

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ADVANCED MICRO DEVICES,)
)
 Plaintiffs,) Civil Action No.
) 05-441-JJF
v.)
)
INTEL CORPORATION,)
)
 Defendant.)

Teleconference in above matter taken pursuant to notice before Renee A. Meyers, Registered Professional Reporter and Notary Public, in the offices of Blank Rome, LLP, 1201 North Market Street, Wilmington, Delaware, on Thursday, December 27, 2007, beginning at approximately 11:00 a.m., there being present:

BEFORE:

THE HONORABLE VINCENT J. POPPITI, SPECIAL MASTER

APPEARANCES:

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23
24

1 SPECIAL MASTER POPPITI: Let's do this,
2 then, for purposes of making sure everyone knows who is
3 on the line, if we can start with class plaintiffs,
4 please, and then AMD and then Intel.

5 MR. SMALL: Your Honor, this is Dan Small
6 for the class plaintiffs.

7 MR. HOLZMAN: Jim Holzman, Prickett, Jones,
8 for the class plaintiffs.

9 SPECIAL MASTER POPPITI: Thank you again.

10 MR. SAMUELS: Good morning, your Honor, Mark
11 Samuels, and with me are Chuck Diamond, Linda Smith, Bo
12 Pearl, and Jennifer Chang from O'Melveny & Myers for
13 AMD, and also Beth Ozmun, in-house counsel for AMD.

14 SPECIAL MASTER POPPITI: Thank you again.

15 MR. HORWITZ: Good morning, your Honor, it's
16 Rich Horwitz of Potter, Anderson for Intel. With me
17 from Gibson, Dunn, if I miss anyone, they will chime in,
18 Bob Cooper, Dan Floyd, Rich Levy, and Kay Kochenderfer.

19 SPECIAL MASTER POPPITI: Thank you. And I
20 do appreciate your accommodation of permitting me to set
21 this matter for hearing on this day, and I believe we
22 have reserved another day for a hearing on DM 8.

23 The first question I have is really a
24 housekeeping question before you all get into some

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1 discussion of the application, itself, and during the
2 course of that discussion, of course, I will have some
3 question.

4 My first question, perhaps it's premature
5 and it should come at the end, but I think it's
6 something I would like you to focus on, if you want to
7 respond at the end of the conference, that's fine, if
8 you want to give me your thoughts now, that would be
9 helpful as well, and that is this: If I make some
10 determination that I am going to have an in camera
11 review of the documents that were generated as a result
12 of the interviews that were conducted and I make that
13 determination in conjunction with a finding,
14 recommendation, or order, depending upon however it
15 should be captioned consistent with my responsibilities
16 under the rule, I'd like some discussion as to whether
17 there can be an understanding that the determination
18 that leads up to my saying I am going to need an in
19 camera review is a preliminary determination for
20 purposes of putting that determination, if you will, on
21 stall so that there would be no opportunity to take
22 exceptions or objections to that determination before
23 the review is conducted.

24 MR. SAMUELS: Your Honor, Mark Samuels for

1 AMD. That would certainly be agreeable to us.

2 SPECIAL MASTER POPPITI: Did Fred Cottrell
3 just join?

4 MR. COTTRELL: Yes, Judge, I am sorry. I
5 used, notwithstanding my request to get a new number, I
6 used the old number but I was listening to some very
7 pleasant music, so it's all my fault.

8 SPECIAL MASTER POPPITI: I am glad that you
9 relaxed. That's a good way to start a day.

10 MR. COTTRELL: I didn't mean to interrupt
11 either.

12 SPECIAL MASTER POPPITI: Thank you.

13 MR. FLOYD: So, just to make sure I
14 understand, then, there would be -- potentially, you
15 are, I guess you are asking us whether or not if there
16 was -- if the Court determined that you wanted to have a
17 preliminary review of the documents in camera, that that
18 order would not, there would not be a procedure to take
19 that particular decision up to the Court. I am
20 assuming, then, there would be an agreement that Your
21 Honor's review would in no way affect any, itself, be a
22 waiver of any privileges?

23 SPECIAL MASTER POPPITI: Correct. And,
24 certainly, it seems to me that if I conduct a review and

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1 I make some judgment with respect to that review, for
2 example, if a judgment is that the information, as
3 reported in the document, is fact information so
4 intertwined with opinion information that is core, that
5 it is so intertwined that it can't be separated, then it
6 seems to me that is a judgment, if you will, that should
7 form the basis of a final document that would be
8 reviewed or there would be an opportunity to review that
9 by exception or objection with the Court.

10 Similarly, if there is a judgment that there
11 is -- that the information as reflected, reported in the
12 documents is such that opinion, mental impressions can,
13 in fact, be separated from facts contained in those
14 documents before that information is released, there
15 would be an opportunity to take exception and objection
16 from that so that nothing would be revealed until the
17 Court -- until whatever I had to say about it in that
18 connection and the Court had an opportunity to enter
19 what would be the final order.

20 MR. SAMUELS: Your Honor, Mark Samuels for
21 AMD. That seems to us to be the correct procedure, and
22 to relieve any concern on Dan's, forgive me, Mr. Floyd's
23 part, we would agree that the interim submission for
24 Your Honor's in camera review would not, itself,

1 constitute a waiver of any privilege or protection.

2 MR. FLOYD: Your Honor, if that is, if,
3 after the argument, if that's the way you choose to go,
4 then we would, obviously, we would agree with that,
5 that's fine, in terms of the procedure. I just want to
6 have had some clarification so I could understand.

7 SPECIAL MASTER POPPITI: Please. And I am
8 happy to -- I have answered the question that you posed.
9 If you have any questions in that regard, please either
10 pose them now or pose them at the end of the conference
11 today.

12 With that, let me, since we spoke to that
13 issue even before hearing you walk through some of your
14 arguments, I do have some questions about the
15 interviews, themselves, and if there is any concern
16 about the question, I am sure you will raise it with me
17 -- did someone just join.

18 MR. SMALL: I am sorry, your Honor, this is
19 Dan Small. That was my other line ringing. I apologize
20 for that.

21 SPECIAL MASTER POPPITI: That's all right.
22 Can I have a better understanding, other than what I
23 have seen in the papers, as to how the interviews were
24 conducted, and by virtue of that question, I am looking

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1 for information as to whether there was a script or a
2 questionnaire that the attorneys had or whether the
3 interview was, you know, free flowing, if you will. I
4 am also looking for information as to the --

5 MS. KOCHENDERFER: There were a number of
6 different attorneys at the Weil firm who were involved
7 in conducting the interviews of the custodians, and
8 there is one particular attorney, David Lender, who you
9 have seen a declaration from, who was in charge of
10 coordinating the efforts of the other attorneys at Weil
11 and they did have some basic parameters that they were
12 trying to make sure they covered with each of the
13 custodians for purposes of making sure that they got the
14 appropriate information to provide, you know, the
15 details, written descriptions provided in the summaries.

16 SPECIAL MASTER POPPITI: And with respect to
17 the attorneys, themselves, Miss Kochenderfer, do you
18 have any sense, as we are speaking, as to the number of
19 years with respect to, first of all, how many attorneys
20 were involved?

21 MS. KOCHENDERFER: I believe that the
22 primary attorneys who were working on it probably was
23 about a half a dozen, but I think, from time to time,
24 they used a few additional attorneys.

1 SPECIAL MASTER POPPITI: Okay. Can you
2 describe with respect to each of the attorneys the years
3 that they have had practicing? Are we talking about, if
4 you will, a "new bee" that is a first or second year? I
5 apologize.

