IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

AMD'S OPENING BRIEF IN SUPPORT OF ITS MOTION FOR SANCTIONS FOR INTEL'S FAILURE TO PRESERVE EVIDENCE

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I.

INTRODUCTION

Intel has severely and irreparably harmed AMD's ability to present its case. At a company where paper trails are strongly discouraged, Intel imposed a "move-it-or-lose-it" document preservation regime where any document not manually saved was permanently expunged. This system led to material and dramatic evidence loss at all levels of Intel. A litigant making a good faith attempt to comply with its unambiguous legal duty to preserve evidence would not have designed the evidence preservation regime Intel did—a regime so porous that, according to Intel's own disclosures, more custodians lost documents than properly saved them. Intel could have easily avoided this evidence preservation fiasco had it and its counsel exercised a modicum of diligence in designing and implementing an effective document preservation program, and then taken any meaningful steps to ensure compliance with it, as the law required. These failures caused the *permanent* destruction of an untold amount of evidence, notwithstanding Intel's much heralded, highly vaunted, but ultimately unsuccessful, attempt at remediation. AMD, therefore, moves for sanctions under the Court's inherent power based on Intel's willful and bad faith destruction of evidence.

At the heart of Intel's preservation problems was its failure to disarm an aggressive auto-delete system despite uncontroverted authority requiring it to do so. Intel misrepresented the workings of that system to AMD, and also misrepresented the steps it would take to neutralize its pernicious effects. Had Intel simply told AMD the truth in Fall 2005, AMD would have immediately asked the Court to intervene and halt the permanent destruction of electronic evidence. But Intel did not, and so its auto-delete shredder continued to run without any safety net. With the consequent risk that vitally important records would disappear forever, Intel owed a higher duty to carefully instruct its employees how to keep critical documents from getting

routinely obliterated. It didn't come close to fulfilling that duty. Intel instead issued litigation hold notices that gave no warning to custodians that, because of the auto-delete system, doing nothing would lead to irrevocable erasure of their email and, therefore, that preservation required them to move their data out of harm's way. Compounding this, Intel failed to send even this defective hold notice to hundreds of custodians whom *its counsel identified* as having relevant, *non-duplicative* information. Intel then neglected to retain the backup tapes made for hundreds of custodians as it promised it would do, therefore failing to backstop its decision to rely on a purely custodian-driven preservation scheme.

Putting the burden of preservation on custodians was an extraordinarily high-risk strategy because at Intel preservation is something of a sin. [redacted] Intel [redacted] went to great lengths to "train" its employees about the potential repercussions of creating a record, to the point of fueling a Harvard Business Review article, proudly authored by one of Intel's own outside directors, on how Intel avoids antitrust unpleasantness.[1] It is no surprise that when Intel deployed its flawed preservation scheme in this culture that many of its employees ignored the tepid warnings that some were lucky enough to receive, and mountains of evidence were irretrievably lost. [redacted] for a period of more than a year and a half, Intel and its lawyers did nothing to stop the destruction despite repeated red flags that they chose to ignore.

[1] Declaration of Roberta Vespremi ("Vespremi Decl."), **Exh. 1** (David Yoffie, *Playing by the Rules: How Intel Avoids Antitrust Litigation*, Harv. Bus. Rev., June 2001, at 119).

The law is unforgiving of those who tip the litigation scales through evidence spoliation. In the seminal case of *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004) ("*Zubulake V*"), Judge Scheindlin laid out a clear set of ground rules for parties and counsel to live by when it came to preserving evidence—rules that were well-known to the legal community in 2005 and certainly known to Intel and its marquee law firms. In *Zubulake*, the facts were remarkably akin to what occurred here, although the scope of destruction paled in comparison to the losses in this case. In *Zubulake*, "[c]ounsel failed to communicate the litigation hold order to all key players. They also failed to ascertain each of the key players' document management habits. By the same token, UBS employees–for unknown reasons–ignored many of the instructions that counsel gave." 229 F.R.D. at 436. Given the failures of counsel to ensure preservation, the *Zubulake* court concluded that "UBS acted *willfully* in destroying potentially relevant information. . . . Because UBS's spoliation was willful, the lost information is presumed to be relevant." *Id.* (emphasis added). Based on UBS's conduct, the court ordered an adverse inference instruction to be provided to the jury at trial and ordered the payment of all of plaintiff's attorney's fees and costs incurred in pursuing the sanctions motion. *Id.* at 439-40. The teaching of *Zubulake* is that turning away while evidence is being destroyed is no different than taking a match to the documents themselves. While the cases certainly have parallels in terms of the root conduct at issue, Intel's repeated and widespread flaunting of its preservation obligations here, however, makes the "willful" conduct in *Zubulake* look almost excusable.

Intel responds to AMD's charges of document destruction with four basic arguments. First, Intel maintains that this fiasco was just the product of an innocent error by a lone in-house counsel. Nonsense. It resulted from a disregard of corporate and individual legal obligations by hundreds of Intel employees who failed to preserve evidence; by Intel's *entire* in-house legal department, which ignored repeated warning signs of fatal flaws in the company's preservation

system; and by the myriad law firms representing Intel in this case who had the ultimate responsibility to ensure that their client followed the law.

Second, Intel claims that its actions and inactions are a case of "no harm, no foul" because its extensive remediation effort ensured that "nothing of any genuine significance [had been] lost." Not even close. File count comparisons–which Intel delayed turning over for months–now prove beyond question that Intel's remediation failed to cure its earlier omissions and that hundreds of thousands of relevant documents have gone permanently missing.

Third, Intel says that if it had turned off automatic email deletion, its entire IT infrastructure would have been placed in peril. There was no such peril. [redacted] Intel could have suspended its auto-delete at the outset and ensured the survival of all relevant evidence.

Finally, deploying a favorite strategy of wrongdoers that "the best defense is a good offense," Intel besmirches AMD's preservation program as no better than its own. This counter-offensive goes nowhere. Intel's investment of over a year and thousands of attorney hours has only confirmed that *AMD had no systemic document preservation failures whatsoever*: AMD had no auto-delete systematically obliterating evidence, AMD's hold notice was comprehensive and instructive, AMD monitored compliance with its evidence preservation instructions, AMD retained robust collections of back-up tapes for its employees and AMD began voluntarily journaling[2] most custodians by November 2005 to capture any data that a couple of rogue custodians or an IT glitch could delete. Indeed, the performance of AMD custodians under a properly implemented preservation system, as reflected in file-count comparisons that measure their success in properly retaining electronic documents, stands in breathtaking contrast to that of

[2] Journaling is a Microsoft Exchange tool that is invisible to the user and which automatically preserves a back-up copy of each email sent to or received by a user.

Intel custodians and stands as the most damning evidence of Intel's malfeasance.

The document losses stemming from Intel's actions and inactions were catastrophic. They dwarf by hundreds of thousands of documents the destruction of evidence in any reported decision *ever*. And, while Intel tried to persuade the Court and AMD that its remedial efforts would magically restore the millions of documents that Intel systematically and intentionally deleted, Intel's file counts instead prove that Intel's remediation largely failed.

Providing direct evidence of loss in a spoliation case is almost always impossible unless a party admits wrongdoing or someone is caught on video shredding the only existing copy of a document. But loss and the prejudice flowing from it can be proven circumstantially, and in the case of email, most notably by comparing the email file counts from time periods where custodians manually controlled their preservation of documents with periods where a machine automatically preserved documents for them (the same methodology repeatedly employed by Intel to demand remediation from AMD for several of its custodians). The thinking behind this approach is that even after email collections are culled for irrelevant and privileged material, particularly where document requests are broad as they were here, custodians will have on average a similar number or range of producible emails each month. To determine whether Intel still had missing documents after its remediation, AMD compared the relevant email counts for Intel custodians when they were manually moving emails to save them from automatic deletion with the relevant email counts for those same custodians after Intel finally deployed some form of backstop against destruction—either weekly backup tapes or duplication by journaling.

