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, vs. INTEL CORPORATION and INTEL KABUSHIKI KAISHA, Defendants.	C. A. No. 05-441-JJF DM No. REDACTED PUBLIC VERSION
PHIL PAUL, on behalf of himself and all others similarly situated, Plaintiffs, vs. INTEL CORPORATION, Defendant.	C. A. No. 05-485-JJF

DECLARATION OF SHAUN M. SIMMONS

I, Shaun M. Simmons, declare and state as follows:

1. If called as a witness in this matter, I could and would testify competently to the following facts, all of which are within my own personal knowledge.

2. I am an attorney licensed to practice law in the State of California and a Counsel with the law firm of O'Melveny & Myers LLP. I have been granted permission to appear pro hac vice for AMD in this case. I make this declaration in support of AMD's Motion for Sanctions for Intel's Failure to Preserve Evidence ("Motion for Sanctions").

AMD's Methodology for Estimating Intel's Lost Emails

3. I prepared the chart attached to this declaration as Exhibit 1. This chart details the changes in average monthly email produced for Intel custodians after Intel began either preserving Weekly Backup Tapes of those custodians' electronic mailboxes or subjecting those custodians' electronic mailboxes to Exchange Journaling.[1] The average monthly produced email figures, and the changes in those figures, are all derived from the file count report Intel produced to AMD on September 14, 2009 (hereinafter, "Intel's file count report'), attached to the concurrently-filed Declaration of Roberta A. Vespremi ("Vespremi Declaration") as Exhibit 38.

4. In preparing Exhibit 1, I used the hold notice dates, Exchange Journaling dates, termination dates, and dates of first Weekly Backup Tape for Intel's custodians, all as contained in disclosures made by Intel in the course of discovery. A true and correct copy of the Intel May 30, 2008 disclosure containing Intel custodians' hold notice dates and Exchange Journaling dates is attached to the Vespremi Declaration as Exhibit 37. A true and correct copy of the Intel May 30, 2008 disclosure identifying the date of the first Weekly Backup Tape Intel preserved for each of its custodians as well as the termination date of any Intel custodian is attached hereto as Exhibit 8.

5. For each custodian listed in Exhibit 1, the following columns of information are supplied: (1) "Self Preservation Months"; (2) "Self Preservation Average"; (3) "Automated

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[1] As described in AMD's Motion for Sanctions and the exhibits to the Declaration of Roberta H. Vespremi ("Vespremi Declaration"), Intel, in the Fall of 2005, began moving the electronic mailboxes of its custodians to a designated storage area so that it could preserve backup tapes of that area (and email stored there) on a weekly basis. As also explained in AMD's Motion for Sanctions, the Vespremi Declaration, and the exhibits to the Vespremi Declaration, in December 2006, Intel began subjecting its custodians' electronic mailboxes to the Exchange Journaling feature of Exchange, which automatically creates a copy of any email sent from or received by that mailbox.

Average"; (4) "Automation Type"; (5) "Percentage Jump"; (6) "Estimated Monthly Loss"; and (7) "Total Estimated Lost Email." Each of these categories is defined below.

6. The column of Exhibit 1 titled "Self Preservation Months" contains the number of full months that elapsed between the date the custodian in question received a hold notice or June 1, 2006 (whichever is earlier) and either the date of the first Weekly Backup Tape containing the custodian's email or the date the custodian's mailbox was subject to the Exchange Journaling (whichever is earlier).[2] For example, Intel custodian REDACTED was emailed a hold notice on July 1, 2005; the first Weekly Backup Tape of his electronic mailbox is dated November 6, 2005; and his email was first subject to Exchange Journaling on December 16, 2006. The number of Self Preservation Months for REDACTED is four. Those months are: July, August, September, and October of 2005.

7. Intel provided a small number of its custodians with a hold notice on July 2, 2005. For these custodians, July 2005 was counted as a full "Self Preservation Month" because the custodians were on hold for nearly all of that month. For example, REDACTED received a hold notice on July 2, 2005; the first Weekly Backup Tape of REDACTED electronic mailbox is dated November 13, 2005; and REDACTED email was first subject to Exchange Journaling on

[2] June 1, 2006 is the date on which Intel provided its Master Custodian List to AMD. As explained in the Motion for Sanctions, Intel represented that the individuals identified on its Master Custodian List represented all Intel personnel in possession of an appreciable quantity of non-duplicative, non-privileged documents responsive to AMD's document requests. Counting the number of Self-Preservation Months for a given custodian from the earlier of the date the custodian received a hold notice or the date the custodian was identified on the Master Custodian List is a conservative method that favors Intel because it charges Intel with responsibility for the preservation of that custodian's files only after Intel was, by its own admission, aware that the particular custodian possessed non-duplicative, non-privileged documents responsive to AMD's document requests.