6 MS. KOCHENDERFER: I know that there were at
7 least two partners at Weil, perhaps more, and that there
8 were some mid-level associates. Whether there was some
9 more junior associates, I don't know the exact number of
10 years that each of them have practiced, but the main
11 people that I am aware of who were working on it were
12 the partners and some mid-level associates.

13 SPECIAL MASTER POPPITI: Was there, and
14 perhaps you have answered this by virtue of some of your
15 earlier comments, but was there an outline, a script, a
16 questionnaire, or were there a series of outlines,
17 scripts, or questionnaires, or direction?

18 MS. KOCHENDERFER: There were directions
19 given by David Lender and there were some basic outlines
20 with basic information that each person was supposed to
21 elicit during the interviews.

22 SPECIAL MASTER POPPITI: And with respect to
23 those directions or, I call them scripts or
24 questionnaires, have those, I think I know the answer to

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1 this question, but it's important to pose it, have those
2 scripts, questionnaires, or directions, have they been
3 produced?

4 MS. KOCHENDERFER: No.

5 SPECIAL MASTER POPPITI: And I might want
6 counsel to follow-up with some questions with respect to
7 my line of questioning as well. I think it's
8 appropriate to do it that way.

9 MS. KOCHENDERFER: Just if I could add one
10 more point.

11 SPECIAL MASTER POPPITI: Please.

12 MS. KOCHENDERFER: David Lender, who was the
13 partner in charge of overseeing the process, would do a
14 re-review of all of the notes and reports from the other
15 attorneys and there were follow-ups that were performed
16 as a result of that, and I wanted to include that as
17 part of the process so you understood the totality of
18 the process and how it worked.

19 SPECIAL MASTER POPPITI: Thank you.

20 With respect to the directions or script or
21 questionnaires, is it your position that those documents
22 constitute work product that constitutes core, if you
23 will?

24 MR. FLOYD: Meaning the questions that were

1 asked of the witnesses? Because this is not a situation
2 where the witnesses were provided with the questionnaire
3 to fill out or something like that. I mean, the issue
4 is when you have -- you have a team of people working on
5 a project, you have to reach some consensus of
6 information you need to get, and so that is, basically,
7 a summary of the information that you have to obtain in
8 the course of the interview. That's the kind of thing
9 we are talking about. I think that -- our view would be
10 the creation of that would be core work product.

11 MS. KOCHENDERFER: Intertwined in some of
12 these notes are follow-up questions and exchanges
13 between counsel.

14 SPECIAL MASTER POPPITI: Are those follow-up
15 questions something that are identified to be followed
16 up by virtue of the direction or the script or the
17 questionnaire?

18 MS. KOCHENDERFER: They are follow-up --
19 they are comments and opinions of the attorneys in terms
20 of either follow-up to be done or -- the reason I am
21 hesitating slightly is we believe that that -- those
22 exchanges would be privileged.

23 SPECIAL MASTER POPPITI: And I understand
24 that and I certainly don't want you to be answering a

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1 question of mine that divulges what you believe to be
2 privileged information.

3 I think this question was just answered, but
4 I do want to make sure: I gather from what I understood
5 that the custodians, themselves, were not writing any
6 information onto a document that, in turn, was produced
7 to the interviewer either before, during, or after the
8 interview was concluded; is that correct?

9 MS. KOCHENDERFER: That is my understanding,
10 yes.

11 SPECIAL MASTER POPPITI: Okay. Were the
12 interviews, themselves, conducted face-to-face or were
13 they conducted by virtue of telephone or were they
14 conducted in part face-to-face, part by telephone, or
15 part telecommunication?

16 MS. KOCHENDERFER: It is my understanding
17 that they were conducted by telephone. There might have
18 been, you know, a handful of exceptions or one exception
19 where there were face-to-face that I don't know about,
20 but my knowledge is that they were done telephonically
21 and recalled that this was a situation where these were
22 interviews of people, many of whom were located in
23 different countries and different time zones, so I know
24 there was some challenge in getting the arrangements set

1 up for these telephonic interviews.

2 SPECIAL MASTER POPPITI: And with respect to
3 those employees that participated, those custodians that
4 participated in the interviews, was there a direction to
5 the employees to participate? And if there was, who did
6 the direction come from?

7 MS. KOCHENDERFER: For the most part, the
8 interviews were set up by a coordinator at Intel who
9 used an Outlook system to put the meeting notices on
10 their respective calendars.

11 SPECIAL MASTER POPPITI: And by virtue of
12 "coordinator," can I expect, then, that the coordinator
13 had, or should I expect that the coordinator had some
14 degree or cloak of authority to say, Here is a date when
15 you will submit yourself to interview by attorneys from
16 Weil?

17 MS. KOCHENDERFER: Right. That's my
18 understanding, yes.

19 SPECIAL MASTER POPPITI: And with respect to
20 those custodians that you would consider to be, I will
21 use the phrase without much of definition to it unless
22 it's important to kind of drill down through this, were
23 custodians you would classify as high level employees in
24 the context of some of the case law that talks about

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1 control group, if you will?

2 MR. FLOYD: The custodian list, as you know,
3 has approximately 1,025 people, I believe at this point,
4 and, so, there is a range. There are people related to
5 this litigation which includes in the number of
6 instances the most senior officers of the company and
7 certainly a number of people that would qualify under, I
8 think, any -- I mean, they are officers or they are
9 similar type people, you know, there is a range all the
10 way down to people who work on account teams and all
11 that. These are not the lowest level employees of the
12 company. The people that have relevant information are
13 typically people with some degree of authority, but
14 there would definitely be, you know, nuances and
15 differences between the groups.

16 SPECIAL MASTER POPPITI: Okay. The
17 direction that came from -- is it the coordinator? Are
18 we talking about one person that was doing the
19 coordination of all of these interviews?

20 MS. KOCHENDERFER: I believe there would
21 have been multiple people who did this over time because
22 I think it was one person was in charge at one point in
23 time and then another person who was in charge at a
24 later point in time. So it was more than one person.

1 SPECIAL MASTER POPPITI: And with respect to
2 those individuals, did they have, would you consider
3 those individuals to be of high level employees?

4 MS. KOCHENDERFER: The schedulers?

5 HEARING OFFICER: The schedulers.

6 MS. KOCHENDERFER: No, I would not.

7 SPECIAL MASTER POPPITI: With respect to the
8 information that was coming from the schedulers, if it
9 was in the form of a direction, did the direction come
10 with any name affixed to it, for example, a manager.

11 MS. KOCHENDERFER: The direction would have
12 come from Intel's in-house counsel.

13 SPECIAL MASTER POPPITI: And would the
14 employees have known that? I am sorry. Would the
15 custodians have known that?

16 MS. KOCHENDERFER: Yes.

17 SPECIAL MASTER POPPITI: Would that have
18 been part of the document that constituted the document
19 to schedule?

20 MS. KOCHENDERFER: I don't know the answer
21 to that.

22 SPECIAL MASTER POPPITI: Do you know whether
23 there -- I expect that there was a
24 document/communication, whether e-mail or hard copy

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1 document, that actually accomplished the direction to
2 schedule and the direction to the custodian from
3 in-house counsel to participate?

4 MS. KOCHENDERFER: It's my understanding
5 that the mechanism would have been a meeting notice
6 provided to the custodian with an explanation that they
7 needed to make themselves available for the call with
8 the lawyers from Weil.