The statistics are sobering. When on the "move-it-or-lose it" preservation system, over ***one-half*** of Intel custodians irretrievably lost ***one out of every three*** of their relevant emails—even when taking into account Intel's massive remediation (*i.e.*, their file counts increased by

50% or more between the two time periods).[3] Worse yet, nearly one-third of Intel custodians managed to irretrievably lose ***one out of every two*** relevant emails they sent or received (*i.e.*, their file counts doubled between the two time periods).[4] Conservatively, Intel's losses amount to over 850,000 emails or more than 4.25 million pages. The law obligated Intel to produce these emails and AMD will never be able to ascertain their contents, or know how their contents would have affected its case.[5] One thing is clear, however: with eighty-six Intel custodians having lost at least half as many emails as they managed to preserve and with *over 600* suffering some form of material preservation failure, this is not the case of a couple bad apples. This is the case of a company whose document preservation culture itself was rotten to the core.

While it might be expected that any custodian's document capture rate will improve under an automated system that captures everything, absent some benign explanation (and none exists here), this does not explain why such a heart-stopping percentage of Intel custodians had file counts half again as large, not to mention in some cases double, once they were placed on automatic preservation. After all, AMD relied on its custodians' good faith to preserve evidence from March 2005 until November 2005, when it began journaling. But only seven of the thirty-seven AMD custodians who Intel has claimed did not preserve evidence had file counts that grew by 50% when they were moved to some form of automatic preservation.[6] Of those, one

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[3] These calculations are just for the custodians for whom AMD had a baseline comparison. So, of these Intel custodians, 148 of 272 (or 54%) had jumps of 50% or greater from the period where they were preserving documents manually to the period where there was some form of automated preservation. For the remaining 106 Intel custodians who were never put on any form of automated preservation, there is no reason to assume their preservation was more effective.

[4] As noted above, these calculations are just for the custodians for whom AMD had a baseline comparison.

[5] The calculations underlying this estimate of lost emails are described in detail in Section II.H. and in the Declaration of Shaun M. Simmons ("Simmons Declaration").

[6] Simmons Decl., **Exh. 3**.

had just started a new job at AMD that ramped slowly while he was on self-preservation, and two had sabbaticals that fully explained their email jumps.[7] At the end of the day, AMD had four custodians who Intel claims failed to preserve and whose email counts show a sizeable jump—only three versus 148 custodians (out of 272 for whom comparisons were available) for Intel. The reasons for this eye-popping difference are obvious. AMD properly instructed its custodians as to their preservation responsibilities, monitored compliance with those instructions and did not subject them to a regime where the default was destruction, not preservation. As a result, in discovery, Intel got what it was entitled to, while AMD did not.

These numbers dispositively prove that Intel's supposedly massive remediation did little to fill in the holes created by its half-hearted preservation. The reason is that Intel's culture of concealment deprived it of any bona fide electronic repositories from which to remediate. Intel's three potential sources of remedial data available to recreate its custodians' email collections–(1) its so-called "Complaint Freeze" Tapes (2) Weekly Backup Tapes and (3) email collected or produced from other Intel employees– each amounted to an empty promise. The Complaint Freeze Tapes were nothing more than an inadequate snapshot of the contents of Intel's email servers at the time AMD's complaint was filed. Because of auto-delete, the email servers generally contained little more than thirty-five days' worth of incoming email, only a week's worth of outgoing email and only one day's worth of deleted items. Making matters even worse, Intel systematically overwrote all of its backup tapes from July 2005 to November 2005 even though its auto-delete system was running throughout this period. While not a means of capturing historical email, Intel's Weekly Backup Tapes at least theoretically should have been a

[7] [redacted]

forward-looking tool for capturing emails created or received after AMD filed suit. [redacted]

This inexcusable dereliction infected not only the email collections of document-producing custodians, but also of the hundreds of others to whom Intel turned as the core of its remediation, which explains why that effort proved so wanting.

In sum, Intel's feckless attempts at preservation have left AMD without the benefit of at least hundreds of thousands and probably over a million *relevant* documents with which to prosecute its case. How many exactly were permanently lost, AMD will never know. Worse yet, AMD will never know how those unavailable documents would have ultimately affected the outcome. To level the playing field, AMD seeks a an appropriate remedy permitting: (1) an adverse inference jury instruction; (2) presentation of evidence of Intel's document destruction at trial and (3) reimbursement of its reasonable attorneys' fees and costs incurred in the investigation and prosecution of Intel's evidence destruction.

II.

FACTUAL BACKGROUND

A. Intel's Culture of Concealment

The Intel Corporation has always acted as if it has something to hide. [redacted]

These efforts were so highly successful that by the time this lawsuit was filed in June 2005, Intel employees were well-schooled about the dangers of creating or preserving documents evidencing Intel's anticompetitive conduct. As is evident from documents that have survived,

[8] Vespremi Decl., **Exh. 5**

[9] *Id.*, **Exh. 6**

[10] *Id.*, **Exh. 7**

[11] *Id.*, **Exh. 1.**

[12] *See, e.g.*, Vespremi Decl., **Exh. 9**

[redacted]

[redacted]

[13] *See*, Vespremi Decl., **Exh. 10** [redacted]

[14]*See, e.g.*, Vespremi Decl., **Exh. 14** [redacted]

[redacted]

Intel's extensive efforts to conceal its business practices were not lost on the European Commission, which recently fined Intel over a billion dollars for its anticompetitive conduct. After a multi-year investigation, EC Commissioner Neelie Kroes noted that in addition to violating Europe's competition laws, "Intel went to great lengths to cover-up many of its anti-competitive actions."[16]

While it may not ordinarily violate any state or federal law to avoid creating or retaining incriminating evidence, Intel had an obligation to immediately reverse course once it knew of the litigation, *i.e.*, to disarm systems designed to obliterate records of its conduct and to counsel and encourage its employees to do exactly the opposite of what they had for so long been trained to do. Intel, however, purposefully and deliberately ignored this obligation.

B. Intel's Unjustified Refusal to Suspend Auto Delete

One would have thought that U.S. evidence preservation rules would have caused Intel to immediately halt its routine email destruction when AMD filed its complaint. Intel, however, did no such thing. Despite having several viable alternatives that would have systematically preserved evidence, Intel chose to leave an auto-delete system running, permanently destroying hundreds of thousands, if not millions, of relevant emails.

At the time AMD filed its complaint, Intel maintained an auto-delete system on the electronic mailboxes of all employees. This system automatically and permanently deleted

[15] Vespremi Decl., **Exh. 16** [redacted]

[16] *Id.*, **Exh. 17** (Neelie Kroes, Eur. Comm'r for Competition Policy Introductory Remarks at Press Conference: Commission Takes Antitrust Action Against Intel (May 13, 2009)).

emails a prescribed number of days after creation or receipt. For the majority of custodians, the system vaporized received email in as little as thirty-five days; sent items and deleted items automatically disappeared after seven days and one day, respectively.[17]

Overwhelming and undisputed case law and the commentary to the Federal Rules of Civil Procedure prohibit a party from continuing the operation of an auto-delete system, but Intel nevertheless kept its running.[18] This decision was unjustifiable for a number of reasons. First, by allowing the system to run, Intel chose a "preservation" regime under which the default setting for potentially relevant materials was destruction, not preservation. Second, the decision had the practical effect of imposing essentially all of Intel's email preservation obligations on individual employees, who had to act affirmatively (and quickly) to save potentially inculpatory documents or lose their email forever to auto-delete.[19] [redacted] So it was hardly realistic of Intel to expect that these employees would suddenly and magically transform into habitual evidence preservers when they had long been trained to be habitual evidence destroyers.

