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

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

ORDER DENYING MOTION OF NON-PARTIES HEWLETT-PACKARD COMPANY AND JOSEPH BEYERS TO QUASH SUBPOENAS *AD TESTIFICANDUM* ISSUED BY INTEL CORPORATION

I.

On May 20, 2010, non-parties Hewlett-Packard Company ("HP") and Joseph Beyers (collectively, the "Non-parties") submitted a Motion to Quash Subpoenas *Ad Testificandum* issued to Joseph Beyers ("Beyers") by Respondent Intel Corporation ("Intel" or "Respondent"). Respondent submitted its opposition to the motion on May 27, 2010. Having fully considered the motion and the opposition, and for the reasons set forth below, the motion to quash is DENIED. In addition, the Non-parties' alternative request for reimbursement of costs and expenses for complying with the deposition subpoena, is also DENIED, as further explained below.

II.

The Non-parties contend that the deposition subpoena should be quashed because Beyers, a former HP employee, was deposed by Intel in April and May of 2009, in private antitrust litigation brought against Intel by Advanced Micro Devices, Inc. ("AMD") and class action plaintiffs (the "AMD litigation"), on substantially similar issues regarding HP central processing units ("CPU"), and microprocessors. Further, the Non-parties assert that Beyers left HP's employ in September 2009, approximately four months after his deposition in the AMD litigation, and that Beyers has little, if any, new knowledge. In addition, HP asserts that Complaint Counsel, as permitted by the Scheduling Order in this matter, has agreed to accept and rely upon Beyers' AMD deposition, rather than take his deposition in this proceeding. In these circumstances, HP argues, any testimony on subjects beyond those explored in the AMD litigation is "presumptively irrelevant" and that, in any event, the relevance of any additional testimony is outweighed by the burden of another deposition, especially in light of additional pending discovery requests to HP by Intel and HP's status as a non-party. Motion to Quash at 6-7.

In opposing the Non-parties' motion, Respondent asserts that Beyers' testimony is relevant to Complaint Counsel's allegations and Respondent's defenses in this matter, as demonstrated by the fact that Beyers has been identified by Complaint Counsel as a trial witness in this litigation. Moreover, Respondent contends that the instant litigation is much broader than the AMD litigation, and involves different parties, different causes of action, different legal theories, many different facts, and different remedies. Respondent asserts that every deposition involves some burden, but that HP has failed to demonstrate that the deposition of Beyers would present an undue burden. Respondent notes that, regardless of whether Complaint Counsel intends to take Beyers' deposition in this case, the scope of Beyers' trial testimony, as designated by Complaint Counsel, is significantly broader than the matters upon which Beyers was deposed in the AMD litigation and that Intel has a right to explore those matters without regard to Complaint Counsel's pre-trial discovery choices. Finally, Respondent denies that the totality of the discovery sought from HP is harassing because Respondent has offered to agree to reduce the alleged burden to HP, without success.

III.

A.

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

HP's contentions that the scope of relevance is to be determined by the scope of questioning in the AMD litigation and/or by Complaint Counsel's strategic choice to rely on Beyers' AMD deposition are unpersuasive, and HP offers no authority for such propositions.[1] The fact that Complaint Counsel intends to call Beyers as a witness at trial in this matter clearly indicates that he has knowledge relevant to the claims and/or defenses in this case. Therefore, pursuant to Rule 3.31(c), Intel has the right to discover that knowledge.

B.

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

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[1] Paragraph 21 of the Scheduling Order's additional provisions provides that AMD depositions shall be included as part of the record in this proceeding but that "nothing in this paragraph in any way limits either party from taking discovery in this proceeding, including discovery duplicative of that taken in the AMD Delaware litigation . . ." This provision does not preclude non-parties such as HP and Beyers from objecting to a deposition in this action. At the same time, however, the provision clearly indicates that a prior deposition in the AMD litigation does not determine the scope of permissible discovery in this litigation.

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

16 C.F.R. § 3.33(b); *see* 16 C.F.R. § 3.43(b). As noted above, the deposition is within the scope of discovery allowed by Rule 3.31(c). Thus, the issue is whether the deposition presents an undue burden, or is cumulative, duplicative, or harassing, as argued by HP. In support of this argument, HP relies principally on the fact that Beyers was deposed in the AMD litigation. This is insufficient.

"The burden of showing that [a subpoena] is unreasonable is on the subpoenaed party." *FTC v. Dresser Indus.*, No. 77-44, 1977 U.S. Dist. LEXIS 16178, at *13 (D.D.C. April 26, 1977). Moreover, "one who opposes an agency's subpoena necessarily must bear a heavy burden. That burden is essentially the same even if the subpoena is directed to a third party not involved in the adjudicative or other proceedings out of which the subpoena arose." *Id.* at *8-9 (*citing FTC v. Tuttle*, 244 F.2d 605 (2d Cir. 1957); *FTC v. Bowman*, 149 F. Supp. 624 (N.D. Ill.), *aff'd*, 248 F.2d 456 (7th Cir. 1957)). That burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested discovery is relevant to that purpose. *See Id.* (enforcing document subpoena served on non-party by the respondent). *See also In re Kaiser Alum. & Chem. Corp.*, No. 9080, 1976 FTC LEXIS 68, at *19-20 (Nov. 12, 1976) ("Even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding."). In agency actions, "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *FTC v. Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at *13.