9 SPECIAL MASTER POPPITI: Okay. And has that
10 document or the template of that document, and if there
11 are more than -- there is more than one template, the
12 templates of that document, have those -- has that
13 document or have those documents been produced?

14 MS. KOCHENDERFER: No.

15 MR. SAMUELS: Your Honor, I believe that we
16 have had produced to us a number of these Outlook
17 calendar notices, I don't know how systematically they
18 were produced to us, I don't think we have 1,023 of
19 them, for example, but I don't believe that we were
20 provided with the attachment to that calendar notice
21 that Miss Kochenderfer just referred to.

22 MS. KOCHENDERFER: Let me just be clear. I
23 don't think there would have been an attachment to the
24 meeting notice, but in the meeting notices, themselves,

1 often -- often times they will explain, This is the time
2 of the meeting, this is the telephone number for the
3 meeting, and this is the reason for the meeting. It
4 would be within the same page, the same meeting notice.

5 SPECIAL MASTER POPPITI: And somewhere on
6 that notice, do I understand from what you are telling
7 me that there would have been the identification of
8 direction from in-house counsel?

9 MS. KOCHENDERFER: Whatever the information
10 was that was being conveyed to the custodian in terms of
11 the purpose of the call would have been within that same
12 meeting notice.

13 MR. SAMUELS: Your Honor, the calendar
14 notices that we have seen contain, you know, nothing
15 that would identify -- that would at least, to my eye,
16 have put the recipient on some sort of legal notice or
17 have some sort of legal, you know, admonition to them,
18 something of that nature. I haven't seen that.

19 SPECIAL MASTER POPPITI: Do we know, from
20 the information that has been provided, whether any
21 custodian chose not to respond to the meeting notice,
22 and, therefore, the custodian that was not interviewed
23 by virtue of a custodian saying, Nobody has told me I
24 have to do this, I am not going to?

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1 MS. KOCHENDERFER: There may have been
2 instances where there needed to be rescheduling done in
3 order to accomplish the interviews, but to the best of
4 my knowledge, all of the currently employed custodians
5 have now been interviewed and summaries provided.

6 SPECIAL MASTER POPPITI: And remind me
7 again, although I think I have some time reference in
8 the papers, when the interviews, themselves, actually
9 started?

10 MR. SAMUELS: Your Honor, I appreciate that
11 that question was directed to Intel, but if I could
12 simply observe that in February of 2007, more or less
13 contemporaneous with the disclosure to us by Mr. Cooper
14 that there was an evidence preservation failure at Intel
15 contemporaneous with that, we were provided a summary
16 of, I believe the number was 55 interviews that had, by
17 that time, been conducted, and I would also observe that
18 according to Mr. Lender's declaration, he started
19 conducting these interviews in February of 2006, which,
20 of course, was several months before we knew anything
21 about this.

22 SPECIAL MASTER POPPITI: Several months
23 after Weil was actually retained?

24 MR. SAMUELS: He claims the retention was

1 November 14, 2006, Mr. Lender does, and the interviews,
2 obviously, some number of them, at least 55 of them,
3 were conducted between November 14 of 2006 and the time
4 when Mr. Cooper presented to us a summary of the
5 preservation issues that were affecting that first batch
6 of interviewees.

7 He, Mr. Lender, says that there were 230
8 employees who were identified as being in the first
9 tranche, but he doesn't say exactly when those
10 interviews were conducted. We simply know that at least
11 55 of them, if I have got my number right, were
12 conducted between November -- between mid November and
13 mid February.

14 MR. FLOYD: I think one of the hesitations
15 on our part was to make sure, because one of the things
16 that happened was as a result of the Court order, we had
17 to make sure, a lot of people had to make sure that they
18 had actually occurred everything systematically, and,
19 so, some of the people, and I don't know the exact
20 numbers, would have been interviewed potentially more
21 than once. And, so, you know, there was -- there was a
22 series of interviews that were, I think, undertaken for
23 similar purposes, but there were, you know, differences
24 in terms of making sure that the scope of the

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1 information had been covered. So you might have
2 information in more than one interview, and, so, you
3 could say, Well, all the information that was in the
4 summary may have been, you know, gotten the second time,
5 but, obviously, there might have been information that
6 was also relevant when somebody was interviewed the
7 first time, so that's really what this is about. I
8 think Mr. Lender did lay out when he was hired and when
9 the process started, which was in November.

10 SPECIAL MASTER POPPITI: Okay. Now, the
11 interviews, as I understand it, were primarily conducted
12 by telephone. Were the interviews tape-recorded, and if
13 they were tape-recorded, do the recordings of those
14 interviews still exist, and if they don't exist, were
15 transcripts made of the interviews, themselves?

16 MS. KOCHENDERFER: To the best of my
17 knowledge, they were not tape-recorded, but I will
18 confirm that to make sure.

19 SPECIAL MASTER POPPITI: Let me pause for a
20 moment and just ask if there are any other questions
21 with respect to the process leading up to the
22 interviews, the description of what the interviews were
23 that I have not -- that I have not touched on?

24 MR. SAMUELS: Your Honor, the questions that

1 your Honor has posed are the logical questions that
2 occur to us as well. I would just observe that it seems
3 to us that a script or questionnaire of some kind must
4 necessarily have been used in order for Mr. Lender to
5 have summarized the interviews in the way that he did
6 for purposes of the summaries that have been provided to
7 the Court and to plaintiffs.

8 SPECIAL MASTER POPPITI: I am happy to pose
9 the question, if that was a question, and the question
10 is: Was there a document that any one of the
11 interviewers or all of the interviewers used for
12 purposes of either using it as an outline, using it as a
13 script, using it as a questionnaire for purposes of
14 conducting an interview, itself?

15 MR. FLOYD: From what I have seen, there are
16 some interviews where people had, you know, because, as
17 we said, there were a list of issues that had to be
18 covered, for some people, there were a list of issues
19 for them to cover, I don't believe, our point remains
20 that they weren't necessarily limited to those issues
21 and the discussion would extend beyond those for other
22 people who -- and I think those are people who had been
23 brought in who weren't part necessarily, you know,
24 Mr. Lender or the, say, the core group who, as far as I

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1 know, didn't have the same form, they knew the
2 questions, they knew what they needed to ask, so I think
3 it was more of a, in those situations, it was more to
4 inform additional people on the team to make sure they
5 covered what they needed to cover.

6 SPECIAL MASTER POPPITI: And then with
7 respect to that, though, those that did have the list,
8 do you know where the list came from and do we know what
9 was -- whether the list still exists so that either you
10 are in a position to know what was on the list or I am
11 in a position to know if I ask that those things be
12 produced in camera?

13 MR. FLOYD: Everything has been -- they have
14 retained what they used. Whatever lists were created
15 were prepared by Weil.

16 SPECIAL MASTER POPPITI: Okay. One other
17 question, then, with respect to the interviews,
18 themselves, and then I want to move into the work
19 product of the interviews, expecting that there was a
20 Weil attorney that was conducting the interview and a
21 custodian on the other end of the line, do you know
22 whether there was anyone else on the telephone line
23 privy to the communications with respect to any one of
24 -- or any of the interviews, themselves?

1 MS. KOCHENDERFER: It's my understanding
2 that the interviews were conducted solely between Weil
3 and the custodians. You know, there might have been
4 some exceptions to that general principle, but it's my
5 understanding that the basic principle was that it was
6 the Weil attorneys and the custodians.

