

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of)	PUBLIC
)	
INTEL CORPORATION,)	Docket No. 9341
)	
Respondent.)	
)	

**COMPLAINT COUNSEL’S MOTION TO COMPEL RESPONSE TO DOCUMENT
REQUEST NO. 53 OR, IN THE ALTERNATIVE, TO STRIKE RESPONDENT’S
AFFIRMATIVE DEFENSES**

Pursuant to Rule 3.38 of the Commission’s Rules, Complaint Counsel respectfully moves the Court for an order that (i) Intel Corporation shall produce all documents responsive to our Second Request for the Production of Documents (Request No. 53) within ten days of the date of its order; (ii) Intel has waived all objections and claims of privileges in its written response to Request No. 53; and (iii) if Intel does not comply with the Court’s order, it is prohibited from presenting evidence at trial supporting any of its nine affirmative defenses set forth in its Answer or any other affirmative defenses it might assert.¹

On February 24, 2010, Complaint Counsel served a Rule 3.33(c) notice of deposition and a Second Request for Production of Documents targeted at Intel’s nine affirmative defenses. (Our Second Request for the Production of Documents is attached as Exhibit A). Intel ignored both requests. Eight days after Intel failed to show up to the deposition, it filed a motion for a

¹ In a telephone conversation on April 14, 2010, Thomas H. Brock and Phil Bailey, Complaint Counsel, and Thomas J. Dillickrath and Daniel S. Floyd, counsel for Respondent, conferred and, despite their good faith efforts, were unable to reach an agreement to resolve this dispute.

protective order.² And, although Intel's response to the Second Request for Production was due on March 26, 2010, Intel did not respond. Ironically, this was only one day after the March 25 status conference at which the Court emphasized the need for the parties to work diligently on discovery, a message that Intel apparently did not receive.

Our Second Request for the Production of Documents has but one document request, Request No. 53, in which we seek documents relating to Intel's affirmative defenses. Intel did not respond to Document Request No. 53 within 30 days, as required by Rule 3.37(b) of the Commission's Rules. It simply ignored the request altogether. Intel finally filed a boilerplate response on April 9, 2010, (Exhibit B), after we notified Intel that we would file a motion to compel. Intel has not produced any documents in response to this request, nor has it given us a date when these documents will be produced.

ARGUMENT

Intel's Response offers three ways in which it will respond to Request No. 53, none of which is adequate.

First, Intel suggests that it will produce documents responsive to our Request No. 53 "to the extent that Intel learns of any" such documents. Intel believes it can satisfy its response to our document request by chance. We are unaware of any case that has endorsed this approach to complying with a document request – especially when documents that support its defenses are likely to have been in Intel's possession for years. We are concerned that this approach would yield a selective production of only those documents (if any) favorable to Intel's affirmative defenses that Intel identifies as it prepares for trial. Thus, this portion of Intel's response should

² See Motion of Intel Corporation for Protective Order Pursuant to Rules 3.33(b) and 3.31(d) dated March 17, 2010. We are continuing to work with Intel to schedule the depositions relevant to the 3.33(c) notice.

be rejected on its face.

Second, Intel suggests that documents responsive to Request No. 53 “have already been produced,” apparently during the course of our Part 2 investigation. In paragraph 2 of our “Instructions and Definitions,” however, we explicitly instructed Intel to identify such documents by the Bates numbers or the document control numbers Intel assigned to those documents during the investigation. Intel did not object to or comply with this instruction. And, Intel still has the obligation to produce documents in response to Request No. 53 that it did not produce during our Part 2 investigation.

Third, Intel argues that it will respond to our Request No. 53 through its production of documents in response to our First Request for the Production of Documents dated January 18, 2010. However, our First Request only sought documents relevant to our case in chief. We did not seek the production of documents relevant to Intel’s affirmative defenses. Therefore, if Intel’s response to our First Request includes any documents responsive to Request No. 53, it would only be by happenstance.

