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**VIA ELECTRONIC FILING  
AND HAND DELIVERY**

The Honorable Vincent J. Poppiti  
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Redacted Public Version

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

Dear Special Master Poppiti:

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

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

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

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

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

#### **I. Intel’s False Claims of “Systemic” AMD Preservation Breakdown.**

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

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

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

<sup>2</sup> Indeed, when Your Honor asked Intel’s counsel directly whether the Court’s Chart “capture[d] your universe of identified problems,” Mr. Pickett confirmed that it accurately set forth “our list

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

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

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

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

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

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

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

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of known and strongly suspected items,” stating “it’s fine.” (See September 11, 2008 Hrg. Tr. at p. 63.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**A. Document Production.**

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

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

**B. Issues Identified In The Court's Chart.**

**1. Court Chart Issue No. 1: Automated Journaling and Archiving.**

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

**2. Court Chart Issue No. 2: Evidence of Specific Deletion Activity.**

AMD produced information on this topic during initial briefing (*see* Fowler Decl. ¶¶ 19-21), and Intel thoroughly interviewed both Redacted and AMD's consultant, Tony Cardine, on this topic. Intel never raised additional questions, and Mr. Pickett conceded that "[w]ithout getting hung up over the word completed, I think [this topic] is substantially completed." (*See* Dec. 12 Hrg. Tr. at p. 25.)

**3. Court Chart Issue No. 3: Redacted Issues.**

AMD produced information during briefing (*see* Fowler Decl. ¶¶ 22-27), and Intel extensively questioned Redacted regarding Redacted dumpster settings and all related topics.

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

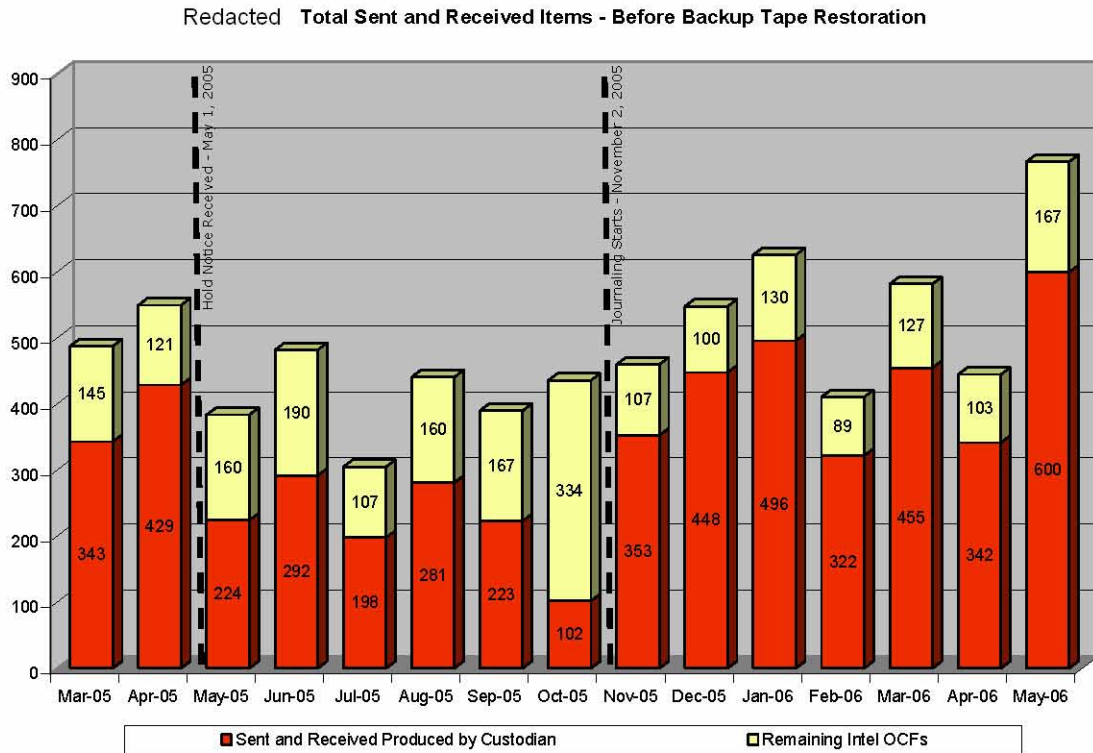
Attached hereto as Exhibit C are three sets of bar charts that depict the production for Redacted Redacted both before and after production of these supplemental files. The two charts in the first set are titled Redacted "Total Sent and Received Items," with one chart depicting production "Before Backup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

