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December 12, 2008

The Honorable Joseph J. Farnan, Jr.
United States District Court
844 King Street
Wilmington, Delaware 19801

VIA ELECTRONIC FILING

Re: In re Intel Corporation, C.A. Nos. 05-MD-1717, 05-441, and 05-485

Dear Judge Farnan:

Pursuant to Federal Rule 53(f), we submit the following letter brief to object to the Special Master's Report and Recommendation Regarding Duration of Depositions of Current and Former Employees of Nonparty Dell Inc. (the "Recommendation") (D.I. 1362 in C.A. 05-MD-1717).¹ As Dell Inc. ("Dell") has stated in its previous submissions to this Court, in submitting this letter brief, Dell is not admitting that it is subject to the jurisdiction of this Court with respect to any issues that may arise.

Statement of the Issues in Dispute

Whether the Special Master wrongly concluded that the five current employees of Dell and former Dell CEO Kevin Rollins (collectively, "Dell Employees"),² all non-parties to this MDL proceeding, should be deposed for 102 hours—2 to 3.2 times the presumptive limit of Federal Rule 30(d)(1). Also, whether the Special Master wrongly concluded that Michael Dell, the current CEO and Chairman of Dell, Jeff Clarke, Senior Vice President of Business Product Group, and Kevin Rollins, Dell's former CEO, ought to even be scheduled for deposition before the other three Dell Employees and relevant Intel witnesses to allow for a proper determination of the time required to depose these high ranking employees.

Argument and Authorities

The Recommendation suggests that the Dell Employees sit for deposition for a collective 102 hours, granting a substantial portion of the time AMD had requested for these witnesses.

¹ We file this letter brief objection to the Recommendation today to comply with the Court's Order Modifying Time for a Party to File Objection to, or a Motion to Adopt or Modify, Special Master's Report and Recommendation Regarding Duration of Depositions of Current and Former Employees of Nonparty Dell Inc., dated December 9, 2008. Additionally, we reserve all rights to have this dispute resolved in the Western District of Texas, or with respect to Mr. Rollins, the District of Massachusetts. Further, we reserve all rights to appeal the Memorandum Order on the Special Master's Report and Recommendation Regarding Threshold Jurisdictional Issue Raised by Current and Former Employees of Dell Inc., dated December 5, 2008 (D.I. 1353).

² The current Dell Employees are Michael Dell, CEO and Chairman of the Board; Jeff Clarke, Senior Vice President of Business Product Group; Dan Allen, Director of Worldwide Procurement; Alan Luecke, Director of CTO Strategy; and Jerele Neeld, Senior Manager of Product Group Quality Customer Experience. All but Mr. Neeld are senior Dell executives.

Those hours—an average of 17 per Dell Employee—include **2 full days** with Michael Dell, the CEO and Chairman of Dell, a Fortune 50 corporation, **2 full days** with Kevin Rollins, the former CEO of Dell, and **more than 3 full days** with Jeff Clarke, another senior executive of Dell—to say nothing of the exorbitant times recommended for the other Dell Employees. Even assuming that AMD will not use all of the hours it has been given, something lawyers rarely do, that unused time is all but useless for senior executives like Mr. Dell, Mr. Rollins, and Mr. Clarke whose schedules are booked weeks and months in advance. AMD giving back time in the middle of the depositions will not permit those executives to reschedule meetings already postponed. Neither AMD nor the Recommendation cited any authority for imposing such burdensome lengths on these non-party witnesses.³

And there is no mistaking these deposition lengths as anything less than unduly burdensome. As Judge Sam Sparks, District Court Judge for the Western District of Texas, characterized AMD’s request: “[T]his schedule doesn’t look reasonable to me I mean it’s presumptively unreasonable.” December 5, 2008 Transcript of Motion Hearing Before Honorable Sam Sparks at 10-11, attached as Exh. A. Judge Sparks was unwilling to presume that the Special Master would adopt AMD’s proposed time limits. *Id.* at 11. Yet the Recommendation does substantially that—refusing to order a reasonable scheduling process that would minimize the burden on these non-parties and allow for an orderly determination of the actual amount of time required of the most senior Dell executives.

