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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



<p style="text-align: center;">In the Matter of</p> <p>INTEL CORPORATION,</p> <p style="text-align: center;">a corporation.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>DOCKET NO. 9288</p>
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ORDER CERTIFYING INTEL'S MOTION
TO SEEK COURT ENFORCEMENT OF SUBPOENAS

Digital Equipment Corporation (Digital) and Compaq Computer Corporation (Compaq), two of three corporations described in the Complaint as injured by the alleged conduct of respondent, have failed to comply with parts of Intel's discovery subpoenas. After losing on a motion to quash,¹ they now raise new arguments, opposing Intel's motion to certify for court enforcement of the subpoenas and filing a cross motion for enhanced protective order.

Many of the new, belated suggestions² for an amended protective order, if timely presented, would seem, at first glance, reasonable: i.e., a "supersensitive" category of

¹ Subpoenas were served on August 5, 1998; after extensions, Compaq and Digital switched counsel and moved to quash or limit on September 16, 1998; on September 18, 1998 the motion was denied, ordering compliance to commence September 25, 1998, and conclude by October 9, 1998; Intel and Compaq and Digital continued to negotiate compliance, but have reached an impasse.

² Some of the suggested deficiencies in the sanctions available for non-compliance with the protective order seem nebulous. Disobedience of a protective order has severe sanctions, including criminal sanctions. Disciplinary Proceedings against Federal Administrative Law Judge, 6 Western New England Law Review, 807, 812-13 (1984).

documents³ with additional restrictions.⁴ Timely and reasonable requests for modification of the protective order will be welcomed and often granted. Order Denying Motions to Quash, Kaiser Aluminum & Chemical Corp., 1976 FTC Lexis 68 (at n.7, p.7), although there is a presumption of regularity that the protective order will protect trade secrets. Id., sub nom. FTC v. Dresser Industries, Inc., 1977, U.S. Dist. Lexis 16178 (at pp. 9-10). Digital and Compaq may overestimate the possibility of the loss of their secrets. It is significant that other companies in the industry complied and produced documents under protection of the same protective order. Kaiser at p. 9; Dresser at p. 9.

Digital and Compaq are particularly adamant that one of Intel's lead counsel, Joseph Kattan, Esq.,⁵ should not see any of their supersensitive documents, alleging that, while he is an outside counsel, from time to time he counsels Intel on business affairs unrelated to this case. Mr. Kattan counters that: "I am the person on the team who is most familiar with computer technology, and therefore serve as the resource to whom attorneys turn for explanation of the technology." Declaration of Oct. 19, 1998. This seems to meet the standard for a trial counsel to have access to documents under a protective order, in order properly to defend his client, while remaining subject to the ethics of the Bar and to sanctions for non-compliance. In-house Counsel in Protective Order, Abbott Laboratories, September 22, 1992, 1992 FTC Lexis 242.⁶

And, while I have no objection to an in camera review of a reasonable number of documents to balance Intel's need against the sensitivity of the contents, that is a matter for negotiation, which at this time, is past due.⁷

³ Documents involving strategic planning, product road maps, and research and development.

⁴ The amended protective order would prohibit access to persons who advise Intel on business matters, with 18 month bar; require affidavits of compliance, a contractual right to examine document custodians, and punitive damages, inter alia, as sanctions of non-compliance; and provide for my in camera review of an unspecified number of supersensitive documents for assessment of confidentiality.

⁵ They do have, however, the "highest regard for the integrity of Joe Kattan, Intel's outside counsel." Answer to Intel's Motion for Enforcement, Oct. 28, 1998 at p.9.

⁶ Rule 3.45 provides that "respondents, their counsel" and authorized others may have access to material subject to an in camera order.

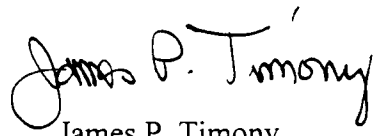
⁷ The suggestion for review of the documents by another neutral third party akin to Mississippi River treatment, may not work here. See Kaiser, supra, at p.8.

Compaq and Digital did not raise these arguments about the protective order in their first motion to quash the Intel subpoenas,⁸ which was denied by Order of September 18, 1998. They have not argued grounds for reconsideration, and the time for appeal has lapsed. Upon consideration of the Motion to Enforce Compliance with the Subpoenas Duces Tecum issued to Compaq Computer Corporation and Digital Equipment Corporation, dated October 19, 1998,

IT IS HEREBY ORDERED that Intel's Motion is GRANTED.

IT IS FURTHER ORDERED that, pursuant to § 3.38(c) of the Rules of Practice, Intel's motion is certified to the Commission with a recommendation that it seek court enforcement of the subpoenas issued to Compaq Computer Corporation and Digital Equipment Corporation.

IT IS FURTHER ORDERED that complaint counsel shall promptly produce to Intel copies of all white papers filed by Digital Equipment Corporation, whether alone or in conjunction with Intel, in connection with FTC File No. 981-0040 or any subsequent file number.


James P. Timony
Administrative Law Judge

Dated: October 30, 1998

⁸ In a nine page motion to quash on September 16, 1998, and 66 pages of specific objections to the specifications of the subpoenas, Compaq and Digital did not raise arguments about the protective order, except a statement that the subpoenas "seek trade secrets or other confidential information which is so valuable that they cannot be shared even with Intel counsel."