UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

NON-PARTY HEWLETT-PACKARD COMPANY'S MOTION FOR RECONSIDERATION AND/OR MODIFICATION OF MAY 19, 2010 ORDER

Pursuant to Rule 3.22 of the Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.22, non-party Hewlett-Packard Company ("HP") respectfully moves for reconsideration and/or modification of the Administrative Law Judge's Order, dated May 19, 2010, denying HP's Motion to Quash the Subpoena *Duces Tecum* Served on it by Intel Corporation and requiring HP to comply with the Subpoena by June 1, 2010. The grounds for HP's motion are set forth in the accompanying Memorandum of Law.

Dated: May 25, 2010

Respectfully submitted,

Kristofor T. Henning/sl

Kristofor T. Henning
Coleen M. Meehan
Victoria L. Wesner
Counsel for Hewlett-Packard Company
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
215-963-5882
215-963-5001 (fax)

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-PARTY HEWLETT-PACKARD COMPANY'S MOTION FOR RECONSIDERATION AND/OR MODIFICATION OF MAY 19, 2010 ORDER

I. INTRODUCTION

Hewlett Packard Co. ("HP") seeks reconsideration and/or modification of the Administrative Law Judge's ("ALJ") May 19, 2010 (the "Order")(Ex. A), because it appears to require non-party HP to collect, process, review and log millions of pages of documents in seven (7) business days.

On March 19, 2010, Intel served HP with a document subpoena seeking fifty-eight (58) separate requests for documents from HP.[1] In its opposition to HP's Motion to Quash, Intel urged the ALJ to adopt the argument that Intel's April 19, 2010 letter ("April 19 letter")(Ex. B) sufficiently limited the burden of responding to its document subpoena. While the ALJ accepted Intel's argument, the April 19 letter does not meaningfully limit discovery as it requires non-party HP to collect and produce documents from at least twenty-four (24) custodians who HP

[1] The Federal Trade Commission ("FTC") also served HP with a document subpoena. Complaint Counsel and HP have successfully agreed to narrow the scope of the FTC's subpoena. Specifically, with four (4) limited exceptions, Complaint Counsel has confirmed that it does not seek microprocessor related documents from HP, but instead is focused on GPU, bundling, benchmarking and standards related information.

estimates will collectively possess over 14,600,000 pages of documents.[2] *See* Declaration of Armando Rand ("Rand Decl.")(Ex. C) ¶¶ 5-6. Even after applying search terms, which Intel first provided to HP today, the resulting set of documents that HP will be required to review for responsiveness and/or log for privilege is estimated to be over 5,800,000 pages of documents. I*d.* ¶ 7.

Compliance with Intel's document subpoena as modified by the Order, is not only unduly burdensome, but physically impossible by June 1. HP believes that in accepting Intel's April 19 letter, the ALJ did not fully appreciate the nature and extent of the burden inherent in responding to the subpoena and, therefore, did not intend the Order to require HP, a non-party, to complete in seven (7) business days the massive collection, processing, review and production efforts — including the completion and production of a privilege log — necessitated by the subpoena. Moreover, seventy-five percent (75%) of the custodians identified in the April 19 letter (eighteen of the twenty-four custodians) are purportedly custodians who allegedly possess microprocessor competition and pricing documents. In the private anti-trust litigation, HP previously collected and searched over 19,500,000 pages of documents from thirty-two (32) custodians on the very same subject. *See* Declaration of Amy Hirschkron ("Hirschkron Decl.")(Ex. D) ¶¶ 5-7. HP respectfully seeks reconsideration on the grounds that: (1) the ordered June 1 deadline is

---

[2] Read literally, the April 19 letter actually imposes additional obligations on HP. First, the number of custodians will exceed twenty-four (24), as Intel's April 19 letter also requires HP to include any HP - AMD Alliance Manager as well as any current or former employee who may have been informally interviewed by the FTC. HP does not concede that custodians who may fall into either category were intended by the ALJ to be included in the custodial collection or are otherwise properly the subject of discovery. Second, Intel seeks to require HP to produce a privilege log from the AMD production, even though the parties previously agreed that such a log was unnecessary. HP respectfully requests the ALJ to clarify or reconsider the Order to the extent it requires HP to: (1) collect from custodians beyond the eighteen (18) specifically identified microprocessor custodians plus the five (5) named and one unnamed GPU custodians, or (2) produce an AMD production privilege log.