I. Intel’s Document Production in Response to Our First Document Request Will Not Yield Documents Responsive to Our Request No. 53

We are concerned about Intel’s attempt to hide behind its production in response to our First Request in light of the Stipulation dated January 28, 2010, that the parties entered to govern Intel’s response to our First Request.³ That Stipulation and the parties’ subsequent agreements – which expressly are applicable only to Intel’s response to our First Request – establish a

³ Stipulation Between Intel and Complaint Counsel Regarding Respondent’s Production of Documents and Electronically Stored Information in Response to Complaint Counsel’s First Set of Requests for Production dated January 28, 2010.

schedule and certain limitations on Intel's response to our First Request. We had legitimate concerns, however, that this schedule and these limitations would unduly restrict any other discovery requests we served on Intel. Therefore when we negotiated that Stipulation, we insisted, and Intel agreed, that the Stipulation would be applicable only to our First Request.

With this background, Intel's attempt to limit its production to our Document Request No. 53 to its response to our First Request, as governed by the January 28, 2010, Stipulation, is unacceptable for three reasons.

Intel's approach would unacceptably delay production of documents relating to Intel's affirmative defenses. In the Stipulation and a subsidiary agreement of the parties a schedule was negotiated for Intel's production of documents responsive to our First Request. Under this schedule, Intel is required to produce the documents of individual Intel employees usually two to three weeks in advance of the date the parties have tentatively set for that employee's deposition. By agreement, these depositions will be taken through the end of discovery on June 15, 2010, and, therefore, in some instances, Intel will produce responsive documents as late as May 25, 2010.

In contrast, we have already begun to take the depositions related to Intel's affirmative defenses on April 19, in depositions noticed pursuant to Rule 3.33(c) and in Request No. 53, and are seeking documents related to Intel's affirmative defenses that we will need for those depositions. Therefore, if Intel is permitted to delay its production of the documents in response to Request No. 53 until May 25, we will not receive these documents until after the Rule 3.33(c) depositions are taken.

Intel's approach would unacceptably limit its production in response to Request No. 53 to certain custodians. In negotiating the Stipulation to govern Intel's response to our First Request the parties agreed that Intel's production is limited to a specified group of custodians jointly named by the parties.⁴ We agreed to this approach because – based on our Part 2 investigation – we had a basis for identifying the custodians of the documents necessary to support *our* claims. But this agreement did not apply to Intel's affirmative defenses.

When that list of custodians was developed early in the case, neither party sought to name the Intel employees who might have documents relevant to Intel's counterclaims. And, while we could identify the Intel employees who might have documents relevant to *our* case, we did not (and still don't) have any basis for identifying the people who might have documents relevant to *Intel's* affirmative defenses. That information is exclusively in the hands of Intel. Thus, if Intel limits its response to Request No. 53 to the custodians the parties named for the First Request, we have no basis to assume that we will receive the responsive documents we need to address Intel's affirmative defenses.

Intel's approach would rely on inapplicable search terms. In negotiating the Stipulation, the parties agreed that Intel would use a set of search terms – in much the same manner as a Lexis or Westlaw word search – to identify the Intel documents responsive to our First Request. We agreed to this approach because – based on our Part 2 investigation – we felt comfortable in negotiating the search terms that could be used to identify the documents relevant to *our* claims.⁵ These search terms, however, were not targeted to identify the documents of Intel relevant to its

⁴ See generally Stipulation Between Intel and Complaint Counsel Regarding Respondent's Production of Documents and Electronically Stored Information in Response to Complaint Counsel's First Set of Requests for Production dated January 28, 2010, ¶¶ 2-5.

affirmative defenses. Indeed, while we could identify the search terms that would locate documents relevant to our own case, we have no independent basis for identifying the search terms necessary to cull out documents relevant to Intel's affirmative defenses. That information is exclusively in the hands of Intel.

