

- g. The materials described in Paragraphs III(A)(2)(a) – (f) above will be referred to as the “EC Production.”

The Requesting Parties agree that the possession of materials by the EC, obtained by seizure or other means, does not constitute a waiver by Dell of any privilege or other exemption against production.

- 3. Only active, user-created, and non-deleted files will be processed and reviewed for possible production. Fragmented, shadowed, deleted, and similar non-active data will not be processed, reviewed, or produced. System files, program files, executable files, empty files, templates, and other files that come with system or application files will not be processed, reviewed, or produced.
- 4. Backup tapes, shared drives, home computers, and other media will not be processed, reviewed, or produced, unless a Requesting Party can establish a reasonable likelihood (a) that responsive data exists on such media that is non-duplicative of data available from any other source and (b) that such data bears a significant impact on the claims or defenses in the litigation.

The Requesting Parties shall have 90 days after Dell’s production of the First Inspection Set and the EC Production to establish that such media should be processed, reviewed, or produced. If no such showing is made, Dell shall have no further obligation to preserve backup tapes, shared drives, home computers, or other media under the Preservation Stipulation, Supplemental Preservation Stipulation, or otherwise.

The Requesting Parties shall bear all costs associated with the processing, review, and production of data from such backup tapes, shared drives, home computers, or other media.

- 5. Except to the extent the EC Production may consist of paper (or imaged static documents), Dell will not gather, review, or produce paper documents.
- 6. The parties will prepare a joint stipulation to file with the appropriate courts to reflect the agreements herein that modify or supersede the Preservation Stipulation and the Supplemental Preservation Stipulation.

B. Pre-culling

The data will be pre-culled by file type, de-duplication, and date.

1. File types

- a. The following file types will be processed and reviewed for possible production: (1) doc, (2) mpp, (3) msg, (4) oft, (5) ost, (6)

pdf, (7) pps, (8) ppt, (9) pst, (10) pub, (11) rtf, (12) tif, (13) txt, (14) vsd, (15) wbk, (16) wk1, (17) wks, (18) wpd, (19) xls, (20) xlw, and (21) zip.

b. Other file types will not be processed, reviewed, or produced.

2. De-duplication

a. De-duplication for e-mail and electronic documents will be done by custodian so that only one instance of a file has to be reviewed/produced for each custodian.

b. Near-duplicates will be culled out and not subject to review or production.

3. Dates

a. Data files before January 1, 2002 will be culled out, except as to Michael Dell, Kevin Rollins, and Kevin Kettler, whose files from January 1, 2001 forward shall be processed and reviewed for possible production.

C. **Search terms, review, and production**

Because Dell and the Requesting Parties have agreed to use search terms run against the Custodian Data in place of the specific document requests, definitions, and instructions in the Subpoenas, non-privileged data files that have search term "hits" shall be presumptively produced, but Dell is not required to produce files that are clearly not relevant to the litigation.

1. First Production Set

a. The Requesting Parties have developed a mutually agreed-upon list of search terms ("First Search Term Set") (Exhibit G), which is numbered and written/defined in dtSearch Boolean syntax to be run verbatim. Dell will run the First Search Term Set against the Custodian Data. If any of the search terms result in an inordinate number of hits, the parties will work together to narrow the search terms.

b. Dell will review all files with search term hits for relevance to the claims and defenses in this litigation. Files without search term hits will not be reviewed or produced. Non-privileged documents with hits shall be presumptively produced, but Dell may withhold documents that are clearly not relevant to the litigation. Non-privileged, responsive documents shall be produced to AMD and Intel in native format as further detailed in the Dell Stipulation Regarding Electronic Discovery and Format of Document

Production (the "Dell Native Production Stipulation") (Exhibit H), which is incorporated into this Agreement by reference. These documents shall constitute the "First Inspection Set." If a non-privileged file contains a search term hit and is going to be part of the First Inspection Set, that entire file, including attachments, shall be presumptively part of the First Inspection Set, but Dell is not required to include in the First Inspection Set attachments that are clearly not relevant to the litigation.

- c. AMD and Intel shall review the First Inspection Set on their vendors' systems consistent with the provisions of the Dell Native Production Stipulation (Exhibit H).
- d. No later than 60 days after receiving the First Inspection Set, AMD and Intel shall designate files for production. Using the reference file identifier supplied by Dell, AMD and Intel shall provide Dell a consolidated list of documents for production. The Requesting Parties will convert the designated native files to tiff format and Bates-number and brand the files as "Confidential" pursuant to the Protective Order entered in the AMD Action. The Requesting Parties will create a load file based on agreed-upon specifications to accompany the tiff images. The tiff images and load file shall constitute the First Production Set. The Requesting Parties shall jointly bear the costs of creating the First Production Set.

2. Second Production Set

- a. No later than 60 days after receiving the First Inspection Set, AMD and Intel may create another mutually agreed-upon list of search terms, which shall be numbered and written/defined in dtSearch Boolean syntax to be run verbatim ("Second Search Term Set"). Dell will run the Second Search Term Set against Custodian Data. If any of the search terms result in an inordinate number of hits, the parties will work together to narrow the search.
- b. Dell will review the non-duplicative files that contain hits from the Second Search Term Set for relevance to the claims and defenses in this litigation. Files without search term hits will not be reviewed or produced. Non-privileged documents with hits shall be presumptively produced, but Dell may withhold documents that are clearly not relevant to the litigation. Non-privileged, responsive documents shall be produced to AMD and Intel in native format as further detailed in the Dell Native Production Stipulation (Exhibit H). These documents shall constitute the "Second Inspection Set." If a non-privileged file contains a search term hit and is going to be part of the Second Inspection Set, that entire file, including attachments, shall be part of the Second

Inspection Set, but Dell is not required to include in the Second Inspection Set attachments that are clearly not relevant to the litigation.

- c. AMD and Intel shall review the Second Inspection Set on their vendors' systems consistent with the provisions of the Dell Native Production Stipulation (Exhibit H).
- d. No later than 60 days after receiving the Second Inspection Set, AMD and Intel shall designate files for production. Using the reference file identifier supplied by Dell, AMD and Intel shall provide Dell a consolidated list of documents for production. The Requesting Parties will convert the designated native files to tiff format and Bates-number and brand the files as "Confidential" pursuant to the Protective Order entered in the AMD Action. The Requesting Parties will create a load file based on agreed upon specifications to accompany the tiff images. The tiff images and load file shall constitute the Second Production Set. The Requesting Parties shall jointly bear the costs of creating the Second Production Set.

3. No further production

- a. After completing the First and Second Production Sets and the EC Production, Dell will have no further obligation to run additional search terms, to search for or produce other information, or to preserve any data, documents, or other information for possible production.
- b. No later than 30 days after Dell has notified the Requesting Parties that it has completed the First and Second Production Sets and the EC Production, all other Dell data and information, including the First and Second Inspection Sets, shall be returned to Dell and permanently deleted from all systems and media used to process, review, produce, store, or backup the data, except as may otherwise be agreed between the parties hereto. The Requesting Parties and their vendors shall certify deletion of this data.

D. **Privilege log**

1. The Requesting Parties may seek a privilege log as to no more than two mutually-agreed, three-month periods of the relevant time for production. If the Requesting Parties cannot agree, AMD and Intel may each select one three-month period. Dell is not obligated to provide any other privilege logs. If a privilege log is requested, it must be requested no later than March 1, 2007.

IV. Transactional Data

Notwithstanding any of the provisions detailed above, Dell will preserve its copies of the microprocessor procurement databases described in the Preservation Stipulation for production of transactional data.

The Requesting Parties will prepare a consolidated list of transactional data they seek. The parties will then negotiate the scope and protocols for production of that data.

V. Cost

AMD, the MDL Plaintiffs, and Intel agree to compensate Dell in the amount of \$890,000 for Dell's costs of collecting, processing, hosting, and producing data and documents under this Agreement and in response to the Subpoenas. AMD, the MDL Plaintiffs, and Intel shall each pay Dell \$296,667 within 15 days of Dell's production of the First Inspection Set. If Dell produces the Phase One Inspection Set on a rolling basis, this payment shall be made within 15 days of when Dell gives AMD, the MDL Plaintiffs, and Intel notice that production of the First Inspection Set is substantially complete.

As outlined above in Section III(C)(1)(d) and Section III(C)(2)(d), AMD, the MDL Plaintiffs, and Intel agree to pay the costs of creating and producing the First and Second Production Sets and for Dell to obtain a copy of the First and Second Production Sets in a format agreeable to Dell.

The payments in this Paragraph V shall constitute the only and final reimbursement by AMD, the MDL Plaintiffs, and Intel of costs incurred by Dell in complying with this Agreement or in responding to the Subpoenas. Dell will pay its own attorney review costs and any and all other additional costs incurred in collecting, processing, hosting, reviewing, or producing data or in otherwise complying with the terms of this Agreement or responding to the Subpoenas, with the exception of any costs incurred in the production of data pursuant to Paragraph III(A)(4) above.

VI. Production of Data to Other Requesting Parties

The Requesting Parties agree that Dell will not produce to any party other than AMD, the MDL Plaintiffs, and Intel the First and Second Inspection Sets, First and Second Production Sets, or the EC Production until the Requesting Parties have an opportunity to resolve any cost-sharing issues between or among themselves either through negotiations and agreement or through intervention of the Special Master.

VII. Alienware

The parties agree to negotiate a similar custodian-based, search-term production protocol for the subpoenas served on Alienware. Pending negotiation of that agreement, the Requesting Parties agree that Alienware may have an indefinite extension of time to object or otherwise respond to subpoenas to Alienware.

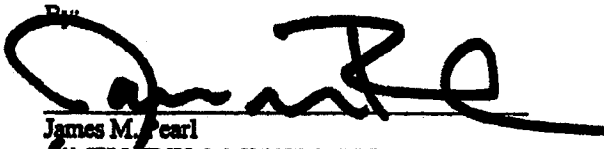
Dated: January 18, 2007

By:



Jeffrey J. Joyce
JONES DAY
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Dallas, Texas 75201-1515

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By: 

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SALES & SERVICES LTD.

