**UNITED STATES OF AMERICA**
**BEFORE THE FEDERAL TRADE COMMISSION**

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| **In the Matter of** | ) | |
| | ) | **DOCKET NO. 9341** |
| **INTEL CORPORATION,** | ) | |
| **a corporation** | ) | **PUBLIC** |
| | ) | |

**MEMORANDUM IN OPPOSITION TO HEWLETT-PACKARD COMPANY'S MOTION TO QUASH INTEL'S SUBPOENA *AD TESTIFICANDUM* ISSUED TO JOSEPH BEYERS**

## I. PRELIMINARY STATEMENT

Intel Corporation ("Intel") submits this memorandum in opposition to Hewlett-Packard Company's ("HP") motion to quash Intel's subpoena *ad testficandum* ("deposition subpoena") to Joe Beyers, a former HP employee. Like HP's motion to quash Intel's subpoena *duces tecum* ("document subpoena"), its related motion here should be denied. *See* Order on Non-Party Hewlett-Packard Company's Motion to Quash Subpoena *Duces Tecum* Served by Intel Corporation ("Subpoena Order"), dated May 19, 2010.

It is undisputed that Intel's subpoena to Mr. Beyers, like its subpoenas to Mssrs. Groudan, Kim and Lee, is relevant to Complaint Counsel's allegations, Intel's defense, and the proposed relief in this case. That alone is sufficient to compel his deposition. *See In re North Texas Specialty Physicians* ("*Physicians I*"), No. 9312, 2003 FTC LEXIS 180, at *5 (FTC December 4, 2003) (Chappell, ALJ) ("[u]nder the Commission's Rules of Practice, any party may take a deposition provided that such deposition is reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of the

respondent"). Complaint Counsel's interrogatory answers make clear that HP is a centerpiece of its case, and its list of witnesses it "will call" at trial includes Mr. Beyers. *See* Resp. and Objs. to Intel's First Set of Interrogatories No. 7-8; Complaint Counsel's May 5, 2010 Revised Preliminary Witness List.[1]

HP's motion to quash Intel's deposition subpoena to Mr. Beyers is based on the same flawed premise as its motion to quash Intel's deposition subpoenas to Mssrs. Groudan, Kim, and Lee -- that Mr. Beyers was deposed in different case brought by a different party (the AMD lawsuit) alleging a different cause of action and legal theory (Sherman Act Section 2, rather than FTC Act Section 5), based on many different facts and seeking different proposed remedies.[2] As similarly discussed in Intel's response to HP's prior motion to quash, this argument fails to satisfy HP's "heavy burden" to resist compliance with a subpoena. *FTC v. Dresser Indus.*, No. 77-44, 1977 U.S. Dist. LEXIS 16178, at *8-9 (D.D.C. April 26, 1977); *see also* Subpoena Order, pp. 2-3.

Intel's subpoena to Mr. Beyers is neither duplicative nor unduly burdensome. Every deposition involves some burden, but it is a burden that is outweighed by the relevance of the information sought. *See, e.g., Horsewood v. Kids "R" Us*, No. 97-2441, 1998 U.S. Dist. LEXIS 13108, at *21 (D. Kan. August 13, 1998) ("that [the witness] is too busy and that a deposition will disrupt his work carries little weight"). Because this case involves a different set of facts and legal theory, the Scheduling Order expressly states that it "*does not preclude a party in this*

[1] These documents were attached as Exhibits A and B, respectively, to Intel's Memorandum in Opposition to HP's Motion to Quash Intel's Subpoena Duces Tecum and are not reattached here.

[2] HP's motion also contains assertions regarding the burden of responding to Intel's document subpoena, as ordered by the Court on May 19, as an apparent prelude to its May 25 motion for reconsideration of this Court's Order. Intel has responded to that motion separately.

*proceeding from seeking discovery that overlaps with prior discovery from Intel's private antitrust litigation*." *See* January 14, 2010 Scheduling Order at p.7 (emphasis added). Pursuant to its Order, Complaint Counsel has already subpoenaed, scheduled, or deposed thirty-one Intel or third party witnesses who were deposed in the AMD litigation, including five witnesses from Dell[3] and two witnesses from IBM.[4]

HP's reliance on the fact that Complaint Counsel apparently does not intend to depose Mr. Beyers, relying instead on his deposition in the *AMD* case, is misplaced. Complaint Counsel apparently intends Mr. Beyers to testify *at trial* on topics that are potentially broader than those he was questioned on in his deposition. These include: (a) any agreements between Intel or AMD and HP related to HP's purchases of CPUs; (b) any other agreements between Intel and HP, included Itanium; (c) customer demand for computers utilizing CPUs from Intel or AMD; (d) Mr. Beyers' interactions with Intel, including but not limited to, HP's use of CPUs from suppliers other than Intel; (e) any problems or concerns related to Intel's and AMD's supply of CPUs to HP; and (f) the effect of Intel's sales practices on HP. *See* Complaint Counsel's Witness List ¶ 57. The witness summary also states that Mr. Beyers will testify regarding "matters discussed during his deposition." *Id.* All the more reason to allow Mr. Beyers' deposition. In any event, Intel's right to defense is not constrained by Complaint Counsel's tactical choices. It would be highly prejudicial for this Court to deny Intel the right to depose a witness who may testify against it at trial when Complaint Counsel has been able to take similar discovery of the witnesses it selects.

