

November 24, 2008

BY ELECTRONIC MAIL

The Honorable Vincent J. Poppiti
Special Master
Blank Rome LLP
Chase Manhattan Centre, Suite 800
1201 North Market Street
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Sidney Balick

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**Re: *In re Intel Corporation Microprocessor Antitrust
Litigation - Discovery Matter***

Dear Judge Poppiti:

Six current and former senior executives of third-party Dell Inc. (the “Dell Witnesses”) argue that this Court lacks jurisdiction to adjudicate a dispute over how long each should sit for deposition in this multidistrict litigation (“MDL”). First, they contend this Court has no authority under the MDL rules to resolve the dispute because five of the Dell Witnesses reside in the Western District of Texas.¹ In the alternative, they assert that AMD stipulated that the Western District Court of Texas should resolve all discovery disputes involving Dell. Both arguments are completely without merit.²

28 U.S.C. § 1407 (“Section 1407”) expressly empowers MDL judges to resolve discovery disputes concerning third-parties who reside outside the district where the MDL action is pending. 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 such authority. (Exh. A, p. 10; Exh. B.)

As to the Dell Witnesses’ assertion that AMD stipulated to the Western District Court of Texas resolving all discovery disputes with 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 Dell and AMD only), which states that all subpoenas to Dell, Inc. must “issue” out of the Western District Court of Texas. (Dell Brief, Exh. 1, ¶11.) AMD agreed to no more, or less, than to follow standard procedure in both federal and MDL cases -- to have the Dell subpoenas issue out of the District Court where the deponents reside. AMD has uniformly followed this procedure for all third-party witnesses in this MDL. AMD never agreed to have the Western District Court *adjudicate* disputes involving subpoenas issued from that district in this MDL. And AMD did not otherwise relinquish its right to ask this Court to decide disputes over Dell depositions, 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.

¹ Query what their position is for the former senior executive who resides in Massachusetts and whose subpoena was issued by the United States District Court for the District of Massachusetts, Boston Division.

² Class Plaintiffs join AMD in this submission.

In any event, the September 2, 2005 Preservation Stipulation was expressly superseded by a subsequent agreement between Dell and all parties to this MDL, which the Dell Witnesses attached to their letter brief as Exhibit A. 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." (Dell Brief, Exh. A, ¶II.G.) Your Honor may recall that during the hearing on November 17, 2008, AMD's counsel could not find anything in this controlling Agreement that even mentions the Western District of Texas. That is because it does not.

AMD respectfully requests that Your Honor deny the Dell Witnesses' attempt to avoid this Court's jurisdiction, and move on to determining how long the Dell Witnesses should be available for deposition in this case.

1. Section 1407 Authorizes this Court to Adjudicate Disputes over Third-Party Subpoenas Issued Outside the District of Delaware.

The plain language of Section 1407 states:

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.

28 U.S.C. § 1407(b). Wright and Miller add that: "In this context, it is not surprising that the Multidistrict Litigation Panel has concluded that the transferee judge has the power to conduct depositions not only in the transferee district but in any other federal district." Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* 3d § 3866 at pp. 512-514.

This Court has already reached the same conclusion. On May 18, 2007, Your Honor issued a Report and Recommendation on Discovery Matter No. 5 (the "Report"), which involved Class Plaintiffs' motion to compel third-party Fry's Electronics, Inc. ("Fry's") to produce certain transactional data pursuant to subpoenas issued from the Northern District Court of California. Like the Dell Witnesses here, Fry's challenged this Court's jurisdiction to enforce the subpoenas. In the Report, Your Honor definitively concluded that, "under the grant of Section 1407, this Court, as the transferee court in multidistrict litigation, has the authority to adjudicate discovery disputes concerning documents-only subpoenas directed to non-parties and issued from a transferring court." (Exh. A, p. 10.) Judge Farnan agreed. (Exh. B.) The Report included six pages of supporting legal authorities, and those authorities fully support the conclusion that Section 1407 grants this Court authority to adjudicate discovery disputes concerning subpoenas for testimony as well as for documents directed to third-parties and issued outside the District of Delaware.

The Dell Witnesses ignore the mountain of legal authorities refuting their position. Instead, they assert without any legal support, that "Section 1407 modifies jurisdiction for parties to lawsuits that are subject to MDL transfers *but does not affect third-parties.*" (Dell Brief at 3;

emphasis added.) This assertion is directly contradicted by the Sixth Circuit's *Pogue* decision, cited multiple times in the Dell Brief:

A judge presiding over an MDL case therefore can compel production by an extra-district nonparty; enforce, modify, or quash a subpoena directed to an extra-district nonparty; and hold an extra-district nonparty deponent in contempt, notwithstanding the nonparty's physical situs in a foreign district where discovery is being conducted.

United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc., 444 F.3d 462, 468-469 (6th Cir. 2006) (cited in Dell Brief at 3).

Thus, under the plain language of Section 1407, this Court's prior ruling and applicable case law, this Court is empowered to adjudicate discovery disputes involving third-parties, including disputes in this MDL regarding depositions of third-party witnesses who reside outside this district.³

2. This Court's Decision to Adjudicate All Discovery Disputes Serves the Policies Underlying Multidistrict Litigation.

Dell's exclusive dealing with Intel over the past decade is at the heart of the antitrust claims against Intel in this MDL. Dell and Intel both deny any exclusive dealing arrangement, and the evidence refuting their position resides in the documents and memories of the two companies' most senior executives, including the Dell Witnesses. Given this Court's familiarity with the factual and legal issues in this MDL, there is no question that this Court is best positioned to resolve the dispute over how long the Dell Witnesses should be deposed.

This Court's resolution of the duration issue is consistent with the mandate this Court received from the Judicial Panel on Multidistrict Litigation when it issued the order establishing this MDL. The Panel's order assigned Judge Farnan as the "single judge" to "formulate a pretrial program" that "eliminate[s] duplicative discovery," "prevent[s] inconsistent pretrial rulings," "conserves the resources of the parties, their counsel and the judiciary," and "ensures 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." (Exh. C.)

Pursuant to the Panel's order, Your Honor and Judge Farnan have already formulated a comprehensive pretrial program, including two earlier orders establishing deadlines for third-parties.⁴ Then on June 20, 2008, this Court issued Amended Case Management Order No. 6 ("CMO No. 6"), which governs "the taking of depositions in this case." (Exh. D.) CMO No. 6 unequivocally expresses this Court's intent to decide all disputes involving depositions for this MDL, including depositions of third-parties. CMO No. 6 includes "special provisions" that specifically lay out the procedures applicable to third-party depositions and was ordered to be

³ The Dell Witnesses' argument appears to boil down to semantics. Whether "jurisdiction" over this discovery dispute resides in Delaware or Texas is of no consequence for purposes of this motion. The law is very clear in either case that the MDL judge has the authority to adjudicate the dispute.

⁴ Order Establishing Date by which Motion Practice for Third Party Discovery May Commence (D.I. 232) and Order Regarding Completion of Party Production (D.I. 466).

served on all third-parties. (*Id.* at ¶5.) Among these provisions is the requirement that a third-party deponent obtain a protective order from *this Court* to avoid a deposition in this MDL:

... Absent some further agreement of the parties and the deponent, **the deposition will commence on the date specified in the subpoena unless the deponent applies for a protective order from this Court pursuant to the Procedures for the Handling of Discovery Disputes Before the Special Master dated June 26, 2006, as amended on October 9, 2007 (available on Pacer). Any such proceeding shall be commenced sufficiently early so as to permit the deposition to proceed on the scheduled start date in the event the application is denied.** (Emphasis in original.)

The Court is fulfilling the mandate of the Panel and the policies underlying that mandate by adjudicating disputes over depositions of third-party witnesses in this MDL.

3. AMD Never Agreed to Have the Western District Court of Texas Adjudicate the Dispute Over How Long the Dell Witnesses Should Sit for Deposition.

The Dell Witnesses argue that AMD entered into a stipulation whereby it allegedly agreed that the Western District Court of Texas should adjudicate all discovery disputes involving Dell and its current and former employees. This argument fails for at least three reasons.

First, the 2005 Preservation Stipulation does not say what the Dell Witnesses claim it says. They rely solely on the following provision: “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.” (Dell Brief, Exh. 1, ¶11.) AMD agreed to follow the standard procedure in MDL cases, which has been applied uniformly to all third-party witnesses in this MDL -- to have the Dell Witnesses’ subpoenas issue out of the District Court where the deponents reside (five out of the Western District of Texas and one out of Massachusetts). AMD did not relinquish its right to ask this Court to adjudicate disputes regarding the Dell deposition subpoenas. Section 1407 expressly empowers an MDL judge to adjudicate discovery disputes involving subpoenas issued outside the MDL district. One of the reasons cases are approved by the MDL panel for consolidation is to avoid the parties having to litigate in District Courts all over the country with the possibility of inconsistent results and forum shopping.⁵

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), defendants in an asbestos MDL pending in the Eastern District Court of Pennsylvania caused subpoenas to issue through the Southern District Court of Texas. The subjects of the subpoenas moved to quash in the Southern District Court of Texas. Those motions were denied, and the Southern District Court of Texas directed all future pleadings in the case to be filed in the Eastern District Court of Pennsylvania, where the MDL was pending. The third-parties filed a petition for writ of mandamus, which the Fifth Circuit denied:

⁵ If anyone has waived rights relevant to this discovery matter it is Dell, which participated fully, and without any reservation of rights, in the proceedings on the Stipulated Protective Order governing confidential information in this MDL. (*See, e.g.*, Exh. E (Dell’s Objections and Comments on Proposed Protective Order).)

Honorable Vincent J. Poppiti

November 21, 2008

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“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)).

Second, the 2005 Preservation Stipulation was entered into on September 2, 2005, prior to the MDL Panel’s order establishing this MDL. (In fact AMD’s Motion for Leave to Serve Document Preservation Subpoenas was granted on July 1, 2005 by Judge Sleet as the case had not yet been assigned to Judge Farnan.) Moreover, the Stipulation was only between Dell and AMD. Intel and Class Plaintiffs were not parties to the stipulation, and each subsequently served subpoenas on Dell.

Third, the 2005 Preservation Stipulation was expressly superseded by the Agreement. On January 1, 2007, Dell, AMD, and *all the other parties* in this MDL entered into the Agreement. After reciting a listing of all the subpoenas served by the parties and by the plaintiffs in the California action and the 2005 Preservation Stipulation and the Supplement thereto, paragraph II.G expressly states: “This Agreement supersedes the subpoenas, the Preservation Stipulation and the supplemental Preservation Stipulation.” (Dell Brief, Exh. A, p. 2). 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,



Adam Balick (DE Bar #2718)

cc: Clerk of the Court
Richard L. Horwitz, Esq.
James L. Holzman, Esq.
Thomas R. Jackson, Esq.
Michael D. Mann, Esq.
Lauren E. Maguire, Esq.
The Honorable Joseph J. Farnan, Jr.