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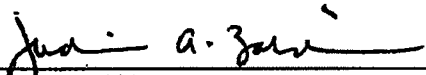
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MICROPROCESSOR ANTITRUST LITIGATION

**EXHIBIT G TO DOCUMENT PRODUCTION AGREEMENT
BETWEEN DELL AND REQUESTING PARTIES**

FIRST SEARCH TERM SET

1. (meet* w/2 comp) or (meet* w/2 compet*)
2. mcp
3. mcap
4. ecap or "e-cap" or lcap or "l-cap" or "price exception"
5. moap or "mother of all programs"
6. iip or "intel inside"
7. mid w/2 comp
8. jumpstart
9. (amd or opteron) w/10 fund*
10. (bid or bridge) w/2 (fund* or bucket* or packet* or pot* or manag*)
11. except* w/2 fund
12. tracker
13. go w/2 fast*
14. "processor fund*" or (pric* w/3 fund*) or (Intel w/3 fund*) or (match* w/3 fund*)
15. D315
16. forward w/2 pric*
17. tactic*
18. (tell* or told or speak* or spoke* or commun* or inform* or meet* or met or confer* or call* or discuss* or share* or note or respon* or roadmap) w/5 (paul or ottelini or craig or barrett or andy or grove or art or intel)
19. fight* w/25 fund*
20. cassini

21. maid or bambino or robusto or "square hole"
22. maverick or renegade or nemo or lilo or stitch
23. project w/10 shanghai
24. amd* or (advanced w/2 (microdevices or devices))
25. opteron*
26. athlon* or A64* or duron or sempron or K-8
27. intel w/2 (approv* or guideline* or permi* or polic* or lever*)
28. amd or intel w/20 (share or position or percent*)
29. *processor* w/3 (strateg* or plan*)
30. etr or "executive technical review"
31. "processor landscape"
32. roadmap w/20 (intel or amd)
33. (amd or intel) w/20 (negotiat* or deal or strateg*)
34. intel w/10 (fud or threat* or withhold* or retaliat* or retribution* or fear* or afraid or *fair or harm* or hurt*)
35. intel w/10 (punish* or revenge or kill* or lever* or pressur* or compet* or obstruct* or kick* or aggress* or damag* or squeeze*)
36. (los* or loos* or *hold*) w/10 (fund* or mdf or rebate* or favor* or check)
37. "cliff discount*" or "first dollar" or "dollar one" or ber or "back end rebate" or predatory
38. (soft or sludge or discretion*) w/10 (money or dollars or *\$\$\$* or fund*)
39. (field* w/10 rate*) or ifr
40. intel w/10 ("below cost" or "below margin" or free or bundl*)
41. intel w/10 (incent* or rebate or discount or special or *\$\$\$* or dcp or "demand creation program")
42. intel w/10 ("supply line agreement" or sla)
43. intel w/10 (relationship* or partner*)

44. intel w/10 (exclusi* or *only* or *house or *shop or quota or restrict* or “loyal*” or “preferred” or promis* or “no choice”)
45. intel w/10 (scheme* or strateg* or agreement* or loi or “letter of intent” or loi or mou or “memo of understanding” or “memorandum of understanding” or contract*
46. intel w/10 (jedec or ieee or tgc or adt or pci-sig)
47. intel and (capacity w/5 problem*)
48. intel w/10 (refus* or angry or unhappy* or weak* or concern* or nightmar* or terribl* or fiasco* or disaster* or catastroph* or calamity or debacle* or disappoint* or frustrat* or furious* or upset* or livid or enrage* or poor* or uncomfortable or fault* or mistak* or miscalculat* or mismanage* or bad or risk* or lose or loose or lost or *happy* or pain* or hardball or “dirty trick*”)
49. (intel or microprocessor*) w/10 (“executive summary” or “executive report” or “board presentation” or bod or minutes or directors or management* or committee* or “white paper” or “task force” or consultan*)
50. (hector or ruiz or dirk or meyer or marty or seyer or dave or fionda or jerry or vogel) w/3 (clarke or koval or everett or vanderslice or kevin or rollins or zucker or stephan)
51. competition w/10 (*fair or attack* or harm* or hurt* or destroy* or disadvantage* or kill* or outspend* or bury or beat* or “shut out” or “keep out” or “lock out” or “squeeze out” or “at all costs”)
52. (cloran or wright or fionda) and (deal or mobile or laptop or desktop or server or sempron* or duron* or turion* or dual-core*)
53. (win or won or lose or lost or risk or bid) w/5 (pixar* or amazon* or monster* or cgg or petrobas* or cybertrader or “american airlines” or aa or msn or eauction or belgacom or stockholm or “france telecom” or “bank of greece” or nec or statoil or volvo or fiat or supercomputer* or cluster*)
54. (bapco or sysmark* or ecost or e?cost) w/10 (*fair or *advantage* or *competiti* or complaint* or manipulate* or influence* or deceptive)
55. price/perf* or (price w/10 performance) and (amd or intel)
56. kadoka or (sweat w/10 tears)
57. point* w/10 indifference*
58. swot
59. jftc or “japan fair trade commission” or “european commission” or “eu” or “competition authorities”

60. intel w/10 (antitrust or anticompetitive or monopol* or litigation or sanction* or illegal or unfair)
61. (mccollam or savo or sant or lefree or kurtzer or kinoshita or hunter or harder or foote or el-dardiry or shah or timm or webb or lahr or larsen or kawamura or gleissner or fleck or fleig or aertebjerg) w/5 (*competi* or tell* or told or speak* or spoke* or commun* or inform* or meet* or met or confer* or call* or discuss* or share* or note or respon*)
62. ccp
63. mmbp
64. (5x5 or qbr or ebr) and (amd or intel)
65. otellini or grove or maloney or gelsinger
66. "guidance package"
67. (100* or pure or exclusive) and (amd or intel)
68. strat* buy
69. "tier 0 incentive"
70. "refuse to lose"
71. "orange book*" or "yellow book*" or "red book*"
72. "contingent upon" and (amd or intel)
73. "economic value" and (amd or intel)
74. spiff* and (amd or intel)
75. "bucket funds"
76. (free or "no charge") w/20 (amd or intel)
77. (D-350 or "commercial desktop") and (amd or intel)
78. "share the pain"
79. vendor w/ 10 "target income"
80. enhancement and (amd or intel)
81. allocation w/20 (amd or intel)
82. "hit the number*"

83. "sweetheart deal" and (amd or intel)
84. ("tier one" or "tier 1" or "tier zero" or "tier 0") and (amd or intel)
85. "mnc"
86. amd w/ 10 *suit or litigation
87. "Fat Tire" or Guinness or Sonic or Shiner or "Kirin Ichiban" or "Tsing Tao" or "Blair Bonnie" or Bristol or Humpback or Magnum or Bouillon or Vanguard or Octans

EXHIBIT 5

In The Matter Of:

*Advanced Micro Devices v
Intel Corporation*

*Teleconference
December 1, 2008*

Corbett & Wilcox

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ADVANCED MICRO DEVICES,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action
)	No. 05-441-JJF
INTEL CORPORATION,)	
)	
Defendant.)	

Teleconference in the above matter, taken pursuant to notice before Debra A. Donnelly, Registered Professional/Certified Realtime Reporter, in the offices of Blank Rome, LLP, 1201 North Market Street, Wilmington, Delaware, on Monday, December 1, 2008, beginning at approximately 1:00 p.m., there being present:

BEFORE:

THE HONORABLE VINCENT J. POPPITI, SPECIAL MASTER

APPEARANCES:

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CHARLES P. DIAMOND, ESQUIRE
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Teleconference

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1 SPECIAL MASTER POPPITI: Okay. Let's
2 start the roll call with AMD, since it's AMD's
3 application, please.

4 MR. BALICK: Good afternoon, Your Honor.
5 It's Adam Balick from Balick & Balick. I have on the
6 line with me Linda Smith, Charles Diamond, and Marc
7 Williams, all from O'Melveny & Myers.

8 MS. SMITH: Good morning, Your Honor.

9 MR. COTTRELL: Your Honor, in Wilmington
10 Fred Cottrell and Steve Fineman.

11 SPECIAL MASTER POPPITI: Thank you all.
12 From Dell, please.

13 MS. MAGUIRE: Your Honor, Lauren Maguire
14 from Ashby & Geddes, and with me I have Tom Jackson and
15 Chris Maynard from Jones Day.

16 SPECIAL MASTER POPPITI: Thank you very
17 much.

18 MS. MAGUIRE: Your Honor, we also
19 represent Kevin Rollins, and Wil Barry from Richards
20 Kibbe & Orbe is on the line as well.

21 SPECIAL MASTER POPPITI: Thank you. And
22 from the Class, please.

23 MR. ATHEY: Your Honor, Clay Athey from
24 Prickett Jones & Elliott for the Class.

Teleconference

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1 MR. FIMMEL: Steve Fimmel from Hagens
2 Berman Sobol & Shapiro for the Class. Good afternoon,
3 Your Honor.

4 SPECIAL MASTER POPPITI: Good afternoon
5 to the both of you.

6 And from Intel, please.

7 MR. HORWITZ: Good afternoon, Your
8 Honor. Here in Wilmington it's Rich Horwitz at Potter
9 Anderson.

10 MR. STONE: Good afternoon, Your Honor.
11 It's Rod Stone and Bob Cooper from Gibson Dunn & Crutcher
12 in Los Angeles.

13 SPECIAL MASTER POPPITI: Good afternoon
14 to you as well.

15 Please, let's proceed with the argument
16 on AMD's motion.

17 MS. SMITH: Your Honor, it's Linda
18 Smith. Should I begin since it's our motion?

19 SPECIAL MASTER POPPITI: Yes, please.

20 MS. SMITH: Okay. I think we disposed
21 of the case law regarding concurrent jurisdiction, and so
22 I'm going to just argue very quickly the effect of the
23 contractual arrangement. This is the subject of their
24 replacement brief.

