduced, non-privileged documents from the Snapshot.

Since AMD cannot deny that substantial data was lost forever as a result of its failure to preserve evidence in early 2005, it is forced to deny that it reasonably anticipated this litigation then. Rather, AMD claims, it did not know of a "[redacted]" claim until [redacted]. That assertion is directly contradicted by its counsel's statements in 2005 that document preservation for this case began before that date. Ex. 27 (10/24/05 AMD Ltr. to Intel 1) (Describing the March 2005 retention of backup tapes and the Snapshot as "AMD Preservation Efforts."). It is also based on a misreading of the applicable law. A potential plaintiff cannot postpone preservation until it has reached a Board of Directors decision that it will sue or that its claim will likely prevail. It cannot interview witnesses and retain counsel, experts, jury consultants – all in preparation for the suit – and wait several months to preserve evidence. No authority allows that type of selective and untimely preservation.

AMD's position fails the straight-face test. It claims that it had no obligation to retain documents related to a lawsuit it had been evaluating and preparing for months, until its outside counsel formally opined to its Board that AMD had a "[redacted]" claim. A plaintiff's obligation to preserve data is not, and has never been, triggered by a subjective standard, such as when the plaintiff makes the decision to sue. *See, e.g., Erie Ins. Exch. v. Applica Consumer Prods., Inc.*, 2005 WL 1165562, at *4 (M.D. Pa. May 17, 2005) (holding "the duty arises as soon as a potential claim is identified," not when a plaintiff decides it is going to sue).

In short, AMD's assertion that its view of the claim changed on [redacted] is not only belied by the positions its counsel took later that year, it boils down to a word game hinging on the false assumption that a conclusion about the "[redacted]" of a claim is controlling. The

evidence shows AMD's lawsuit was both objectively and subjectively foreseeable no later than January. *See Mosaid*, 348 F. Supp. 2d at 336.

In addition, even if there were any merit to AMD's claim it did not anticipate a claim against Intel in January 2005 (when it started intense preparations for this litigation), it certainly did by March 2005. Its own legal department notified AMD IT on March 11 that that AMD "[redacted]" Ex. 26 (AMD-500-00000092 to 93) (emphasis in original). AMD instructed its IT staff to, among other steps, [redacted]" Exchange backups, conduct and retain a backup. *Id.* at AMD-500-00000092. AMD's admission in its evidence preservation notice that by March 2005 it was required to preserve all "[redacted]" is more than sufficient to compel AMD to produce unique data from the Snapshot created in response to that notice. *Id.*

Intel's request is narrowly tailored to compel production of responsive data from production custodians who are, by definition, "relevant" to this litigation. *See* 5/15/06 Stip. and Order (D.I. 77); 9/19/07 Case Mgt. Order #3 (D.I. 595). The request calls for unique documents that have not been produced to date and thus have not been available from other sources. [redacted]. Ex. 28 ([redacted] Tr. 168:21-169:19). Indeed, AMD created the Snapshot based on a belief that it might be used at some point to produce data to Intel. Ex 26 (AMD-500-00000092) (AMD instructed its IT managers to retain the March 19, 2005 Snapshot in order to "[redacted]"); Ex. 71 (Depo. Ex. 215 at 2) (describing retention protocols for this litigation); Ex. 27 (10/24/05 AMD Ltr. to Intel 1) (describing snapshot as a

"preservation effort"). And because AMD's allegations largely focus on pre-Complaint conduct, the pre-Complaint documents on the Snapshot are likely to be highly relevant to Intel's defenses.

C. AMD Should Be Sanctioned For Its Stealth Restorations And Misleading Statements To Intel And The Court.

For over a year, Intel asked AMD whether it had restored any custodian's data from any alternative sources. AMD denied that there were "other restoration activities for this litigation performed besides [redacted]." *See* Ex. 63 (6/15/09 Hrg. Tr. at 48:12-18). That was, in AMD's own terms, "categorically untrue." *Id.* 47:10-11. Following months of denials and evasions, and only under Court Order, AMD finally admitted in August 2009 that, contrary to its representations to Intel and the Court, it had been secretly restoring backup tape data for 57 of its production custodians, including for many senior executives, *since November 2008*.

Just prior to its belated disclosure, AMD agreed to produce remedial data from the backup tapes of 37 of those 57 custodians. Thus far, that remediation has resulted in the eleventh hour production of more than 200,000 new, previously unproduced documents from 24 of those 37. Many more are still to come from the remainder. AMD's decision to conceal its restoration activities, misrepresent them when asked, dribble documents out as it saw fit, then produce hundreds of thousands more only after the close of discovery, is plainly prejudicial.

