

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN RE:)
INTEL CORP. MICROPROCESSOR))
ANTITRUST LITIGATION,))
- - - - -))
ADVANCED MICRO DEVICES,) MDL Docket No. 05-1717-JJF
INC., a Delaware))
corporation and AMD))
INTERNATIONAL SALES &))
SERVICE, LTD, a Delaware))
corporation,))
))
Plaintiffs,))
) C.A. No. 05-441-JJF
v.))
))
INTEL CORPORATION, a))
Delaware corporation, and))
INTEL KABUSHIKI, a))
Japanese Corporation,))
))
Defendants.))

Wednesday, March 7, 2007
8:55 a.m.
Courtroom 4B

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE JOSEPH J. FARNAN, JR.
United States District Court Judge

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APPEARANCES:

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-and-

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BY: LINDA SMITH, ESQ.
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-and-

HOWREY SIMON
BY: PETER MOLL, ESQ.
BY: DARREN BERNHARD, ESQ.

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GIBSON DUNN
BY: ROBERT COOPER, ESQ.
BY: DANIEL FLOYD, ESQ.
BY: KAY KOCHENDERFER, ESQ.

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1 APPEARANCES CONTINUED:

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4 PRICKETT, JONES & ELLIOTT
5 BY: JAMES HOLZMAN, ESQ.

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-and-

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8 COHEN MILSTEIN
9 BY: DANIEL SMALL, ESQ.

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Counsel for Class Plaintiffs

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1 THE CLERK: All rise.

2 THE COURT: All right. Good
3 morning. Be seated, please.

4 THE COURT: Okay. We're here for
5 a status conference, and I want to turn first to
6 the letters. And what you can do is announce
7 your appearance when you speak.

8 I've taken a look at these
9 submissions concerning the Intel document issue,
10 and my interest is first finding out, as is
11 indicated in the papers, you have only
12 preliminarily addressed finding out the extent
13 effect of the lapse. And then to test that
14 theory. And then, if necessary, to fashion a
15 remedy for the proper retention policy. In
16 other words, cure whatever the lapses are.

17 And I looked at the time frame
18 that you're talking about, which kind of puts it
19 in that final stage sometime in May. And I'm
20 not sure, understanding the volume that's being
21 talked about, if the apparent facts can be
22 tested adequately in that amount of time. That
23 would be my concern.

24 You know, as you all know, Well,

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1 this isn't particularly, if it's a human error,
2 an uncommon experience in this kind of
3 litigation. I think the big difference here is
4 the volume.

5 Everything up to the testing, in
6 my view, can be agreed or all the procedures you
7 all need to take, you need to agree. Or if
8 there's disagreement, they can be resolved by
9 the Special Master, including any hearing.

10 If you go back and look at the
11 Daimler Chrysler case, that pretty much would be
12 a guidepost for you about how I want to handle
13 this.

14 MR. COOPER: This is the case you
15 had decided; right, Your Honor?

16 THE COURT: Yes. And you know,
17 that had a very discrete set of documents that
18 were the issue. They were basically found
19 during the course of the trial and mentioned by
20 someone coming to testify on an airplane.

21 So that was pretty much able to be
22 taken care of, you know, in a relatively short
23 period of time.

24 And you know, the effect is pretty

1 much able to be known prior to finding out why
2 the documents haven't been disclosed, because we
3 have the documents. So you could look at them
4 and say, Well, this is what...

5 In this case, we don't know what
6 the documents are. That's the big issue, it
7 seems to me. And there's this sizeable volume
8 that could have been caught up in this lapse.

9 I don't want to lose my train of
10 thought. The bottom line is I'm sending the
11 preliminary matters, as you may agree or need to
12 have resolved for determining the preliminary
13 facts to the Special Master.

14 I do want to know what the
15 resolution on a preliminary basis is, because
16 I'm going to possibly have to deal with it as in
17 Daimler Chrysler and a couple patents cases
18 where there's opinions out there down the road.
19 So I want to be satisfied. And then I'm going
20 to become more involved with the Special Master
21 on the testing of the effect of the lapse.