Teleconference

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1 SPECIAL MASTER POPPITI: And as you do
2 that, and I understand that -- first of all, I'm going to
3 ask Dell whether Dell agrees that we had disposed of that
4 particular issue?

5 However, I do want to ask it in the
6 context, for my own benefit, not necessarily for the
7 benefit of any decision I need to make, but are you
8 suggesting, Ms. Smith, that you agree that there is
9 concurrent authority? That is, that each of the courts
10 has the authority to enforce subpoenas that issue from
11 the district in Texas?

12 MS. SMITH: Your Honor, I'm a little
13 bit -- I have not seen the use, in the cases, and I have
14 reviewed all the applicable case law, I hope, and I have
15 not seen the use of the word concurrent.

16 SPECIAL MASTER POPPITI: I haven't
17 either.

18 MS. SMITH: And that was the term that
19 Dell used in their replacement brief.

20 But, you know, I'm just following -- I
21 mean, there is a Fifth Circuit Court case, and I know
22 Your Honor is well familiar with these, but this is
23 In re: Clients and Former Clients of Barron & Budd, P.C.
24 and Occupational Medical Resources, Inc.

Teleconference

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1 SPECIAL MASTER POPPITI: Yes.

2 MS. SMITH: And it's 478 F. 3d 670, and
3 it's 5th Circuit.

4 It starts out with the basic principle
5 that a motion to quash or modify a subpoena is to be
6 granted by the court in which the subpoena is issued.
7 And then it goes down to say certain federal statutes
8 create an exception to the rule that only the issuing
9 court may quash, modify, or enforce the subpoena.

10 SPECIAL MASTER POPPITI: Right.

11 MS. SMITH: For example, the
12 multidistrict litigation statute authorizes a judge
13 assigned an MDL action to "exercise the powers of a
14 district judge in any district for the purpose of
15 conducting pretrial depositions in such coordinated or
16 consolidated pretrial proceedings." Citing Section
17 1407(b). This statute, therefore, authorizes the
18 transferee district court to exercise the authority of a
19 district judge in any district. The transferee court may
20 hear or decide motions to compel or motions to quash or
21 modified subpoenas directed to nonparties in any
22 district.

23 Though the statutory language refers to
24 pretrial depositions, the statute wisely has been

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1 interpreted to embrace document production subpoenas as
2 well. And then it cites Moore's Federal Practice.

3 And then, Your Honor, we found another
4 5th Circuit case, which is called -- and, I'm sorry, this
5 will be the last. There is plenty of case law. I don't
6 need to cite it, but it's called Astarte, A-S-T-A-R-T-E,
7 Shipping Co. versus Allied Steel & Export Service, 767 F.
8 2, 86, 87 is the jump cite, and it's 5th Circuit 1985,
9 that cited In re: Miller, and it says, "First of all, a
10 transfer under Section 1407 transfers the action lock,
11 stock, and barrel. The transferee district court has the
12 power and the obligation to modify or rescind any orders
13 in effect in the transferred case which it concludes are
14 incorrect."

15 And between that and the Pogue case,
16 Your Honor, and certain other cases that are at least
17 governing in the 5th Circuit, not to mention the other
18 cases that have been cited both by Your Honor in the
19 Fry's decision, as well as by the parties in their
20 original briefing, it seems to us that whether the MDL
21 Court under Section 1407, and the case law and the
22 Panel's mandate sit as if it is in the Western District
23 of Texas, and every other district court where a subpoena
24 issues in an MDL case, or if it sort of transfers to you,

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1 it doesn't make a difference. And probably the starkest
2 example of this is a case that I really like, and that's
3 the one that they cited again, Dell has cited again, and
4 that's In re: Uranium Antitrust Litigation, and that is
5 503 F. Supp. 33, and that is a case where --

6 SPECIAL MASTER POPPITI: Yes, buy me a
7 ticket to fly.

8 MS. SMITH: Yeah, that is a case where
9 the court decided that the transferee judge did have the
10 jurisdiction, but that he had to -- he had to move and
11 hear these things in every district court where a
12 subpoena was pending. And that was later -- you know,
13 that notion was later disabused, both in Pogue, where
14 they basically said, you know, they gave U.S. ex rel.
15 Pogue, P-O-G-U-E, versus Diabetes Treatment Centers of
16 America, which said, basically, I'm not going to give you
17 the whole thing, but the judge found that while he had
18 the power to act in another district as a judge of that
19 district, the language of Section 1407 permitting a judge
20 to exercise the powers in any district requires the judge
21 to journey to another district. And the judge said we do
22 not find that Section 1407 requires the court to become a
23 peripatetic dispenser of justice, and agree with the
24 other courts that have rejected this reading.

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1 SPECIAL MASTER POPPITI: But I think you
2 are suggesting by my question and your comments that even
3 though you are accepting the words that Dell uses for
4 purposes of refiling their document, you're not agreeing
5 with Dell that it is concurrent authority. Is that
6 correct?

7 MS. SMITH: That is correct. I think
8 this court, as the MDL court, has the authority and it
9 can operate as it so chooses.

10 SPECIAL MASTER POPPITI: Okay. Then
11 even before you get into a discussion as to whether there
12 is or there was an agreement as between you and Dell that
13 subpoenas would issue from the District Court in Texas,
14 and in addition to that the authority that the
15 multidistrict court ultimately received, because I
16 understand that the -- that the agreement was -- the
17 order that Judge Farnan entered was earlier. But let me
18 assume for the moment that that agreement lived beyond
19 the order of the Panel to refer this case to Delaware.

20 I'd like to hear your view as to whether
21 parties are able to agree to strip the multidistrict
22 judge from the authority that that judge would have to
23 enforce subpoenas or to manage issues involving the
24 discovery in his or her case simply because there was an

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1 agreement to issue subpoenas from another district? I'd
2 like to hear some conversation as to whether or not you
3 think it is, number one, permissible, or even if it is
4 permissible, is it wise for a certain judge to permit
5 that to occur?

6 MS. SMITH: Your Honor, I think it is --
7 it is that it is not permissible for the parties to
8 contract away the MDL court's authority.

9 I think if the MDL court made the
10 decision, for whatever reason, to allow the Western
11 District to adjudicate it for some reason, then the
12 MDL -- that's in the MDL court's discretion, but it is
13 not in the discretion of the parties to contract away the
14 MDL court's authority. That's the first part of the
15 question.

16 And the second is, is it wise? You
17 know, I think we've had a lot of discussion about this
18 already, but Section 1407 and the whole MDL process was
19 conceived of for a very clear purpose, and in the -- you
20 know, as we talked about, the Panel's order assigned
21 Judge Farnan as the single judge to, quote, formulate a
22 pretrial program that, quote, eliminates duplicative
23 discovery, prevents inconsistent pretrial rulings,
24 conserves the resources of the parties, their counsel,

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1 and the judiciary, and ensures that pretrial proceedings
2 will be coordinated in a manner leading to a just and
3 expeditious resolution of the actions to the benefit of
4 not just some, but all of the litigation parties.

5 Litigation's parties.

6 And I think it was the specter of
7 having, you know, in a case this large, of having
8 subpoenas issuing all over the United States and being
9 differently and separately adjudicated there, was one of
10 the reasons for the MDL pretrial consolidation. And I
11 think the court, the reason behind the multidistrict
12 litigation and the Panel's order is to prevent forum
13 shopping and inconsistent results.

14 The other thing is -- and so I think it
15 is wise for the MDL judge to retain that authority. And,
16 also, I mean, frankly, this case has been now -- we're
17 now on our three, three plus years anniversary. And this
18 court has the expertise to evaluate this dispute, you
19 know, based on three years of familiarity with the
20 factual and legal issues of this MDL, and I can't imagine
21 any other court having that kind of expertise to exercise
22 over any kind of dispute, discovery dispute that occurs.

23 SPECIAL MASTER POPPITI: But overlay
24 your comments with the fact, and this is what Dell was

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1 saying -- the efficacy of the fact is another question.
2 But overlay your comments with the apparent agreement --
3 well, not apparent. There was an agreement as between
4 Dell and AMD that subpoenas would issue from other than
5 the MDL court.

6 Now, of course, that agreement predated
7 the MDL order. What is your view of what effect that
8 agreement has after the entry of the MDL order?

9 MS. SMITH: Well, there is two things at
10 issue here.

11 The effect of that order is nothing more
12 or less than we will issue the subpoenas out of the
13 United States District Court for the Western District of
14 Texas on Dell, and that is basically the full extent of
15 the order. And it was entered into before the MDL order
16 was issued, etc. But, nonetheless -- so I think, number
17 one, it was issued at a time -- it's limited in its
18 context to we agree to issue the subpoenas out of.

19 It's very clear from the authority of
20 Section 1407, the Panel's rules, as well as the case law,
21 that the adjudication of disputes arising from the
22 issuance of the subpoenas is by the MDL Panel.

23 So I see nothing -- by the MDL judge,
24 excuse me.

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1 So I see nothing inconsistent, if you
2 take our agreement a deal is a deal is a deal, that we
3 will issue the subpoenas out of the Western District of
4 Texas, and this court's authority to adjudicate any
5 disputes arising therefrom.

6 And one other --

7 SPECIAL MASTER POPPITI: What is your
8 take, though, from the agreement as described by Intel in
9 Intel's correspondence to me -- let me just give you a
10 date for purposes of the record. Intel's correspondence
11 is dated November 24 of 2008. And in that correspondence
12 Mr. Drane advises that as between Intel and Dell, there
13 was an agreement with respect to the issuance of the
14 subpoenas, and there was an agreement with respect to any
15 enforcement action on those subpoenas.

16 MS. SMITH: Right. Your Honor, and my
17 view is that it's utterly and completely irrelevant to
18 this dispute. This is an undisclosed oral agreement
19 between Intel and Dell, and has nothing to do with this
20 issue.