Dell and the Dell Employees are non-parties in this MDL proceeding and should be afforded the customary accommodations non-parties have long been given in litigation of every size and shape. *See Williams v. City of Dallas*, 178 F.R.D. 103, 112 (N.D. Tex. 1998) (holding that the fact that movants are non-parties is an “important factor that the court may consider in deciding whether to quash the subpoenas”); *Cmedia, LLC v. Lifkey Healthcare, LLC*, 216 F.R.D. 387, 389 (N.D. Tex. 2003) (“One factor to be considered in assessing the burden of complying with a subpoena is whether the moving party is a non-party to the litigation.”) (internal citation omitted). There is simply no justification to double or triple the deposition limitation under Federal Rule 30 before a single Dell Employee or Intel counterpart has even been sworn in. The Recommendation should not be adopted by this Court.

A. Background

Despite being a non-party to this MDL proceeding, Dell has already been burdened greatly by this MDL proceeding: the production of nearly 450,000 documents, providing a corporate representative to testify on certain “transactional” (i.e., pricing) data, and total costs of many millions. Now Dell has agreed, after AMD requested depositions of more than 30 Dell witnesses, to make available one former and five current Dell employees—the Dell Employees, five of whom are or were senior Dell executives.

³ AMD’s single authority in support of its outrageous time demands—decided thirteen years before the 7-hour limit was added to Rule 30(d)(1)—addresses only whether senior executives should be made available for deposition, which is not germane to this dispute. *Travelers Rental Co., Inc. v. Ford Motor Co.*, 116 F.R.D. 140 (D. Mass. 1987). In fact, *Travelers* supports the exact proposal the Dell Employees urged in this dispute—after initially noticing Ford senior executives for deposition and a hearing on a motion to quash or modify those notices, depositions were first taken of lower-level Ford employees to “then reassess [plaintiff’s] need to take the depositions of the four higher-level executives.” *Id.* at 141.

AMD has always requested 12 hours with Mr. Dell, 14 hours for three other Dell Employees, and 21 hours each with Mr. Clarke and Mr. Allen. The current Dell Employees are all long-term employees of Dell and have very busy schedules running Dell’s regular business, an especially challenging task given the current market conditions.

In reliance on section 11 of the Preservation Stipulation between AMD and Dell⁴ and a basic reading of Rule 45, the current Dell Employees filed a Motion to Quash Deposition Subpoenas or, Alternatively, for Protective Order in the Western District of Texas. On December 5, 2008, Judge Sparks held a hearing on that motion and AMD’s motion to stay those proceedings. Though he decided to carry the motion to stay, he stated that AMD’s “schedule doesn’t look reasonable,” was “presumptively unreasonable,” and that “this looks like people who can’t or won’t . . . be reasonable.” Exh. A at 10, 11, 12.

Notwithstanding Judge Sparks’ view, on December 8, 2008, following expedited briefing and a telephone conference in which the current Dell Employees again proposed to bifurcate the depositions,⁵ the Special Master concluded that the Dell Employees should sit for deposition for between 14 and 21 hours, with the majority of that time given to AMD, 2 hours to Class Plaintiffs, and 3.5 hours to Intel. The following morning, Intel sought reconsideration of the Special Master’s conclusion, asking that he revise his conclusion to reduce AMD’s allocation by 1.5 hours for Mr. Clarke, Mr. Allen, and Mr. Luecke and increase Intel’s allocation by the same amount.

The Special Master issued his Recommendation that afternoon, making concessions for Intel’s position—by further increasing the already great burden placed on Mr. Clarke, Mr. Allen, and Mr. Luecke. The Recommendation concluded that the Dell Employees ought to be deposed for 102 total hours, an average of 17 hours for each witness. Recommendation at 4-5. The Special Master’s revised recommendation allocates deposition time thusly:

<u>Witness</u>	<u>Total</u>	<u>AMD</u>	<u>Class⁶</u>	<u>Intel</u>
Allen	22.5	15.5	2	5
Clarke	22.5	15.5	2	5
Luecke	15	8.5	2	4.5
Rollins	14	8.5	2	3.5
Neeld	14	8.5	2	3.5
Dell	14	8.5	2	3.5
Total	102	65	12	25

Id. at 4-5. Additionally, the Special Master concluded that the “depositions shall be conducted in accordance with the practices and procedures established by the orders of this Court issued in connection with this MDL proceeding, and specifically Case Management Order No. 6.” *Id.* at 5.