manifestly unjust and (2) the ALJ committed legal error in failing to limit discovery directed to a non-party to what is reasonable under the facts of record given the burden and the likelihood of discovering additional, non-cumulative material somehow relevant to the claims and defenses in this case.[3]

II. FACTUAL BACKGROUND

A. Intel's April 19 Letter Requires HP To Collect Millions Of Pages Of Documents To Respond To Its Discovery Requests.

The Intel subpoena includes fifty-eight (58) separate requests to HP, at least twenty (20) of which seek microprocessor related information – the subject of HP's prior document production and depositions. *See, e.g.,* Ex. E at Requests 6-11, 15, 19-21, 26-29, 34 and 35. Though Intel's April 19 letter gives the illusion of narrowing the subpoena so as to not be unreasonably cumulative or unduly burdensome, the reality is otherwise. Indeed, the Intel subpoena as modified by the April 19 letter requires HP to collect data from at least eighteen (18) custodians on microprocessor pricing and competition issues alone. Included in that group of custodians are HP's CEO and several other senior executives. Using the actual average volume of data HP collected per custodian in the private anti-trust litigation and the industry conversion estimates set forth in the attached Rand and Hirschkron declarations (*see* Rand Decl. ¶¶ 5-6; Hirschkron Decl. ¶¶ 5-7), this microprocessor part of the collection alone would total approximately 11,000,000 pages. Adding the six (6) custodians Intel proposes for GPU-related documents increases the estimated total volume to 14,600,000 pages. *See* Rand Decl. ¶¶ 5-6.

Moreover, it takes approximately two (2) weeks to process and prepare the collected electronic data for attorney review. *See id.* ¶ 7. Applying de-duplication and filtering processes

---

[3] In response to both the FTC and Intel's document subpoenas, HP is in the process of collecting the documents from the GPU custodians that Intel identified in its April 19 letter.

could reduce the overall volume for review by HP's counsel by as much as sixty percent (60%). *Id.* ¶¶ 8-10. Under this best-case-scenario assumption, HP's counsel will still review approximately 5,800,000 pages for responsiveness to each of Intel's fifty-eight (58) document requests. *Id.* ¶ 11. Such a review will require approximately 46,400 man hours to complete. *Id.* ¶¶ 12-13.[4]

B. HP's Attempts To Negotiate A Narrowing Of The Discovery Intel Seeks Have Been Rebuffed.

On May 20, 2010, HP attempted yet again to reach a compromise with Intel, but to no avail. Intel has refused to agree to even an extension of the June 1 deadline. Moreover, Intel just proposed today (three (3) business days before the production deadline) the search term protocol that HP can use to filter, prior to the review phase, the millions of pages HP would have to collect for the twenty-four (24) custodians referenced in the April 19 letter. Thus, to comply with the Order, HP would have to do the impossible: finish the collection, processing, and review of millions of pages, and produce all documents responsive to Intel's requests (and the corresponding privilege logs) by June 1, 2010.

III. ARGUMENT

A. Notwithstanding Its Best Efforts, HP Cannot Collect, Process, Review And Log The Millions Of Pages Of Documents At Issue In The Seven (7) Business Days Required By The Order.

Because Intel refuses to grant HP an extension of time, under the Order, HP must complete production (and the corresponding privilege log) in response to the April 19 letter by June 1, 2010. *See* 16 C.F.R. § 3.38A(a). This is simply not doable. HP believes that, at the time

---

[4] These figures do *not* take into account the additional burden on HP from Intel's insistence on a collection, review and production from across the *entire* HP organization, *without* limitations, to respond to six (6) requests for FTC and New York Attorney General related documents. *See* Ex. B.

of the ruling, the ALJ was led to believe that Intel's April 19 letter sufficiently limited the discovery burden that Intel purports to impose on non-party HP. As more fully set forth herein, the April 19 letter does nothing of the kind. Accordingly, HP requests reconsideration or modification.