[17] Vespremi Decl., **Exh. 18** [redacted]

[18] *See Broccoli v. Echostar Commc'ns Corp.*, 229 F.R.D. 506, 510-12 (D. Md. 2005) (characterizing the defendant's email auto-delete policy as "extraordinary" and granting an adverse inference where the defendant failed to suspend policy after the duty to preserve arose); *Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 146 (D.D.C. 2007) (stating that the failure to suspend an auto-delete feature that operated every *sixty* days was "indefensible"); *Peskoff v. Faber*, 244 F.R.D. 54, 60 (D.D.C. 2007) (stating that the failure to suspend auto-delete at the outset of a litigation may serve as the basis for sanctions under Rule 37(f)). *See also* Vespremi Decl., **Exh. 19**, at n.5 (Special Master's Report and Recommendations (DM4A)) (quoting the advisory committee notes to Fed. R. Civ. P. 37(f) wherein the advisory committee noted that a litigant cannot in good faith sit idly by and allow a routine feature of its information system destroy potentially relevant materials).

[19] *See* Vespremi Decl., **Exh. 20**, [redacted]

Intel knows that its continuation of auto-delete is indefensible from a preservation standpoint. Accordingly, Intel has attempted to justify this decision on the ground that "turn[ing] off auto delete would [have] pose[d] an unacceptable risk to the performance and integrity of [Intel's] 137 Exchange servers over time."[20] [redacted]

[20] *Id.*, **Exh. 21** (Report and Proposed Remediation Plan of Intel Corporation and Intel Kabushiki Kaishi to Special Master Pursuant to March 16, 2007 Order re Intel's Evidence Preservation Issues), at 14.

[21] [redacted]

[redacted] While Intel was certainly under no legal duty to implement journaling, it was under a legal duty to stop the routine destruction of evidence.

Intel's final excuse for leaving auto-delete running is that it told AMD it was going to do

[22] *See* Vespremi Decl., **Exh. 22** [redacted]

[23] Vespremi Decl., **Exh. 24**, [redacted]

[24] *Id.*, **Exh. 25** [redacted]

[25] Vespremi Decl., **Exh. 26** [redacted]

so at the beginning of the case. While this is true, it is also misleading. In an October 2005 letter to AMD, Intel misrepresented how its auto-delete worked as well as the other prophylactic measures it intended to use to prevent evidence destruction.[26] For instance, Intel claimed its auto-delete operated on a thirty-five day cycle. In fact, for sent items and deleted items, the auto-delete operated on a seven-day and one-day cycle. In the October 2005 letter, Intel also promised to migrate the electronic mailboxes of those employees possessing relevant materials to designated storage areas where they would be backed up on a weekly basis.[27] Intel broke this promise. Intel also promised that those weekly tapes would be preserved throughout the course of the litigation.[28] Intel broke this promise too by destroying hundreds of backup tapes. Finally, because Intel's backup system operated on a weekly basis, Intel employees could, and likely did, undermine it by deleting files from their mailboxes before the weekly backup could occur.[29]

C. Intel's Failure to Issue Litigation Holds to Hundreds of Employees

Intel's decision to continue the operation of its auto-delete system had the effect of imposing all, or nearly all, of Intel's preservation obligations on individual employees until they were eventually migrated to some form of automated preservation. Having shifted the burden of preservation of thousands of individuals, Intel was under a heightened duty to ensure that its employees were reasonably equipped to fulfill that responsibility. Consequently, one would

[26] Vespremi Decl., **Exh. 29** [redacted]

[27] *Id.*

[28] *Id.*

[29] *Id.*, **Exh. 30**, [redacted]

have expected–and the law certainly required–Intel to: (1) timely notify employees of their preservation obligations; (2) carefully instruct employees about the nature and scope of their preservation obligations and (3) conduct reasonable follow up and monitoring to ensure that employees understood and were complying with their preservation obligations. One also would have expected Intel to put in place a reasonable backup tape system–as it promised it would do–to save emails from the auto-delete system. Yet, Intel did none of these things.

In May 2006, as part of an effort to reduce the scope of discoverable evidence in this case, AMD and Intel entered into a Stipulation and Order Regarding Document Production, commonly referred to as the "Custodian Stipulation," by which each agreed to provide the other with a list of all its personnel likely to have documents responsive to each side's document requests.[30] A month later, Intel provided AMD with its Master Custodian List containing 1,023 names of individuals (hereafter "Custodians"), representing that each possessed an appreciable quantity of non-privileged, *non-duplicative documents responsive to AMD's document requests*.[31] As the employees Intel considered to be its most important, these 1,023 individuals should have been put under hold, their hold obligations explained and their compliance carefully monitored. But by the end of July 2006, *two months after* Intel first provided its Master Custodian List to AMD, Intel had failed to issue litigation holds to at least 378 Custodians.[32] Worse yet, Intel placed only nine more on hold between August and December 2006, leaving

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[30] Vespremi Decl., **Exh. 33** (Stipulation and Order Regarding Document Production dated May 15, 2006).

[31] *Id.*, **Exh. 34** (Intel's Master Custodian List dated June 1, 2006).

[32] Vespremi Decl., **Exh. 21** [redacted]

387 Custodians wholly uninformed of their preservation obligations, of the existence of auto-delete or of what was necessary to bypass it, a year and a half into the litigation.[33] Fifty-eight Custodians never received a litigation hold notice at all because they left Intel before those in charge of preservation woke up to the situation in February 2007.[34] All the while Intel's auto-delete continued to run.

One would expect minor flaws or gaps in any preservation system, or a refusal by a few employees to follow the most lucid instructions. But when the company has massive systemic breakdowns at every level of the preservation regime, massive losses of data will ensue. Here, Intel's failure to issue timely litigation holds caused eye-popping preservation failures. [redacted] did not receive a litigation hold notice until February 21, 2007.[35] As a result [redacted] preserved an average of just eight emails per month from July 2005 through January 2007.[36] In March 2007, the first full month after he received his litigation hold notice,

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[33] *Id.*, **Exh. 37** [redacted]

[34] *Id.*

[35] *Id.*

[36] These email preservation figures, and all other Intel email figures used in this motion, are derived from Intel's File Count Report, which Intel produced on September 14, 2009 (attached as **Exhibit 38,** to the Vespremi Decl.). For each Production Custodian, Intel's File Count Report provides, among other things: (1) a monthly total of relevant email files produced from the Custodian's "Organic" collection; and (2) a monthly total of relevant email files produced from a Custodian's "Repopulation" sources. A Custodian's Organic collection includes all relevant email actually preserved by the Custodian (*e.g.*, on his or her hard drive) as well as all email recovered from versions of the Custodian's mailbox that were recovered from backup tapes Intel had for the Custodian. A Custodian's Repopulation collection includes relevant email that the Custodian did not preserve, but that Intel was able to produce from other sources such as backup tapes containing other Custodians' files. The number of email files produced from a Custodian's Organic collection is the best available figure of what the Custodian actually preserved. In many cases, however, this figure can grossly overstate the amount of email the Custodian preserved because it includes items that the Custodian deleted but which were recovered from backup tapes containing the Custodian's electronic mailbox. [redacted]

[redacted] preserved 691 relevant emails—an increase of more than 7,500% pre-remediation.[37] In April 2007, [redacted] had 1,334 relevant emails—an increase of 14,700%.[38] [redacted] did even worse. Like [redacted] did not receive a litigation hold notice until February 21, 2007.[39] Predictably, for the twenty months after AMD sued, [redacted] managed to preserve just forty-one emails in total, on average just two per month.[40] In March 2007, after receiving the litigation hold notice, he preserved 1,068 relevant emails—an increase of more than 53,000% pre-remediation.[41] In April 2007, he preserved 1,285 relevant emails—an increase of 64,000%.[42] [redacted] were not alone. Intel custodian [redacted] preserved no email whatsoever from August 2005 to December 2006.[43] In March 2007, the first full month after he received his hold notice, he preserved 1,202 emails.[44] Similarly, [redacted] preserved a total of forty emails between August 2005 and September 2006—an average of less than three per month.[45] In March 2007, the first full month after he received a hold notice, [redacted] preserved

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[redacted]

[37] Vespremi Decl., **Exh. 38** (Intel's September 14, 2009 File Count Report).