21 SPECIAL MASTER POPPITI: Okay.

22 MS. SMITH: First I heard of it, and
23 doesn't matter.

24 SPECIAL MASTER POPPITI: Okay.

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1 MS. SMITH: The other thing, Your Honor,
2 and this is -- there is two more things, and I will try
3 to be very brief.

4 One is that it's one thing to agree with
5 Dell and to agree with other companies that we will issue
6 the subpoenas out of a place where their headquarters is.
7 And that's all well and good.

8 SPECIAL MASTER POPPITI: What was the
9 purpose of that?

10 MS. SMITH: Well, I think you will have
11 to ask Dell. They wanted it, and we saw no down side to
12 it, so we gave it to them.

13 But the intent was undisclosed, and it
14 certainly didn't encompass in our mind giving up the
15 adjudication by the MDL, which had not yet been entered
16 yet.

17 But, Your Honor, I do see something
18 different here, and that is, you know, we looked at this
19 long and hard in the last couple of days, and Federal
20 Rules of Civil Procedure 45 does provide that you are
21 supposed to issue the subpoena on a nonparty, you know,
22 within a hundred miles of where they reside. And I think
23 that whether or not the MDL is in effect -- of course, it
24 is -- we are still obligated right now, with individual

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1 deponents, as opposed to Dell the corporation, to issue
2 subpoenas within a hundred miles of where the individuals
3 reside.

4 And that is why we did the five out of
5 the Western District of Texas; we did Mr. Rollins out of
6 Massachusetts; and consistent with that, we've done Elio
7 Levy from Tech Data as the Middle District of Florida,
8 and Rich Pereira of Tech Data as the Middle District of
9 Florida; and Alex Hsu from Supermicro out of the Northern
10 District of California, and I can go on and on.

11 But basically, with third parties, we
12 are issuing them out of the district in which they
13 reside, or within a hundred miles of the district in
14 which they reside. And then if there is any disputes
15 that need to be adjudicated, they're all going over to
16 the MDL court, as is required and expected.

17 And the last thing, of course, and I
18 know Your Honor is aware of this, is that the original
19 stipulation back in June of '05 -- oh, sorry --

20 SPECIAL MASTER POPPITI: I'm sorry, I
21 missed your comment.

22 MS. SMITH: Okay. The original
23 preservation stipulation, September 6, 2005, says in
24 paragraph 11, "AMD agrees that any subpoena for testimony

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1 or for the production of documents and/or testimony AMD
2 may serve upon Dell will issue out of the United States
3 District Court for the Western District of Texas." On
4 the same page of that agreement at paragraph 13 it says,
5 "This stipulation will remain in force pending further
6 stipulation or order of the court, or agreement of the
7 parties to this stipulation."

8 And that takes us to the agreement of
9 the parties, which is between not only AMD and Dell, but
10 AMD and Dell and Intel and the Class. And at that time
11 there was also another Class in the California state
12 court, and that is the agreement that's effective as of
13 January 1, 2007.

14 And as Your Honor knows, it recites that
15 it governs all subpoenas served on Dell in a list of
16 matters, and including the MDL, the AMD action, and the
17 California action. Then it recites all the -- the
18 preservation stipulation from back at September 2nd,
19 2005, the supplemental stipulation, the AMD service of
20 subpoenas, Intel's service of subpoenas, the plaintiff in
21 the MDL's action service of subpoenas, the plaintiff in
22 the California action service of subpoenas, and concludes
23 by saying in G, on page 2, "This agreement supersedes the
24 subpoena, the preservation subpoena, and the supplemental

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1 preservation subpoena," and it's signed by all parties.

2 And I don't know how -- you know, I
3 don't know how, even if you just rely on a deal is a deal
4 is a deal, that in addition to the intervening MDL Panel
5 order and the authority that it conveyed, just as a
6 contractual basis, the original agreement was abrogated
7 by this agreement between all the parties.

8 SPECIAL MASTER POPPITI: And Dell says
9 that it wasn't. I mean, that's their response to that.
10 Correct?

11 MS. SMITH: I think Dell says that they
12 had the undisclosed intent, as they do in the hundreds of
13 subpoenas that they receive, that they have the
14 undisclosed intent to commit to something broader than
15 what the language that we agreed to, which just says the
16 subpoenas will issue out of the Western District of Texas
17 full stop. And then it's certainly abrogated. So I
18 don't know where they get that argument. I'm sure we'll
19 hear next.

20 SPECIAL MASTER POPPITI: Okay. Just
21 give me one moment, please.

22 Counsel, let me just again for purposes
23 of the record understand your position with respect to
24 the subpoenas that you have requested issue. And I guess

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1 my question is: You've made the decision to issue
2 subpoenas from different districts. Correct?

3 MS. SMITH: Yes, Your Honor, based on
4 Federal Rule 45.

5 SPECIAL MASTER POPPITI: And my question
6 is quite squarely: Do you then not agree that this
7 district, as the multidistrict court, that this district
8 has authority to issue subpoenas throughout the country?

9 MS. SMITH: Your Honor, I think this
10 district court, the MDL court has the authority to issue
11 subpoenas throughout the country.

12 That said, to be safe, and I also think
13 it is extremely clear under 1407, the Panel's rules and
14 the case law that this court has the authority to
15 adjudicate disputes over the subpoenas wherever they may
16 issue.

17 SPECIAL MASTER POPPITI: Right.

18 MS. SMITH: I do think, in an excess of
19 caution, that it's probably prudent when you get to the
20 individual third-party deponents to issue the subpoenas
21 out of the district where they reside, because that way,
22 since we know that any dispute over them will come to
23 this court anyway, it seems to me, quote, safer. But I
24 don't think it abrogates the authority of this court, the

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1 MDL court to issue the subpoenas if it chooses.

2 SPECIAL MASTER POPPITI: Yes, and that
3 would be -- that's certainly consistent with my view of
4 this court's authority with respect to the initial
5 authority to issue subpoenas.

6 MS. SMITH: Yes, Your Honor.

7 SPECIAL MASTER POPPITI: I don't know
8 whether Dell has a different view, and I'm sure I'll hear
9 that when I turn to Dell.

10 Any other comments, then, please?

11 MS. SMITH: No, Your Honor.

12 SPECIAL MASTER POPPITI: All right. Who
13 am I going to be hearing from for Dell? Mr. Jackson?

14 MR. JACKSON: Yes, Your Honor, I'm on.

15 SPECIAL MASTER POPPITI: Thank you, sir.
16 You may proceed.

17 MR. JACKSON: All right, Your Honor.

18 Let me begin by making a point that I
19 think is important.

20 The concept of where disputes get
21 decided as it relates to Dell and Dell employees is not
22 an issue that is unique to this litigation. Dell, in
23 fact, as you might imagine for a company of its size,
24 gets served with subpoenas, you know, as a nonparty from

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1 a variety of different matters during the course of a
2 year, and it certainly adds up over time.

3 Dell's policy uniformly has been in
4 those circumstances to try and get a uniform, consistent
5 resolution of disputes that might arise, and the way they
6 have done that is by requiring that all subpoenas come
7 out of the Western District of Texas. They've done that
8 in both individual actions, and they've done it in MDL
9 actions other than the current one that is before the
10 court.

11 SPECIAL MASTER POPPITI: Let me focus on
12 that for a moment, Mr. Jackson. And I'll want you -- I'm
13 sure you will want me to be understanding that in more
14 detail.

15 From the perspective of the
16 multidistrict court, you suggested that it's important
17 for Dell to have -- and I hope I'm adopting the word that
18 I heard. If not, please, please correct me if I didn't.
19 Consistency from Dell's point of view is important. Is
20 that a fair statement?

21 MR. JACKSON: Yes, Your Honor. Across
22 all of the various subpoenas that it gets, that is
23 correct.

24 SPECIAL MASTER POPPITI: And I

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1 understand that.

2 My question is: From this district's
3 point of view, as the multidistrict court in massive
4 litigation as this is, isn't this the epitome of the
5 reason for a multidistrict assignment, number one?

6 And if that is the case, isn't this the
7 epitome of an example where consistency in this case,
8 consistency across all defendants -- I'm sorry, third
9 parties, isn't that consistency from the court's
10 perspective much more important than consistency as it
11 relates to Dell as an individual third party?

12 MR. JACKSON: Your Honor, I learned a
13 long time ago never to try and speak for a court's point
14 of view.

15 Let me say this, that from the
16 perspective of nonparty discovery, that, you know, we
17 think any issue as to whether or not it was going to be
18 consistently decided in the MDL court or not was taken
19 away by the stipulation which agreed as part of a whole
20 document production process that it would occur in the
21 Western District of Texas.

22 And Dell was very happy that they were
23 able to get that agreement. They got that same agreement
24 from Intel, and Intel understood what it meant.

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1 So we think that whatever that issue may
2 be from the Court's perspective, and again I don't
3 presume to speak for the Court on its desire for
4 consistency, that it was essentially bargained away as it
5 relates to Dell.

6 And that wouldn't necessarily apply to
7 other nonparties who either did or did not ask for a
8 similar and get a similar agreement.

9 SPECIAL MASTER POPPITI: But,
10 Mr. Jackson, and focusing squarely on that issue,
11 wouldn't that present the domino effect or the
12 possibility of a domino effect of many third parties
13 negotiating for a position that literally strips this
14 court of its authority as granted by the transfer order
15 as contemplated by the federal statute? Namely, to
16 manage discovery, to eliminate duplicate discovery, to
17 prevent inconsistent pretrial rulings, right down the
18 line.

19 MR. JACKSON: But, Your Honor, I also
20 don't want to engage in a question of trying to predict
21 what may or may not happen or what has happened with
22 respect to other nonparties. I simply don't know the
23 answer to that question.