December 16, 2006. The number of Self Preservation Months for REDACTED is four (July, August, September, and October of 2005).

8. The column of Exhibit 1 titled "Self Preservation Average" contains the mean number of sent and received emails produced for a given custodian per month during the Self Preservation Months as derived from Intel's file count report. Thus, the Self Preservation Average of REDACTED is calculated as follows. First, the number of "Organic Unique Produced Sender", "Organic Unique Produced Recipient", "Repop Unique Produced Sender", and "Repop Unique Produced Recipient" emails (as reported in Intel's file count report) is summed for the months of July, August, September, and October of 2005. The result is 293. This amount is then be divided by four (the number of Self Preservation months) for a Self-Preservation Average of 73.

9. By way of background, the terms "Organic Unique Produced Sender," "Organic Unique Produced Recipient," "Repop Unique Produced Sender" and "Repop Unique Produced Recipient" are taken directly from Intel's file count report and are the terms Intel has created to describe categories of email produced for its custodians. Intel uses the term "Organic" to refer to those emails that were preserved by the custodian himself, or that were not preserved by the custodian but were preserved on a Weekly Backup Tape of the custodian's electronic mailbox. Intel uses the term "Repop" to refer to those emails that were not preserved by a custodian himself or captured by a Weekly Backup Tape of the custodian's mailbox, but were produced solely from materials collected from other Intel custodians.[3] Intel uses the term "Unique" to

[3] See Exhibit 8 to Vespremi Declaration (Deposition of REDACTED September 29, 2009, 36:7-39:24).

denote that only one version of a particular email was counted, even if multiple identical copies of the same email were produced.

10. "Organic Unique Produced Sender" is a term Intel uses to refer to non-duplicative organic emails produced where the custodian was the sender. "Organic Unique Produced Recipient" is a term Intel uses to refer to non-duplicative organic emails where the custodian was the recipient. "Repop Unique Produced Sender" is a term Intel uses to refer to non-duplicative emails where the custodian was the sender but the email was not preserved by the custodian and was instead produced from another Intel custodian. Finally, Repop Unique Produced Recipient is a term Intel uses to refer to non-duplicative emails where the custodian was the recipient but the file was not preserved by the custodian and was instead produced from another Intel custodian.[4]

11. The column of Exhibit 1 titled "Automated Average" contains the mean number of sent and received emails produced for a given custodian per month during the full months he was subject to Intel's Weekly Backup Tape regime or Exchange Journaling, whichever of these forms of automated preservation was implemented first. The column titled "Automation Type" indicates whether the Automated Average for a given custodian is a result of Intel's Weekly Backup Tape regime or Exchange Journaling. If a custodian's email was subject to Exchange Journaling and the Weekly Backup Tape regime in the same month, then the Automation Type

[4] In calculating a custodian's Self-Preservation Average, I used the sum of Organic Unique Produced Sender, Organic Unique Produced Recipient, Repop Unique Produced Recipient, and Repop Unique Produced Sender -- as opposed to simply using the sum of Organic Unique Produced or Repop Unique Produced. I did this because Intel has represented to AMD that, in some cases, the Organic Unique Produced or Repop Unique Produced totals can include emails that were not sent or received by the subject custodian. For instance, Intel has explained that some custodians at Intel had in their possession email files that actually belonged to another custodian. See February 6, 2009 Letter from Intel's Counsel Donn Pickett to AMD's Counsel Mark Samuels, a true and correct copy of which is attached hereto as Exhibit 7.

would be identified as Exchange Journaling. Note that there were a handful of Intel custodians whose first Weekly Backup Tape was preserved as of July 2, 2006. The month of July 2, 2006, was treated as a full month under Intel's Weekly Backup Tape regime for purposes of calculating the Automated Average of these custodians because the Weekly Backup taken on July 2, 2006 should have captured email back to the beginning of July 2006, if not earlier.

