UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

ORDER DENYING MOTION OF NON-PARTIES HEWLETT-PACKARD COMPANY, JEFF GROUDAN, LOUIS KIM AND JOSEPH LEE TO QUASH SUBPOENAS *AD TESTIFICANDUM* ISSUED BY INTEL CORPORATION

I.

On May 13, 2010, non-parties Hewlett-Packard Company ("HP"), Jeff Groudan ("Groudan"), Louis Kim ("Kim"), and Joseph Lee ("Lee") (collectively, the "Non-parties") submitted a Motion to Quash Subpoenas *Ad Testificandum* issued to Groudan, Kim, and Lee by Respondent Intel Corporation ("Intel"). Intel submitted its opposition to the motion on May 20, 2010. Having fully considered the motion and opposition, and for the reasons set forth below, the motion to quash is DENIED. In addition, the Non-parties' alternative requests, for reimbursement of costs and expenses for complying with the deposition subpoenas and/or for an order limiting the subject areas for questioning, are also DENIED, as further explained below.

II.

The Non-parties contend that the deposition subpoenas should be quashed because they are duplicative, unduly burdensome, and harassing. In support of this claim, the motion states that Groudan, Kim, and Lee are current HP employees, each of whom was previously deposed in prior private antitrust litigation brought against Intel by Advanced Micro Devices, Inc. ("AMD") and class action plaintiffs (the "AMD litigation"). The Non-parties assert that: the claims in the instant case regarding central processing units ("CPU") and microprocessors are substantively the same as those in the AMD litigation; Intel questioned Groudan, Kim, and Lee at the prior depositions in the AMD litigation; Groudan, Kim, and Lee have little relevant knowledge; and neither Groudan, Kim, nor Lee has acquired any new knowledge since their depositions, which occurred approximately one year ago.

In opposing the Non-parties' motion, Intel asserts that Groudan, Kim, and Lee have all been identified by Complaint Counsel as trial witnesses in this litigation. Moreover, Intel contends that the instant litigation is much broader than the AMD litigation, and involves different parties, different causes of action, different legal theories, many different facts, and different remedies. According to Intel, Complaint Counsel has taken depositions in this litigation of individuals who were deposed in the AMD litigation. Therefore, Intel argues, Intel will be at a disadvantage if it is denied the same opportunity. Intel further argues that the Non-parties have failed to meet their burden of demonstrating that the depositions will be duplicative, unduly burdensome, or harassing. In this regard, Intel also notes that the Scheduling Order entered in this case contemplates retaking depositions taken in the AMD litigation and that the Scheduling Order limits depositions to a single, 7-hour day.

III.

A.

Pursuant to Commission Rule 3.33, "[a]ny party may take a deposition of any named person or of a person or persons described with reasonable particularity, provided that such deposition is reasonably expected to yield information within the scope of discovery under § 3.31(c)(1) . . ." 16 C.F.R. § 3.33(a). The scope of discovery encompasses any discovery that "may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1).

The Non-parties do not argue that the proposed deponents lack any relevant, discoverable information. Their conclusory assertions, unsupported by affidavits, that the deponents possess only limited relevant knowledge, are unpersuasive. Moreover, the fact that Complaint Counsel intends to call Groudan, Kim, and Lee as witnesses at trial in this matter clearly indicates that each of these individuals has knowledge relevant to the claims and/or defenses in this case. Therefore, pursuant to Rule 3.31(c), Intel has the right to discover that knowledge.

B.

The Commission Rules authorize the Administrative Law Judge to grant a motion to preclude a deposition:

> upon a determination that such deposition would not be reasonably expected to meet the scope of discovery set forth under § 3.31(c), or that the value of the deposition would be outweighed by the considerations set forth under § 3.43(b) [unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence].

16 C.F.R. § 3.33(b); *see* 16 C.F.R. § 3.43(b). Because each of the proposed deponents was previously deposed in the AMD litigation, the Non-parties contend that depositions in this case would produce cumulative evidence, and be harassing and unduly burdensome. Accordingly, the Non-parties seek an order quashing the deposition subpoenas.

"The burden of showing that [a subpoena] is unreasonable is on the subpoenaed party." *FTC v. Dresser Indus.*, No. 77-44, 1977 U.S. Dist. LEXIS 16178, at *13 (D.D.C. April 26, 1977). That burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested discovery is relevant to that purpose. *See Id.* (enforcing document subpoena served on non-party by the respondent). *See also In re Kaiser Alum. & Chem. Corp.*, No. 9080, 1976 FTC LEXIS 68, at *19-20 (Nov. 12, 1976) ("Even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding."). In agency actions, "[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." *FTC v. Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at *13.