Exhibit A

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

IN RE:)	
)	
INTEL CORP. MICROPROCESSOR)	MDL Docket No. 05-1717-JJF
ANTITRUST LITIGATION)	(Re: D.I. 300)
<hr style="border: 0.5px solid black;"/>		
)	
PHIL PAUL, on behalf of himself and all)	
others similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	C.A. No. 05-485-JJF
)	
INTEL CORPORATION,)	
)	
Defendant.)	

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**SPECIAL MASTER'S REPORT AND RECOMMENDATIONS
REGARDING THRESHOLD ISSUE RAISED BY
CLASS PLAINTIFFS' MOTION TO COMPEL AND OTHER ISSUES**

RECOMMENDATION CONCERNING JURISDICTION AND PROTECTIVE ORDER

INTRODUCTION

The captioned cases are antitrust actions brought against Intel Corporation ("Intel") as the manufacturer of microprocessors that run the Microsoft Windows and Linux families of operating systems (the "x86 Microprocessor Market"), a market in which Intel is alleged to hold worldwide market share measured as 80% of the market in units and 90% of the market in revenues.

The 05-485 action is brought on behalf of a class of consumers who allege economic injury resulting from Intel's alleged anticompetitive and monopolistic practices. The 05-485 action has been consolidated with over 70 other consumer-related actions by the Judicial Panel on Multidistrict Litigation and assigned to this Court, where it is docketed as MDL Docket No. 05-1717 (collectively, the "Class Litigation"). As used herein, the term "Class Plaintiffs" refers to the plaintiffs in the Class Litigation.

The matter *sub judice* comes before me, as Special Master,¹ on the motion of the Class Plaintiffs (D.I. 422 in Case No. 05-1717)² to compel Fry's Electronics, Inc. ("Fry's") to produce certain transactional data pursuant to a documents-only subpoena. Fry's initially questions the jurisdiction of this Court, the transferee court in a multidistrict litigation ("MDL"), to enforce a documents-only subpoena issued from a transferring court in the MDL and directed to a non-party litigant. Further, Fry's seeks to amend the existing Protective Order entered in the Class Litigation (D.I. 277)³ to address its concerns regarding any production of its transactional data. Fry's other objections can be summarized as follows: (i) the Class Plaintiffs have failed to adequately identify the transactional data sought; (ii) the meet and confer process was

¹ The Order appointing Special Master is docketed at D.I. 60 in the 05-1717 MDL docket, and at D.I. 21 in Case No. 05-485.

² Unless otherwise specified, the docket items cited hereinafter refer only to the docket in Case No. 05-1717.

insufficient; (iii) the data sought from Fry's is available from other sources; (iv) the Class Plaintiffs have failed to establish their need for the financial data; (v) to the extent Fry's is required to produce transactional data, the Protective Order should be amended to protect such information; and (vi) the Class Plaintiffs should pay Fry's reasonable expenses in producing documents. Since the Class Plaintiffs and Fry's are continuing to meet and confer on various of these enumerated objections, the Special Master defers addressing any of them at this time.

For the reasons discussed further herein, the Special Master concludes that 28 U. S. C. § 1407 provides this Court, as the transferee court, with the power to enforce a documents-only subpoena issued from a transferring court in MDL and directed to a non-party. Further, while the Special Master acknowledges that the Protective Order allows any "Party" or "Third Party" (as such terms are defined in the Protective Order), for good cause shown, to move for modification of the Protective Order (D.I. 277, ¶ 28), the Special Master concludes that Fry's has failed to establish good cause in this matter to modify the Protective Order.

BACKGROUND

On June 23, 2006, the Class Plaintiffs served Fry's with a documents-only subpoena issued from the United States District Court for the Northern District of California (the "Subpoena"). While the Subpoena seeks the production of documents in addition to data, the motion to compel filed by the Class Plaintiffs on March 29, 2007 (the "Motion to Compel"), is limited to the production of certain transactional data.⁴ D.I. 422 at 1, fn 1.

On April 17, 2007, Fry's filed its objection to the Motion to Compel (the "Objection"). D.I. 323, Case No. 05-485.

³ The Protective Order was also entered in Advanced Micro Devices, Inc. v. Intel Corporation, Case No. 05-441.

⁴ The Class Plaintiffs contend that the data needs to be produced "soon" because of its relevance to the upcoming class certification motion. D.I. 422 at 1, footnote 1, which must be filed on September 7, 2007. D.I. 410.

On April 23, 2007, the Class Plaintiffs filed their reply in support of the Motion to Compel (the “Reply”). D.I. 440. In the Reply, the Class Plaintiffs make clear that they seek production of Fry’s transactional data as such data exists in the ordinary course of business. D.I. 440 at 1. Further, Class Plaintiffs acquiesce to receiving only a “statistically relevant sample” of such transactional data for class certification purposes at this time, but maintain that a full production of data will be required for the merits of their action. D.I. 440 at 3.

On May 1, 2007, the Special Master conducted a hearing on the Motion to Compel (the “May 1 Hearing”), at which counsel for the Class Plaintiffs and counsel for Fry’s argued their respective positions. At the outset of the hearing, the Special Master addressed Fry’s threshold issue concerning this Court’s authority to entertain the Motion to Compel and expressed his intention to issue a report and recommendation concerning the same. Transcript of May 1 Hearing (hereinafter referred to as Tr.) at 7:1 – 9:14.⁵ Thereafter, the Special Master reviewed the process behind the formulation and entry of the Protective Order and Fry’s participation in such process to establish a backdrop for the parties’ respective arguments. Tr. at 9:22 – 15:19.

At the conclusion of the May 1 Hearing, it became apparent that the record was not fully developed as to whether the transactional data, as kept in the ordinary course of Fry’s business, would be in a form useable and useful to the Class Plaintiffs, and, thus, necessary. Tr. at 93:18 – 95:20. To enable the Class Plaintiffs an opportunity to complete the record on this issue, the parties stipulated to an informal review process which is expected to continue as necessary through May 23, 2007. D.I. 459.

⁵ Since Fry’s has requested that a portion of the transcript be docketed under seal, the transcript has not yet been

DISCUSSION

A. Jurisdiction

The federal statute governing multidistrict litigation or MDL, 28 U.S.C. § 1407 (“Section 1407”), provides in pertinent part that: “[t]he judge or judges to whom [MDL] actions are assigned ... 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.” In re Automotive Refinishing Paint Antitrust Litigation, 229 F.R.D. 482, 485 (E. D. Pa. 2005) (citing 28 U. S. C. § 1407(b)) (emphasis added). The purpose of Section 1407 is to create an expedited procedure for the handling of multidistrict litigation, In re Factor VIII, 174 F.R.D. 412, 415 (N. D. Ill. 1997) (“Factor VIII”), and to provide for a unified concept of pretrial proceedings, United States ex rel. Pogue v. Diabetes Treatment Centers of America, Inc., 238 F. Supp. 2d 270, 274 (D.D.C. 2002) (“Pogue”) (citing In re San Juan Dupont Plaza Hotel Fire Litigation, 117 F.R.D. 30, 32 (D.P.R. 1987)).

The overwhelming majority of courts that have considered the issue of whether Section 1407(b) authorizes a transferee judge the power to act as any judge of any district for pretrial depositions as well as subpoenas *duces tecum*, have found that it does. See, e.g., United States ex rel. Pogue v. Diabetes Treatment Centers of America, Inc., 444 F.3d 462, 469 n. 4 (6th Cir. 2006) (“Pogue Circuit Decision”) (“[T]he rationale underlying the MDL statute of ‘just and efficient’ resolution of pretrial proceedings requires the conclusion that Section 1407(b)’s grant of authority applies to both deposition subpoenas and documents-only subpoenas.”); Factor VIII, 174 F.R.D. at 415 (“It would make no sense for [Section] 1407(b) to confer authority to conduct depositions but not the authority to require productions of documents at a deposition.”); Pogue,

docketed.

238 F. Supp. 2d at 274; In re San Juan Dupont Plaza Hotel Fire Litigation, 117 F.R.D. 30, 32 (D.P.R. 1987) (“San Juan Hotel Fire”); In re Sunrise Sec. Litig., 130 F.R.D. 560, 586 (E.D. Pa. 1989); but see VISX, Inc. v. Nidek Co., 208 F.R.D. 615, 616 (N. D. Cal. 2002) (“VISX”) (narrowly reading Section 1407(b) to limit it to strictly deposition disputes and finding that Fed. R. Civ. P. 45 trumps Section 1407 where a documents-only subpoena is at issue).

Similar to the circumstances in the instant matter, in Factor VIII, the plaintiffs moved for an order compelling a non-party, The Marketing Research Bureau, Inc. (“MRB”), to comply with a subpoena *duces tecum*. Factor VIII, 174 F.R.D. at 413. The subpoena *duces tecum* issued out of the United States District Court for the District of Connecticut; the MDL transferee court was the United States District Court for the Northern District of Illinois. Id. MRB refused to comply and the plaintiffs moved the MDL transferee court for an order compelling compliance. Id. MRB challenged the jurisdiction of the MDL transferee court. Id. In reliance upon prior authorities, including San Juan Hotel Fire, 117 F.R.D. 30, In re Corrugated Container Antitrust Litigation, 620 F.2d 1086 (5th Cir. 1980), In re Corrugated Container Antitrust Litigation, 644 F.2d 70 (2d Cir. 1981), In re Sunrise Sec. Litig., 130 F.R.D. 560 (E.D. Pa. 1989), the Factor VIII MDL transferee court held that Section 1407(b) gave it authority to rule, as transferee judge, on the motion to compel compliance with the subpoena issued in the District of Connecticut. Factor VIII, 174 F.R.D. at 415. “This conclusion is not only consistent with the cases, it is consistent with the purpose of § 1407, which is to create an expedited procedure for the handling of multidistrict litigation. Requiring a transferee judge to travel from district to district to hold hearings and rule on discovery matters would hardly be an efficient way of managing consolidated pretrial proceedings.” Id.⁶

⁶ One court has taken a quixotic approach by construing the term “*in any district*” of Section 1407(b) to require the judge to “journey to another district to hear a discovery dispute in that district.” In re Uranium Antitrust Litigation,

