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March 17, 2010

By Hand

Federal Trade Commission
Office of the Secretary
Room H-135
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: *In the Matter of Intel Corporation* (Docket No. 9341)

Dear Sir or Madam:

On behalf of Intel, Corp. ("Intel"), I hereby submit the original and two paper copies of the following public documents:

- (i) Intel Corporation's Motion for Protective Order Pursuant to Rules 3.33(b) and 3.31(d);
- (ii) the Memorandum in Support of Intel's Motion for Protective Order Pursuant to Rules 3.33(b) and 3.33(d) including the Statement of Eric Mahr Pursuant to Paragraph 3 of the January 14, 2010 Scheduling Order;
- (iii) the Declaration of Eric Mahr;
- (iv) a Proposed Order; and
- (v) a Proof of Service.

As requested by the Secretary, a copy will be sent via electronic mail to secretary@ftc.gov and dclark@ftc.gov.

March 17, 2010
Page 2

Please acknowledge receipt of this filing by stamping and returning to me the enclosed copy of this transmittal letter. If you have questions, please call me or Wendy Terry at 202-663-6505.

Kind Regards,

A handwritten signature in black ink, appearing to read "Eric Mahr". The signature is written in a cursive, slightly slanted style.

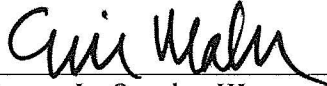
Eric Mahr

Enclosures

Copies:

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Attorneys for Intel Corporation

Dated: March 17, 2010

PUBLIC

FTC Docket No. 9341
Motion of Intel Corporation For Protective Order
Pursuant To Rules 3.33(b) and 3.33(d)

Memorandum in
Support

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

**MEMORANDUM IN SUPPORT OF INTEL'S MOTION FOR PROTECTIVE ORDER
PURSUANT TO RULES 3.33(b) AND 3.31(d)**

On December 16, 2009, Complaint Counsel filed what is likely the largest, broadest, and—from both a legal and factual perspective—most open-ended antitrust case ever brought by the Federal Trade Commission. Just over two months later, on February 24, 2010, Complaint Counsel served its First Notice of Deposition of Intel Corporation. That Notice sought to compel Intel to prepare and produce company witnesses to lay out through deposition testimony the legal and factual bases for Intel's defense of this entire action. And if that were not enough, it sought to compel Intel to do so within 13 days of the Notice, before Complaint Counsel had received Intel's interrogatory responses on many of the identical topics on which testimony is sought, before Complaint Counsel has completed producing materials from its Part 2 investigation, and before Complaint Counsel has taken any of the more than 60 depositions of Intel employees it has declared its intention to take.

Complaint Counsel's Notice is legally deficient and improper under the Commission's Rules for at least three reasons: *First*, topics 1 through 4 of the Notice are entirely duplicative of interrogatories previously propounded by Complaint Counsel and therefore exceed the scope of permissible discovery under Rule 3.31(c)(2). *Second*, topics 4 and 5 of the Notice are impossibly broad and vague, reflecting the unreasonable breadth and vagueness of the Complaint

itself. Topic 4 seeks testimony concerning Intel's legitimate business justifications for any and all of the innumerable business decisions it made over the ten-year period covered by the Complaint, and topic 5 seeks testimony concerning all of the factual assertions made in the first eight, single-spaced pages of Intel's Answer. *Third*, the Notice seeks testimony concerning the substance of Intel's legal contentions, positions, and conclusions, as opposed to the facts supporting those contentions, positions, and conclusions, and therefore improperly seeks information protected by the attorney-client privilege and work product doctrine.

Accordingly, Intel respectfully requests that the Court enter a protective order to prevent the proposed deposition pursuant to Commission Rules 3.33(b) and 3.31(d).

BACKGROUND

Complaint Counsel served its First Notice of Deposition of Intel Corporation on February 24, 2010. *See* Attachment 1 to Declaration of Eric Mahr ("Mahr Declaration"). The Notice was served pursuant to Rule 3.33(c)(1), the equivalent of Rule 30(b)(6) of the Federal Rules of Civil Procedure, which allows a party to name a corporation as a deponent. Complaint Counsel unilaterally scheduled Intel's deposition for March 9, 2010, less than two weeks from the date of service of the Notice, and sought corporate designees to testify "as to matters known or reasonably available to Intel" concerning five topics. The first four topics in the Notice seek testimony regarding Intel's Second, Fourth, Seventh, and Eighth affirmative defenses. In these defenses, Intel alleges that the relief sought in the Complaint is not in the public interest (Second Defense), that the Commission lacks subject matter jurisdiction (Fourth Defense), that the Complaint is barred by laches (Seventh Defense), and that Intel is not liable because it acted in accordance with legitimate business justifications (Eighth Defense). Topic 5 seeks testimony regarding "Intel's purported assertions of fact in its preamble on pages 1-8 of its Answer."

The parties met and conferred concerning the Notice several times, including on March 11, 16 and 17; however, they were unable to resolve their differences.

DISCUSSION

Rule 3.33(c)(1) allows a party to name a corporation as a deponent as long as the party describes the matters on which examination is requested with “reasonable particularity.” The named corporation must then designate individuals to testify on its behalf on the identified topics. *Id.* Rule 3.33(b), which was added to the Rules in 2009,¹ allows the Court to “rule on motion by a party that a deposition shall not be taken 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).” Thus, the Court may prevent the taking of a deposition if it would not comport with the limitations on discovery set forth in Rule 3.31(c), namely, that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (iii) the burden and expense of the proposed discovery outweigh its likely benefit.

16 C.F.R. § 3.31(c)(2). When Rule 3.31(c) was amended in 1996, it was intended to “strengthen the ALJ’s authority to prevent abusive discovery tactics by limiting the frequency or extent of

¹ See, e.g., 74 Fed. Reg. 1814 (Jan. 13, 2009) (“The proposed Rule added paragraph (b) to Rule 3.33, which allows the ALJ, upon a party’s motion, to prevent the taking of a deposition . . .”). Although there have been no decisions involving the new Rule 3.33(b), the legislative history surrounding the adoption of the new Part 3 Rules suggests that the intent of the amendments to the deposition Rule was to adhere to the model of the FRCP. See *id.* (defending proposed rule as consistent with the Federal Rules).

discovery under certain conditions (e.g., when it would be cumulative or duplicative)” and “track[] in relevant part the language of Fed. R. Civ. P. 26(b)(2), which sets forth similar limitations on discovery.” 61 Fed. Reg. 50643 (1996).

Additionally, a party may seek a protective order to prevent the taking of discovery “to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding.” 16 C.F.R. § 3.31(d).

1. The Notice Improperly Seeks Unreasonably Duplicative Discovery.

Rule 3.31(c)(2)(i) prohibits discovery that is “unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.” Complaint Counsel has made this determination quite simple in this case, as it already has issued an interrogatory asking Intel to identify “every act, omission, practice, instance, document, and/or communication constituting or relating to the grounds for each of the Nine Defenses asserted by Intel in its answer.” Interrogatory No. 1, Complaint Counsel’s First Set of Interrogatories to Respondent Intel (1-16) (Feb. 10, 2010); Mahr Decl., Attachment 2. Topics 1-4 of the Notice, each of which seeks testimony concerning a specific one of those nine defenses, are therefore entirely and unambiguously duplicative. In addition, Complaint Counsel has “ample opportunity by discovery in the action to obtain the information sought,” Rule 3.31(c)(2)(ii), including through the interrogatories already served, as well as through the depositions of the more than 60 Intel employees Complaint Counsel has declared it intends to take. Under these circumstances, the burden and expense of the proposed deposition is certain to outweigh any possible benefit. *See* Rule 3.31(c)(2)(iii).