⁴ The September 2, 2005 Stipulation re: Preservation of Documents by Dell Inc. is attached as Exh. B.

⁵ The Dell Employees have proposed on multiple occasions that the parties depose Mr. Allen, Mr. Neeld, and Mr. Luecke for two days each by mid January 2009, schedule one day each for Mr. Dell, Mr. Clarke, and Mr. Rollins by mid February, and, mindful of the testimony that will have been elicited, negotiate in good faith as to any additional time AMD might believe necessary with the Dell Employees.

⁶ Class Plaintiffs may yield some or all of their time to AMD. Recommendation at 4-5.

The Dell Employees disagree with both the deposition lengths and the rules to be applied and lodge these objections.

B. Standard of Review

Pursuant to Rule 53(f), this Court must decide de novo all factual findings and legal conclusions recommended by a master. Fed. R. Civ. P. 53(f)(3)-(4); *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789, 813 (E.D. La. 2007).

C. Two to Three Times the Presumptive Deposition Limit Constitutes an Undue Burden on the Dell Employees.

Despite the requirement that AMD and Class Plaintiffs “take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena,” Fed. R. Civ. P. 45(c)(1),⁷ the Recommendation imposes on the Dell Employees times that are two to more than three times the limits of Federal Rule 30.⁸ The durational limitation was inserted into Rule 30 in 2000 with circumstances similar to the present dispute in mind: “[O]verlong depositions can result in undue costs and delays.” FRCP 30, 2000 Notes of Advisory Committee ¶ 3.

The Recommendation “agree[d] with AMD . . . that each of the Dell Witnesses was personally involved in and has distinct, particularized knowledge of the transactions at issue in this case.” Recommendation at 2. While AMD’s brief made similar conclusory statements, those statements are belied by the very exhibits that AMD attached to its brief. For example, AMD’s brief asserts that “[Michael] Dell, Rollins, and Clarke were the key interfaces and deal makers with Intel’s most senior executives.” AMD Brief (D.I. 1349) at 3. Yet, AMD attached only two exhibits between Kevin Rollins and anyone at Intel and only one email between Michael Dell and anyone at Intel,⁹ and that exhibit fails to support AMD’s assertion, instead merely reflecting Mr. Dell’s complaint to Intel about third-party testing results on comparable Intel and AMD products. Exh. 6 to App. (D.I. 1354) to the AMD Brief.

Such conclusory statements and inapposite documentary support are far from sufficient to find that Michael Dell, CEO and Chairman of a Fortune 50 corporation, Kevin Rollins, the former CEO, or the other Dell Employees should be forced to testify for two or three full days about Intel’s alleged efforts to coerce Dell from using AMD as an alternative microprocessor supplier. Discovery on that topic should not require protracted questioning of Mr. Dell, Mr. Rollins, or any of the other Dell Employees. The essential questions are why did Dell buy from Intel?, why didn’t Dell buy from AMD?, and, did the reasons change over time? These questions, no matter how they are phrased, should not take up to 22.5 hours to ask. Nor are these

⁷ Additionally, the issuing court “must quash or modify a subpoena that . . . (iv) subjects a person to undue burden.” Fed. R. Civ. P. 45(c)(3)(A); see also *Bagwell v. Rival Consumer Sales Corp.*, No. EP-06-CA-117-FM, 2006 WL 2883137, at *2-3 (W.D. Tex. Sept. 19, 2006) (granting motion to quash deposition subpoena).

⁸ “Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours.” Fed. R. Civ. P. 30(d)(1).

