

November 21, 2008

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**BY ELECTRONIC MAIL**

The Honorable Vincent J. Poppiti  
Special Master  
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Wilmington, DE 19801-4226

**Re: *In re Intel Corporation Microprocessor Antitrust  
Litigation - Discovery Matter  
(MDL Jurisdiction over Dell Witnesses)***

Dear Judge Poppiti:

Yesterday, the Dell Witnesses filed a motion to quash in the United States District Court for the Western District of Texas.<sup>1</sup> The motion seeks to quash the subpoenas that AMD and Class Plaintiffs served on five current Dell Witnesses in this MDL. (The sixth Dell Witness was served out of the District Court of Massachusetts and is not a movant in the Texas court.) The motion is based on the Dell Witnesses' assertion that the estimated length of the depositions allegedly imposes an undue burden. Under Western District Court of Texas Local Rule CV-7(d), AMD's opposition to the motion to quash is due on December 1, 2008. That is one day before Your Honor is currently scheduled to decide whether this very discovery dispute should be adjudicated by Judge Farnan (based on Your Honor's recommendation). As such, the merits of the dispute have leaped ahead of the threshold "jurisdictional" issue.

A more appropriate and orderly approach would be for this Court to first decide the jurisdictional question. To this end, AMD recommends and requests that this Court as the MDL court proceed down one of two possible paths. First, this Court could proceed with the jurisdictional issue in the MDL on an expedited basis. The Dell Witnesses' brief is due to Your Honor by close of business today. AMD is prepared to file its brief simultaneously, rather than on November 25, as currently scheduled. If Your Honor is available, the jurisdictional issue could be heard and decided early next week. Alternatively, Judge Farnan could contact the Western District Court of Texas judge assigned to the Dell Witnesses' motion and ask that the motion be held in abeyance pending a determination on the jurisdictional issue. This course of action is common practice in MDL proceedings for these situations. The Western District Court of Texas

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<sup>1</sup> The Dell Witnesses acknowledge in a footnote to their brief in support of the motion to quash that this Court has scheduled a hearing on December 2, 2008 to decide whether it has jurisdiction to resolve the parties' dispute regarding the depositions of Dell witnesses.

judge assigned to the Dell Witnesses' motion is the Honorable Sam Sparks (Chambers Phone No.: (512) 916-5230).

28 U.S.C. § 1407 ("Section 1407") expressly empowers MDL judges to resolve discovery disputes concerning non-parties who reside outside the district where the MDL action is pending:

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

Indeed, based on Section 1407, Your Honor has already issued a Report and Recommendation in this MDL, adopted by Judge Farnan, holding that this Court has this authority. (D.I. No. 300, Discovery Matter No. 5.)

As to the Dell Witnesses' assertion that AMD stipulated that the Western District Court of Texas should adjudicate all discovery disputes involving Dell, there is *no* such stipulation. AMD *never* agreed that the Western District Court of Texas would resolve any disputes with Dell in this case. The Dell Witnesses rely entirely on a provision in a September 2, 2005 Document Preservation Stipulation between AMD and Dell (entered into before the MDL Panel issued its order establishing this MDL). The 2005 Preservation Stipulation merely states that all subpoenas to Dell, Inc. must "issue" out of the Western District Court of Texas. (*See* Exhibit A at paragraph 11.) AMD agreed to no more, or less, than to follow standard procedure in MDL cases -- to have the Dell subpoenas issue out of the District Court where the deponent resides -- a procedure it has uniformly followed in this case with respect to all third-party witnesses. But AMD never agreed to have the Western District Court of Texas *adjudicate* disputes involving subpoenas issued from that district in this MDL or otherwise to relinquish its right to ask this Court to decide Dell deposition disputes so as to provide a uniform orderly discovery regime in this case. As noted above, Section 1407 expressly empowers an MDL judge to adjudicate discovery disputes involving subpoenas issued outside the MDL district. The Fifth Circuit is clearly in agreement with this. In *In re Clients & Former Clients of Baron & Budd, P.C.*, 478 F.3d 670 (5th Cir. 2007), the Fifth Circuit held:

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


district court to exercise the authority of a district judge in any district: The transferee court may hear and decide motions to compel or motions to quash or modify subpoenas directed to nonparties in any district.”

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

In any event, the September 2, 2005 Preservation Stipulation was expressly superseded by a later agreement between Dell and all the parties to this MDL. That agreement, entitled “Microprocessor Antitrust Litigation Document Production Agreement Between Dell and Requesting Parties” (the “Agreement”) expressly states that it “*supersedes* the subpoenas, the Preservation Stipulation, and the Supplemental Preservation Stipulation.” (Exhibit B, paragraph II.G at page 2; emphasis added.) By its express terms, the Agreement abrogated AMD’s obligation to do anything out of the ordinary for Dell, and contains nothing to suggest that discovery disputes are to be resolved in the Western District Court of Texas.

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

Respectfully submitted,



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