UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S RESPONSE TO INTEL'S MOTION FOR LEAVE TO DEPOSE THE BUREAU OF LABOR STATISTICS

We do not take a position on Intel's request to take a deposition of an official of the Bureau of Labor Statistics ("BLS"). We file this response to correct the misrepresentations and mischaracterizations of both fact and law in Intel's motion, so that the Judge can properly assess whether to issue a subpoena. Whether the third party that is served with the subpoena has any objection if and once a subpoena is served is a separate issue that the Rules allow.[1]

A subpoena under Rule 3.36 is warranted only if the targeted material is "reasonably relevant," and that the information "cannot reasonably be obtained by other means . . . ." Rule 3.36(b)(2)-(3). This is a more demanding standard than that applicable to discovery from private parties under Rule 3.31(c)(1), *i.e.,* that "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." We do not believe that the deposition of a BLS

[1] Intel apparently misreads the provisions of Rule 3.36. Intel frames its motion as seeking leave to depose the Bureau of Labor Statistics. Under Rule 3.36, though, Intel may seek the leave of the Court *to serve a subpoena* on a government agency. We mention this because, if the Court grants Intel's motion and Intel serves the subpoena, the Bureau of Labor Statistics and the Department of Labor – like any other third party on which a subpoena is served – may then elect to seek a protective order from this Court that discovery be limited or not be had. We will defer

official will lead to admissible evidence.

Intel suggests that the BLS pricing data is "directly relevant" to whether Intel has monopoly power in the x86 market.[2] First, the law does not support Intel's position. We are unaware of any decision that has relied on BLS pricing data in assessing a firm's market power. The analysis of Intel's monopoly power will turn on an assessment of market shares and entry barriers. Polypore Initial Decision at 303-305 (explaining that "monopoly power may be inferred from a firm's possession of a dominant share of a relevant market"). For example, Intel has already admitted that its share of the x86 desktop market has exceeded 70 percent; and that its share of the x86 notebook market has exceeded 80 percent throughout the relevant time period. Respondent's PUBLIC Answers to Complaint Counsel's Requests for Admission (1-4) (Mar. 1, 2010). These market shares support a finding of monopoly power under American law. *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997) ("Courts generally require a 65% market share to establish a *prima facie* case of market power"); Polypore Initial Decision at 310.

Second, the BLS data is not what Intel claims it is and thus is not relevant. BLS does not report the prices of x86 CPUs much less the prices of x86 CPUs used in servers or desktops or notebooks. The BLS price series at issue, PCU 33441333441312, aggregates the prices of "microprocessors *and* microcontrollers *and* related devices." The BLS "microprocessor" pricing data aggregates the prices of *any* product classified as a "microprocessor" or "microcontroller" or "related devices" by a manufacturer participating in the survey, including everything from cell

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to DoL's exercise of this discretion in the same way that we have not filed briefs in the contentious discovery disputes between Intel and other third parties.

phone microprocessors to those in televisions. The inclusion of non-relevant products renders the BLS data meaningless. Moreover, Intel admits that it does not contribute *any* pricing data to the BLS. Respondent's PUBLIC Answers to Complaint Counsel's Requests for Admission, Nos. 8-9 (Mar. 1, 2010). Intel suggests that the BLS relies on secondary pricing data from third party newsletters and industry reports. Of course, there is no evidence that Intel contributes pricing data to those sources. Thus, Intel will seek to introduce material into evidence that, by its own admission, can only be described as double or even triple hearsay.

Two additional points related to Intel's motion merit attention. First, Intel relies heavily on a working paper published by Dr. Michael Holdway, a staff economist as BLS. Intel repeatedly states that the paper was "prepared on behalf of the BLS." Intel Motion at 4. This is not accurate. Dr. Holdway's January 2001 paper includes the following disclaimer: "The views expressed represent those of the author and not those of BLS or any of its staff." See Exhibit 3 to Intel's Motion at p.1. Thus, this paper cannot be construed as either a government agency report or one that is relevant to the facts in this case.

Finally, Intel tells the Court that we have engaged in "*ex parte*" contacts with lawyers at the Department of Labor. Intel's Brief at 6. In this case, as in *every* case, lawyers from both sides have had "*ex parte*" contacts with counsel for almost every third party. That is not unusual and is not improper. Indeed, as mentioned in the letter from the Department of Labor, Intel contacted and spoke with the Department of Labor without allowing us to participate at all. We are also unaware of what Intel's lawyers have said to numerous other counsel for third parties. However, we would never use that fact to impugn the reputations of Intel's legal team in an

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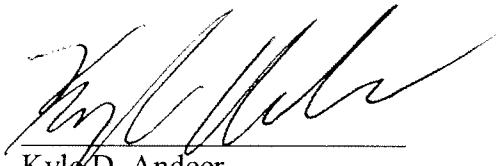
[2] Intel does not suggest that the data is relevant to the other markets at issue in this case –

effort to gain a tactical advantage. We point this out, because we believe Intel's argument on this point is improper and without any basis.

In sum, the BLS materials do not meet the standards articulated by this Court in its recent ruling on the admissibility of the European Commission decision. If a government decision addressing Intel's monopoly power and exclusionary conduct – issues that are directly relevant to this proceeding – is inadmissible then surely the BLS materials are inadmissible in this proceeding. However, admissibility is an issue that can be dealt with at trial. Subject to the foregoing, we do not take a position regarding Intel's motion for leave to serve a subpoena on the Bureau of Labor Statistics.

May 28, 2010

Respectfully submitted,



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such as x86 CPUs used in servers, x86 CPUs used in desktops, or x86 CPUs used in notebooks.

CERTIFICATE OF SERVICE

I certify that I filed via hand and electronic mail delivery an original and two copies of the foregoing Response to Intel's Motion for Leave to Depose the Bureau of Statistics with:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-159
Washington, DC 20580

I also certify that I delivered via electronic and hand delivery a copy of the foregoing Response to Intel's Motion for Leave to Depose the Bureau of Statistics to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing Response to Intel's Motion for Leave to Depose the Bureau of Statistics to:

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