7 SPECIAL MASTER POPPITI: With respect to
8 those exceptions, do you know if those exceptions were
9 noted, and if they were noted, was the notation the
10 identity of someone other than the interviewer and the
11 interviewed custodian?

12 MS. KOCHENDERFER: The only reason I put the
13 qualifier in there is that, I am not sure of this, but
14 there may have been Intel in-house counsel on some of
15 them. I will have to confirm that.

16 MR. SAMUELS: Your Honor, please forgive me.
17 It just occurred to me that there is another question
18 that Your Honor might consider posing to Intel, which is
19 whether the attorney conducting the interview, the Weil
20 attorney preserved the raw notes that he or she was
21 taking contemporaneous with the phone call, and whether
22 those notes were then later converted into some, you
23 know, memorandum or some more durable form?

24 In other words, when I am taking -- when I

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1 am on a phone call, I often jot notes of what someone
2 tells me. Often times, I might prepare, afterwards, a
3 memorandum that's a more folksom summary and that
4 sometimes contains my mental impressions.

5 SPECIAL MASTER POPPITI: I was going to be
6 moving into that line of questioning, and for purposes
7 of -- the purpose of asking the questioning, and I will
8 say that respectfully, I am just going to adopt the
9 outline that was just given, and if there can be a
10 response to that, that would be very helpful?

11 MS. KOCHENDERFER: Yes. It's my
12 understanding that Weil preserved their contemporaneous
13 notes that were taken during the interview while the
14 interview was being taken. In fact, many of the notes
15 actually are handwritten notes that are notes that were
16 taken during the calls.

17 There are also what we would consider to be
18 privileged and work product exchanges then that go back
19 and forth on e-mail and some typewritten notes and the
20 like.

21 SPECIAL MASTER POPPITI: With respect, then,
22 to those notes that were preserved, was there also the
23 creation of a document that either summarized those
24 notes that is a document different from the summaries

1 that were provided pursuant to paragraph eight of the
2 order that required the production of that information?
3 Maybe I wasn't very artful in asking that question.

4 Certainly fact information was provided as a
5 result of the direction of paragraph eight of the
6 operative order.

7 Was there a document that previewed -- a
8 document between the handwritten notes and the summary?

9 MS. KOCHENDERFER: I believe that there
10 were.

11 SPECIAL MASTER POPPITI: And are those
12 documents organized by custodian and do they still
13 exist?

14 MS. KOCHENDERFER: All of the documents have
15 been preserved with respect to each custodian. The
16 reason that there is a little bit of a hesitation here
17 on our end is that depending on what follow-up was
18 needed with each facility and depending on how the
19 attorneys interacted with one another, there were a
20 number of documents that were generated and some e-mail
21 traffic between counsel.

22 SPECIAL MASTER POPPITI: With respect to the
23 follow-up, was the follow-up a function of not having an
24 understanding of what the response was? Was it a

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1 follow-up because the custodian wasn't able to respond
2 without doing something else on his or her part?

3 MS. KOCHENDERFER: An example of a follow-up
4 that I am familiar with is a situation where one
5 attorney from Weil conducted the interview with the
6 custodian, and David Lender, who was in charge, overall,
7 of the project, reviewed the notes and said, There is
8 some more information I think we ought to be getting
9 from this person, let's call them back and do some
10 follow-up. There might have been other reasons for
11 doing follow-up, but it was an effort to make sure that
12 Weil captured all of the information that they thought
13 was appropriate to capture in order to provide the
14 information about the retention practices of the
15 custodians.

16 SPECIAL MASTER POPPITI: Okay. Are there
17 any other questions, then, with respect to the product,
18 the output of the interviews of the custodians?

19 MR. SAMUELS: Your Honor, I guess just one,
20 and that is whether the paragraph eight summaries were
21 prepared by Mr. Lender or someone from Weil, Gotshal who
22 had actually conducted the interview?

23 MS. KOCHENDERFER: They were prepared by
24 David Lender.

1 MR. SAMUELS: Thank you. Your Honor, unless
2 one of my colleagues does, I have no further questions.

3 MS. KOCHENDERFER: I apologize. I wanted to
4 add one clarification.

5 SPECIAL MASTER POPPITI: Please.

6 MS. KOCHENDERFER: The paragraph eight
7 summaries have, many of them have two paragraphs. The
8 first paragraph is a paragraph that describes the
9 retention practices that is the summary that comes from
10 the Weil attorneys.

11 SPECIAL MASTER POPPITI: Yes.

12 MS. KOCHENDERFER: The second paragraph is a
13 paragraph that says something to the effect of, This
14 custodian, we have a complaint free state, we have
15 weekly backup tapes that start November 2005 and we
16 harvested the custodian on X date, Y date, and Z date.
17 That second paragraph with the information about what
18 alternative, you know, what additional media we have for
19 each of the custodians, that's something that Gibson,
20 Dunn put together and put into the summaries.

21 I just wanted to make that clarification.
22 It doesn't have anything to do with interviewing the
23 custodians, the factual information that we provided.

24 MR. SAMUELS: Thank you, Kay. I -- we

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1 always understood that that second paragraph, sort of
2 the summary of I.T. possession, I.T. tapes and so forth,
3 that's not the subject of this motion.

4 SPECIAL MASTER POPPITI: Okay. Then with
5 that, if -- I don't know whether the information that
6 you have just talked about is helpful even in terms of
7 helping to frame what you want to be saying to me for
8 purposes of your argument? I am sure I will have some
9 questions as you hit the highlights of your argument.

10 MR. SAMUELS: Your Honor, would you like us
11 to begin?

12 SPECIAL MASTER POPPITI: Yes.

13 MR. SAMUELS: So, to recap, your Honor, this
14 motion presents three issues; first, whether the Weil,
15 Gotshal interview notes are privileged at all, second,
16 whether any privilege has been waived, and, third,
17 whether and to what extent they are protectable as work
18 product.

19 Let me take the issues in that order. On
20 the privilege question, of course, there are three
21 elements, and the burden is on the party asserting
22 privilege to establish each of those elements. The
23 first, of course, there has to be a communication
24 between client and counsel; second, that the

1 communication must have been intended to be, and, in
2 fact, have been kept confidential; and, third, the
3 communication must be for purpose of obtaining or
4 providing legal advice.

5 I want to focus on the second of those two
6 elements, the confidentiality requirement, and I want to
7 invite your Honor to read Mr. Lender's declaration
8 carefully. I have reviewed it several times. He never
9 says anywhere in the declaration that the interviews
10 were intended to be confidential.

11 SPECIAL MASTER POPPITI: Let me just pull
12 that while you are going through it, and while I am
13 doing that, I do have that in front of me, I do want to
14 pose a question at the front end. I gather, even by
15 your launch, if you will -- well, I will just pose the
16 question: Are you conceding that there once was an
17 attorney/client privilege over the document, notes that
18 we are talking about?

19 MR. SAMUELS: No, your Honor, we don't. And
20 that's exactly where I was going because I think that
21 concession is misattributed to us in the opposition
22 papers. We have not conceded that and for the reason
23 that the second prong, the confidentiality prong seems,
24 to us, not to have been established, and if your Honor

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1 has Mr. Lender's affidavit in front of him --

2 SPECIAL MASTER POPPITI: I do.

3 MR. SAMUELS: -- you will note that he
4 doesn't say anything to that effect in his affidavit.
5 And unless I have missed it, which I don't believe I
6 have, Mr. Lender never even uses the word
7 "confidential."

