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BY ELECTRONIC MAIL
The Honorable Vincent J. Poppiti
Special Master
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1201 North Market Street
Wilmington, DE 19801-4226

Re: ***In re Intel Corporation Microprocessor Antitrust Litigation - Discovery Matter***

Dear Judge Poppiti:

Six current and former senior executives of third-party Dell Inc. (the "Dell Witnesses") argue that this Court lacks jurisdiction to adjudicate a dispute over how long each should sit for deposition in this multidistrict litigation ("MDL"). First, they contend this Court has no authority under the MDL rules to resolve the dispute because five of the Dell Witnesses reside in the Western District of Texas.[1] In the alternative, they assert that AMD stipulated that the Western District Court of Texas should resolve all discovery disputes involving Dell. Both arguments are completely without merit.[2]

28 U.S.C. § 1407 ("Section 1407") expressly empowers MDL judges to resolve discovery disputes concerning third-parties who reside outside the district where the MDL action is pending. Indeed, based on Section 1407, Your Honor has already issued a Report and Recommendation in this MDL, adopted by Judge Farnan, holding that this Court has such authority. (Exh. A, p. 10; Exh. B.)

As to the Dell Witnesses' assertion that AMD stipulated to the Western District Court of Texas resolving all discovery disputes with Dell, there is *no* such stipulation. AMD *never* agreed that the Western District Court of Texas would resolve any disputes with Dell in this case. The Dell Witnesses rely entirely on a provision in a September 2, 2005 Document Preservation Stipulation (between Dell and AMD only), which states that all subpoenas to Dell, Inc. must "issue" out of the Western District Court of Texas. (Dell Brief, Exh. 1, ¶11.) AMD agreed to no more, or less, than to follow standard procedure in both federal and MDL cases -- to have the Dell subpoenas issue out of the District Court where the deponents reside. AMD has uniformly followed this procedure for all third-party witnesses in this MDL. AMD never agreed to have the Western District Court *adjudicate* disputes involving subpoenas issued from that district in this MDL. And AMD did not otherwise relinquish its right to ask this Court to decide disputes over Dell depositions, so as to provide a uniform, orderly discovery regime in this case. As noted above, Section 1407 expressly empowers an MDL judge to adjudicate discovery disputes involving subpoenas issued outside the MDL district.

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[1] Query what their position is for the former senior executive who resides in Massachusetts and whose subpoena was issued by the United States District Court for the District of Massachusetts, Boston Division.
[2] Class Plaintiffs join AMD in this submission.

In any event, the September 2, 2005 Preservation Stipulation was expressly superseded by a subsequent agreement between Dell and all parties to this MDL, which the Dell Witnesses attached to their letter brief as Exhibit A. That agreement, entitled "Microprocessor Antitrust Litigation Document Production Agreement Between Dell and Requesting Parties" (the "Agreement"), expressly states that it "supersedes the Subpoenas, the Preservation Stipulation, and the Supplemental Preservation Stipulation." (Dell Brief, Exh. A, ¶II.G.) Your Honor may recall that during the hearing on November 17, 2008, AMD's counsel could not find anything in this controlling Agreement that even mentions the Western District of Texas. That is because it does not.

AMD respectfully requests that Your Honor deny the Dell Witnesses' attempt to avoid this Court's jurisdiction, and move on to determining how long the Dell Witnesses should be available for deposition in this case.

1. Section 1407 Authorizes this Court to Adjudicate Disputes over Third-Party Subpoenas Issued Outside the District of Delaware.

The plain language of Section 1407 states:

> The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

28 U.S.C. § 1407(b). Wright and Miller add that: "In this context, it is not surprising that the Multidistrict Litigation Panel has concluded that the transferee judge has the power to conduct depositions not only in the transferee district but in any other federal district." Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 3d § 3866 at pp. 512-514.

This Court has already reached the same conclusion. On May 18, 2007, Your Honor issued a Report and Recommendation on Discovery Matter No. 5 (the "Report"), which involved Class Plaintiffs' motion to compel third-party Fry's Electronics, Inc. ("Fry's") to produce certain transactional data pursuant to subpoenas issued from the Northern District Court of California. Like the Dell Witnesses here, Fry's challenged this Court's jurisdiction to enforce the subpoenas. In the Report, Your Honor definitively concluded that, "under the grant of Section 1407, this Court, as the transferee court in multidistrict litigation, has the authority to adjudicate discovery disputes concerning documents-only subpoenas directed to non-parties and issued from a transferring court." (Exh. A, p. 10.) Judge Farnan agreed. (Exh. B.) The Report included six pages of supporting legal authorities, and those authorities fully support the conclusion that Section 1407 grants this Court authority to adjudicate discovery disputes concerning subpoenas for testimony as well as for documents directed to third-parties and issued outside the District of Delaware.