24 What I do know is that the process and

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1 its efforts of consolidating together discovery doesn't
2 strip the parties to the MDL, both the plaintiff and the
3 defendant, from being able to engage in negotiations for
4 the production of documents and other things.

5 SPECIAL MASTER POPPITI: I understand
6 that completely.

7 MR. JACKSON: And in the process of
8 doing that, you know, if they choose to give up the
9 resolution of that dispute to another place, I don't see
10 any reason why an MDL court wouldn't honor that
11 obligation, just like any other court would in a normal
12 piece of litigation.

13 And so --

14 SPECIAL MASTER POPPITI: Would you not
15 agree with me?

16 MR. JACKSON: I'm sorry?

17 SPECIAL MASTER POPPITI: Would you not
18 agree with me that when you submit -- at least it's been
19 my experience on the receiving end of receiving
20 stipulations from the parties dealing with pretrial
21 issues, it is the practice, at least of this Special
22 Master, on behalf of this particular judge, to review the
23 stipulations, and if I make a determination that the
24 stipulation is not consistent with my responsibility of

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1 coordinating and conducting and supervising discovery, I
2 won't sign a stipulation just because it's submitted. I
3 won't put a so ordered just because there is a so ordered
4 on the bottom of it.

5 Isn't it my responsibility as a special
6 master to review that stipulation and make sure that it
7 makes sense in the entire operation of the multidistrict
8 litigation?

9 MR. JACKSON: Your Honor, again, I'll
10 confess I've never been in your position, and so I
11 haven't thought about it as far as I'm concerned.

12 What I do know is that there is nothing
13 about the MDL process that ought to take away the parties
14 to that proceeding's ability to come to accommodations or
15 resolutions to try and cut down the number of issues that
16 find their way to you or to the district judge or anybody
17 else.

18 SPECIAL MASTER POPPITI: It would seem
19 to me that that's working the process for the purposes of
20 making it more efficient.

21 My question goes to parties agreeing in
22 the context of multidistrict litigation that you are --
23 you are taking the authority away from the multidistrict
24 court to benefit the third party, for whatever reason.

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1 MR. JACKSON: Understood, Your Honor.
2 And I think that the parties in the process are trying to
3 get a vast amount, in this case in trying to get vast
4 amounts of information from Dell, which they have
5 gotten --

6 SPECIAL MASTER POPPITI: Yes.

7 MR. JACKSON: -- were encouraged to sort
8 of come to some agreements and resolutions and to
9 cooperate with Dell in order to make that happen.

10 And that one of the consequences of that
11 is if they voluntarily decide that should there be future
12 disputes that arise -- and, you know, and we got through
13 the document production process without ever having to
14 have a dispute.

15 SPECIAL MASTER POPPITI: You sure did.

16 MR. JACKSON: Knock on wood. You know,
17 but if in exchange for that they voluntarily want to
18 have, or were willing to give up the question of who is
19 going to decide this issue, then I think that's perfectly
20 consistent with all the other federal rules that exist
21 out there.

22 SPECIAL MASTER POPPITI: Okay. Then
23 let's go back to --

24 MR. JACKSON: I'm not trying to --

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1 SPECIAL MASTER POPPITI: Go back to the
2 question of whether there is an agreement or whether
3 there isn't.

4 MR. JACKSON: All right.

5 SPECIAL MASTER POPPITI: The question I
6 asked Ms. Smith later in our conversation, let me start
7 with that.

8 Do you agree or disagree that the
9 multidistrict court has the authority to issue subpoenas
10 nationwide?

11 MR. JACKSON: Your Honor, I think if you
12 have jurisdiction, the natural correlation of that
13 jurisdiction is you have that power. I just think those
14 go one from the other.

15 SPECIAL MASTER POPPITI: And I don't
16 disagree with that. That makes sense to me.

17 My next question is, then, aside from
18 the language in the stipulated order, whereby you and AMD
19 did agree that the subpoenas would issue from the United
20 States District Court for the Western District of Texas,
21 you hear Ms. Smith saying that's the extent of the
22 agreement, and I'm hearing you say, no, it's not.

23 How do I come out on that? I mean, how
24 do you expect me to come out on that when the language of

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1 the document only refers to the issuance of the subpoenas
2 in the first place?

3 MR. JACKSON: Well, as my client
4 responded, Judge, when we read the AMD argument, why in
5 the world else would they have thought we insisted on
6 that provision to start with? And there is no other
7 explanation for it.

8 SPECIAL MASTER POPPITI: Other than the
9 question --

10 MR. JACKSON: Dell's reason for
11 insisting on having it come out of the Western District
12 is because it meets Dell's purpose of trying to have a
13 consistent resolution of Dell's discovery obligations in
14 the multiple lawsuits that it addresses and handles on an
15 annual basis.

16 SPECIAL MASTER POPPITI: But I'm looking
17 at rather, you would agree with me, clear and unambiguous
18 language in this stipulated order. I'm looking at the
19 four corners of the document, and there is nothing that
20 deals with the issue of enforcement. Is that a fair
21 comment?

22 MR. JACKSON: I think -- I think there
23 is -- the words enforcement appear no place in the
24 stipulation, Your Honor. I agree with that.

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1 I think as a natural consequence of the
2 agreement, I think Intel understood the natural
3 consequence of the agreement, and that's what's reflected
4 in their letter to you.

5 SPECIAL MASTER POPPITI: Well, Intel
6 comes at it from a little bit of a different perspective,
7 because Intel names names, if you will. They said there
8 was a conversation as between -- let me go back to that
9 letter again for purposes of the record. Mr. Stone of
10 Intel was having conversation with Mr. Joyce of Dell.
11 And Mr. Joyce said that he was not going to accept -- I
12 guess that's the word that was used, was it not? He was
13 not going to accept service of the subpoena on behalf of
14 Dell on the condition -- only on the condition it be
15 issued out of the district that -- District of Texas.
16 That's a little bit of a different record, is it not?

17 MR. JACKSON: Your Honor, in the context
18 of "he said, she said" sorts of comments, I will tell the
19 Court that I have spoken to the gentleman here,
20 Mr. Conrad, who was handling the negotiations with
21 Mr. Pearl of O'Melveny, and Mr. Conrad tells me in no
22 uncertain terms Mr. Pearl understood exactly why Dell was
23 insisting on this provision.

24 Also, in the context of what the Court

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1 has said, which is, you know, you're looking at the
2 agreement and the four corners, trying to avoid getting
3 out and away from that, that the purpose of including it
4 was clear, is because that way, that the issuing court
5 would then decide the issue.

6 MS. SMITH: Your Honor, it's Linda
7 Smith.

8 Can I say one thing here? One of the
9 things we had expected to see, because of the undisclosed
10 intent and the clear language of the agreement, not to
11 mention that it was superseded, was a declaration, a
12 letter, an Affidavit, an e-mail --

13 SPECIAL MASTER POPPITI: We'll get to --

14 MS. SMITH: Anything. And, also,
15 Mr. Pearl of our office is my partner, and he did not
16 deal with Mr. Conrad on this, he dealt with Jeffrey
17 Joyce. And he tells me in no uncertain terms that
18 adjudication of disputes was never discussed.

19 SPECIAL MASTER POPPITI: I can't --

20 MS. SMITH: I understand that, Your
21 Honor.

22 SPECIAL MASTER POPPITI: That's part of
23 the reason why there is a different record here with
24 Dell.

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1 MS. SMITH: I agree, Your Honor. But
2 what I'm saying is I would have expected --

3 SPECIAL MASTER POPPITI: Counsel, I'm
4 going to ask you to hold your comments until you have
5 another chance, please.

6 MS. SMITH: Okay. Thank you.

7 SPECIAL MASTER POPPITI: Let me then
8 focus for the moment and accept the proposition that the
9 order, which does not contain the language of
10 enforcement, let me assume for the moment that it did.

11 And then I'm directed to the stipulation
12 that was entered into in January of 2007. I don't know
13 any other way to read the document production agreement
14 between Dell and requesting parties in any other fashion
15 than to read it that all agreements entered into before
16 that date are obviated by the agreement of that date.

17 How can I read that any differently,
18 Mr. Jackson?

19 MR. JACKSON: Your Honor, if you look at
20 the obligations that were imposed in the original
21 stipulation and the supplemental stipulation, those
22 obligations survived, or at least the parties have
23 behaved as if they did, because they are obligations to
24 maintain and preserve various items that were not

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1 superseded by the document production agreement.

2 What was superseded was the
3 requirement -- two things, really.

4 One, the requirement to continue an
5 ongoing maintenance of documents on the theory that the
6 time and path for such a requirement to make any sense.

7 Secondly, because we at that point had
8 received, as Ms. Smith pointed out, multiple subpoenas
9 that all asked for different types of documents in
10 different forms and factions, and had different date
11 ranges and all the variations one can imagine when you
12 get multiple subpoenas in a same topic area, they were
13 all superseded and replaced by a single set of search
14 terms in a process that was agreed upon to handle that.

15 But the obligation as it related to
16 future subpoenas was not part of that part of the
17 negotiation. So I think what -- if the Court looks at
18 the other obligations that were in those stipulations,
19 you'll see that they weren't superseded.

20 SPECIAL MASTER POPPITI: Well, the
21 problem I'm having with that is the language itself.
22 Again, I'm confronted with language in an order which is
23 clear and unambiguous and within the four corners of an
24 order. It's certainly more than a contract at the point

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1 in time when Judge Farnan signed it.

2 But I'm looking at the stipulation, and
3 looking at paragraph II-G. It says, This agreement
4 supersedes the subpoenas. I understand that.

5 The preservation stipulation and the
6 supplemental preservation stipulation. Now, there is no
7 date for the preservation stipulation and no date for the
8 supplemental preservation stipulation. And yet I'm
9 hearing that the only possible reference for the
10 preservation stipulation is the stipulation re
11 preservation of documents by Dell, Inc., so ordered by
12 the court on whatever date Judge Farnan signed it. It
13 was September the 8th.