While there have been no decisions on point under Rule 3.31(c), federal case law provides that, “in certain circumstances, a party may properly resist a 30(b)(6) deposition on the

grounds that the information sought is more appropriately discoverable through contention interrogatories.” *SmithKline Beecham Corp. v. Apotex Corp.*, No. 99-CV-4304, 2004 WL 739959, at *2 (E.D. Pa. Mar. 23, 2004); *see also, e.g., 3M Co. v. Kanbar*, 2007 WL 1794936, at *2 (N.D. Cal. Jun. 19, 2007) (granting protective order because notice sought legal conclusions that should not form the basis for 30(b)(6) deposition topics and were more properly subject of contention interrogatories). For example, the court in *In re Independent Service Organizations Antitrust Litigation*, 168 F.R.D. 651 (D. Kan. 1996), granted Xerox’s motion for a protective order where the plaintiff had served Xerox “with a Rule 30(b)(6) deposition notice requesting that Xerox produce a corporate witness to testify about *facts supporting numerous paragraphs of Xerox’s denials and affirmative defenses in its Answer and Counterclaims.*” *Id.* at 654 (emphasis added). The court did not require Xerox to produce a witnesses in response the notice, which sought legal conclusions and information that was otherwise discoverable through interrogatories and other means. *See also id.* (“Although we have no quarrel with CCS’s contention that it has a right to discover the facts upon which Xerox will rely for its defense and counterclaims, CCS’s attempt to discover those facts through a Rule 30(b)(6) deposition is overbroad, inefficient, and unreasonable.”)

2. The Notice is Unreasonably Broad and Vague.

The Complaint in this action challenges virtually every significant aspect of Intel’s design, manufacture, marketing and sale of microprocessors since 1999, including pricing decisions, innovations, standards, use of benchmarks, product roadmaps, and interoperability. The Complaint does not, however, stop with microprocessors, a product that in the *AMD v. Intel* litigation occupied four years of discovery and generated some 100 million pages of documents and 2,200 hours of deposition testimony. This Complaint also asserts claims regarding

compilers, benchmarks, product specifications standards, and both discrete and integrated graphics products. To further its sweeping goals, the Complaint relies on at least eight distinct theories of exclusionary conduct, which it pleads using open-ended and non-specific allegations lacking precisely those details that are necessary for Intel to formulate a targeted defense.

Particularly in light of the Commission's open-ended claims in this action, Complaint Counsel's failure to identify specific topics for testimony with the "reasonable particularity" required by Rule 3.31(c)(1) renders the Notice unreasonably broad and vague. For instance, topic 4, as posed, would require Intel to prepare and produce witnesses to testify as to the legitimate business justifications supporting any and all of the innumerable business decisions Intel has made over the more than ten years covered by the Complaint. Similarly, topic 5 would require Intel to prepare and produce witnesses to testify concerning every fact in the first eight (single-spaced) pages of Intel's Answer, which itself responds to the Commission's sprawling 106-paragraph Complaint. Because of this breadth, Intel would be forced to designate numerous individuals to testify regarding topics 4 and 5 alone. Even if the topics in the Notice were somehow appropriate, service of the Notice at this point in the litigation constitutes an improper attempt to circumvent Rule 3.35(b)(2)—which provides that contention interrogatories need not be answered until the close of discovery—by noticing what is in effect a "contention deposition." Complaint Counsel has identified 272 witnesses on its preliminary witness list, including some 126 Intel employees, and has declared its intention to depose as many as 67 of those employees. At a minimum, Complaint Counsel should be required to complete those depositions, and to identify any topics for further discovery with "reasonable particularity," before being permitted to proceed with any deposition under Rule 3.33(c)(1).

3. The Notice Improperly Seeks To Elicit Legal Conclusions and Expert Testimony.

Complaint Counsel's Notice is also flawed because it seeks to elicit testimony regarding Intel's legal contentions, positions, and conclusions. *See, e.g.*, Topics 2-3 (seeking testimony concerning Intel's subject matter jurisdiction and laches defenses, respectively). Intel has been unable to find any Part 3 decisions addressing this issue under Rule 3.33(c). Again, however, there is ample federal case law support for the proposition that "depositions, including 30(b)(6) depositions, are designed to discover facts, not contentions or legal theories, which, to the extent discoverable at all prior to trial, must be discovered by other means." *J.P. Morgan Chase Bank v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 362 (S.D.N.Y. 2002); *Gossar v. Soo Line Railroad Co.*, No. 3:09-cv-9-RLY-WGH, 2009 WL 3570335, at *2 (S.D. Ind. Oct. 27, 2009) (a party "may not serve a Rule 30(b)(6) notice for the purpose of requiring [the opposing party] to marshal all of its factual proof and prepare a witness to be able to testify on a particular defense" (internal quotation marks and citation omitted)); *Captain Shontel Nicholas v. City of New York*, No. CV-07-134, 2009 U.S. Dist. LEXIS 4366, at *1-2 (E.D.N.Y. Jan. 22, 2009) (eliciting support for contentions "is not the purpose of Rule 30(b)(6), which is to discover facts, not contentions or legal theories"); *King Pharmaceuticals, Inc. v. Eon Labs, Inc.*, No. 04-CV-5540 (DGT), 2008 WL 5111005, at *1 (E.D.N.Y. Dec. 4, 2008) (seeking elaborations on legal issues "is an improper use of Rule 30(b)(6) depositions, which 'are designed to discover facts, not contentions or legal theories'"). Especially at this early stage of the litigation, Complaint Counsel should not be permitted to use the proposed deposition here "to explore opposing counsel's thought processes as to *which* facts support these contentions (and which do not), or what inferences can

be drawn from the evidence that has been assembled so far.” *FTC v. Cyberspy Software, LLC*, No. 6:08-cv-1872-Orl-31GJK, 2009 WL 2386137, at *4 (M.D. Fla. July 31, 2009).²

Additionally, several of the topics in the Notice improperly demand what is more appropriately expert testimony. For example, topic 1 seeks testimony concerning Intel’s position that the relief sought by the Commission is not in the public interest because of its negative economic impact. This is classically expert testimony and is therefore an inappropriate subject for a corporate deposition. *See, e.g., T & H Landscaping, LLC v. Colo. Structures Inc.*, Civil Action No. 06-cv-00891-REB-MEH, 2007 WL 2472056, at *4 (D. Colo. Aug. 28, 2007) (granting motion for protective order based on improper 30(b)(6) notice where plaintiffs sought defendant’s position regarding assertions in expert reports). Indeed, Complaint Counsel in Part 3 proceedings has itself sought protective orders to “limit any deposition testimony to factual inquiries into areas within the witness’ personal knowledge” when they believed that the “true purposes for . . . depositions [would be] to gain expert testimony.” *See In re Basic Research, LLC*, Dkt. No. 9318, Complaint Counsel’s Motion For Protective Order (Nov. 18, 2004), at 19-20. Mahr Decl., Attachment 3.

