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November 26, 2008

## **VIA ELECTRONIC FILING AND HAND DELIVERY**

Special Master Vincent J. Poppiti  
Blank Rome LLP  
1201 Market Street  
Suite 800  
Wilmington, DE 19801

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

Dear Special Master Poppiti:

We submit the following letter brief with respect to whether this Court or the United States District Court for the Western District of Texas (“Western District”) should resolve certain issues relating to the subpoenas ad testificandum issued out of the Western District (the “Subpoenas”) and served on five current Dell Inc. (“Dell”) employees and one former Dell employee (collectively, “Dell Employees”). This brief is submitted as a replacement for the letter brief submitted on November 21, 2008. As 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 Issue in Dispute**

Whether AMD and Dell, by express agreement, specified the Western District as the forum for resolving discovery disputes related to the Subpoenas.<sup>1</sup>

### **Argument and Authorities**

Jurisdiction over the Subpoenas issued out of the Western District and served upon Dell Employees, all of whom are non-parties to this litigation, resides with the Western District, and, by virtue of the provisions of 28 U.S.C. § 1407, this Court has concurrent jurisdiction over the Subpoenas. AMD has, however, waived any right to have this Court adjudicate discovery disputes under the Subpoenas by expressly contracting to issue all subpoenas to Dell out of the Western District. The sole purpose for which Dell requested that provision, as is Dell’s standard

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<sup>1</sup> Current Dell Employees have filed a Motion to Quash the Deposition Subpoenas or, Alternatively, for Protective Order in the Western District. AMD’s response is due on December 4, 2008.

practice for the hundreds of subpoenas served on it each year, was to ensure that any discovery disputes be adjudicated by the Western District, in accordance with Rule 45. Dell sought a similar arrangement with Intel, which Intel agreed to and issued subpoenas on that basis.

### **A. Background**

Though it has never been a party to this litigation, Dell has been forced to participate in this litigation for several years. At least as early as September 2005, AMD was negotiating with Dell regarding the preservation and production of Dell documents. To date, Dell has produced over 86 gigabytes of data (nearly 450,000 documents)—at the insistence of AMD. Dell has also provided a corporate representative to testify on certain “transactional” (i.e., pricing) data at Intel’s request.

Part of the document production negotiations between Dell and AMD concerned the situs of subsequent subpoenas AMD might serve on Dell. Those negotiations took place against a backdrop of AMD discussing various motions regarding preservation and document subpoenas issued out of Delaware. The negotiations resulted in a specific provision regarding the issuance of subpoenas to Dell: “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.”<sup>2</sup> September 2, 2005 Stipulation re: Preservation of Documents by Dell Inc., Exhibit A to the January 18, 2007 Document Production Agreement Between Dell and Requesting Parties (the “Stipulation”) (respectively, Exhs. A and 1).

During recent months, AMD and Dell have been negotiating the number and length of depositions of Dell witnesses. After several rounds of discussions, AMD agreed to depose only one former and five current Dell employees—the Dell Employees, five of whom are or were senior Dell executives.<sup>3</sup>

On November 4-5, 2008, AMD served the Subpoenas on the six Dell Employees that are the subject of the present dispute. Per the Stipulation, the subpoenas were issued out of the Western District.<sup>4</sup> Since that time, Class Plaintiffs have served tag-along subpoenas on the Dell Employees, also issued out of the Western District. All told, AMD, Class Plaintiffs, and Intel have indicated that they seek to depose the six Dell Employees for more than 129 hours.<sup>5</sup>

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<sup>2</sup> Dell’s Corporate Headquarters are in Round Rock, Texas, within the jurisdiction of the Western District.

<sup>3</sup> Kevin Rollins, former CEO; 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. Mr. Neeld is not a senior Dell executive.

<sup>4</sup> While Class Plaintiffs issued a subpoena to Mr. Rollins out of the Western District, AMD had Mr. Rollins’ subpoena issued out of the District of Massachusetts.

<sup>5</sup> AMD has requested 96 hours with the six witnesses; Class Plaintiffs, 12 hours; and Intel, 21 hours.

**B. AMD Expressly Contracted Away Any Alleged Right to Have This Court Resolve Disputes Concerning the Subpoenas.**

The Federal Rules make clear that the court from which a subpoena is issued has jurisdiction to resolve any dispute that arises related to the subpoena. Fed. R. Civ. P. 45(c)(3); *see also In re: Clients and Former Clients of Baron & Budd, P.C. & Occupational Med. Resources., Inc.*, 478 F.3d 670, 671 (5th Cir. 2007) (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) ("A motion to quash or modify a subpoena is to be granted by 'the court by which a subpoena was issued.'")). In MDL matters, a number of courts have found that a judge presiding over an MDL matter may exercise jurisdiction under section 1407 as if it were a district judge in the issuing court.<sup>6</sup> *Id.* at 671-72.