[38] *Id.*

[39] *Id.*

[40] *Id.*, **Exh. 38** (Intel's September 14, 2009 File Count Report).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] Vespremi Decl., **Exh. 38** (Intel's September 14, 2009 File Count Report).

[45] *Id.*

2,255 emails.[46] Intel's failure to issue hold notices thus led to such massive preservation failures and such wide preservation gaps that Intel's remediation had little chance of success from the outset. As shown in Section H, this remedial effort predictably failed.

Intel seeks to minimize the seriousness of its failure to issue timely litigation hold notices by casting that failure as a "single, unintentional human error," which it attributes to a lone member of Intel's Legal Department, [redacted] Scapegoating does not absolve Intel of responsibility. First, it ignores that Intel's obligation to preserve documents did not rest on a single in-house counsel. Rather, all of Intel's lawyers, including its many outside counsel, also had an affirmative obligation to make sure that Intel was fulfilling its preservation obligations. Second, it is not accurate to describe the failure to issue litigation hold notices as a "single, unintentional human error." Rather, this failure was a continuing abdication of responsibility on the part of Intel that occurred daily for more than eight months. Missing a handful of custodians in a case of this magnitude is expected and falls into the category of excusable neglect. Hundreds of custodians, however, do not simply fall through the cracks for months unless an entire legal team abdicated its duty.

D. Intel's Failure to Adequately Instruct Its Custodians of Their Preservation Obligations

In addition to issuing its litigation hold notice late almost as often as it issued it on time, Intel omitted from its litigation hold notice instructions critically necessary to ensure that Intel employees preserved email adequately.

1. Intel's Failure to Instruct Custodians to Preserve Sent and Received Email from Auto-Delete

Intel chose a preservation scheme that required employees to affirmatively move relevant

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[46] *Id.*

[47] *See* **Exh. 21** to the Vespremi Decl. (Intel's Proposed Remediation Plan), at 22.

emails to safe locations (such as Outlook PST files) before they were gobbled up by Intel's auto-delete. Having made this election, Intel was duty bound to instruct employees both that their email would automatically disappear unless they did something to prevent it and the time within which they had to act. [redacted] Making matters worse, Intel apparently never explained this pernicious "move-it-or-lose-it" system [redacted] resulting in a still unexplained, bewildering and pervasively-shared "misunderstanding" [redacted] that "IT was saving all emails" and that email could be permanently deleted with impunity.[51]

Intel's litigation hold notice also inexplicably failed to instruct employees that they needed to preserve not only all responsive email items they ***received***, but also those they ***sent***.[52] [redacted]

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[48] Vespremi Decl., **Exh. 40** [redacted]

[49] *Id.*

[50] *Id.*, **Exh. 41** [redacted]

[51] *See* Vespremi Decl., **Exh. 41** [redacted]

[52] *Id.*, **Exh. 40** (Intel's July 1, 2005 Litigation Hold Notice).

[53] Vespremi Decl., **Exh. 41** [redacted]

2. Failure to Instruct Custodians to Preserve Instant Messages

[redacted] Having made this decision, Intel should have informed employees of the need and means to manually preserve their instant messages, [redacted]. But it didn't do this either. [redacted]

E. Intel's Failure to Monitor Custodian Preservation Compliance

Intel's hold notice follow-up was as lacking as its notices were deficient in the first place. It simply emailed notices in a manner calculated to keep them under most employees' radars and

[54] Vespremi Decl., **Exh. 42** [redacted]

[55] *See id.*, **Exh. 41** [redacted]

[56] *See, e.g.*, Vespremi Decl. **Exh. 13** [redacted]

then made no effort to confirm that employees received or read them, much less complied with them.

1. Intel's Irresponsible Approach to Litigation Hold Distribution

Intel's failure to distribute its hold notice in a responsible manner had very real consequences in this case. [redacted] These are not just academic points. [redacted]

[57] Vespremi Decl., **Exh. 43** [redacted]

[58] *Id.*

[59] *See id.*, **Exh. 41** [redacted]

[60] Vespremi Decl., **Exh. 44** [redacted]

[redacted]

2. Intel's Failure to Monitor Custodian Preservation Compliance

[redacted]

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[61] *Id.* (emphasis added).

[62] *Id.*

[63] *See id.*, **Exh. 37** [redacted]

[64] Vespremi Decl., **Exh. 43** [redacted]

[redacted]

[redacted] Specific examples of [redacted] Custodians who ignored their preservation obligations and had demonstrable data loss after remediation include:

- [redacted], who was issued a legal hold notice on July 1, 2005.[67] [redacted]

[65] *See* Vespremi Decl., **Exh. 45** [redacted]

[66] *See id.*, **Exh. 21** [redacted]

[67] *See* Vespremi Decl., **Exh. 37** [redacted]

[68] *Id.*, **Exh.** 41 [redacted]

[redacted] Not surprisingly, even after Intel's remediation, [redacted] has a demonstrable loss of email during the time period he was supposed to be preserving. Once [redacted] was finally moved from a "move-it-or-lose-it" regime to a weekly backup tape regime, his monthly email file counts jumped by almost 500 emails a month.[72]

- [redacted], received his first hold notice on July 1, 2005.[73] [redacted] claims that he believed his emails were being retained automatically throughout the entire hold period[redacted], there is no credible evidence to support how he could have labored under this misimpression for six months after the lawsuit was filed.

- [redacted] during most of the relevant time period, received a hold notice on July 1, 2005[redacted] and [redacted] allegedly believed that IT was automatically backing up his e-mail during the "move-it-or-lose-it" period.[76]

- [redacted] was similarly under the ostensible, inexplicable misimpression IT was saving his emails.[77] [redacted] loss even after remediation is breathtaking. His monthly email average jumps from an average of just over 70 emails during the "move-it-or-lose-it" period to almost 550 after his email was subject to weekly backup, an increase of **648%**.[78]

- [redacted]

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69 [redacted]

[redacted]. His emails jumped from an average of about 250 emails per month during the "move-it-or-lose-it" period to 1150 per month after being subject to weekly backup.[80]

3. Intel's Failure to Take Prompt Remedial Action upon Discovery of Massive Preservation Breakdown

[redacted] Intel knew that it had suffered massive systemic and custodian preservation breakdown.[81] Upon such a discovery, any prudent litigant actually intending to foreclose further destruction of evidence would have promptly assured that then-existing data was taken out of harm's way. Indeed, Intel easily could have: (1) immediately pulled out of circulation backup tapes for all custodians not already on dedicated servers (which was more than 500 hundred custodians) so they would not be overwritten; (2) temporarily suspended its backup tape rotation schedules until custodians had been moved to an automated retention mechanism; (3) taken the equivalent of another "complaint freeze" snapshot of all servers across the relevant Outlook environment; (4) conducted an immediate, across-the-board harvest of all custodians' data; (5) issued immediate and effective litigation hold instructions to all custodians; (6) enabled journaling for all custodians, even if temporarily, while new backstops were put in place and hold instructions issued or (7) immediately suspended auto-delete or changed the dumpster settings on custodians' email accounts so that nothing further could be purged. Instead, for months after Intel detected its massive preservation failures, it simply stood by and watched as data it could have saved, but did not, slipped into oblivion.