In Pogue, relator moved to enforce subpoenas *duces tecum* issued to non-parties that owned the defendants. Pogue, 238 F. Supp. 2d at 272. The subpoenas *duces tecum* issued out of the United States District Court for the Middle District of Tennessee; the MDL transferee court was the United States District Court for the District of Columbia. Id. The non-parties subject to the subpoenas moved to quash the subpoenas, arguing that the MDL transferee court had no jurisdiction to enforce a subpoena *duces tecum* issued by another district court. Id. at 272-73. While noting that “it is not entirely a settled question whether an MDL court may enforce a subpoena *duces tecum* issued by another court” under the grant of Section 1407, the Pogue court held that the “weight of authority and effectuation of the purposes of multi-district litigation support a finding of jurisdiction.” Id. at 273. The “weight of authority” cited by Pogue includes the following decisions, San Juan Hotel Fire, 117 F.R.D. 30, In re Corrugated Container Antitrust Litigation, 662 F.2d 875 (D.C. Cir. 1981), In re Corrugated Container Antitrust Litigation, 644 F.2d 70 (2d Cir. 1981), In re Sunrise Sec. Litig., 130 F.R.D. 560 (E.D. Pa. 1989), and Factor VIII, 174 F.R.D. 412. The Pogue court reasoned as follows:

The language of § 1407 allows a judge to act as another district judge ‘for the purpose of conduction pretrial depositions.’ A subpoena *duces tecum* is an order to appear at a specific place on a specific date with certain documents. A deposition is also an order to appear. A subpoena *duces tecum* can be issued as an incident to a deposition.... The laws and rules governing federal courts strive to minimize elaborate formality and needless procedure. To effectuate those goals and to avoid placing on parties and nonparties from whom documents are sought the burden of holding a pro forma deposition in order to come under the aegis of § 1407, the Court holds that the power to act as the judge of any district for pretrial depositions includes as an incident the power to enforce subpoenas *duces tecum*.

Pogue, 238 F. Supp. 2d at 274-75 (citations omitted).

503 F. Supp. 33, 35 (N.D. Ill. 1980). A subsequent decision from the United States District Court for the Northern District of Illinois declined to follow the Uranium Antitrust interpretation of Section 1407 as compelling the MDL transferee judge to travel to the issuing jurisdiction to resolve disputes. See Factor VIII, 174 F.R.D. at 415.

Similarly, the court in San Juan Hotel Fire considered the interplay between a motion to enforce a subpoena duces tecum issued to a non-party and Section 1407. San Juan Hotel Fire, 117 F.R.D. 30. The court began its analysis with the purpose and policy of multidistrict litigation, which is to “provide for a unified concept of pretrial proceedings.” Id. at 32. The court concluded that to enable the MDL judge fully to exercise the power to act as a judge of any district for pretrial depositions, “it is necessary to append to the transferee judge enforcement powers in relation to subpoenas issued in the deposition district, including depositions and subpoenas addressed to nonparties.” Id. (citation omitted).

Likewise, in In re Sunrise Sec. Litig., 130 F.R.D. 560 (E.D. Pa. 1989), the court held that it had the power to enforce subpoenas *duces tecum* issued from another district court incident to depositions. The court concluded that under Section 1407, “a multidistrict judge may decide a motion to compel a non-party in other districts even if he or she is not physically situated in those districts.” Id. at 586.

More recently, in In re Automotive Refinishing Paint Antitrust Litigation, 229 F.R.D. 482, 487 (E.D. Pa. 2005), plaintiffs moved to compel a non-party foreign witness, CEPE, to respond to plaintiffs’ request for production of documents. The Automotive Refinishing court held that under Section 1407(b) it could adjudicate the motion to compel pursuant to its authority as the MDL transferee court. Id. at 486. In support of its conclusion, the court cited to In re Sunrise Sec. Litig., 130 F.R.D. at 586, for the proposition that Section 1407 authorizes a transferee court judge to sit as the court in “other districts to hear and decide motions to compel discovery from non-parties” and that “a multidistrict judge may decide a motion to compel a non-party in other districts even if he or she is not physically situated in those districts.” Id. at

486. See also *id.* (citing 17 James Wm. Moore et al., Moore's Federal Practice § 112.07[1] [b] (3d ed. 2004) (“[T]he [MDL] judge has jurisdiction to order nonparties to comply with a subpoena *duces tecum* issued by another district judge. There is no requirement that the [MDL] court or judge be physically present in the other district to decide a motion to compel production pursuant to a subpoena issued by another district.” (footnotes omitted)). The Automotive Refinishing court also noted that the Third Circuit has stated *in dicta* that Section 1407(b) “empowers the transferee judge in multidistrict cases to act not only on behalf of the transferee district, but also with ‘the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated proceedings.’” *Id.* at 486 (citing In re Flat Glass Antitrust Litig., 288 F.3d 83, 90 n.12 (3d Cir. 2002) (internal citations omitted)).

Here, the only case cited by Fry’s to support its contest to the jurisdiction of this Court to adjudicate the present dispute is VISX, 208 F.R.D. 615. In VISX, the United States District Court for the Northern District of California was called upon to adjudicate plaintiff’s motion to enforce documents-only subpoenas issued to non-parties outside the Northern District of California. *Id.* at 616. In VISX, the court refused to enforce the documents-only subpoenas at issue, reasoning that: (i) Fed. R. Civ. P. 45(e) provided the only procedure for enforcing a subpoena *duces tecum* is to institute contempt proceedings before the district court that issued the subpoena, and (ii) Section 1407(b) only expands a transferee court’s discovery powers only to pretrial depositions, not documents-only subpoenas. *Id.*

Neither Fry’s nor the Class Plaintiffs advised the Court that, in a subsequent decision, the United States District Court for the Northern District of California declined to follow VISX, concluding instead that Section 1407(b) applied to documents-only subpoenas. See In re Welding Rod Products Liability Litigation, 406 F. Supp. 2d 1064 (N.D. Cal. 2005). More

recently, the Pogue Circuit Decision rejected the VISX decision that Section 1407(b)'s authority did not extend to enforcement of documents-only subpoenas. Pogue Circuit Decision, 444 F.3d at 469 n.4. Specifically, the Sixth Circuit concluded “that the rationale underlying the MDL statute of ‘just and efficient’ resolution of pretrial proceedings requires the conclusion that Section 1407(b)'s grant of authority applies to both deposition subpoenas and documents-only subpoenas.” Id.

Given the United States District Court for the Northern District of California's determination not to follow its earlier VISX decision, the Pogue Circuit Decision's rejection of VISX, and the fact that the VISX decision is at odds with the rationale underlying the MDL statute, the Special Master declines to accord the VISX decision any weight.

Based on the foregoing analysis of the relevant case law, the Special Master concludes that the majority view is the better reasoned view, as it is consistent with the underlying purpose of multidistrict litigation—to provide for a unified concept of pretrial proceedings. Further, the Special Master believes that the Third Circuit would likely adopt the better-reasoned majority view based upon its dicta that Section 1407(b) “empowers the transferee judge in multidistrict cases to act not only on behalf of the transferee district, but also with ‘the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated proceedings.’” In re Flat Glass Antitrust Litig., 288 F. 3d 83, 90 n.12 (3d Cir. 2002). Accordingly, the Special Master recommends that this Court conclude that, under the grant of Section 1407, this Court, as the transferee court in multidistrict litigation, has the authority to adjudicate discovery disputes concerning documents-only subpoenas directed to non-parties and issued from a transferring court.

B. The Protective Order

I. The Process Employed to Finalize the Protective Order.

As set forth at the May 1 Hearing, the formulation and entry of the Protective Order was the result of extensive proceedings, whereby non-parties to the litigation were provided with notice of the proposed protective order and an opportunity to provide written comments to the same and argue as to the propriety of the proposed language.⁷ Tr. at 9:22 – 15:19.

An explication of the “process” is important. The first phase of the process, mandated in part by the Court’s Case Management Order No. 1 (D.I. 79), is generally set forth as follows:

The parties with Court approval, have implemented *a process to obtain third party input on a Protective Order, and the Proposed Protective Order*, as well as the positions of the Parties and third parties will be provided to the Court on or before May 31, 2006.

Case Management Order No. 1. at ¶ 5(b), D.I. 79 (emphasis added).

a. Solicitation of Input From Non-Parties

The first step of the process was to solicit input of non-parties on the proposed protective order. As a result of this process, objections and comments (the “Third Party Objections”) were filed by Fry’s and the following entities: Hewlett-Packard Company; Egenera, Inc.; Best Buy Company, Inc.; Fujitsu Limited; NEC Corporation; Sony Corporation; Sony Electronics, Inc.; Toshiba Corporation; Circuit City Stores, Inc.; Acer America Corporation; ASI Computer Technologies, Inc.; Avnet, Inc.; Ingram Micro Inc.; Synnex Corporation; Tech Data Corporation; Microsoft Corporation; International Business Machine Corporation; Dell Inc.; Lenova Group Ltd.; Hitachi, Ltd.. D.I. 221 at 2-3.

⁷ The process may well have been unprecedented, as counsel for the Class Plaintiffs noted, “I have never been involved where the Court proactively invited third parties to look at a concrete proposal formulated by the parties for a protective order, where they had an opportunity to look at a concrete draft and give written comments as well as to argue as to the propriety of the language. That kind of a proceeding I’ve never seen.” Tr. at 18:3 – 18:10; see also D.I. 461 (suggesting process was unprecedented).

b. Negotiations to Resolve Third Party Objections

The second step in the process was for the parties to engage in discussions with non-parties in an effort to resolve the issues raised in the Third Party Objections and informal responses. This is set forth more fully in the Special Master's Report and Recommendations Regarding Proposed Protective Order (the "Protective Order Report and Recommendations") (D.I. 221) as follows:

Parties' Responses to Objections/Comments

Following the filing of the Third Party Objections, AMD and Intel filed their respective responses and objections to the Third Party Objections. D.I. 148-49. The Parties' responses addressed some, but not all, of the Third Party Objections by voluntary revisions to certain language of the Proposed Protective Order. The Parties, however, were not in complete agreement with respect to the extent to which the Third Party Objections should be accommodated, as well as with respect to the working of the revisions to effect certain of the accommodations. This resulted in competing versions of the Proposed Protective Order pending approval before the Court, as well as outstanding issues with respect to those objections raised by the Third Parties that went largely unaddressed. With the Court's agreement, the Special Master scheduled a hearing on the terms of the Proposed Protective Order and directed the parties to provide appropriate notice to the Third Parties of the hearing.