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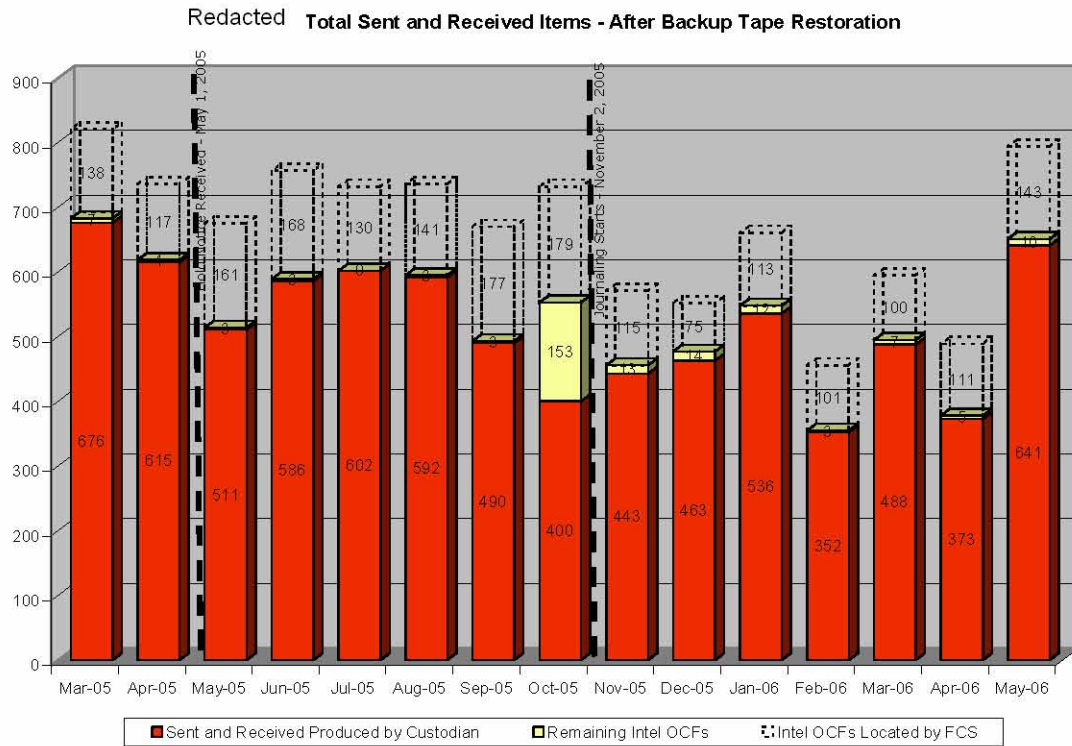
<sup>4</sup> As AMD previously described to Intel, AMD also produced on November 14, 2008, certain deposition reharvest data for Redacted that had not previously been produced as a result of vendor error. The deposition reharvest email produced from Redacted journal extract related to June 2006 and thereafter.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

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





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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**A. Confirmatory Discovery.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

**C. Intel's New Document Requests Are Unwarranted.**

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

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

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

**V. Conclusion**

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

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

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

Respectfully,

/s/ Frederick L. Cottrell, III

Frederick L. Cottrell, III (#2555)

FLC/III

Enclosures

cc: Clerk of the Court  
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