⁹ When the proposed deponent is a high-level executive, courts require that the proposed deponent must have “unique personal knowledge.” See, e.g., *Baine v. General Motors Corp.*, 141 F.R.D. 332, 334-35 (M.D. Ala. 1991). In fact, “[v]irtually every court that has addressed deposition notices directed at an official at the highest level or ‘apex’ of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment.” *Celerity, Inc. v. Ultra Clean Holding, Inc.*, No. C 05-4374, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007). A deposition of a high-level executive without unique personal knowledge is improper especially when the information can be obtained “from depositions of lower-level employees with direct knowledge of the facts at issue.” *Id.* (citing *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)).

time limits justified because “this MDL proceeding is massive in breadth and scope.” Recommendation at 3. As Judge Sparks noted, “It doesn’t make any difference about the facts of the case. This is discovery and time of people trying to run a corporation.” Exh. A at 11.

AMD has claimed that it needs to explore hundreds of emails or conversations between Intel and Dell with each witness. This approach is not a proper way to deal with the deposition time of non-parties, and it forces Intel to also seek inordinate amounts of time to defend itself. AMD and the Class Plaintiffs will have ample opportunity to explore Intel’s relationship with Dell through testimony of Intel witnesses—an opportunity that AMD has so far largely ignored. The depositions of Dell Employees, on the other hand, should be focused and targeted, recognizing their role as non-parties to this MDL proceeding. The only way to ensure that the depositions are focused and targeted is to enforce strict and reasonable time limitations as set forth in Rule 30.

D. The Dell Employee Depositions Should be Governed by the Rules of the District Court Issuing the Subpoenas.

This Court has held, in ruling on the question of its ability to determine issues relating to the Dell Employee subpoenas, that it rules on those issues as if it is a District Judge in either the Western District of Texas or the District of Massachusetts by virtue of the provisions of Section 1407. Memorandum Order, dated Dec. 5, 2008, adopting Special Master’s Report and Recommendation Regarding Threshold Jurisdictional Issue Raised by Current and Former Employees of Non-Party Dell Inc., dated Dec. 2, 2008 at 5 (recommending that this Court “exercise its authority, sitting both as an MDL court and for the purposes of this case as a court of the Western District of Texas and the District of Massachusetts”). The Dell Employees do not reside within the jurisdictional reach of this District, and they should be deposed under the rules applicable in their district.

Appeals from discovery orders relating to these Dell Employee depositions, even under the MDL, if any, will go to either the Court of Appeals for the Fifth Circuit or First Circuit to maintain discovery procedure consistency within the circuit where the discovery is taken. *In re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 880 (D.C. Cir. 1981); *In re Corrugated Container Antitrust Litig.*, 620 F.2d 1086, 1090-91 (5th Cir. 1980). To apply the deposition rules of this Court to the Dell Employees runs counter to this directive. Specifically, counsel of the Dell Employees should be allowed to confer with their clients during the course of the depositions, and between the multiple deposition dates of each Dell Employee that the Recommendation contemplates, as is the practice under the rules in both the Western District of Texas and the District of Massachusetts.

Conclusion

Dell and the Dell Employees object to the Recommendation and ask that this Court enter an Order limiting the depositions of the Dell Employees to one day of seven hours, as provided by Rule 30(d)(1). Alternatively, the Dell Employees ask that this Court enter an Order limiting the depositions of Mr. Allen, Mr. Luecke, and Mr. Neeld to no more than two days of seven hours and to temporarily delay the depositions of Mr. Dell, Mr. Clarke, and Mr. Rollins until the other Dell Employees have been deposed and reasonable time limits can be assessed for the issues about which Mr. Dell, Mr. Clarke, and Mr. Rollins will be asked to testify given their executive-level status and in light of the requirement that burdens on non-parties be minimized.

The Dell Employees also ask that the depositions take place under the rules of the districts issuing the subpoenas.

Respectfully,

/s/ Lauren E. Maguire

Lauren E. Maguire

LEM: nml
Attachments

cc: Frederick L. Cottrell, III, Esquire (by hand; w/attachments)
Richard L. Horwitz, Esquire (by hand; w/attachments)
James L. Holzman, Esquire (by hand; w/attachments)