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VIA ELECTRONIC FILING AND HAND DELIVERY

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

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

Dear Special Master Poppiti:

We submit the following letter brief with respect to the Special Master's jurisdiction over subpoenas ad testificandum issued out of the United States District Court for the Western District of Texas (the "Subpoenas") and served on five current Dell Inc. ("Dell") employees and one former Dell employee (collectively, "Dell Employees"). As Dell has stated in its previous submissions to this Court, in submitting this letter brief, Dell is not admitting that it is subject to the jurisdiction of this Court with respect to any issues that may arise.

Statement of the Issue in Dispute

Whether this Court has jurisdiction to resolve discovery disputes related to the Subpoenas issued out of the Western District of Texas where non-party current Dell Employees have already filed a motion to quash the Subpoenas or, alternatively, for a protective order in the Western District of Texas and where Dell and AMD expressly contracted that all subpoenas would be issued out of the Western District of Texas.¹

Argument and Authorities

Jurisdiction over the Subpoenas issued out of the Western District of Texas and served upon Dell Employees, all of whom are non-parties to this litigation, resides with the United States District Court for the Western District of Texas and not with this Court for two reasons. First, the Subpoenas were issued out of the Western District of Texas and the current Dell Employees have moved to quash the Subpoenas in that district, as the Federal Rules require.

¹ Current Dell Employees have filed a Motion to Quash the Deposition Subpoenas or, Alternatively, for Protective Order in the Western District of Texas. That Motion is currently pending.

Second, and more fundamentally, AMD waived any alleged rights to have this Court adjudicate discovery matters under the deposition subpoenas when it expressly contracted to issue all subpoenas to Dell out of the Western District of Texas.

A. Background

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

Part of the document production negotiations between Dell and AMD concerned the situs of subsequent subpoenas AMD might serve on Dell. These negotiations resulted in a specific provision regarding the issuance of subpoenas to Dell: “AMD agrees that any subpoena for testimony or for the production of documents and/or testimony AMD may serve upon Dell will issue out of the United States District Court for the Western District of Texas.”² September 2, 2005 Stipulation re: Preservation of Documents by Dell Inc., Exhibit A to the January 18, 2007 Documents Production Agreement Between Dell and Requesting Parties (the “Stipulation”) (respectively, Exhs. A and 1).

During recent months, AMD and Dell have been negotiating the number and length of depositions of Dell witnesses. AMD initially sought to depose more than thirty Dell-related witnesses but eventually agreed to limit that request to one former and five current Dell employees—the Dell Employees, five of whom are or were senior Dell executives.³

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

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

³ Kevin Rollins, former CEO; Michael Dell, CEO and Chairman of the Board; Jeff Clarke, Senior Vice President of Business Product Group; Dan Allen, Director of Worldwide Procurement; Alan Luecke, Director of CTO Strategy; and Jerele Neeld, Senior Manager of Product Group Quality Customer Experience. Mr. Neeld is not a senior Dell executive.

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

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

B. The Western District of Texas is the Appropriate Jurisdiction to Resolve Disputes Concerning the Subpoenas.

1. The Subpoena-Issuing Court has Jurisdiction over the Subpoenas.

The Federal Rules make clear that the court from which a subpoena is issued has jurisdiction to resolve any dispute that arises related to the subpoena. Therefore, the Western District of Texas, and not this Court, is the proper forum to resolve Dell's dispute regarding the excessive duration of the subpoenas issued by AMD out of the Western District of Texas.

Under Federal Rule 45(a)(2)(b),⁶ a subpoena to depose a non-party witness must issue from the court in which the deposition will be taken. *U.S. ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, 444 F.3d 462, 468 (6th Cir. 2006). Any dispute that arises over the subpoena of a non-party—whether it be a motion to quash or for protective order—is properly decided by the court that issued the subpoena. *Id.* (citing Rule 45(c)(2)(B)); see also *In re: Clients and Former Clients of Baron & Budd, P.C. & Occupational Med. Resources, Inc.*, 478 F.3d 670, 671 (5th Cir. 2007) (quoting 9 James W. Moore et al., *Moore's Federal Practice* § 45.50[4], at 45-75 through 45-77 (Matthew Bender 3d ed. 2006) (“A motion to quash or modify a subpoena is to be granted by ‘the court by which a subpoena was issued.’”)).⁷