D.I. 221 at 78.

c. Hearing on Open Disputes Concerning the Protective Order

The issues still in dispute after negotiations were brought before the Special Master at a hearing during which non-parties had an opportunity to argue their respective positions. This step in the process is described in the Protective Order Report and Recommendations as follows:

Hearing re: Proposed Protective Order

On June 9, 2005, prior to the scheduled hearing, the Parties distributed to the Third Parties a revised version of the Proposed Protective Order identifying the changes the parties were willing to make to accommodate certain of the objections posed by the Third Parties, to better allow the scheduled hearing to focus on the provisions remaining in

contention.

On June 12, 2006, the Special Master conducted a hearing at which the parties and Third Parties were afforded an opportunity to be heard with respect to those provisions of the Proposed Protective Order still in dispute. *See* D.I. 143 (Transcript of June 12, 2006 Hearing, docketed in 05-1717). For the sake of efficiency, the Third Parties agreed – without waiving the objections they had previously submitted in written form – to allow counsel for one Third Party to speak as a representative for all Third Parties with respect to issues on which they shared similar views. *Id.* at 44:10-46:12.

At the hearing, the major issue in dispute was whether discovery materials obtained through the captioned litigations before this Court – especially Confidential Discovery Materials – can be used for purposes of the Japan Litigation and the California Class Litigation. The Parties and Third Parties also represented that Definitions J, R, S and U of the “Definitions” section of the Proposed Protective Order contained provisions still in dispute. They also identified Paragraphs 1, 4, 5, 6, 7, 8, 10, 14, 15, 16 and 31 of the “Terms and Conditions” section as containing provisions still in dispute.

During the course of the hearing, the remaining disputes were either (a) resolved by revisions agreed to by both the Parties and the Third Parties; (b) resolved by determinations reached by the Special Master, or (c) taken under advisement for further consideration and recommendation by the Special Master.⁸

D.I. 221 at 78-79.

Fry’s, while choosing to file a Third Party Objection in connection with the Proposed Protective Order on May 22, 2006 (D.I. 98), did not participate in the Special Master’s June 12, 2006 hearing, claiming that it did not have a realistic opportunity to participate, as it did not receive adequate notice of the hearing. D.I. 451 at 5, n.4. Fry’s reiterates this position in its May 9, 2007 submittal, stating that it “could not as a practical matter participate in the hearing, as it would have required travel to Delaware which was not practical under the circumstances (and it had no reason to retain Delaware counsel).” D.I. 467 at 2, n.2. The Special Master finds

⁸ The hearing was conducted pursuant to the Special Master’s authority to manage discovery and to conduct hearings. *See* Fed. R. Civ. P. 53 (b) and (c) and Order Appointing Special Master (D.I. 73 at ¶ 3).

Fry's explanation to be unpersuasive given the participation of other Third Parties. In any event, it should be noted that Fry's objections were duly accepted and considered.

d. The Protective Order Report and Recommendations

The Protective Order Report and Recommendations itself was part of the process, spanning 117 pages described: (a) the Third Party Objections, (b) revisions made to the Protective Order in light of the Third Party Objections and ensuing discussions to resolve such objections, (c) unresolved disputes, and (d) recommendations with respect to such unresolved disputes and the bases supporting the same.

e. Objections to the Protective Order Report and Recommendations

Pursuant to Fed. R. Civ. P. 53(g)(2), parties and non-parties were afforded a twenty-day period within which to file any objection to the Special Master's Protective Order Report and Recommendations. Neither Fry's nor any third party filed any objection. Only Intel and Advanced Micro Devices, Inc. ("AMD") availed themselves of this opportunity, filing their respective objections. D.I. 111 and 112.

f. Entry of the Protective Order

Ultimately, on September 26, 2006, this Court, after considering objections filed pursuant to Fed. R. Civ. P. 53(g)(2) by both Intel (D.I. 111) and AMD (D.I. 112), adopted the Protective Order proposed by the Special Master (D.I. 275) and entered the Protective Order as proposed by the Special Master (D.I. 277). There was no D. Del. L.R. 7.1.5 Motion for Reargument filed by any party or third party.

g. Fry's Participation in the Process

The Class Plaintiffs take the position that the Protective Order is the law of the case, and, regardless, Fry's has not met its good cause burden to effect its change. D.I. 464. Fry's on the

other hand, while asserting that it has shown good cause, attempts to characterize the process leading up to entry of the Protective Order as, in essence, a meet and confer among the parties, the Third Parties and ultimately with the Special Master, and suggesting that Fry's participation or lack thereof in such process should have no consequence. D.I. 467. The Special Master concludes that the participation or lack thereof of Fry's in the established process is a factor that is appropriate to consider in the good cause analysis as to whether the Protective Order should be modified.

2. Fry's Present Concerns Regarding the Protective Order Were Raised Previously

Fry's present concerns with respect to the existing Protective Order were previously raised in the context of Third Party Objections. These concerns were specifically considered in the Protective Order Report and Recommendations and were addressed either through revision or rejected. See D.I. 221, pp. 39-40, 44, 48-49, 81-82, 90, 96-97.

a. Experts/Consultants

Fry's suggests that prior to the disclosure of highly confidential information to any expert or consultant, the party seeking such disclosure should provide Fry's with not less than ten days advance notice of such disclosure, which notice shall identify the expert or consultant, identify the person's title, job responsibilities and affiliations with any party, and include a copy of the person's most recent curriculum vitae that identifies all of such person's past and present employment and/or consulting relationships. D.I. 328 at Ex. E, Case No. 05-485. Further, Fry's suggests that each party should be limited to designate only one expert or consultant who is authorized to receive such highly confidential material. Id.

With respect to seeking the disclosure of the experts/consultants that may have access to its highly confidential information, Fry's did not object to paragraph 11 of the Proposed

Protective Order in its Third Party Objection. D.I. 221 at 44-45; 92-96.

Regardless, a number of third parties did object to paragraph 11 of the Proposed Protective Order. The Protective Order Report and Recommendations described the objections to paragraphs 6(b) and 11 and the resolution of same as follows:

C. Paragraph 6(b) and 11 (revised)

Paragraph 6(b) and 11 address disclosure of Confidential Discovery Materials to Experts/Consultants. The Third Parties objected to the original language of these paragraphs on the basis that it would permit disclosure of their Confidential Discovery Materials to such professionals, without notification to the Third Parties. As argued by the Third Parties:

The technology world is small and getting smaller every day. And who the parties are selecting, and my guess is there's going to be quite a number of experts and consultants in this case, and who they're using may very well be relevant to the non-parties in the context of the ordinary course of their business. . . [T]heir is clearly a legitimate business interest for the non-parties to know who's getting access to their incredibly sensitive information.

D.I. 143 at 88:12-89:6.

The Parties initially argued against the change sought by the Third Parties "simply because there's going to be a lot of experts, a lot of consultants. Many of them are non-testimonial. And both Intel and AMD view that as work product that we wouldn't, in the ordinary course, be disclosing to anybody, nor would we have any obligation to do so." D.I. 143 at 89:13-20. The Parties, however, went on to offer that they would be willing to accommodate the Third Parties' concerns in the spirit of compromise, and agreed to work with the Third Parties to come up with mutually acceptable language.

Following the hearing, by submission dated June 15, 2006, the Parties agreed to revise the concluding paragraph of Paragraph 11 to add the following language:

Except with the consent of the Producing Party, however, Confidential Discovery Material shall not be disclosed to an expert or consultant who at the time of the intended disclosure is an officer or employee of a party. The

Acknowledge of Protective Order signed and executed by a Party's or Class Party's Expert/Consultant [] shall be made available to Third Parties whose confidential Discovery Material is disclosed to that Expert/Consultant, under the express agreement that such Third Parties maintain the information contained in the Acknowledgement in absolute confidence.

Based upon this record, the Special Master concludes that Paragraphs 6(b) and 11 of the Proposed Protective Order, including certain of the proposed revisions agreed to by both the Parties and the Third Parties, is acceptable and recommends that the proposed revision to Paragraph 11 should be reworded as set forth above.

Protective Order Report and Recommendations D.I. 221, pp. 81-82.

While the revisions set forth above do not provide Fry's with 10 days advance notice and the extensive work history in the form of a curriculum vitae that it now seeks, the Protective Order does strike a balance between the interest of non-parties in knowing who will have access to their confidential information and protecting a party's ability to retain its own expert of choice. Accordingly, the Special Master concludes that Fry's has not shown good cause to disrupt this balance and modify the Protective Order in this regard.

b. In-House Counsel and a Two-Tier System

In its proposed revisions to the Protective Order, Fry's suggests a two-tier system – one tier for outside counsel's eyes only in connection with discovery material believed to be extremely confidential and/or sensitive in nature or a "trade secret" (as defined in Fed. R. Civ. P. 26(c) and 45(c)(3)(B)(i)) and a second tier for less sensitive material that would contemplate in-house counsel review. D.I. 328 at Ex. E, Case No. 05-485.

In its Third Party Objection, Fry's also argued for this two-tier approach to protect its highly confidential information from in-house counsel. See D.I. 221 at 39-40 and 48-49. Fry's was not alone with its concern regarding in-house counsel of the parties having access to

Confidential Discovery Material. Id.

The concerns with respect to in-house counsel's access to Confidential Discovery Material were primarily addressed in the revision to Definition G of the Protective Order defining "In-House Litigation Counsel." D.I. 221 at 86-87.⁹ Specifically, the revisions to the definition of In-House Litigation Counsel were designed to expand the categories that would prohibit the disclosure of Confidential Discovery Material to include in-house counsel who are engaged in: (a) the review or negotiation of any contract with a producing party related to the sale of microprocessors, (b) counseling in connection with PC or server manufacturing or operating system or software design or development, and (c) the licensing of Microsoft software or technology. D.I. 221 at 86.

The Proposed Protective Order had already carved out in-house counsel that were engaged in the review and approval of competitive pricing or marketing programs which is, among others, one of Fry's primary concerns. Id.

Further, in response to the concerns raised by the Third Party Objections, the parties proposed to limit the number of in-house lawyers who would receive access to third parties' discovery materials to two lawyers at Intel and two lawyers at AMD. D.I. 221 at 86; D.I. 277 ¶ 6(c). Additionally, the parties proposed to revise paragraph 6(c) of the Protective Order to require notice to the producing parties of the identity of the in-house lawyers who will have access to the discovery materials. D.I. 221 at 48-49 and 86; D.I. 277 ¶ 6(c).