But inflicting that prejudice is not the end of it. AMD now arbitrarily refuses to produce unique data from the backup tapes of the 20 other custodians, including many key witnesses in the case, for whom it restored backup tape data. AMD cannot deem a portion of their restored documents off limits without any justification, and thereby reward its own intransigence. Intel requests sanctions against AMD for its misrepresentations to Intel and the Court, and an Order

compelling the production of all unique, responsive, non-privileged documents from backup tapes created by that undisclosed restoration project, related to 20 AMD custodians.[12]

The 20 custodians that are the subject of this request are designated production custodians and thus, by definition, are relevant to this case. Moreover, AMD identified 18 of them in its first set of Rule 26 Initial Disclosures, October 6, 2005 Stipulation and Order at 2-3, and Intel deposed 11 of them. Significantly, these custodians include some of the most senior of AMD employees, including its [redacted], who AMD has stated will testify at trial on damages, several other key custodians, and a witness designated by AMD as an expert at trial, [redacted].[13]

Under Federal Rule of Civil Procedure 26(b)(2), "a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery." FED. R. CIV. P. 26(b)(2) (Adv.

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[12] [redacted]

[13] [redacted]

Comm. Notes, 2006 Amendment).[14] Under Federal Rule of Civil Procedure 37(a), "a party may move for an order compelling disclosure or discovery." FED. R. CIV. P. 37(a). Moreover, Your Honor has the "authority to regulate all proceedings and take all measures necessary to manage electronic discovery production" in this matter. 5/11/06 Order Appointing Special Master (D.I. 73) at 2 (citing FED. R. CIV. P. 53(c)).

AMD concedes that it restored backup tape data for the 20 custodians at issue during the fact discovery period. "Restoration, of course, is the act of making inaccessible material accessible." *Zubulake v. UBS Warburg, LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) ("*Zubulake III*"). Once AMD conducted its targeted data restoration for this litigation, the restored data (which included unique documents from relevant custodians) became "reasonably accessible" and subject to discovery in this litigation. As noted in *Zubulake III*, "once the safe is opened, the production of the documents found inside is the sole responsibility of the responding party," and "cost-shifting is no longer appropriate." 216 F.R.D. at 291.[15]

Had Intel known that the data had been restored – particularly for some of the key AMD custodians in this case – Intel certainly would have requested its timely production during the discovery period for use during depositions. *But Intel never had that opportunity.* Instead, AMD restored the data into an active format, used it for a litigation purpose, then deactivated it, and all the while failing to disclose these activities to Intel and the Court.

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[14] *See also* D. OF DEL. AD HOC COMM. FOR ELECTRONIC DISCOVERY, DEFAULT STANDARD FOR DISCOVERY OF ELECTRONIC DOCUMENTS at ¶ 4 ("parties shall search their documents, *other than those identified as limited accessibility electronic documents*, and produce responsive electronic documents in accordance with Fed. R. Civ. P. 26(b)(2)") (emphasis added).

[15] As provided in the Court's June 22, 2009 Order, Intel reserves the right to request additional deposition testimony regarding the burden of AMD's preservation tape restoration. 6/22/09 Report and Rec. at 8 (D.I. 1933), adopted as an Order 7/9/09 (D.I. 1581)).

This issue is entirely one of AMD's own making. It restored data on its own initiative. Yet it decided to keep that restoration secret. Even when Intel asked AMD if were restoring data, AMD falsely represented to Intel and the Court that it had not. If AMD had come clean in 2008 when it began restoring data for these custodians, this problem would have been solved many months ago. AMD's attempt to cover its tracks failed and it now must suffer the consequences. *See GE Harris,* 2004 WL 5702740, at *3 ("A party's bad faith intent speaks to that party's degree of fault and must be factored into a court's choice of sanction.")

Finally, Intel's request for this sanction is timely. In connection with the Court's overruling of AMD's various objections and instructions during 30(b)(6) depositions, the Parties stipulated, and the Court ordered, that Intel may seek production of documents from specific custodians based upon "new testimony that Intel obtains through further deposition." 8/27/09 Stip. and Order at 2-3 (D.I. 2077). Intel was required to, and did, within two weeks of the deposition, identify to AMD all such custodians and describe with particularity the basis for Intel's request – namely, the undisclosed preservation tape restoration for 20 additional AMD custodians. Ex. 70 (8/28/09 Intel Ltr. to AMD). The parties met and conferred in September and AMD refused to comply with Intel's request. Rocca Decl. ¶ 2; Ex. 30 ([redacted] Tr. 206:25-208:22).