F. Intel's Failure to Implement an Email Backup Tape System

In October 2005, Intel represented to AMD that it had started moving all electronic

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[80] Vespremi Decl., **Exh. 38** [redacted]

[81] *Id.*, **Exh. 49** [redacted]

mailboxes of its custodians to designated servers that would be backed up weekly.[82] Intel also represented that it would preserve these weekly backups throughout the course of the litigation. Finally, Intel represented that it would move all other Custodians' electronic mailboxes to designated servers so that their email could also be backed up and preserved weekly.

Three empty promises. Of Intel's 1,023 Custodians, nearly 500 Custodians' mailboxes were not migrated to the dedicated servers or backed up for *eighteen months or more* after AMD filed its complaint.[83] [redacted] In short, the electronic mailboxes of more than half of Intel's Custodians were never timely placed on Intel's weekly backup system.

Intel then compounded the collapse of its migration program by losing or overwriting many of the backup tapes it managed to make. [redacted] "Complete" backups exist for barely one-third of the individuals on Intel's Master Custodian List (357 of the 1023).[87] And

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[82] Vespremi Decl., **Exh. 29** [redacted]

[83] Simmons Decl, **Exh.** 7 [redacted]

[84] *Id.*

[85] *Id.*, **Exh. 21** [redacted].

[86] *Id.*, at 27-28.

[87] Vespremi Decl., **Exh. 21** [redacted]

even those do not cover July, August, September or October 2005. Consequently, from July 2005 through July 2006–a full year following the filing of AMD's complaint–Intel operated a "move-it-or-lose-it" preservation system with absolutely no backup net under 65% of its Custodians.[88]

[redacted] Unfortunately, as it did with so many other preservation red flags, Intel simply ignored this warning and did nothing to correct the situation.[90]

G. Intel's Remediation Was Hobbled by Insufficient Sources of Remedial Data

The preservation problems described above were so massive and affected so many Intel Custodians that Intel's outside counsel realized it had no choice but to try to remediate. But Intel's effort could draw from painfully few sources of remediation data: (1) email residing on Intel's Complaint Freeze Tapes; (2) email residing on Intel's Weekly Backup Tapes and (3) email harvested directly from the 1,023 individuals on Intel's Custodian List.[91] Because these remedial sources each had gaping holes, Intel's remediation generally flopped.

Intel's Complaint Freeze Tapes consisted of a daily snapshot of Intel's email servers taken between June 24, 2005 and July 3, 2005.[92] Because of Intel's aggressive auto-delete and

[redacted]

mailbox size restrictions, the email mailboxes captured contained very little data. As noted earlier, the vast majority of electronic mailboxes at Intel were subject to a 35/7/1 auto-delete. Thus, with limited exceptions, the Complaint Freeze Tapes captured only forty-four days' of received email (*i.e.*, inbox items dated between May 20, 2005 and July 3, 2005), only sixteen days' of sent email (*i.e.*, sent items dated between June 17, 2005 and July 3, 2005), and ten days' of deleted email (*i.e.*, deleted items dated between June 23, 2005 and July 3, 2005). Moreover, the Complaint Freeze Tapes were able to capture this range of email items only if they had not already been deleted by an Intel Custodian. Given what AMD knows now about Intel's deletion practices, this is hardly a safe bet.

For a number of reasons, some already discussed, Intel's Weekly Backup Tapes were not a stopgap. In the first place, Intel retained virtually no backups during the first three months after the lawsuit was filed, when Intel employees were presumably chatting about its merits and the danger it posed to Intel's business practices.[93] Indeed, Intel did not preserve Weekly Backup Tapes for *any* Intel Custodians until November 2005.[94]

Moreover, Intel's Weekly Backup plan was so porous as to make it nearly useless in preventing permanent deletions of important email. Intel's Weekly Backup Tapes operated on Sundays. But its hair-trigger auto-delete of email a custodian sent to Deleted Items caused them to vanish after only one day—a setting Intel could have changed in minutes but never altered. Thus, if a Custodian deleted an email during the work-week (*i.e.*, Monday through Friday), the Sunday Weekly Backup would not capture it because it would already be long gone. [redacted]

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[93] *Id.*, at 14-15.

[94] Vespremi Decl., **Exh. 21** (Intel's Proposed Remediation Plan), at 29. During the period from July to November 2005, Intel was also creating *daily* backup tapes as part of its disaster recovery program, but Intel overwrote these tapes regularly until the custodians were moved to segregated servers. *Id.* at 6-8, 23-26.

[redacted] it is likely that substantial amounts of email slipped through the cracks created by the Sunday Weekly Backup scheme.

Intel's last source of remedial data —email that was harvested from mailboxes of other Intel employees subject to preservation—has obvious shortcomings. In the first place, these employees were subject to the same preservation failings as the Custodians selected for production–tardy and incomplete litigation hold notices, a rapacious auto-delete system, the absence of an effective data-recovery backstop, and their own individual preservation compliance issues. Indeed, because 387 of those Custodians were never even instructed to preserve evidence until twenty months after the litigation began, it is no surprise that their email repositories were an empty vessel for Intel to turn to. Moreover, a general search of employees' mailboxes would not uncover (and recover) one of the most important types of documents in the case—email sent outside Intel, particularly to Intel's customers, agreements with whom were generally memorialized, if at all, not in written contracts but in strings of emails.

H. Intel's Fatally Flawed Preservation Scheme and Its Failure to Create a Reliable Backup Program Combined to Irretrievably Lose Unprecedented Amounts of Relevant Evidence

The numbers tell the story. When left to their own preservation devices, including receiving wrong, underpowered and incomplete preservation instructions and no effective monitoring or backstop, one half of Intel's Custodians managed to irretrievably lose ***one out of every three emails*** they sent or received.[95] Almost one-third of them managed to irretrievably lose at least ***half of their email.***[96] When taken in conjunction with the extensive periods of time most Intel Custodians were solely on self-preservation, these losses amounted to hundreds of

[95] Simmons Decl., **Exh. 1.**

[96] *Id.*

thousands of missing, relevant documents that AMD was entitled to receive but didn't.

How do we know? As Intel has steadfastly maintained with respect to AMD's preservation, the best way to test the integrity of a custodian-driven "move-it-or-lose-it" preservation system that relies on individual employees to select and retain relevant email is to compare the number of relevant email they produce before and after the preservation of their email becomes automated. Such a "before-and-after comparison" can be done with respect to the majority of Intel Custodians because at some point Intel moved these individuals to an automated form of preservation, either by placing them on journaling or by backing up their email to tape on a weekly basis.[97] The population of Custodians for whom a comparison can be made is statistically significant. Of the 378 Intel Custodians, 202 were placed on Weekly Backup Tapes prior to their production cut-off, and another seventy were journaled prior to their production cut-off.