12. Returning to the example of REDACTED, the Automation Type for REDACTED is "Weekly Backup" because Intel first began retaining Weekly Backup Tapes of REDACTED email in November 2005, and did not subject his email to Exchange Journaling until December 2006. The Automated Average for REDACTED is the mean number of produced emails sent and/or received by REDACTED per month during the full months he was subject to the Weekly Backup Tape regime. This figure is calculated by summing the Organic Unique Produced Sender, Organic Unique Produced Recipient, Repop Unique Produced Sender, and Repop Unique Produced Recipient emails (as reported in Intel's file count report) for REDACTED for the months of December 2005 through November 2005, and then dividing that figure by the same number of months (i.e., 12). The resulting Automated Average is 548.

13. The column of Exhibit 1 titled "Percentage Jump" reports the percentage difference, which is most often a percentage increase, between a given custodian's Self Preservation Average and his corresponding Automated Average. This figure is reached using the following standard percentage difference calculation: ((Automated Average - Self Preservation Average) / Self Preservation Average) * 100. For REDACTED this calculation would be: ((548 - 73) / 73) * 100. And the corresponding Percentage Jump would be 648%.

14. For each custodian in Exhibit 1, the column titled "Estimated Monthly Loss" is the difference between the custodian's "Self Preservation Average" and the "Automated Average." This Estimated Monthly Loss figure is then multiplied by the number of Self Preservation Months to arrive at a total estimated lost email figure, which is reported for each custodian in the column titled "Total Estimated Lost Email."

15. The Total Estimated Lost Email figure for each of the Intel custodians in Exhibit 1 is summed at the bottom of page 10 of Exhibit 1 and reported as the "Total Loss." The figure is 611,285 lost emails.

16. The mean Percentage Jump of the 272 Intel custodians who are the subject of Exhibit 1 is 127%. This figure was arrived at by calculating the mean of the jump percentages contained in the column titled Percentage Jump. For purposes of this calculation, those Intel custodians with a Percentage Jump of less than zero were treated as having a Percentage Jump of zero on the rationale that the negative percentage change occurring after automation is not indicative of any greater evidence preservation during the Self-Preservation Months than a zero jump would be. In any case, even if the negative percentages are included in the mean Percentage Jump calculation the overall result does not change much, coming in at 123%.

17. Four Intel custodians had particularly large Percentage Jumps -- anywhere from 1,227% to 5,867%. To be conservative in favor of Intel, Intel's overall mean Percentage Jump was recalculated after excluding these individuals and their respective Percentage Jumps as outliers. The result is a mean of 87%. This figure is reported at page 10 of Exhibit 1 as the "Trimmed Mean." As with the overarching mean Percentage Jump at Intel, this "Trimmed Mean" figure does not materially change if the negative jump percentages are included in the

mean Percentage Jump calculation instead of being converted to zeros. With no zeroing out of the negative jump percentages, the Trimmed Mean is still 84%.

18. There are 106 custodians for whom Intel produced documents in this case and for whom a comparison could not be made between the Self Preservation Average and the Automated Average because, for example, their email was not subject to Weekly Backup Tape or Exchange Journaling at least one full month prior to their production cut-off or prior to their termination from Intel. For these custodians, an estimated loss figure is calculated by extrapolation, using the results of the 272 custodians who are the subject of Exhibit 1 as the starting point.

19. This calculation is done by taking the total lost emails for the 272 (i.e., 611,285), and then dividing that figure by the total number of Self-Preservation Months attributable to the 272 Intel custodians (i.e., the sum of the Self Preservation Months column or 1,802). This yields the average number of lost emails one would expect to see for any single month of self-preservation at Intel. The figure is 339 emails.

20. The next step in the estimated loss calculation is to add up the number of Self-Preservation Months attributable to these 106 custodians. According to Intel's disclosures, five of the 106 custodians were terminated prior to the litigation or shortly after it was filed. As a result, no Self-Preservation Months are attributable to those custodians. Another nineteen of these Intel custodians were designated as "Free Throws" by AMD, but were not included on Intel's original custodian list.[5] To be conservative in favor of Intel, no Self-Preservation Months were attributed to these custodians either. For the remaining eighty-two custodians, Self-

[5] The term Free Throw is one the parties have developed to refer to custodians who may be designated for production at any time.