² Indeed, protection from such improper use of deposition discovery may explain the only substantive difference between the Commission’s Rule 3.33(c)(1) and F.R.C.P. 30(b)(6), *i.e.*, that while the Federal Rules permit a 30(b)(6) deposition of any “government agency,” the Commission’s Rule permits such a deposition of any “governmental agency *other than* the Federal Trade Commission, or any bureau or regional office of the Federal Trade Commission.” 16 C.F.R. § 3.33(c)(1) (emphasis added).

CONCLUSION

For the foregoing reasons, Intel respectfully requests that the Court enter a protective order to prevent the proposed deposition pursuant to Commission Rules 3.33(b) and 3.31(d).


Respectfully submitted,

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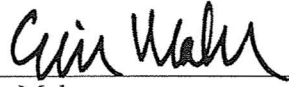

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Attorneys for Intel Corporation

Dated: March 17, 2010

5. I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.



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Washington, D.C. 20006
T: 202-663-6000
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Date: March 17, 2010

PUBLIC

FTC Docket No. 9341
Declaration of Eric Mahr in Support of
Intel Corporation's Motion for Protective Order
Pursuant to Rules 3.33(b) and 3.33(d)

Attachment 1

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

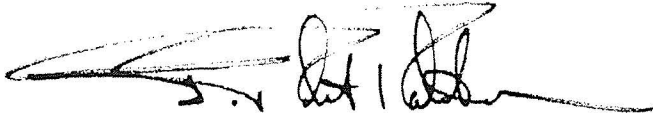
COMPLAINT COUNSEL'S FIRST NOTICE OF DEPOSITION OF
INTEL CORPORATION

PLEASE TAKE NOTICE, that pursuant to Rules 3.33(a) and (c)(1) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings (16 C.F.R. §§ 3.33(a) and (c)(1)), Complaint Counsel will take the deposition of Intel Corporation or its designee(s), who shall testify on Intel's behalf, about matters known or reasonably available to Intel Corporation regarding the attached list of topics. The testimony will be taken at the Federal Trade Commission, 901 Market Street, Suite 570, San Francisco, CA 94103, beginning at 9:00 am on March 9, 2010, and shall continue each business day until it is concluded.

Intel Corporation is advised that it must designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify. The persons so designated shall testify as to matters known or reasonably available to Intel regarding the attached list of topics.

Dated: February 24, 2010

Respectfully submitted,



J. Robert Robertson
Complaint Counsel
Bureau of Competition, H-374
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

**ATTACHMENT A TO COMPLAINT COUNSEL'S FIRST NOTICE OF
DEPOSITION OF INTEL CORPORATION**

Intel's designee(s) shall testify as to matters known or reasonably available to Intel concerning the following claims or defenses from Intel's Answer to the Complaint:

1. "The relief sought in the Complaint is not in the public interest because it would, among other things, harm competition, injure consumers, interfere with valid contracts, and abrogate valid intellectual property rights." (Second Defense)
2. "Pursuant to 15 U.S.C. § 45(a)(3), the Commission lacks jurisdiction over conduct that does not have a direct, substantial, and reasonably foreseeable effect on U.S. commerce." (Fourth Defense)
3. "The Complaint is barred in whole or part by laches, based on the Commission's prior investigations of the same conduct alleged in the Complaint and its decisions not to take action." (Seventh Defense)
4. "Intel is not subject to liability under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, because it at all times alleged acted in accordance with legitimate business justifications." (Eighth Defense)
5. Intel's purported assertions of fact in its preamble on pages 1-8 of its Answer.

CERTIFICATE OF SERVICE

I certify that I delivered via electronic mail one copy of the foregoing Complaint Counsel's First Notice of Deposition of Intel Corporation to:

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Wilmer Cutler Pickering Hale & Dorr
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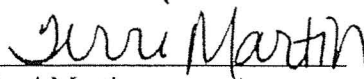
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*Counsel for Defendant
Intel Corporation*

February 24, 2010

By:



Terri Martin
Federal Trade Commission
Bureau of Competition

Attachment 2

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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

**COMPLAINT COUNSEL'S FIRST SET OF INTERROGATORIES
TO RESPONDENT INTEL (1-16)**

Pursuant to Rule 3.35 of the Federal Trade Commission's Rules of Practice, Complaint Counsel hereby requests that Respondent Intel answer the following Interrogatories within 30 days from the date of service thereof.

1. Identify every act, omission, practice, instance, document, and/or communication constituting or relating to the grounds for each of the Nine Defenses asserted by Intel in its Answer.
2. Explain in full your basis for the statement on page 2 of Intel's Answer that Intel lacks "monopoly power in the market for CPUs" and identify every act, omission, practice, instance, document, and/or communication constituting or relating to the grounds for such statement.
3. For each year since 1999, identify every company that Intel contends constrained, constrains or has the potential to constrain the price of the x86 microprocessors Intel sells for use in netbooks, notebooks, desktops, or servers.
4. For each company identified by you in response to Interrogatory 3 above, state separately for each form factor (i.e., netbooks, notebooks, desktops, or servers) the sales volumes, in units and dollars, of microprocessors that are used in netbooks, notebooks, desktops, and servers for each year since 1999.
5. State separately Intel's average sales price for microprocessors that are used in netbooks, notebooks, desktops, and servers for each year since 1999.
6. Identify and describe in detail every Intel agreement to sell microprocessors used in netbooks, notebooks, desktops, or servers since 1999 that (1) in any way refer to or mention market share or market segment share, or (2) in which any term or condition, including unit price, is expressly or impliedly dependent upon market share or market segment share.

7. Identify and describe in detail every Intel agreement with a customer (including, but not limited to, the OEMs that you stated purchased “microprocessors solely from Intel” in response to paragraph 6 of the Complaint in Intel’s Answer).whereby Intel would be the sole source of microprocessors used in netbooks, notebooks, desktops, or servers
8. For every instance between 1999 and 2009, inclusive, in which an agent or representative of Intel met with a member of the Federal Trade Commission or its staff, or filed a white paper, identify the meeting by date and participants (or authors and recipients) and describe the subject matter of the meeting or white paper including any action or forbearance sought by Intel.
9. Identify every Independent Software Vendor or Independent Software Developer that bought or used Version 7.1 of Intel’s Compiler.
10. Identify every survey, study, analysis, instance, document, and/or communication constituting or relating to the support for your claim that Intel’s complier has consistently “enabled software to run faster on non-Intel microprocessors than software compiled with non-Intel compilers.” Intel Answer at ¶ 59.
11. Identify and describe the reasons for and amount of every discount Intel gave from its “CAT C” list price since 1999.
12. Identify and describe all of the computing applications that can be shifted from a CPU to a GPU as you admit in your answer at ¶ 77.
13. Identify and describe the reasons for Intel’s failure to allow Nvidia chipsets to interoperate with its Nehalem CPU.
14. Identify and describe every instance (including the date and with whom) in which Intel revealed its discrete graphics processor technology development roadmap.
15. Identify and describe (and identify documents concerning or related to) each Intel microprocessor, microprocessor architecture, chipset, or GPU (including those currently in development by Intel) that experienced delays during its development, and identify the length and cause of each such delay.
16. Identify and describe (and identify documents concerning or related to) each instance in which Intel was unable to supply microprocessors and/or chipsets to a customer, or was delayed in supplying microprocessors and/or chipsets to a customer and identify the length and cause of each such failure or delay.