[3] The Dell witnesses are Dan Allen (scheduled for June 2), Alan Luecke (scheduled for June 9), Jeff Clarke (scheduled for June 29), Michael Dell (scheduled for July 21), and Kevin Rollins (scheduled for July 23).

[4] The IBM witnesses are Jeff Benck (deposed on April 12) and Dave Rasmussen (deposed on May 4).

Finally, HP's repeated reference to the number of other deposition subpoenas that Intel has issued to HP employees, as purported evidence that Intel is "harassing" HP in this case, is both irrelevant and unfounded. Intel has consistently offered to reduce HP's purported burden to reach an agreement on both document and deposition discovery, but has been stonewalled in its efforts. For example, on May 22, Intel offered to reduce its depositions of HP-related witnesses by almost half in exchange for HP's agreement to produce the remaining witnesses, including Mssrs. Beyers, Groudan, Kim, and Lee.[5] This offer remains outstanding.

## II. ARGUMENT

A deposition subpoena is an appropriate means to obtain "any information relevant and not privileged." *In re North Texas Specialty Physicians* ("*Physicians II*"), No. 9312, 2004 FTC LEXIS 21, *2-3 (FTC February 13, 2004) (Chappell, ALJ). Under the Commission's Rules of Practice, a subpoena is appropriate if it is "reasonably expected to yield information relevant to the allegations of the complaint, or to the defense of the respondent." *Physicians I*, 2004 FTC LEXIS 180, at *5 (citing 16 C.F.R. §§ 3.31(c)(1), 3.33(a)). A party who opposes a deposition subpoena "bears the burden of showing that an order quashing the subpoena is justified." *Id.* at *6. This burden is heavy and "no less for a non party." *In re Rambus, Inc.*, No. 9302, 2002 FTC LEXIS 90, at *9 (FTC Nov. 18, 2002); *Dresser*, 1977 U.S. Dist. LEXIS 16718, at *8-9.

### A. It Is Undisputed That Intel's Deposition Subpoena Seeks Information Relevant To Its Defense

Intel's deposition subpoena to Mr. Beyers seeks information relevant to Intel's defense. As with its motion to quash the subpoenas to Mssrs. Groudan, Kim, and Lee, HP does not (and

[5] A copy of this proposal has been attached as Exhibit A to Intel's opposition to HP's motion for reconsideration of this Court's May 19, 2010 denying HP's motion to quash Intel's subpoena *duces tecum*.

cannot) challenge the relevance of its subpoena to Mr. Beyers. Complaint's Counsel's case relies heavily on Intel's alleged conduct with respect to HP and the (potentially live) testimony of this very witness. Intel's subpoena should be enforced on that basis alone. *See Physicians I*, 2004 FTC LEXIS 180, at *5-6 (enforcing third party deposition subpoenas based on relevance); *Physicians II*, 2004 FTC LEXIS 21, at *3 (same); *Horsewood*, 1998 U.S. Dist. LEXIS 13108, at *21-23 (same).

**B. Intel's Subpoena Is Not Unduly Burdensome**

As with its motion to quash the Kim, Groudan, and Lee subpoenas, HP does not assert any specific burden to Mr. Beyers outside of the customary inconvenience associated with appearing at a deposition. This generic claim of burden is not nearly enough to meet its obligation to show that the alleged burden outweighs the undisputed relevance and importance of the witness' testimony. *See, e.g., Dresser*, 1977 U.S. Dist. LEXIS 16178, at *13 ("[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest"); *Horsewood*, 1998 U.S. Dist. LEXIS 13108, at *21 ("that [the witness] is too busy and that a deposition will disrupt his work carries little weight").

