UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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 *DUCES TECUM*

Intel Corporation ("Intel") submits this memorandum in opposition to Hewlett-Packard Company's ("HP") motion to quash Intel's subpoena *duces tecum* issued on March 11, 2010 ("Subpoena"). HP's motion should be denied, and it should be ordered to comply with Intel's Subpoena, as narrowed by Intel's April 19, 2010 letter.

Intel's Subpoena seeks documents necessary to defend against Complaint Counsel's broad allegations and claimed relief. The Complaint alleges that Intel engaged in unfair business practices that maintained its monopoly over central processing units ("CPUs") and threatened to give it a monopoly over graphics processing units ("GPUs"). *See* Compl. ¶¶ 2-28. Complaint Counsel's Interrogatory Answers state that it views HP, the world's largest manufacturer of personal computers, as a centerpiece of its case. *See, e.g.*, Complaint Counsel's Resp. and Obj. to Respondent's First Set of Interrogatories Nos. 7-8 (attached as Exhibit A). Complaint Counsel intends to call eight HP witnesses at trial on topics crossing virtually all of HP's business lines, including its purchases of CPUs for its commercial desktop, commercial notebook, and server businesses. *See* Complaint Counsel's May 5, 2010 Revised Preliminary Witness List (attached as Exhibit B). Complaint Counsel may also call HP witnesses on other topics, including its

assessment and purchases of GPUs and chipsets and evaluation of compilers, benchmarks, interface standards, and standard-setting bodies. *Id.* The sweeping injunctive and declaratory relief Complaint Counsel seeks in this matter implicates Intel's prior and *current* agreements and relationships with its customers, including HP.

Intel expects to defend a case that is broader than the underlying *AMD v. Intel* private antitrust litigation ("AMD case") and involves more recent time periods, different products, and different alleged conduct. For example, unlike the AMD case, Complaint Counsel's allegations involve GPUs, chipsets, compilers, benchmarks, and interface standards. None of those were subjects of the HP discovery in the AMD case. Complaint Counsel's case regarding CPUs involves HP's commercial desktop and notebook, workstation, and server business—[redacted]

HP concedes the Subpoena seeks documents that are definite in scope and relevant to Intel's defense and, thus, that it satisfies two of the three criteria for an enforceable subpoena. *FTC Manual* § 10.13.6.4.7.3. HP recognizes that Intel offered to narrow its Subpoena in an April 19 letter and that Intel has reiterated its willingness to further narrow where possible. HP nonetheless moves to quash the entire Subpoena because it claims it is "unreasonable" to be required to produce CPU documents from post-2006 or from any new custodians simply because it produced some CPU-related documents from *different* custodians or for an *earlier* time period.

HP has failed to meet the "heavy burden" necessary to quash Intel's Subpoena. *In re Flowers Indus., Inc.*, No. 9148, 1982 FTC LEXIS 96, at *12 (Mar. 19, 1982). HP's memorandum does not identify any specific burden it faces. HP's generic assertions of burden are insufficient. HP is one of the largest corporations in the world, with 2009 revenues over $114 Billion (more than three times Intel's revenues). Moreover, the narrowed number of custodians Intel requested in its April 19 letter (twenty-four) – despite the much broader range of subject matters and time period – [redacted]

I. BACKGROUND

Complaint Counsel filed its Complaint under Section 5 of the FTC Act, a statute that was not at issue in the underlying AMD litigation and which Complaint Counsel asserts covers a broader range of conduct than was at issue in AMD's Sherman Act claims. *See* Compl. ¶ 1 ("the Commission may consider public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust law") (citation omitted). The Complaint contains several categories of factual allegations different from those at issue in the AMD case, including vague allegations of coercion and deception to hinder competition in compilers, software, benchmarks, and GPUs. Complaint Counsel's Interrogatory Answers state that it also intends to challenge Intel conduct related to HP's purchases of CPUs in the corporate desktop, corporate notebook, and server market segments. *See* Exhibit A, Nos. 7-8. Complaint Counsel has requested documents from Intel employees responsible for HP that post-date July 2006, [redacted]

[redacted], and the Complaint seeks injunctive and declaratory relief that implicates Intel's current agreements with HP.