22 I hope I made myself as clear as
23 you want me to. Does AMD have anything or The
24 Class?

1 MR. DIAMOND: Your Honor, Charles
2 Diamonds, O'Melveny & Meyers for AMD. I think I
3 understand your point of view.

4 There's a piece of this, though,
5 that we're very interested in, and that I don't
6 know that that you covered or mentioned. And
7 that is a remediation plan.

8 THE COURT: I thought I mentioned
9 the remedy.

10 MR. DIAMOND: If that's what you
11 meant by --

12 THE COURT: Yes.

13 MR. DIAMOND: -- remedy?

14 THE COURT: Yes.

15 MR. DIAMOND: I mean, we really
16 have two problems here. One is a preservation
17 system, which in our view should never have been
18 relied on in the first place, which is this move
19 it or lose it. And if you don't, it gets swept
20 clean every 35 days.

21 The other is the failure to
22 implement that and back it up with a reliable
23 back-up system. From our standpoint, it's very
24 important that we get what documents can be

1 recovered as quickly as possible, so that we can
2 start deposition discovery. We don't want to
3 start deposition discovery -- depositions of
4 Intel's witnesses and only have the half the
5 documents when we know there's a pipeline that's
6 going to be generated.

7 And I think the Special Master
8 needs to help us come up with a mutually agreed
9 upon plan of what things are going to be
10 resorted to. We think all of them should be
11 resorted to. And what populations of documents
12 are recreated. We think whatever can be
13 recreated in the back-ups ought to be recreated,
14 and Intel ought to just put aside this
15 voluntarily release, voluntary process. They
16 ought to reconstitute their database of Email
17 communication and go through it, and produce
18 what's relevant from the various custodians who
19 have been identified.

20 But you know, that's not a simple
21 task. We understand that. That's going to be a
22 time intensive task. We understand that.

23 But the sooner we reach agreement
24 of what the plan of remediation is, the sooner

1 we have will remediation, and the sooner we will
2 be able to get underway.

3 I think we can always -- we'll
4 always have time at the back end to address,
5 okay, what's been lost irrevocably, what are the
6 likely consequences of that, how ought the Court
7 deal with that?

8 But our interest right now is
9 let's define the problem. Let's define a
10 solution to the problem. And let's get that
11 implemented on a 24-7 basis, so that we can get
12 our discovery underway.

13 THE COURT: All right. Intel.

14 MR. COOPER: Yes, Your Honor. Bob
15 Cooper for Intel.

16 First I think I should tell the
17 Court that we are, as Intel has, turned to every
18 resource to locating every E-mail that can be
19 located, and we are doing that on a, on really a
20 24-7 basis. It's a huge project.

21 As Your Honor I think noted, we're
22 dealing with over one thousand people spread
23 across the entire world. I think some ten
24 different centers for data processing and E-mail

1 exchange materials reside. Our production is
2 continuing in the meantime.

3 We have produced, I think Your
4 Honor may have noted some 17 million, the
5 equivalent of 17 million pages of documents. We
6 anticipate that the first round of production
7 when completed for the first people, probably
8 the most important, the 217 people, will be in
9 the area of 47 million pages of documents,
10 that's all going forward and we have these
11 tiered backups that we discussed which we are
12 resorting to in full.

13 We are in the process now of
14 restoring tapes and all that is going forward
15 and we will be in a position periodically to
16 report where that stands.

17 What is most important from our
18 viewpoint is to have the time, and I think we're
19 talking about realistically a month to pull
20 everything together so we can make a complete
21 report to Your Honor and to the Special Master,
22 and we're more than happy to work with the
23 Special Master in the interim, and we're happy
24 to share information as we proceed with the

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1 plaintiffs so they know what they're doing.

2 We're very hopeful that as a
3 practical matter given the enormous amount of
4 people covered, in fact, that only a percentage
5 of those will be used for production ultimately,
6 that there will not be any significant losses of
7 E-mail data. We laid out some of that in our
8 letter.