INSTRUCTIONS

The instructions set out in Respondent’s First Set of Interrogatories Issued to Complaint Counsel are hereby incorporated by reference to the extent they are consistent

with the Federal Trade Commission's Rules of Practice. Federal Trade Commission Rule 3.35(a)(2) sets out the instructions for responding to Interrogatories: "Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to on grounds not raised and ruled on in connection with the authorization, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after the service of the interrogatories. The Administrative Law Judge may allow a shorter or longer time."

DEFINITIONS

The definitions set out in Respondent's First Set of Interrogatories Issued to Complaint Counsel are hereby incorporated by reference to the extent they are consistent with the Federal Trade Commission's Rules of Practice.

CERTIFICATION

Pursuant to 28 U.S.C. § 1746, I hereby certify under penalty of perjury that this response to the Interrogatories 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.

(Signature of Official)

(Title/Company)

(Typed Name of Above Official)

(Office Telephone)

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

CERTIFICATE OF SERVICE

I, Kyle Andeer, hereby certify that on this 10th day of February, 2010 I caused a copy of the documents listed below to be served by email on each of the following:

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Eric Mahr
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Counsel for Respondent
Intel Corporation

DOCUMENTS SERVED:

- (i) Complaint Counsel's First Set of Interrogatories to Respondent Intel Corporation (Requests 1-16); and
- (ii) this Certificate of Service.

February 10, 2010

By: Kyle Andeer /s/
Kyle D. Andeer
Federal Trade Commission
Bureau of Competition

Attachment 3

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



In the Matter of)

BASIC RESEARCH, L.L.C.,)
A.G. WATERHOUSE, L.L.C.,)
KLEIN-BECKER USA, L.L.C.,)
NUTRASPORT, L.L.C.,)
SOVAGE DERMALOGIC)
LABORATORIES, L.L.C.,)
BAN, L.L.C.,)
DENNIS GAY,)
DANIEL B. MOWREY, and)
MITCHELL K. FRIEDLANDER,)

Respondents.)

Docket No. 9318

PUBLIC DOCUMENT

COMPLAINT COUNSEL'S MOTION FOR PROTECTIVE ORDER

Pursuant to RULE OF PRACTICE 3.22, Complaint Counsel moves for a *Protective Order* to limit the scope of Respondents' subpoenas *duces tecum* to two of Complaint Counsel's testifying experts; deny improper discovery demanded in 22 separate subpoenas *duces tecum* sent to Third Parties across the nation; and limit the scope of Respondent Dennis Gay's "Notice of Videotape Depositions" sent to 4 other Third Parties to protect these parties from annoyance, oppression, undue burden and expense. Respondents' subpoenas or notices are overbroad, unduly burdensome, harassing, seek information that is not reasonably expected to yield information relevant to this matter, and seek to gain expert testimony improperly. An *Order* limiting the scope of Respondents' subpoenas and depositions is appropriate.

BACKGROUND

The *Complaint* in this matter alleges, *inter alia*, that Basic Research and other related companies and individuals (collectively, "Respondents") marketed certain dietary supplements with unsubstantiated claims for fat loss and weight loss, and falsely represented that some of these products were clinically proven to be effective, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45 and 52.

The *Scheduling Order* in this matter set January 10, 2005, as the deadline for conducting all depositions, so the parties are preparing to depose witnesses while negotiating numerous outstanding discovery issues. In addition, the *Scheduling Order* set November 8, 2004, as the deadline for issuing subpoenas *duces tecum*.

Complaint Counsel has conferred with Respondents in an attempt to resolve the issues relating to the scope of these subpoenas discussed in this *Motion*. Although we were able to come to an agreement regarding two other testifying experts' subpoenas, Respondents declined to limit the two scientific substantiation experts' subpoenas *duces tecum* to areas of inquiry that the parties mutually agree are relevant and not unduly burdensome. Respondents further declined to withdraw their subpoenas to the 22 Third Parties, claiming that the inquiries are relevant to impeach one of Complaint Counsel's Expert Witnesses, Dr. Steven Heymsfield, regarding the use of double-blind clinical trials. As discussed below, the subpoenas seek documents that are completely outside the scope of the issues in this case. Finally, Respondents declined to limit the Notice of Videotape Depositions to the remaining 4 Third Parties to factual inquiry, as opposed to expert opinion. Respondents' positions necessitated the filing of the present *Motion*.

DISCUSSION

I. Scope of Discovery

“Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the compliant, to the proposed relief, or to the defenses of any respondent.” RULE OF PRACTICE 3.31(c)(1); *see FTC v. Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979). The Administrative Law Judge has the authority to quash or limit any subpoena that is unduly burdensome. *See* RULE OF PRACTICE 3.31(c)(1)(i) and (iii) (use of subpoena and other discovery methods “shall be limited by the Administrative Law Judge” where the “discovery sought is unreasonably cumulative or duplicative, or obtainable from some other source that is more convenient, less burdensome, or less expensive. . . ; the burden and expense of the proposed discovery outweigh its likely benefit”); RULE OF PRACTICE 3.31(c)(2) (authorizing Administrative Law Judge to “enter a protective order denying or limiting discovery. . .”). Moreover, the ALJ has the power to deny discovery or modify a subpoena and limit the scope of permissible discovery “which justice requires to protect a party or other person from annoyance, embarrassment, oppression or undue burden or expense. . .” RULE OF PRACTICE 3.31(d)(1).

RULE 3.31(c)(4)(A) provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and has ample power to regulate its timing and scope and prevent abuse. “All data, documents, or information considered by a testifying expert witness in forming the opinions to be proffered in a case is discoverable.” *Dura Lube Corp.*, No. 9292, 1999 F.T.C. Lexis 254 at *6 (Dec. 15, 1999)¹ *citing* Fed. R. Civ. P.

¹ Copies of all unpublished materials are attached as Exhibit A in alphabetical order.

