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December 4, 2008

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

VIA ELECTRONIC FILING AND HAND DELIVERY

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

Dear Special Master Poppiti:

We submit the following letter brief¹ with respect to the number of deposition hours five current Dell Inc. (“Dell”) employees and one former Dell employee (collectively, “Dell Employees”)² will be forced to endure as non-parties to this MDL proceeding. As Dell has stated in its previous submissions to this Court, in submitting this letter brief, Dell is not admitting that it is subject to the jurisdiction of this Court with respect to any issues that may arise.

Statement of the Issue in Dispute

Whether the parties’ request to depose the six Dell Employees for at least 129 total hours constitutes an undue burden on the non-party Dell Employees in violation of Federal Rules 30 and 45. Also, whether Dell’s current CEO and Chairman, Michael Dell, and Dell’s former CEO, Kevin Rollins, ought to even be scheduled for deposition before the other four Dell Employees and relevant Intel witnesses.

Argument and Authorities

Pursuant to Federal Rules 45(c)(3)(A)(iv) and 30(d)(1), the Dell Employees should not be subjected to more than 1 day of 7 hours of deposition testimony. The parties have cumulatively requested an average of more than 21 hours for each Dell Employee. AMD itself has requested 96 total hours, between 12 and 21 hours for each Dell Employee.

On their face, these time requests constitute an undue burden under Rule 45(c)(3)(A)(iv). Dell and the Dell Employees are non-parties in this MDL proceeding, and their testimony will

¹ We reserve all rights to have this dispute resolved in the Western District of Texas. On November 20, 2008, the current Dell Employees filed a motion to quash or for protective order in the Western District, which motion is set for hearing on December 5, 2008. Further, we reserve all rights to object to the Special Master’s Report and Recommendation Regarding Threshold Jurisdictional Issue Raised by Current and Former Employees of Non-Party Dell Inc.

² The current Dell Employees are Michael Dell, CEO and Chairman of the Board; Jeff Clarke, Senior Vice President of Business Product Group; Dan Allen, Director of Worldwide Procurement; Alan Luecke, Director of CTO Strategy; and Jerele Neeld, Senior Manager of Product Group Quality Customer Experience. The former Dell Employee is Kevin Rollins, Dell’s former CEO.

largely be cumulative as between them and Intel witnesses.³ Accordingly, the Dell Employees request that the Court limit the depositions of Mr. Allen, Mr. Clarke, Mr. Luecke, and Mr. Neeld, to no more than one day of seven hours, as provided by Rule 30(d)(1) and delay the depositions of Mr. Dell and Mr. Rollins until the other Dell Employees have been deposed and reasonable time limits can be assessed for the issues for which Mr. Dell and Mr. Rollins will be asked to testify given their status as current and former CEO's of Dell.

A. Background

Dell is a non-party to this MDL proceeding and has produced (nearly 450,000 documents). And it has provided a corporate representative to testify on certain "transactional" (i.e., pricing) data. As that document production wound down, AMD and Dell began negotiating the number and length of depositions of Dell witnesses. AMD initially sought to depose more than thirty Dell-related witnesses but eventually agreed to limit that request to one former and five current Dell employees—the Dell Employees, five of whom are or were senior Dell executives.⁴

On November 4, 2008, AMD served a subpoena issued out of the District of Massachusetts on Mr. Rollins. The following day, AMD served subpoenas issued out of the Western District on the current Dell Employees. Since that time, Class Plaintiffs have served tag-along subpoenas, originally all issued out of the Western District, but now corrected to follow AMD's lead.

The current Dell Employees are all long-term employees of Dell and have very busy schedules running Dell's regular business. AMD and Class Plaintiffs apparently seek to depose the Dell Employees about the vendor-supplier relationship between Intel and Dell in the hopes of eliciting testimony that Intel had monopoly power, which Intel improperly used to cause Dell not to use AMD as an alternative microprocessor supplier. Discovery on that topic should not require protracted questioning. Dell's consistent goal, both then and now, was to obtain high quality microprocessors at the best possible price.

The Dell Employees were involved in the vendor-supplier relationship with Intel to varying degrees. Dan Allen and Jeff Clarke had day-to-day responsibility for negotiating all aspects of the relationship with Intel. Alan Luecke was involved in Dell's product design, which necessitated some interaction with Intel on product plans, and Mr. Luecke occasionally provided his guess as to Intel's reaction were Dell to switch some of its microprocessor supply to AMD. But he had no role in the Intel negotiations. Jerele Neeld, for a time, was responsible for managing the details of Intel sales incentive programs. Michael Dell and Kevin Rollins had no day-to-day responsibilities with the Intel relationship but were infrequently involved in negotiations given the volume of Dell's purchases.

