

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of)
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)
INTEL CORPORATION,) DOCKET NO. 9288
)
)
a corporation.)
)

ORDER RE SEQUESTER

Respondent Intel Corporation requests a protective order to preclude complaint counsel from information produced in response to the investigative subpoena and civil investigative demand (“CID”) issued to Intel by the Commission on October 26, 1998, in a separate investigation, after the last dates for issuing requests for production of documents or interrogatories in this adjudication, Docket No. 9288.

Docket No. 9288 arises out of an investigation conducted by the Bureau of Competition in which the Bureau had the authority to use compulsory process directed at both Intel and third parties. On October 16, 1997, the Commission issued a document subpoena and CID to Intel and Intel produced over 900 boxes of documents.

Following this discovery, the Bureau of Competition split its investigation. One part, aimed at Intel’s withholding of the right to use its intellectual property from three companies that asserted intellectual property rights against it, resulted in the Complaint issued on June 8, 1998, in Docket 9288. By my scheduling order of July 14, 1998, the last day for issuing document requests to the parties was August 10, 1998. The last day for issuing party interrogatories was September 9, 1998. By letter of October 2, 1998, the parties agreed to limit the scope of Intel’s production: Exhibit B attached to Intel’s motion.

The original investigation of Intel continued,¹ and on October 26, 1998, Chairman Pitofsky issued the subpoena and civil investigative demand. The new subpoena and CID replicate many of the requests for production and interrogatories served by complaint counsel on Intel in Docket No. 9288; however, they go beyond agreements reached by the parties by letter

¹ The investigatory staff do not include complaint counsel.

dated October 2, 1998 in this adjudication regarding the limitations on the scope of Intel's production.²

Commission counsel in an adjudicative proceeding may properly see and use documents or information otherwise obtained by the Commission—whether through compulsory process or otherwise, whether confidential or not—and such access and use may occur without leave of the ALJ and without notice to respondent. Commission's *Arco* statement, June 2, 1978, at pp. 51-52, attached to complaint counsel's opposition.³ However, this use of the Commission's compulsory process must not be misused,⁴ *id.* n.67 at p. 52:

Since sequestration or notice of access by the staff handling the adjudicative proceeding is generally not legally required and can impose significant administrative difficulties, there are substantial reasons for declining to agree to such limitations and a refusal to do so should not properly give rise to any inference of bad faith. Nevertheless, the Commission's staff must remain scrupulously aware of the fact that the Commission's rules do not authorize the staff to exercise investigatory powers under Part 2 of the Commission's rules for the purpose of aiding complaint counsel in a pending adjudicative proceeding, and they must take care to assure that legitimate exercises of the Commission's broad powers of compulsory process do not provide a basis for a

² Complaint counsel argue that they never agreed to limit availability of materials obtained in the investigation.

³ Rule 3.43(c) governs information obtained in investigations:

Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings and may be offered in evidence by counsel representing the Commission in any such proceeding.

16 C.F.R. § 3.43(c). The Commission's *Arco* statement provided a "clear and definitive" interpretation of Rule 3.43(c). Complaint counsel's opposition p. 3.

⁴ Investigational subpoenas should not be used to circumvent safeguards designed to ensure fair and expeditious trials. *Horizon Corporation*, 88 F.T.C. 208, 209 (1976) (*dicta*). The "ALJ has the means of preventing the introduction of . . . evidence obtained in violation of any orders he issued relating to the timing and scope of discovery." *Ibid.* Moreover, a protective order preventing complaint counsel even from having access to or making use of the investigative subpoena documents and CID responses may be necessary to protect Intel's right to procedural due process. *Infra*.

respondent to fear that those powers are being abused. We are confident that the staff will continue to do so. (Emphasis added.)

An administrative law judge has both the authority and the duty to control an adjudicative proceeding so as to ensure a fair and impartial hearing. 16 C.F.R. § 3.42(c). Here, complaint counsel's access to and use of documents and information from the use of investigatory compulsory process issued after the discovery cut off dates in this adjudication, in the context and timing of the agreement to limit production in response to very similar adjudicatory discovery demands, would raise a reasonable question of circumvention of my scheduling order. A protective order is therefore necessary to prevent complaint counsel from using extrajudicial discovery to obtain an unfair and impermissible advantage, or, at least, to prevent "a basis for a respondent to fear that those powers are being abused." Intel's motion for a protective order is therefore GRANTED.⁵

IT IS FURTHER ORDERED that documents and information produced in response to the October 26, 1998, investigative subpoena and civil investigative demand shall not be disclosed to counsel supporting the complaint who have entered a notice of appearance in this proceeding.

James P. Timony
Administrative Law Judge

Dated: January 8, 1999

⁵ In the *Arco* statement, the Commission noted that in *Sunkist*, Docket 9100, the administrative law judge sequestered from complaint counsel materials subpoenaed by the Bureau of Economics in a related investigation. At n.25, p.21.