UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

NON-PARTIES HEWLETT-PACKARD COMPANY AND JOSEPH BEYERS' MOTION TO QUASH SUBPOENA *AD TESTIFICANDUM* ISSUED BY INTEL CORPORATION

Pursuant to Federal Trade Commission Rule of Practice 3.34(c), 16 C.F.R. § 3.34(c), non-parties Hewlett-Packard Company ("HP") and Joseph Beyers move to quash the subpoena *ad testificandum* Intel Corporation issued to Mr. Beyers. The grounds for this motion are set forth in the accompanying Memorandum of Law.

Dated: May 20, 2010

Respectfully submitted,

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

MEMORANDUM OF LAW IN SUPPORT OF NON-PARTIES HEWLETT-PACKARD COMPANY AND JOSEPH BEYERS' MOTION TO QUASH SUBPOENA *AD TESTIFICANDUM* ISSUED BY INTEL CORPORATION

I. INTRODUCTION

The Federal Trade Commission ("FTC") brought this administrative adjudicative proceeding against Intel Corporation ("Intel") for alleged violations of § 5 of the Federal Trade Commission Act. The FTC alleges that Intel holds improper monopoly power in the markets for central processing units ("CPUs"), microprocessors specifically, and graphics processing units ("GPUs"). Intel has issued extensive discovery subpoenas directed to non-party Hewlett-Packard Co. ("HP") in connection with this proceeding, including a subpoena *duces tecum* seeking fifty-eight (58) categories of documents and a total of ***nineteen (19) deposition subpoenas*** to HP and its current or former employees. HP's attempts to elicit an agreement from Intel to limit the scope of the discovery Intel seeks from HP have been unsuccessful.[1] Indeed, Intel's "narrowed" request requires HP to produce documents from twenty-four (24) custodians and produce nineteen (19) witnesses for deposition. HP estimates that the volume of documents that it would be required to collect and search for the twenty-four (24) custodians Intel proposes

[1] In an Order dated May 19, 2010, the ALJ denied HP's Motion to Quash Intel's Subpoena *Duces Tecum*. HP is evaluating its ability to seek clarification and/or reconsideration of that Order.

under its "narrow" approach is over fourteen million (14,000,000) pages.[2] Moreover, much of the discovery sought is largely cumulative of documents and depositions HP has already produced as a non-party in a private anti-trust litigation against Intel. Specifically, in that prior litigation, HP collected, searched, reviewed and produced documents from thirty-two (32) custodians and produced nine (9) witnesses for deposition, many of whom appeared for multiple days. HP tried to resolve the issues presented in this motion with Intel and sought permission to postpone the deadline for filing this motion to quash. Therefore, HP was required to file this motion. Nevertheless, HP remains willing to discuss reasonable limitations on the number of depositions of present and former HP employees.

One of the nine (9) witnesses that was previously deposed, Joseph Beyers ("Mr. Beyers") is the subject of this motion. Mr. Beyers is a former HP employee who was deposed by Intel (among others) for two days in the private anti-trust litigation. As explained below, the totality of the discovery sought from HP as a non-party is unduly burdensome, harassing, duplicative and purports to impose a burden and expense on a non-party that outweighs any supposed benefit. Intel's unrestrained approach to discovery of a non-party violates the Rules of Practice of the FTC and the Federal Rules of Civil Procedure and thus should not be countenanced by the Commission. Intel's deposition subpoena to Mr. Beyers should therefore be quashed.

II. BACKGROUND

A. HP's Discovery In Intel's Private Anti-Trust Litigation

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[2] Using the estimates of data gathered for the private anti-trust litigation, HP estimates that each custodian will have approximately 9.4 GB of data which equate to 610,000 pages per custodian. *See* http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf HP believes that application of this electronic data estimate to the instant case is conservative. Unlike in the private anti-trust litigation where the parties agreed to a date limitation for the document collection, here, Intel purports to require HP to produce documents for eighteen witnesses with no time limitation.