The time limits that have been suggested reflect an intent to try to explore each and every email or conversation between Intel and Dell. This approach is not a proper way to deal with the time of non-parties and it forces Intel to seek equal amounts of time in order to defend itself. Even more distressing is the fact that AMD has chosen to proceed with the Dell Employees

³ Current Dell Employees have filed a Motion to Quash the Deposition Subpoenas or, Alternatively, for Protective Order in the Western District of Texas. AMD's opposition brief is due December 4, 2008. The District Court has set a hearing on that motion for December 5, 2008 at 2:00 p.m.

⁴ Mr. Neeld is not a senior Dell executive.

before deposing the key Intel witnesses.⁵ Taking the Intel witnesses first would clearly result in less time with—and less burdensome to—the Dell Employees.

AMD has insisted on deposition time periods that are three to four times those permitted by the Federal Rules. Specifically, all parties to this litigation have sought the following time allowances—greatly exceeding 7 hours for all of the Dell Employees:⁶

	<u>AMD</u>	<u>Class</u> ⁷	<u>Intel</u> ⁸
Dan Allen	21 hours	2 hours	Half of total time
Jeff Clarke	21 hours	2 hours	Half of total time
Alan Luecke	14 hours	2 hours	Half of total time
Jerele Neeld	14 hours	2 hours	Half of total time
Kevin Rollins	14 hours	2 hours	Half of total time
Michael Dell	12 hours	2 hours	Half of total time

In total, these figures amount to, *at a minimum, 129 hours* for the six Dell Employees.⁹

B. The Subpoenas Should Be Quashed Because They Seek Testimony Time That is Unreasonable, Unnecessary, and Would Subject Dell Employees to Undue Burden.

The Subpoenas should be quashed because they impose an unreasonable and undue burden on Dell Employees, in violation of Rule 45(c). In issuing a subpoena on non-parties, the issuing party “must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.” Fed. R. Civ. P. 45(c)(1). And the issuing court “must quash or modify a subpoena that . . . (iv) subjects a person to undue burden.” Fed. R. Civ. P. 45(c)(3)(A); see also *Bagwell v. Rival Consumer Sales Corp.*, No. EP-06-CA-117-FM, 2006 WL 2883137, at *2-3 (W.D. Tex. Sept. 19, 2006) (granting motion to quash deposition subpoena). A party seeking to quash a subpoena bears the burden of persuasion. See *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004) “Whether a burdensome subpoena is reasonable must be determined according to the facts of the case.” *Id.*

The facially unreasonable burdens sought to be imposed on the Dell Employees are amplified by the Dell Employees’ status as non-parties to this MDL proceeding and, by and large, senior Dell officers or employees. See *Williams v. City of Dallas*, 178 F.R.D. 103, 112 (N.D. Tex. 1998) (holding that the fact that movants are non-parties is an “important factor that the court may consider in deciding whether to quash the subpoenas”); *Cmedia, LLC v. Lifkey Healthcare, LLC*, 216 F.R.D. 387, 389 (N.D. Tex. 2003) (“One factor to be considered in assessing the burden of complying with a subpoena is whether the moving party is a non-party to

⁵ For example, Art Roehm, Paul Ottelini, and Craig Barrett are all Intel personnel involved in the Dell Supplier relationship whom AMD has not yet deposed and has indicated it will not depose until after deposing the Dell witnesses.

⁶ Oct. 3, 2008 Letter from Bernard C. Barmann, Jr. re: AMD v. Intel (Exh. A).

⁷ Nov. 5, 2008 Letter from Steve Fimmel re: Intel Corporation Microprocessor Antitrust Litigation (Exh. B).

⁸ Oct. 6, 2008 Letter from Sogol K. Pirnazar re: AMD v. Intel—Depositions to be scheduled in November 2008 and beyond (Exh. C).

⁹ Intel has requested three and one-half hours from each Dell Employee on the assumption that each would be deposed for a single day. In effect, Intel is requesting half of the time for which each Dell Employee is deposed. *Id.*

the litigation.”) (internal citation omitted).

Further, courts should be particularly wary of imposing undue burdens on high-ranking corporate officials, Mr. Dell and Mr. Rollins especially, because they may be vulnerable to abusive litigation tactics. When the proposed deponent is a high-level executive, courts require that the proposed deponent must have “unique personal knowledge.” *See, e.g., Baine v. General Motors Corp.*, 141 F.R.D. 332, 334-35 (M.D. Ala. 1991). In fact, “[v]irtually every court that has addressed deposition notices directed at an official at the highest level or ‘apex’ of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment.” *Celerity, Inc. v. Ultra Clean Holding, Inc.*, No. C 05-4374, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007). A deposition of a high-level executive without unique personal knowledge is improper especially when the information can be obtained “from depositions of lower-level employees with direct knowledge of the facts at issue.” *Id.* (citing *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)).

