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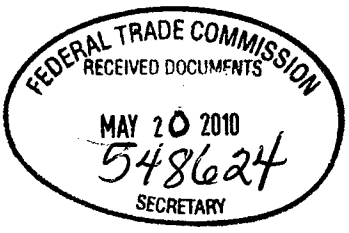

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	**DOCKET NO. 9341**
INTEL CORPORATION,	)	
a corporation	)	**PUBLIC**
	)	
	)	

MEMORANDUM IN OPPOSITION TO HEWLETT-PACKARD COMPANY'S MOTION TO QUASH INTEL'S SUBPOENAS *AD TESTIFICANDUM* ISSUED TO JEFF GROUDAN, LOUIS KIM AND JOSEPH LEE

I. PRELIMINARY STATEMENT

Intel Corporation submits this memorandum in opposition to Hewlett-Packard Company's ("HP") motion to quash Intel's subpoenas *ad testficandum* ("deposition subpoenas") to three current HP employees: Jeff Groudan, Louis Kim and Joseph Lee. Like HP's motion to quash Intel's subpoena *duces tecum* ("document subpoena"), its related motion should be denied. *See* Order on Non-Party Hewlett-Packard Company's Motion to Quash Subpoena *Duces Tecum* Served by Intel Corporation ("Subpoena Order"), dated May 19, 2010.

It is undisputed that each witness possesses information relevant to Intel's defense and that all are featured on Complaint Counsel's "will call" trial witness list. The witnesses' prior depositions in the separate *AMD* case change nothing -- under the law, fairness, and the Scheduling Order, which expressly contemplates discovery "overlap" in this independent, different case. Complaint Counsel is subject to no such restriction, and Intel should not be forced to defend this massive and important litigation at a procedural disadvantage. In any event, the Scheduling Order in this case limits each deposition to no more than one day (and Intel

is willing to discuss further limitations on a case-by-case basis), and Intel will work with HP on scheduling and location (subject to the June 15 discovery cutoff). The requested depositions could not be more appropriate in a case like this one.

"Under the Commission's Rules of Practice, any party may take a deposition provided that such deposition is reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of the respondent." *In re North Texas Specialty Physicians* ("*Physicians I*"), No. 9312, 2003 FTC LEXIS 180, *5 (FTC December 4, 2003) (Chappell, ALJ). Opponents, including non-parties, have the "heavy burden" to prove otherwise. *FTC v. Dresser Indus.*, No. 77-44, 1977 U.S. Dist. LEXIS 16718, *8-9 (D.D.C. April 26, 1977); *see also* Subpoena Order, pp. 2-3.

That burden is not met here. It is self-evident that Intel's deposition subpoenas seek testimony that is relevant to its defense of Complaint Counsel's broad allegations and claimed relief. Complaint Counsel's interrogatory answers make clear that HP is a centerpiece of its case, and Complaint Counsel's list of witnesses it "will call" at trial includes Messrs. Groudan, Kim and Lee. *See* Resp. and Objs. to Intel's First Set of Interrogatories No. 7-8; Complaint Counsel's May 5, 2010 Revised Preliminary Witness List.[1] HP does not dispute that Intel's deposition subpoenas seek relevant information. That alone compels their enforcement. *See Physicians I*, 2003 FTC LEXIS 180, *5-6.

HP's only argument in support of its motion to quash is its generic assertion that the deposition subpoenas are burdensome because Messrs. Groudan, Kim and Lee were deposed in a different case brought by a different party (the *AMD* lawsuit) alleging a different cause of action

[1] These documents were attached as Exhibits A and B, respectively, to Intel's Memorandum in Opposition to HP's Motion to Quash Intel's Subpoena Duces Tecum and are not reattached here.

and legal theory (Sherman Act Section 2, rather than FTC Act Section 5), based on many different facts and seeking different proposed remedies. In any event, the Scheduling Order expressly contemplates that discovery in this case will overlap with the discovery taken in the AMD case and "*does not preclude a party in this proceeding from seeking discovery that overlaps with prior discovery from Intel's private antitrust litigation.*" *See* January 14, 2010 Scheduling Order at p.7 (emphasis added). By comparison, Complaint Counsel has *already* deposed, noticed, or subpoenaed for deposition twenty-eight (28) people who were already deposed in the AMD case, including at least one third-party witness from IBM and several from Dell, and has questioned the witnesses deposed so far on many of the same subjects they previously testified about in the AMD case. HP's argument would lead to the absurd result that the Scheduling Order means one thing for Complaint Counsel and another for Intel.[2] In addition, the argument is disingenuous. HP clearly is not requiring Complaint Counsel to rely on its witnesses' previous testimony, but (apparently) is offering them live at trial.