Preservation Months were counted as the number of full months between the date the custodian received a preservation notice or June 1, 2006, whichever is earlier, and the custodian's production cut-off (or in some cases termination date). As explained in note 2 above, this approach is conservative and favors Intel because it charges Intel with preservation responsibility only after Intel expressly identified these custodians as possessing non-duplicative, non-privileged materials responsive to AMD's document requests.

21. As an example, REDACTED was issued a hold notice on July 1, 2005, but he was not placed on Exchange Journaling until February 2007 or subject to the weekly backup regime until April 2007. As a party designated custodian whose email was not reharvested for deposition, his production cut-off was June 1, 2006. The number of self-preservation months for REDACTED is therefore eleven.[6]

22. Exhibit 2 to this declaration is a chart containing the self-preservation month calculation for the 82 Intel custodians described in paragraph 18 of this declaration. The total number of self-preservation months attributable to these 82 Intel custodians is 760. At an average loss rate of 339 emails per self-preservation month, the total estimated loss is 257,640 emails (i.e., 760 * 339).

AMD's Pre AND Post-Exchange Journaling Average Monthly Produced Email Counts

23. Attached as Exhibit 3 to this declaration is a chart that details the average monthly produced email counts for 113 AMD custodians before and after those custodians were subject to

[6] Under Case Management Order No. 3, the parties were entitled to request that certain numbers of custodians have their email "reharvested" in connection with their deposition, such that their email would be produced through March 31, 2008.

Exchange Journaling.[7] All numerical figures reported in this chart are derived from the AMD file count report described in and attached to the Declaration of Tony Cardine as Exhibit A.

24. In preparing Exhibit 3, I also relied on the hold notice dates, Exchange Journaling dates, and termination dates AMD disclosed to Intel in the course of discovery. A true and correct copy of AMD's hold notice disclosure is attached hereto as Exhibit 4. A true and correct copy of AMD's Exchange Journaling dates disclosure is attached hereto as Exhibit 5. A true and correct copy of AMD's termination dates disclosure is attached as Exhibit 9.

25. For each AMD custodian listed in Exhibit 3, the following columns of information are supplied: (1) Self Preservation Average; (2) Journal Average; and (3) Percentage Difference.

26. The column of Exhibit 3 titled "Self Preservation Average" reports the mean number of unique emails produced for a given custodian per month during the "Self Preservation Months." A given AMD custodian's Self-Preservation Months are equal to the number of full months between the date the custodian received a hold notice and the date the custodian was placed on Exchange Journaling. For example, REDACTED was given a hold notice on April 1, 2005, and his email was subject to Exchange Journaling on November 15, 2005. Thus, Schofield had 7 months of Self-Preservation (April through October 2005). Note that if an AMD custodian was provided a hold notice within the first five days of the month in which that notice was provided, then that month would be included as a full self-preservation month. For example, REDACTED was issued a hold notice on July 5, 2005. That month would be counted as a full month of Self-Preservation for REDACTED

[7] As explained in note 1, the Exchange Journaling system automatically makes a copy of every email sent or received by a mailbox subject to that system.

27. The Self-Preservation Average for a given AMD custodian is calculated by adding the "Unique Produced" and "OCF" email counts for the AMD custodian (as reported in the AMD file count report) during his Self-Preservation Months and then dividing by the total number of Self-Preservation Months.[8] As an example, REDACTED Self-Preservation Average is calculated as follows. First, the Unique Produced and OCF counts for Schofield are added for the months of April through October. Next, that sum is divided by the number of Self Preservation Months, which is seven. The resulting figure is REDACTED Self-Preservation Average, which is 712 emails.

28. The column of Exhibit 3 titled "Journal Average" reports the average number of unique emails produced for a given AMD custodian per month from the first full month he was placed on the Exchange Journaling through his production cut-off (or in some cases his termination date). Again, however, if a custodian was started on Exchange Journaling within the first five days of the month, that month would be treated as a full month subject to the Exchange Journaling because the vast majority of the month would in fact be covered by Exchange Journaling. Similarly, if an AMD custodian already subject to the Exchange Journaling was terminated within the last five days of a given month, that month would be included as a full Exchange Journaling month because, again, the vast majority of the month was covered by Exchange Journaling.