The "before and after" comparisons for these 272 Intel Custodians are striking, as the attached report card shows. An astounding 148 (54%) experienced a jump of 50% or more in their produced email count.[98] Or, to put it another way, these 148 custodians saved ***only half as many*** relevant emails when forced to dodge Intel's auto-delete on their own as when their email was automatically saved for them after Intel migrated them to automated preservation.[99] For eighty-six of these Custodians (31%), the number of relevant emails preserved when Intel moved to some form of automated preservation ***doubled***![100] And these numbers take into account all of the data restored as part of Intel's remediation.

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[97] The exact methodology we used is summarized in the Simmons Declaration and the results for each Custodian are reported in Exhibit A thereto.

[98] Simmons Decl., **Exh. 1**.

[99] *Id.*

[100] *Id.*

Based on this analysis, one can reliably infer that, even after remediation, Intel Custodians collectively managed to irretrievably lose well over 850,000 emails as a result of Intel's "move-it-or-lose-it" self-preservation regime.[101] For the 272 Custodians for whom a before-and-after comparison can be made, an estimate of the total number of email lost can be made by multiplying the average monthly difference between the pre- and post-automated email production with the number of months the Custodian was left to fend for him- or herself.[102] For example, during the eight months Intel Custodian [redacted] was solely responsible for his preservation, Intel produced an average of just 130 emails for him.[103] During the ten months he was subject to the journal, Intel produced an average of 682 emails for him.[104] Thus, [redacted] estimated loss is 4,418 emails (552 emails in each of the eight months of self-preservation).[105] Applying this logic across all members of the 272 yields a figure of more than 611,000 lost emails.[106]

Because there is no reason to believe that the 106 Custodians for whom a comparison cannot be made did any better while they were on Intel's self-preservation plan,[107] an estimate of

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[101] *Id.*

[102] *Id.*

[103] Simmons Decl., **Exh. 1**.

[104] *Id.*

[105] *Id.*

[106] Simmons Decl., ¶¶ 5-15, Exh. 1.

[107] Indeed, post-remediation file counts for a number of these Custodians call into serious question their good faith in preserving evidence. For example,

- [redacted] Between July 1, 2005 and March 31, 2007 (the applicable production cut-off), Intel produced an average of just thirty-two sent and received emails per month for [redacted]
- [redacted] Intel produced an average of just twenty sent and received emails between July 1, 2005 and September 30, 2006 (Crepps was terminated from Intel in October of 2006).

their lost email can be made in the same way but by using average loss rates for the 272 custodians for whom a comparison was possible.[108] When one applies that loss rate over the remaining Custodians for whom a comparison was not possible, it nets out to more than additional 257,000 lost emails, for a total of 868,000 lost emails.[109]

Sadly, this number, as large as it is, surely understates the total loss. That is because it assumes that backup tapes were a foolproof method of preservation inasmuch as loss rates for most Intel Custodians were computed by comparing relevant produced email counts under self-preservation with those after a Custodian was migrated to backup tape. For reasons discussed earlier, even when migrated to servers subject to Intel's Weekly Backup, Custodians could defeat the system simply by deleting items between Monday and Friday (i.e., at least a day ahead of the backup) or by double deleting them at any time. [redacted]

- Between July 1, 2005 and March 31, 2007 (the applicable production cut-off), Intel produced an average of just eighty-seven sent and received emails per month for [redacted]
- For [redacted], Intel produced an average of just 112 sent and received emails per month between July 1, 2005 and July 1, 2006 ([redacted] was terminated from Intel on August 19, 2006).
- For [redacted], Intel produced an average of just seventy-nine sent and received emails per month between July 1, 2005 and July 31, 2006 ([redacted] was terminated from Intel on August 4, 2006).

Vespremi Decl., **Exh. 38,** [redacted]

[108] A comparison could not be made because (1) the Custodian was terminated prior to the litigation or prior to being placed on backup tape or journal (five Custodians); (2) the Custodian was not placed on backup tape or journal until immediately prior to or after the end of the Custodian's production period (eighty-two Custodians) or (3) the Custodian was a Free Throw Custodian who was not on Intel's original Custodian list and for whom Intel did not supply backup tape or journaling information (nineteen Custodians).

[109] Simmons Decl., ¶¶ 18-22, **Exh. 2.**

[redacted]

Intel will undoubtedly argue that the improved production rates under automated preservation show not that Intel's email preservation in the pre-automated world was deficient, but simply that the automated world invariably produces more email because it preserves everything for later review by professionals who err on the side of producing even the close calls. While one would expect produced email counts to increase modestly after a transition from custodian-based preservation to automated preservation, it is simply not credible to suggest that Intel's widespread and substantial jumps can be fully explained by this phenomenon.

One obvious way to demonstrate this is to compare Intel's increased production rate following institution of automated preservation with that of AMD. As the Court will recall, most AMD custodians were tasked with preserving their own email for varying periods of time before AMD began journaling in November 2005. Yet, AMD's increased email production rate following the journaling of its custodians looks nothing like that experienced by Intel. Rather, for the 113 AMD custodians who were put on automated preservation prior to their production cut-off, the mean jump in produced email counts after automation is just 20%.[112] Now contrast

[110] *See, e.g.*, Vespremi Decl., **Exh. 30** [redacted]

[111] Vespremi Decl., **Exh. 41,** [redacted]

[112] We use AMD's preservation performance as a whole to benchmark a well-performing preservation scheme. Further, because AMD's data counts are being compared to Intel's after remediation, we include all sources of AMD data so as to make for an "apples-to-apples" comparison. Thus, AMD's mean jump includes all files produced to Intel: (1) organic files

that with the collective mean of Intel's Custodians. For the 272 Intel custodians who were migrated to some form of automated preservation, the mean post-automation jump is 127%—and that after a massive remediation effort directed to the pre-automation period.[113] And even if one removes the worst preserving custodians from this group as outliers, Intel's mean jump is still 87%.[114] In other words, Intel's mean jump in production rates following automated preservation is 400 to more than 600% higher than AMD's—even considering Intel's extensive remediation effort.[115]

Thus, even if one uses the AMD mean jump to discount increases in Intel's file counts after its Custodians were moved to some form of automated preservation, the numbers show massive losses while Custodians preserved independently under Intel's "move-it-or-lose-it" regime. After application of the 20% discount, 120 Intel Custodians continue to have a 50% jump in produced email counts and sixty-three Intel Custodians continue to have a 100% or greater jump in produced email counts.[116] Estimates of Intel's total document loss also remain record-breaking.[117] Even reducing losses to take into account the fact that some portion of its

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preserved by the custodians; (2) files identified by Intel or AMD in other custodian's files and (3) files AMD culled from backup tapes to address "anomalies" for a handful of AMD productions. Simmons Decl., ¶¶ 23-31, **Exh. 3**.

[113] Simmons Decl., ¶¶ 16-17, **Exh. 1**.

[114] *Id.*

[115] The explanation for the disparities between the companies' respective jump percentages is obvious. AMD made a good faith effort to comply with its evidence preservation obligations from the outset. It issued detailed hold notices. It made sure its custodians read and understood those notices. And it followed up on its hold notices regularly. Further, unlike Intel, AMD did not spend the years preceding this litigation training its employees to systematically purge their files to avoid discovery of them. Thus, when AMD moved to an automated preservation regime, its custodians experienced a modest overall increase in produced email counts with few outliers—just what one would expect.

[116] Simmons Decl., ¶¶ 32-37, **Exh. 6**.

[117] *Id.*

post-automation jump reflects the benefits of automated preservation, Intel managed to irrevocably lose almost 650,000 emails.[118] And this figure is conservative in that it assumes that Intel's backup tape system captured everything, when in fact the system was easily evaded and almost certainly resulted in losses due to manual Custodian deletions.

III.