8 And beyond Mr. Lender's failure to say a
9 word on the subject, we are highly skeptical whether
10 these interviews were ever intended to be confidential,
11 and even if there may have been that intent at the
12 outset, there is no question in our mind that they have
13 not been maintained as such.

14 I have already told Your Honor that the
15 interviews began in December of 2006, and we were
16 provided in February with purported summaries describing
17 dozens of individual custodian's document preservation
18 issues elicited through Mr. Lender's interviews.

19 Over the next several months, we and the
20 Court received these paragraph eight summaries
21 purportedly describing the remainder of the 1,023
22 custodians' preservation issues. So it seems to us,
23 Your Honor, that these witness interviews were conducted
24 for the very purpose of reporting to the Court what

1 preservation issues the custodians had, and that negates
2 the possibility, in our mind, that they were ever
3 intended to be kept confidential.

4 So, even before we get to the question of
5 waiver, to which I will turn next, we have a fundamental
6 failure on Intel's part to establish the existence,
7 well-known, of the privilege, and we have strong
8 indications that they were never intended to be
9 confidential, again, because they appear to have been
10 conducted for the very purpose of publicly reporting
11 individual custodian preservation issues and because
12 Mr. Lender, in his declaration, never suggests
13 otherwise. And, again, because of the content of those
14 interviews, as reported in these paragraph eight
15 disclosures, the content has been publicly disclosed,
16 and that would also display any confidentiality.

17 SPECIAL MASTER POPPITI: When you are
18 referring to confidentiality, are you focusing squarely
19 on the claim of attorney/client privilege?

20 MR. SAMUELS: Yes, Your Honor. The argument
21 I just delivered was entirely on the question of
22 privilege. And, you know, when a lawyer has a
23 conversation with a client, you know, not every
24 conversation is intended to be kept confidential and not

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1 every conversation is, in fact, kept confidential. And
2 it seems to me these interviews conducted from top to, I
3 won't say the bottom, but certainly well into the middle
4 ranks of Intel's work force, well outside the control
5 group, there is really nothing to establish that
6 individuals being interviewed expected or -- expected
7 their conversations to be kept confidential, and, in
8 fact, they were not because the content of them was
9 purportedly summarized in these paragraph eight
10 summaries.

11 SPECIAL MASTER POPPITI: And let me ask you
12 to focus, just briefly, on the issue of control group,
13 and I think, I don't know whether you agree with me,
14 that the state of the law with respect to the control
15 group analysis is one that I think the majority of
16 courts contest should be flexible; do you accept that?

17 MR. SAMUELS: Yes, Your Honor, I do.

18 SPECIAL MASTER POPPITI: How would you then
19 bring that analysis, if even the analysis is necessary,
20 to what you just suggested?

21 MR. SAMUELS: Well, Your Honor, I am not
22 sure it is necessary for the reason that the individuals
23 that we are talking about, if they were -- if they were
24 having communications with Mr. Lender for the purpose of

1 getting legal advice, I think we would have heard that.
2 Instead, to our way of thinking, these were interviews
3 more like the interviews an investigator might take at
4 the scene of an accident asking people what they saw.
5 And those kinds of communications are generally not
6 viewed as confidential and the interview notes are
7 generally discoverable.

8 SPECIAL MASTER POPPITI: Okay. If you will
9 go on with your analysis, please?

10 MR. SAMUELS: So let me turn next to the
11 question of waiver. So in the Third Circuit, a waiver
12 occurs where the holder of privilege voluntarily
13 discloses or consents to disclosure of any significant
14 part of the communication. And superimposed on that is
15 what the courts call the fairness doctrine which is
16 intended to prevent prejudice to a party and distortion
17 of the judicial process that can result from a selective
18 disclosure by a privilege holder during litigation of
19 otherwise privileged information.

20 Your Honor, let's look at the uses to which
21 Intel has put these interviews, and I would suggest that
22 the fairness doctrine applies here. First, Your Honor,
23 Intel reported to the Court the, and trumpeted the
24 conduct of this internal investigation and asserted as

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1 fact that its internal investigation had revealed that
2 all of its custodian evidence preservation issues were
3 the result of innocent misunderstandings or errors by
4 individual custodians and that none of them had resulted
5 from any deliberate misconduct.

6 Intel further reported to the Court, again,
7 based on these custodian interviews, that it could
8 assure plaintiff and the Court that anything one
9 custodian neglected to preserve would have been sent to
10 and preserved by some other custodian, and, therefore,
11 that nothing of any genuine significance will prove to
12 have been lost, and that's a quote from the report.

13 Intel has, by this time, served up summaries
14 prepared by Mr. Lender of the interviews that he and his
15 colleagues conducted, and those summaries are in the
16 form of these paragraph eight reports. Each of them, I
17 would suggest and Your Honor has them, they have all
18 been carefully written up, in our view, to present the
19 facts in a light most favorable to Intel, and those
20 summaries raise a number of questions with us.

21 Now, I would note that none of those
22 statements have been under oath and none of them can be
23 tested, the veracity of them can't be tested except by
24 seeing what the custodians actually said. And in that

1 respect, the Kidder, Peabody court, that's the Third
2 Circuit, sorry, the Southern District of New York case
3 that's cited in our papers is dead on factually with
4 this case. And if Your Honor has no questions about
5 waiver, I then move on to work product, which I think we
6 have touched on already.

7 SPECIAL MASTER POPPITI: I don't have any
8 questions for you about waiver.

9 MR. SAMUELS: So, on work product, of course
10 we have got core work product or opinion work product on
11 the one hand and ordinary or non-core work product on
12 the other hand.

13 Your Honor, there is no argument that's been
14 made by Intel that if and to the extent the notes
15 contain non-core or ordinary work product, the undue
16 hardship test is met; in other words, that the
17 maintenance of protection for non-core work product
18 yields where it were necessary to avoid undue hardship
19 to the other side and Intel does not dispute that the
20 undue hardship test would be met if this is non-core
21 work product.

22 Instead, Intel simply asserts that all the
23 notes are core work product, and, of course, we can't
24 know that, at this point, Your Honor can't know that,

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1 but we simply observe that records of what witnesses say
2 at interviews conducted by lawyers are not automatically
3 accorded protection as core work product. The books are
4 full of cases to that effect and the question is always
5 whether the witness statements are so commingled with
6 attorney mental impressions, in which case the solution
7 is not to allow them to be withheld in their entirety,
8 as Intel urges, but, instead, the portions containing
9 the attorney opinion and mental impressions are to be
10 redacted with the remainder produced. And that's what
11 we think ought to be done in this case, Your Honor.

12 SPECIAL MASTER POPPITI: And I would expect
13 that you would agree if that were a path that I thought
14 was important to go down, would you agree that Intel
15 should have the opportunity in producing those documents
16 for my review in camera to propose what portion of the
17 documents should be withheld because they are core? In
18 other words, they would be in a position to say, The
19 yellow line, if you will, is core, and the material
20 that's not lined is fact?

21 MR. SAMUELS: Yes, Your Honor, we would
22 agree with the caveat that I think Your Honor would or
23 ought to do a sanity check on those proposed redactions.

24 SPECIAL MASTER POPPITI: I understand that

1 completely.

2 Let me have Intel's view of the world,
3 please.

4 MR. FLOYD: This is Dan Floyd on behalf of
5 Intel. We believe we have established the foundation
6 for the attorney/client privilege in the Lender
7 declaration in paragraph four. He indicates that the
8 interviews were conducted, at least in significant part,
9 for -- to obtain information to provide legal advice,
10 also to provide legal advice at the time.