Advanced Micro Devices, Inc. ("AMD") brought an anti-trust action against Intel (now settled) that alleged Intel willfully maintained an improper monopoly in the microprocessor market in violation of § 2 of the Sherman Act. Class action plaintiffs also brought a similar action against Intel. AMD, Intel and the class plaintiffs all served third-party discovery requests on non-party HP that generally sought documents and information relating to microprocessor competition and pricing. In response, HP produced nine (9) deposition witnesses (including Mr. Beyers) who were subject to questioning by Intel, among others, in addition to collecting and searching over nineteen million (19,000,000) pages of documents from thirty-two (32) custodians (including Mr. Beyers). The document collection, search, review and production process spanned over 18 months and resulted in HP producing 230,000 pages of documents. HP understands that Complaint Counsel and Intel have agreed that depositions taken in Intel's private anti-trust litigation can be treated as if they were taken in this proceeding. *See* January 14, 2010 Scheduling Order, ¶ 21. In that regard, therefore, Mr. Beyers can be considered as having already been deposed in this proceeding.

Not only has Intel already had the opportunity to take the deposition of Mr. Beyers relating to CPUs and microprocessors, the FTC's claims against Intel regarding CPUs and microprocessors in this proceeding are substantively the same as AMD's claims in the Intel private litigation.[3] For instance, both the FTC and AMD complaints alleged that: (1) Intel possesses monopoly power in the CPU market (FTC Compl. ¶ 41, AMD Compl. ¶ 25);[4] (2) Intel coerced Tier One Original Equipment Manufacturers ("OEMs"), such as HP, into arrangements to limit or foreclose their use of competitor's products (FTC Compl. ¶ 6, AMD Compl. ¶¶ 35, 47,

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[3] The parties' agreement to treat the discovery taken in the private anti-trust litigation as if taken before the FTC underscores this point.

[4] The FTC and AMD complaints are attached as Exhibits A and B respectively.

72); (3) Intel offered market share or volume discounts selectively to OEMs, which bundled microprocessors with free or heavily discounted chipsets and motherboards (FTC Compl. ¶¶ 7, 53, AMD Compl. ¶¶ 60, 85); (4) if an OEM purchased a competitor's products, Intel punished or threatened OEMs with retaliation by, *inter alia*, reducing or withdrawing discounts, rebates or subsidies (FTC Compl. ¶ 54, AMD Compl. ¶¶ 35, 64); and (5) the OEMs were susceptible to retaliation because Intel is the only supplier with the CPU product breath to meet all OEM requirements and demands (FTC Compl. ¶ 50, AMD Compl. ¶¶ 36, 63).

B. Discovery Requests To HP In This Proceeding

Both Complaint Counsel and Intel served document subpoenas on HP. Complaint Counsel and HP have successfully agreed to narrow the scope of the FTC's subpoena.[5] Despite its efforts, HP has been unable to strike a similar agreement with Intel. Indeed, even though Intel sought and obtained voluminous discovery from HP in the private anti-trust litigation, it now wishes to proceed as if that discovery was irrelevant. Intel's idea of compromising on its discovery is really not a compromise at all. In its letter dated April 19, 2010, Intel proposes to require HP to collect documents from twenty-four (24) custodians. HP estimates that this undertaking will entail the collection of over fourteen million (14,000,000) pages of documents. *See* FN1, above. While Intel pays lip service to its claim of trying to reasonably limit its non-party discovery, HP and Intel are not able to reach accord on what is reasonable under the circumstances. Indeed, in addition to the documents for the fifty-eight (58) separate requests that Intel has served, Intel also seeks the deposition of ***nineteen (19)*** of HP's current or former employees, including HP's outside anti-trust counsel and the subpoena to Mr. Beyers which is

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[5] With some limited exceptions, Complaint Counsel has confirmed for HP that it does not seek microprocessor related documents from HP, but instead is focused on GPU, bundling, benchmarking and standards related information

the subject of the instant motion. *See* Ex. C; Ex. D.[6] Thus, in addition to the nine (9) depositions of HP personnel taken in the private anti-trust litigation alleging anti-competitive conduct by Intel, Intel now purports to seek nineteen (19) additional HP depositions in this proceeding, four (4) of which are cumulative and duplicative of depositions taken in the private litigation, alleging the same anti-competitive conduct.