29. Returning to the REDACTED example, REDACTED was placed on the Exchange Journaling on November 15, 2005. Because he was selected for deposition reharvest, REDACTED REDACTED files were produced through March 2008. Consequently, his Post-Exchange

[8] The "Unique Produced" emails are those that an AMD custodian preserved or that were produced from backup tapes containing the custodians' electronic mailbox. The "OCF" emails are those that were produced from other AMD custodians' files only.

Journaling period is from December 2005 through March 2008. For those 28 months, the AMD file count report shows a total of 19,848 unique emails were produced for REDACTED which translates to a Journal Average of 709 per month.

30. The column of Exhibit 3 titled "Percentage Change" uses the same standard percentage change formula that was used for Intel's custodians as described above in paragraph 11. For REDACTED that formula would obviously result in a percentage change of zero percent because the average number of unique emails produced for him during self-preservation is almost exactly the same as the average during the Exchange Journaling period.

31. The mean Percentage Change of the 113 AMD custodians who are the subject of Exhibit 3 is 20%. As with the Intel calculation, for purposes of calculating the overarching AMD mean Percentage Change, those AMD custodians with a Percentage Change of less than zero were treated as having a Percentage Change of zero. Again, the rationale is that a negative jump after Exchange Journaling is not indicative of greater evidence preservation during the "Self-Preservation Period" than a zero jump would be. If the negative jumps are included in the AMD overall mean calculation, then that mean drops to 10%.

Discounted Intel Email Loss Model

32. Exhibit 6 to this declaration provides an additional email loss estimate for Intel that discounts the Intel losses on a percentage basis equivalent to the mean jump experienced by AMD custodians after migration to the Exchange Journaling system. As explained in the AMD Motion for Sanctions at section II.H. this calculation is intended to give Intel credit for the type of benign increase in email counts one would expect to see when a litigant attempting to comply

with his preservation obligations in good faith moves from a self-preservation system to an automated one.

33. To do so, Exhibit 6 makes the following modifications to the loss calculation set forth in Exhibit 1. First, for each of the 272 Intel custodians, Exhibit 6 contains a new Percentage Jump figure which is equivalent to the custodian's original Percentage Jump figure from Exhibit 1 minus the AMD mean jump of 20%. Thus, as an example, REDACTED original Percentage Jump of 82% is discounted by 20% to a revised figure of 62%. This revised figure is reported in the column titled "Jump Percentage After Discount."

34. Second, for each of the 272 Intel custodians, Exhibit 6 contains a discounted monthly loss figure, which is generated by use of a straightforward proportionality equation. So, for REDACTED his monthly lost email figure reduces from 434 lost emails per month to 328 lost emails per month. This revised figure is reported in the column titled "Discounted Monthly Loss Figure." The proportionality formula use to create this result is simply:

$$\frac{.82}{434} = \frac{.66}{X}$$

35. Third, the discounted monthly loss figure is then multiplied by the number of Self-Preservation Months, which are the same in both Exhibit 1 and Exhibit 6, to create a discounted total loss figure for each custodian. Returning to REDACTED his total loss figure drops from 1,734 to 1,311. The revised figure is reported in the column titled "Total Discounted Loss Per Custodian."

36. After these steps are taken for each custodian, the new total loss figure for the Intel 272 custodians is 452,210 emails. Extrapolating this figure out to the 106 custodians for

whom a pre and post automated comparison of produced email counts was not possible (using the same methodology set forth in paragraphs 17-19 of this declaration) yields a revised loss figure of 190,760 emails.[9] Combining these two loss figures results in a total discounted loss figure for Intel custodians of 642,970 emails.

37. Below is a table summarizing the results of the Intel loss calculations described above.

Custodian Group	Total Estimated Lost Emails	Emails Discounted to Account for Automation	Total Estimated Loss After Discount
272	611,285	(159,075)	452,210
106	257,640	(66,880)	190,760
Combined Totals	**868,925**	**(225,955)**	**642,970**

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: October 14, 2009

Shaun M. Simmons

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[9] The intermediary calculations are: 452,210 Lost Emails Divided by 1,802 Self Preservation Months = 251 Lost Emails Per Self Preservation Months. 251 Lost Emails Per Self Preservation Month multiplied by 760 Self Preservation Months = 190,760 emails.

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2009, I electronically filed the foregoing document with the Clerk of Court using CM/ECF and have sent by electronic mail to the following:

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