14 MR. JACKSON: In the document production
15 agreement that was entered on the 18th of January, 2007,
16 all of those various orders are attached as exhibits.
17 And the Court is correct, you are referring to the
18 right -- the right stipulations.

19 SPECIAL MASTER POPPITI: I don't know
20 how I can read --

21 MR. JACKSON: -- as a practical matter,
22 was the ongoing preservation obligation that was also in
23 that stipulation. So...

24 SPECIAL MASTER POPPITI: But, counsel,

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1 what it didn't do, it didn't literally carve out what
2 you're suggesting. It didn't simply carve out the
3 preservation stip -- the part of the order that dealt
4 with the obligation to preserve.

5 It says, This agreement supersedes the
6 preservation stipulation. I mean, how do I read that any
7 other way than reading it the way it reads?

8 MR. JACKSON: The only thing I can
9 suggest, Your Honor, is that you look at the other things
10 that Dell was obligated only under those prior
11 stipulations to preserve.

12 The argument that AMD is advancing would
13 leave you in a situation in which the replacement
14 agreement would have relieved us of an obligation to
15 preserve any of the documents that we have agreed to
16 preserve for purposes of a search, which would have left
17 us with a very hollow result.

18 So, as a matter of simply reading the
19 agreements together, it can't possibly mean that all of
20 those obligations were gone. And the stipulation as it
21 relates to future subpoenas and the issuance of those,
22 because at that point the document subpoenas had already
23 been issued out of the Western District of Texas, would
24 have had no reason to have been superseded as it relates

Teleconference

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1 to that.

2 And again, Your Honor, were I to know
3 now, or were I to know then what the dispute would be
4 now, of course we would have insisted upon better
5 language to describe it. You are reading the language
6 correctly, Your Honor.

7 SPECIAL MASTER POPPITI: And that is, of
8 course, one of the reasons for the parallel evidence
9 rule, because in hindsight we would all perhaps make
10 language tighter in documents of this nature when we're
11 looking back in hindsight and when there is, in fact, a
12 dispute.

13 Just give me one moment to collect my
14 thoughts. Hold on.

15 (Brief recess.)

16 SPECIAL MASTER POPPITI: Counsel, if you
17 have any more thoughts, please. Otherwise, I would like
18 to hear from the Class, if there is anything to add to
19 Ms. Smith's argument. I should have asked you that in
20 the first place. I do apologize.

21 MR. FIMMEL: Your Honor, the only point
22 that the Class wanted to make was that we were not a
23 party to the purported agreement to have the disputes
24 adjudicated in the Western District of Texas.

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1 SPECIAL MASTER POPPITI: Thank you.

2 Counsel, by virtue of even hearing that
3 statement, and I guess I should have expected that were
4 the case in light of the papers that have been put before
5 me, but perhaps that's even the best example of, the
6 Class plaintiffs from their perspective just said to me,
7 I think, we shouldn't be stuck with this because we're in
8 multidistrict litigation here, and we anticipated that it
9 means what it means, and we expected ultimately Judge
10 Farnan would have a say when there is a dispute with
11 respect to a subpoena that gets issued.

12 Intel, please.

13 MR. STONE: Your Honor, Rod Stone on
14 behalf of Intel.

15 We really were not a party to the
16 agreement between Dell and AMD, and were not part of
17 those negotiations, so don't really have anything to add
18 beyond what we put in our letter with respect to the
19 conversation I had with Mr. Joyce with respect to the
20 issuance of the Intel subpoena.

21 SPECIAL MASTER POPPITI: And that, of
22 course, is, as I understand it, simply the subject of an
23 oral agreement as between Intel counsel and Dell counsel.
24 Is that correct? There is nothing in writing?

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1 MR. STONE: That is correct, Your Honor.

2 SPECIAL MASTER POPPITI: Okay. All
3 right.

4 Here is my view of this, and here is the
5 way I think it is important to create the record. I'm
6 going to ask AMD and the Class to discuss an appropriate
7 form of order. I'm going to ask that Dell have the
8 opportunity to review it and to agree to it as to form
9 only, expecting that they may not agree to the substance
10 of it.

11 Number one, it seems to me if I am
12 asked, as I am being asked, to look at the stipulation
13 and order that was entered by the Court on September the
14 8th of 2005, the language of the order is what it is. It
15 is no more and no less than AMD and Dell agreeing that
16 subpoenas will issue for Dell out of the United States
17 District Court for the Western District of Texas.

18 I'm mindful of the fact that that order
19 was entered prior to the order of the MDL Panel. I'm
20 also mindful of the fact that Judge Farnan would have had
21 an opportunity consistent with the law surrounding
22 referral of a case to an MDL judge to make a
23 determination as to whether that order should have been
24 modified, and he did not do that.

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1 Just for purposes of rounding out the
2 record, let me just direct counsel's attention to -- just
3 hold for a second, please.

4 In terms of Judge Farnan having the
5 opportunity to look at and modify any existing orders
6 once he received the MDL assignment, if you will look at
7 In re: Master Key Antitrust Litigation, 320 F. Supp.
8 1404, and that's the JPML 1971, the language of the
9 order, as I said, is what it is. And it's important for
10 me, absent a record that would permit me to make a
11 determination that there was an agreement above and
12 beyond the language of this order, to say that the
13 language of the order is what it is, and it does not
14 address the issue of enforcement.

15 So I do conclude on the basis of this
16 record that there was no agreement that took this
17 language and extended it. Said another way, no agreement
18 that it's different from the language of the order
19 itself.

20 Second, it seems to me that the whole
21 purpose of the MDL federal legislation would be easily
22 frustrated if third parties were able in conjunction with
23 their proper effort to do what I think all parties do,
24 and that is attempt to meet, confer, and resolve issues

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1 regarding discovery, particularly in a case of this
2 nature where the cooperation on the part of AMD and Dell
3 would likely -- the cooperation itself produce the kind
4 of information that has been shared, I think it would be
5 foolish of me not to expect that if Dell chose to contest
6 some of the requests that were being made, if other third
7 parties chose to contest some of the requests that were
8 being made, this litigation could come to a grinding
9 halt.

10 I know that you're all aware of the path
11 that Fry's Electronics took, and how long it took to get
12 that matter resolved when Class plaintiffs tested those
13 issues. But it seems to me that the whole purpose of the
14 MDL statute and order would be frustrated were agreements
15 of this nature to be routine.

16 Said another way, even if there were an
17 agreement, and even if the -- this order was not
18 superseded by the later agreement in January of 2007, and
19 I conclude that it, in fact, was, even if it weren't, I
20 would recommend to Judge Farnan that the order of
21 September 8 of 2005 be modified in such fashion that
22 would permit him to exercise the authority that he does
23 have throughout the country in dealing with issues
24 involving subpoenas, whether they issue from this court

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1 or whether they issue from any other court.

2 What I would like AMD to do is to craft
3 a form of order which puts in place my recommendation to
4 the court. I would like to hear how quickly that can be
5 done, because, as AMD knows, if Dell does not agree with
6 my recommendation, they have the right to go to Judge
7 Farnan and convince him that this is not the appropriate
8 way or not the correct way to approach this dispute.

9 How quickly can AMD and the Class work
10 on the order, and how quickly can it be turned over to
11 Dell, and how quickly can I have it back for purposes of
12 my signing it?

13 MS. SMITH: Your Honor, it's Linda
14 Smith.

15 We can work with the Class and get this
16 done and over to Dell by close of business today.

17 SPECIAL MASTER POPPITI: And turned
18 around from Dell, please?

19 MR. JACKSON: Your Honor, if we get it
20 by the end of the day, we'll have it back to you by no
21 later -- well, assuming it follows exactly what the Court
22 said, I'm sure we won't have problems in terms of the
23 form, we'll get it back to you first thing in the
24 morning.

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1 SPECIAL MASTER POPPITI: Okay. And that
2 would be good. I'll look for it, then, not later than
3 noon tomorrow.

4 What I'm also going to propose is,
5 knowing how quickly you all brought this to my attention
6 and knowing that the papers do not represent a
7 significant universe of material, as I have in other
8 matters, I'm going to propose to the Court a quicker
9 turnaround for you to take; that is, if Dell chooses to
10 take exception to the order. And my inclination is to
11 suggest that that be not later than three days from the
12 issuance of the order.

13 And what I'll ask AMD to do is if you
14 will -- no, actually, I'll generate that from this end.
15 What I intend to do is propose a form of order to Judge
16 Farnan where he, number one, shortens the amount of time
17 within which Dell can take an exception. And your
18 submittals are, short as they are, I will likely suggest
19 to Judge Farnan that he also impose a page limitation,
20 if, in fact, there are exceptions taken.

21 What, clearly, I'm not in a position to
22 do, in light of the expected schedule for discovery, if
23 Dell chooses to take exception, I'm certainly not in a
24 position to suggest how quickly this gets turned around

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1 back to me for purposes of making a determination on the
2 underlying dispute.

3 In the context of the order that I
4 prepare for Judge Farnan's signature, by virtue of
5 language that I will choose to use in that order, I will
6 suggest to him the urgency from AMD's perspective.

7 Any questions or comments, please?

8 MS. SMITH: Your Honor, it's Linda
9 Smith.

10 I have just two questions, both of which
11 are not -- I think you -- both of which are not easy.

12 The first is that our response in Texas
13 to Dell's motion to quash is due on December 4, which
14 under even this expedited program would pass before this
15 was completely resolved by Judge Farnan. And my question
16 to Dell is: Will you agree not to proceed in Texas until
17 such time as Judge Farnan issues his order?

18 MR. JACKSON: I am more than happy to
19 ask the clients their view on that request. I am not --
20 I do not have the authority to respond one way or the
21 other as we sit here on the phone.

22 MS. SMITH: All right. Judge Poppiti,
23 would -- this seems -- this seems to sort of again --

24 SPECIAL MASTER POPPITI: Ms. Smith,

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1 you're cutting out.