Intel served its Subpoena *duces tecum* on March 11, 2010, over two months ago. HP Mot., Exhibit B. The Subpoena sought documents on the *new* topics and *new* time periods in the Complaint, as well as several *new* witnesses that Complaint Counsel has identified on its trial witness list. New topics include: (a) HP's interactions with the FTC (Requests 1-6); (b) graphics and chipset interoperability and sourcing (Requests 13-14, 24, 36-55; (c) benchmarking issues (Requests 16-18); bundling issues (Request 55); and assessments of VIA (Requests 12, 26-27, 35). On April 19, Intel proposed a narrowing of its Subpoena, using a finite number of custodians and search term protocols. HP Mot., Exhibit C. The proposal reduced the number of GPU and chipset requests and proposed that HP identify six custodians most likely to have responsive documents. It also narrowed Intel's CPU-related requests and made clear that Intel sought only *new* CPU-related documents from either: (a) custodians whose files were not produced during the AMD case, four of whom were identified by Complaint Counsel on its trial witness list; or (b) more recent CPU-related documents, [redacted]

HP responded to Intel's proposal on April 26 with a blockade: it asked Intel to eliminate all of its requests for CPU-related custodians and informed Intel that it would not discuss Intel's other requests (*e.g.*, for GPUs and chipsets) until Intel agreed. On April 29, Intel informed HP that it was willing to discuss means to minimize any burden on HP, but that it had to maintain its

narrowed request for CPU documents.[1] On May 5, Intel made one final effort to reach agreement by proposing further reductions for the production of CPU documents. On May 7, HP informed Intel that it was still unwilling to produce such documents and would move to quash Intel's Subpoena in its entirety.

II. ARGUMENT

"The law is clear that a recipient of a subpoena *duces tecum* issued in an FTC adjudicative proceeding who resists compliance therewith bears a ***heavy burden***." *Flowers Indus.*,1982 FTC LEXIS 96, at *15 (emphasis added). HP cannot satisfy this burden. The Court should enforce Intel's Subpoena *duces tecum* and deny HP's motion to quash.

1. Commission Precedent Strongly Favors Discovery of Relevant Evidence

"Parties may obtain discovery to the extent that it 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). "Information may not be withheld . . . if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id*. The operative question is "whether the subpoena seeks information that is reasonably expected to be 'generally relevant to the issues raised by the pleadings.'" *In re Rambus, Inc.*, No. 9302, 2002 FTC LEXIS 90, at *5 (FTC Nov. 18, 2002).

"The burden of showing that the request is unreasonable is on the subpoenaed party." *FTC v. Dresser Indus.*, 1977-1 Trade Cas. ¶61,400, at *13 (D.D.C. 1977) (internal quotations omitted). That burden, as confirmed in *Polypore*, is particularly heavy "where . . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that

[1] Intel also informed HP that it could not agree to a fourth 10-day extension for HP to move to quash Intel's subpoena due to the likely impasse and the need to resolve issues in advance of the June 15, 2010 discovery deadline.

purpose." *In re Polypore Int'l, Inc.*, No. 9327, 2009 FTC LEXIS 41, at *9 (FTC Jan. 15, 2009) (enforcing third-party subpoena) (Chappell, ALJ).

2. Intel's Subpoena Is Definite and Calls Relevant Documents

Under the FTC Operating Manual rules, a subpoena *duces tecum* is enforceable if it is: (a) definite, (b) relevant, and (c) reasonable. *FTC Manual* § 10.13.6.4.7.3. Intel's Subpoena is definite and seeks relevant documents, and HP does not contest either of these first two prongs. That failure, alone, should mean the Subpoena is enforceable. *Flowers Indus.*, 1982 FTC LEXIS 96, at *12-18 (enforcing subpoena that was "generally relevant to the issues in the proceedings" notwithstanding claims of burden); *Rambus*, 2002 FTC LEXIS 90, at *5.