The Dell Witnesses ignore the mountain of legal authorities refuting their position. Instead, they assert without any legal support, that "Section 1407 modifies jurisdiction for parties to lawsuits that are subject to MDL transfers *but does not affect third-parties*." (Dell Brief at 3;

emphasis added.) This assertion is directly contradicted by the Sixth Circuit's *Pogue* decision, cited multiple times in the Dell Brief:

> A judge presiding over an MDL case therefore can compel production by an extra-district nonparty; enforce, modify, or quash a subpoena directed to an extra-district nonparty; and hold an extra-district nonparty deponent in contempt, notwithstanding the nonparty's physical situs in a foreign district where discovery is being conducted.

United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 444 F.3d 462, 468-469 (6th Cir. 2006) (cited in Dell Brief at 3).

Thus, under the plain language of Section 1407, this Court's prior ruling and applicable case law, this Court is empowered to adjudicate discovery disputes involving third-parties, including disputes in this MDL regarding depositions of third-party witnesses who reside outside this district.[3]

2. This Court's Decision to Adjudicate All Discovery Disputes Serves the Policies Underlying Multidistrict Litigation.

Dell's exclusive dealing with Intel over the past decade is at the heart of the antitrust claims against Intel in this MDL. Dell and Intel both deny any exclusive dealing arrangement, and the evidence refuting their position resides in the documents and memories of the two companies' most senior executives, including the Dell Witnesses. Given this Court's familiarity with the factual and legal issues in this MDL, there is no question that this Court is best positioned to resolve the dispute over how long the Dell Witnesses should be deposed.

This Court's resolution of the duration issue is consistent with the mandate this Court received from the Judicial Panel on Multidistrict Litigation when it issued the order establishing this MDL. The Panel's order assigned Judge Farnan as the "single judge" to "formulate a pretrial program" that "eliminate[s] duplicative discovery," "prevent[s] inconsistent pretrial rulings," "conserves the resources of the parties, their counsel and the judiciary," and "ensures that pretrial proceedings will be conducted in a manner leading to a just and expeditious resolution of the actions to the benefit of not just some but all of the litigation's parties." (Exh. C.)

Pursuant to the Panel's order, Your Honor and Judge Farnan have already formulated a comprehensive pretrial program, including two earlier orders establishing deadlines for third-parties.[4] Then on June 20, 2008, this Court issued Amended Case Management Order No. 6 ("CMO No. 6"), which governs "the taking of depositions in this case." (Exh. D.) CMO No. 6 unequivocally expresses this Court's intent to decide all disputes involving depositions for this MDL, including depositions of third-parties. CMO No. 6 includes "special provisions" that specifically lay out the procedures applicable to third-party depositions and was ordered to be

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[3] The Dell Witnesses' argument appears to boil down to semantics. Whether "jurisdiction" over this discovery dispute resides in Delaware or Texas is of no consequence for purposes of this motion. The law is very clear in either case that the MDL judge has the authority to adjudicate the dispute.

[4] Order Establishing Date by which Motion Practice for Third Party Discovery May Commence (D.I. 232) and Order Regarding Completion of Party Production (D.I. 466).

served on all third-parties. (*Id.* at ¶5.) Among these provisions is the requirement that a third-party deponent obtain a protective order from *this Court* to avoid a deposition in this MDL:

> . . . . Absent some further agreement of the parties and the deponent, **the deposition will commence on the date specified in the subpoena unless the deponent applies for a protective order from this Court pursuant to the Procedures for the Handling of Discovery Disputes Before the Special Master dated June 26, 2006, as amended on October 9, 2007 (available on Pacer). Any such proceeding shall be commenced sufficiently early so as to permit the deposition to proceed on the scheduled start date in the event the application is denied.** (Emphasis in original.)

The Court is fulfilling the mandate of the Panel and the policies underlying that mandate by adjudicating disputes over depositions of third-party witnesses in this MDL.