11 The interview started at a time before, you
12 know, any of this -- before the order to provide the
13 information was entered, so I think it's a fair
14 assumption that the interviews -- I think it is clear
15 that the interviews were conducted for those purposes.

16 To the extent that the word "confidential"
17 is not contained in this declaration, we are happy to
18 supplement it. We think it's obvious, it may have just
19 been an oversight in terms of when somebody is hired to
20 provide legal advice, but implied in that is that it's
21 confidential.

22 There is no indication, there is no record
23 that any of the legal advice has been disclosed at all.
24 The only information that's been provided here, and I

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1 think that's a critical point, is factual information
2 that was required of Intel pursuant to the March 16,
3 2000, stipulated order.

4 In that order is really basically a series
5 of questions, which, in our view, is a much like an
6 interrogatory. The order, which was negotiated by
7 counsel and entered by the Court, did not require
8 disclosure of the underlying investigative materials,
9 so, you know, we believe there was no waiver, but even
10 if providing the information, underlying factual
11 information could be viewed as a waiver, it would be a
12 partial waiver and we don't think the unfairness test in
13 the Westinghouse case could be made here.

14 The one thing -- I don't think Intel could
15 be accused of only disclosing helpful information.
16 There is no question that Intel answered all of the
17 questions completely, and while there, you know, have
18 been words used like "purportedly" in certain types of
19 characterizations, the fact is all the questions were
20 answered completely for all 1,023 custodians.

21 The scope of this disclosure was ordered by
22 the Court and it was at AMD's request. We included the
23 correspondence where the specific nature of the
24 disclosure, they specifically asked for it in this form,

1 so --

2 SPECIAL MASTER POPPITI: You would agree
3 with me that, and let me take the question that comes to
4 mind with respect to your last comment, you would agree
5 with me that you could have said, No, we are not going
6 to do that, we are going to do it in a different
7 fashion? And I gather that I have all of the
8 information that you both want me to have with respect
9 to your meet and confers leading up to the agreed to
10 order; is that a fair comment, or fair comments?
11 Namely, you could have said no and we would have been in
12 a different circumstance?

13 MR. FLOYD: That is correct. However, when
14 the parties get together, discuss issues, reach an
15 agreement, have that agreement then approved by the
16 Court, the notion, then, that having provided that
17 information, it is unfair not to provide other
18 information sort of is a matter of course because there
19 isn't any showing here that the information was
20 inadequate, that it was, you know, that it was not
21 complete.

22 Now, Mr. Samuels says, Gee, it seems like it
23 was carefully written, but to suggest that sort of a
24 night follows day, that because this information was

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1 provided after negotiation, that all the investigative
2 materials necessarily need to be provided without any
3 real showing here of a problem seems to me that that is
4 a bit of a bootstrap.

5 And unlike in the case decided by AMD, in
6 particular, you have Kidder, Peabody and Granite
7 Partners, the investigations there were not done for
8 litigation purposes. There was public production of a
9 report and they would paraphrase, you know, the specific
10 words of the interviews and wide spread use of notes in
11 litigation.

12 Here, what we really have was a, you know, a
13 couple of lines in the remediation brief now that they
14 are trying to drive a very broad waiver through. One
15 was, you know, Mr. Samuels described both of them, but
16 neither discloses the content of information -- of the
17 communications, and I think the first regarding the
18 practices of the individual custodians, I don't believe
19 it adds any new information beyond the summaries,
20 themselves, essentially, it provides a sort of a wrap up
21 of our view of what those summaries provide.

22 SPECIAL MASTER POPPITI: Even if I don't get
23 to a waiver issue on the core that would be the, I
24 expect, would be the notes, the mental impressions of

1 counsel that were made during the course of the
2 interviews, themselves, even if I don't get to that and
3 I am only focused on the fact that with respect to
4 non-core work product which is factual information that
5 you -- that has been gathered from the custodians and
6 reported through the Court, to the Court to the other
7 side, even if I am only focused on those facts, why
8 isn't it important, and I will use the word "essential,"
9 to be able to test whether your reporting of those facts
10 is accurate?

11 MR. FLOYD: Well, Your Honor, I think in --

12 SPECIAL MASTER POPPITI: Even preserving the
13 core, even if I conclude that you didn't waive the core,
14 we would, would we not, be in the same circumstance if
15 you divulged any of the facts even in an interrogatory
16 response?

17 MR. FLOYD: Fair enough. Let me respond to
18 that.

19 The first is, to the extent that the
20 information provided is subject to the attorney/client
21 privilege, then there is no waiver, then whether it's
22 core or non-core is irrelevant, one. The second one is,
23 is that, obviously, in litigation, factual information
24 is provided, statements are made, and they are tested

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1 through discovery. I think the idea that you test that
2 through the production of work product that require a
3 certain showing, and, here, to suggest that any time
4 that you have -- you are providing information, and,
5 here, we did provide it in the form requested pursuant
6 to this Court order to say, Well, yes, you provided it
7 all, but, gee, we'd like to see all of your work product
8 just to make sure rather than go through other forms of
9 discovery, I don't think they cite any cases that
10 suggest that you break work product simply because you
11 would like to do an audit. I mean, there is usually
12 some showing that there is a problem and that there is a
13 reason why you want to break that protection. There is
14 a legal protection there.

15 So, in this case, it seems to me that it's
16 just a very generalized issue of wanting an audit
17 combined with what they suggest are the burdens of
18 dealing with it.

19 SPECIAL MASTER POPPITI: Here is my, perhaps
20 my dilemma is this: It just seems to me that what Intel
21 agreed to was to provide non-core work product, and the
22 agreement, as I understand it, based on your meet and
23 confers which resulted in a stipulated order, was to
24 provide non-core work product in the form of the

1 summaries that were contemplated by paragraph eight.

2 I don't see anything in the orders, and I
3 think it's fair to say "orders" because the latter order
4 contemplated the first order and didn't change anything
5 in the first order that wasn't inconsistent, the orders
6 don't say anything about retaining the qualified work
7 product privilege, if you will, over the -- over the
8 underlying documents that contain the factual
9 information from which the summaries were produced.

10 MR. FLOYD: And I guess I would have to
11 respectfully disagree in the sense that the scope of
12 what is required to be produced was defined, and, so, it
13 easily has been defined as, You do interviews, you give
14 us the raw notes. I mean, everybody knew you had to do
15 interviews. You have to do an investigation. That's
16 implied in any type of request like that.

17 And since the order, itself, provided the
18 form and since we complied with it, to suggest then that
19 the order, itself, then contemplated production of other
20 material or necessarily required it, I just respectfully
21 disagree, but, on the other hand, it doesn't say there
22 is a waiver and there is a myriad of privileges or, you
23 know, in connection with an investigation, a myriad of
24 privileges or work product protection that might occur

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1 that you might have, and I don't think it was necessary
2 to specifically say that in light of what the
3 limitations of what it is that Intel was required to do,
4 which were negotiated and approved.

5 SPECIAL MASTER POPPITI: So, what I think
6 what you are asking me to do is to look at the
7 information that you have provided with respect to your
8 meet and confers, and I think there are only several
9 documents that have been provided, I expect that does
10 represent the universe?

11 MR. FLOYD: You mean the correspondence that
12 led to the March 16, 2007, order?

13 SPECIAL MASTER POPPITI: That's correct.
14 You are asking me to look at that, you asking me to look
15 at the order and say the parties reached a four-cornered
16 agreement and the agreement is what it is and that's it
17 and that's all?