Under those decisions, this Court and the Western District have concurrent jurisdiction over the Subpoenas. AMD and Dell, however, entered into a stipulation, filed with this Court, that controls the present dispute. Parties are free to stipulate pertaining to any discovery matter. *See* Fed. R. Civ. P. 29 ("[P]arties may stipulate that: (b) other procedures governing or limiting discovery be modified."); *see also Lee v. Central Gulf Towing, L.L.C.*, No. 04-1497, 2004 U.S. Dist. Lexis 25773, at \*4 (E.D. La. Dec. 9, 2004) ("[P]arties may by written stipulation . . . modify other procedures governing discovery."); *Riley v. Walgreen*, 233 F.R.D. 496, 500 (S.D. Tex. 2005). Federal Rule 29 encourages agreed-upon, lawyer-managed discovery to limit the cost, effort, and expense involved in court intervention in discovery motion practice. *Lee*, 2004 U.S. Dist. Lexis 25773, at \*4-5. The orderly and efficient conduct of discovery depends to a large extent on the cooperation of counsel, who must be able to rely upon the agreements they make. *Id.* at \*5.

Dell and AMD did exactly that in September 2005—by designating the Western District as the forum to resolve disputes relating to all subpoenas that might be served on Dell. And the Stipulation is clear that "any subpoena for testimony . . . will issue out of the United States District Court for the Western District." Stipulation § 11 (Exh. A). That provision was included precisely to make sure that any future discovery disputes would be resolved by that and only that district court. In fact, Dell receives hundreds of third-party subpoenas every year. And Dell's standard practice is to insist that they are issued out of the Western District so that any disputes are resolved there.

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<sup>6</sup> When there is a motion to quash subpoenas pending in the issuing court, some issuing courts have transferred the motions to the MDL judge. *In re Subpoenas Served on Wilmer, Cutler & Pickering and Goodwin Proctor LLP*, 255 F.Supp.2d 1, 2-3 (D.D.C. 2003) ("[I]t is entirely appropriate for this Court to remit this matter [to the MDL judge] for resolution."); *In re Subpoena Issued to Boies, Schiller & Flexner LLP*, 2003 WL 1831426, at \* 1 (S.D.N.Y. Apr. 3, 2003) (transferring a motion to quash to the MDL judge to further "the goal of judicial economy"); *but cf. In re Uranium Antitrust Litig.*, 503 F. Supp. 33 (N.D. Ill. 1980) (denying a motion to compel the subpoena-issuing courts to transfer all future discovery motions).

Section 11 of the Stipulation must be given meaning. *See Lynch Prop., Inc. v. Potomac Ins. Co. of Illinois*, 140 F.3d 622 (5th Cir. 1998) (stating that contracts are construed “to give effect to each term in the contract and to avoid rendering any term a nullity”). Since the Stipulation was entered, AMD, Intel, and Class Plaintiffs have all served document subpoenas on Dell, all of which were issued out of the Western District, and AMD and Class Plaintiffs served the Subpoenas on Dell Employees out of that district. The Stipulation provision would have been meaningless if it dictated nothing more than the caption plastered across the top of these subpoenas. Section 11 was intended to govern the location for the resolution of future disputes, just as Dell explained to Intel “that any disputes that arose regarding compliance with the subpoena would be resolved out of the Western District of Texas.” Intel Brief, ¶ 2. Intel agreed and issued the subpoena on that basis. *Id.*

The fact that this MDL was established after the Stipulation was entered is irrelevant. AMD’s action against Intel was pending in this same Court when AMD and Dell agreed that all subpoenas would be issued out of the Western District.

Finally, the Stipulation, and specifically the provision at issue here, was not superseded in all respects by the January 18, 2007 Document Production Agreement Between Dell and Requesting Parties. (Exh. 1.) The Document Production Agreement is based on the document collection that Dell performed pursuant to the Stipulation.<sup>7</sup> While it did discontinue Dell’s ongoing document preservation obligations, Dell remained obligated to preserve that which had already been preserved and to search and produce documents based on a single, agreed-to search term set instead of the various parties’ disparate document subpoenas.<sup>8</sup> Further, Dell has continued to maintain and preserve a copy of its microprocessor procurement databases and, at great expense to Dell, continued to preserve an on-line database of the custodian’s hard drives.

Respectfully,

/s/ Lauren E. Maguire

Lauren E. Maguire

Attachments

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

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<sup>7</sup> “Dell will collect, process and review . . . (a) Active data files from the hard drives of the 28 ‘Custodians’ defined by, and imaged pursuant to, the Preservation Stipulation.” Document Production Agreement, § III.A.1 (Exh. 1).

<sup>8</sup> “In place of specific document requests, definitions, instructions, and other terms of the Subpoenas, the parties have agreed to use a custodian-based, search-term approach to electronically search Dell’s data files.” *Id.* at § II.F.