Finally, with respect to Fry's concern regarding where and how in-house counsel have access to Confidential Discovery Material, paragraph 9 of the Protective Order already limited the way in which in-house counsel could view and access Confidential Discovery Material. D.I.

⁹ Although the Protective Order Report and Recommendations refers to Definition J in this regard, it is Definition G of the final version of the Protective Order (D.I. 277) that contains the definition of In-House Litigation Counsel.

221 at 48-49 and D.I. 277 at ¶ 9.

Despite the existing protections in the Protective Order regarding In House Litigation Counsel having access to highly confidential information, Fry's persists in arguing for a two-tier form of Protective Order. At the May 1 Hearing, the Special Master permitted Fry's to supplement its filings with a post-hearing submittal that focused on a protective order entered by Judge Kent A. Jordan in In re Tricor Direct Purchaser Antitrust Litigation, No. 1:05-cv-00340-KAJ and 1:05-cv-00360-KAJ (D. Del.). On May 2, 2007, Fry's submitted its letter and supporting materials, which materials included letter briefs previously submitted to Judge Jordan by counsel for the parties in In re Tricor Direct Purchaser Antitrust Litigation, D.I. 451 through D.I. 453.

The Special Master did not find the protective order entered by Judge Jordan to be particularly instructive to the matter *sub judice*, as every protective order has its own unique history involving the negotiations and concerns of the interested parties that went into its crafting.

Similarly, Fry's directs the Special Master to statements made by Judge Farnan over six years ago in F. Hoffman-La Roche, Ltd. v. Igen International, Inc., Case No. 98-318-JJF, whereby Judge Farnan states: "In this district, highly confidential, assuming the information is properly designated, ... is limited to outside counsel, experts and consultants." D.I. 467, Ex. B.10 At the same time, Fry's in its May 2, 2007 submittal included correspondence from Chief Judge Sue L. Robinson dated March 14, 2006, and an Order dated January 25, 2005, that appear to be directly at odds with the foregoing statement of Judge Farnan. D.I. 452, Ex. C. Specifically, in the March 14, 2006 letter, Judge Robinson writes, "I allow in every case one in-

10 Notwithstanding the earlier statement, Judge Farnan did, of course, adopt the Protective Order Report and Recommendations in its entirety and entered the Protective Order as proposed.

house representative to view the most confidential of documents.” Id.; January 25, 2005 Order (same) at id.

Interestingly, neither Fry’s nor the Class Plaintiffs in their written responses direct the Special Master to any relevant case law on the subject. Fry’s, however, in its May 2, 2007 submittal included correspondence to Judge Jordan dated November 24, 2006, that sets forth relevant case law regarding whether and when it is appropriate to exclude in-house from having access to confidential information. D.I. 452, Ex. C. The Special Master believes that a review of the relevant case law is both instructive and compelling.

The seminal case on the subject is U.S. Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984). U.S. Steel provides that a party’s designation as in-house counsel cannot serve to automatically deny that party access to information deemed confidential. Id. at 1467. See also R.R. Donnelley & Sons Co. v. Quark, Inc., C.A. No. 06-032-JJF, 2007 WL 61885, at *1 (D. Del. Jan. 4, 2007); Affymetrix, Inc. v. Illumina, Inc., C.A. No. 04-901-JJF, 2005 WL 1801683, at *2 (D. Del. July 28, 2006); United States v. Dentsply International, Inc., 187 F.R.D. 152, 159 (D. Del. 1999)¹¹; Motorola, Inc. v. Interdigital Technology Corp., C.A. No. 93-488-LON, 1994 WL 16189689, at *3 (D. Del. Dec. 19, 1994). U.S. Steel further provides that courts must look to the factual circumstances surrounding each individual counsel’s activities, associations and relationships with a party, with a focus as to whether in-house counsel are involved in the competitive decision making process. Id. at 1468. This District has consistently followed U.S. Steel and its “competitive decision making standard” when considering whether in-house counsel should be denied access to highly confidential information.¹² See, e.g., R.R. Donnelley,

¹¹ While court applied the “competitive decision making standard” to the motion at issue because the litigants agreed on such standard, the court acknowledged that non-parties to litigation are situated differently than parties, not having undertaken the risks of disclosure. Id. at 160, n. 7.

¹² It should be noted that a line of cases exists recognizing that courts often afford fuller protection to technological

2007 WL 61885, *1; Affymetrix, 2005 WL 1801683, at *2; Commissariat A L'Energie Atomique v. Dell Computer Corp., C.A. No. 03-484-KAJ, 2004 WL 1196965, at *2 (D. Del. May 25, 2004); Dentsply, 187 F.R.D. at 159-60; Motorola, 1994 WL 16189689, at *3. See also Carpenter Technology Corp. v. Armco, Inc., 132 F.R.D. 24, 27 (E.D. Pa. 1990); Sullivan Marketing, Inc. v. Valassis Communications, Inc., C.A. No. 93-6350, 1994 WL 177795, at *2 (S.D.N.Y. May 5, 1994).

Where in-house counsel are not involved in competitive decision making, courts have routinely refused to bar in-house counsel access to confidential discovery materials. See, e.g., In re Plastics Additives Antitrust Litigation, C.A. No. 03-2038, 2005 U.S. Dist. LEXIS 23771, at *11-12 (E.D. Pa. Aug. 24, 2005) (granting in-house counsel access to confidential discovery materials where no involvement in “competitive decision making”); Carpenter Technology Corp., 132 F.R.D. at 27-28 (allowing senior staff attorney access to confidential information where his affidavit indicated that he had no involvement in decisions regarding pricing of products or services sold, nor did he participate in marketing decisions or product design or production).

While the Special Master did not conduct a hearing focused on named in-house counsel and their precise duties, the Protective Order at issue essentially accomplishes the same result by defining in-house counsel in such a way as to exclude persons who engage in competitive decision making.¹³ The restrictions contemplated by the referenced case law are built into the definition of “In-House Litigation Counsel” which provides as follows:

“In-House Litigation Counsel” means any attorney who is an employee in the legal department of a Party whose responsibilities consist of overseeing the AMD Litigation or the Class Litigation, and who shall not from the date of entry of this

cases (e.g., patent and design information). See, e.g., Safe Flight Instrument Corp. v. Sundstrand Data Control Inc., 682 F. Supp. 20, 22 (D. Del. 1988).

¹³ No third party requested such a hearing.

Protective Order through a period of one (1) year following the conclusion of the AMD Litigation or the Class Litigation, whichever occurs later, be engaged in: (a) the review and approval of competitive pricing or marketing programs; (b) the review of any aspect of microprocessor or chipset manufacturing, (c) the filing or prosecution of patent applications, (d) the review or negotiation of any contract with a Producing Party related to the sale or marketing of microprocessors, (e) counseling in connection with PC or server manufacturing or operating system or software design or development, and (f) the licensing of Microsoft software or technology.

D.I. 277 at Definition G.

The Special Master concludes that Fry's has not met its burden to show good cause in light of the developed case law. Moreover, the Special Master concludes that Fry's commercial or trade secrets are adequately protected under the Protective Order.

3. Fry's Should Not Have A Second Bite of the Apple.

As set forth above, Fry's present concerns with respect to the existing Protective Order were previously raised in the context of Third Party Objections. These concerns were specifically considered in the Protective Order Report and Recommendations and were either addressed in some fashion through revision or rejected. See D.I. 221, pp. 39-40, 44, 48-49, 81-82, 90, 96-97.

Fry's unconvincingly argues that the concerns it previously raised in connection with its Third Party Objection should now be revisited, as warranted by the different landscape confronting Fry's at the present. Tr. 19:6 – 23:13. Specifically, Fry's argues in essence for a second bite at the apple because first, it was not served with the Subpoena until approximately one month after it had filed its Third Party Objection and, therefore, did not have notice with respect to the precise information being presently sought; and second there are now "tens and tens of law firms representing class plaintiffs that want to have access to Fry's data." Tr. 23:8-13.

The Special Master concluded that the timeline in this case belies Fry's arguments:

- July 12, 2005 – Class Plaintiffs filed their class action complaint (D.I. 1, Case No. 05-485);
- October 4, 2005, AMD served Fry's with a documents-only subpoena seeking, among other things, documents sufficient to show (a) financial inducements in connection with the purchase of computer systems, and (b) "retail sell-through of computer systems on a monthly basis since January 1, 2001" (D.I. 440, Ex. F of Volin Decl.);
- May 22, 2006 – Fry's filed its Third Party Objection in connection with the Proposed Protective Order (D.I. 98); .
- June 2, 2006 – Fry's was provided notice of the opportunity to participate in the hearing regarding the Proposed Protective Order prior to its entry, and chose not to avail itself of the opportunity to participate in such hearing (D.I. 122);
- June 23, 2006 – Fry's was served with Class Plaintiffs' documents-only subpoena seeking, among other things, transactional data which is considered a "commercial or technical trade secret" as contemplated by the Proposed Protective Order. (D.I. 206);¹⁴
- June 27, 2006 – The Protective Order Report and Recommendations issued, which included the following language:

* * *

WHEREAS, the preparation for trial of these actions may require the discovery and use of documents and other information which constitute or contain commercial or technical trade secrets, or other confidential information the disclosure of which would be competitively harmful to the producing party ... (D.I. 221, p. 4).

- July 17, 2007, the deadline to file an objection to the Protective Order Report and Recommendations expires pursuant to Fed. R. Civ. P. 53(g)(2) and Fry's does not file any objection to the Protective Order Report and Recommendations;
- September 26, 2007 – The Honorable Joseph J. Farnan, Jr. adopted the Protective Order Report and Recommendations (D.I. 275) and entered the Protective Order (D.I. 277); and
- October 6, 2006 – the time to file a motion for reargument in connection with the entry of the Protective Order expires and Fry's does not file any such motion.

The Special Master concludes that Fry's should not now be heard to complain.

¹⁴ The AMD documents and subpoena and the Fry's documents-only subpoena are in large measure the same. They both seek data which should be considered commercial or trade secret.

C. Fry's Miscellaneous Objections

The Special Master defers consideration on all the objections, pending the on-going meet and confer process that the Class Plaintiffs and Fry's are presently engaged in.

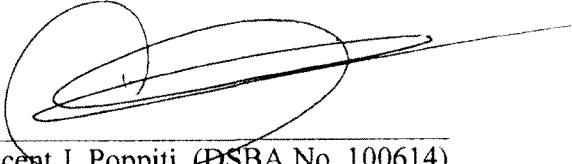
CONCLUSION

For the reasons set forth above, the Special Master concludes as follows:

1. The Court has authority, as the transferee court in multidistrict litigation, to adjudicate discovery disputes concerning documents-only subpoenas directed to non-parties and issued by transferring courts;
2. Fry's has failed to demonstrate good cause to amend the Protective Order;
3. Other Fry's objections are not ripe for consideration.