HP's claim that Intel is "not prejudiced" from relying on the discovery in the AMD case, *see* HP Mot. at 6, is incorrect. HP can point to no authority that prevents a party from obtaining new documents relevant to its defense simply because it previously obtained some documents from an earlier time period or from different custodians from the same third-party in a previous case involving different parties, different legal standards, different fact allegations and different relief. Intel has not sought duplicative discovery, and HP need not turn over a single document previously produced. But Intel is entitled to obtain new discovery in this case. Four years after the AMD document discovery took place, Complaint Counsel has alleged new facts and theories in an entirely new and independent proceeding.

3. Intel's Subpoena Was Reasonable, Particularly As Narrowed

Given the clear relevance of Intel's Subpoena, HP has not met its "heavy burden" to show that it is unreasonably burdensome. *Flowers Indus.*, 1982 FTC LEXIS 96, at *12. Tellingly, HP makes no specific claims of undue burden in responding to Intel's Subpoena. As

the largest computer manufacturer in the world with sales over $114 Billion last year, HP's generic assertion of burden is not credible. The fact that it is willing to produce documents related to GPUs, chipsets, compilers, and other topics suggests that its generic burden claim is merely rhetorical.

HP also argues that its status as a "non-party" should justify its refusal to comply with the Subpoena because non-parties should benefit from a lower showing of burden. HP Mot. at 5. That misstates the law. Non-parties' appeals for differential treatment have repeatedly been rejected in FTC proceedings. *See, e.g.*, *Polypore*, 2009 FTC LEXIS 41, at *2-*5. Instead, non-parties, like parties, must show that compliance with the subpoena "unduly disrupt or seriously hinder normal operations of a business . . . The burden is no less for a non-party." *Rambus*, 2002 FTC LEXIS 90, at *9. Moreover, even when a non-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." *Kaiser*, 1976 FTC LEXIS 68, at *19-20.[2]

In any event, HP is hardly a disinterested party. [redacted]

[2] Cases cited by HP for the proposition that third parties should bear a lesser burden in challenging a subpoena are not on point. Both involved confidentiality issues and much narrower legal disputes than the broad allegations at issue here. *Echostar Comm. Corp. v. News Corp.*, 180 F.R.D. 391, 395 (D. Colo. 1998) (discovery not relevant to narrow breach of contract claim); *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 425 (Fed. Cir. 1993) (document and deposition subpoena "exceed the narrow scope" of patent at issue).

[redacted]

HP has not made any particular showing of burden, let alone demonstrated that production of microprocessor-related requests will impose a "substantial degree of burden" that would "seriously hinder" its business operations. *Rambus*, 2002 FTC LEXIS 90, at *9. [redacted] To the extent that HP argues it is burdened by "duplicating efforts," Intel's April 19 proposed modification eliminates that argument: it asks for new CPU documents for a time period more recent than HP's production in the AMD case and from custodians whose files HP did not produce in that case. *See Rambus*, 2002 FTC LEXIS 90, at *10 (burden argument "undermined by the fact that [respondent] has been willing to alleviate the burdensome through compromise"); *see also Kaiser*, 1976 FTC LEXIS 68, at *20.

HP argues in the alternative that, should Intel's Subpoena not be quashed in its entirety, HP should be reimbursed for its costs in responding to Intel's Subpoena. HP Mot. at 6-7. HP never proposed cost-sharing as a means of reaching a voluntary production agreement, and only mentioned to counsel for Intel that it would move on that alternate ground on the day it filed its motion. The law is clear that non-parties that are industry participants with an interest in the

outcome of the proceeding are only entitled to reimbursement for copying costs, not the costs of review and production. *Rambus* 2002 FTC LEXIS at *15; *Flowers Industr.*, 1982 FTC LEXIS, at 17-18; *Kaiser*, 1976 FTC LEXIS at *21-22. Notwithstanding this clear precedent, Intel is willing to share some of HP's production costs, [redacted]

CONCLUSION

For the foregoing reasons, HP's motion to quash should be denied and Intel's Subpoena *duces tecum* should be enforced.

[3] [redacted] In this case, Intel is willing to share one-third of production costs, with HP and Complaint Counsel also bearing one-third.

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