The Non-parties fail to cite any authority for the proposition that a party should be precluded from taking a deposition because the proposed deponent had previously been deposed in a separate case. Even in the same case, a deponent may be subjected to more than one deposition in certain circumstances, such as the passage of time or the addition of new or different claims. *See Collins v. International Dairy Queen*, 189 F.R.D. 496, 498 (M.D. Ga. 1999). *Compare Jones v. Cunningham*, No. 99-20023, 2009 U.S. Dist. LEXIS 101713 (Oct. 20, 2009) (denying motion for leave to take second deposition where movant failed to allege existence of new evidence or legal theories); *Graebner v. James River Corp.*, 130 F.R.D. 440 (N.D. Cal. 1989) (granting protective order against taking second deposition where claims had not broadened since first deposition). In the present case, the prior depositions occurred in separate litigation which, among other things, involved a narrower set of claims, legal theories, and facts, as well as different prosecuting parties. Accordingly, the fact that the Non-parties were deposed in the AMD litigation is not a sufficient basis for concluding that requiring depositions in the present case would be unduly burdensome, duplicative, or harassing. In addition, paragraph 8 of the additional provisions of the Scheduling Order entered in this case limits depositions to "a single, seven-hour day, unless otherwise agreed by the parties or ordered by the Administrative Law Judge." This time limitation further helps ensure that the Non-parties will not be unduly burdened by appearing for deposition in this case.[1]

[1] Intel notes that paragraph 21 of the Scheduling Order's additional provisions permits retaking depositions of deponents from the AMD litigation. That paragraph provides that AMD depositions shall be included as part of the record in this proceeding but that "nothing in this paragraph in any way limits either party from taking discovery in this proceeding, including discovery duplicative of that taken in the AMD Delaware litigation . . ." As non-parties, HP, Groudan, Kim, and Lee are not bound by this provision.

C.

The Non-parties request in the alternative that, if the depositions are permitted, then Intel should be precluded from questioning Groudan, Kim, and Lee on any subject about which the deponent testified at his AMD deposition. The request is denied. Such a restriction on the scope of the deposition appears more likely to create further disputes, which is not in the interests of the deponents, the parties, or the proceedings. Moreover, Intel will necessarily be mindful of the seven-hour time limitation, which is likely to encourage Intel to be efficient in its questioning and discourage Intel from duplicating prior lines of questioning.

The Non-parties further request that, if the depositions are to proceed, that Intel should be required to reimburse HP, Groudan, Kim, and Lee for "all of their costs (including attorneys' fees) incurred in preparing for and providing any such depositions." Motion to Quash at 7. This request is also denied. The Commission Rules do not provide for reimbursement of costs or expenses in connection with taking depositions. With respect to compliance with document subpoenas, however, the Commission has held that a "subpoenaed party is expected to absorb the reasonable expenses of compliance as a cost of doing business, but reimbursement by the proponent of the subpoena is appropriate for costs shown by the subpoenaed party to be unreasonable." *In re Int'l Tel. & Tel. Corp.*, No. 9000, 1981 FTC LEXIS 75, at *3 (March 13, 1981); *see In re North Tex. Specialty Physicians*, Docket No. 9312, 97 F.T.C. 202, 2004 FTC LEXIS 18, at *7 (Feb. 4, 2004) (denying cost reimbursement because the subpoena did not impose an undue burden on the non-party); *In re R.R. Donnelley & Sons Co.*, No. 9243, 1991 FTC LEXIS 268, at *1-2 (June 6, 1991) (holding that subpoenaed party "can be required to bear reasonable costs of compliance with the subpoena").

To determine whether expenses are "reasonable," the Administrative Law Judge "should compare the costs of compliance in relation to the size and resources of the subpoenaed party." *In re Int'l Tel. & Tel. Corp.*, No. 9243, 1981 FTC LEXIS 75, at *3 (March 13, 1981) (*citing SEC v. OKC Corp.*, 474 F. Supp. 1031 (N.D. Tex. 1979)). The Non-parties have offered no information on their resources or the estimated costs of complying with the deposition subpoenas. Moreover, Groudan, Kim, and Lee are employees of HP, and are being deposed in connection with their knowledge as employees of HP. It is reasonable to assume that their costs are properly borne by HP in the first instance, and according to Respondent, HP had sales of over $114 billion last year. In summary, there is no basis for concluding that the costs to Groudan, Kim, and Lee, or to HP, in connection with these depositions are unreasonable.

IV.

For the reasons stated herein, the Motion of Non-parties HP, Groudan, Kim, and Lee to Quash Subpoenas *Ad Testificandum* issued by Intel, and their alternative requests

for a limitation on the questioning and for reimbursement of costs, are DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: May 28, 2010