HP again points to no particular burden any of the deposition subpoenas impose but, instead, simply lodges a generic assertion of burden. That is insufficient. Depositions always involve some burden to the deponent. The fact that these witnesses possess relevant, important information overrides HP's generic claim. Courts routinely enforce deposition subpoenas that seek relevant information, despite some burden. *See, e.g., Horsewood v. Kids "R" US*, No. 97-2441, 1998 U.S. Dist. LEXIS 13108, at *21 (D. Kan. Aug. 13, 1998) ("[t]he probability that [movant] can provide relevant evidence to a material issue outweighs the suggested burden of his

[2] HP raises an additional "burden" argument that the depositions of Messrs. Groudan, Kim and Lee should be quashed because Intel has also subpoenaed a number of other HP witnesses. HP cites nothing to support the idea that a deposition subpoena to three employees is burdensome because others have also been subpoenaed.

deposition"). Here, any burden is limited by the rule that any deposition cannot exceed seven hours, and Intel will work with HP in good faith on scheduling and location.

HP's motion should be denied, and Messrs. Groudan, Kim and Lee should be ordered to comply with Intel's subpoena and appear for their depositions.

II. ARGUMENT

A deposition subpoena is an appropriate means to obtain "any information relevant and not privileged." *In re North Texas Specialty Physicians* ("*Physicians II*"), No. 9312, 2004 FTC LEXIS 21, *2-3 (FTC February 13, 2004) (Chappell, ALJ). Under the Commission's Rules of Practice, a subpoena is appropriate if it is "reasonably expected to yield information relevant to the allegations of the complaint, or to the defense of the respondent." *Physicians I*, 2004 FTC LEXIS 180, *5 (citing 16 C.F.R. §§ 3.31(c)(1), 3.33(a)). A party who opposes a deposition subpoena "bears the burden of showing that an order quashing the subpoena is justified." *Id.* at *6. This burden is heavy and "no less for a non party." *In re Rambus, Inc.*, No. 9302, 2002 FTC LEXIS 90, at *9 (FTC Nov. 18, 2002); *Dresser,* 1977 U.S. Dist. LEXIS 16718, *8-9.

A. It Is Undisputed That Intel's Deposition Subpoenas Seek Information Relevant To Its Defense

Intel's deposition subpoenas to Messrs. Groundan, Kim and Lee - - all three of whom are on Complaint Counsel's list of "will call" trial witnesses - - seek information relevant to Intel's defense. HP does not (and cannot) challenge the central relevance of any of the three deposition subpoenas. Complaint's Counsel's case relies heavily on Intel's alleged conduct with respect to HP and the testimony of these very witnesses. The deposition subpoenas should be enforced on that basis alone. *See Physicians I*, 2004 FTC LEXIS 180, *5-6 (enforcing third party deposition

subpoenas based on relevance); *Physicians II*, 2004 FTC LEXIS 21, *3 (same); *Horsewood*, 1998 U.S. Dist. LEXIS 13108, at *21-23 (same).

B. Depositions of Messrs. Groudan, Kim and Lee Are Not Unduly Burdensome

Unable to contest relevance, HP relies on "burden," but identifies none in particular, certainly none that outweighs the importance of these witnesses' depositions to Intel's defense of this massive case seeking to condemn its alleged past business practices and comprehensively legislate them in the future. HP's generic burden claim is not nearly enough to meet its obligation to show that the alleged burden outweighs the undisputed relevance and importance of the witnesses' testimony. *See, e.g., Horsewood*, 1998 U.S. Dist. LEXIS 13108, at *21 ("that [the witness] is too busy and that a deposition will disrupt his work carries little weight").

The fact that these witnesses were previously deposed by AMD and Intel in a prior, separate, case is also insufficient to outweigh their testimony's relevance. In agency actions, "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Dresser*, 1977 U.S. Dist. LEXIS 16178, at *13. The Commission itself recognizes that "it is not unusual for prospective witnesses in an antitrust case to be interviewed or deposed several times prior to their testimony." *In re Champion Spark Plug Co.*, No. 9141, 1981 FTC LEXIS 105, *2 (FTC December 1, 1981).

Alternatively, HP requests, in a single sentence, that Intel be prohibited from asking Messrs. Groudan, Kim and Lee questions on "any subjects already addressed at their prior depositions." HP Mem. at 7. It cites no law supporting this unworkable request, and it is not well founded. The Scheduling Order expressly contemplates overlapping discovery. *See* Scheduling Order at 7. Pursuant to that Order, Complaint Counsel has taken or scheduled

depositions of at least 28 witnesses who were previously deposed in the AMD case, including several third-party witnesses from Dell and IBM, and has asked questions on many topics covered by the witness in his or her deposition in the AMD case. [redacted] The Scheduling Order cannot permit Complaint Counsel to ask questions on topics addressed by the witnesses in the AMD case, but deny Intel the ability to do so.[4]

This is a different case than the AMD litigation, with a different discovery record being developed by a different plaintiff, based on different legal theories and strategies, to be presented to a different trier of fact. Even if it is related generally to some of the same facts -- and this case is by no means factually "the same" as AMD's, but much broader on several different

[3] Mr. Pann was deposed for four days in the AMD case, both in his personal capacity as a corporate witness under Fed. R. Civ. Proc. 30(b)(6). He is scheduled to testify again as a corporate witness and also in his personal capacity on Friday, May 21.