D. AMD Should Be Ordered To Come Clean, Once And For All.

The contrast between Intel's and AMD's conduct regarding their responsibility for evidence preservation could hardly be clearer. Intel has been forthcoming about its problems and has undertaken enormous, costly efforts to remediate. Those extraordinary efforts have been successful and Intel has completed the most expensive and extensive remediation in history.

AMD chose a different path. It continually assured Intel and the Court that its evidence preservation was "exemplary" and resulted in only a "very few and innocuous" errors that resulted in "inconsequential" data loss. Ex. 2 (6/11/08 AMD Ltr. to Court 1 (D.I. 964)). Indeed,

it boasted of its achievements in very specific ways. On August 10, 2007, it advised Intel in writing that

> [w]e have now completed a review of AMD's preservation program with respect to each of the 108 AMD party-designated production custodians. We are pleased to report that our preservation program appears to be operating as designed and intended; no lapses in that program have been identified.

Ex. 46 (8/10/07 AMD Ltr. to Intel 1).

Intel initially demonstrated to AMD (and the Court) in June 2008 that AMD's story did not hold up, starting with the less-than-exemplary practices of its [redacted], [redacted], who [redacted]. But AMD stuck to its story and tried to stonewall any efforts to investigate its evidence preservation. While expressly acknowledging its "ongoing duty to apprise Intel" of any data losses, Ex. 2 (6/11/08 AMD Ltr. to Court 3 (D.I. 964)), AMD nevertheless instructed its 30(b)(6) witness not to answer any questions about whether it knew certain custodians, such as [redacted] had any preservation issues. And it was only after Intel secured this Court's order for AMD to respond that AMD admitted not only that [redacted] deleted almost all of his emails, but that AMD knew about the problem in mid-2007. Ex. 30 ([redacted] Tr. 203:13-14).

As detailed above, this AMD omission was not isolated. AMD either failed to disclose or affirmatively misrepresented the truth about its evidentiary preservation lapses again and again – from the initial boast of "no lapses" through the "exemplary" mantra and on to the secret restoration of half of its production custodians. In so doing, AMD has evaded and obstructed at every step to short-circuit any inquiry into evidence preservation issues.

Yet Intel affirmatively disclosed its issues and was required by the Court's March 10, 2009, Order to disclose "all known 'preservation issues'" affecting any custodians "of which Intel's counsel is aware, regardless of when and under what circumstances said information became known." It was ordered to "take reasonable steps to provide a

comprehensive written summary that includes all relevant facts concerning the nature, scope and duration of the preservation issues." 3/10/09 Order 3 (D.I. 1628).

It is long past time to hold AMD to this same standard. On this record of AMD's substantial known lapses, obfuscations, misrepresentations and a studied strategy to avoid disclosures of lapses, there is more than sufficient justification to order AMD to disclose all known preservation issues. Intel respectfully requests that AMD be made subject to the terms of the March 10 Order and ordered to comply with it within 15 days of the Order on this Motion.

IV. REQUEST FOR RELIEF

Based on the foregoing, Intel respectfully requests the following relief:

1. An Order sanctioning AMD for its failures to preserve evidence when it first reasonably anticipated this litigation, and compelling AMD to remediate its document production with responsive, unique, non-privileged documents from the Snapshot for all AMD production custodians within 60 days of the Order;

2. An Order sanctioning AMD for its undisclosed data restoration and its misconduct regarding those activities, by compelling AMD within 60 days of the Order to remediate its document production with responsive, unique, non-privileged documents from monthly preservation tapes for the following AMD production custodians: [redacted] The date range of this production should be consistent with AMD's remediation for the 37 "histogram" custodians – specifically, from March 2005 through the date the custodian was placed on journaling or the date of their own production cutoff, whichever is earlier.

3. An Order (a) requiring AMD within 15 days to take reasonable steps to provide to Intel and the Court a comprehensive written summary that includes all relevant facts concerning the nature, scope, and duration of every preservation issue (as defined in the Court's March 10, 2009 Order at ¶ 4 (D.I. 1628)) known to AMD; (b) requiring AMD within 15 days to disclose to Intel all as yet undisclosed remediation or data restoration; and (c) permitting Intel to use, without limitation, the recently produced documents as well as any documents produced pursuant to the Order for any purpose in this litigation.

4. Any other Order or remedy that the Court deems just and appropriate.

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