The Non-parties fail to demonstrate that the Beyers deposition subpoena poses an undue burden. First, as the foregoing authorities make clear, status as a non-party does not carry special weight, and the cases upon which HP relies for this proposition are readily distinguishable. *See Cusamano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir 1998) (holding that First Amendment value of academic freedom outweighed party's need to discover confidential interviews and notes made by non-party academic researcher); *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993) (concluding that the district court did not abuse its discretion in denying the requested discovery from non-party because party had not demonstrated need for the broad range of information requested).

Second, the Non-parties fail to cite any authority for the proposition that a deposition is unduly burdensome, cumulative, or duplicative, because the proposed deponent had previously been deposed in a different case. Even in the same case, a

deponent may be subjected to more than one deposition in certain circumstances, such as the passage of time or the addition of new or different claims. *See Collins v. International Dairy Queen*, 189 F.R.D. 496, 498 (M.D. Ga. 1999). *Compare Jones v. Cunningham*, No. 99-20023, 2009 U.S. Dist. LEXIS 101713 (Oct. 20, 2009) (denying motion for leave to take second deposition where movant failed to allege existence of new evidence or legal theories); *Graebner v. James River Corp.*, 130 F.R.D. 440 (N.D. Cal. 1989) (granting protective order against taking second deposition where claims had not broadened since first deposition). In the present case, the prior deposition occurred in separate litigation which, among other things, involved a narrower set of claims, legal theories, and facts, as well as different prosecuting parties. In addition, HP's conclusory assertion, unsupported by affidavit, that Beyers "has little, if any, new knowledge" to offer in deposition is insufficient to support a conclusion that deposition's likely relevance is outweighed by the likelihood that it would be cumulative and/or duplicative of the AMD testimony.

For all the foregoing reasons, the Non-parties have failed to demonstrate that the Beyers deposition is unlikely to yield relevant information, or that it would be unduly burdensome, duplicative, or harassing. In reaching this decision, it is noteworthy that paragraph 8 of the additional provisions of the Scheduling Order entered in this case limits depositions to "a single, seven-hour day, unless otherwise agreed by the parties or ordered by the Administrative Law Judge." This time limitation further helps ensure that the Non-parties will not be unduly burdened by permitting the Beyers deposition in this case. Similarly, if Beyers' relevant knowledge is indeed as limited as the Non-parties claim, it is reasonable to expect the deposition to be substantially shorter than the seven-hour limit permits.

C.

The Non-parties request in the alternative that, if the Beyers deposition is allowed, then Intel should be required to reimburse HP and Beyers "for all of their costs (including attorneys' fees) incurred in preparing for and providing" the deposition. Motion to Quash at 8. This request is also denied. HP erroneously relies upon the F.T.C. Operating Manual. That publication is an administrative staff manual which is designed to give guidance to FTC staff "in processing matters within the agency . . ." Operating Manual, Ch. 1.1.1. The Rules of Practice, not the F.T.C. Operating Manual, govern administrative litigation. Commission Rule 3.1, 16 C.F.R. § 3.1; *see also* F.T.C. Operating Manual Ch. 1.1.1 (stating "the Commission's . . . Rules of Practice are the official rules of the agency . . ." and that the Operating Manual is not binding legal authority).

The Commission Rules of Practice do not provide for reimbursement of costs or expenses in connection with taking depositions. With respect to compliance with document subpoenas, however, the Commission has held that a "subpoenaed party is expected to absorb the reasonable expenses of compliance as a cost of doing business, but reimbursement by the proponent of the subpoena is appropriate for costs shown by the subpoenaed party to be unreasonable." *In re Int'l Tel. & Tel. Corp.*, No. 9000, 1981 FTC LEXIS 75, at *3 (March 13, 1981); *see In re North Tex. Specialty Physicians*, Docket No.

9312, 97 F.T.C. 202, 2004 FTC LEXIS 18, at *7 (Feb. 4, 2004) (denying cost reimbursement because the subpoena did not impose an undue burden on the non-party); *In re R.R. Donnelley & Sons Co.*, No. 9243, 1991 FTC LEXIS 268, at *1-2 (June 6, 1991) (holding that subpoenaed party "can be required to bear reasonable costs of compliance with the subpoena").

To determine whether expenses are "reasonable," the Administrative Law Judge "should compare the costs of compliance in relation to the size and resources of the subpoenaed party." *In re Int'l Tel. & Tel. Corp.*, No. 9243, 1981 FTC LEXIS 75, at *3 (March 13, 1981) (*citing SEC v. OKC Corp.*, 474 F. Supp. 1031 (N.D. Tex. 1979)). The Non-parties have offered no information on their resources or the estimated costs of complying with the deposition subpoena. According to Respondent, HP had sales of over $114 billion last year. There is no basis for concluding that the costs to Beyers or to HP, in connection with this deposition, would be unreasonable.

IV.

For the reasons stated herein, the Motion of Non-parties HP and Joseph Beyers to Quash Subpoena *Ad Testificandum* issued by Intel, and their alternative request for reimbursement of costs, are DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: June 1, 2010