ARGUMENT

The duty to preserve evidence is a simple one. It begins when a party reasonably anticipates litigation. *Howell v. Maytag*, 168 F.R.D. 502, 505 (M.D. Pa. 1996). Once that duty arises, a party "must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) ("*Zubulake IV*"). This is no mere passive duty. *See Mosaid Tech. Inc. v. Samsung Elecs. Co.*, 348 F. Supp. 2d 332, 339 (D.N.J. 2004) ("When the duty to preserve is triggered, it cannot be a defense to a spoliation claim that the party inadvertently failed to place a 'litigation hold' or 'off switch' on its document retention policy to stop the destruction of that evidence."). It requires diligent and active effort on the company's part, beginning with counsel, which has the affirmative obligation to explain and regularly reiterate the litigation hold instructions to employees, as well as to continually monitor compliance with those instructions. *Zubulake V*, 229 F.R.D. at 439. Wholesale failure to monitor document preservation constitutes *willful* document destruction. *Zubulake IV.*

After the duty to preserve relevant evidence attaches, a failure to comply gives rise to sanctions under either the Federal Rules of Civil Procedure or the district court's inherent authority. *Mosaid Tech.*, 348 F. Supp. 2d at 335. Three factors are considered when evaluating whether spoliation sanctions are appropriate:

[118] *Id.*

> (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994).

A. Intel's Bad Faith Conduct

[redacted] Unfortunately, evidence destruction continued almost unabated for nearly eighteen months after Intel was under a duty to preserve. Intel acted with a culpable state of mind in failing to preserve hundreds of thousands of email from hundreds of employees, [redacted]. No litigant acting in good faith to preserve evidence would have: (1) made the willful decisions Intel made to ignore its legal obligations to stop routine evidence destruction;[119] (2) ignored red flags of preservation failures and (3) ignored the requirement that counsel actively ensures the preservation of evidence through adequate explanation and diligent supervision of the client. No good faith effort to preserve evidence could possibly result in more custodians routinely destroying evidence than those actually obeying their legal preservation obligations.

In previous pages, AMD has cataloged evidence of Intel's bad faith in discharging its preservation obligations. AMD only summarizes that here by noting that Intel breached even the most minimal standards of care by:

- Misrepresenting to AMD's counsel in numerous ways both the document destruction policies of Intel and what Intel would do to preserve evidence;

[119] *See also* Fed. R. Civ. P. 37(f) advisory committee note: "The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve."

- Failing to suspend auto-delete or otherwise prevent the systematic destruction of evidence in the face of uncontroverted case law and the federal rules requiring Intel to do so, [redacted]
- Failing to have either inside or outside counsel monitor and police Intel's evidence preservation in any way;
- Failing to explain the hold obligations to [redacted] in a manner that they could understand and comply with;
- Failing to detect for sixteen months after the litigation began that [redacted] ostensibly laboring under the identical false assumption that they need not preserve anything because Intel's IT organization was supposedly doing it for them;
- [redacted] allowing the destruction of evidence by scores of Intel Custodians, [redacted] after a duty to preserve first arose;
- [redacted] to instruct others inside and outside of Intel to destroy highly relevant evidence they were obligated to preserve;
- Failing to assure that proper litigation holds had been distributed until February 2007, [redacted]
- [redacted];

- Failing to take prompt remedial steps to preserve existing data upon discovery of massive, wide-spread systemic and custodian preservation breakdown;
- Failing to preserve hundreds of backup tapes for scores of Intel Custodians; and
- Misleading AMD and the Court as to the true nature of the problems of its individual Custodians through deceptive and incomplete disclosures.

B. Prejudice to AMD

As a result of Intel's bad faith conduct and its permanent destruction of evidence, AMD has suffered irreparable prejudice. A showing of prejudice requires "plausible, concrete suggestions" as to the contents of the destroyed evidence. *Schmid*, 13 F.3d at 80. There must be "a reasonable possibility, based on concrete evidence" that the destroyed evidence would have been favorable to a party's case. *Tracinda Corp. v. DaimlerChrysler AG*, 2003 WL 22951696, at *2 (D. Del. Nov. 25, 2003). While the Third Circuit has not settled on the required burden of proof to establish prejudice, under any standard the prejudice suffered by AMD as a result of Intel's permanent destruction of at least hundreds of thousands of *relevant* emails is egregious. *See Micron v. Rambus*, 255 F.R.D. 135, 149 (D. Del. 2009) (concluding that the "clear and convincing" evidentiary standard only applies to dispositive sanctions).

A comparatively weak showing of prejudice may require a proportionally greater finding of fault in order to impose spoliation sanctions; or conversely, strong evidence of prejudice may justify sanctions in the absence of highly-culpable conduct. *Id.* For example, the bad faith destruction of computer files "alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party." *Liafail, Inc. v. Learning 2000, Inc.*, 2002 WL 31954396, at *4 (D. Del. Dec. 23, 2002) (citing

Residential Funding v. DeGeorge Fin. Corp., 306 F.3d 99, 109 (2d Cir. 2002)).[120] Such balancing of culpability and prejudice accords with the analytical framework of *Schmid*, as well as the larger remedial function of the adverse inference - to restore the prejudiced party to the position it would have occupied if the spoliation had not occurred. *Residential Funding*, 306 F.3d at 108 (citing *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 75 (S.D.N.Y. 1991)).

If proof of bad faith spoliation does not alone establish the relevance of the destroyed evidence, then at most a showing of relevance by a preponderance of evidence is required to impose an adverse inference or another non-dispositive sanction. According to this Court, "prejudice must be shown by 'direct evidence which is clear and convincing' when dispositive sanctions are sought, and by a preponderance of the evidence when non-dispositive sanctions are sought." *Tracinda*, 2003 WL 22951696, at *2 n.2 (citing *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 108 (D. Colo. 1996) (emphasis added) (finding that DaimlerChrysler failed to show prejudice, which prevented the granting of a spoliation inference)).

Intel's evidence destruction has prejudiced AMD's ability to prove its case. The evidence destroyed amounts to over 800,000 *relevant* emails. Intel cannot seriously dispute that at least some of these 800,000+ *relevant* documents would have been helpful to AMD's claims.

Moreover, Intel's failure to preserve email paints an unusually strong case of prejudice when considered in light of its habitual avoidance of formal contracts and its careful control over how its customer arrangements are characterized. This is a company that relies instead on email

[120] Likewise, "a showing of gross negligence in the destruction or untimely production of evidence will in some circumstances suffice, standing alone, to support a finding that the evidence was unfavorable to the grossly negligent party." *Residential Funding*, 306 F.3d at 109; *see also In re NTL Sec. Litig.*, 244 F.R.D. 179, 198-200 (S.D.N.Y. 2007) (finding grossly-negligent failure to implement adequate litigation hold and to issue reminders to employees to preserve email did not require extrinsic proof of relevance before granting an adverse inference).

chains, and their disappearance poses unique and irremediable problems for AMD.[121] Moreover, email is the medium in which Intel Custodians let their guard down and candidly discuss the true manner in which Intel conducts its business.

[redacted]

[121] Vespremi Decl., **Exh. 5** [redacted]

[122] *See, e.g.*, Vespremi Decl., **Exh. 56** [redacted]

[123] *See id.*, **Exh. 9** [redacted]

[124] *See, e.g., id.*, **Exh.** [redacted]

Intel's failure to preserve email has also prejudiced AMD's ability to respond to Intel's defenses. Intel says that AMD has lost in the marketplace, not because of any anticompetitive conduct on Intel's part, but because, AMD has suffered from bad marketing, supply shortages, and execution problems. Only through Intel email does a different story emerge. [redacted]

Countless emails helpful to AMD have likely been lost as a result of Intel's preservation misconduct. Given the massive losses during the pre-backup and pre-journaling discovery periods, and Intel's inability to restore that evidence through its remediation effort, there is no room for any other conclusion.