And where a subpoena is issued by a district court when the underlying matter is pending in another court, “the proper court in which to file a motion to quash or modify the subpoena is the issuing court, not the court in which the action is pending.” *Pogue*, 443 F.3d 468. The MDL rules do not change that result. In MDL matters, pretrial proceedings “operate pursuant to both [28 U.S.C.] Section 1407 and the Federal Rules of Civil Procedure.” *Id.* And while there may be tension between Rule 45 and § 1407, the Federal Rules “are designed to ensure that district courts remain firmly in control of those depositions and document productions involving non-parties located in their districts.” *Id.* Section 1407 modifies jurisdiction for parties to lawsuits that are subject to MDL transfers but does not affect third-parties.

Here, the Dell Subpoenas were not issued out of this Court, but rather out of the Western District of Texas. Further, Dell has filed motions to quash the Subpoenas or, alternatively, for protective order in the Western District of Texas. Hence, the Western District of Texas has jurisdiction to resolve any disputes concerning the Subpoenas. See *In re Uranium Antitrust Litig.*, 503 F. Supp. 33 (N.D. Ill. 1980) (denying a motion to compel the subpoena-issuing courts to transfer all future discovery motions). There is nothing in Section 1407 that need be construed to eviscerate Rule 45's clear language nor the Western District of Texas' jurisdiction, nor is there any suggestion that third-party discovery practice should be fundamentally changed by the MDL process.

⁶ Federal Rule 45 imposes burdens on party litigants to avoid unnecessary inconvenience and expenses to non-party deponents, such as Dell Employees. *In re Corrugated Container Antitrust Litig.*, 620 F.2d 1086, 1090 (5th Cir. 1980).

⁷ In fact, an “issuing court must quash or modify a subpoena that . . . (iv) subjects a person to an undue burden.” Rule 45(a)(3)(A) (emphasis added).

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

In addition to and independent of the above grounds, AMD and Dell reached an arms-length agreement that controls the present dispute. Parties are free to stipulate pertaining to any discovery matter. *See* Fed. R. Civ. P. 29 (“[P]arties may stipulate that: (b) other procedures governing or limiting discovery be modified.”); *see also Lee v. Central Gulf Towing, L.L.C.*, No. 04-1497, 2004 U.S. Dist. Lexis 25773, *4 (E.D. La. Dec. 9, 2004) (“[P]arties may by written stipulation . . . modify other procedures governing discovery.”); *Riley v. Walgreen*, 233 F.R.D. 496, 500 (S.D. Tex. 2005). Federal Rule 29 encourages agreed-upon, lawyer-managed discovery to limit the cost, effort, and expense involved in court intervention in discovery motion practice. *Lee*, 2004 U.S. Dist. Lexis 25773, *4-5. The orderly and efficient conduct of discovery depends to a large extent on the cooperation of counsel, who must be able to rely upon the agreements they make. *Id.* at *5.

Dell and AMD did exactly this in September 2005—by designating that the Western District of Texas was the forum to resolve disputes relating to all subpoenas that might be served on Dell. And the Stipulation is clear that “any subpoena for testimony . . . will issue out of the United States District Court for the Western District of Texas.” Stipulation § 11 (Exh. A). That provision was included precisely to make sure that any future discovery disputes would be resolved by that and only that district court.

Section 11 must be given meaning. *See Lynch Prop., Inc. v. Potomac Ins. Co. of Illinois*, 140 F.3d 622 (5th Cir. 1998) (stating that contracts are construed “to give effect to each term in the contract and to avoid rendering any term a nullity”). Since the Stipulation was entered, AMD, Intel, and Class Plaintiffs have all served document subpoenas on Dell, all of which were issued out of the Western District of Texas, and AMD and Class Plaintiffs served the Subpoenas on Dell Employees out of that district. The Stipulation provision would have been meaningless if it dictated nothing more than the caption plastered across the top of these subpoenas.⁸ It was intended to govern the location for the resolution of future disputes.

Respectfully,

/s/ Lauren E. Maguire

Lauren E. Maguire

Attachments

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

⁸ This is especially true if this Court determines, by operation of the Federal Rules, that it has jurisdiction to resolve non-Delaware subpoenas between AMD and non-parties to this MDL proceeding.