Federal Rule 30 is clear that “[u]nless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours.” Fed. R. Civ. P. 30(d)(1). This durational limitation was inserted into the Rule in 2000 due to “overlong depositions [that] can result in undue costs and delays.” FRCP 30, 2000 Notes of Advisory Committee ¶ 3.

Here, AMD seeks to depose each Dell Employee for far in excess of seven hours. In fact, the parties in the Delaware litigation seek to depose each Dell Employee for no less than seventeen hours, and, with respect to two Dell Employees, more than twenty-seven hours. And all 129 hours is requested merely to obtain testimony as to whether Intel used its alleged monopoly power to improperly coerce Dell not to use AMD as an alternative microprocessor supplier. Though there may be many documents detailing the various sales incentives programs agreed to between Dell and Intel over time, the fundamental question of whether Intel improperly coerced Dell does not require multiple days from multiple witnesses (14 days sought by AMD alone) to obtain an answer. Given their responsibilities, Mr. Clarke and Mr. Allen will have the most to say about the Intel negotiations but far, far less than the 27-28 hours currently being demanded. Mr. Luecke and Mr. Neeld, neither of whom had negotiating responsibilities as to Intel, had limited roles in the relationship—much less knowledge than 19-20 hours of testimony would necessitate. And Mr. Dell, the CEO and Chairman of Dell, and Mr. Rollins, Dell’s former CEO, had only episodic involvement in the Intel negotiations. The vast majority of testimony they may provide will be highly cumulative of Mr. Allen’s and Mr. Clarke’s and cannot justifiably be expected to cover 17 plus hours each.⁷

In addition, AMD and the Class Plaintiffs will have ample opportunity to explore Intel’s relationship with Dell through testimony of Intel witnesses—an opportunity that AMD has so far largely ignored. AMD and Class Plaintiffs should be forced to depose Intel witnesses on the minute details of the Intel-Dell relationship. The depositions of Dell Employees, on the other hand, should be focused and targeted, recognizing their role as non-parties to this MDL proceeding. The only way to ensure that the depositions are focused and targeted is to enforce strict and reasonable time limitations.

⁷ To a large degree, the testimony sought from Dell Employees will be cumulative—both among Dell Employees and especially between Dell employees and Intel testimony. If parties other than the nonparty movant have equal or better access to relevant information, courts have discretion to disallow the nonparty deposition. *See, e.g., In re Blackstone Partners, L.P.*, 2005 WL 1560505, at *3 (S.D.N.Y. July 1, 2005); *Cohn v. Taco Bell Corp.*, 1993 WL 451463, at *5 (N.D. Ill. Nov. 1, 1993).

Respectfully,

/s/ Lauren E. Maguire

Lauren E. Maguire

LEM: nml
Attachments

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

EXHIBIT A



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October 3, 2008

VIA E-MAIL AND U.S. MAIL

Sogol K. Pirnazar, Esq.
Gibson Dunn & Crutcher
333 South Grand Avenue
Los Angeles, California 90071

Re: **AMD v. Intel**

Dear Sogol:

Consistent with our agreed-upon protocols regarding deposition logistics, I am providing notice of certain third party depositions that AMD intends to take in late November or in December. These are in addition to the Intel and third party witness depositions previously noticed and/or scheduled for October and November.

We intend to take the depositions of Michael Dell, Dan Allen, Jerele Neeld, Alan Luecke, Jeff Clarke, and Kevin Rollins, all currently or formerly of Dell. We estimate AMD's examinations will take the following numbers of hours: Mr. Dell twelve hours, Mr. Allen twenty-one hours, Mr. Neeld fourteen hours, Mr. Luecke fourteen hours, Mr. Clarke twenty-one hours, and Mr. Rollins fourteen hours. These estimates are for AMD's examination only.

Sincerely,

Bernard C. Barmann, Jr.
for O'MELVENY & MYERS LLP

cc: Daniel S. Floyd, Esq.
Mindy G. Davis, Esq.
Steve Fimmel, Esq.

EXHIBIT B



HAGENS BERMAN
SOBOL SHAPIRO LLP

STEVE FIMMEL
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November 5, 2008

Mr. Sogol K Pirnazar
Gibson Dunn & Crutcher
333 South Grand Avenue
Los Angeles, CA 90071

Re: Intel Corporation Microprocessor Antitrust Litigation

Dear Sogol:

Pursuant to the agreed-upon protocols regarding deposition logistics, I am providing notice that Class counsel intends to examine the following third parties at the depositions previously scheduled by counsel for AMD.