2 MS. SMITH: I'm sorry. This seems to
3 exemplify the problems with not having things
4 multidistricted.

5 You have made a recommendation, which
6 may or may not be appealed to Judge Farnan. And
7 meanwhile, can you or can Judge Farnan, if Dell will not
8 agree to halt the Texas proceeding, ask that it be stayed
9 until such time as -- I'm not asking you to speak for
10 Judge Farnan. I just -- this is exactly what happens
11 when the multidistrict court is trying to interface with
12 another court at the same time.

13 SPECIAL MASTER POPPITI: I understand
14 what you're saying.

15 In your papers to me, I believe that
16 there was some request or suggestion that Judge Farnan
17 engage the judge in the Western District of Texas. And I
18 think I told you, it may not have been the last time that
19 we talked, it may have been the first time, that I had
20 already advised Judge Farnan's case manager that there
21 was that request that was made. And I think I remember,
22 without looking down at the transcript, remember telling
23 all of you that by virtue of making that contact with
24 Judge Farnan's Chamber, I'm sure that he is aware of it.

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1 And yet, at the same time, I'm certainly not in a
2 position to expect when, if at all, he will accept that
3 suggestion.

4 MS. SMITH: Understood, Your Honor.
5 When will -- I'm not sure --

6 SPECIAL MASTER POPPITI: The only
7 other -- I landed on three days only because I landed on
8 three days. It seems to me it's doable in two, because
9 all of your papers are finished. It's just a matter of
10 reformatting them to some extent, perhaps taking into
11 consideration what I have recommended, and simply
12 repackaging it for Judge Farnan's view if Dell chooses to
13 do that.

14 So if there is an expectation, and I'm
15 certainly wanting to be fair to all concerned parties, if
16 there is an expectation it can be done in two days, then
17 I will recommend that we shorten the time to two days.

18 And my experience, counsel, with respect
19 to suggestions to Judge Farnan of that nature is that he
20 has -- he has always accepted the recommendation to
21 shorten the time and has always taken the time that I
22 have recommended for purposes of establishing a deadline.

23 MR. JACKSON: Your Honor, this is Tom
24 Jackson.

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1 Taking our normal 20 days to three is
2 fairly dramatic. Taking it yet another day or two seems
3 very, very short for us.

4 SPECIAL MASTER POPPITI: Okay. Then
5 I'll leave it at three.

6 Do you have another comment or question?

7 MS. SMITH: Yes, I did. But,
8 Mr. Jackson, will you be able to indicate to us today
9 whether your client is so inclined to allow us to stay
10 this until we hear from Judge Farnan?

11 MR. JACKSON: I promise to raise the
12 issue with them. I do not know how quickly they will
13 come to a decision, but as soon as they do, I will let
14 you know. That's all I can do.

15 SPECIAL MASTER POPPITI: Any other
16 comments or questions, or would you prefer -- I can
17 certainly leave you all on the line, just put you on
18 hold, and when you're finished, if it's a matter of
19 further conferring --

20 MS. SMITH: Your Honor, this is Linda
21 Smith.

22 I have one last issue. The subpoena
23 issued in the Western District of Texas, the first one
24 for the deposition of Dan Allen, provides that his

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1 deposition is scheduled to commence on September 8th. I
2 mean, excuse me, I've lost my track of time,
3 December 8th. And that would be -- that would be pretty
4 quickly, especially considering that we need at this
5 point to wait for Judge Farnan's ruling and then brief
6 and address the duration of the deposition issue.

7 I had already written on November 24th
8 to Mr. Jackson and his other folks at Jones Day
9 suggesting that under the original schedule, which
10 contemplated a more expedited -- well, was expediting
11 things, but contemplated that the original times for
12 briefing the second part, the duration of the deposition
13 issue, would be originally, I'm saying, simultaneous
14 briefs on the 4th of December and hearing on the 8th.
15 And I, therefore, expressed to Mr. Jackson, et al. that
16 because there may be a hearing on the 8th, that we would
17 be happy to either issue a new subpoena for the 10th, or
18 maybe he would agree to treat the subpoena for Dan Allen,
19 which requires an appearance on December 8th, as if it
20 requires his appearance on December 10th.

21 Mr. Jackson's response was, no, we have
22 not -- I'm reading it. We have not agreed to any dates
23 in any of your subpoenas. We have consistently
24 maintained that position and continue to do so.

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1 So I guess what I'm saying is, we have
2 and have always been willing to be flexible about the
3 issue. We do need to get these depositions done, but we
4 do understand that these have to be resolved. There is
5 currently an outstanding subpoena directing -- Federal
6 subpoena directing Mr. Allen to appear on the 8th at
7 9 o'clock, and we need to have some sort of agreement on
8 that.

9 And if we can't do it between the
10 parties, I think we have to bring that issue now to Your
11 Honor.

12 MR. JACKSON: Your Honor, Tom Jackson,
13 if I might.

14 SPECIAL MASTER POPPITI: Yes, please.

15 MR. JACKSON: The issue of the subpoenas
16 is the subject of a pending motion to quash. And as the
17 Court knows, all of that is wound up into the issue of
18 the question of length. And that's the sole basis on
19 which there is a motion to quash.

20 I am not going to recommend to my client
21 that we require Ms. Smith to re-serve subpoenas for
22 whatever date we ultimately agree to to take these depos
23 on. I think one subpoena is good enough, and we can
24 agree to change the date to whatever date it ultimately

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1 turns out to be. Because I realize and understand that
2 each of these people, in fact, will be deposed. The open
3 question is for how long.

4 And so, you know, I'm not going to
5 require to keep serving subpoenas or otherwise deal with
6 that, if that helps her in any way.

7 MS. SMITH: Well --

8 SPECIAL MASTER POPPITI: It sounds like
9 it helps some, doesn't it, Ms. Smith?

10 MS. SMITH: Well, it does help some.
11 You know, as Your Honor is aware, for at least these six
12 deponents, the five current and the one former, there is
13 an agreement that they will appear, and the question is
14 how long.

15 I feel like -- and, you know, I feel
16 like if we don't have consent that the motion to quash
17 will be stayed, and if we don't have consent on any date,
18 and sort of a, what I would regard as, with all due
19 respect, somewhat of an intransigence on this issue, you
20 know, we're in position to move for contempt on the 8th
21 if he doesn't --

22 SPECIAL MASTER POPPITI: My reaction is
23 you have to do what you have to do. And if the
24 conversation is going to be, as Mr. Jackson just

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1 suggested, the same. I mean, once this matter leaves my
2 desk, it seems to me that the issue will be squarely
3 before all of you, and it will be Dell's decision as to
4 whether or not they take exception. And if they do, I
5 think I've done my part in trying to move this along by
6 suggesting that there also be an order accompanying this
7 order asking Judge Farnan to turn to it as quickly as he
8 chooses. I don't think there is really anything more
9 that I can do from my desk other than tee it up for Judge
10 Farnan in the next four days.

11 MS. SMITH: Okay. Thank you, Your
12 Honor.

13 SPECIAL MASTER POPPITI: And leave it to
14 whomever to get his intention as quickly as possible.

15 All right. I will look for an order not
16 later than noon tomorrow, and I can assure you it will be
17 out of here soon thereafter.

18 (Hearing concluded at 2:11 p.m.)

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C E R T I F I C A T E

STATE OF DELAWARE

NEW CASTLE COUNTY

I, Debra A. Donnelly, a Notary Public within and for the County and State aforesaid, do hereby certify that the foregoing teleconference was taken before me, pursuant to notice, at the time and place indicated; that the teleconference was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the transcript is a true record of the teleconference; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this day of December A.D., 2008.

DEBRA A. DONNELLY, RPR
CERTIFICATE #151-PS
EXPIRATION: PERMANENT

EXHIBIT 6



"Adam Balick"
<abalick@balick.com>

12/02/2008 02:48 PM

To "Poppiti, Vincent J." <Poppiti@BlankRome.com>

cc "Sloan, Elizabeth" <Sloan@BlankRome.com>, "LeVan, Mary" <LEVAN@Blankrome.com>, "David, Carrie" <david-c@BlankRome.com>,

bcc

Subject RE: AMD v. Intel; C.A. No. 05-441; 05-485; and MDL No. 05-1717

History: This message has been forwarded

Dear Judge Poppiti:

We wanted to advise you of the following developments in the Western District of Texas with respect to Dell's Motion to Quash, or Alternatively, for a Protective Order.

Judge Sparks of the Western District of Texas has ordered a hearing for this Friday, December 5, 2008, on the Motion to Quash. (See attached Order.) Based on a conversation between Judge Sparks' clerk and AMD's counsel in Texas, we understand that Judge Sparks was unaware of the MDL proceeding at the time that he scheduled the hearing. On behalf of AMD, we asked counsel for Dell to file a joint motion to stay the hearing in the Western District of Texas pending Judge Farnan's ruling on Your Honor's Report and Recommendation on the MDL Court's jurisdiction to resolve the merits of this dispute. The Dell Witnesses have refused to agree to a stay. Accordingly, AMD intends to file a motion to stay in the Western District of Texas tomorrow, which hopefully will be heard at the December 5, 2008 hearing. Because Dell's motion assumes that the Western District of Texas has jurisdiction of this dispute and addresses the merits of that dispute regarding whether these depositions should proceed at all and, if so, their duration, AMD will be forced to address the merits issues in its briefing. Judge Sparks may well decide inconsistently with the MDL Court on jurisdiction and does not have the MDL Court's three years of expertise in the law and the facts of this case to make an appropriate determination of the importance of the testimony of the Dell Witnesses.

We should also note that Dell's refusal to stay the Texas proceedings is contrary to what Dell's counsel stated to Your Honor on November 25, 2008: "I can assure you there will be no hearing in Texas prior to [December 8, 2008]." (See attached at 15:17-20.) Dell's counsel also stated at that time that it would "alert" this Court if a hearing on the Motion to Quash was set in Texas. (Id. at 15:12-13.)