26(a)(2)(B); 16 C.F.R. § 3.31(c)(4)(B); *Thompson Med. Co.*, 101 F.T.C. 385, 388 (1983). “Full disclosure of the basis of an expert opinion ensures the independence of the expert’s conclusions.” *Dura Lube* at *6. The RULES OF PRACTICE and this Court’s *Scheduling Order* require that for each expert expected to testify at trial, the parties must exchange all documents reviewed, consulted, or examined by the expert in connection with forming his or her opinion on the subject on which he or she is expected to testify, regardless of the source of the document or whether a document was originally generated in another investigation or litigation. *Id.* at * 6-7. The scope of discovery is not limited to documents relied on by the expert in support of his or her opinions, but also extends to documents considered but rejected by the testifying expert in reaching those opinions. *Id.* at *7. An expert’s prior opinions on the same subject matter may also be relevant to probe whether the expert has taken inconsistent positions. However, while a testifying expert’s testimony from prior investigations or litigations must be produced, the documents “underlying” such testimony are not discoverable in subsequent litigation, “unless such documents were also relied upon or reviewed by a testifying expert in formulating an opinion in this case.” *Id.* at *9. In addition, only those reports and documents prepared by any non-testifying experts which were relied upon or reviewed by a testifying expert in forming opinions in the instant case are discoverable *Id.*

In addition, under RULE 3.31(c)(4)(B), the Administrative Law Judge can order discovery of facts or opinions held by non-testifying or consulting experts who had been retained by the opposing party in anticipation of litigation only upon a showing of exceptional circumstances. The party seeking discovery from a non-testifying expert faces a heavy burden. *See Order Denying Basic Research’s Motion to Compel* at 2 (Nov. 4, 2004); *Hoover v. Dep’t. of Interior*, 611 F.2d 1132, 1142 n.13 (5th Cir. 1980).

II. Respondents' Subpoenas to Drs. Eckel and Heymsfield are Overbroad, Unduly Burdensome, and Seek Information Not Relevant to this Matter

After the close of business on November 8, 2004,² Respondents untimely served Complaint Counsel via email with copies of subpoenas *duces tecum* directed to two testifying scientific substantiation experts retained by Complaint Counsel, Dr. Steven B. Heymsfield, M.D., Executive Director of Clinical Sciences at Merck & Co., and Dr. Robert Eckel, M.D., a Professor at the University of Colorado and the President-elect of the American Heart Association.³ Respondents' subpoenas consist of 22 identical specifications (and Heymsfield has 2 additional specifications), *not* including the 38 sub-specifications contained therein, which are designated by lower-case letters.

Complaint Counsel does not object to Specifications 1-7, and 20-22, which seek proper discovery, including a copy of the expert's file, correspondence with the FTC or any other individual relating to this case, all reports and drafts of reports prepared by the expert in connection with this case, all documents reviewed and all materials consulted or relied upon in forming any opinion in connection with this case, all documents which the FTC provided to the expert and all documents which the expert provided to the FTC, in connection with this case, and all notes of any meetings or telephone conversations with the FTC in connection with this matter. These specifications all properly demand documents which were prepared or used and relied upon by the experts in this case.

² This service was at 5:19 p.m. and therefore pursuant to the *Scheduling Order*, past the November 8th 5:00 p.m. deadline for issuing written discovery requests not related to issues of authenticity and admissibility of exhibits. *See Scheduling Order* at p. 1, 3.

³ Respondents' subpoenas *duces tecum* to our testifying experts are attached hereto as Exhibits B and C, respectively.

However, the remaining specifications, 8-19 and 23, are overbroad, unduly burdensome, seek information not reasonably expected to yield information relevant to this case, and seek materials that are outside of those relied upon by these experts in forming their opinions in this case. Accordingly, Complaint Counsel request that the Administrative Law Judge limit the scope of the subpoenas by striking these specifications.

A. Specifications Demanding a Library of Testifying Experts' Written Work

Specifications 8,⁴ 9,⁵ 10,⁶ and 11⁷ seek an overly broad range of documents and information which is readily discoverable by a reading of the experts' *curriculum vitae* (CV). On October 6, 2004, Complaint Counsel turned over our list of testifying experts, along with copies of their CVs. Dr. Eckel's CV includes a list of 94 speaking/participant events dating back to 1980, 136 publications, 18 letters and editorials, 32 chapters and books/reviews, and 183

⁴ Specification 8 seeks, "all documents that you have ever authored or contributed to regarding: a) obesity; b) weight loss; c) fat loss; d) the Federal Trade Commission; e) clinical trial protocol or procedures; f) the definition of 'competent and reliable scientific evidence'; g) Federal Trade Commission advertising rules and regulations; h) dietary supplements; i) weight loss or fat loss advertising."

⁵ Specification 9 seeks, "all documents relating to lectures, speeches or testimony that you have ever given regarding: a) obesity; b) weight loss; c) fat loss; d) the Federal Trade Commission; e) clinical trial protocol or procedures; f) the definition of 'competent and reliable scientific evidence'; g) Federal Trade Commission advertising rules and regulations; h) dietary supplements; i) weight loss or fat loss advertising."

⁶ Specification 10 seeks, "all documents relating to medical or clinical studies or tests that you have conducted or contributed to or participated relating to or involving: a) obesity; b) weight loss; c) fat loss; d) dietary supplements."

⁷ Specification 11 seeks, "all patents and patent applications (whether or not published or pending review by the United States Patent and Trademark Office) in which you are named as an inventor or patent owner or assignee of any invention relating to: a) obesity; b) weight loss; c) fat loss; d) dietary supplements."

abstracts. Dr. Heymsfield's CVs includes a list of 312 original peer-reviewed articles, a number of articles in the Press, articles submitted, case reports, and reviews submitted in press, 110 book chapters/reviews, 4 books, 29 editorials/letters/book reviews, and patents.

Respondents requests seek an unlimited number of documents on unrelated matters involving different issues. Complaint Counsel have no objection to production of the documents that specifically relate to this case. Indeed, Complaint Counsel have turned all known materials requested in Specifications 1-7 and 20-22. That type of discovery is contemplated by the RULES and is clearly relevant. In addition, The RULES require Complaint Counsel to provide a "list of all publications authored by the witness within the preceding 10 years." RULE OF PRACTICE 3.31(b)(3). Complaint Counsel have complied with this rule and have gone further by providing each expert's CV which lists publications dating back further than 10 years. Nothing in the RULES requires that the experts provide copies of all of their publications.

Complaint Counsel have retained experts to address whether scientific support exists to substantiate the specific efficacy and establishment claims challenged in the Complaint given Respondents' specific products and their corresponding ingredients, dosage, composition and application. Respondents' subpoenas are so overbroad that they encompass thousands of pages of materials that do not relate to the issues or the claims and products challenged in this case. For example, Respondents are seeking all documents the experts have ever authored regarding nine broad areas. Documents that would be responsive to this subpoena would include, for example, documents regarding Dr. Eckel's participation in numerous articles and clinical studies relating to the study of metabolism and relationships between obesity, insulin and diabetes. Such studies and articles are not relevant to the purpose for which Dr. Eckel has been designated as an

expert. Moreover, the specifications seek “all documents” relating to lectures, speeches or testimony he has provided, “all documents” the expert has ever authored, and “all documents relating to” any clinical study the expert has ever been involved in regarding a) obesity, b) weight loss; c) fat loss, d) clinical trial protocol, and e) dietary supplements.⁸ To the extent any documents are within the scope of expert discovery prescribed within the RULES OF PRACTICE and this Court’s *Scheduling Order*, they have been produced. But Respondents’ specifications far exceed the allowable scope of discovery. They specifically ask for all underlying documents, a request clearly beyond the permissible scope of discovery. *Compare Dura Lube* at *9 (in order to discover whether an expert has taken a prior inconsistent position, prior testimony must be produced, however the documents “underlying” the testimony are not discoverable in subsequent litigation, “unless such documents were also relied upon or reviewed by a testifying expert in formulating an opinion in this case”)

Further, the Respondents are asking the experts to produce virtually their entire lives’ work. Dr. Eckel’s CV alone lists over 200 publications, and Dr. Heymsfield’s CV lists over 400 publications. It is clear that many of the documents they seek are publicly available, and therefore equally available to all parties and may no longer be readily available to the experts without going to the same sources that Respondents would go to. The CVs already provide a list for Respondents. To require the experts, who are extremely busy with various professional obligations, to search for and produce every document relating to all of these broad areas in

⁸ Specifications 8 and 9 further seek all documents relating to the FTC and advertising law. These requests exceed the scope of Dr. Eckel and Heymsfield’s expertise and hence are not relevant. Similarly seeking any patent information (specification 11) is not relevant to their expert opinions.

which these experts have spent numerous years of their lives studying and working, would be an arduous process, to say the least, and unduly burdensome.