In accordance with the Court's Order dated May 7, 2007 (D.I. 465), a party may file objections to, or a motion to adopt or modify, the Special Master's Order, Report or Recommendation on any issues related to the Motion to Compel no later than 5 days from the time the Special Master's Order, Report or Recommendation is served.

ENTERED this
18th day of May, 2007



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

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: :
: :
INTEL CORP. MICROPROCESSOR : MDL Docket No. 05-1717-JJF
ANTITRUST LITIGATION : :
: :
PHIL PAUL, on behalf of himself :
and all others similarly :
situated, : **CONSOLIDATED ACTION**
: :
Plaintiffs, : Civil Action No. 05-485-JJF
: :
v. :
: :
INTEL CORPORATION, :
: :
Defendant. :

O R D E R

WHEREAS, the Special Master issued a Report and Recommendation (D.I. 367 in Civ. Act. No. 05-485; D.I. 482 in Civ. Act. No. 05-md-1717) concerning Class Plaintiffs' letter motion seeking to compel Fry Electronic's, Inc. to produce transactional data (D.I. 310 in Civ. Act. No. 05-485; D.I. 422 in Civ. Act. No. 05-md-1717);

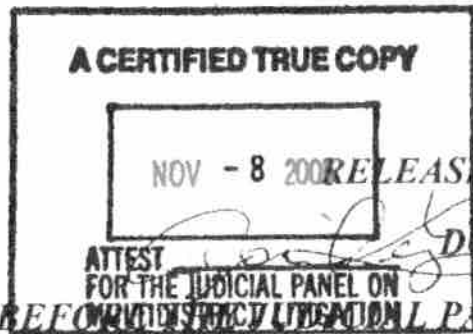
WHEREAS, objections to the Report and Recommendation were due by May 25, 2007, and none have been filed;

NOW THEREFORE, IT IS HEREBY ORDERED that the Special Master's Report and Recommendation (D.I. 367 in Civ. Act. No. 05-485; D.I. 482 in Civ. Act. No. 05-md-1717) is **ADOPTED**.

June 14, 2007
DATE


UNITED STATES DISTRICT JUDGE

Exhibit C



JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

NOV - 3 2005

FILED
CLERK'S OFFICE

JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE INTEL CORP. MICROPROCESSOR ANTITRUST LITIGATION

**BEFORE WM. TERRELL HODGES, CHAIRMAN, JOHN F. KEENAN, D.
LOWELL JENSEN, J. FREDERICK MOTZ, ROBERT L. MILLER, JR.,
KATHRYN H. VRATIL AND DAVID R. HANSEN, JUDGES OF THE
PANEL**

TRANSFER ORDER

This litigation currently consists of fourteen actions listed on the attached Schedule A and pending in two districts as follows: ten actions in the Northern District of California and four actions in the District of Delaware.¹ Pursuant to 28 U.S.C. § 1407, plaintiffs in one Northern District of California action originally moved for centralization of this docket in their California district, but they now favor selection of the District of Delaware as transferee forum. Plaintiff in one of the Delaware actions, Advanced Micro Devices, Inc. (AMD), has stated that it does not object to centralization in the District of Delaware, so long as the Panel orders that AMD's action be allowed to proceed on a separate track within the Section 1407 proceedings. All other responding parties, (i.e. plaintiffs in eight of the nine remaining California actions, the plaintiffs in the three remaining Delaware actions, common defendant Intel Corp., and plaintiffs in various District of Delaware and Northern and Southern District of California potential tag-along actions) support centralization without qualification. With but one exception, all of these additional respondents also support designation of the District of Delaware as transferee forum. The lone dissenter on this point is the plaintiff in a Southern District of California potential tag-along action, who favors centralization in his California district.

On the basis of the papers filed and hearing session held, the Panel finds that the actions in this litigation involve common questions of fact, and that centralization under Section 1407 in the District of Delaware will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. All actions involve allegations that common defendant Intel Corp. monopolized and unlawfully maintained a monopoly in the market for the microprocessing chips that serve as the "brains" of most modern computers. Centralization under Section 1407 is necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings (especially with respect

¹The Panel has been notified of additional related actions recently filed in the Northern and Southern Districts of California, the District of Delaware, the Southern District of Florida, and the Eastern and Western Districts of Tennessee. In light of the Panel's disposition of this docket, these actions will be treated as potential tag-along actions. See Rules 7.4 and 7.5, R.P.J.P.M.L., 199 F.R.D. 425, 435-36 (2001).

to class certification matters), and conserve the resources of the parties, their counsel and the judiciary. Transfer under Section 1407 will have the salutary effect of placing all actions in this docket before a single judge who can formulate a pretrial program that: i) allows discovery with respect to any non-common issues to proceed concurrently with discovery on common issues, *In re Joseph F. Smith Patent Litigation*, 407 F.Supp. 1403, 1404 (J.P.M.L. 1976); and ii) ensures 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. We decline to grant AMD's request to issue specific instructions that could limit the discretion of the transferee court to structure this litigation as it sees fit. As Section 1407 proceedings evolve in the transferee district, AMD may wish to renew its argument that the nature of its claims and/or its status as a litigant would warrant separate tracking for its action within the centralized MDL-1717 proceedings. That argument is one to be addressed to the transferee court, however, and not to the Panel.

In concluding that the District of Delaware is an appropriate forum for this docket, we observe that i) the district is an accessible location that is geographically convenient for many of this docket's litigants and counsel; ii) the district is well equipped with the resources that this complex antitrust docket is likely to require; and iii) the district is the near unanimous choice of all responding parties.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, the actions listed on Schedule A and pending outside the District of Delaware are transferred to that district and, with the consent of that court, assigned to the Honorable Joseph J. Farnan, Jr., for coordinated or consolidated pretrial proceedings with the actions pending there and listed on Schedule A.

FOR THE PANEL:



Wm. Terrell Hodges
Chairman

SCHEDULE A

MDL-1717 -- In re Intel Corp. Microprocessor Antitrust Litigation

Northern District of California

David E. Lipton, et al. v. Intel Corp., C.A. No. 3:05-2669

Maria I. Prohias v. Intel Corp., C.A. No. 3:05-2699

Ronald Konieczka v. Intel Corp., C.A. No. 3:05-2700

Patricia M. Niehaus v. Intel Corp., C.A. No. 3:05-2720

Steve J. Hamilton v. Intel Corp., C.A. No. 3:05-2721

Michael Brauch, et al. v. Intel Corp., C.A. No. 3:05-2743

Susan Baxley v. Intel Corp., C.A. No. 3:05-2758

Huston Frazier, et al. v. Intel Corp., C.A. No. 3:05-2813

Dwight E. Dickerson v. Intel Corp., C.A. No. 3:05-2818

The Harman Press v. Intel Corp., C.A. No. 3:05-2823

District of Delaware

Advanced Micro Devices, Inc., et al. v. Intel Corp., et al., C.A. No. 1:05-441

Jim Kidwell, et al. v. Intel Corp., C.A. No. 1:05-470

Robert J. Rainwater, et al. v. Intel Corp., C.A. No. 1:05-473

Matthew Kravitz, et al. v. Intel Corp., C.A. No. 1:05-476

Exhibit D

may have to the taking of a deposition, including, but not limited to, the location or length, which will be raised promptly and addressed by the Special Master, as required.

1. **Notice and Logistics.**

a. **Deposition Point Person.** Intel, AMD, and Class Plaintiffs each will appoint a deposition point person to whom all communications regarding depositions will be sent. The parties will cooperate to expand the notifications as necessary and convenient, but for a communication concerning the notice or scheduling of a deposition to be effective it must be made by email to the deposition point person(s).

b. **Advance Notice Of Depositions.** Between the first and fifth of each month, each side will notify the other by e-mail or letter of the depositions each party wishes to take the following month, including third parties, and will include in the notification the estimated number of hours of examination by the noticing party. For party witnesses, the e-mail or letter should be followed-up by a formal deposition notice within 7 days. The deposition notice need not include a specific date or location to be effective, nor does it need to comply with the seven (7) day notice provision set forth in Local Rule 30.1. For 30(b)(6) depositions, the initial e-mail or letter should include a preliminary list of the topics of examination for that deposition. A final list of the topics of examination should be provided with the formal deposition notice within 7 days. Subpoenas will be prepared and served on witnesses as required, although the parties agree to cooperate to minimize the burdens. Absent unusual circumstances or compelling scheduling issues, party related witnesses (*i.e.*, current and former employees of a party) will be produced for deposition in the month requested, and third party depositions should also, to the extent possible, take place in the month requested.

c. Scheduling of Depositions. The parties will use best efforts to confirm the dates and locations for depositions as soon as practicable but no later than 14 calendar days after receipt of the letter requesting the depositions. The date for a deposition shall be final or “locked in” and not subject to further change 10 days before the deposition is scheduled to take place, absent agreement of the parties or a specific showing of unavoidable good cause.

d. Reporting and Videotaping of Depositions. The parties have entered into a joint arrangement with a court reporting and videographer firm that will govern all depositions. All depositions will be videotaped unless the noticing side informs the parties to the contrary. For purposes of tabulating deposition hours each party has used, the videographer shall track to the nearest quarter-hour (rounding up) the time consumed by each party’s examination (which is defined as the time from commencement of the examination through completion, excluding breaks), and the videographer shall announce the totals on the stenographic record at the conclusion of each day of examination. In the event a deposition is not videotaped, time-tracking shall be performed by the court reporter.

e. Numbering of Deposition Exhibits. The parties will meet and confer to develop a protocol for the numbering of deposition exhibits to facilitate use of depositions at trial. The parties have agreed on distinct exhibit number ranges for use in depositions: AMD will use exhibit numbers 1 to 5000, Intel will use exhibit numbers 5001 to 10000, and Class Plaintiffs will use exhibit numbers 10001 to 15000. Additional ranges will be assigned, if need be. Each party, with assistance from the court reporters,

will track its own deposition exhibits and use their numbers sequentially from one deposition to the next by the same party.

f. Deposition Hour Allocations. The parties are collectively allocated 2,086 hours of merits depositions exclusive of expert depositions. AMD and Class Plaintiffs are collectively allotted 1,147 hours; Intel is allocated 939 hours. For scheduling purposes, a full day of deposition shall consist of 7 hours of examination.