While the content of missing deleted files will forever remain unknown, documents originally deleted are sufficient to prove the relevance of what Intel destroyed and its impact on AMD's case. In *Zubulake V*, the court looked to the emails that UBS failed to originally produce –due to intentional deletion by UBS employees–yet later managed to find via alternative sources, like backup tapes, as a means for assessing the likely substance and significance of the deleted emails that could not be recovered. 229 F.R.D. at 427-28. Similarly, documents that Intel failed originally to produce yet later located from alternate sources (euphemistically called "Repop" or "Repopulation" by Intel), or that were produced only by third parties, offer the best evidence available of the likely relevance and importance of similarly-deleted documents since they were initially deleted, either by the Custodian himself or by way of Intel's auto-deletion system. Such evidence reveals that the lost documents, [redacted] would have

[redacted]

aided AMD's ability to prove the following claims. [redacted]

[redacted] Below are bullet point summaries of these emails.

[redacted]

125 [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

129 [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Moreover, in this case AMD has further proof of prejudice from the archives of third parties. Third party produced documents corroborate what the file counts unquestionably demonstrate: Intel's remediation failed in crucial respects and critical documents were permanently destroyed by Intel. These third party productions have yielded highly relevant correspondence between Intel and its customers that Intel never produced—presumably because these documents fell into the Intel shredder. [redacted]

135 [redacted]

[redacted]

In its Remediation Report, Intel asserted that AMD could recover any emails that Intel destroyed in third party productions so, in essence, there was "no harm, no foul." But, third

138 [redacted]

party productions were extremely limited in terms of the time-periods and custodians covered by the productions, and even further limited by the narrow search terms insisted on by the third parties to reduce their cost and burden. [redacted] there is no meaningful IBM third-party production from which to recover the documents Intel destroyed. Dell, HP, Lenovo and the other major OEM production agreements were similarly limited in time and scope. At this juncture, AMD knows for certain that Intel's remediation failed to capture the documents described above. AMD also knows these documents would aid the trier of fact and AMD in its prosecution of this case, and we are left to assume, given Intel's preservation failures and its vigilant efforts to avoid a paper trail, that many more documents like this exist but will never be recovered from any source.

As in *Zubulake*, it is obvious from these remediation documents that scores of Intel Custodians attempted to cover their tracks and others acted with gross disregard of their obligation to preserve evidence of Intel's misconduct. We can only surmise, as other courts have done, that the evidence Intel employees were so diligently trying to destroy was not only relevant to AMD's claims but, in fact, critical to a fair presentation before the trier of fact. In a similar document destruction case, the court in *United States v. Philip Morris USA Inc.* concluded that "[b]ecause we do not know what has been destroyed, it is impossible to accurately assess what harm has been done to the Government and what prejudice it has suffered." 327 F. Supp. 2d 21, 25 (D.D.C. 2004) (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 616 (D.N.J. 1997)) (finding that Philip Morris' reckless disregard for its preservation duties warranted evidentiary and monetary sanctions).

C. Appropriateness of an Adverse Inference Sanction

On facts far less egregious, and faced with exponentially smaller losses, courts have not hesitated to issue adverse inferences to level the playing field in front of the trier of fact. In *Broccoli*, 229 F.R.D. 506, the defendant failed to suspend its automatic deletion policy after it had been put on notice of potential litigation. The court held that Echostar was "guilty of gross spoliation of evidence" and that it had acted in bad faith in its failure to suspend its email and data destruction policy. *Id.* at 512. These bad faith actions, the court stated, "prejudiced Broccoli in his attempts to litigate his claims and measurably increased the costs for him to do so." *Id.; see also Kounelis v. Sherrer*, 529 F. Supp. 2d 503, 519 (D.N.J. 2008) (imposing adverse inference in section 1983 action for unintentional failure to preserve video surveillance and noting that "[s]poliation occurs when a party has intentionally or *negligently* breached its duty to preserve potentially discoverable evidence") (emphasis added); *DaimlerChrysler Motors v. Bill Davis Racing, Inc.*, 2005 WL 3502172, at *3 (E.D. Mich. Dec. 22, 2005) (granting an adverse inference and permitting plaintiff to present evidence of defendant's failure to preserve electronic data); *Scott v. IBM Corp.*, 196 F.R.D. 233, 248-49 (D.N.J. 2000) (imposing a spoliation inference where the defendant was aware that the destroyed documents would be subject to discovery but nevertheless failed to preserve those documents).

Even "negligent destruction of relevant evidence can be sufficient to give rise to the spoliation inference." *Mosaid Tech.*, 348 F. Supp. 2d at 338. In *Mosaid*, Samsung had not placed a litigation hold on its automatic deletion policy. Its internal email deletion system therefore allowed potentially responsive emails to be deleted. As a result, Samsung did not produce a single technical email in response to requests in a highly technical patent case. Because of Samsung's failure to preserve documents, the magistrate judge imposed a spoliation inference. *Id.* at 333-34. Samsung argued that the adverse inference was inappropriate where

the electronic evidence was destroyed inadvertently as a result of automatic computer operations used in the ordinary course of business. *Id.* at 337. The *Mosaid* court rejected Samsung's argument and issued an adverse inference reasoning that because "the spoliation inference serves a remedial function--leveling the playing field after a party has destroyed or withheld relevant evidence," the offending party's culpability is "largely irrelevant" when the opposing party has been undeniably prejudiced. *See id.* at 338.

While this Court previously rejected an adverse inference sanction where there was no proof of intentional destruction of evidence as well as no proof of loss or prejudice, the facts of this case could not be more different. In *Tracinda*, 2003 WL 22951696, at *1 n.1 , a secretary– with no knowledge of the lawsuit– innocently destroyed a few "While You Were Out" pink message notes, whose content she had already transcribed into a nearly-verbatim list. *Id.* Because DaimlerChrysler had access to the contents of the destroyed notes, the complete lack of prejudice was thus sufficient grounds to reject DaimlerChrysler's spoliation motion. *Id.* at *2. While the harmless loss of a few message notes–the only incident of spoliation by Tracinda–may be excusable, Intel's destruction of countless documents is not. The content of many of those documents has been lost forever, thereby prejudicing AMD's case in a manner far greater than faced by DaimlerChrysler. Indeed, conduct far less egregious than Intel's ultimately led this court to impose over $500,000 in Rule 16 sanctions against DaimlerChrysler for tardily producing 61 pages of documents. *Tracinda Corp. v. DaimlerChrysler AG*, 2005 WL 927187, at *4 (D. Del. Apr. 20, 2005).

IV.

CONCLUSION

Due to Intel's willful and bad faith destruction of relevant evidence, AMD asks that the Court grant its request for an adverse inference instruction to the jury. With this motion, AMD

has submitted a proposed jury instruction for the Court that attempts to remedy the prejudice caused by Intel's spoliation of evidence. That instruction provides that the jury be told that (1) Intel permanently destroyed hundreds of thousands of relevant documents and (2) the jury may presume that the documents Intel destroyed and failed to produce would have been favorable to AMD's claims that Intel violated Section 2 of the Sherman Act. In addition to, but not in lieu of an adverse inference instruction, AMD requests that the Court permit evidence of Intel's document destruction to be presented to the jury. Finally, AMD asks the Court to order Intel to pay the reasonable attorneys' fees and costs associated with investigating and prosecuting this motion.

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CERTIFICATE OF SERVICE

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