These discovery requests are not tailored to discover information that is reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any Respondent. If Respondents wish to conduct such a fishing expedition, they should be prepared to expend their own time and resources, and not demand those of Third Parties, specifically our testifying experts, who are also medical doctors.

B. Specification Demanding Legal Documents

Specification 12⁹ seeks information that is beyond the scope of discovery. Here, Respondents demand all documents relating to civil or criminal lawsuits in which the experts were named as a party. The RULES require that Complaint Counsel provide “a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the proceeding four years.” Complaint Counsel have complied with this requirement and will continue to supplement as more facts become available. However, Respondents’ specification seeks documents not simply relating to the expertise of these witnesses; apparently, they are also seeking documents with which to impeach their credibility. Respondents are on a harassing fishing expedition to obtain anything to personally attack these expert witnesses, even separate and apart from their professional experience and opinions. This type of information can be obtained within reasonable limits by questioning the witnesses during their depositions. In fact, under the Federal Rules of Evidence, specific instances of conduct for the purpose of attacking

⁹ Specification 12 seeks “all documents relating to lawsuits, whether criminal or civil, in which you were named as a party.”

the witnesses' credibility, other than the conviction of certain crimes, may not be proved by extrinsic evidence. FED. R. EVID. 608(b). Respondents are simply not entitled to demand that the expert witnesses provide personal documentation regarding any civil or criminal lawsuits in which the experts were a party as opposed to testifying as an expert witness in their professional capacity. There is no provision in the RULES that would call for providing such information to Respondents and Respondents cannot show that such discovery would be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any Respondent, much less that demanding such information is not unfairly prejudicial or harassing.¹⁰

C. Specifications Relating to Other Work and Compensation

Specifications 10,¹¹ and 13-19¹² all demand documents relating to other work the experts

¹⁰ If Respondents' counsel wishes to impeach our testifying experts by raising questions concerning their capacity for truthful testimony, as in the hypothetical case of damaging transcripts from divorce proceedings, then at the very least, Respondents should embark on their own safari, instead of demanding that others perform the work of the expedition. There are limits to admissible evidence. Unless there is evidence referring to character for truthfulness or untruthfulness, such evidence would be inadmissible under FED. R. EVID. 608(a) and likely unfairly prejudicial under FED. R. EVID. 403.

¹¹ See Footnote 6 for details of Specification 10.

¹² Specification 13 seeks, "all documents pertaining to work that you have performed for any company that manufactures, markets or sells pharmaceuticals or dietary supplements relating to: a) obesity; b) weight loss; c) fat loss." Specification 14 seeks, "all documents relating to weight loss or fat loss advertisements that you have authored, reviewed or approved relating to any weight loss or fat loss product." Specification 15 seeks, "all documents relating to requests for approval that you have made to the FDA, FTC or any other regulatory body, either on behalf of yourself or some other third party, relating to advertising or package labeling claims that you sought to make in relation to any weight loss or fat loss product." Specification 16 seeks, "all documents relating to efforts by you, either on your own behalf, or on behalf of any other third party or parties, to justify or substantiate advertising claims made in relation to any weight loss or fat loss product including but not limited to pharmaceutical products or dietary supplements."

performed either for other companies or for other government agencies in the broad areas in which make up their expertise, and thus, their entire professional careers. Respondents here are seeking documents that, once again, are so overreaching as to encompass areas which have no relationship to the issues in this case. These specifications are not tailored to the specific subject matter of the experts' testimony in this case. A search for all of these documents which span the careers of these experts would be an arduous and overly burdensome task.

The RULES require that Complaint Counsel provide "a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the proceeding four years." The *Scheduling Order* goes further and provides that Complaint Counsel provide a list of "all prior cases in which the expert has testified or has been deposed." *Scheduling Order* at 5. Complaint Counsel have complied with this requirement and will continue to supplement as more facts become available. While testimony in the possession of Complaint Counsel or the expert, including deposition testimony, from prior investigations or litigation must be produced, the documents underlying such testimony are not discoverable in this subsequent litigation, unless such documents were also relied upon or reviewed by a testifying expert in formulating an opinion in this case. *See Dura Lube* at *9. Nevertheless, the documents that Respondents are seeking through these overbroad subpoenas, are far beyond that required by either the RULES or

Specification 17 seeks, "all documents pertaining to work that you have performed for the Federal Trade Commission, The Food and Drug Administration or any other federal agency, whether as an expert, consultant or in any other capacity, relating to: a) obesity; b) weight loss; c) fat loss; d) the Federal Trade Commission; e) clinical trial protocol or procedures; f) the definition of 'competent and reliable scientific evidence'; g) Federal Trade Commission advertising rules and regulations; h) dietary supplements; i) weight loss or fat loss advertising." Specification 18 seeks, "all scientific and/or medical testing protocols you have authored." Specification 19 seeks, "all scientific and/or medical testing protocols on which you have provided comments, including your comments."

the *Scheduling Order*. Respondents will have the opportunity to question, within reasonable limits, these experts at depositions in this matter. However, demanding documents on matters that have no bearing on their opinions formed in this case, under these circumstances, with these particular products is an unreasonable and unduly burdensome task. There is no provision in the RULES that would call for providing such documentation to Respondents and Respondents cannot show that such discovery would be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.

D. Specifications Relating to Other Products Not Made by Respondents or Challenged in the *Complaint* are Not Relevant and Unduly Burdensome

The subpoena *duces tecum* for Dr. Heymsfield includes two extra specifications¹³ which seek all records and documents reflecting side effects experienced and comments about side effects experienced by subjects in control or placebo groups during a specific study titled, “Weight Control and Risk Factor Reduction in Obese Subjects Treated for 2 Years with Orlistat: A Randomized Controlled Trial.” This is a study in which Dr. Heymsfield is listed as an author, along with 10 other doctors. These specifications call for documents that discuss side effects of Orlistat, a drug that is not at issue in this case, nor do any of the challenged products in this case contain any of the same active ingredients. Moreover, the side effects of a drug are only relevant

¹³ Specification 23 seeks “all records and documents of whatever kind reflecting side effects experienced by subjects in control or placebo groups during the study titled Weight Control and Risk Factor Reduction in Obese Subjects Treated for 2 Years with Orlistat: A Randomized Controlled Trial . . . You may provide redacted records or documents redacting identifying information concerning the test subjects including but not limited to name, address, telephone number, social security number or similar.” Specification 24 seeks “all records and documents of whatever kind reflecting comments by subjects concerning or related to any side effects experienced by subjects in control or placebo groups during the study titled Weight Control and Risk Factor Reduction in Obese Subjects Treated for 2 Years with Orlistat: A Randomized Controlled Trial . . .”

when discussing safety claims. The *Complaint* in this case does not allege any issues with regard to the safety of the challenged products, rather the allegations concern the efficacy of these products with respect to the claims made in the Respondents' promotional materials. Therefore, the specifications relating to side effects of participants in an unrelated study, having nothing to do with the issues in this case are completely irrelevant and certainly not reasonably calculated to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.