2. Location and Other Scheduling Issues.

Depositions will be held in a city convenient to the deponent. The specific location of the deposition in that city will be selected by the deposing lawyer. Depositions lasting more than one day will be conducted day to day, unless the witness agrees to an adjournment requested by the examining party or unanticipated scheduling exigencies otherwise requires. Attendance and conduct at a deposition will be governed by Local Rules 30.3 and 30.6 and the protective order entered in this case.

3. Special Master

The parties agree that discovery issues that arise during depositions may be presented telephonically to the Special Master. Any decisions made in connection with such issues, except those involving privilege or other immunity or protection from disclosure, will be final and not subject to further review by the Court. Any objections raised will be deemed preserved for all purposes.

4. Review, Signing, and Custody of Transcript.

The parties agree that that the original transcript will be sent to the attorney defending a witness, who will then promptly forward the transcript to the witness to review. Subject to reasonable extensions, which will be freely given, party witnesses will

have thirty days from the date the transcript is sent by the court reporter to the defending attorney to review and sign the transcript, and the attorney will notify all parties of changes or corrections promptly, but no later than five (5) days after receiving them. The attorney representing a party witness or the attorney for the party that requested or noticed a third party deposition shall maintain custody of the original transcript and make it available upon reasonable request. The parties agree that copies of a transcript may be used as if they were the original litigation transcript, including where a witness fails to sign the original transcript for any reason after given an opportunity to do so, subject to the protective order.

5. **Special Provisions Applicable to Third-Party Depositions**

a. **Service of Notification.** In the case of deponents who are neither current nor former employees of a party, or other persons who are not under the control of a party, the notification provided for in Paragraph 1(b) will also be served on (i) the deponent if unrepresented, or counsel known to represent the deponent in this litigation, and (ii) in the case of current or former employees of any entity served with a subpoena in this case, the entity or any counsel representing it. Service to the deponent will be by certified mail, and email, where available and reasonably ascertainable. All notices served under this paragraph will include a copy of this Order. Should the non-noticing party contemplate conducting an examination of the deponent lasting more than one hour, it will provide to the same persons a counter-notice setting forth the estimated duration of its examination.

b. **Scheduling of Deposition.** Any person receiving such a notice (and counter-notice), or counsel acting on his or her behalf, will provide date(s) for the

commencement of the deposition in the month requested as soon as practicable but no later than 14 calendar days after receipt of the letter requesting the deposition. The proposed date(s) should be sufficient to accommodate the time estimates of the parties. Upon receiving a proposed start date, the requesting party will promptly cause a subpoena for that date to be served on the deponent or any counsel authorized by the deponent to accept service. In the event the deponent or his/her representative fails timely to provide a start date, the deposition will be noticed for a date selected by the requesting party. Absent some further agreement of the parties and the deponent, **the deposition will commence on the date specified in the subpoena unless the deponent applies for a protective order from this Court pursuant to the Procedures for the Handling of Discovery Disputes Before the Special Master dated June 26, 2006, as amended on October 9, 2007 (available on Pacer). Any such proceeding shall be commenced sufficiently early so as to permit the deposition to proceed on the scheduled start date in the event the application is denied.**


c. Disputes Over the Scheduling of Third-Party Depositions. The parties recognize that document productions, including some third party productions, are ongoing. A party receiving notice of a proposed third-party deposition that believes the deposition is premature given the status of pertinent document productions, will within seven days provide a written objection to the requesting party and to the deponent. Any scheduling dispute the parties are unable to resolve shall promptly be brought to the attention of the Special Master for resolution. The pendency of any such dispute, however, shall not relieve the deponent and the parties of their scheduling obligations under this Order.

d. **Local Rule 30.6.** Local Rule 30.6 shall apply to the defense of third-party depositions.

6. **Third Party Document Production Cut-Off.** So as to permit timely completion of third-party depositions, all third parties currently under subpoenas duces tecum are ordered to complete their production of documents on or before August 29, 2008. Plaintiffs shall so inform third-parties of this production cut-off by serving copies of this Order on them or their counsel. **Any third-party that believes it cannot comply with this deadline shall apply to this Court for relief from it on or before July 1, 2008.**

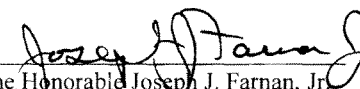
7. **Reports to the Special Master.** Within fifteen days of the end of every second month (beginning July 15, 2008), the parties will jointly report to the Special Master on the number of hours of depositions each has expended during the preceding two months and any issues relating to progress of the depositions, or any other issues, that have arisen in connection with the depositions.

ENTERED this 20th day of June, 2008.



Vincent J. Poppiti (#100614)
Special Master

SO ORDERED this 20 day of June, 2008.



The Honorable Joseph J. Farnan, Jr.
Delaware District Court Judge

Exhibit E

JONES DAY

2727 NORTH HARWOOD STREET • DALLAS, TEXAS 75201-1515
TELEPHONE: 214-220-3939 • FACSIMILE: 214-969-5100

Direct Number: (214) 969-2963
dtconrad@jonesday.com

JP668299:mmb

May 19, 2006

VIA E-MAIL AND FEDERAL EXPRESS

Ron Eberhard
Clerk of U.S. District Court
District of Delaware
J. Caleb Boggs Federal Building
844 King Street
Lockbox 18
Wilmington, DE 19801

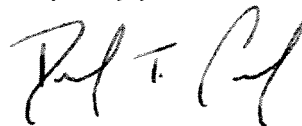
Re: *Advanced Micro Devices, Inc., et al. v. Intel Corp., et al.* (C.A. No. 05-441-JJF)
In re Intel Corp. Microprocessor Antitrust Litigation (MDL No. 1717-JJF)
Paul v. Intel Corp. C.A. No. 05-485-JJF

Dear Mr. Eberhard:

Enclosed for filing in the above matter please find non-party Dell Inc.'s ("Dell's") Objections and Comments on the Proposed Protective Order in the above-referenced matter. As a non-party to the above matter, Dell files these comments and objections pursuant to the Stipulation and Order regarding the Protective Order approval process, signed by Judge Farnan on May 11, 2006.

We will also transmit paper copies of this letter and the originally executed copy of Dell's objections. If you have any questions regarding these matters, please do not hesitate to contact me.

Very truly yours,



Daniel T. Conrad

Enclosure

[DLI-6004781v1]

ATLANTA • BEIJING • BRUSSELS • CHICAGO • CLEVELAND • COLUMBUS • DALLAS • FRANKFURT • HONG KONG • HOUSTON
IRVINE • LONDON • LOS ANGELES • MADRID • MENLO PARK • MILAN • MOSCOW • MUNICH • NEW DELHI • NEW YORK • PARIS
PITTSBURGH • SAN DIEGO • SAN FRANCISCO • SHANGHAI • SINGAPORE • SYDNEY • TAIPEI • TOKYO • WASHINGTON

BACKGROUND

After AMD commenced this action against Intel, AMD notified Dell that it planned to subpoena certain documents from Dell. Dell and AMD thereafter entered into a Stipulation Re: Preservation of Documents, which was entered by the Court on September 12, 2005. On October 4, 2005, AMD served a subpoena on Dell seeking production of certain information. Dell and AMD later entered into a Supplemental Stipulation Re: Preservation of Documents.

AMD and Dell are currently negotiating the scope and procedures for Dell's document production. Intel has indicated that it intends to serve a subpoena on Dell in June 2006.

OBJECTIONS AND COMMENTS

Dell has the following objections to and comments on the Proposed Order:

I. **Dell's Confidential Discovery Material Should Be Protected At Trial And During Other Court Proceedings – Paragraph 14**

The Proposed Order contains a provision for AMD, Intel, and the Class Parties (the "Parties," as defined in the Proposed Order) to meet and confer for the purpose of determining which documents require confidential treatment for trial. (Proposed Order ¶ 14.) But the Proposed Order provides no protection for a Third Party's Confidential Discovery Material. Dell requests that the Court require the Parties to give Dell 10 days' written notice and to meet and confer with Dell if any of the Parties anticipates using Dell's Confidential Discovery Material at trial or other court proceeding. Such a provision would allow Dell the opportunity to take steps to protect its Confidential Discovery Material while not unreasonably burdening the Parties.

Dell requests that the following language be added to Paragraph 14:

"Before the Parties may use Confidential Discovery Material of a Third Party at trial, a hearing, or other open court proceeding, they are required to give the Third Party 10 days' written notice."

II. Dell's Confidential Discovery Material Should Be Protected In Depositions – Paragraph 5

Paragraph 5 of the Proposed Order provides a mechanism to treat deposition testimony as confidential, but this paragraph does not provide adequate protection to Third Parties. Since Dell is a non-party, it will not be attending all depositions, which makes it difficult -- if not impossible -- for Dell to protect its Confidential Discovery Material used during depositions, especially of former Dell employees or witnesses who have never been a Dell employee but whom might be shown Dell Confidential Discovery Material. Moreover, it would be unfair, as currently provided in Paragraph 5, for such a "witness or his or her attorney" to be given the transcript for purposes of designating it as confidential, as neither the witness nor their attorney would necessarily have Dell's interests in mind. (*See* Paragraph 5.) For that same reason, it would also be unfair for "those attending the deposition" to "agree at its conclusion that it may be treated as non-confidential." (*Id.*)

Dell requests that all deposition questions, testimony, and exhibits reflecting its Confidential Discovery Material be automatically designated as Confidential Discovery Material and that no such designation may be changed unless Dell is afforded the procedures of Paragraph 16 of the Proposed Order. Dell requests that the following language be added to Paragraph 5:

"If Confidential Discovery Material of a Third Party is disclosed in questions, answers, objections, exhibits, or otherwise during a deposition, the entire deposition (including exhibits) shall be designated "Confidential Discovery Material" unless and until the Third Party otherwise agrees or the procedures of Paragraph 16 are followed. No witness, attorney, or other person attending the deposition, unless it is an attorney for the Third Party, may make any agreement or designation to the contrary."

III. Witnesses Should Be Required To Sign An Acknowledgement Of Protective Order Before Being Shown Dell's Confidential Discovery Material – Paragraph 10

Paragraph 10 addresses the use of Confidential Discovery Material with a Producing Party's former employees and the author / recipients of the Confidential Discovery Material.

Paragraph 10, however, does not require that such a witness be informed of the protective order *before* counsel discloses Confidential Discovery Material and does not *require* the witness to sign the Acknowledgment of Protective Order. Further, Paragraph 10 provides that former employees of one Party who are currently employed by the opposing Party may not be shown Confidential Discovery Material, but no such protection exists for Third Parties.