9 And I appreciate Your Honor's
10 approach, it seems to me to be exactly the right
11 way to go about this and we'll do everything to
12 honor that.

13 THE COURT: All right. Thank you.

14 So --

15 MR. DIAMOND: If I could just
16 update you, because this has obviously been a
17 subject of continuing conversations between the
18 parties and we also spoke to Judge Poppiti
19 yesterday afternoon and we're meeting with him,
20 if you think appropriate, we'll meet about him
21 this morning and try to hammer out a schedule.

22 AMD is not -- we're not -- we're
23 not disagreeable to giving Intel an additional
24 month's time. We would like to get together at

1 the front end and agree as to what their report
2 is going to look like that they will deliver to
3 us and to Judge Poppiti at end of the month,
4 what information it will contain so that we
5 don't have any misunderstanding a month from
6 now.

7 We would also like to agree on a
8 briefing schedule with respect to the remedy,
9 what plan remediation is going to be imposed at
10 the end and we put together a schedule that gets
11 that decided by mid May, and if any party has an
12 objection they can come see you about that.

13 I think that's probably the most
14 expeditious way for us to come up with a
15 timetable that's reasonable and that everybody
16 can live with, and you probably don't want to
17 involve yourself with negotiating that out
18 anyway.

19 I just close by saying that we
20 appreciate Intel's efforts. The facts are not
21 all in yet, but there is no cause for optimism
22 that we're going to be able to reconstitute this
23 Humpty Dumpty. Fully a third of the thousand
24 custodians here were never instructed to save

1 anything. And as to those, presumably they have
2 been washed away. No backups were made until
3 two weeks ago. No effort was made to stop that
4 data loss.

5 As to the remaining two-thirds of
6 the custodians, half of them --

7 THE COURT: Of course that would
8 only be important to me if it was an intentional
9 dump. I mean, because otherwise it's human
10 error in that -- I'll put it in that broad
11 category of human error, and that's why I don't
12 want to pre assess what this initial inquiry
13 might determine. You know, it appears on the
14 surface to be a human lapse.

15 MR. DIAMOND: I wouldn't disagree
16 with that, but at some point implementing a
17 system which is really not reasonably calculated
18 to save is the equivalent of a deliberate
19 destruction. At some point human indifference
20 to this crosses the line and a cavalier attitude
21 becomes really recklessness and that's the
22 equivalent of an intentional destruction.

23 I'm not saying that happened here,
24 we don't know, we haven't taken any depositions,

1 which we will do that.

2 THE COURT: But the product of an
3 intentional dump and the product of at least in
4 my experience in quiet a few complex cases would
5 be that the resulting loss is much different,
6 and what we want to get is documents to move on
7 in discovery that are adequate, sufficient and
8 cover all the basis to allow the kind of
9 discovery that ought to occur in a case like
10 this. I understand everything you're saying,
11 and I hope we can address about 80 percent of
12 it.

13 MR. DIAMOND: I hope we can as
14 well.

15 THE COURT: Okay. Do you want to
16 respond?

17 MR. COOPER: Well, I was just
18 going to point out, Your Honor, that maybe this
19 is apparent from the letter, but it gets a bit
20 confused. There were, as Your Honor
21 understands, a group of people who were added to
22 the retention list late. They should have gone
23 on in June and they were --

24 THE COURT: That's why he says

1 you're reckless.

2 MR. COOPER: Right. And he says
3 that was something we should have caught. Well,
4 yes, we should have caught that.

5 THE COURT: Exactly.

6 MR. COOPER: But what happened
7 was, we had previously put on over a thousand
8 and we kept the provisional thousand on so the
9 substitution didn't occur. We had all these
10 other people on retention, there are two or
11 three people on account and one person versus
12 another person.

13 We believe that there is a rich
14 body of material that we can draw on. We also
15 know that many of our employees, whether they're
16 on retention or not, what they do when they
17 operate in this business is things that are
18 important in terms of decisions and what they're
19 doing, they migrate to a separate folder so they
20 can identify later on, and once that migration
21 takes place, it is not subject to the audit, so
22 there is a rich body of material out there.

