

Intel Auto-Delete System Under Fire In Antitrust Suit

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Wednesday, Jan 02, 2008 --- Plaintiffs in an antitrust suit against Intel Corp. have moved for an order forcing Intel to reveal whether an “auto-delete” function that rid e-mails from the company's computer system was ever disabled.

The controversial purging system is at the center of a heated battle between Intel and rival chip-maker Advanced Micro Devices Inc. that has stalled the litigation in discovery since Intel admitted last March that it had lost 21 months' of potentially relevant correspondence.

In a letter filed Friday to the U.S. District Court for the District of Delaware, AMD's lawyers urged U.S. District Judge Vincent Poppiti to compel Intel to produce documents and testimony concerning its e-mail-preservation practices in other cases, specifically whether it had ever “turned off” the auto-delete function it kept running after it was sued for alleged monopoly abuses in June 2005.

AMD told Judge Poppiti that Intel chose to ignore its expressed concerns about the automatic deletion of employees' e-mails. The company offered false assurances, AMD said, that the function would not interfere with its preservation obligations because all relevant e-mails would be saved on backup servers and that all relevant employees were advised to retain electronic documents.

“Even after Intel discovered in the fall of 2006 that many of its most important custodians were not complying with its litigation hold notice, and that its backup system had failed as well, Intel inexplicably kept the auto-delete e-mail shredding running,” AMD said.

“After it eventually made disclosure of its preservation lapses to plaintiffs in February 2007 – and only in the face of a threat by plaintiffs to seek a court order if it didn't – Intel finally did exactly what it claims was impossible for it to have done at the outset of litigation in 2005: it disabled the auto-delete function,” the company said.

In April 2007, AMD, together with a consumer class acting as co-plaintiffs, served discovery requests on Intel for all documents and testimony regarding its preservation policies and practices and any deviation thereof in the past 10 years. But the company, citing privilege and irrelevance, has refused to comply with the request, AMD said.

“Intel’s relevance objection to AMD’s discovery into its prior practices is pure makeweight,” AMD said. “Whether Intel has turned off its auto-delete system in connection with other cases is clearly germane to the question of whether doing so would have been possible or practical in 2005, at the outset of this case.”

Had it disabled the function in the past, Intel’s intentional “fateful decision” to keep the auto-delete system operating after AMD filed suit is “highly suspect and raises serious questions about Intel’s commitment to preserving documents in this case,” the company said. AMD said that preliminary evidence had shown that it was feasible to selectively suspend deletion.

The failure of Intel to keep records for discovery in an antitrust case has called into question the company’s commitment to preserving potentially crucial evidence, AMD said. And the amount of evidence lost in the case as a result of Intel’s e-mail retention lapses has far exceeded anything the company hinted at when it first made its admission, AMD said.

“They are losses of a nature and scope as to call into question Intel’s entire document preservation scheme,” AMD said. “Indeed, one is forced to ask whether any responsible litigant seriously intent on retaining evidence would have adopted so flawed a system, and then so systematically fail to monitor and police it. It was, in short, a preservation scheme destined to fail in a cataclysmic way. And it did.”

Pursuant to a prior court order dividing discovery into two phases, AMD can now delve into the issue of culpability.

The parties in the case, which include a consumer class whose members claim they paid more for computers as a result of monopoly abuses by Intel, agreed last June to deal with the company’s proposed strategy to fix the retention lapses before looking to lay blame.

In a stipulation filed in the court, the parties asked the special master overseeing discovery to issue an order splitting the process in two — addressing Intel’s remediation plan first, then probing liability.

Neither the judge nor the special master has yet made any substantive ruling concerning the preservation failures, but AMD wants the court to set an outside date by which Intel’s remediation goals must be accomplished.

The dispute over the e-mails intensified when AMD served subpoenas in late May to Intel’s outside counsel demanding documents relating to the issue.

The subpoenas were issued to Los Angeles-based firm Gibson, Dunn & Crutcher LLP and Howery LLP in Washington, D.C., after Intel declined AMD’s request to ensure the lawyers retained the potentially relevant material.

AMD said Intel’s counsel was involved in monitoring the company’s e-mail

retention practices and in investigating the extent of Intel's preservation lapses.

Intel has admitted that an in-house lawyer responsible for preserving the e-mails "lost track" of things and forgot to alert employees to save their electronic correspondence from being purged by the auto-delete system.

Ultimately, the company has insisted, "nothing of any genuine significance will prove to have been lost."

The case is *In re Intel Corp Microprocessor Antitrust Litigation*, case number 05-441, in the U.S. District Court for the District of Delaware.