HP's assertion that a deposition of Mr. Beyers is unnecessary because he was deposed in the AMD case reflects a misunderstanding of the breadth of Complaint Counsel's case, the different legal standard at issue, the sweeping injunctive remedy Complaint Counsel seeks, and the broad topics that Mr. Beyers will testify on at trial, according to Complaint Counsel's witness list. This is a different case in a different forum, and the Scheduling Order here expressly contemplates overlapping discovery. S*ee* Scheduling Order at 7. Complaint Counsel has already taken or scheduled depositions of at least thirty-one witnesses who were previously deposed in

the AMD case, including several third-party witnesses from Dell and IBM, and has asked questions on many topics covered by the witness in his or her deposition in the AMD case.[6] It would be highly prejudicial for Intel to be denied the same access to discovery that Complaint Counsel has received. *See, e.g., Standard Oil Co. v. FTC*, 475 F. Supp. 1261, 1278 (N.D. Ind. 1979) (holding that respondents had a due process right to have discovery requests heard when Complaint Counsel was able to take similar discovery from respondents).

This is a different case than the AMD litigation, with a different discovery record being developed by a different plaintiff, based on different legal theories and strategies, to be presented to a different trier of fact. Even if it is related generally to some of the same facts -- and this case is by no means factually "the same" as AMD's, but much broader on several different dimensions, including those on which Mr. Beyers will apparently testify at trial -- Intel has the right as a matter of both law and fairness to develop its defense to *this case*.[7] Courts routinely enforce deposition subpoenas and order a second deposition in the *same* case when new theories and new facts emerge, let alone in a different case brought by a different party under a different theory. *See, e.g., Collins v. Int'l Dairy Queen*, 189 F.R.D. 496, 498 (M.D. Ga. 1999) ("[b]ecause of the time that has elapsed, the addition of new claims, and the evident knowledge of the witnesses in particular areas, re-examination of the two witnesses is likely to provide additional information not obtainable at the first depositions"). As with its motion to quash the Groudan, Kim, and Lee subpoenas, HP cites no case quashing a deposition subpoena to an opposing

[6] Examples of overlapping testimony were provided in Intel's response to HP's motion to quash the Groudan, Kim, and Lee subpoenas. Intel Mem. at 5-6. They will not be repeated here.

[7] For example, Intel recently received a production from Complaint Counsel containing HP documents that it had collected during prior investigations into Intel conduct. Several of these documents were not produced by HP in the AMD cases, are relevant to Intel's defense, and directly implicate Mr. Beyers.

party's trial witness simply because that witness was previously deposed in a different case, and we are aware of none.[8]

### C. Intel Is Willing To Work With HP To Avoid Any Unreasonable Burden

HP argues in the alternative that if the deposition subpoenas are not quashed, Intel should be required to reimburse HP and Mr. Beyers for the costs and attorneys' fees associated with the depositions. However, as noted in the Subpoena Order, a subpoenaed party, particularly one like HP that has an interest in the litigation, is expected to bear reasonable costs. Subpoena Order, pp. 3-4; s*ee also Kaiser Alum.*, 1976 FTC LEXIS 68, at *21-22; *Rambus*, 2002 FTC LEXIS 90, at *15.

Intel is willing to accommodate the witnesses with respect to deposition dates and location, subject to the Scheduling Order. HP is more than twice Intel's size and its revenues last year topped $114 billion. Moreover, HP, a key player in the industry, does not and cannot credibly claim that is has no interest in this litigation. It should bear the resulting, reasonable expenses.

## CONCLUSION

HP's motion to quash should be denied and Intel's deposition subpoena to Mr. Beyers should be enforced.

[8] HP's reliance on *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998) is misplaced. *Cusumano* involved highly confidential academic research of marginal relevance, not the clearly relevant deposition testimony at issue here. *Id.* at 715-717. [redacted]

Respectfully submitted,

GIBSON DUNN & CRUTCHER LLP
Robert E. Cooper
Daniel S. Floyd
333 South Grand Avenue
Los Angeles, CA 90071-3197
T: 213-229-7000
F: 213-229-7520
rcooper@gibsondunn.com
dfloyd@gibsondunn.com

Joseph Kattan, PC
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
T: 202-955-8500
F: 202-467-0539
jkattan@gibsondunn.com

HOWREY LLP
Darren B. Bernhard
Thomas J. Dillickrath
1299 Pennsylvania Ave, N.W.
Washington D.C. 20004
T: 202-383-0800
F: 202-383-6610
BernhardD@howrey.com
DillickrathT@howrey.com

WILMER CUTLER PICKERING
HALE AND DORR LLP

James C. Burling
60 State Street
Boston, MA 02109
T: 617-526-6000
F: 617-526-5000
james.burling@wilmerhale.com

James L. Quarles III
Howard M. Shapiro
Leon B. Greenfield
Eric Mahr
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
T: 202-663-6000
F: 202-663-6363
james.quarles@wilmerhale.com
howard.shapiro@wilmerhale.com
leon.greenfield@wilmerhale.com
eric.mahr@wilmerhale.com

*Attorneys for Intel Corporation*

Dated: May 27, 2010