III. ARGUMENT

The FTC Practice Rules specifically authorize the Administrative Law Judge to limit discovery upon a determination that, *inter alia*, it is "unreasonably cumulative or duplicative," is obtainable from a more convenient source or the "burden and expense of the proposed discovery outweigh its likely benefit." *Id.* (emphasis added); *see also* 16 C.F.R. § 3.31(d)(1) (2008) (authorizing Administrative Law Judge to issue order protecting non-party from unduly burdensome discovery). In particular, "repeat depositions are disfavored." *See, e.g., Jones v. Cunningham*, No. 99-20023, 2009 WL 3398801 at *2 (N.D. Cal. 2009) (quoting *Graebner v. James River Corp.*, 130 F.R.D. 440, 441 (N.D. Cal. 1990)). That is precisely the case here. Intel (through the same counsel representing it in this proceeding) already had the opportunity to – and actually did – question Mr. Beyers about allegations that it engaged in improper anti-competitive conduct in the CPU market, which is, in relevant part, the subject of this proceeding. Indeed, in addition to Intel, counsel for the FTC actually attended Mr. Beyers' prior deposition.[7] Additional depositions of any witnesses already deposed in Intel's private anti-trust litigation

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[6] Certain exhibits to Intel's second set of subpoenas are confidential under a protective order and have been removed.

[7] In the course of the parties' meet and confer discussions, Intel has indicated only that it wishes to depose Mr. Beyers for a second time because this proceeding was initiated by a different claimant and Complaint Counsel has proceeded under § 5 of the FTC Act, as opposed to the Sherman Act that was the basis of AMD's claims against Intel. The underlying alleged conduct as it pertains to HP at issue in each instance, however, is the same.

would be unnecessary, duplicative, cumulative and harassing.

Preliminarily it must be noted that Complaint Counsel is not seeking the deposition of Mr. Beyers and, indeed, has agreed to accept the deposition testimony of Mr. Beyers from the private anti-trust litigation as if it were taken in this proceeding. Accordingly, any attempt by Intel to seek testimony from Mr. Beyers beyond that on which he was already deposed is presumably irrelevant to the claims and defenses in this case. Under the FTC Rules, parties may obtain discovery only of information that is either relevant to the allegations in the complaint, the proposed relief, or the defenses of any respondent. FTC Rules of Practice § 3.31(c)(1). Given that Complaint Counsel is not seeking any additional information from Mr. Beyers beyond what it (and Intel) already has in its possession from the private anti-trust litigation, and that Intel questioned Mr. Beyers extensively less than one year ago, Intel is now hard pressed to demonstrate that any testimony it now seeks to elicit is relevant to the claims and defenses in this case.

Further, the burden placed on HP and Mr. Beyers for any such deposition, especially when viewed in light of the totality of Intel's discovery requests to HP, outweighs any purported benefit of covering the same subject matter a second time – particularly given their status as non-parties to this proceeding and Intel's prior depositions. *See, e.g., Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir.1998) ("[Nonparties] have no dog in [the] fight. Although discovery is by definition invasive, parties to a law suit must accept its travails as a natural concomitant of modern civil litigation. Non-parties have a different set of expectations. Accordingly, concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs."); *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993) ("[T]he fact of nonparty status may be considered by the court in

weighing the burdens imposed in the circumstances.").

A. Intel's Subpoena To Mr. Beyers Should Be Quashed Because It Is Unreasonably Duplicative, Unduly Burdensome And Harassing.

There is no reasonable justification for Intel's attempt to re-depose Mr. Beyers. Mr. Beyers was deposed in Intel's private anti-trust litigation approximately a year ago (April and May 2009) for a total of two (2) days.[8] Both the FTC and Intel (through the same law firm representing it in this proceeding) were present at Mr. Beyers' prior deposition. Over the course the two-day deposition, Intel spent approximately four (4) and three quarters hours questioning Mr. Beyers about matters relating to microprocessor pricing and competition and focused on HP's business dealings with Intel and AMD relating to microprocessors through 2004.

HP also produced a substantial number of documents from Mr. Beyers' files in the private anti-trust litigation, which Intel has and had for use at Mr. Beyers' first deposition. In addition, Mr. Beyers left HP in September 2009 (just four (4) months after his deposition) and has limited, if any, new knowledge about the microprocessor pricing and competition allegations in the FTC's complaint. For all of the reasons set forth above, there is no reason for a second, duplicative and harassing deposition of Mr. Beyers that would simply rehash subject matters already addressed at his first deposition.