II. Intel Has Waived Any Objections and Claims of Privilege to our Second Request

Any order to compel production by Intel also must ensure that Intel is precluded from capitalizing on any further delay in responding to our Request No. 53. Therefore, we ask that the Court add two specific provisions to its order compelling Intel to respond to our Request No. 53. First, we ask the Court to rule that Intel's failure to file a written response to our Request No. 53 within 30 days after it was served – by March 26, 2010 – constitutes a waiver of any objections or privileges it might have asserted in a timely filing. Also, we ask that the Court rule now that, if Intel does not comply with the Court's order, the affirmative defenses it raises in its Answer will be stricken and Intel will not be able to present any evidence to support these defenses at trial. This will give Intel advanced notice of the risks it runs if it does not comply with the order of the Court and we are forced to bring this matter to the Court yet again.

The waiver of objections and privileges is both presumed and appropriate if, like Intel, a party does not respond to a document request in time. *E.g., In re United States*, 864 F.2d 1153, 1156 (5th Cir. 1986)(under Fed. R. Civ. P. 34, the “general rule” is that when a party fails to object timely to production requests, “objections thereto are waived”); *Ordoyne v. McDermott, Inc.*, 2000 U.S. Dist. LEXIS 12075 (E.D. La. Aug. 14, 2000) (under Fed. R. Civ. P. 34, finding a waiver of objections because party responded twenty-two days late); *Woods v. Kraft Foods, Inc.*,

⁵ See generally *id.* ¶¶ 6-12.

2006 U.S. Dist. LEXIS 73126 (E.D. Cal. 2006) (under Fed. R. Civ. P. 34, waiver of objection because party responded no more than nine days late). The rationale for the strict enforcement of the thirty day time limit is obvious: “Any other result would . . . completely frustrate the time limits contained in the Federal rules and give license to litigants to ignore the time limits for discovery without any adverse consequences.” *RE/MAX Int’l, Inc. v. Trendsetter Realty, LLC*, 2008 U.S. Dist. LEXIS 38101 (S.D. Tex. 2008).

Strict enforcement of the time limit is appropriate here. Part 3 proceedings are conducted on a more expeditious schedule than most federal court litigation. Thus, a party’s failure to answer a discovery request on time carries an even greater threat to the integrity of Part 3 proceedings.

Second, if Intel does not produce all documents responsive to our request within 10 days of the date of the Court’s Order – so that it is feasible for us to review the documents before we proceed with the Rule 3.33(c) depositions – Intel’s affirmative defenses should be stricken from its Answer. This sanction is clearly contemplated by Rule 3.38(b)(6), which provides that:

If a party . . . fails to comply with any discovery obligation imposed by these rules . . . the Administrative Law Judge . . . may take such action in regard thereto as is just, including but not limited to the following

* * * *

(6) Rule that a pleading, or part of a pleading . . . concerning which the order or subpoena was issued, be stricken

Federal courts have long held that dismissal sanctions, similar to those we anticipate here, may be appropriate.. *See, e.g., In re Heritage Bond Litig.*, 223 F.R.D. 527 (C.D. Cal. July 21, 2004) (under Fed. R. Civ. P. 37(b)(2)(B), granting evidentiary or issue preclusion motion for failure to comply with court order); *Satcorp Int’l Group v. China Nat’l Import & Export Corp.*,

917 F. Supp. 271 (S.D. N.Y. Mar. 14, 1996) (under Fed. R. Civ. P. 37(b)(2), granting motion to strike jurisdictional defense and imposing monetary sanctions for discovery violations); *Adolph Coors Co. v. American Ins. Co.*, 1993 U.S. Dist. LEXIS 3732 (D. Colo. Mar. 4 1993) (under Fed. R. Civ. P. 37(b)(2), granting issue preclusion motion dismissing one of the defendant's defenses for continued discovery violations). Courts have reasoned that "[t]he use of dismissal as a sanction for failing to comply with discovery has been upheld because it accomplishes the dual purpose of punishing the offending party and deterring similar litigants from misconduct in the future." *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). Sanctions are particularly appropriate when, as here, a party delays the production of documents when depositions of the document custodians are imminent and the parties are rapidly approaching the discovery cut-off date. *In re Heritage Bond Litigation*, 223 F.R.D. at 530, citing *Payne v. Exxon Corp.*, 121 F.3d 503, 508 (9th Cir. 1997) ("[The parties] were therefore deprived of any meaningful opportunity to follow up on that information, or to incorporate it into their litigation strategy.")