18 MR. FLOYD: Well, I don't even know whether
19 you really need to look at the correspondence. At the
20 end of the day, whatever the parties agreed to is what
21 we put in the document. We put some of that in there
22 because we wanted to make sure it was understood that we
23 were asked to provide this information and we were asked
24 to provide it basically in the form in which we provided

1 it. But I would say that, you know, I think it's fair,
2 in all these instances, because we have a lot of
3 negotiations where we take different positions, I would
4 never want to argue that if, you know, it's the
5 agreement that binds us and binds AMD and the class.
6 It's not the, you know, statements made in other
7 correspondence.

8 SPECIAL MASTER POPPITI: Give me one second
9 here. I want to look at -- I am looking at some
10 language, I am also looking at a July 10th order. Just
11 give me a minute to look at these two orders together,
12 and then I know I have a question. Hold on. If you
13 will take a look, please, at the July 10 order --

14 MR. SAMUELS: Your Honor, so I don't fumble
15 for it, was this an exhibit to one of the letter briefs?

16 SPECIAL MASTER POPPITI: It was, indeed. It
17 was Exhibit 5 of your motion to compel -- I am sorry,
18 Intel's response to your motion to compel.

19 MR. SAMUELS: Thank you, your Honor.

20 SPECIAL MASTER POPPITI: And what I am
21 looking at is paragraph seven of that order as well as
22 paragraph eight of the order, the paragraph that I
23 referenced earlier where it says that this order does
24 not supersede.

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1 MR. SAMUELS: The bifurcation order?

2 SPECIAL MASTER POPPITI: Yes. And I am
3 focused in paragraph seven --

4 MR. FLOYD: Yes, Your Honor. I imagine you
5 are focused on the non-core work product section here?

6 SPECIAL MASTER POPPITI: Yes.

7 MR. FLOYD: I think the main point on this
8 is that this was in the context of a particular
9 production pursuant to this order which is defined.
10 There is a scope of custodians who are being produced,
11 and it is being produced from, and that was the scope of
12 the waiver and it did not involve -- include the Weil,
13 Gotshal people who have custody of these materials. The
14 intent there was not to waive non-core work product as
15 to those materials.

16 SPECIAL MASTER POPPITI: Does AMD agree with
17 that?

18 MR. SAMUELS: Well, I am trying to get that
19 provision there. You are talking, Dan, about paragraph
20 one?

21 SPECIAL MASTER POPPITI: Paragraph seven.

22 MR. FLOYD: Yes. It says, in seven, "It is
23 agreed that in producing documents pursuant to this
24 order," and it sets forth, in paragraph one, who we are

1 producing from.

2 SPECIAL MASTER POPPITI: Yes, it does.

3 MR. SAMUELS: Well, Your Honor, if you look
4 at paragraph two, paragraph two allowed Intel, based on
5 its representation, to limit its search for responsive
6 documents to those six individual's PST files, but if
7 there are no such segregated files, Intel shall use its
8 best efforts to locate all documents responsive to the
9 remediation discovery.

10 SPECIAL MASTER POPPITI: I see that line.

11 MR. FLOYD: I appreciate that. We should
12 look at paragraph three because we specifically excluded
13 attorneys and legal staff on the basis that
14 non-duplicative documents held by these individuals are
15 almost entirely protected from discovery by the
16 attorney/client privilege or work product doctrine.

17 Now, AMD obviously still objected but --

18 MR. SAMUELS: The very next sentence says,
19 This has been done over our objection. We reserve the
20 right to seek an order compelling the production of
21 responsive materials from attorney and staff as well as
22 an order requiring the submission of privilege logs.
23 That's exactly what we are doing.

24 SPECIAL MASTER POPPITI: Right.

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1 MR. FLOYD: I understand. But this
2 indicates Intel's intent to maintain the privilege and
3 not waive it through this order. Obviously, you did
4 not, yourself, waive any rights to claim it. I am
5 simply addressing Your Honor. I don't mean to address
6 Mr. Samuels who --

7 SPECIAL MASTER POPPITI: I understand. That
8 is a little awkward over the phone.

9 MR. FLOYD: That's fine. I believe this
10 paragraph indicates the intent of Intel to maintain the
11 privilege over those documents. It's privileged or work
12 product protection to the extent it still existed, so I
13 don't believe this July 10th, 2006, order should be
14 viewed -- I mean seven order should be viewed as a
15 waiver.

16 SPECIAL MASTER POPPITI: Okay.

17 MR. FLOYD: We, essentially, said, We are
18 not producing any documents from legal counsel because
19 we believe they are privileged or work product. A and B
20 said, We reserve the right to seek to compel that; we
21 reserve the right to oppose such an order.

22 SPECIAL MASTER POPPITI: And that's
23 essentially where we are.

24 MR. FLOYD: So that's why I believe it goes

1 back to the original order.

2 SPECIAL MASTER POPPITI: Okay. Any other
3 comment, please?

4 MR. FLOYD: And then one last point from
5 Intel and then I think Mr. Samuels will want to make a
6 point, too, it sounds like.

7 The statements stated by AMD were in support
8 of Intel's -- Intel provided them in support of its
9 remediation plan which the parties have now agreed to
10 and the Court has entered. There is no issue yet fallen
11 on the table and Intel hasn't used those interviews to
12 defend itself on that issue so we think that issue is
13 not ripe yet.

14 MR. SAMUELS: Your Honor, I guess I would
15 simply close with two observations. First, Your Honor,
16 if you look at the original order requiring the
17 paragraph eight summaries, the paragraph eight summary,
18 the paragraph eight obligation is to disclose relevant
19 preservation issues affecting each custodian. We didn't
20 pose the questions that Intel chose to answer, for
21 example, whether the custodian regularly copied other
22 Intel employees.

23 Now, when you look at the paragraph eight
24 disclosures, that's what's littered throughout them. Of

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1 course, we don't know what other Intel custodians were
2 presumably copied or sent ccs on messages that an
3 individual custodian failed to preserve. That would be
4 reflected, presumably, in the interview notes which are
5 being withheld from us.

6 So, I think Your Honor a few minutes ago
7 posed to Mr. Floyd exactly the right question, which is:
8 Am I being asked and is AMD being asked to accept the
9 veracity of these paragraph eight summaries without
10 test? That's exactly what they are trying to force us
11 to do and they know that the only way that we could test
12 the veracity of those statements is to take up to 1,000
13 depositions, which, you know, we will do if we need to
14 but we certainly think that's highly inefficient and
15 more than meets the test in the cases for undue
16 hardship, and that would be my last point, Your Honor.

17 MR. FLOYD: One final point, Your Honor,
18 from Dan Floyd. Obviously, if these are privileged, and
19 we believe they are privileged, then whether they are
20 core or non-work product is not relevant, and, so, the
21 notion, then, and we have also, only a subset of these
22 people are actually producing documents in the
23 litigation, or have been designated formally as
24 custodians, excuse me.

1 So the notion, then, that somehow weaving
2 through all that and coming up and trying to excise
3 non-core work product out of some small subset of people
4 is if, as we believe most of the people here, if not
5 all, would be subject to or protected by attorney/client
6 privilege also to us doesn't seem to be a worthwhile
7 endeavor, and I will close with that.

8 Thank you.

9 SPECIAL MASTER POPPITI: Okay. Let me just
10 do this. What I'd like to do, for purposes of making
11 sure that I have covered what I want to cover with you,
12 I'd like to take just five minutes, if you don't mind.
13 What I'd like to do is put you all on hold and let's see
14 what clock we are going to go by.