Respectfully,

Adam Balick

Adam Balick

711 King St. | Wilmington DE 19801

Main Tel. (302) 658-4265 | Main Fax. (302) 658-1682



Email: abalick@balick.com | Web: www.balick.com Order.pdf AMD transcript from 112508 teleconference.pdf

EXHIBIT 7



Thomas R. Jackson/JonesDay
Extension 5-2978
12/02/2008 05:04 PM

To Beth.Ozmun@amd.com, LSmith@OMM.com
cc Mary_Pape@Dell.com, <Marc_Vockell@Dell.com>, csmaynard@JonesDay.com
bcc
Subject Outline of Proposed Agreement Re: Dell Depositions

Linda and Beth,

In advance of our 5:30 call, I wanted to share our thoughts on resolving our discovery disputes in the Delaware and W.D. TX courts without further need for judicial intervention. I believe we have reached a tentative agreement concerning how the depositions of the current and former Dell employees will proceed under the deposition subpoenas issued out of the Western District of Texas. To our understanding, the tentative agreement is as follows:

1. AMD agrees that the dates noticed in the deposition subpoenas issued out of the Western District of Texas and served upon the six former and current Dell employees are not binding and that Dell and AMD will negotiate new deposition dates for each.
2. Dell will schedule two deposition days with each of Jerele Neeld, Dan Allen, and Alan Luecke as soon as practical, but for dates no later than January 31, 2009, for questioning by all of the parties to this MDL proceeding. AMD does not agree that two days is the maximum deposition time Neeld, Allen, and Luecke will be made available for and Dell does not agree that any of them will be made available for additional time. AMD does agree to work in good faith to get each of these depositions completed in two days.
3. After the Neeld, Allen, and Luecke depositions are taken, Dell and AMD will negotiate in good faith the time limits for the depositions of Jeff Clarke, Kevin Rollins, and Michael S. Dell. In the meantime, Dell will hold open a single day in February or March for each of their depositions, though AMD understands that, at this time, Michael S. Dell is being offered for only half of a single day.
4. Dell will withdraw, without prejudice, its Motion to Quash Deposition Subpoenas or, Alternatively, for a Protective Order currently set for hearing on December 5, 2008 in the Western District of Texas before Judge Sam Sparks.
5. AMD and Dell will jointly withdraw, without prejudice, the application in the Delaware MDL proceeding to have Special Master Poppiti resolve the dispute as to the length of the Dell employee depositions. Further, AMD and Dell will jointly seek to have Special Master Poppiti withdraw the Special Master's Report and Recommendation Regarding Threshold Jurisdictional Issue Raised by Current and Former Employees of Nonparty Dell Inc.

I look forward to speaking to you both in a few minutes.

Thomas R. Jackson
Jones Day
2727 North Harwood Street
Dallas, Texas 75201
214-969-2978

=====

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EXHIBIT 8

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

IN RE)	
INTEL CORPORATION)	
MICROPROCESSOR ANTITRUST)	MDL No. 05-1717-JJF
LITIGATION)	
<hr/>		
ADVANCED MICRO DEVICES, INC., a)	
Delaware corporation, and AMD)	
INTERNATIONAL SALES & SERVICES, LTD.,)	
a Delaware corporation,)	
)	
Plaintiffs,)	
)	C.A. No. 05-441-JJF
v.)	
INTEL CORPORATION, a Delaware corporation,)	
and INTEL KABUSHIKI KAISHA, a Japanese)	
corporation,)	
)	
Defendants.)	
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PHIL PAUL, on behalf of himself)	
and all others similarly situated,)	C.A. No. 05-485-JJF
)	
Plaintiffs,)	CONSOLIDATED ACTION
)	
v.)	
)	DM 20
INTEL CORPORATION,)	
)	
Defendants.)	
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**SPECIAL MASTER'S REPORT AND RECOMMENDATION
REGARDING THRESHOLD JURISDICTIONAL ISSUE RAISED BY
CURRENT AND FORMER EMPLOYEES OF NON-PARTY DELL INC.**

BACKGROUND¹

This Report and Recommendation involves a dispute that arose after plaintiffs Advanced Micro Devices, Inc. and AMD International Sales & Service, Ltd. (hereafter jointly, "AMD") caused subpoenas to issue out of the United States District Court for the Western District of Texas for the depositions of five current Dell Inc. ("Dell") employees (Dan Allen, Jeffrey W. Clarke, Michael S. Dell, Alan Luecke and Jerele D. Neeld) and out of the District of Massachusetts for the deposition of a former Dell employee (Kevin Rollins). Class Plaintiffs caused subpoenas to be issued out of the Western District of Texas for the depositions of the current Dell employees and out of the District of Massachusetts for the deposition of Kevin Rollins, a former Dell employee (collectively, "the Dell Witnesses"). Pursuant to Amended Case Management Order No. 6, AMD, Intel Corporation ("Intel") and Class Plaintiffs thereafter provided time estimates for each deposition. Counsel for the Dell Witnesses objected and declined to make the Dell Witnesses available unless the parties agreed to abbreviate the depositions.

At AMD's request, on November 17, 2008, the Special Master convened a hearing. During that hearing, counsel for the Dell Witnesses challenged the Special Master's jurisdiction to enforce the subpoenas and indicated their intention to file appropriate motions in the Western District of Texas. The Special Master then ordered the parties to brief the jurisdictional issue, indicating that, if appropriate, he would address the merits of the dispute over the duration of the depositions after deciding the jurisdictional issue.

The Dell Witnesses, AMD and Intel have filed letter briefs on the jurisdictional issue. Class Plaintiffs have joined in AMD's letter brief. The Special Master held hearings on the

¹ In entering this Report and Recommendation, the Special Master considered a proposed form of Report and Recommendation submitted on December 2, 2008 by counsel for AMD. The Special Master is advised that counsel for the Dell witnesses approved the December 2, 2008 submittal as to form only.

jurisdictional issue on November 25, 2008 and December 1, 2008. Counsel for all interested parties were present.

Counsel for the current Dell Witnesses argue that this MDL Court lacks jurisdiction to enforce the subpoenas for only one reason. They argue that AMD waived the MDL Court's jurisdiction when it entered into a Preservation Stipulation with Dell, which was then entered as an Order by this MDL Court on September 8, 2005 (the "2005 Order"). (no D.I. number assigned). Specifically, the Dell Witnesses point to paragraph 11 of the 2005 Order:

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.

DISCUSSION

Having read and considered all of the briefs filed in this proceeding on whether AMD waived this Court's ability to resolve disputes over the Dell Witness subpoenas in favor of the Western District of Texas, and having heard argument from counsel at the hearings on November 25, 2008, and December 1, 2008, the Special Master concludes as follows:

1. Under 28 *U.S.C.* § 1407, this Court, as an MDL Court, "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). The 2005 Order, paragraph 11, states only that AMD will serve subpoenas on Dell that "issue" out of the United States District Court for the Western District of Texas. The 2005 Order says nothing about enforcing or resolving disputes about such subpoenas. In the absence of any record of an agreement beyond the plain and unambiguous language of the 2005 Order, the Special Master concludes that there was no agreement between AMD and Dell that would strip this MDL Court of its authority, under 28 *U.S.C.* § 1407(b), to enforce or otherwise resolve disputes over the subpoenas served on the Dell Witnesses.

2. Even if the 2005 Order had included a provision stripping this MDL Court of its authority under 28 *U.S.C.* § 1407(b), the Special Master concludes that the 2005 Order was expressly superseded by the January 1, 2007 Microprocessor Antitrust Litigation Document Production Agreement Between Dell and Requesting Parties. Hence, any preexisting agreement between AMD and Dell concerning enforcement of subpoenas would have been abrogated.

3. Even if the 2005 Order had not been abrogated, to the extent that it would deprive this MDL Court of the power to enforce subpoena issues in this coordinated action, the Special Master concludes that it would frustrate the very purposes of the MDL legislation - eliminating duplicative discovery, preventing inconsistent pretrial rulings, conserving the resources of the parties, their counsel and the judiciary, and ensuring 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.² Moreover, although, Fed. R. Civ. P. 29 encourages agreed-upon, lawyer managed discovery to limit the cost, effort and expense involved in court intervention in discovery matter practice, *Lee v. Central Gulf Towing, L.L.C.*, 2004 WL 2988478, at *2 (E.D.La. Dec. 09, 2004), parties and non-parties alike should not by agreement be permitted to strip an MDL Court of its authority under 28 *U.S.C.* § 1407 without the express order of the MDL Court.

CONCLUSION

For the reasons set forth above, the Special Master concludes that this District Court has the authority to enforce the subject subpoenas.

IT IS THEREFORE HEREBY RECOMMENDED THAT:

(a) In exercise of the Court's authority under 28 *U.S.C.* § 1407 to "modify or rescind any orders in effect in the transferred case which it concludes are incorrect," *Astarte Shipping Co.*


² *In re Intel Corp. Microprocessor Antitrust Litigation*, 403 F.Supp.2d 1356 (J.P.M.L. Nov. 3, 2005) (transfer order).

v. Allied Steel & Export Service, 767 F.2d 86, 87 (5th Cir. 1985); *In re Master Key Antitrust Litig.*, 320 F. Supp. 1404 (J.P.M.L. 1971), the 2005 Order BE RESCINDED;

(b) The Court exercise its authority, sitting both as an MDL Court and for purposes of this case as a court of the Western District of Texas and the District of Massachusetts, to decide the merits of the dispute involving the duration of the depositions of the Dell Witnesses.

THE SPECIAL MASTER'S REPORT WILL BECOME FINAL ORDER OF THE COURT, UNLESS OBJECTION IS TAKEN IN ACCORDANCE WITH THE ANTICIPATED ORDER BY THE COURT WHICH SHORTENS THE TIME WITHIN WHICH AN APPLICATION MAY BE FILED PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 53(f)(2).

ENTERED this Wednesday day of December, 2008.



Vincent J. Poppiti (DSBA) No. 100614
Special Master