The process of collecting, preparing, reviewing and producing documents in response to Intel's subpoena is inescapably time-consuming. HP spent eighteen (18) months collecting approximately 19,500,000 pages from thirty-two (32) custodians and ultimately produced approximately 230,000 pages of responsive documents in the private anti-trust litigation. *See* Hirschkron Decl. ¶¶ 5-6. The Order requires HP to bear a comparable — and now cumulative — burden in seven (7) business days.

Specifically, responding to Intel's fifty-eight (58) requests (and assuming application of filtering and search terms) requires HP to review approximately 5,800,000 pages for privilege and responsiveness. *See id.* ¶¶ 8-11. Completing that review alone would require an estimated 46,400 man hours. *See id.* ¶¶ 12-13. While HP is in the process of collecting the electronic documents for the twenty-four (24) custodians identified in the April 19 letter, it has not completed that collection, and it takes approximately two weeks to put the electronic data into a format that it can be reviewed by outside counsel. *See* Rand Decl. ¶ 7. HP therefore respectfully requests an extension of time to produce the documents responsive to the Order.[5]

B. The Burden Of Complying With The May 19, 2010 Order Outweighs Its Likely Benefit.

The FTC Practice Rules provide that the ALJ limit discovery where the "burden and expense of the proposed discovery outweigh its likely benefit." 16 C.F.R. § 3.31(c)(1)(iii); *accord* Fed. R. Civ. P. 26(b)(2)(C)(iii). The test of burdensomeness "involves a balancing of

---

[5] HP will begin to produce documents on a rolling basis as expeditiously as possible.

interests." *See* Fed. Trade Comm'n, Operating Manual (hereinafter "FTC Manual") § 10.13.6.4.7.3, available at http://www.ftc.gov/foia/adminstaffmanuals.shtm (last modified June 25, 2007). Borrowing from the Federal Rule of Civil Procedure that is the counterpart to Rule 3.21(c)(1) of the FTC Rules of Practice, factors to be weighed should include "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii).

Notably, Intel has not made any specific showing of why additional document requests on the exact same subject are not merely cumulative of the discovery in the private anti-trust litigation, aside from the general assertion that this proceeding involves later time periods than the private anti-trust litigation. *See generally* 16 C.F.R. § 3.31(c)(1)(i) (mandating that ALJ limit discovery that is "unreasonably *cumulative or* duplicative")(emphasis added). The fact that Intel does not require HP to produce the same 230,000 pages of microprocessor documents previously produced, misses the point. Understandably, Intel urges the ALJ to overlook the cumulative — as opposed to purely duplicative — nature of Intel's microprocessor related requests in determining the reasonableness of the requests under the FTC Rules of Practice, 16 C.F.R. § 3.31(c)(1)(i). As evidenced by the discovery exercise that HP underwent as a non-party in the private anti-trust litigation, the simple fact is that the burden to HP outweighs the theoretical benefit to Intel. Indeed, in the underlying private anti-trust litigation, HP collected 19,500,000 pages of documents and less than 2% were responsive. Under the circumstances, the likelihood of discovering additional, non-cumulative material somehow relevant to the claims or defenses of the parties in this litigation is remote. The fact that the FTC is not requiring HP to search for and produce microprocessor documents (with four (4) limited exceptions) underscores this point.

See also FTC Manual ("[A]s the documents sought become less clearly *necessary*, the [ALJ], the [FTC], or the courts will be likely to cut the subpoena back to reasonable limits.") (emphasis added).

With respect to the interests of others, first, Intel's microprocessor document requests impose a heavy burden on HP. Specifically, seventy-five percent (75%) or 11,000,000 pages of the estimated 14,600,000 pages of data that Intel is demanding HP collect relates to microprocessor pricing and competition issues, precisely the subject of HP's collection of approximately 19,500,000 pages in the private anti-trust litigation. Similarly, reviewing that data for additional microprocessor documents would require approximately 34,800 hours. *See* Rand Decl. ¶¶ 11-13.