Respondents claim that such documents are relevant for the purposes of impeaching Dr. Heymsfield's testimony regarding the issue of double-blind clinical trials. This purpose is not facially evident from the specifications themselves, and the language of the specifications is broad enough to allow the Respondents to ask any question on side effects or safety. Moreover, compelling the expert to produce all documents relating to the study exceeds the scope of discovery for impeachment purposes. *See Dura Lube* at *9. Respondents could not offer such documents into evidence in order to impeach Dr. Heymsfield's testimony because such documents would be extrinsic evidence and not admissible. *See* FED. R. EVID. 608(b); *United States v. Boykoff*, 67 Fed. Appx. 15, 2003 U.S. App. LEXIS 9808 (2d Cir. 2003). Even without the documents, Respondents will have the opportunity to ask questions within reasonable limits at a deposition for impeachment purposes. Accordingly, a protective order is appropriate because the "burden . . . of the proposed discovery outweigh its likely benefit." 16 C.F.R. § 3.31(c)(1)(iii); *see also* 16 C.F.R. § 3.31(d).

III. Respondents' Subpoenas to the 22 Third Parties are Overbroad, Unduly Burdensome, Harassing, and Seek Information Not Reasonably Expected to Yield Information Relevant to this Matter

A. Respondents' Overreaching and Irrelevant Specifications

On November 9, 2004, after the general deadline for issuance of written discovery requests, Respondents served Complaint Counsel with emailed copies of 22 different subpoenas *duces tecum* that it issued to doctors, scientists, and custodians of records for various laboratories and research clinics who participated in one of two specified research studies regarding weight loss.¹⁴ The letter attached to each of these subpoenas indicates that the subpoenas were sent on November 8, 2004 via First Class Mail.¹⁵ Respondents' subpoenas directed to 18 of the 22 Third Parties seek all documents regarding *side effects* experienced by subjects during a study titled, "Weight Control and Risk Factor Reduction in Obese Subjects Treated for 2 Years with Orlistat: A Randomized Controlled Trial."¹⁶ These specifications contain identical wording to Specifications 23 and 24 of Dr. Heymsfield's subpoena *duces tecum* as described above. This weight loss study involved a drug called Orlistat, which Respondents have never marketed or sold. Respondents' subpoenas directed to the remaining 4 Third Parties seek documents regarding *side effects* experienced by subjects during a different weight loss study entitled, "A

¹⁴ Respondents' cover letters and the first page of the subpoenas *duces tecum* to the 22 Third Parties are attached hereto as Exhibits D.

¹⁵ These 22 subpoenas were sent along with a letter dated November 8, 2004, from a law firm called Manatt, Phelps & Phillips, LLP, and an attorney, Barrie Berman VanBrackle, that purportedly represents Respondents. Neither the attorney in question, nor the law firm, have filed a *Notice of Appearance* in this action.

¹⁶ An example of the complete "Orlistat" study subpoena is attached at Exhibit E.

randomized double-blind placebo-controlled clinical trial of a product containing ephedrine, caffeine, and other ingredients from herbal sources for treatment of overweight and obesity in the absence of lifestyle treatment.”¹⁷

B. A Protective Order is Appropriate

These specifications all seek documents reflecting the side effects of either Orlistat, a drug which does not involve any ingredients similar to the challenged products and which is not even relevant to the proceedings in this case, or a different ephedra/ caffeine product than that challenged in the *Complaint* in this case. As discussed above, the issue of side effects of a particular product is only relevant when discussing safety claims. The *Complaint* in this case does challenge any safety claims; rather the allegations concern whether the Respondents disseminated false and misleading advertising with respect to the efficacy claims made in the Respondents’ promotional materials. Therefore, any documents relating to side effects of participants in an unrelated study,¹⁸ having nothing to do with the issues in this case are completely irrelevant and certainly not reasonably calculated to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. As such these requests exceed the scope of expert discovery. *See Dura Lube* at *6-9. Respondents’ foray into this area appears calculated to obtain evidence relevant to other proceedings, not this matter.

¹⁷ An example of the complete “ephedrine” study subpoena is attached at Exhibit F.

¹⁸ The ephedra/caffeine study was not submitted by Respondents as part of their substantiation for the claims made in their promotional materials.

As discussed above, Respondents are apparently seeking discovery from these 22 individuals and entities in order to gather cross-examination impeachment material to use against Complaint Counsel's expert, Dr. Heymsfield, who participated in the Orlistat study. This is a harassing technique in which Respondents are attempting to use the subpoena power of this process to conduct onerous discovery upon Dr. Heymsfield's colleagues. Discovery should be granted "when the court is persuaded that the party seeking discovery is not abusing the procedure and the information sought would prove helpful in providing for a full and fair adjudication." *Thompson Medical Co.*, 101 F.T.C. 386 (Mar. 11, 1983) (citations omitted). These 22 subpoenas seek information unrelated to the allegations in the Complaint, the proposed relief, or the defenses of Respondents and hence are create an arduous, and harassing task for Third Parties who are not connected to this case. The discovery sought here is unreasonable, overly burdensome, and any tangential relation to impeachment of one of Complaint Counsel's expert witnesses is outweighed. Accordingly, justice requires that the Administrative Law Judge exercise his power to deny the discovery sought by these subpoenas to protect these 22 Third Parties from annoyance, embarrassment, oppression or undue burden or expense. *See* RULE OF PRACTICE 3.31(d)(1).

C. Respondents' Subpoenas *Duces Tecum* are Untimely

The *Scheduling Order* in this matter set November 8, 2004, as the deadline for issuing subpoenas *duces tecum*. The *Scheduling Order* further provides that the parties are required to "serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* . . ." *Scheduling Order* at 5. On November 9, 2004, Respondents sent to Complaint Counsel via electronic mail copies of the 22 subpoenas *duces tecum* that they issued to the 22 Third Parties.

The letter attached to each of these subpoenas asserts that the subpoenas were placed in the mail on November 8, 2004. At least two of the Third Parties notified Complaint Counsel that they received the subpoenas on November 15, 2004 (seven days later), and as of November 16, 2004, one of the Third Parties notified Complaint Counsel that it had not yet received the subpoena. In light of the date of service on Complaint Counsel and the fact that the Third Parties received the subpoenas significantly after the *Scheduling Order's* issuance deadline, it is questionable whether Respondents indeed issued the subpoenas before the close of business on November 8, 2004 as required and hence the Court should deem these subpoenas invalid.