It would be particularly appropriate to include this sanction in the Court's order. Unlike most federal court litigation, this administrative litigation has a discovery schedule that is simply too short to allow any party simply to ignore discovery requests like Intel did here. The order will give Intel a chance to comply with the discovery request. At the same time, the order will give Intel fair warning that its defiance of the Court's order will lead to harsh sanctions. *See Adolph Coors*, 164 F.R.D. 507 at 519.

CONCLUSION

For the reasons set forth above, we respectfully move the Court for an order compelling the production of documents responsive to our Document Request No. 53; that Intel has waived all objections, including privileges, to Document Request No. 53; and that if Intel does not comply with the Court's Order within 10 days, its affirmative defenses shall be stricken.

Respectfully submitted,

Dated: April 20, 2010

By: 

J. Robert Robertson
Kyle D. Andeer
Thomas H. Brock
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2008
Facsimile: (202) 326-2884

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
INTEL CORPORATION,)	DOCKET NO. 9341
)	
Respondent.)	
)	

**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL’S MOTION TO
COMPEL RESPONSE TO DOCUMENT REQUEST NO. 53**

Upon consideration of the briefs and arguments of the Parties, it is hereby
ORDERED, that Complaint Counsel’s Motion to Compel Response to Document
Request No. 53 is GRANTED, and it is further
ORDERED, that Intel shall produce all documents responsive to Complaint Counsel’s
Document Request No. 53 within 10 days of the date of this Order, and it is further
ORDERED, that Intel has waived all objections, including privileges, to Document
Request No. 53.

Dated: _____

D. Michael Chappell
Chief Administrative Law Judge

EXHIBIT A

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
INTEL CORPORATION,)	Docket No. 9341
)	
Respondent.)	
)	

**COMPLAINT COUNSEL’S SECOND SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS TO RESPONDENT
INTEL CORPORATION**

REQUESTS FOR PRODUCTION

Pursuant to the Federal Trade Commission’s Rules of Practice, 16 C.F.R. §3.37, and the Definitions and Instructions set forth below, Complaint Counsel hereby requests that Respondent Intel Corporation produce within 30 days all documents, electronically stored information, and other things in its possession, custody, or control responsive to the following requests.

- 53. All DOCUMENTS that are within your control and that YOU contend support, or that YOU intend to use to support, any of YOUR claims or defenses in this matter, including but not limited to, the DOCUMENTS that YOU consulted, referred to, or used to prepare YOUR response to interrogatory number 1 in Complaint Counsel’s First Set of Interrogatories to Respondent Intel.

INSTRUCTIONS & DEFINITIONS

- 1. The Company shall submit documents as instructed below absent written consent signed by Kyle Andeer or a designee.
- 2. If a document responsive to Request 53 has already been produced to Complaint Counsel YOU shall identify the document(s) by Bates Number or Document Control Number.
- 3. “DOCUMENTS” shall mean all original and nonidentical copies of the original of all written, recorded, transcribed, or graphic matter of every type and description, however and by whomever prepared, produced, reproduced, disseminated, or made, including but not limited to analyses, letters, telegrams, memoranda, reports, books, studies, surveys, forecasts, pamphlets, notes, graphs, tapes, data sheets, printouts, websites, microfilm, indices, calendar or diary entries, manuals, guides, outlines, abstracts, histories, and agendas, minutes, or records of meetings, conferences, electronic mail and telephone or other conversations or communications, as well as films, tapes or slides and all other data compilations or databases in the possession, custody or control of INTEL or to which

INTEL has access. The term “DOCUMENTS” also includes drafts of documents, copies of documents that are not identical duplicates of the originals, and copies of documents the originals of which are not in the possession, custody or control of Intel.