Second, the time necessary to collect, process, review and complete production in accordance with the Order could unnecessarily delay the proceedings. Intel chose to wait three and a half months after it was served with the Complaint in this proceeding to subpoena documents from HP, then allowed weeks to go by before responding to HP's requests for a proposal to narrow the subpoena. *See* K. Henning Decl. to HP's Motion to Quash. HP should not now be forced to bear the burden of unreasonably cumulative and unnecessary discovery related to the same microprocessor pricing and competition issues. Also, Intel refuses to grant HP an extension of time to respond to these massive requests fully knowing the June 1 deadline is physically impossible.

Balancing the burden on HP against the remote and theoretical benefit to Intel, HP respectfully submits that the ALJ should limit Intel's microprocessor document requests beyond the terms set forth in Intel's April 19, 2010 proposal. Specifically, HP proposes that it collect,

search and produce to Intel the microprocessor documents that it has agreed to provide to the FTC.

C. HP's Motion for Reconsideration Should be Granted.

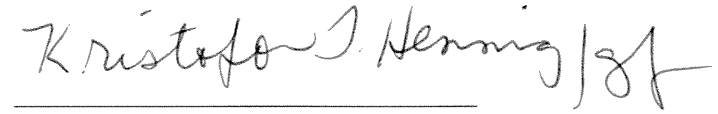
The ALJ may grant a motion for reconsideration where "there is a need to correct a clear error or manifest injustice." *In re Rambus Inc.*, Docket No. 9303, 2003 FTC LEXIS 49 (Mar. 26, 2003) (citing *Regency Communications, Inc. v. Cleartel Communications, Inc.*, 212 F. Supp. 2d 1, 3 (D.D.C. 2002). As illustrated above, the nature and extent of the burden inherent in complying with the April 19 letter is severe. The Order mandating compliance with the April 19 letter appears to adopt Intel's representations regarding the relevance of the documents sought and underestimates the burden on HP, especially in light of the June 1, 2010 deadline. Contrary to Intel's representations, HP did object on relevance grounds and also objected to producing documents that were cumulative and duplicative of subjects about which HP had already produced voluminous materials to Intel in other litigations. *See* Ex. D to HP's Motion to Quash. Here, HP's burden outweighs the remote possibility of a benefit to Intel from the additional microprocessor related discovery. Accordingly, HP respectfully urges the ALJ to reconsider or modify the Order to address the manifest injustice and relieve HP from an impossible deadline and an undue burden.

IV. CONCLUSION

For the above reasons, HP respectfully requests that: (1) the ALJ reconsider the Order to extend the time that HP has to comply and/or (2) otherwise modify the subpoena to bring it within reasonable limits.

Dated: May 25, 2010

Respectfully submitted,



Kristofor T. Henning
Coleen M. Meehan
Victoria L. Wesner
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
215-963-5882
215-963-5001 (fax)
khenning@morganlewis.com
cmeehan@morganlewis.com
vwesner@morganlewis.com

Counsel for Hewlett-Packard Company

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

[PROPOSED] ORDER GRANTING NON-PARTY HEWLETT-PACKARD COMPANY'S MOTION FOR RECONSIDERATION AND/OR MODIFICATION OF MAY 19, 2010 ORDER

Before the Administrative Law Judge is Non-Party Hewlett-Packard Company's Motion for Reconsideration and/or Modification of May 19, 2010 Order denying its Motion to Quash Subpoena *Duces Tecum* Served By Intel Corporation ("Motion for Reconsideration"). Having considered the Motion for Reconsideration and the arguments of counsel, this Court finds that the motion should be, and hereby is, GRANTED.

IT IS THEREFORE ORDERED that the May 19, 2010 Order is hereby vacated to the extent it requires Hewlett-Packard Company to comply with the Intel Subpoena, as modified by the April 19, 2010 letter, by June 1, 2010. Intel's Subpoena will be narrowed to conform to the agreement reached between HP and Complaint Counsel.

ORDERED:

_____
D. Michael Chappell
Administrative Law Judge

Date: May ___, 2010