Again, to the extent Intel will attempt to argue that it is seeking to depose Mr. Beyers on subjects not covered during his two-day deposition in the private litigation, such information is not relevant to the claims and defenses and therefore is not discoverable. FTC Rules of Practice § 3.31(c)(1); *see also F.T.C. Manual* § 10.13.6.1 ("Discovery after complaint is *limited to* the

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[8] The transcript of Mr. Beyers' deposition is confidential under a protective order from Intel's private litigation and therefore, it is not attached here. If the Administrative Law Judge prefers, HP is willing to provide a full copy of this transcript for non-public *in camera* review.

complaint's allegations, to the proposed relief, or to the defenses of any respondent.") (emphasis added).

Simply put, the documents from thirty-two (32) custodians and nine (9) depositions for Intel of HP personnel on microprocessor competition and pricing are more than sufficient. Any additional depositions – especially of those HP personnel who have already been deposed on the same subject matter – are unnecessary and harassing to HP and the potential witnesses. Further, Intel has failed to proffer a specific need or reason for taking a second deposition of Mr. Beyers a little over one year after his deposition in the private anti-trust litigation. Absent additional justification from Intel for duplicative depositions, the Administrative Law Judge should quash Intel's deposition subpoena to Mr. Beyers.

B. Alternatively, Intel Should Be Required To Reimburse HP and Mr. Beyers For All Of Their Costs (Including Attorney's Fees) Incurred In Preparing For And Providing Any Second Depositions.

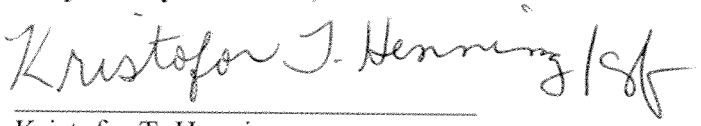
The FTC Operating Manual expressly authorizes an order under appropriate circumstances requiring a party seeking discovery to reimburse the subject of its discovery requests for its associated costs and expenses. *F.T.C. Manual* § 10.13.6.4.7.8. For the reasons explained above, the Administrative Law Judge should quash Intel's deposition subpoena to Mr. Beyers in its entirety. If, however, any deposition is permitted to move forward in some form, in light of Intel's prior deposition of Mr. Beyers approximately one year ago, Intel should be required to reimburse HP and Mr. Beyers for all of their costs (including attorneys' fees) incurred in preparing for and providing a second deposition.

IV. CONCLUSION

HP and Mr. Beyers respectfully request that the Administrative Law Judge quash Intel's deposition subpoena to Mr. Beyers.

Dated: May 20, 2010

Respectfully submitted,



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STATEMENT OF KRISTOFOR T. HENNING PURSUANT TO FEDERAL TRADE COMMISSION RULE OF PRACTICE 3.22(G)

I am an attorney with Morgan, Lewis & Bockius LLP and submit this statement pursuant to Federal Trade Commission Rule of Practice 3.22(g), 16 CFR § 3.22(g), in connection with Non-Parties Hewlett-Packard Company and Joseph Beyers' Motion to Quash Subpoena *Ad Testificandum* Issued by Intel Corporation. I spoke with David Emanuelson, counsel for Intel Corporation, in good faith in an attempt to resolve by agreement the issues raised by HP's Motion to Quash, on at least May 5, 2010, May 6, 2010, May 7, 2010, May 10, 2010, May 18, 2010 and May 19, 2010. During those conversations, the parties were unable to reach an agreement that obviated the need for HP's motion.

Dated: May 20, 2010

Respectfully submitted,

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[PROPOSED] ORDER GRANTING MOTION OF NON-PARTIES HEWLETT-PACKARD COMPANY AND JOSEPH BEYERS TO QUASH SUBPOENA *AD TESTIFICANDUM* ISSUED BY INTEL CORPORATION

Before the Administrative Law Judge is Non-Parties Hewlett-Packard Company and Joseph Beyers' Motion to Quash Subpoena *Ad Testificandum* Issued By Intel Corporation ("Motion to Quash"). Having considered the Motion to Quash and the supporting arguments and the responses by Intel Corporation, this Court finds that the motion should be, and hereby is, GRANTED.

IT IS THEREFORE ORDERED that the Subpoena *Ad Testificandum* issued to Joseph Beyers on April 30, 2010 by Intel Corporation, are hereby quashed.

ORDERED:

D. Michael Chappell
Administrative Law Judge

Date: May ___, 2010