4. “INTEL,” “COMPANY,” “YOU,” and “YOUR” shall each mean and refer to Respondent Intel Corporation including without limitation all of its corporate locations, and all predecessors, subsidiaries, Intel Kabushiki Kaisha, parents, and affiliates, and all past or present officers, directors, agents, representatives, employees, consultants, attorneys, entities acting in joint-venture or partnership relationships with defendants, and others acting on their behalf.
5. Unless modified by agreement with Complaint Counsel, this Request for Production requires a complete search of all the files of the COMPANY.
6. If any document covered by these Requests is withheld by reason of a claim of attorney-client privilege, attorney work product protection, or any other privilege or protection, please furnish a log providing the following information with respect to each such withheld document: document control number, date, names, positions and organizations of all authors and recipients (including designation of attorneys), general subject matter, specific legal basis upon which the document has been withheld, and any other information necessary to allow for assessment of the claim under Rule 3.38A.
7. In this Request, the present tense shall be construed to include the past tense, and the past tense shall be construed to include the present tense. The singular shall be construed to include the plural, and the plural shall be construed to include the singular.
8. If documents responsive to this Request no longer exist, but YOU have reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the Request(s) to which they are responsive, and identify persons having knowledge of the content of such documents.
9. This Request shall be deemed continuing in nature so as to require further and supplemental production.
10. Forms of Production: The COMPANY shall submit documents as instructed below:
 - a. Documents stored in electronic or hard copy formats in the ordinary course of business shall be submitted in electronic format provided that such copies are true, correct, and complete copies of the original documents:
 - i. submit Microsoft Access, Excel, and PowerPoint in native format with extracted text and metadata; and
 - ii. submit all documents other than those provided pursuant to subparts (a)(i) or (a)(iii) in image format with extracted text and metadata.
 - iii. electronic format: documents stored in hard copy form may be submitted in image format (i.e., pdf) accompanied by OCR.

- b. For each document submitted in electronic format, include the following metadata fields and information:
 - i. for documents stored in electronic format other than email: beginning Bates or document identification number, ending Bates or document identification number, page count, custodian, creation date and time, modification date and time, last accessed date and time, size, location or path file name, and SHA Hash value;
 - ii. for emails: beginning Bates or document identification number, ending Bates or document identification number, page count, custodian, to, from, CC, BCC, subject, date and time sent, Outlook Message ID (if applicable), child records (the beginning Bates or document identification number of attachments delimited by a semicolon);
 - iii. for email attachments: beginning Bates or document identification number, ending Bates or document identification number, page count, custodian, creation date and time, modification date and time, last accessed date and time, size, location or path file name, parent record (beginning Bates or document identification number of parent email), and SHA Hash value; and
 - iv. for hard copy documents: beginning Bates or document identification number, ending Bates or document identification number, page count, and custodian.
 - c. If the COMPANY intends to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in the COMPANY's computer systems or electronic storage media, or if the COMPANY's computer systems contain or utilize such software, the COMPANY must contact a Commission representative to determine, with the assistance of the appropriate government technical officials, whether and in what manner the COMPANY may use of such software or services when producing materials in response to this Request.
 - d. Submit data compilations in Excel spreadsheet or in delimited text formats, with all underlying data un-redacted and all underlying formulas and algorithms intact.
 - e. Submit electronic files and images as follows:
 - i. for productions over 10 gigabytes, use IDE and EIDE hard disk drives, formatted in Microsoft Windows-compatible, uncompressed data;
 - ii. for productions under 10 gigabytes, CD-R CD-ROMs and DVD-ROM for Windows-compatible personal computers, and USB 2.0 Flash Drives are also acceptable storage formats.; and
 - iii. **All documents produced in electronic format shall be scanned for and free of viruses. The Commission will return any infected media for replacement, which may affect the timing of the COMPANY's compliance with this Request.**
11. All documents responsive to this Request, regardless of format or form and regardless of whether submitted in hard copy or electronic format:

- a. shall be produced in complete form, un-redacted unless privileged, and in the order in which they appear in the COMPANY's files, and shall not be shuffled or otherwise rearranged. For example:
 - i. if in their original condition hard copy documents were stapled, clipped, or otherwise fastened together or maintained in file folders, binders, covers, or containers, they shall be produced in such form, and any documents that must be removed from their original folders, binders, covers, or containers in order to be produced shall be identified in a manner so as to clearly specify the folder, binder, cover, or container from which such documents came; and
 - ii. if in their original condition electronic documents were maintained in folders or otherwise organized, they shall be produced in such form and information shall be produced so as to clearly specify the folder or organization format;
- b. shall be marked on each page with corporate identification and consecutive document control numbers;
- c. shall be produced in color where necessary to interpret the document (if the coloring of any document communicates any substantive information, or if black-and-white photocopying or conversion to TIFF format of any document (e.g., a chart or graph), makes any substantive information contained in the document unintelligible, the COMPANY must submit the original document, a like-colored photocopy, or a JPEG format image);
- d. shall be accompanied by an affidavit of an officer of the COMPANY stating that the copies are true, correct, and complete copies of the original documents; and
- e. shall be accompanied by an index that identifies: (i) the name of each person from whom responsive documents are submitted; and (ii) the corresponding consecutive document control number(s) used to identify that person's documents, and if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that Commission representatives determine prior to submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Commission representative will provide a sample index upon request.

12. To furnish a complete response to this Request, the person supervising compliance must submit a signed and notarized copy of the attached verification form along with the responsive materials.

13. Questions regarding this Request for Production may be directed to Thomas Brock at (202) 326-2813. The response to this Request for production should be directed to the attention of Terri Martin and delivered between 9:00 a.m. and 5:00 p.m. on any business day to Federal Trade Commission, Bureau of Competition, 601 New Jersey Avenue, NW, Room 7147, Washington, DC 20001 or to the address subsequently supplied. Hand delivery by courier to Ms. Martin will be acceptable.

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to Complaint Counsel's Second Set of Requests for Production of Documents to Respondent Intel Corporation has been prepared by me or under my personal supervision from records of Intel Corporation, and is complete and correct to the best of my knowledge and belief.

Where copies rather than original documents have been submitted, the copies are true, correct, and complete copies of the original documents. If the Commission uses such copies in any court or administrative proceeding, Intel Corporation will not object based upon the Commission not offering the original document.

(Signature of Official)

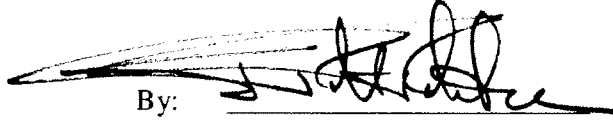
(Title/Company)

(Typed Name of Above Official)

(Office Telephone)

Respectfully submitted,

February 24, 2010

A handwritten signature in black ink, appearing to read "J. Robert Robertson", written over a horizontal line.

By:

J. Robert Robertson
Federal Trade Commission
Bureau of Competition

CERTIFICATE OF SERVICE

I certify that I delivered via electronic mail one copy of the foregoing Complaint Counsel's Second Set of Requests for Production of Documents to Respondent Intel to:

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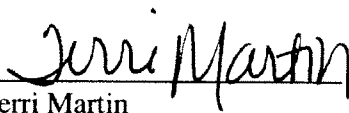
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*Counsel for Defendant
Intel Corporation*

February 24, 2010

By:



Terri Martin
Federal Trade Commission
Bureau of Competition

EXHIBIT B

to use to support its defenses) Intel will produce such documents. Intel incorporates in this response the information provided in its Initial Disclosures.

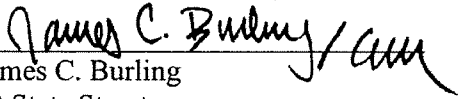
Respectfully Submitted,


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Attorneys for Intel Corporation

Dated: April 9, 2010

CERTIFICATE OF SERVICE

I certify that I filed via hand and electronic mail delivery an original and two copies of the foregoing Motion to Compel with:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-159
Washington, DC 20580

I also certify that I delivered via electronic and hand delivery a copy of the foregoing Motion to Compel to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing Motion to Compel to:

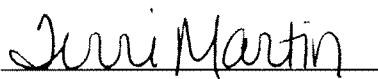
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*Counsel for Defendant
Intel Corporation*

April 20, 2010

By: 
Terri Martin
Federal Trade Commission
Bureau of Competition