23 And your observation about testing
24 I thought was very insightful because that is

1 what we plan to do after we get everything
2 collected, we can do some testing to see to what
3 extent we are recovering what we believe are the
4 bulk of the e-mails from everyone that AMD wants
5 to see the material from.

6 THE COURT: And my comment to
7 those remarks would be -- and that's the point
8 when I'll engage with Special Master Poppiti
9 with all of you, to determine how broad of a
10 remedy I would order. But I'll listen to what
11 everybody has to say, but we're dealing with a
12 foundation of fact as found by the Special
13 Master and reviewed by me.

14 MR. COOPER: That would be very
15 helpful.

16 THE COURT: Okay.

17 MR. COOPER: Thank you.

18 THE COURT: Thank you. I'm going
19 to turn -- so I see the Special Master in fact
20 has made it through the snow and appeared.

21 SPECIAL MASTER POPPITI: Thank
22 you, Your Honor.

23 THE COURT: And I understand,
24 Mr. Poppiti, you want to get together with these

1 folks today on the Intel document issue, and I
2 can review what I have said or they can if there
3 is any questions you can ask me about the
4 procedure, I kind of briefly outlined here.

5 All right. I want to move to the
6 agenda that we submitted and move to item number
7 two, which is a cut off for the document
8 exchange.

9 Let me say this about that item,
10 item number three, I'm willing -- I understand
11 the difficulty of this case for you. I'm
12 willing, if you both agree, to extend time as
13 you see fit by agreeing.

14 I'm here until 2010, so I can go
15 along with almost anything that you can agree
16 to. And also if you can't agree, I am available
17 or the Special Master is, in a preliminary
18 sense, to make a decision about a dispute on
19 scheduling.

20 But you know, we would like to
21 make this case move as expeditiously as you can
22 accomplish that, understanding the nature of it.

23 So on any item that you want to
24 extend, I want you to feel free to do that. And

1 I'll presume that it's a reasonable extension if
2 it's by stipulation. If it's not, then you'll
3 get up with me or the Special Master, and we'll
4 resolve disputes about time.

5 So I think that should help you
6 with some of these items, and you know, as I
7 said, if they're agreed, we accept them.

8 Okay. Let me turn to AMD. Is
9 there any matters that you wanted to take up?

10 MR. DIAMOND: No, Your Honor.
11 That covers it.

12 THE COURT: Intel?

13 MR. COOPER: I think that's it,
14 Your Honor.

15 THE COURT: Okay. We have a class
16 rep. I'm not excluding you, I'm just trying
17 to --

18 MR. SMALL: We've been enjoying
19 the proceedings, Your Honor. The class has
20 nothing further.

21 THE COURT: Okay. And we are
22 going to enter decisions today.

23 There's two pending motions. And
24 on one, we're going to enter the decision. The

1 other one, the briefing was finished on February
2 28th.

3 But I'm hoping to get you the
4 answer there by the end of the month. So
5 hopefully that will keep everything moving.

6 MR. SMALL: Thank you.

7 THE COURT: Okay. I'm going to
8 speak with Mr. Poppiti, and you all can adjourn.
9 And then I assume he'll arrange to meet with
10 you.

11 (Court was recessed at 9:15 a.m.)

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1 State of Delaware)
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2 New Castle County)

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CERTIFICATE OF REPORTER

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7

I, Heather M. Triozzi, Registered

8

Professional Reporter, Certified Shorthand Reporter,

9

and Notary Public, do hereby certify that the

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foregoing record, Pages 1 to 20 inclusive, is a true

11

and accurate transcript of my stenographic notes

12

taken on March 7, 2007, in the above-captioned

13

matter.

14

15

IN WITNESS WHEREOF, I have hereunto set my

16

hand and seal this 8th day of March, 2007, at

17

Wilmington.

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21

Heather M. Triozzi, RPR, CSR

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23

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