3. AMD Never Agreed to Have the Western District Court of Texas Adjudicate the Dispute Over How Long the Dell Witnesses Should Sit for Deposition.

The Dell Witnesses argue that AMD entered into a stipulation whereby it allegedly agreed that the Western District Court of Texas should adjudicate all discovery disputes involving Dell and its current and former employees. This argument fails for at least three reasons.

First, the 2005 Preservation Stipulation does not say what the Dell Witnesses claim it says. They rely solely on the following provision: "AMD agrees that any subpoena for testimony or for the production of documents and/or testimony AMD may serve upon Dell will issue out of the United States District Court for the Western District of Texas." (Dell Brief, Exh. 1, ¶11.) AMD agreed to follow the standard procedure in MDL cases, which has been applied uniformly to all third-party witnesses in this MDL -- to have the Dell Witnesses' subpoenas issue out of the District Court where the deponents reside (five out of the Western District of Texas and one out of Massachusetts). AMD did not relinquish its right to ask this Court to adjudicate disputes regarding the Dell deposition subpoenas. Section 1407 expressly empowers an MDL judge to adjudicate discovery disputes involving subpoenas issued outside the MDL district. One of the reasons cases are approved by the MDL panel for consolidation is to avoid the parties having to litigate in District Courts all over the country with the possibility of inconsistent results and forum shopping.[5]

The Fifth Circuit is clearly in agreement with this. In *In re Clients & Former Clients of Baron & Budd, P.C.*, 478 F.3d 670 (5th Cir. 2007), defendants in an asbestos MDL pending in the Eastern District Court of Pennsylvania caused subpoenas to issue through the Southern District Court of Texas. The subjects of the subpoenas moved to quash in the Southern District Court of Texas. Those motions were denied, and the Southern District Court of Texas directed all future pleadings in the case to be filed in the Eastern District Court of Pennsylvania, where the MDL was pending. The third-parties filed a petition for writ of mandamus, which the Fifth Circuit denied:

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[5] If anyone has waived rights relevant to this discovery matter it is Dell, which participated fully, and without any reservation of rights, in the proceedings on the Stipulated Protective Order governing confidential information in this MDL. (*See, e.g.*, Exh. E (Dell's Objections and Comments on Proposed Protective Order).)

> "Certain federal statutes create an exception to the rule that only the issuing court may quash, modify, or enforce a subpoena. For example, the multidistrict litigation (MDL) statute . . . authorizes a judge assigned an MDL action to 'exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.' [citing § 1407(b)] This statute therefore authorizes the transferee district court to exercise the authority of a district judge in any district: The transferee court may hear and decide motions to compel or motions to quash or modify subpoenas directed to nonparties in any district...."

In re Clients & Former Clients of Baron & Budd, P.C., 478 F.3d at 671 (quoting 9 James W. Moore et al., *Moore's Federal Practice* § 45.50[4], at 45-75 through 45-77 (Matthew Bender 3d ed. 2006)).

Second, the 2005 Preservation Stipulation was entered into on September 2, 2005, prior to the MDL Panel's order establishing this MDL. (In fact AMD's Motion for Leave to Serve Document Preservation Subpoenas was granted on July 1, 2005 by Judge Sleet as the case had not yet been assigned to Judge Farnan.) Moreover, the Stipulation was only between Dell and AMD. Intel and Class Plaintiffs were not parties to the stipulation, and each subsequently served subpoenas on Dell.

Third, the 2005 Preservation Stipulation was expressly superseded by the Agreement. On January 1, 2007, Dell, AMD, and *all the other parties* in this MDL entered into the Agreement. After reciting a listing of all the subpoenas served by the parties and by the plaintiffs in the California action and the 2005 Preservation Stipulation and the Supplement thereto, paragraph II.G expressly states: "This Agreement supersedes the subpoenas, the Preservation Stipulation and the supplemental Preservation Stipulation." (Dell Brief, Exh. A, p. 2). By its express terms, the Agreement abrogated AMD's obligation to do anything out of the ordinary for Dell, and contains nothing to suggest that discovery disputes are to be resolved in the Western District Court of Texas.

Accordingly this Court can and should exercise jurisdiction over Plaintiffs' disputes with Dell, and it should ask the Western District to stay its hand in deference to the MDL proceeding.

Respectfully,

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