[4] In addition, HP's request would inevitably lead to disputes of interpretation and impose much greater burdens on its witnesses' time.

dimensions, including those on which Messrs. Groudan, Kim and Lee will apparently testify at trial -- Intel has the right as a matter of both law and fairness to develop its defense to *this case*. Courts routinely enforce deposition subpoenas and order a second deposition in the same case when new theories and new facts emerge, let alone in a different case brought by a different party under a different theory. *See, e.g., Collins v. Int'l Dairy Queen*, 189 F.R.D. 496, 498 (M.D. Ga. 1999) ("[b]ecause of the time that has elapsed, the addition of new claims, and the evident knowledge of the witnesses in particular areas, re-examination of the two witnesses is likely to provide additional information not obtainable at the first depositions"). HP cites no case quashing a deposition subpoena to an opposing party's trial witness simply because that witness was previously deposed in a different case, and we are aware of none.

The two cases cited by HP are not on point. Both involved efforts to re-depose a witness in the *same case* in which he had previously been deposed. *See Graebner v. James River Corp.*, 130 F.R.D. 440, 441 (N.D. Cal. 1989); *Jones v. Cunningham*, No. 99-20023, 2009 U.S. Dist. LEXIS 101713, *1 (N.D. Cal. October 20, 2009). Moreover, both cases recognized that "new evidence" or "new theories" would be good cause for re-deposing a witness, but - - unlike here - - found those circumstances lacking. *Graebner,* 130 F.R.D. at 441 (noting that a new deposition in the same case would be justified by a "long passage of time with new evidence, new theories added to the complaint"); *Jones*, 2009 U.S. Dist. LEXIS 101713, at *5 (movant "has not stated that the motion for leave to take further deposition stems from the development of new evidence or new theories").

Intel has no wish to inconvenience anyone unnecessarily, but it must be allowed to develop its defense in response to Complaint Counsel's theories, strategies, and evidence. Cross-

examination of key witnesses is fundamental to that defense, and HP has not shown a burden that outweighs that right. The motion should be denied.

C. Intel Is Willing To Work With HP To Avoid Any Unreasonable Burden

HP argues in the alternative that if the deposition subpoenas are not quashed, Intel should be required to reimburse HP and Messrs. Groudan, Kim and Lee for the costs and attorneys' fees associated with the depositions. However, as noted in the Subpoena Order, a subpoenaed party, particularly one like HP that has an interest in the litigation, is expected to bear reasonable costs. Subpoena Order, pp. 3-4; *see also Kaiser Alum.*, 1976 FTC LEXIS 68, at *21-22; *Rambus*, 2002 FTC LEXIS 90, at *15.

Intel is willing to accommodate the witnesses with respect to deposition dates and location, subject to the Scheduling Order. HP should bear the resulting, reasonable expenses.

CONCLUSION

For the foregoing reasons, HP's motion to quash should be denied and Intel's deposition subpoenas to Messrs. Groudan, Kim and Lee should be enforced.

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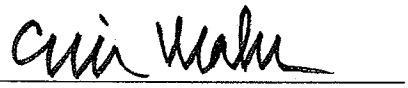

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Attorneys for Intel Corporation

Dated: May 20, 2010

Exhibit A

No Public Version Available

Exhibit B

No Public Version Available

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	**DOCKET NO. 9341**
INTEL CORPORATION,	)	
a corporation	)	**PUBLIC DOCUMENT**
	)	
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PROOF OF SERVICE OF PUBLIC FILINGS

I, Eric Mahr, hereby certify that on this 20th day of May, 2010, I caused a copy of the documents listed below to be served *by hand* on each of the following: the Office of the Secretary of the Federal Trade Commission (original and two copies) and The Honorable D. Michael Chappell (two copies); and *by electronic mail* to The Honorable D. Michael Chappell (oalj@ftc.gov), Melanie Sabo (msabo@ftc.gov), J. Robert Robertson (rrobertson@ftc.gov), Kyle D. Andeer (kandeer@ftc.gov), Teresa Martin (tmartin@ftc.gov), and Thomas H. Brock (tbrock@ftc.gov):

(i) a public version of the Memorandum in Opposition to Hewlett-Packard Company's Motion to Quash Intel's Subpoena *Ad Testificandum* Issued to Jeff Groudan, Louis Kim and Joseph Lee including a set of public exhibits; and

(iv) this Proof of Service of Public Filings.

In addition, these same public documents have been served via electronic mail and will be sent via Federal Express to Counsel for Hewlett-Packard Company:

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