V. Respondents' Subpoenas Ad Testificandum to the 4 Remaining Third Parties Should be Limited to Factual Inquiries and Should Prohibit Expert Opinion Inquiry

On November 10, 2004, Respondent Gay issued a "Notice of Videotape Deposition" for the following individuals and entities: George Bray, Frank Greenway, Dermtech International, Edward G. Fey, Dr. Bruce Frome, Ken Shirley, and Paul Lehman.¹⁹ These individuals and entity either participated in, or have a relation to, studies submitted by Respondents as substantiation for the challenged products. Respondent listed the first 5 parties in its Preliminary Witness List as individuals or representatives "to testify as to the scientific support for the products and claims

¹⁹ Greenway and Bray are individuals who conducted the studies regarding the challenged aminophylline gels; Frome is a lawyer and doctor who is mentioned in advertisements for the aminophylline gel products; Fey is a medical doctor whose name appeared in advertisements for some of the challenged products; Dermtech is the company that conducted the "cadaver studies" for the aminophylline gels; Lehman is an officer with Dermtech who conducted and approved the "cadaver studies"; and Shirley is president of BPI Labs, which formulated the aminophylline gels.

identified in the Complaint.”²⁰ None were listed as expert witnesses. In fact, Respondents have listed only Respondent Daniel Mowrey as their testifying expert regarding the scientific substantiation. The remaining two individuals, Shirley and Lehman, were not listed in either party’s Preliminary Witness List or Expert Witness list and Respondent has not supplemented their witness list to include them. The deadline imposed in the *Scheduling Order* for listing expert witnesses has passed (October 13, 2004). During discussions with Respondents’ counsel, Respondents agreed to withdraw the notices for Bray, Greenway, and Frome because Complaint Counsel presently does not intend to call them as witnesses at the proceeding in this case. However, Respondents continue to refuse to withdraw the remaining 4 Notices.²¹ Accordingly, Complaint Counsel seek an order limiting the depositions of these 4 Third Parties to factual inquiries relating to their own personal knowledge of factual information relating to this case, and prohibiting any expert opinion relating to the issues in this case.

Both Fey and Dermtech are listed in Complaint Counsel’s Preliminary Witness List as parties who may be called “to testify as to the ingredients or attributes of the products identified in the Complaint. The testimony as listed, is limited to a factual inquiry within the party’s personal knowledge. On the other hand, Respondents listed these Third Parties in their Preliminary Witness List as parties who may be called to “testify as to the scientific support for the products and claims identified in the Complaint.” This type of testimony specifically calls for

²⁰ In its Preliminary Witness List, Complaint Counsel listed 5 of these 7 parties as individuals or entities “to testify as to the ingredients or attributes of the products identified in the Complaint.”

²¹ Respondents’ Notice of Videotape Depositions to the remaining 4 Third Parties are attached hereto as Exhibit G.

scientific expert opinion as to the competence and reliability of the substantiation provided by Respondents for their claims made in their promotional materials. This type of expert witness must be indicated as per the Court's *Scheduling Order* and as per the RULES OF PRACTICE. If Respondents are seeking to use these individuals for expert opinion testimony, they were required to identify the individuals, prepare and provide expert reports, and provide all other information required by the RULES. See *Scheduling Order*, at 1- 2, 5-6; RULES OF PRACTICE 3.31(b)(3). The *Scheduling Order* specifically provides that "fact witnesses shall not be allowed to provide expert opinions." *Scheduling Order* at 6.

Respondents' Expert Witness List only indicates one individual to testify as to the scientific substantiation - - Respondent Daniel Mowrey. Therefore, fact witnesses, such as Fey, Lehman, and Shirley cannot be called upon to provide expert opinion. It appears that instead of hiring an independent expert witness to opine on the substantiation submitted by Respondents, Respondents are attempting to obtain expert opinion testimony through the back door by deposing individuals involved in conducting the studies and promoting the aminophylline gels. Although Complaint Counsel have no objection to Respondents' right to depose witnesses listed on its *Preliminary Witness List* to gain discovery on facts within their personal knowledge, the contents of the subpoena suggest that the true purposes for these depositions is to gain expert testimony. For example, on the "List of Areas of Inquiry" specified on Dermtech's subpoena, aside from the factual areas listed, Respondents list "the results" of the studies and "the conclusions" of the studies. See Exhibit G at 4. In these areas, Respondents can only be seeking an expert's opinion. Respondents did not list the areas of inquiry for the remaining individuals, however, it is clear that they are seeking similar testimony which would likely call for expert

opinion.

Because none of these witnesses are listed on either Respondents or Complaint Counsel's expert witness list, Complaint Counsel seek a ruling to limit any deposition testimony to factual inquiries into areas within the witness' personal knowledge. This will protect the integrity of the discovery process and prevent any further abuse here by Respondents.

In addition, the *Scheduling Order* provides that "the preliminary and final witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order." *Scheduling Order* at 5. Respondents failed to amend their preliminary witness list, nor did they notify Complaint Counsel of their intent to call Shirley and Lehman as witnesses. Instead, Respondents waited until the close of written discovery to send notices to Complaint Counsel that they wish to depose these Third Parties. Based on their failure to comply with the Administrative Law Judge's *Scheduling Order*, both Lehman and Shirley should be stricken as witnesses to be deposed by Respondents.

CONCLUSION

Respondents' abusive discovery tactics are unreasonable and inconsistent with the RULES OF PRACTICE and the *Scheduling Order* in this case. These overreaching, harassing, and overly burdensome subpoenas seek documents that are not likely to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. Respondents further seek to gain improper expert opinion from fact witnesses during the noticed depositions. For the reasons set forth above, and in the interest of judicial efficiency and economy, this Court should limit and deny Respondents' invalid and improper discovery.

Respectfully submitted,

Laura Schneider/RK

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Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dated: November 18, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 2004, I caused *Complaint Counsel's Motion for a Protective Order* to be served and filed as follows:

- (1) the original, two (2) paper copies filed by hand delivery and one (1) electronic copy via email to:
Donald S. Clark, Secretary
Federal Trade Commission
600 Penn. Ave., N.W., Room H-159
Washington, D.C. 20580
- (2) two (2) paper copies served by hand delivery to:
The Honorable Stephen J. McGuire
Administrative Law Judge
600 Penn. Ave., N.W., Room H-113
Washington, D.C. 20580
- (3) one (1) electronic copy via email and one (1) paper copy by first class mail to the following persons:

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COMPLAINT COUNSEL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
INTEL CORPORATION,)
a corporation)
_____)

DOCKET NO. 9341
PUBLIC DOCUMENT

**[PROPOSED] ORDER GRANTING INTEL'S MOTION FOR PROTECTIVE ORDER
PURSUANT TO RULES 3.33(b) AND 3.31(d)**

Respondent Intel Corporation, having moved on March 17, 2010 for a protective order pursuant to Rules 3.33(b) and 3.33(d) to prevent the taking of its deposition pursuant to Complaint Counsel's First Notice of Deposition of Intel Corporation; and

Good cause having been shown,

IT IS ORDERED that Complaint Counsel's February 24, 2010 Notice of Deposition Of Intel Corporation is deemed null and void.

D. Michael Chappell
Administrative Law Judge

Dated: _____

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Attorney for Intel Corporation

Dated: March 17, 2010