Michael Dell, Dan Allen, Jerele Neeld, Alan Luecke, Jeff Clarke, and Kevin Rollins, all currently or formerly of Dell. We estimate Class examinations will take two additional hours for each individual.

Best regards,

HAGENS BERMAN SOBOL SHAPIRO LLP

Steve Fimmel

SWF:BSM
Enclosure

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EXHIBIT C

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October 6, 2008

VIA ELECTRONIC AND U.S. MAIL

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Bernard Barmann, Esq.
O'Melveny & Myers
400 South Hope Street
Los Angeles, California 90071-2899

Re: *AMD v. Intel –Depositions to be scheduled in November 2008 and beyond*

Dear Bernie:

Consistent with our agreed-upon protocols regarding deposition logistics, I am writing to inform you of the depositions of AMD witnesses that Intel seeks to take in November and beyond.

I. Notice for Deposition of Individual AMD Witnesses

In addition to Patrick Moorhead's deposition, which we requested for October and for which we still need proposed dates, please note that Intel intends to take the depositions of John C. Morris in November 2008.

Also, to ensure that we provide ample advance notice to have AMD's executives block the requested dates on their calendars, I inform you now that Intel intends to take the depositions of Dirk Meyer and Hector Ruiz in January 2009.

- 1) We expect that the deposition of **John C. Morris** will require approximately five (5) hours of examination time and we would like to proceed with that deposition on November 3.
- 2) As indicated in my letter of September 5, we estimate the deposition of **Patrick Moorhead** will require approximately fourteen (14) hours of examination time. We have proposed to take this deposition on November 12 to 14 or during the week of November 17.
- 3) We estimate that the deposition of **Dirk Meyer** will require fourteen (14) hours of examination time over three days. We would like to proceed with this deposition during the week of January 12, 2009.
- 4) Likewise, we estimate that the deposition of **Hector Ruiz** will require fourteen (14) hours of examination time over three days. We propose to proceed with that deposition during the week of January 26, 2009.

GIBSON, DUNN & CRUTCHER LLP

Bernard Barmann, Esq.
October 6, 2008
Page 2

Please confirm these dates, or provide alternative dates for each of these witnesses. Also, please inform us of the appropriate locations for these depositions as soon as possible so that notices and/or subpoenas are issued as appropriate. I assume you will accept service of these documents for these witnesses – please let me know immediately if that is not the case.

5) I also want to confirm that Intel will continue with the deposition of *William Edwards* on October 15, 2008 in Austin, Texas.

II. Notice for Deposition of Third Party Witnesses

Intel also plans to depose the following third-party witnesses in November:

- Intel intends to take the deposition of *Robert Davidson* of Gateway. Intel estimates needing approximately six (6) hours of examination time for the deposition of Mr. Davidson.
- Intel plans to take the deposition of *Susan Whitney* of IBM. Intel will need seven (7) hours of examination time and it proposes to take the deposition on November 17.

In addition, Intel plans to depose the following Dell witnesses in late November and December:

- *Michael Dell, Jeff Clarke, and Kevin Rollins*. At this time, Intel estimates that it will need approximately three and a half (3.5) hours of examination time for each of these three witnesses. Please note that these time estimates may change based upon the ultimately agreed upon total length of the deposition and the scope of the issues and documents that the parties cover during each deposition.

III. Counter Notice of Examination Time For Deposition of Third Party Witnesses

To ensure clear communications and proper scheduling of depositions, Intel provides the following estimates for the counter-examination time it requires for third-party witness depositions requested by AMD and/or the Class.

- Intel will require approximately three (3) hours of examination time during the deposition of *Richard Pereira* (Tech Data) which has been scheduled for November 7.
- As to AMD's request for the depositions of *Dan Allen, Jerele Neeld, and Alan Luecke*, please note that Intel will require approximately three and a half (3.5) hours of counter-examination time for each of these three witnesses, subject to the same caveats with respect to examination time as mentioned above with respect to the three Dell witnesses requested by Intel.

These counter designations by Intel are in addition to prior counter designations of third-party witnesses identified in my August and September letters to you and in direct communications between other counsel for Intel and AMD. As always, please feel free to contact me if you have any questions.

Very truly yours,


Sogol K. Pirmazar

SKP/skp

cc: Michael M. Maddigan, Esq.
Daniel S. Floyd, Esq.
Darren B. Bernhard, Esq.