Dell requests three changes to Paragraph 10. First, the first word of Paragraph 10 – “upon” – should be changed to “before,” much like Paragraph 11. Second, if the witness refuses to sign the Acknowledgement of Protective Order, Dell should be given 10 days’ written notice and have the opportunity to determine whether, for example, a former employee is bound by a confidentiality provision in a Dell employment agreement or is otherwise independently bound to keep Dell’s information confidential. If the witness has no such obligation, Dell would then have the opportunity to seek relief from the Court regarding whether and the extent to which the witness could be provided access to Dell’s Confidential Discovery Material. Third, if a former Dell employee or other potential witness is employed by a Dell competitor or other Producing Party, that witness should not be shown Dell Confidential Discovery Material except by separate written agreement.

These changes would afford Dell reasonable protection while not unduly burdening the Parties. Dell requests that Paragraph 10 be replaced with the following:

“Before disclosing Confidential Discovery Material pursuant to paragraphs 6(f) or 6(g), other than to a current employee, director, agent or Rule 30(b)(6) designee of the Producing Party, counsel shall inform the witness of the existence of this Order, the confidential status of the information disclosed, and the restriction that the information not be further disseminated or used for any purposed other than the litigation. Before the disclosure, the witness shall sign and be provided a signed copy of the Acknowledgement of Protective Order set forth and attached hereto. If the witness will not sign the Acknowledgement, the Confidential Discovery Material may not be disclosed. Counsel may thereafter provide 10 days’ written notice to the Third Party whose Confidential Discovery Material is

at issue. The notice shall identify the witness and the Confidential Discovery Material involved with specificity (by document control numbers, deposition transcript page and line references, or other means sufficient to easily locate such materials). Unless agreement is reached or the Court orders otherwise, at the end of 10 days, the Confidential Discovery Material may be disclosed to the witness under the same terms as if the witness had executed the Acknowledgement of Protective Order. No copies of Confidential Discovery Material shall be provided to a witness other than for purposes of the deposition examination without the written consent of the Producing Party. No Confidential Discovery Material of a Party shall be shown to a former employee of a Party employed by the opposing Party, except pursuant to separate written agreement. No Confidential Discovery Material of a Third Party shall be shown to a witness employed by a competitor of that Third Party or other Producing Party, except pursuant to separate written agreement.”

IV. Dell Should Be Notified And Given The Opportunity To Protect Its Confidential Discovery Material That Is Filed Under Seal If That Information Might Be Unsealed – Paragraph 23

The Proposed Order contemplates that the Parties could file Dell Confidential Discovery Material so long as it is filed under seal. (Proposed Order ¶¶ 23-24.) The Proposed Order does not, however, contain any procedure requiring the Parties to give Dell notice before any effort is made to unseal its Confidential Discovery Material. Dell requests a 10-day written notice and asks the Court to add the following language to Paragraph 23 of the Proposed Order:

“Before the Confidential Discovery Material of any Third Party may be unsealed, the Parties are required to give the Third Party 10-days’ written notice of the possibility that the material might be unsealed. The notice shall identify the Confidential Discovery Material involved with specificity (by document control numbers, deposition transcript page and line references, or other means sufficient to easily locate such materials).”

V. Dell Should Be Informed Of The Identities Of In-House Litigation Counsel Given Access To Its Confidential Discovery Material – Paragraph 6(c)

Paragraph 6(c) provides that the identity of “In-House Litigation Counsel” shall be disclosed to the opposing Party, but it says nothing about Third Parties. Dell requests that it too be provided the identities of In-House Litigation Counsel to whom its Confidential Discovery Material is shown. Dell requests that Paragraph 6(c) be replaced by the following:

“Two In-House Litigation Counsel identified to the Producing Party;”

VI. Dell’s Confidential Discovery Material Should Not Be Used In The “Japan Litigation” Until The Japan Court Permits Discovery And Enters An Adequate Protective Order

There are various provisions of the Proposed Order that would allow Dell’s Confidential Discovery Material to be used in the Japan Litigation. (*See, e.g.*, Definitions B, I, K, L, O and ¶¶ 1, 2, 6(d), 6(h), 8, 11, 17, 18, 20-22, and 26-28.) But the Japan court has apparently not entered any protective order, the Parties have not indicated that they have requested a protective order, and it is unclear whether the Japan court will do so or that it even has the power to do so. (*See id.* ¶ 6(d) (recognizing that the Japan court has not instituted procedures to protect confidentiality) and ¶ 21 (same).) Due to this uncertainty, Dell asks the Court to modify the Proposed Order to disallow discovery conducted under this Court’s protective order to be used in the Japan Litigation. If and when the Japan Court addresses third-party discovery and confidentiality, Dell will be in a position to evaluate the protections offered by that court and express any concerns at that time. Moreover, AMD and Intel should not be able to end run discovery protections that might be available to non-parties in the Japan Litigation by conducting U.S.-based discovery and shipping it all to Japan. If Dell is entitled to protections from discovery in the Japan litigation, Dell should not be forced to waive those protections by participating in discovery in this case.

Dell requests that the Japan Litigation be excluded from the Proposed Order entirely, including the following: (1) that Definitions B, K, and O be deleted, (2) that Definitions I, J, L, and M have references to “Japan Litigation” removed, (3) that Paragraphs 1, 2, 6(d), 8, 11, 17, 18, and 26-28 have references to “Japan Litigation” removed, (4) that Paragraphs 6(h) and 20-22 be deleted, and (5) that the Japan Counsel and Japan Expert/Consultant Acknowledgement of Protective Order be deleted.

VII. Dell Should Be Able To Produce All Responsive Information Without The Burden Of The Proposed Notification Process – Paragraph 18

As a buyer of microprocessors and chipsets, Dell has received from both AMD and Intel technical and financial information that AMD and Intel consider confidential to themselves. Dell estimates that it has thousands of documents that may contain confidential AMD or Intel information. Dell is prepared to produce to all Parties -- with the confidentiality legend required by the Proposed Order – the information it has received from AMD and Intel.

The Proposed Order, however, would require Dell to engage in the burdensome and costly process of a document-by-document analysis to determine whether a responsive document might contain information that AMD or Intel consider to be confidential, give notice to AMD or Intel of the possible production, wait to see if AMD or Intel have objections to the production, and then wait until any objections are resolved. (Proposed Order ¶ 18.) Neither AMD nor Intel have explained why Dell cannot produce their Confidential Discovery Material to the other party so long as it is labeled “confidential” as required by the Proposed Order. Moreover, as a non-party to this matter, Dell should not be required to devote the substantial attorney time it would take to resolve confidentiality issues on a document-by-document basis. Dell requests that the first sentence of Paragraph 18 remain in the Proposed Order, but that the remainder of that paragraph be deleted. Alternatively, Dell requests that AMD and Intel simply agree that it can produce documents without regard to the process set forth in Paragraph 18.

VIII. Dell Should Have More Than 10 Days To Respond To A Challenge To A Confidentiality Designation

AMD and Intel have agreed to respond to each other within 10 days of a challenge to confidentiality designations. (Paragraph 16.) No doubt AMD and Intel will have armies of lawyers working on this case for years to come. Dell, on the other hand, will have little or no involvement in this litigation once it produces documents. If Dell’s confidentiality designations

are challenged, it will reasonably take more than 10 days to respond to such a challenge. Dell requests that the “ten (10) court days” provision of Paragraph 16(a), (b), and (e) be changed to “thirty (30) calendar days” for challenges to Third-Party designations.

IX. Miscellaneous

A. Definition J Should Extend to the Conclusion of “All” Litigation, Not “Any” of the Litigation

Definition J (“In-House Litigation Counsel”) restricts certain conduct for a period of “one year following the conclusion of *any* of” the litigation. The word “any” should be changed to “all” to effectuate the apparent intent of the definition – to prevent in-house counsel for a Party who has been permitted access to Confidential Discovery Material from engaging in certain business/legal functions for one year after the litigation is concluded. The definition could alternatively be modified to track the “whichever occurs later” language of Paragraph 8, which refers to a one-year prohibition on In-House Litigation Counsel participating in the patent process.

B. Definitions J, L, and M Omit Reference to “California Class Litigation”

Definition J (“In-House Litigation Counsel”), Definition L (“Producing Party” and “Receiving Party”) and Definition M (“Third Party”) refer to the AMD Litigation, the Class Litigation, and the Japan Litigation, but they do not refer to the California Class Litigation. Counsel for AMD informed Dell that the omission appeared to be inadvertent. If intentional, however, Dell reserves the right to respond to any explanation of the purpose of intentionally omitting this litigation from these definitions.

C. Paragraph 15 Omits Reference To “Japan Litigation”

Paragraph 15 refers to the AMD Litigation, the Class Litigation, and the California Class Litigation, but it does not refer to the Japan Litigation. It is unclear whether this omission was

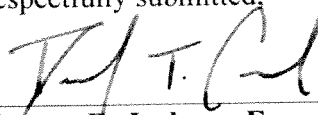
intentional. As noted above, Dell believes that the Proposed Order should not allow for discovery in the Japan Litigation. Nevertheless, should the Court allow the Parties to use Confidential Discovery Materials of Third Parties in the Japan Litigation, Dell asks the Court to include "Japan Litigation" in Paragraph 15.

D. Paragraph 6(b) May Contain An Incorrect Reference

Paragraph 6(b) refers to "limitations set forth in Paragraph 10 herein." It appears to Dell that this provision should reference Paragraph 11, rather than Paragraph 10.

Dated: May 19, 2006

Respectfully submitted,



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Daniel T. Conrad, Esq.
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2727 North Harwood Street
Dallas, Texas 75201-1515
Telephone: 214-220-3939
Facsimile: 214-969-5100

Attorneys for Dell Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on May 19, 2006, a true and correct copy of Dell Inc.'s Objections and Comments to Proposed Protective Order was sent to the clerk's office to be filed electronically and, pursuant to the Court's May 1, 2006 Order, served contemporaneously on the following:

Frederick L. Cottrell, III at cottrell@rlf.com

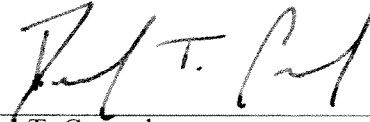
Chad M. Shandler at shandler@rlf.com

Richard W. Horwitz at rhorwitz@potteranderson.com

W. Harding Drane, Jr. at wdrane@potteranderson.com

James L. Holzman at jlholzman@prickett.com

J. Clayton Athey at jcathey@prickett.com



Daniel T. Conrad