15 MR. FLOYD: Certainly, Your Honor.

16 SPECIAL MASTER POPPITI: I have 12:22 on a
17 cell phone. The computer reads differently and the
18 clock reads differently than that. If we can all
19 reconvene at 12:30, and what I am going to be doing is
20 putting you on hold so I won't be able to hear if you
21 all have any communication among yourselves.

22 I don't know whether this puts you back to
23 music, Fred. If it does --

24 MR. COTTRELL: It was very nice, Your Honor,

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1 thank you.

2 MR. HORWITZ: Your Honor, can I be excused
3 for the rest of the call?

4 SPECIAL MASTER POPPITI: Yes, you may.

5 MR. HORWITZ: Thank you.

6 SPECIAL MASTER POPPITI: Thank you. Let me
7 make sure I hit the right button here and don't lose you
8 all.

9 MS. SMITH: I think I will, too.

10 SPECIAL MASTER POPPITI: The water is
11 calling.

12 MS. SMITH: No, no, the cost of the call.
13 Thank you very much, Your Honor.

14 SPECIAL MASTER POPPITI: I understand.
15 Enjoy the rest of your vacation.

16 (Recess taken.)

17 SPECIAL MASTER POPPITI: What I think I
18 need, even before I put pen to paper for purposes of
19 writing the conclusion, I don't think I am in a position
20 to make an ultimate determination if there exists
21 attorney/client privilege until I have the benefit of
22 some of the additional documents that I identified
23 during the course of my comments regarding the
24 interviews, themselves, namely, the direction to the

1 custodians, the meeting notices, if you will, any
2 information that was given to the custodians with
3 respect to confidentiality, their expectations with
4 respect to that communication between the custodian and
5 the attorneys at Weil. The other documents that I
6 believe I identified during the course of my questions
7 are the lists or questionnaires, themselves, that, the
8 exchange of e-mails that may have related to the ramp up
9 to those questions, questionnaires, interviews, any
10 follow-up that may have existed, and they all relate, it
11 seems to me, to an ultimate determination as to whether
12 there was an attorney/client privilege that I have to
13 focus on.

14 In addition to that, it seems to me that
15 there is little if any question, I don't think there
16 really is any question, that we have work product here.
17 I don't think there is any dispute. I don't think I
18 heard any dispute.

19 The question then becomes: Is there a
20 waiver of that at least gets to the point where it's
21 important to determine whether the notes of the
22 interviews, themselves, contain factual information that
23 was ultimately revealed through the paragraph eight
24 summary. And it seems to me that with respect to that

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1 work product, that there was a waiver with respect to
2 the facts that were revealed. It seems to me that the
3 whole purpose of the dialogue that resulted in the
4 paragraph eight commitment was to have the factual
5 information that was ultimately revealed in the form of
6 summaries.

7 It also seems to me that, although we work
8 in a profession where attorneys should be able to be
9 taken at their word, it seems to me that we also work in
10 the world of an advocacy system, an adversarial system,
11 if you will, where you have got the right to test of --
12 to test that word. I am not suggesting that the word of
13 counsel is being tested here, but I am suggesting that
14 it's important to at least have the opportunity to
15 measure what are called summaries against what those
16 summaries were compiled from, if that's possible,
17 because it seems to me that my responsibility will
18 ultimately be to look at the raw data material and make
19 a determination as to whether, with respect to each of
20 the custodians, whether the factual information is
21 independent of so it can be revealed or whether it is so
22 intertwined with the mental impressions of and opinions
23 of counsel that it cannot be revealed.

24 You know, to some great extent, by virtue of

1 the way the summaries have been constructed, by virtue
2 of the way the information has been revealed, I clearly
3 have some degree and I think counsel for AMD and counsel
4 for the class plaintiffs have some understanding as to
5 what the mental impressions were of counsel just in
6 formulating the outline of the information and how the
7 information was to be reported.

8 I think what -- not I think, what I will
9 need, and I expect it may require some discussion,
10 whether now or whether at some other point, I am going
11 to need the production in camera for me to conduct that
12 work, and I want to make sure that we set a timetable
13 that is reasonable for Intel and also set a window for
14 me so that I can have a target to turn around my
15 ultimate conclusion with respect to that in camera
16 review and my ultimate conclusion with respect to the
17 issues that have been served up in this particular
18 application.

19 So, with that, is it going to be better to
20 ask you to do some of the organization of that, by
21 "you," I mean you in a meet and confer in fairly short
22 order as to what I am going to be reviewing and how it
23 should be delivered, the time frame in which it should
24 be delivered, and the turnaround time?

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1 MR. SAMUELS: Your Honor, that's certainly
2 fine with us, and we appreciate very much Your Honor's
3 interest in getting this resolved quickly.

4 Might I suggest that Mr. Floyd and I confer
5 either later today or tomorrow and that we, I believe we
6 have another hearing on DM 8 next week; is that right?

7 SPECIAL MASTER POPPITI: I think it's the
8 week after. It's the week after, and I am not sure --
9 my computer went to sleep while we were all -- just a
10 moment -- it is the week after and I am not sure we want
11 to let it hang on for that period of time.

12 MR. SAMUELS: Would Your Honor be available
13 this time next Thursday and let Mr. Floyd and I try to
14 develop a protocol in the meantime?

15 SPECIAL MASTER POPPITI: Next Thursday would
16 be the 3rd, yes, and I would, depending upon what you
17 think we are going to need in terms of time, I can do
18 11:00 on Thursday, the 3rd.

19 MR. SAMUELS: I think that would be fine,
20 Your Honor.

21 SPECIAL MASTER POPPITI: I do have something
22 at 12:30, and I can't expect that we are going to need
23 to work together --

24 MR. FLOYD: Your Honor, obviously, we know

1 what time of year we are dealing with here so that that
2 will create some challenges in pulling together
3 information immediately, so I am assuming that the
4 purpose of that call would be to work through and make
5 sure what it is exactly the form that we try to produce
6 things and --

7 SPECIAL MASTER POPPITI: I don't see that,
8 given the time of year, I certainly don't see the 3rd to
9 be that point in time when you say, This is it, we don't
10 have anything else to do, and you can expect to start to
11 see these materials on the 4th.

12 MR. FLOYD: Your Honor, we appreciate that.

13 SPECIAL MASTER POPPITI: Then why don't we
14 look to January 3rd at 11:00, and, Renee, if you can put
15 that on your calendar, that would be great.

16 MR. SAMUELS: One last item, Your Honor.
17 This goes without saying, but I am going to say it
18 anyway, we would expect that Weil, Gotshal would be
19 instructed by counsel that they should retain, continue
20 to retain all of the raw interview notes and the
21 summaries that are the subject of the motion.

22 SPECIAL MASTER POPPITI: I would expect that
23 they would, but that's my direction.

24 MR. FLOYD: That's fine, Your Honor. They

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1 are under those instructions and remain under those
2 instructions.

3 SPECIAL MASTER POPPITI: Okay. Thank you
4 all very much. Have the rest of a good week between two
5 holidays. Some have celebrated the first, I know that
6 everyone will celebrate the second one. I wish everyone
7 a happy and healthy new year and look forward to working
8 with you on the 3rd.

9 MR. SAMUELS: Thank you, your Honor.

10 MR. FLOYD: Thank you, your Honor.

11 SPECIAL MASTER POPPITI: Thank you all very
12 much.

13 (The hearing was concluded at 12:45 p.m.)

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